



Date and Time: Tuesday, September 26, 2023 12:53:00 PM CST

Job Number: 206613441

## Documents (100)

### 1. [In re Pinkney, 47 Kan. 89](#)

**Client/Matter:** -None-

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### 2. [United States v. E. C. Knight Co., 60 F. 306](#)

**Client/Matter:** -None-

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### 3. [United States v. Cassidy, 67 F. 698](#)

**Client/Matter:** -None-

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### 4. [United States v. Addyston Pipe & Steel Co., 85 F. 271](#)

**Client/Matter:** -None-

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### 5. [Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1](#)

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6. [State ex rel. Crow v. Firemen's Fund Ins. Co., 152 Mo. 1](#)

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7. [Kevil v. Standard Oil Co., 11 Ohio Dec. 114](#)

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8. [WOODBERRY v. MCCLURG, 78 Miss. 831](#)

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9. [Metcalf v. American School Furniture Co., 108 F. 909](#)

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10. [National Salt Co. v. United Salt Co., 12 Ohio Dec. 386](#)

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11. <a href="#"><u>Bement v. National Harrow Co., 186 U.S. 70</u></a>	
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12. <a href="#"><u>State v. Shippers Compress &amp; Warehouse Co., 95 Tex. 603</u></a>	
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13. <a href="#"><u>State ex rel. Crow v. Armour Packing Co., 173 Mo. 356</u></a>	
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14. <a href="#"><u>Supreme Lodge United Benev. Ass'n v. Johnson, 77 S.W. 661</u></a>	
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15. <a href="#"><u>Chicago, Wilmington &amp; Vermillion Coal Co. v. People, 114 Ill. App. 75</u></a>	
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16. [In re Bell, 69 Kan. 855](#)

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17. [State v. Jack, 69 Kan. 387](#)

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18. [Graf v. Master Horse-Shoers' Protective Ass'n, 15 Ohio Dec. 18](#)

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19. [A. Booth & Co. v. Davis, 127 F. 875](#)

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20. [Needles v. Bishop & Babcock Co., 14 Ohio Dec. 445](#)

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21. [Ft. Worth & D. C. R. Co. v. State, 99 Tex. 34](#)



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22. [Wills v. Central Ice & Cold Storage Co., 39 Tex. Civ. App. 483](#)

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23. [Hunt v. Riverside Co-operative Club, 140 Mich. 538](#)

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24. [Bobbs-Merrill Co. v. Straus, 139 F. 155](#)

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25. [In re Goode, 16 Ohio Dec. 404](#)

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26. [OPINION ON REHEARING, 73 Kan. 343](#)

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27. [State v. Wilson, 73 Kan. 334](#)

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28. [State v. Missouri, K. & T. R. Co., 99 Tex. 516](#)

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29. [Norton v. W. H. Thomas & Sons Co., 99 Tex. 578](#)

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30. [State ex rel. Taylor v. Ross, 16 Ohio Dec. 704](#)

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31. [State v. Hygeia Ice Co., 16 Ohio Dec. 735](#)

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32. <a href="#"><u>State v. Crystal Ice Mfg. &amp; Cold Storage Co., 17 Ohio Dec. 640</u></a>	
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33. <a href="#"><u>John D. Park &amp; Sons Co. v. Hartman, 153 F. 24</u></a>	
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34. <a href="#"><u>R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co., 151 F. 819</u></a>	
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35. <a href="#"><u>State v. Ice Delivery Co., 17 Ohio Dec. 515</u></a>	
<b>Client/Matter:</b> -None-	
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022
36. <a href="#"><u>Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 F. 358</u></a>	
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37. [State v. Bovee, 17 Ohio Dec. 663](#)

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38. [Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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39. [Dr. Miles Medical Co. v. John D. Park & Sons Co., 164 F. 803](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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40. [Redland Fruit Co. v. Sargent, 51 Tex. Civ. App. 619](#)

**Client/Matter:** -None-

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41. [Terr. v. Long Bell Lumber Co., 1908 OK 263](#)

**Client/Matter:** -None-

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42. [State v. Brady, 114 S.W. 895](#)



**Client/Matter:** -None-

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43. [Bigelow v. Calumet & H. Min. Co., 167 F. 721](#)

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44. [State ex rel. Hadley v. Std. Oil Co., 218 Mo. 1](#)

**Client/Matter:** -None-

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45. [State v. General Fire Extinguisher Co., 20 Ohio Dec. 240](#)

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46. [People v. Sacramento Butchers' Protective Asso., 12 Cal. App. 471](#)

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47. [Corn Products Refining Co. v. Roser-Runkle Co., 22 Ohio Dec. 663](#)

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48. [State v. Glenn Lumber Co., 83 Kan. 399](#)

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49. [Malakoff Gin Co. v. Riddleberger, 133 S.W. 519](#)

**Client/Matter:** -None-

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50. [State v. Racine Sattley Co., 63 Tex. Civ. App. 663](#)

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51. [Standard Oil Co. v. United States, 221 U.S. 1](#)

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52. [United States v. Union P. R. Co., 188 F. 102](#)

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53. <a href="#"><u>Larabee Flour Mills Co. v. Missouri P. R. Co., 85 Kan. 214</u></a>	
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54. <a href="#"><u>Dukate v. Adams, 101 Miss. 433</u></a>	
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55. <a href="#"><u>Smith v. Morganton Ice Co., 159 N.C. 151</u></a>	
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56. <a href="#"><u>United States v. Union P. R. Co., 226 U.S. 61</u></a>	
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57. <a href="#"><u>United States v. Lake Shore &amp; M. S. R. Co., 203 F. 295</u></a>	
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58. [United States v. Great Lakes Towing Co., 208 F. 733](#)

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59. [Robert H. Ingersoll & Bro. v. McColl, 204 F. 147](#)

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60. [State ex rel. Jones v. Mallinckrodt Chemical Works, 249 Mo. 702](#)

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61. [Continental Sec. Co. v. Interborough Rapid Transit Co., 207 F. 467](#)

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62. [Standard Oil Co. v. State, 107 Miss. 377](#)

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63. [International Harvester Co. v. Kentucky, 234 U.S. 589](#)



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64. [Co-operative Live Stock Com. Co. v. Browning, 260 Mo. 324](#)

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65. [State ex rel. Moose v. Frank, 114 Ark. 47](#)

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66. [McCall Co. v. O'Neil, 25 Ohio Dec. 591](#)

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67. [Guyton v. Eastern Electric Co., 91 Ohio St. 106](#)

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68. [United States v. Rockefeller, 222 F. 534](#)

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
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69. [State ex rel. Barker v. Armour Packing Co., 265 Mo. 121](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

70. [Munter v. Eastman Kodak Co., 28 Cal. App. 660](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

71. [Frey & Son, Inc. v. Cudahy Packing Co., 228 F. 209](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

72. [Bogata Mercantile Co. v. Outcault Advertising Co., 184 S.W. 333](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

73. [Woods v. Am. Brewing Ass'n, 183 S.W. 127](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**



**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

74. [Henry Gildehaus Co. v. Busse & Borgman Co., 27 Ohio Dec. 111](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

75. [Orebaugh v. Neu, 6 Ohio App. 404](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

76. [People v. Baff, 99 Misc. 684](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

77. [United States v. Colgate & Co., 250 U.S. 300](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

78. [United States v. United States Steel Corp., 251 U.S. 417](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

79. [United States v. American Column & Lumber Co., 263 F. 147](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

80. [United States v. United Shoe Machinery Co., 264 F. 138](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

81. [United States v. Reading Co., 253 U.S. 26](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

82. [McMaster v. Ford Motor Co., 114 S.C. 100](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

83. [Coca-Cola Co. v. Vivian Ice, Light & Water Co., 150 La. 445](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

84. [Washington Cranberry Growers Ass'n v. Moore, 117 Wash. 430](#)

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**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

85. [Griffin v. Palatine Ins. Co., 238 S.W. 637](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

86. [Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 366](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

87. [Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

88. [Federal Trade Com. v. P. Lorillard Co., 283 F. 999](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

89. [Columbus Packing Co. v. State, 106 Ohio St. 469](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"



**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

90. [People v. Apostolos, 73 Colo. 71](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

91. [Hurt v. Brandt, 37 Idaho 186](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

92. [State v. P. Lorillard Co., 181 Wis. 347](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

93. [State ex rel. Thompson v. Nashville R. & L. Co., 151 Tenn. 77](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

94. [State ex rel. Griffith v. Anthony Wholesale Grocery Co., 118 Kan. 394](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**



**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

95. [A. B. Small Co. v. Lamborn & Co., 267 U.S. 248](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

96. [Vandell v. United States, 6 F.2d 188](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

97. [Mission v. Richards, 274 S.W. 269](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

98. [McConnon & Co. v. Ralston, 275 S.W. 165](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

99. [Gano v. Delmas, 140 Miss. 323](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022

100. [United States v. GE Co., 272 U.S. 476](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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Cases

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Jan 01, 1891 to Dec 31, 2022



## In re Pinkney

Supreme Court of Kansas

July, 1891, Decided ; July 9, 1891, Filed

No Number in Original

**Reporter**

47 Kan. 89 \*; 27 P. 179 \*\*; 1891 Kan. LEXIS 324 \*\*\*

In the matter of the Petition of A. E. PINKNEY et al. for a writ of Habeas Corpus.

**Prior History:** [\*\*\*1] Original Proceeding in Habeas Corpus.

ON May 12, 1891, a complaint was made charging that the petitioners did, in Leavenworth county, on the same day, "unlawfully agree and combine together and enter into, and then and there were in a contract, agreement and combination with each, and each of them with certain other persons and corporations, the names of which are now unknown to this affiant, which said agreement, contract and combination is and was designed and intended to control the cost and rate of insurance within said state by threatening persons and affiant in the insurance business with injury to their [said persons'] business, if such persons refused to demand the same cost and rate as should be named by said defendants and by them and the other persons and corporations with whom they have combined, in violation of the laws of Kansas." A warrant was issued upon this complaint in similar terms, and the petitioners appeared before the justice issuing the warrant without being arrested, where a preliminary examination was had, at the conclusion of which the petitioners were held for appearance and trial at the next term of the district court, and bail was fixed at \$ 200 [\*\*\*2] each. The petitioners refusing to give a recognizance, a commitment was issued, under which they were taken into the custody of the sheriff, and from this custody they seek release by the writ of habeas corpus. Other facts are stated in the opinion of the court, filed on July 9, 1891.

**Disposition:** Case remanded.

## Core Terms

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broad sense, occupation, provision of an act, combinations, trusts

## LexisNexis® Headnotes

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

International Trade Law > Forfeitures & Penalties > General Overview

### HN1 Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Laws of 1889, ch. 257, § 1 (Kansas), embraces the provision with reference to the business of insurance, and is as follows: That all arrangements, contract, agreements, trusts, or combinations between persons or corporations, that are made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of

47 Kan. 89, \*89 L<sup>2d</sup> 7 P. 179, \*\*179 L<sup>2d</sup> 891 Kan. LEXIS 324, \*\*\*2

articles that are imported into the state of Kansas, or in the product, manufacture, or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations that are designed or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful, and void.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

## [\*\*HN2\*\*](#) Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Laws of 1889, ch. 257, § 1 (Kansas), provides as follows: That all persons entering into any such arrangement, contract, agreement, trust, or combination, or who shall, after the passage of this Act, attempt to carry out or act under any such arrangement, contract, agreement, trust, or combination that is described in the Act §§ 1, or 2, either on his own account or as agent or attorney for another, or as an officer, agent or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than \$ 100 and not more than \$ 1,000, and to imprisonment not less than 30 days and not more than 6 months, or to both such fine and imprisonment, in the discretion of the trial court.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## [\*\*HN3\*\*](#) Regulated Practices, Price Fixing & Restraints of Trade

The word "trade" is any occupation or business that is carried on for subsistence or profit. Generally equivalent to occupation, employment, or business, whether manual or mercantile. Any occupation, employment, or business that is carried on for profit, gain, or livelihood, not in the liberal arts or in the learned professions. The word is also defined as an occupation, employment, or business that is carried on for gain or profit. The business which a person has learnt, and which he carries on for subsistence or profit, occupation, particularly employment, whether manual or mercantile, as distinguished from the liberal arts or the learned professions and agriculture.

Governments > Legislation > Interpretation

Governments > Legislation > Overbreadth

## [\*\*HN4\*\*](#) Legislation, Interpretation

The mere generality of the title to an act does not render it objectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled.

Governments > Legislation > Interpretation

## [\*\*HN5\*\*](#) Legislation, Interpretation

47 Kan. 89, \*89 L<sup>2d</sup> 179, \*\*179 L<sup>2d</sup> 891 Kan. LEXIS 324, \*\*\*2

The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction that is given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title.

Governments > Legislation > Interpretation

#### [\*\*HN6\*\*](#) Legislation, Interpretation

The breadth and comprehensiveness of a title is a matter of legislative discretion. The courts cannot modify a title, any more than they can change the body of the law. The title has to be construed even as the language of the act, and the courts may neither narrow nor enlarge the meaning which the legislature has intended the title should have.

Governments > Legislation > Interpretation

#### [\*\*HN7\*\*](#) Legislation, Interpretation

A liberal interpretation should be placed upon the construction of language that is employed in the title to express the subject of an act.

Governments > Legislation > Interpretation

#### [\*\*HN8\*\*](#) Legislation, Interpretation

A slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void, where it may be known both from the act and the title thereto, and the circumstances then existing, what was meant and intended by the legislature.

Governments > Legislation > Interpretation

#### [\*\*HN9\*\*](#) Legislation, Interpretation

In determining the validity of legislative enactments, they will not be declared void if they can be upheld upon any reasonable grounds. If the invalidity of legislative enactments is a matter of any reasonable doubt, the doubt must be resolved in favor of the act.

## **Headnotes/Summary**

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### **Headnotes**

ANTI-TRUST LAW -- *Valid Statute*. The provisions of the "anti-trust law," being chapter 257 of the Laws of 1889, so far as they relate to the business of insurance, are covered by the title of the act, and are, therefore valid.

**Counsel:** Thomas P. Fenlon, and E. F. Ware, for petitioners.

Lucien Baker, and J. H. Atwood, for respondent.

**Judges:** JOHNSTON, J., HORTON, C. J. VALENTINE, J., concurring.

**Opinion by:** JOHNSTON; HORTON

## Opinion

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[\*90] [\*\*179] The opinion of the court was delivered by

JOHNSTON, J.: The only question presented in behalf of the petitioners is the validity of what is known as the "antitrust law," so far as it relates to the business of insurance. (Laws of 1889, ch. 257.) The contention is, that the portion of the act pertaining to insurance is not clearly expressed in the title, as required by § 16, article 2, of the constitution, and is therefore void. The title is: "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." [HN1](#) [↑] Section 1 of that act embraces the provision with reference to the business of insurance, and is as follows:

[\*\*\*3] "SECTION 1. That all arrangements, contract, agreements, trusts or combinations between persons or corporations, made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful, and void."

[\*91] [HN2](#) [↑] Section 3 of the act provides as follows:

"SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination, or who shall, after the passage of this act, attempt to carry out or act under any such arrangement, contract, agreement, [\*\*\*4] trust, or combination described in sections 1 or 2 of this act, either on his own account or as agent or attorney for another, or as an officer, agent or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than \$ 100 and not more than \$ 1,000, and to imprisonment not less than 30 days and not more than six months, or to both such fine and imprisonment, in the discretion of the court."

It thus appears that the body of the act contains a specific provision for the prevention of trusts or combinations which tend to control the cost or rate of insurance, and to punish all persons who enter into or attempt to carry out such trusts or combinations.

The question presented is, does the word "trade," used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by [\*\*180] way of sale or exchange in commodities; [\*\*\*5] and it is said that the use of the word in connection with that of "products," in the title, qualifies the meaning of "trade," and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it, but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, [HN3](#) [↑] it is any occupation or business carried on for subsistence or profit. Anderson's Dictionary of Law gives the following definition: "Generally equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment or business carried on for profit, gain, [\*92] or livelihood, not in the liberal arts or in the learned professions." In Abbott's Law Dictionary the word is defined as "an occupation, employment or business carried on for gain or

profit." Among the definitions given in the Encyclopaedic Dictionary is the following: "The business which a person has learnt, and which he carries on for subsistence or profit; occupation; particularly employment, whether manual or mercantile, as distinguished [\*\*\*6] from the liberal arts or the learned professions and agriculture." A like definition of the word is given in the Imperial Dictionary.

Rapalje & Lawrence's Law Dictionary, to which we are cited by the petitioners, gives the restricted definition: "Traffic; commerce; exchange of goods for other goods, or for money." It is the only authority, however, which uses the word in its commercial sense alone. Bouvier limits the meaning to commerce and traffic and the handicraft of mechanics; and we are also cited by the petitioners to the definition given by Webster, which specifically is: "The act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter." This author, however, gives the more enlarged meaning of the word as well, as follows: "The business which a person has learned, and which he engages in, for procuring subsistence, or for profit; occupation; especially mechanical employment as distinguished from the liberal arts, the learned professions, and agriculture; as we speak of the trade of a smith, of a carpenter, or mason, but not now of the trade of a farmer, or a lawyer, or a physician." The broader signification given to the [\*\*\*7] word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title. Here a term is employed in the title which, if given the broader meaning, would render the provision in question valid, while, by giving it the narrower and perhaps more common meaning, it would render [\*93] the provision invalid. Which of these should be adopted? HN4<sup>↑</sup> The mere generality of the title to an act does not render it objectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled. Titles of a very general nature have been adopted in the legislation of this state, and their use has been encouraged and sustained. ( *Bowman v. Cockrill*, 6 Kan. 311; *Division of Howard Co.*, 15 id. 194; *Woodruff v. Baldwin*, 23 Kan. 491; *Comm'r's of Marion Co. v. Comm'r's of Harvey Co.*, 26 id. 181; *The State* [\*\*\*8] *ex rel. v. Sanders*, 41 id. 228.) That the broader meaning of the word "trade" was the one intended by the legislature, is manifest from the incorporation of the insurance provision in the body of the act. HN5<sup>↑</sup> The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title. In *Woodruff v. Baldwin*, 23 Kan. 491, 494, it was said:

"Is it not more just and fair to say that the legislature has used the title in the broadest sense, a sense broad enough to include the subject-matter of this article, and that it meant by the expression 'criminal procedure' every proceeding resulting from crime, and not simply those for the prevention and punishment of crime? . . . HN6<sup>↑</sup> The breadth [\*\*\*9] and comprehensiveness of a title is a matter of legislative discretion. . . . The courts cannot modify a title, any more than they can change the body of the law. The title has to be construed even as the language of the act, and the courts may neither narrow nor enlarge the meaning which the legislature intended the title should have. Here is a title intrinsically broad and comprehensive. . . . Evidently the legislature intended by this title one whose scope was broad enough to include the article, and while there is a sense in which the article does not [\*94] treat of criminal procedure, yet we must impute to the legislature an intent to use the title in a broader sense."

How can it be said that the business of insurance is foreign to the title of this act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the legislature, would embrace such business? How can anyone be misled as to this provision by the use of the word "trade," when the leading lexicographers and writers employ the word in a sense which is comprehensive enough to cover the provision? The fact that the narrower meaning of the word is the one most frequently used will [\*\*\*10] not justify the court in restricting the meaning which the legislature intended it should have. Suppose the legislature had passed a law entitled "An act to prevent and punish the obstruction of highways," and in the body of the act included specific [\*\*181] provisions declaring it to be unlawful to place obstructions upon railroads, as well as upon county roads, streets, and alleys, and prescribed severe penalties for the violation of its provisions: could it be said that the provision with reference to

railroads was invalid because it was not indicated by the title to the act? The term "highway," as commonly used, applies to the public roads and streets over which all may travel, on foot, or horseback, or in carriages, and yet in its broader sense it includes railroads; and hence, when by the provisions of the act it appeared that the legislature used it in its broader sense, it could hardly be said that the provision with reference to railroads was unconstitutional because it was not fairly embraced in the title of the act. So here, the legislature having employed the word "trade" in its broadest sense, and one which fairly covers the provision assailed, we do not feel warranted [\*\*\*11] in adopting the narrower meaning or in holding the act invalid. The rigid and technical rule contended for by the petitioners has never been applied to § 16, article 2, of the constitution. Although the provision is mandatory, it has been repeatedly held by this and other courts that [HN7↑](#) a liberal interpretation should be placed upon the construction of language employed in the title to express the subject of the act. In [Bowman v. Cockrill, I<sup>951</sup> supra](#), the court said that the provision "should be liberally construed; otherwise the legislature would be confined within such narrow rules that they would be greatly embarrassed in the proper and legitimate exercise of their legislative functions." In [City of Eureka v. Davis, 21 Kan. 578](#), it was said that "it must be borne in mind that while the constitutional provision is mandatory, it must be applied in a fair and reasonable way; otherwise it would become a source of more injury than the ills it was designed to remedy." In [Philpin v. McCarty, 24 Kan. 393](#), it was remarked that "this constitutional requirement is not to be enforced in any narrow or technical spirit. It was introduced to prevent a certain abuse, and it should [\*\*\*12] be construed so as to guard against that abuse, and not to embarrass or obstruct needed legislation." In [City of Wichita v. Burleigh, 36 Kan. 34, 12 P. 332](#), it was said that [HN8↑](#) "a slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void, where it may be known both from the act and the title thereto, and the circumstances then existing, what was meant and intended by the legislature." (See, also, *Woodruff v. Baldwin*, *supra*; [Comm'r's of Marion Co. v. Comm'r's of Harvey Co., supra](#); [The State v. Barrett, 27 Kan. 213](#); Cooley's Const. Lim., 6th ed., 175, and cases cited.)

Another rule recognized and followed by all courts [HN9↑](#) in determining the validity of legislative enactments is, that they will not be declared void if they can be upheld upon any reasonable grounds. If their invalidity is a matter of any reasonable doubt, the doubt must be resolved in favor of the act. ([Comm'r's of Cherokee Co. v. The State, 36 Kan. 337, 13 P. 558](#).) Guided by these rules, we reach the conclusion, not without some doubt, however, that the provision of the act with reference to insurance is not foreign to the title of [\*\*\*13] the act, nor violative of § 16, article 2, of the constitution. We do not desire or intend to determine at this time the validity of the act as to any profession, occupation or business beyond that of insurance.

Having decided the provision to be valid, and all other [\*96] questions being waived, it follows that the petitioners must be remanded.

VALENTINE, J., concurring.

HORTON, C. J.: I do not think the word "trade," in the title of chapter 257, Laws of 1889, clearly or fairly indicates or includes lawyers, doctors, insurance agents, or insurance companies.

## **United States v. E. C. Knight Co.**

Circuit Court, E.D. Pennsylvania

January 30, 1894

No Number in Original

**Reporter**

60 F. 306 \*; 1894 U.S. App. LEXIS 2729 \*\*

UNITED STATES v. E.C. KNIGHT CO. et al.

### **Core Terms**

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commerce, sugar refining, sugar, refineries, refined, monopoly, restrain, foreign nation, contracts, stockholders, monopolize, stock, refined sugar, percent, manufacture

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Fines

#### **HN1** [] **Conspiracy, Elements**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Sentencing > Fines

International Trade Law > General Overview

#### **HN2** [] **Antitrust & Trade Law, Sherman Act**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or, by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

### **HN3** [down arrow] Antitrust & Trade Law, Sherman Act

The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violation of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

**Counsel:** [\*\*1] Ellery P. lingham, U.S. Atty., and Robert Ralston, Asst. U.S. Atty.

John G. Johnson and R. C. McMurtrie, for defendants.

**Opinion by:** BUTLER

## Opinion

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[\*306] BUTLER, District Judge. The bill charges, in substance, as follows:

E.C. Knight Company, Spreckels' Sugar Refining Company, Franklin Sugar Refining Company and the Delaware Sugar House, were, until on or about March 4, 1892, independently engaged in the manufacture and sale of refined sugar. That they were competitors with the American Sugar Refining Company and with one another; and that they were engaged in trade with the several states and with foreign nations. That the American Sugar Refining Company had, prior to March 4, 1892, obtained the control of all the sugar refineries in the United States, with the exception of the Revere, of Boston, and the refineries of the said four defendants. That the Revere produced annually about 2 per cent., and the said four defendants about 33 per cent. of the total amount of sugar refined in the United States. That in order that the American Sugar Refining Company might obtain complete control of the production and price of refined sugar in the United States, it and John E. Searles, [\*\*2] Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, etc., of the said four defendants by which they attempted to obtain control of all the sugar refineries in this district for the purpose of restraining the trade thereof among the other states. That in pursuance of this scheme, on or about March 4, 1892, John E. Searles, Jr., entered into a contract with the defendant Knight Company and individual stockholders named for the purchase of all the stock of the said company, and subsequently delivered to the said defendants in exchange therefor shares of the American Sugar Refining Company. That on or about the same [\*307] time the said Searles entered into a similar contract with the Spreckels Company and individual stockholders and made a similar contract with the Franklin Company and stockholders and with the Delaware Sugar House and stockholders.

The bill further avers that the American Sugar Refining Company monopolizes the manufacture and sale of refined sugar in the United States and controls the price of sugar. That in making the said contracts the said Searles and the American Sugar Refining Company combined and conspired with the [\*\*3] other defendants named to restrain trade and commerce in refined sugar among the several states and foreign nations. That the said contracts were made with intent to enable the said American Sugar Refining Company to monopolize the manufacture and sale of refined sugar among the several states.

The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E.C. Knight Company, the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about 33 per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Company and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, [\*\*4] excepting the four located in Philadelphia, and that of the Revere Company in Boston, the latter producing about 2 per cent. of the amount refined in this country; that in March, 1892, the American Sugar Refining Company entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Company thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Company obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale [\*\*5] in each instance left the sellers free to establish other refineries and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase, the Delaware Sugar House Refinery [\*308] has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about 10 per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

The object in purchasing the Philadelphia refineries was to obtain a greater influence or more [\*\*6] perfect control over the business of refining and selling sugar in this country.

Are the defendants' acts, as above shown, prohibited by the statute of 1890, relating to trade and commerce? The provisions involved are as follows:

**HN1**[] Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**HN2**[] Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or, by imprisonment not exceeding one year, or by both said punishments, [\*\*7] in the discretion of the court.

**HN3** Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violation of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The principal questions raised are:

First, do the facts show a contract, combination or conspiracy to restrain trade or commerce, or a monopoly within the legal signification of these terms?

Second, do they show such contract, combination or conspiracy to restrain or monopolize trade or commerce "among **[\*\*8]** the several states or with foreign nations?"

Third, can the relief sought be had in this proceeding?

In the view I entertain the first and third need not be considered. The second must receive a negative answer, and this will dispose of the controversy.

**[\*309]** The federal government possesses no jurisdiction over the contracts, business or property of individuals within the states -- except to collect revenue for its support. Its powers are derived exclusively from the constitution. It has none other than such as are directly or impliedly conferred by that instrument; and the latter contains no suggestion of authority to intermeddle with such property rights. By the eighth section of article first, congress is empowered "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." In pursuance of this power the statute of 1890 was enacted; and as the terms employed show, congress was duly careful to keep within the limits of its authority. It is "trade and commerce among the several states and with foreign nations" that the statutes seek to guard against restraint or monopoly.

The contracts and acts of the defendants relate **[\*\*9]** exclusively to the acquisition of sugar refineries and the business of sugar refining, in Pennsylvania. They have no reference and bear no relation to commerce between the states or with foreign nations. Granting therefore that a monopoly exists in the ownership of such refineries and business, (with which the laws and courts of the state may deal,) it does not constitute a restriction or monopoly of interstate or international commerce. The latter is untouched, unrestrained and open to all who choose to engage in it. The plaintiff contends, however, that such monopoly in refineries and refining incidentally secures a monopoly of commerce among the states. This position, however, is unsound; the deduction is unwarranted. The alleged control of refining does not of itself secure such commercial monopoly; and at present none exists. The most that can be said is that it tends to such a result; that it might possibly enable the defendants to secure it, should they desire to do so. Whether it would or not depends on their ability with this advantage to control such commerce. They have not tested this ability by attempting to control it, nor shown a disposition to do so. They sell **[\*\*10]** their product, and purchasers may use it in such commerce, or otherwise as they choose. At present the defendants neither have, nor have attempted to secure, such commercial monopoly. As before stated, if they have a monopoly it is in refineries and refining, alone -- over which the plaintiff has no jurisdiction. If they should retire from business, close their refineries or devote them to other purposes, the plaintiff could not object. This might and doubtless would indirectly produce some disturbance of or interference with such commerce, but it would not bring the defendants or their property within the jurisdiction to congress. Numerous instances might be cited, where contracts, business arrangements and combinations indirectly affect interstate and international commerce without bringing the parties to them or their property within this jurisdiction. It is the stream of commerce flowing across the states, and between them and foreign nations, that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has therefore no authority over articles of merchandise or their **[\*\*11]** owners, or contracts or combinations **[\*310]** respecting them, which have not entered into this stream, or having entered, have passed out. It may prohibit and

punish all acts which are intended and directed to restrain or otherwise interfere with or disturb such commerce, but it can go no further. To extend its authority to business transactions which have no direct relation to this commerce, but which may incidentally affect it, and to ownership and rights in property not involved in such commerce, because it may possibly become so involved, would be unwarranted by the terms of the constitutional provision, or the statute, -- would draw within the jurisdiction of congress most of the business transactions and property of individuals within the states, and would oust the jurisdiction of the states accordingly. A large proportion of the contracts which men enter into, and of the changes which they make in their business and business relations, may and probably do affect such commerce. The diminution or increase of production in agriculture or manufactures, changes from one branch of business or trade to another, all incidentally tend to this result. State legislation prohibiting [\*\*12] or restraining the manufacture or sale of certain articles of merchandise, or increasing their cost by exacting license fees, have the same indirect tendency. Such legislative restraint of the manufacture or sale of poisons and alcoholic liquors, and even the increase in the cost or price of property by taxation, could only be sustained by favor of the federal government, in a different view of its power.

The discussion need not be extended; the question is not new. It was fully considered in a case which arose under the statute -- In re Greene, 52 Fed. 104 -- and the opinion of Jackson, J., (now of the supreme court,) is so clear and satisfactory that I am restrained from quoting what he says only by the desire to be brief. Veazie v. Moor, 14 How. 568, 574; Coe v. Errol, 116 U.S. 517 [6 Sup. Ct. 475]; Kidd v. Pearson, 128 U.S. 1 [9 Sup. Ct. 6], -- are to the same effect. The case of U.S. v. Greenhut, 50 Fed. 469, and In re Corning, 51 Fed. 213, cited by the plaintiff, are in affirmation of this view, rather than against it. Every element of combination and monopoly shown here was averred in the indictments under consideration there. It was held, however, that no offense [\*\*13] against the statute was set out, no interference with interstate or international commerce being charged. The cases did not fail through matter of form or technically, but because the facts averred did not constitute an offense against the United States.

In the cases of U.S. v. Jellico Mountain Coal & Coke Co., 46 Fed. 432; Manufacturing Co. v. Klotz, 44 Fed. 721; Dueber Watch Case Manuf'g Co. v. E. Howard Watch & Clock Co., 55 Fed. 851, cited by the plaintiff, this question was not considered or raised.

People v. American Sugar Refining Co., 7 Rey & Corp. (Cal.) 83, and People v. North River Sugar Refining Co., 16 N.Y. Civ. Proc. 1 & 6, [3 N.Y. Supp. 401]; Id., 54 Hun, 354 [7 N.Y. Supp. 406], -- were suits in state courts and involved questions of state law, only.

The bill must lie dismissed, with costs.

## United States v. Cassidy

District Court, N.D. California

April 1, 1895; April 2, 1895

No. 3059

**Reporter**

67 F. 698 \*; 1895 U.S. Dist. LEXIS 158 \*\*

UNITED STATES v. CASSIDY et al.

### **Core Terms**

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engine, train, mail, Railway, depot, conspiracy, track, killed, telegram, crowd, boycott, switch, employes, indictment, mail car, yards, mediation, testifies, railroad, couple, morning, pulled, coming, obstruct, strikers, lodge, conversation, relates, talk, passenger

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Elements

International Trade Law > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > General Overview

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

#### **HN1[] Conspiracy to Defraud, Elements**

U.S. Rev. Stat. § 5440 provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than \$ 10,000, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## [\*\*HN2\*\*](#) [down] **Conspiracy, Elements**

The first element of conspiracy under U.S. Rev. Stat. § 5440 is the act of two or more persons conspiring together; the second is to commit any offense against the United States; and the third is what is termed the "overt act," or the element of one or more of such parties doing any act to effect the object of the conspiracy. With respect to the first element, a conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. The common design is the essence of the charge.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## [\*\*HN3\*\*](#) [down] **Conspiracy, Elements**

While it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## [\*\*HN4\*\*](#) [down] **Conspiracy, Elements**

A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. Furthermore, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

## [\*\*HN5\*\*](#) [down] **Exemptions, Statements by Coconspirators**

Any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This

rule applies to the declaration of a co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

## [\*\*HN6\*\*](#) [down] **Criminal Offenses, Miscellaneous Offenses**

U.S. Rev. Stat. § 3995 provides that any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than \$ 100.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

## [\*\*HN7\*\*](#) [down] **Criminal Offenses, Miscellaneous Offenses**

U.S. Rev. Stat. § 3995, making it an offense to obstruct and retard the passage of the mails, applies to those persons who "knowingly and willfully" obstruct and retard the passage of the mails, or the carrier carrying the same; that is to say, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the acts with the intention that such shall be their operation. The statute also applies to those persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, the intention to obstruct and retard the passage of the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Fines

## [\*\*HN8\*\*](#) [down] **Conspiracy, Elements**

26 Stat. 209 provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$ 5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

### **HN9** [down] **Antitrust & Trade Law, Sherman Act**

"Trade" is defined as the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange. The word "commerce," as used in 26 Stat. 209 and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. Railroad cars are instrumentalities of commerce. The primary object of the statute is to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN10** [down] **Inchoate Crimes, Conspiracy**

The doing of some act in pursuance of a conspiracy is an ingredient of the crime, and must be established as a necessary element of the offense, although the act need not be in itself criminal or amount to a crime.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

### **HN11** [down] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Employees have the right to quit their employment, but they have no right to combine to quit their employment, in order thereby to compel their employer to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken has no effect whatever upon the character or reward of their services. It is the motive for quitting and the end sought thereby that makes the injury involved unlawful, and the combination by which it is effected an unlawful combination. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Boycotts, though unaccompanied by violations or intimidation, are unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

### **HN12** [down] **Antitrust & Trade Law, Sherman Act**

A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of commerce among

the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### [HN13](#) [ ] Accessories, Aiding & Abetting

All who engage, either as principals, or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. A man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Trials > Burdens of Proof > General Overview

### [HN14](#) [ ] Burdens of Proof, Prosecution

The presumption of innocence is in favor of defendants. A mere preponderance of testimony, in a criminal case, is not sufficient to justify a verdict of guilty. The burden of proof is upon the prosecution, and it must prove every material fact, and establish the guilt of the defendants to the jury's satisfaction, beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors, so that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the accused. Reasonable doubt arises out of the evidence and is not imaginary doubt, fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns are involved, -- a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. When such a doubt exists, the accused is entitled to its benefit, and should be acquitted. But where the evidence is satisfactory to the impartial mind that the crime was committed; that the defendant committed it as charged, -- when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence, properly, there can be no reasonable doubt, and the prisoner should be convicted.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Evidence > Types of Evidence > Testimony > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

### [HN15](#) [ ] Judicial Officers, Judges

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives; by contrary evidence. And the jurors are the exclusive judges of his credibility. In judging credibility of witnesses, jurors may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by their judgment as reasonable men.

**Counsel:** [\*\*1] H. S. Foote, Special Asst. U.S. Atty., and Samuel Knight, Asst. U.S. Dist. Atty.

Geo. W. Monteith, for defendants.

**Opinion by:** MORROW

## Opinion

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[\*701] MORROW, District Judge (charging jury). Gentlemen of the Jury: I congratulate you on the approaching termination of this case. For five months you have been required to give your constant, and, I might say, exclusive, attention to the daily proceedings in this court. The trial of the case has been protracted, but I am not prepared to say that any greater time has been occupied than was necessary, under the circumstances, to secure the testimony of the 216 witnesses who have appeared before you upon the stand. The nature of the charges against the defendants now on trial, covering, as they do, the whole field of the railroad strike of last summer in this district, necessarily involves the closest scrutiny into every feature of that affair. In this examination you have displayed a patient interest of such a commendable character as to call for the special acknowledgment of the court. You are, indeed, entitled to the gratitude of every good citizen of the community for the sacrifices you are making, and for the service you are rendering [\*\*2] in the faithful performance of a public duty.

In submitting the case to your consideration, it becomes my duty to call your attention to the character of the charges against the defendants, and the provisions of law under which the prosecution is being conducted. It is the duty of the court to declare the law; it is your exclusive province and responsibility to apply the law so declared to the facts as you, upon your conscience, believe them to be established.

[\*702] The indictment contains two counts, which, in general terms, charge that the defendants conspired, combined, and agreed together, and with divers other persons, to obstruct and retard the passage of the United States mails, and the carrier carrying the same, and also that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States, and with foreign countries. The crime of conspiracy is based upon [HN1](#) section 5440 of the Revised Statutes of the United States, which provides as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or [\*\*3] more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court."

To make this statute as clear to you as possible, I will call your attention to its three essential provisions. [HN2](#) The first element is the act of two or more persons conspiring together; the second is to commit any offense against the United States; and the third is what is termed the "overt act," or the element of one or more of such parties doing any act to effect the object of the conspiracy. With respect to the first element, we find that a conspiracy has been described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. [Pettibone v. U.S., 148 U.S. 203, 13 Sup. Ct.](#) 542. The common design is the essence of the charge, and [HN3](#) while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish [\*\*4] the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or

means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. HN4 [↑] A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who [\*\*5] knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. U.S. v. Babcock, 3 Dill. 586, Fed. Cas. No. 14,487. Furthermore, where several persons are proved to have combined together for the same [\*703] illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that HN5 [↑] any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.

The confederacy to commit an offense [\*\*6] is the gist of the criminality under the law. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons, to commit crime, requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinctive from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong.

The second essential element in the offense described by the statute is the purpose of the conspirators to commit an offense against the United States. The indictment charges that the defendants conspired with others to commit two offenses against the United [\*7] States, -- one to obstruct and retard the passage of the United States mail and the carrier carrying the same; and the other, that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States and with foreign countries. The first charge is based upon the provisions of HN6 [↑] section 3995 of the Revised Statutes, which provides as follows:

"Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars."

This section of the Revised Statutes was originally section 9 of the act of March 3, 1825 (4 Stat. 104), and, having been passed prior to the introduction into the United States of the method of transporting mail by railroads, the phraseology of the law conformed to the conditions prevailing at that time, but it is equally applicable to the modern system of conveyance, and protects alike the transportation of the mail by the "limited express," as it does the carriage by the old-fashioned stagecoach. There are, however, certain [\*704] provisions [\*\*8] of law directed specifically to the transportation of the mail by railroad trains, to which I desire to call your attention.

Section 3964 of the Revised Statutes provides as follows:

"The following are established post-roads: \* \* \* All railroads or parts of railroads which are now or hereafter may be in operation."

Section 3, Act March 3, 1879 (20 Stat. 358), provides "that the postmaster general shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed." Section 4000 of the Revised Statutes provides that:

"Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

There is still another provision of law applicable to the transportation of mails on the Pacific railroads, which is as follows:

"That the grants aforesaid are made upon the condition that said company shall \* \* \* transport mails \* \* \* upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all [\*\*9] the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered to the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." Act July 1, 1862, to aid in construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, § 6 (12 Stat. 493).

Recurring, now, to [HN7](#) section 3995 of the Revised Statutes, making it an offense to obstruct and retard the passage of the mails, and you will observe that the statute applies to those persons who "knowingly and willfully" obstruct and retard the passage of the mails, or the carrier carrying the same; that is to say, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the acts with the intention that such shall be their operation. [U.S. v. Kirby, 7 Wall. 485](#). "It would be no defense under this statute," said an eminent judge in a recent case, "that the obstruction was effected by merely quitting employment, where the motive [\*\*10] of quitting was to retard the mails, and had nothing to do with the terms of employment." [Thomas v. Railway Co., 62 Fed. 822](#).

The statute also applies to those persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, the intention to obstruct and retard the passage of the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. [U.S. v. Kirby, supra.](#)

The second offense, which, it is charged in the indictment, was the object of the conspiracy, was to restrain trade and commerce among the several states and with foreign nations. This offense is described in an act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 [HN8](#), (26 Stat. 209), which provides as follows:

[\*705] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such [\*\*11] contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[HN9](#) "Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. [County of Mobile v. Kimball, 102 U.S. 702](#); [Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 203, 5 Sup. Ct. 826](#). Pullman cars in use upon the roads are instrumentalities of commerce. [U.S. v. Debs, 64 Fed. 763](#).

The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate [\*\*12] commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. [U.S. v. Patterson, 55 Fed. 605](#). But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another. [U.S. v. Workingmen's Amalgamated Council, 54 Fed. 995, 1000](#).

We come, now, to consider the third element involved in the crime of conspiracy, as it is declared in the statute under consideration; that is to say, the overt act, or the element of one or more of the parties to the conspiracy doing any act to effect its object. At common law, it was neither necessary to aver nor to prove an overt act in furtherance of a conspiracy. Bannon v. U.S., 15 Sup. Ct. 467. The offense was complete when the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. It was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. U.S. v. Walsh, 5 Dill. 58, Fed. Cas. No. 16,636. But, under the statute of the United States now under [\*\*13] consideration, HN10[<sup>1</sup>] the doing of some act in pursuance of a conspiracy is an ingredient of the crime, and must be established as a necessary element of the offense, although the act need not be in itself criminal or amount to a crime. U.S. v. Thompson, 12 Sawy. 155, 31 Fed. 331.

With this general statement and explanation of the statute involved in this case, I will proceed to consider the allegations in the indictment, which, as I said before, contains two counts.

The first count charges that the defendants conspired both to obstruct and retard the passage of United States mails, and to unlawfully engage in a combination and conspiracy in restraint of trade and commerce, while the second count charges a conspiracy in restraint [\*706] of trade and commerce alone. Otherwise, both counts are, in substance and form, identical. In general terms, the two counts charge: (1) Formation of the conspiracy; (2) legal corporate existence of the Southern Pacific Company, and its means, manner, and methods of transporting the mails and interstate commerce; (3) means conspired to be used in effecting the object of the conspiracy; (4) overt act charged; (5) concluding with an allegation of [\*\*14] unlawful intent.

Bearing these general features of the indictment in mind, you will now be able to understand the meaning of the various allegations of the indictment, as I proceed to refer to them somewhat more in detail.

Taking up the first count: The formation of the conspiracy is alleged, and it is charged that John Cassidy, John Mayne, Fred Clarke, and James Rice, with divers others, names unknown, did conspire to obstruct and retard the passage of the mails of the United States, and to restrain trade and commerce among the several states and with foreign nations. (2) The legal corporate existence of the Southern Pacific Company, and its means, manner, and method of carrying the mails and interstate commerce, are set out. It is averred that the Southern Pacific Company was a railroad corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, express matter, and other commodities, comprising and constituting trade and commerce, within the meaning of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies, [\*\*15] approved July 2, 1890." The lines of railroad over which it carried on its mail and interstate commerce; the manner and means employed and necessary to its doing so, viz. yards, depots, tracks, trains of cars, and other equipment suitable for the transportation of the United States mails, passengers, freight, and express matter, and other commodities, -- are also set out. (3) Then follow the means conspired to be used in effecting the object of the conspiracy. These are, briefly: First. By forcibly taking and keeping possession and control of all yards, depots, tracks, and trains of cars upon said lines of railway, and by forcibly holding and detaining the same. Second. By causing to be assembled, and assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places upon said lines of railway, in said state and Northern district of California, to wit: 1. At the city and county of San Francisco. 2. City of Sacramento. 3. City of Oakland. 4. City of San Jose. 5. City of Stockton. 6. Town of Red Bluff. 7. Town of Dunsmuir, county of Siskiyou. 8. City of Vallejo, county of Solano. 9. Town of Lathrop, county of [\*\*16] San Joaquin. 10. Town of Palo Alto, county of Santa Clara. By gathering in great numbers in said yards and depots, and other places, around, in, and upon the trains, cars, and engines of the said Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains. Third. By threats, intimidation, personal assaults, and other force and violence, to prevent the engineers, firemen, conductors, [\*707] brakemen, switchmen, and other employes of said Southern Pacific Company from discharging their duties, and from moving and operating said engines, trains, and railways. Fourth. By forcibly disconnecting air brakes upon such trains, -- mail, passenger, and freight. Fifth. By putting out the fires in the engines drawing the same. Sixth. By throwing switches, in order to prevent the passage of such trains through depots and stations. Seventh. By opening drawbridges over navigable and other streams, upon which

drawbridges the tracks of said railway cars were situated. Eighth. By burning and destroying bridges, trestles, and culverts, over which such trains necessarily and usually would pass. Ninth. By loosening, [\*\*17] removing, and displacing the rails of the tracks of said railroads. Tenth. By greasing the rails of the said tracks. Eleventh. By stopping trains upon railway crossings and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches. Twelfth. By compelling the employes of said railroad company to leave their trains, shops, and the work of said company, while in the performance of their duty. Thirteenth. By using all such other forcible means as to them should seem expedient to prevent, for an indefinite period, the use of the said railways for the transportation of the mails of the United States and interstate commerce.

It will be well to observe, at this point, that the indictment does not charge that the defendants did, in fact, use or put in operation the means herein set out, in effecting the object of the conspiracy; the charge is that such were the means conspired to be used for that purpose. Now, when you come to consider the testimony, you will probably find that some of it tends to show that certain persons did, in fact, use such means to prevent the movement of railway trains. This testimony was admitted, not to prove [\*\*18] that such acts had been committed, but because of the relevancy of such testimony to the charge in the indictment, -- that such means were to be used in effecting the object of the conspiracy. In other words, it tends to show that a conspiracy was formed to obstruct and retard the passage of the United States mails, and to restrain trade and commerce among the several states and with foreign nations, and that such means were to be used to carry the conspiracy into effect.

This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used or put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.

After stating the means by which the conspiracy was to be effected, the indictment then sets out the overt acts; that is to say, it charges the doing of certain acts to effect the object of the conspiracy. They are as [\*\*19] follows: That on the 6th day of July, 1894, the defendants, at Palo Alto, (1) forcibly took possession and control of the yards, depots, buildings, tracks, engines, and cars, and other appliances and [\*708] property, of the Southern Pacific Company: 1. By causing to be assembled, and assembling with, a large crowd of persons in said depots, buildings, and yards of the Southern Pacific Company; and by gathering with said crowds of persons in said depots, buildings, and yards, around, in, and upon the aforesaid trains, cars, and engines, and upon the tracks of the railways. 2. By threats, intimidations, personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employes of said company having charge of said depot, buildings, and other property, etc. It is further charged (2) that, on the 6th day of July, 1894, said defendants, at Palo Alto, forcibly and violently prevented the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto: 1. By gathering in crowds, etc. 2. By placing physical obstructions upon said track. 3. By displacing the switches. [\*\*20] 4. By forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employes, while engaged as aforesaid. 5. By uncoupling the cars of said trains and disconnecting the same. 6. By removing said cars from said tracks. 7. By withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein. 8. By displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails. 9. By other violent, forcible, and unlawful acts and means to the grand jurors unknown. It is further charged (3) that said defendants, at the time and place above indicated, unlawfully, forcibly, and violently occupied and held possession and control of said yards, depots, tracks, engines, trains of cars, and other appliances and property of the Southern Pacific Company, by the means aforesaid, and by said means excluded the Southern Pacific Company and its employes from the possession, use, and control thereof, and by said means prevented the movement of said trains [\*\*21] from and including July 6 to and including July 10, 1894.

The same observation, which I have just made to you with respect to the establishing of one or more of the means alleged to have been concocted and conspired to be used, is applicable to the overt acts charged. It is not necessary to a verdict of guilty that you should find that each and every one of the overt acts charged have, in fact,

been committed. If you are satisfied beyond a reasonable doubt that one or more of these overt acts have been committed, and that they were done in furtherance of the conspiracy alleged to have been entered into by and between these defendants, and to carry out or effectuate in some way the object of the conspiracy, that is all that the law requires. The indictment concludes with allegations of intent, viz.: That the defendants, by the acts and means aforesaid, knowingly and willfully obstructed and retarded the passage of the mails and the carrier carrying the same, and restrained interstate commerce from the 6th of July to and including the 10th day of July, 1894, at Palo Alto. The second count, as stated above, is confined to charging a conspiracy to restrain trade and commerce [\*709] [\*22] alone; otherwise it is identical in form and substance with the count just elaborated upon.

Having directed your attention to the different provisions of law involved in the charges against these defendants, and having also stated to you, in brief terms, the several allegations of the indictment, you are now prepared to consider the testimony in the case in its proper light, for the purpose of determining the guilt or innocence of the defendants; but in referring to the testimony you will distinctly understand that you are the exclusive judges of the facts, and that it is not my province or purpose to intrude upon your jurisdiction in any particular or to any degree. If, in any of my rulings during the progress of this trial, I have appeared to indicate that any controverted fact has been established, or if I now assume or appear to consider or treat any fact as proved, unless it may be an admitted fact, you will disregard such assumption, and act entirely upon your own judgment and conscience in determining the facts of the case.

From what has been stated, it will appear to you that you are brought to the consideration of three questions which may be properly suggested to you [\*23] as a guide for your deliberation: (1) Has the government proved the existence of a conspiracy alleged in the indictment? (2) If it did exist, were any of the alleged acts performed by one or more of the parties to the conspiracy? (3) If such a conspiracy existed, were the defendants parties to it?

Taking these questions in their order, you will first consider whether the conspiracy charged in the indictment has been established.

#### General Conspiracy.

This is the important question in this case, and is a question of fact for you to determine, subject to such rules of law as the court will give you to assist you in arriving at a correct conclusion. The evidence on this point is largely circumstantial, and involves a consideration of the acts of members of the American Railway Union; the course and methods of the association in boycotting the Pullman cars, and subsequently declaring a strike against the Southern Pacific Company; and, generally, the attitude and conduct of the strikers and those acting with them during the time the strike was in operation.

#### American Railway Union.

The evidence tends to show that the American Railway Union is a fraternal organization, composed [\*24] of railroad employees below a certain grade. The headquarters of the association are located at Chicago, Ill. In June and July last Eugene V. Debs was its president; Geo. W. Howard, vice president; and Sylvester Keliher, secretary. The union is divided up into local unions. In the constitution of the order, introduced in evidence, the principles and purposes, so far as they are pertinent to this feature of the case, are stated as follows:

"It is a self-evident truth that 'in union there is strength,' and, conversely, without union weakness prevails; therefore the central benefit to be derived from organization is strength, -- power to accomplish that which defies individual [\*710] effort. The American Railway Union includes all railway employees, born of white parents, organized within one great brotherhood. There is one supreme law for the order, one roof to shelter all, and all united when unity of action is required. The reforms sought to be inaugurated and the benefits to be derived therefrom, briefly stated, are as follows:

"First. The protection of members in all matters relating to wages and their rights as employes is the principal purpose of the organization. [\*25] Railway employes are entitled to a voice in fixing wages and in determining conditions of employment. Fair wages and proper treatment must be the return for efficient service, faithfully performed. Such a policy insures harmonious relations and satisfactory results. The order, while pledged to

conservative methods, will protect the humblest of its members in every right he can justly claim; but, while the rights of members will be sacredly guarded, no intemperate demand or unreasonable propositions will be entertained. Corporations will not be permitted to treat the organization better than the organization will treat them. A high sense of honor must be the animating spirit, and even-handed justice the end sought to be attained. Thoroughly organized in every department, with a due regard for the right wherever found, it is confidently believed that all differences may be satisfactorily adjusted; that harmonious relations may be established and maintained; that the service may be incalculably improved; and that the necessity for strike and lockout, boycott and black-list, alike disastrous to employer and employe, and a perpetual menace to the welfare of the public, will forever [\*\*26] disappear.

"Second. In every department of labor, the question of economy is forced to the front by the logic of necessity. The importance of organization is conceded, but, if it costs more than a workingman is able to pay, the benefits to accrue, however great, are barred. Therefore, to bring the expenses of the organization within the reach of all is the one thing required, -- a primary question which must be settled before those who stand most in need can participate in the benefits to be derived; hence to reduce the cost to the lowest practical point is a demand strictly in accord with the fundamental principles of economy, and any movement which makes it possible for all to participate in the benefit ought to meet with popular favor.

Third. The organization will have a number of departments, each of which will be designed to promote the welfare of the membership in a practical way and by practical methods. The best thought of workingmen has long sought to solve a problem of making labor organizations protective, not only against sickness, disability, and death, but against the ills consequent upon idleness and those that follow in its train. Hence there will be established [\*\*27] an employment department, in which it is proposed to register the name of every member out of employment. The department will also be fully informed where work may be obtained. It is doubtful if a more important feature could be suggested. It evidences fraternal regard without a fee, benevolence without alloy."

Section 54 of the constitution of the American Railway Union (entitled "Laws of Protection") provides for what is called a "board of mediation," and defines its powers. It is as follows:

"The board of mediation of each local union shall elect a chairman. The chairman of the local board of mediation shall be a member of the general board of mediation of the system or line on which they are employed. The general board of mediation shall elect a chairman and secretary. The general board of mediation shall meet on the second Tuesday of September of each year at the headquarters of the road on which they are employed, for the transaction of such business that may emanate from the local board of mediation. All complaints and adjustments of a general character shall be handled by the general board of mediation. All complaints and adjustments must be taken up first by the [\*\*28] local union; if accepted by a majority vote, it shall be referred to the local board of mediation for adjustment; and, if failing, the case shall be submitted to the chairman of the general board of mediation; failing in which, they shall notify the president of the general union, who shall authorize the most available member of the board [\*711] of directors to visit and meet with the general chairman of the board of mediation, and issue such instructions as will be promulgated by the directors."

The right of employes of railway companies to organize in this way for their own benefit and protection is not questioned. They are entitled to the highest wages and the best conditions they can command, and they may organize an association or union for that purpose. There is no controversy on this point. It is a benefit to them, and it is not prejudicial to the interests of the public, that they should unite in their common interests and combine for such lawful purposes. In *Thomas v. Railway Co., 62 Fed. 817*, Judge Taft, in the circuit court of the United States for the Southern district of Ohio, speaking of the relation of railway employes to the American Railway Union, says: [\*\*29]

"If they (the employes) stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite

with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, they may order them, upon pain of expulsion from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory."

This is clearly the law; but there is a just and reasonable limitation to the power and privilege of railway employees, even under the protection of such an organization. They are not entitled to [\*\*30] interfere with the rights and property of others, and by force and intimidation compel a carrier of United States mails or of interstate commerce to suspend the operations of such necessary and lawful business; or, to state the proposition a little more exactly, they have no privilege or right to violate a law of the United States.

Now, with respect to the general charge of conspiracy contained in this indictment, I will direct your attention to some of the testimony which the government claims tends to establish that element of the case.

#### Time When the Boycott Took Effect.

It is admitted that in the latter part of June, 1894, a convention of the American Railway Union, assembled at Chicago, resolved to boycott the Pullman Company; this boycott to take effect in five days, should the difficulties existing between that company and its employes not be settled at the expiration of that period. On June 26, 1894, the president of the general union sent the following telegram, which was received by the American Union Lodge, known as "Local Union No. 310," having its headquarters in Oakland: "Pullman boycott in effect to-day noon, by order of convention." The telegram was signed by [\*\*31] E. V. Debs, the president of the union. G. D. Bishop, secretary of local union No. 310, at Oakland, identifies [\*712] this telegram. The boycott was therefore declared at noon of June 26, 1894, which fell on a Tuesday.

Mr. Knox, who was an employe of the Southern Pacific Company at Sacramento, and a member of the American Railway Union at that place, being called as a witness for the defense, testified that he was chairman of the mediation committee; that the duties of the committee were to settle the differences between the employes and the corporation. He relates the circumstances connected with the commencement of the boycott, as follows:

"On the 26th of June we were asked to boycott the Pullman cars, and the union took action on it, and the mediation committee were ordered to call at Mr. Wright's office, -- this was about 11:20 at night, -- and notify him of the action of the union. Mr. Knox, Mr. Compton, and Mr. Mullen composed the mediation committee. We went down, and saw Mr. Wright, and told him what action the union had taken, and went back and reported again to the union. We were authorized then to lay off from our work, and to attend to this boycott; to notify [\*\*32] the members, and the like. I went down and asked Mr. Halloran for leave of absence until the trouble was over with, and it was granted me. I was laying off at the time of the strike. Obtained leave of absence about two o'clock or 2:30 in the morning of the 27th of June. The object of the boycott was this: That the American Railway Union had a big lodge at Pullman, Illinois. The Pullman Company had reduced the wages of their employes so that they could hardly live. \* \* \* Received a message from President Debs, asking us to boycott the Pullman cars, and the mediation committee went down to the depot after the meeting. We ordered the boycott. We decided to boycott Pullman cars. We were notified to go down and tell Mr. Wright of the action of the union, which we did. Then we reported back to the union again, and told them what Mr. Wright said, and, after that, the meeting was adjourned, and we went from there to the depot to carry out our instructions. We were given full power to act in the matter. When we got to the depot, or shortly after we arrived there, Mr. Halloran, the yardmaster, and Mr. Small, and several of the officials, showed up around there, and wanted to know [\*\*33] what the trouble was. Mr. Halloran called me off to one side, and asked me, as a favor, not to ask the men to boycott the Pullmans on 2, 4, and 16. He said that if we did not wish to handle the Pullman cars, if we would agree not to call him a scab, he would switch the cars. After consulting with the balance of the mediation committee, it was decided to let the Pullman cars on 2, 4, and 16 go through to their destinations without boycotting them. We told him we would switch the cars instead of him. We did not ask him to do any work. On the morning of the 27th, about 8:30, I went through the shops, -- there were a great many shopmen belonging to our union, -- to see what action they had taken in reference to working on Pullman cars. I found a great many of the men idle. They were not working on the Pullman cars. We told them to go and complete their work; to never mind boycotting the work; to keep on with it. \* \* \* After going through the shops, and notifying

the men to keep on with their Pullman work, we then went back to the depot. There was a train due to leave there at 10:25 in the morning, known as 'No. 84.' She has a Pullman car off of No. 2, that comes from Chicago, [\*\*34] and another one to put on there at Sacramento. There is a first-class car put on at Sacramento. The other is a tourist car. The one that came through from Sacramento was loaded and the other one was empty. We asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. We thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. Mr. Halloran then came to us, and said he would take the engine and go to couple on, and we should come up and ask him not to couple on, and tell him we did not want him to scab on us, and he would not couple on. With that understanding he took the engine, and went around on the track where the Pullman car was, and started to couple on. We went over, and told him we did not like to have the yardmaster [\*713] scabbing on us; it did not look well. He said, 'Of course, I will have to yield;' and he went up to the office, and asked us if we would go with him. We went with him. Mr. Jones asked him if he could not get some one else to put on the Pullman cars. He said, 'No; they are all A.R.U. men.' Mr. Jones said, 'Cannot you hire some one else?' He said, 'No; they [\*\*35] are all A.R.U. men.' That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office, and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. They refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be no parties to holding the mail. He refused. We went to him, and asked him if he would not let this other Pullman car go on 104, because the passengers were very anxious to get through. He said they would, and they switched the loaded tourist car off of 84, and put it on 104. That is about all that happened on the 27th. \* \* \* That train was made up at Sacramento. It runs between Sacramento and Oakland, by Tracy, and around that way. The Pullman cars go to Los Angeles. They carry the Pullmans down to Lathrop, and then they go to Los Angeles. The balance of the train comes into Oakland. It starts from Sacramento. The Pullman car, though, that goes through, that comes from Chicago, -- [\*\*36] that loaded one, -- the tourist car. They sent it out on another train at night, 5:30. '104' it is called. Sent it out in the evening, -- on the same day. There was nothing left of that train, then, except the mail, baggage, express, and passenger cars. There was no one in the passenger cars. They went off on the next train, - - the passengers; the through passengers from Chicago that went on the next train. There were a good many of the local that went on the next train, too. That only runs to Tracy. It does not come clear around to San Francisco, but stops there. Know C. A. Newton. I had a conversation with him on the night of the 26th, and I might have had on the 28th. I would not say for certain. Had a conversation with him on the night of the 26th, at which I showed him a telegram. The telegram read: 'Boycott declared on Pullman cars. E. V. Debs.'"

C. A. Newton, called for the United States, night yardmaster at Sacramento, for the Southern Pacific Company, contradicts Mr. Knox on this point, and says that Mr. Knox handed him a telegram, which he read. That the telegram read: "H. A. Knox, Sacramento. Boycott declared against Pullman. Hold all Pullmans. E. V. [\*\*37] Debs." That he handed the telegram back to Knox, who left the room where they had met, with the exclamation, "That is hell." The witness Knox further states:

"About 12:30, I think it was, on the morning of the 28th, I received a message from Los Angeles, saying that some men were discharged for refusing to handle Pullman cars, and saying that the Los Angeles Union had decided to strike for the reinstatement of those men, and asked us to participate in the strike. The committee having full power to act, we considered the matter, and came to the conclusion it was a just fight, and we would take it up and help them out. In that message from Los Angeles they asked us if we would notify all concerned, which we did. I went down to the depot, and that special that Mr. Newton was testifying about -- the officers' special -- was just pulling out of the depot. I had had a conversation with the engineer and the fireman before that, and they told me if there was any strike they wanted a finger in the pie, so I ran up and got on the engine, and told the engineer and fireman about what had occurred. They said, 'Well.' Some one stopped them; I don't know who. They were stopped from the hind [\*\*38] end of the train, and they said, 'Cut us off, and we will go to the house,' so somebody cut the engine off. I don't know who it was. No one was with me on the cab of the engine, -- only the engineer and fireman. Did not offer any threats or intimidation or violence. \* \* \* The [\*714] engine was cut off, and the engineer was taking it around to the roundhouse. I was in the depot by that time. Mr. Wright wanted to know what was the matter with the special. I told him, as near as I could find out, the engineer was going to strike with us. He had Mr. Newton stop him there in front of the depot, and he had a conversation with the engineer, and they finally agreed to go on with

the special, and asked us if we would couple on. We told him, 'Yes; if they wanted to go.' I told Mr. Wright I thought it was foolish for them to go. They would go just as far as Rocklin, and that was no place to stay. There were no accommodations there at all. He said, 'For God's sake, let them go out of Sacramento, if they don't get over the American river bridge.' I thought to accommodate him. We would not ask the conductor and brakeman to boycott the officers' special. We would let them go as [\*\*39] far as Rocklin. I knew they would not get any further than that, because the men had already quit up there. I got on the engine, and rode up through Sixth street yard with them, to see that the switches were all set, and everything ready to go. I rode with the engineer on the engine. After I got back from Sixth street the committee then went up to the Western Union & Postal Telegraph Company, and we sent a good many dispatches notifying them that we had struck."

(These telegrams will appear further on.)

Newton testified as follows with relation to the special car, -- or officers' special, as it was called, -- and with reference to the statements made by Knox at the time:

"I know Mr. Knox personally. He used to work for me. Mr. Mullen, I knew him personally, too. Mr. Compton I did not know until after the strike. I saw Mr. Knox about the 26th of June. \* \* \* The first train that came into the yard after that conversation I had with Mr. Knox (referring to above) was a special that came from Oakland. It got in about 12:25 on the morning of the 29th. It was a special passenger train, that ran out of its ordinary time. It was composed of two officers' cars and the engine. [\*\*40] \* \* \* Saw Mr. Knox on the arrival of the officers' train, a little while after it got in, when it got ready to leave. Knox came running through the depot, and hollered out: 'Stop that train! Stop that train! Not a son of a bitch of a wheel will turn on the system.' This was on the morning of the 29th, about 12:25."

This, it will be observed, flatly contradicts Knox as to what occurred at that time.

The witness Newton testifies further as to Knox's attitude, as follows:

"Did not have any direct conversation with Knox. When No. 3 came in, going east, there was quite a number of shopmen around there, standing in groups, I guess to the extent of forty or fifty. They came in charge of United States Marshal Long. This was along in the morning, about daylight, probably four o'clock, on the 29th. That was a mail train, -- the regular Eastern overland, -- the Atlantic express; the 'fast mail,' they call it. After No. 3 pulled out, the groups got moving towards the depot, -- after she pulled out, -- and some one in the groups made the remark to Mr. Knox why he did not hold the train, -- what he let her go out for. He said he did not have force enough to hold her, but when seven [\*\*41] o'clock came he would call out the shop men, and he would have force enough to hold anything that came along."

Knox testifies that:

"The strike was formally declared about 12:30 or 1 o'clock on the morning of the 29th of June by the Los Angeles Union. In Sacramento it was left in the hands of the committee. The committee had full power to act. The committee decided to strike to have those men in Los Angeles reinstated. As soon as they got the message they consulted probably for 25 or 30 minutes, and went on and did as requested by the message, to notify all those concerned. That was about 12:30 or 1 o'clock on the morning of June 29th. Had not at that time received any notification from Oakland. Did not act [\*715] on anything but the notification from Los Angeles. The members that were out on the road, -- we notified all the unions along, Truckee, and Rocklin, and Dunsmuir, and all over the system, -- we notified them that we had struck; that we had ordered a general strike in Sacramento, and those in Sacramento -- the shop men -- were all notified the next morning after they went to work, perhaps 8 o'clock or 8:30."

The attitude of the mediation committee, as representatives [\*\*42] of the American Railway Union, is stated by Knox as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them that, in the first place, we had boycotted the Pullman

cars on legal advice; and, if I am not mistaken, I told them who our advice was from, -- Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did. Consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

Again he says:

"I told Mr. Baldwin our men would not work on Pullman cars. That is all I told him. \* \* \* We were doing nothing with reference to preventing the movement of trains; only [\*\*43] quit work, that is all. \* \* \* We were trying to induce the men that showed up to strike with us. That was the understanding between Mr. Wright and myself. \* \* \* I told Mr. Baldwin that our men would not work on Pullman cars. Did not make the statement that we would not allow Pullman cars to move."

As to the power possessed by the mediation committee, Knox says:

"The committee had full power to act. The union had given them full power to act."

On cross-examination Knox testifies as follows:

"We discriminated between Pullmans that were full of passengers and Pullmans that were empty, on the 27th and 28th of June. After the strike was ordered, we did not. All Pullmans were treated alike, and everything else, except mail. It grew from the Pullman cars to every other form of cars except the mail cars. After those men were discharged it did; did not matter what the destination of the cars was. We thought that we could control the A.R.U. organization, and we did. Anything that we knew anything about we controlled their action, through the strike. Anything that was done by any of the officers of the A.R.U. organization during the strike was done with the full consent, and [\*\*44] was under the policy of our organization, as far as Sacramento was concerned. We were given full power to act. That power has never been taken away from us yet. Had control on the 3d of July, but do not know whether there was an A.R.U. man who moved the Pullman cars on that day or not. Could not swear to it. I do not think there were very many of them."

It appears that on July 5th, and during the strike, Knox, Compton, and Mullen, of the mediation committee, appeared before the Citizens' Protective Association of Sacramento, and made a statement concerning the attitude of the American Railway Union. Cornelius C. Howell, who was present at the meeting, testifies as follows:

"Was in Sacramento the latter part of June and the early part of July last. I was employed by the Industrial Improvement & Manufacturers' Association [\*716] of Sacramento. I was looking up manufacturers' industries to locate at Sacramento for that company or association. Became a member of the Citizens' Protective Association, I believe, on the 3d of July. That association formed for to get together and see if they could not do something to open up the commerce connected with the city, and such [\*\*45] other business as might be necessary, owing to the condition that things were in at that time from the cause of the strike that had been ordered on the 29th of June, or the strike that occurred on the 29th of June. I was secretary of the organization from the day that we organized, up until, I think, the 15th or 20th of July; somewhere along there. Performed the duties of secretary at meetings. Recollect a meeting held on or about the 5th day of July last. It was called by the association to see if they could not do something in order to open up the commerce. Members of the mediation committee of the A.R.U. were present at that meeting. They were Mr. Knox, Mr. Compton, and Mr. Mullen. After discussing the ways and means to adjust matters, it was decided that it would be better to bring these people before the association, this mediation committee, and find out the condition of affairs, -- what the causes were of all the trouble, -- and see if we could not do something to adjust matters; and in that connection it was agreed that we would admit them, and see what they had to say; they having, I believe, made a proposition to some member of the association that they would like [\*\*46] to come before the association, as the mediation committee of the American Railway Union. They came before the meeting and made a statement. Parts of their statement were reduced to writing. This is a part of the

record of the meeting of the Citizens' Protective Association held on the 5th of July. Not the entire statements, but I took down part of what they said, and then we dictated it out, and took the minutes to Mr. Knox in his room. Mr. Compton was present when I went there with the minutes. I asked them to read them over, and see if they were correct; that I did not wish to have them quoted as saying something before the association that they did not say, and, before they would become a part of the record, I wanted them to see if they were right. I read the minutes to them. These two were present at the time. They looked them all over; and wherever they wanted any changes made I run the pencil through them, as it appears here, and when they got through -- they looked it all over and read it -- I wrote this certificate attached, and Mr. Knox signed it, and Mr. Compton signed it, in my presence, -- both of them in my presence. I left the paper with them so that they might [\*\*47] show it to Mr. Mullen, another member of the committee. He returned, as I understand, after I left, signed the paper, and they sent it down to my office. We had offices in the same building. The interlineations or erasures were made just before that was signed, while Mr. Compton and Mr. Knox were standing at my side. I think they were made -- in fact, I know -- at the request of Mr. Knox. He did the talking."

This document reads as follows:

"Sacramento, July 7th, 1894.

"When the committee returned and had introduced the mediation committee from the A.R.U. to the chairman, Mr. Katzenstein, he in turn introduced Mr. Knox, Mr. Mullen, and Mr. Compton to the association, and invited Mr. Knox to address the association, which he had come to meet. Mr. Knox, among other things, after thanking the association for allowing him to be heard, stated among the grievances that the original cause for this strike was on behalf of the wage-earners at Pullman, Illinois. Mr. Geo. Pullman had been grinding down his men with such small wages that it was impossible for them to get along. Mr. Knox went into detail as to treatment of the employes received at the hands of the Pullman Car Co., [\*\*48] at Pullman, Ill. That through the president of the A.R.U. order he had declared a boycott against the Pullman cars, and to effectually accomplish the object he had ordered the strike, and it had now resolved itself to this: That the A.R.U. order, which he represented, demanded that Pullman restore his men in Chicago to their old places, with the same scale of wages paid to them in 1893; or that the S.P.R.R. Co. purchase the one-quarter ownership of the Pullman Co., paint out the Pullman name from the cars, and restore all the men on the railroad and in all shops to their old position and wages. Senator Cox inquired of Mr. [\*717] Knox if he did not think this committee of citizens could be interested to an extent that something might be done to adjust matters between them and the railroad. Mr. Knox said it had gone so far that nothing could be done until the whole question was settled, and that he had given his ultimatum. Mr. McClatchy asked Mr. Knox what condition affairs were in at this time or what the situation was. Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger cars or freight cars of any kind or description would he consent [\*\*49] to have moved until such time as the demand he made had been complied with. Mr. Mullen said, in part, after Mr. Knox had taken his seat, that this was a fight between capital and labor, and that from the chief justice of the United States down through all the branches -- judicial and legislative departments -- of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation. Mr. Cox then asked what he could suggest. To this Mr. Knox replied that they might intercede with the government, and see if they could not move the mails and express to accommodate the business of the country. He said that that would help us out. 'We are in this fight to win, but we are as anxious to have it settled as you are, and we want to go to work, but will not until this question is settled as I have outlined. There is a revolution going on in this country. Today it is a principle that we are contending for. Should we give up, they would make us crawl on our bellies after them.' Mr. Compton stated, among other things, that the A.R.U. organization [\*\*50] would not resort to any desperate means, so long as the Railroad Co. would deal with them without using armed force. That their organization was composed of law-abiding citizens, and would not commit any overt acts. At this point Mr. Ray tried to have his resolution read, but was declared out of order, and the resolution remained on the table. Several attempts were made by others, but without effect; whereupon Mr. Avery moved that a vote of thanks be tendered this committee for having made this association of business men so frank and fair a statement in relation to their position with the railroad company and this general boycott. The motion being seconded, it was unanimously carried, after which the committee retired.

"We have read the foregoing statement of the records kept by Mr. Howell of our statements, and certify to their correctness.

"Committee: H. A. Knox, Chairman.

"Thos. Compton.

"Jas. Mullen."

Mr. Knox was asked if he signed the statement produced by Howell. He said he did; that there were some alterations, but they were not material.

Continuing, Howell further stated:

"Saw Knox after the 7th. I had no conversation with him, although I saw him a number [\*\*51] of times, after the time I went to his room and he signed that paper, until the 9th of July. I saw him then before the executive committee of the Citizens' Protective Association, at the Orangevale office in Sacramento. George B. Katzenstein, Mr. Van Vorhees, Gen. Llewellyn Tozier, Mr. Frank Miller, Mr. J. V. McClatchy, of the Sacramento Bee, and I am not sure but I think Senator Cox was present at that meeting. The executive committee was composed of nine members, but they were not always there. Mr. Knox was there. I was there. I think Mr. James Mott was there. He is the manager of the Crocker Company up there. During the time of this strike we were in the habit of meeting every day, sometimes twice a day, and we had received information from some source that the government was going to take charge of affairs, and we had heard a good many rumors. We sent for Knox. We brought him there to see what position he was going to take in view of the fact that the troops were to be expected there. This was the 9th of July. These gentlemen met Mr. Knox in the capacity of the executive board of the Citizens' Protective Association. Mr. Katzenstein, the chairman of the executive committee, [\*\*52] asked Mr. Knox some questions in relation to the position that his [\*718] association expected to take or that he expected to take after the troops got there. My recollection is that Mr. Katzenstein in one of the questions said that it was reported, and so published, that Mr. Debs, of Chicago, had issued a proclamation advising all men to keep away from these public places, from collecting at the depots, and so forth, and he asked him why that rule could not be enforced by the A.R.U. here. Mr. Knox handed Mr. Katzenstein a telegram. The telegram, as near as I can remember, -- the substance of the telegram, -- was about this: To pay no attention to newspaper rumors; that they were sure to win; that everything was progressing all right in their interests, or words to that effect. Mr. Katzenstein asked him this further question: That in view of the fact that the troops were ordered there, and would probably be there the next day, or the morning after, and as the matter was passing out from the civil authorities to the military, and in view of the fact that he was a citizen, the same as the balance of the people he had come there to meet, what position he would take; to which [\*\*53] he said, as near as I recollect, that, so far as he was concerned himself, he could not do anything, for there were two or three injunctions against him. But, so far as his men were concerned, which was over 2,000, he had no control of them, and he did not believe they would allow any train to go out of the depot with Pullman cars attached. Then Mr. Katzenstein further asked him, as near as I can recollect, \* \* \* that in view of the fact of the military coming there, and if it would be a question between the principles of his order and the protection of the citizens and his family and so forth, which course he would pursue. He said that the principles of the order of the A.R.U. stood first with him in relation to this business, or in relation to this strike. Mr. Katzenstein, as near as I can remember, called his (Knox's) attention to the proclamation, as it was published in the paper. I don't remember Mr. Knox saying anything in relation to the cause of the proclamation. He produced that telegram. It was read. He handed it out, and talked in about the same strain that was expressed in the language of the telegram. I would not undertake to repeat what he said. I remember distinctly [\*\*54] he stated you could not depend on the proclamation. He did not believe there was any truth in it, and used this telegram as evidence to corroborate his statement."

V. S. McClatchy, called on behalf of the United States, testified:

"I am one of the proprietors and business manager of the Evening Bee, Sacramento."

A paper being shown the witness, he said:

"That paper is a statement made by the secretary of the Citizens' Protective Association, under instructions from its executive committee. \* \* \* The paper was drawn up by Mr. Howell, secretary of the Citizens' Protective Association, under instructions of its executive committee, and purported to embody the statements made by the mediation committee of the American Railway Union before the Citizens' Protective Association at its meeting, I think, of July 5th. Mr. Howell was instructed to draw this paper up and present it to the mediation committee for their approval and signature. \* \* \* I saw it signed by two gentlemen. I did not see the third member of the committee sign it. \* \* \* Mr. Knox, who was chairman of the committee, signed it, and, as certain as I can be at this time, the second one was Mr. Compton. The third [\*\*55] member, who I think was Mr. Mullen, was not present. \* \* \* At this time I saw those two names signed Mr. Howell was present. He then left it with Mr. Knox, who was to obtain the signature of the third gentleman. \* \* \* I have in my possession another statement signed by Knox, relative to the strike. \* \* \* Mr. Knox made certain statements before the executive committee of the Citizens' Protective Association, I think about July 9th, -- I do not want to be certain of the date, -- and under instructions I prepared a report of Mr. Knox's remarks before the committee, or some of them, and submitted it to him for approval prior to its being published in the newspaper. Mr. Knox approved it, after minor amendments, and it was published. \* \* \* Mr. Knox signed it in my presence. \* \* \* Mr. Knox's signature was obtained in the afternoon, shortly before the Bee would go to press. In order to insure its publication [\*719] that day, it had to be cut up in what printers call 'short takes.' \* \* \* It was signed before being cut up. It can be readily pasted together."

After further testimony tending to identify the document, it was introduced, and is as follows:

"Chairman H. A. Knox, [\*\*56] of the Sacramento mediation committee of the A.R.U., had a short conference this afternoon with the executive committee of the Citizens' Protective Association, at the request of the latter. The work of the committee so far had been directed towards preventing a conflict at Sacramento that could only result in bloodshed, without settling the main issue, and to this end had brought influence to bear on both the Southern Pacific Company and its striking employees to prevent any aggressive measures on either side. The position of the United States government, however, in ordering the opening of the road and the use of federal troops for such purpose, has practically taken all discretion out of the hands of the railroad company and the United States marshal. Mr. Knox was asked, therefore, if the United States government insisted on taking charge at Sacramento and running trains, would the A.R.U. permit it to be done without obstacle, or would it oppose by force the government officials and troops? Mr. Knox stated that personally he would do all he could to prevent a conflict with the government, and, if it moved trains, would not oppose, whether with Pullmans attached or not, and would [\*\*57] so advise his men. He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him -- over 2,000 strong -- that they would not obey orders in that event, and would engage the troops. He said the position of the A.R.U. was in no way changed. It would not permit the running of any trains unless the demands of the organization, as outlined at a former conference with the citizens' committee, and published in the Bee of Friday last, were complied with. His attention being called to the declaration of Eugene V. Debs, head of the A.R.U., calling on all members not to attempt interference with trains or railway property, Mr. Knox said that he had not received officially any such notice, and had been warned by Debs to pay no attention to newspaper reports, unless officially reported to him. He could not, therefore, take any notice of the proclamation referred to, and doubted its genuineness. [Signed] H. A. Knox."

Mr. Knox denies having signed the statement produced by Mr. McClatchy. In this regard he testifies as follows:

"I never signed that statement in the world. [\*\*58] That statement, or part of it, was when they called me before their committee in the afternoon, I think, of the 9th. It was simply said verbally, part of it, and part of it was not. I never signed the statement, and they have got more in there than I ever said. \* \* \* The statement is about correct, until we get down to where it says: 'He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him, over 2,000 strong, that they would not obey orders in that event, and would engage the troops.' I never made any such statement as that."

Barry Baldwin, the United States marshal for the Northern district of California, was at Sacramento during the strike, and testifies as follows respecting statements made to him by members of the mediation committee and others, in relation to the attitude of the American Railway Union:

"I know Mr. Knox, Mr. Compton, and Mr. Mullen. Know Mr. Worden. I saw them on the evening of the 1st of July at the depot, in a caboose, in the yard there, right at the depot, on the tracks. I was told that they were a committee; that they were the [\*\*59] leaders of the committee of the strikers. Found Mr. Worden there at the time. \* \* \* I went there officially, in order to protect the mails, -- to protect the trains carrying the mails; in [\*720] order to allow the railroad officials to run the trains carrying the mails. We heard that they were being prevented from doing so. This was Sunday evening, the 1st of July, about eight o'clock in the evening. \* \* \* It was a caboose on the tracks adjacent to the depot building, -- the yard at Sacramento; possibly a hundred yards from the river, -- fifty to a hundred yards. The parties in the car went to find Mr. Knox. Mr. Knox was not in the car at the time. They found Mr. Knox, and Mr. Knox came in presently, after a little; and they requested a number of people there, who had no business with their committee, to withdraw. A number of people in there withdrew, leaving, I suppose, some six to ten inside the car. It was dark in the car. It was lighted afterwards, but poorly lighted. Mr. Knox was present, and also Mr. Worden, and I believe Mr. Compton, and Mr. Mullen, and several others whom I don't know, -- did not recognize at the time. \* \* \* I stated to them the purpose for [\*\*60] which I had come to Sacramento, and they asked me whether Pullman cars were to be moved with the train. Knox was the spokesman, and did most of the speaking. The others spoke a little, some of the others, and especially Mr. Worden, who was continually talking and interrupting. I told them who I was, and my purpose in going to Sacramento. \* \* \* My business there was to see them and talk to them, and see what the trouble was, and why these trains could not be moved, and why they were preventing them from being moved. They objected to Pullman cars being moved, claiming that they were willing that the trains should go with the mails and other passenger cars, but not with Pullman cars. They said they had advice that Pullmans were no part of a train, -- no part of a mail train; and they gave me to understand that they would not be allowed to go, -- to be moved. They said they had eminent legal advice. That they had paid \$250 for the advice. They did not state who had advised them. \* \* \* I told them that I should perform my duties, and see that the trains were moved. I told them that the trains should be moved as often as made up, with Pullman cars attached where it was customary [\*\*61] to place them. I told them that I was certain they were not right in doing it, -- in opposing the proper authorities and defying the law. They continued in the attitude that they could not allow Pullman cars to move. I told them my purpose in being there was to protect those mail trains, and trains carrying the mails, -- United States mails. \* \* \* Had conversation with Mr. Worden on my way up from the caboose out across the tracks. He asked if we knew who he was, and I then first learned his name. He said that his name was Worden; that every one knew him there, and he was prominently connected with the movement. \* \* \* It was the A.R.U. people that were organized there. They were the mediation committee of the A.R.U. They were the committee. I treated them officially as leaders of the movement, -- ostensible leaders of the movement."

The same witness further testifies, as to the action and attitude of the mediation committee, substantially as follows:

"I saw the members of the mediation committee again (the second time) on the evening of the 2d, at the Golden Eagle Hotel, at my room. Saw Knox, Mullen, and Compton. They came to see me as the mediation committee of the [\*\*62] A.R.U. They came to see me as U.S. marshal. They came to see me at the room I occupied. I informed them that it was my intention to go down the next day, and clear the depot grounds of the crowds that were there, in order that the railroad company could move their trains, -- the mail trains, or trains carrying the mails, -- and that I hoped that the strikers would not offer any resistance; that I was there by lawful authority to do this; it was my duty to do it. Then we talked the matter over. They said that they had no wish to use any violence. They asked me to go down. They said they would do all they could to get the strikers to vacate the depot grounds. They asked me to go down myself, or with as few deputies as possible, for they thought there was less danger of a conflict if I did that; that I could get on better alone than to take down a number of deputies; that it might irritate the people, and we would not get on well. But they said they would assist me as much as they could in inducing the crowd to clear away from the depot, and allow the trains to be operated. [\*721] They said that if they did this they wanted me to allow them to send a committee of three to [\*\*63] induce the engineers, or those that were to work the trains, in together, to persuade them not to go out with the Pullman cars; to go inside of the line I might form. I told them that I did not know that I would object to their doing that, so long as they did not intimidate them, -- so long as they were not too persistent, and would not continue to talk to them too long, or in any other way threaten them, by numbers of talk; and also, if the people they were talking to did not wish to hear them, did not wish to listen to them, and requested them to leave, why, they should leave. But I told them that I could not promise even that I would let them do that; that I could not say at that moment; that there might be some objection arise at the time on the part of the

railroad company, and I might have to further consider the question as to their right to be present at the depot grounds, but at that time I did not see any objection to it, as long as they did it peaceably."

Mr. Knox, in his testimony, details this interview in the caboose as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as [\*\*64] possible to them, and told them, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from, -- Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course, we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did; consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

T. W. Heintzelman, master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the United States, testified as follows:

"I know Knox and Compton. They were out on a strike. Before the strike, Knox was a switchman, and Compton was a machinist working in the shop. \* \* \* I was present during a part of a conversation between Knox and Mr. Small at the roundhouse [\*\*65] on June 30th. Mr. Small was the superintendent of motive power. \* \* \* I heard Knox remark that they were in the strike to win, and they were going to win by any means."

E. C. Jordan, locomotive engineer at Sacramento, called for the United States, testified to attending a meeting on June 29, 1894, at which Knox was present, as follows:

"In relation to a telegram he said he would get, it was asked him as to what his jurisdiction was in this matter; and he stated that his jurisdiction extended from Sacramento to El Paso and to Portland and to Ogden, out of Sacramento. \* \* \* There were three orders present, -- Conductors, the Engineers, and Mr. Knox, of the A.R.U. \* \* \* The meeting was held for the purpose, as I understood it, of taking some action to bring the strikers or the A.R.U. men and the company together, in order to devise some means by which the strike could be adjusted in some manner to start the road."

The following telegrams, purporting to have been signed and sent by H. A. Knox to various unions within his jurisdiction, respecting the state of affairs at Sacramento, and transmitting advice to other local unions with reference to the action they should take, were [\*\*66] introduced [\*722] by the prosecution for the purpose of showing the concert of purpose and action among the different branches of the American Railway Union.

"June 27, 1894. To I. B. Hoffmire, Portland, Or.: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To E. V. Debs, Pres. A.R.U., Chicago: Will we stop loaded sleepers? Ans. H. A. Knox."

"June 27, 1894. To W. H. Clune, Los Angeles: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To J. M. Wagner, Ogden, Utah: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir, Cal.: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To E. V. Debs, Chicago, Ill.: The ORC and BRI are going to take train out to-night. We are going to stop everything. Answer. H. A. Knox."

"June 28, 1894. To J. M. Wagner, Ogden, Utah: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir: Don't know, but if any, you hold. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: Yes; stay in Rocklin. H. A. Knox."

"June 29, 1894. To C. B. McClintock, Truckee, Cal.: Hold Nos. 4 & 2 sure. H. A. Knox."

[\*\*67] "June 29, 1894. To G. W. Lindsay, Wadsworth, Nev.: Hold No. 4 there sure. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: General tie up ordered. Notify all concerned. Answer. H. A. Knox."

"June 29, 1894. To McClintock, Truckee: General tie up ordered. Notify all concerned. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A.R.U., Chicago: General tie up ordered on S.P. system. All out. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: Everything on system at standstill. Company makes their death struggle to-night. H. A. Knox."

"June 30, 1894. To F. Almas, Summit, Cal.: No; stop at once. H. A. Knox."

"June 30, 1894. To J. C. Church, Carlin, Nev.: Ice until further orders. Everything stopped. H. A. Knox."

"June 30, 1894. To J. T. Roberts, Oakland, Cal., A.R.U.: Have any troops left, and where are they going? H. A. Knox."

"June 30, 1894. To J. T. Roberts, A.R.U., Oakland: Has train left with deputy marshals? Rumor here. H. A. Knox."

"June 30, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: This motion was adopted by B. of L.E. and O.R.C.: That the basis of the settlement be that all discharged men who have [\*\*68] taken part in the Pullman boycott be reinstated, and guaranty given men won't be discharged for same cause. Pullman boycott to remain in force, and strike declared off. This is the grandest victory ever won, and everybody is on our side. H. A. Knox."

"July 1, 1894. To A. W. Wallace, Rocklin, Cal.: There was, but we stop at other points. Not wheel moving. H. A. Knox."

"July 1, 1894. To J. T. Roberts, A.R.U., Oakland, Cal.: Keep me posted on everything that leaves there. H. A. Knox."

"July 1, 1894. To W. H. Clune, Sec., Los Angeles, Cal.: How are engineers and conductors standing with us down your way? H. A. Knox."

"July 2, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: Did you give permission to move Mrs. Stanford? H. A. Knox."

"July 2, 1894. To H. L. Walther, Dunsmuir, Cal.: She can go via Davis, not by Sacramento.

"July 2, 1894. To H. L. Walther, Dunsmuir, Cal.: Troops coming here. Stand firm; we are. Ans. H. A. Knox."

"July 3, 1894. To E. E. Barton, Ogden, Utah: We understand Co. tried to brake block, but we fooled them. H. A. Knox."

[\*723] "July 3, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: Hunt up the National Pres. of the Marine [\*\*69] Engineers. Confer with him. Steamers are a terrible damage to us. H. A. Knox."

"July 4, 1894. To McClintock, Sec. A.R.U., Truckee, Cal.: Big army here. You come with all guns and volunteers. Come by train without orders at once. H. A. Knox."

"July 4, 1894. To E. E. Barton, Ogden, Utah: Good. Same here. We have 4,000 beside the city. Stand firm. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Soldiers on this end of American river. Don't stop. Bridge O.K. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Come. Bring all hands. Rush. H. A. Knox."

"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

"July 4, 1894. To W. H. Walthers, Dunsmuir, Cal. Don't close the Western Union office. That will hurt our cause. And take guard away from the Postal office. H. A. Knox."

"July 4, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: We have the troops on our side. They have refused to obey commands, and we are stayers from away back, -- bound to succeed. H. A. Knox."

"July 5, 1894. To C. B. McClintock, Truckee, [\*\*70] Cal.: Please allow merchants to take perishable freight from cars, but agent must check it to them. H. A. Knox."

"July 5, 1894. To Madden & Turner, Dunsmuir, Cal.: All quiet here. We are sure to win. H. A. Knox."

"July 5, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: It is reported the U.S. marshal and Gen. Dimond, of state troops, has turned our affair over to Washington. Have attorney there to work on it. We have everything our own way, and have not broke the law, only by keeping about 5,000 men in sight. Please advise us what to do. Not a wheel moving. H. A. Knox."

"July 6, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: Any truth in report of strikers and soldiers having battle in Chicago? Please ans. We are as firm as rock. H. A. Knox."

"7/7/189. To J. M. Wagner, Ogden, Utah: All quiet. Stand firm. H. A. Knox."

"July 7, 1894. To Wm. O. Leary, Pres. Miners' Union, Virginia City, Nev.: Resolutions received, and return thanks. We are bound to win. We are as solid as rock. H. A. Knox, Chairman."

"July 8, 1894. To W. H. Clune, Los Angeles, Cal.: Force them to stop, or tell them when we settle, their firemen will run their engines. We done that, [\*\*71] and you bet it brought them to time. All quiet here. We are solid as rock. H. A. Knox."

"July 9, 1894. To W. H. Clune, Los Angeles, Cal.: Everything very quiet here. Nothing moving here. How is things there? Stand firm, and don't let nothing go. H. A. Knox."

"July 9, 1894. To Chas. Fink, Oakland, Cal.: We sent Geo. Hale to Vallejo, but if there at Oakland he is O.K. H. A. Knox."

"July 11, 1894. To W. G. Boyce, Pres. Miners' Union, Silver City, Nev.: Thanks for sympathy. We are under heavy expense. Financial aid would be gratefully received. H. A. Knox, Chairman."

"July 11, 1894. To Chick Featherson, Summit, Cal.: I received orders from E. V. Debs to order strike on entire system. Hence my order. Sacto. is solid yet. H. A. Knox."

"July 11, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: Sorry you are in jail, but be strong, and we will carry the strike on if they put all of you in jail. Lots of soldiers here, but everything quiet so far. Every man out here, but a few scab engineers. H. A. Knox."

"July 11, 1894. To J. S. Walton, Oakland, Cal.: Adopt code. Lots of soldiers here, but everything quiet yet. H. A. Knox."

"July 12, 1894. To J. Balder, [\*\*72] Truckee, Cal.: Train of soldiers getting ready to leave here for Truckee. Everything quiet. H. A. Knox."

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"July 12, 1894. To E. V. Debs, Pres. A.R.U., Chicago, Ill.: I will stand [\*724] by A.R.U. as long as life lasts. I refused to run for railroad commissioner because I thought so much of the fight. We are doing nothing but what is proper. We are going to fight it out on this line. We have 1,800 soldiers here, but no trains out yet. H. A. Knox."

"July 13, 1894. To Chairman A.R.U., Truckee, Cal.: Reports all fake. Stand pat. Freight left here, under protection of soldiers, for the East. H. A. Knox."

"July 13, 1894. To Clune, Chairman A.R.U., Los Angeles, Cal.: Reports all fakes. Strike is on in full force. Stay with them to the last. All O.K. here. H. A. Knox."

"July 13, 1894. To J. C. March, Carlin, Nev.: 1,800 soldiers here for two days, but have only got freight out east. Reports are all false. Stand pat. H. A. Knox."

"July 13, 1894. To F. M. Gillett, San Luis Obispo, Cal.: Reports all false. Stand pat. 1,800 troops here, but got only one train out in two days. Sure to win. H. A. Knox."

"July 13, 1894. To E. V. Debs, Pres. A.R.U., Chicago, [\*73] Ill.: United Press dispatch says you have declared strike off. I have sent messages all over denying it. Answer. H. A. Knox."

Telegrams have been introduced purporting to have been signed by H. A. Knox, addressed to E. V. Debs, at Chicago, and to other persons, in relation to the strike, dated July 14th, and subsequent dates; but Knox testifies that he was arrested on July 14th, and was in jail for three weeks, and he denies specifically having signed the 11 telegrams dated July 22d, which bear his name. It is possible that some member of the mediation committee, or other officer of the American Railway Union at Sacramento, acting for the committee, may have signed these telegrams in the name of Mr. Knox; but as the testimony in the case, and particularly the telegrams sent out by T. H. Douglass, who appears to have been chairman of the mediation committee after July 14th, indicate that the strike was declared off on July 21st, telegrams purporting to have been signed by Knox, and dated after July 14th, and particularly those dated July 22d, are certainly discredited, and I will not, therefore, refer to them further in this connection. In any view, they do not appear to be important.

[\*\*74] George Vice testified, on the part of the defense, that he had been a locomotive fireman for the Southern Pacific Company in June last; that he belonged to the American Railway Union at Sacramento; was the vice president of it; thinks he was present the night that the telegram came from Chicago, announcing the fact that there was going to be a Pullman boycott. He admits signing the following telegram:

"Sacto., July 6, 1894. H. F. Michaels, Master Cactus Lodge, 94, Tucson, Ariz.: Firemen of following lodges out with A.R.U., to the man: 260, 143, 312, 91, 97, 19, 58, 98, 366, 193, and Roseburg. If you tie division up, will guaranty full protection of A.R.U. Not a wheel turned here for six days. Answer. Geo. Vice, Master 260."

Also the following:

"Sacramento, Cal., July 16, 1894. J. Friant, Fresno, Cal.: Firemen here stand firm. Scabs scarce. We are winners. Geo. Vice."

Also the following:

"Sacto., July 16, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Firemen here all firm. Scabs scarce. We're winners. You stand firm. Geo. Vice."

[\*725] He also admits sending the following:

"Sacramento, Cal., July 17, 1894. R. E. Nobel, Summit: Quit immediately, and tie [\*75] up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

The witness, being questioned about the wording of the telegram, testified further as follows:

"A Juror: Q. What did you mean by 'tie up everything'? A. Leave their work. Q. You said, 'Quit and tie up everything.' What do you mean by 'tie up everything'? A. Just to leave work. The Court: Q. You say, 'Quit and tie up everything.' 'Quit' seems to be your definition for 'tie up.' A. I meant the same thing by it. Q. 'Quit' and 'tie up' are the same thing? A. Yes, sir. Mr. Knight: Q. By 'tie up everything,' you mean leave work from everything? A. Leave the service. Q. From everything? A. Yes, sir. Q. What is the meaning of the word 'everything'? You said, 'tie up everything.' A. I suppose there is a whole lot of meaning to 'everything.' Q. What is your meaning in that connection? A. If a man is on a job, according to that, -- if he is on an engine, -- he will leave his work."

He also admits sending the following telegram:

"Sacramento, Cal., July 17, 1894. J. J. Brennan, Rocklin: Stand. Do not allow anybody to report for work. Stronger here than ever. We're sure winners. [\*\*76] Geo. Vice."

The witness states:

"When this telegram was sent, it was only meant for the firemen. There were lots of firemen that did not belong to the A.R.U."

Admits writing and sending this telegram:

"Sacramento, Cal., July 17, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Still firm, and will stay to last. Sure winners. Gaining recruits from scabs. Fillmore weakening. He interviews mediation board, and makes concessions. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. H. F. Michaels, Tucson, Ariz.: State situation. Tied up here tighter than ever. Use all means to do same there. We're winners. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. W. J. Featherson, Summit, Cal.: Quit immediately, and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

Also this one:

"Sacramento, Cal., July 21, 1894. F. P. Sargent, Terre Haute, Ind.: Eastern B.L.F. men taking our jobs. For God's sake, save us. S.P. will not re-employ us. Use all means to save us. Answer. Geo. Vice, Master 260."

The witness states that he had no authority to send telegrams for the American Railway Union; that he sent them by virtue [\*\*77] of his being a master of the Brotherhood of Locomotive Firemen. He admits, however, that he was also an officer of the American Railway Union, being its vice president.

H. B. Breckenfeld, called for the United States, testified that he was chief train dispatcher for the Sacramento Division of the Southern Pacific, at Sacramento; that he knew Terry Douglass; that he knew that Douglass was connected with the A.R.U. during the recent strike, because Douglass appeared before Mr. Fillmore, or in his rooms, on one or two occasions, in connection with the strike; [\*\*726] that on one occasion Douglass came in an official capacity; that, when he did come in an official capacity, Douglass announced that they had decided to declare the strike off. This was in the latter part of July. Douglass' position in the American Railway Union was a member of the mediation committee. Douglass was not a member of the mediation committee right through the strike. The witness understood that they (Douglass and the two men who accompanied him on the occasion just referred to) took the place of the original mediation committee at Sacramento. On the occasion referred to they came into the rooms of [\*\*78] Mr. Fillmore, and requested the stenographer who was present to prepare upon the typewriter a statement to that effect, which was read to them by the stenographer, and was signed by them. The witness was present when this was done. Witness knows the handwriting of Douglass. Identifies the signature of Douglass on the following telegrams:

"Sacto., July 14th, 1894. To F. P. Cox, Rocklin, Cal.: Men are determined. Situation good. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: A committee of fruit growers has waited on us. Are you any nearer a settlement? Ans. quick. T. H. Douglass."

"Sacto., July 16, 1894. To S. Brennan, Rocklin, Cal.: Message from Debs. Situation everywhere good. Switchmen have all quit here. T. H. Douglass."

"Sacto., July 16, 1894. To R. A. Battenfield, Rocklin: Four trains tied up at Red Bluff. No crews to move. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: Scabs coming from East. With few exceptions, men solid here. T. H. Douglass."

"Sacramento, Cal., July 17, 1894. To R. A. Battenfield, Rocklin, Cal.: Situation better than yesterday. Prospects brighten every hour to A.R.U. T. H. Douglass."

[\*\*79] "Sacto., July 18th, 1894. To R. A. Battenfield, Rocklin: Did any train leave Rocklin this morning? T. H. Douglass."

"Sacto., July 18th, 1894. To W. Balder, Truckee, Cal.: Received message from James Hogan. He states situation firm everywhere. T. H. Douglass."

"Sacto., July 18th, 1894. S. J. Brennan, Rocklin: Situation has not changed. No work for shopmen. T. H. Douglass."

"Sacto., July 18th, 1894. To E. E. Barton, Ogden, Utah: Committee waited on J. A. Fillmore. Nothing satisfactory. Men remain firm. T. H. Douglass."

"Sacto., July 19, 1894. To G. W. Lindsay, Wadsworth, Nev.: No change in situation here. Remain firm. T. H. Douglass."

"Sacto., July 20, 1894. To James Hogan, Chicago, Ill.: True situation men wavering in many places. Give your views affairs. T. H. Douglass."

"Sacto., July 21st, 1894. To F. P. Cox, Rocklin, Cal.: Probably strike will be declared off at 2 p.m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To W. Balder, Truckee, Cal.: Expect strike to be settled by 2 p.m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To G. W. Lindsay, Wadsworth, Nev.: This lodge has declared strike off by unanimous vote. T. H. Douglass."

[\*\*80] "Sacto., July 21, 1894. To S. J. Brennan, Rocklin, Cal.: This lodge has declared strike off. T. H. Douglass."

"Sacramento, Cal., July 21, 1894. To W. Balder, Truckee, Cal.: Strike has been declared off Pacific, unconditional. T. H. Douglass."

T. H. Douglass, called for the defendants, testified: That he was a brakeman last June and July, running between Sacramento and Truckee. That he belonged to the American Railway Union and Order of Railway Conductors. That he acted as chairman of the mediation committee, he thinks, from the 12th or 13th or 14th [\*727] of July. That the occasion of his so acting was because the original members on that committee were arrested. That John Hurley and G. H. Hale were on the committee with him. That he continued in that capacity until the strike was declared off. That he does not remember the day when the strike was declared off, but he thinks it was the 25th day of July. He attended a meeting of the American Railway Union on the 26th of June. There was a message read from E. V. Debs, declaring a boycott on Pullman cars. The union took action on the matter, and declared a

boycott. Was in Truckee when the strike was ordered. First [\*\*81] heard of it about 6:30 in the morning. "The train master asked the crew if they would go out on No. 20. They told him, 'Yes.' After he [the train master] left, seven or eight men came in, and told us there was a strike ordered, and we had not better go. Well, we did not go." Douglass admits having received and sent a number of dispatches during the strike.

Beginning of the Strike at Oakland.

Thomas J. Roberts, a witness for the defendants, testified that he resided in West Oakland; that he had been employed for six years as a locomotive engineer for the Southern Pacific Company; that he was president of local union No. 310, of the American Railway Union, which was organized in May, 1894; that the first he knew of any trouble was a communication he received from Mr. Worden, who was delegate to the convention in Chicago. He says:

"I received a letter from him stating that the Pullman boycott had been declared, to take effect in five days, unless the trouble between the Pullman Company and their employes was settled. On the same day a telegram was read in our meeting -- that was Tuesday, June 26th -- from the president of our general union, saying, 'Pullman boycott in effect [\*\*82] to-day noon, by order of convention.'"

He further says:

"It was the evening before we received the telegram, and, that being our regular meeting night, the secretary held the telegram until the meeting opened; and after the meeting had opened, and we got through with our preliminary work, the telegram was read, and the matter was discussed, and I think the telegram said the Pullman boycott was in effect that day at noon. Still we did not want to take any snap judgment on the company, and we decided not to put it into effect until 12 o'clock the following day, June 27th. That would be Wednesday. A motion was put and carried to that effect, and our secretary was instructed to notify the Southern Pacific officials that after Wednesday, June 27th, at noon, we would not handle any Pullman cars, or do any Pullman work."

Continuing, the witness testified:

"June 27th the boycott took effect, at noon. That afternoon we had some trouble in the passenger yard where I was employed. Some of the boys that were cleaning cars were instructed by some foreman that they were working under to clean some certain Pullman cars, and they refused to do so. They told him that they belonged to [\*\*83] the American Railway Union, and that there was a boycott in effect, and that they could not clean the Pullman cars. He told them that if they did not want to do that there was nothing else for them to do, and that they could go home."

The men were reinstated at his request. They went on with their customary work. The strike was to take effect the morning of the 29th, at 12:30. It was for the reinstatement of the men who had [\*728] been discharged. By "strike," he means that the men were all to withdraw from the service of the company, and refuse to work. In case the men were reinstated, they would be returned to work. By "the men," he means the strikers. There was no resolution. That was the understanding, -- his understanding. The secretary was instructed to notify all the unions on this system, or in this state; he is not sure which. All the action that was taken was that they advised the men to try and keep men from going to work and taking their places; to persuade those that were at work to quit. "Tie up" is a railroad phrase. It means to cease work. It is used by officials and train dispatchers. Perhaps a train at Port Costa may get orders, "Train No. 18 [\*\*84] will tie up at Tracy." That means that they will not go any further.

The witness was shown a number of telegrams, among others the following, which he admits having sent:

"West Oakland, Cala., June 28, 1894. To F. P. Sargent, Terre Haute: Firemen's lodge here indorsed Pullman boycott. Will not handle their cars. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To W. H. Russell, Secretary B.R.T., Bakersfield, Cal.: What is situation? Define position of B.R.T. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To H. A. Knox, A.R.U., Sacramento, Cal.: No troops sent out from here. T. J. Roberts."

"Oakland, Cal., June 29, 1894. To E. H. Leon, San Jose, Cal.: Firemen out here. Do not work. Come home. T. J. Roberts."

"West Oakland, July 14, 1894. To F. P. Sargent, Terre Haute, Ind.: Authorized American Railway Union strike here. Shall B.L.F. men work during strike? T. J. Roberts."

"West Oakland, July 18, 1894. To F. B. Porter, Reno, Nev.: Solid here. Do not waver. Victory is ours. T. J. Roberts."

He was in frequent correspondence with the officers of different lodges of the American Railway Union throughout the state, and in some instances with the American Railway [\*\*85] Union headquarters at Chicago, during the strike. Does not know particularly that he sent them by virtue of his official position as president of the American Railway Union in Oakland. It was merely for information. The union sent a great many official notifications of the strike throughout the state. He did not. The secretary sent them. The union ordered the secretary to notify the different local unions in the state of the strike here. They had no authority to send them in his name. They related to the strike. He got some messages from Knox, of Sacramento, and sent him some.

G. D. Bishop, called for the defense, testifies that he was the secretary of the American Railway Union at Oakland. The secretary was instructed, the night of the boycott, to notify other unions in reference to the boycott.

Beginning of the Strike at Red Bluff, Truckee, and Dunsmuir.

John Kelly testified, as a witness on behalf of the government, that he went out on strike on June 28th or 29th; that he had been a fireman for the Southern Pacific Company; that he went out at Red Bluff; that he was a member of the American Railway Union; that that had to do with his going out on a strike.

J. P. [\*\*86] Heaney, a witness called for the defendants, states that he [\*729] went to Red Bluff from Sacramento on June 28th; that he lived at Sacramento, and belonged to the Sacramento lodge of the American Railway Union; that he had been braking for the Southern Pacific Company; that there was no American Railway Union organization at Red Bluff. He testifies as to being advised of the strike by a telegram from Mr. Knox; that he had asked Mr. Knox if there was a strike ordered, and the latter had replied, "Yes, there is a general strike ordered by Eugene V. Debs." The witness states that he was appointed chairman of a committee at Red Bluff. The committee were composed of railroad employes who had struck. Although the witness is very uncertain as to the purpose of the meetings, and the appointment of the committee of which he was chairman, he admits that at least one of its objects was in order that there might be some authorized person to receive and send dispatches for the men out on strike at other points, and be a channel of communication between Mr. Knox and the men at Red Bluff. He received quite a number of dispatches from Mr. Knox, and from other places. Although Heaney admits [\*\*87] having received a great many telegrams, his recollection as to their contents is extremely vague. But one of these telegrams was introduced on the part of the prosecution. It is as follows:

"3:15 p.m., July 3/94. Red Bluff, Cal. Received at Sacramento, Cal. Jack Heaney: Trains switched by official. Coaches detained by three thousand people. H. A. Knox."

One from Heaney reads as follows:

"Red Bluff, Cal., July 2, '94. H. A. Knox, Sacramento, Cal.: Shall we let Adams, engineer that brought No. 15 in, go back with Mrs. Stanford's special? He has no fireman. Heaney."

The following is a telegram from Dunsmuir, purporting to be signed by M. C. Roberts:

"Dunsmuir, Cal., June 28th, 1894. H. A. Knox, S. P. Depot, Sacramento, Cal.: Has Portland boycotted Pullman? Answer. M. C. Roberts."

Mr. Knox replied:

"Sacramento, Cal., June 28, '94. M. C. Roberts, Dunsmuir, Cal.: Don't know. But if any, you hold. H. A. Knox."

From Truckee comes the following telegram:

"Truckee, Cal., July 4, 1894. H. A. Knox, Sac.: Do you still want us? Train on mail line ready to go. C. B. McClintock."

Mr. Knox replied:

"July 4, 1894. To C. B. McClintock, Truckee, Cal.: Come without [\*\*88] fail; coming from all points. H. A. Knox."

The following telegram purports to have been sent by F. H. Almus to Mr. Knox:

"Summit, Cal., June 30/4. Harry Knox, Chairman of A.R.U. Committee, Sac.: Will I continue service on work train or not? Answer. F. H. Almus."

Almus testified for the defendants, and stated that he was a member of the American Railway Union. Knox's reply is as follows:

"June 30, 1894. To F. Almus, Summit, Cal.: No. Stop at once. H. A. Knox."

[\*730] The following telegrams are from Los Angeles, signed by W. H. Clune:

"June 27/4. Los Angeles, Cal. G. D. Bishop, Secretary A.R.U. 310, W. Oakland, Cala.: Stand firm. Will boycott at Los Angeles this p.m. W. H. Clune, Sect. No. Eighty."

"L.A. 7/2, 1894. To T. J. Roberts, Prest. A.R.U., Oakland, Cal.: Resolutions in press is fake. Out of one hundred engineers here, ninety-seven are with us till the end. Trainmen, firemen, carmen, shopmen, section and bridge men, -- solid. W. H. Clune, Secty."

Strike in San Francisco by A.R.U. Lodge 345.

It is admitted by the defense that the defendants John Mayne and John Cassidy were members of this lodge at the time of the strike. Rice and Clark, the [\*\*89] two other defendants charged in the indictment, but who are not on trial, were also members of the same lodge. Charles Ault, called for the government, testified: That he was a member of the American Railway Union. That the number of his lodge was 345, San Francisco. It was the same lodge to which the defendants belonged. One Bradley was president, and another person, by the name of Elliott, was on the executive committee. This lodge went out on the strike, as a body, on June 29th, -- the night of June 29th. It also appeared from the testimony of H. J. Bederman, a witness for defendants, that one J. E. Riordan was its secretary. McClintock was also a member of this lodge. The purpose which prompted the lodge to join the strike is stated by the testimony as follows: T. J. Roberts, president of the Oakland lodge, American Railway Union, testified that the union of which he was president authorized the secretary to send telegrams to different unions, as follows:

"American Railway Union three hundred ten declared strike. Takes effect twelve thirty a.m. to-day."

A telegram to this effect was sent to the lodge in San Francisco:

"Oakland, Calif., June 29, 1894. J. E. Riordan, [\*\*90] 118 Sixth St., Room 71, S.F.: American Railway Union three hundred ten has declared strike. Takes effect twelve thirty a.m. to-day. T. J. Roberts, President."

Mr. Roberts, when examined, said that he had not personally authorized the sending of telegrams of such purport, and knew nothing about them. Some 21 others of a similar character were sent to different places.

Mr. Bishop, the secretary of the same organization, testified that these telegrams were sent out by direction of the union. They were authorized by the union. It will be noticed that the dispatch claimed by the government to have been sent to Riordan, of the San Francisco union, of which the defendants were members, is practically to the same effect. This witness acknowledged receiving the following telegram, purporting to come from J. E. Riordan:

"San Francisco, June 30, 1894. G. D. Bishop, Oakland: Committee out on organization Narrow Gauge. Your assistance required. J. E. Riordan."

He testified that he authorized the sending of the following telegram to J. E. Riordan on June 30, 1894:

"Oakland, Cal., June 30th, 1894. To J. E. Riordan, 118 6th St., S.F.: Will send men at once to confer with you. G. [\*\*91] D. Bishop, Sec."

[\*731] H. J. Bederman, a witness called for the defendants, and employed as a switchman by the Southern Pacific Company last spring, testifies, substantially, that he belonged to Lodge 345, San Francisco, of the American Railway Union; that the defendants belong to the same lodge; that the occasion of the strike by his union was on account of some of the members being discharged for not handling Pullman cars; that an executive and press committee was appointed; that the executive had charge of almost everything concerning the strike of the men; that most of the men belonging to his union worked on the Coast Division; that the committees were appointed on the evening of June 29th; that all the power regarding the strike was delegated to the executive committee, so that this committee had charge of the strike; did not seem inconsistent to him in striking on a division where there were no Pullman cars; not a question of sympathy; they were members of the union; they were supposed to do what was right by every member; if one was discharged for a cause he was not guilty of, they would try and protect him; the union protected them; Mr. Riordan was secretary of the [\*\*92] union.

George Elliott testified, on being called as a witness for the defendants, that he was a foreman switchman in the passenger yards of the Southern Pacific Company, at Fourth and Townsend streets; that he joined the American Railway Union (Lodge 345, San Francisco) on the night of the 29th of June, or the 30th; that he became chairman of the executive committee; that this committee were to do everything that was to be done in connection with the strike; they had full power; the question of Pullman cars never, to his knowledge, came up; they struck for the reinstatement of employes that had been discharged. On cross-examination he states that he struck because of the discharged employes; he believes some were discharged in Los Angeles, and some in Sacramento; simply struck to see justice done. On redirect examination, he said that he first got some information about the strike from Mr. Bederman; that he believes that Bederman read a message to him; he doesn't know whether it came from Oakland or Sacramento.

Edward F. Gerald, a witness called for the government, gave testimony tending to prove the handwriting of Mr. Riordan. He states, respecting the following telegrams, [\*93] that he "thinks they are all Mr. Riordan's signatures":

"San Francisco, 6/29, 1894. To Chas. E. Bradley, Engineer S.P. Co., Pajaro: Strike ordered to-day noon. Let trains come north. Notify San Jose and along the line. J. E. Riordan."

"June 29, 1894. F. Gillett, San Luis Obispo, S.P. Co. Caboose: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A.R.U."

"June 29, 1894. C. E. Bradley, Tres Pinos, S.P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A.R.U."

"June 29, 1894. A. E. Pratt, Pacific Grove, S.P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A.R.U."

"June 29, 1894. E. B. Stanwood, Castroville Station, S.P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #354, A.R.U."

"June 29, 1894. G. W. Gillett, Aptos, S.P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A.R.U."

[\*732] "F. W. Clark, Pac. Grove: Greer O. K. Keep on good work. Tie up strong. J. E. Riordan."

"San Francisco, 6-30, 1894. G. D. Bishop, Oakland Yard S.P. Co. Committee out on organizing Narrow Gauge. Your assistance [\*\*94] required. J. E. Riordan."

It is admitted on the part of the defendants that the following telegrams were signed by George Elliott, although, when the latter was cross-examined, he could not recollect as to whether he signed some of them, and denied that he signed others. The witness J. E. Dillon identified his handwriting.

"San Fran., 7/1, 1894. To R. Gillett, Aptos, Cal.: Not a wheel turning between here and Chicago. It is our fight sure. Will keep you posted. George Elliott, Chairman."

"7/2, 1894. To Ed Stanwood, Castroville Station: Everything is coming our way. Not a wheel moving between here and Chicago. Victory is certain. George Elliott, Chairman A.R.U."

"7/2, 1894. To Ed Pratt, Pacific Grove: We are gaining strength rapidly. The fight is ours. Everything is coming our way. George Elliott, Chairman A.R.U."

"San Fran., 7/3, 1894. To R. W. Gillett, Aptos: No, sir. Allowing no trains to run we can help. Geo. Elliott, Chairman."

"San Francisco, 7/3, 1894. To J. Morehead, Pacific Grove: No, sir. Out to win, and going to. Will advise when settled. George Elliott, Chairman."

"7/3, 1894. To W. H. French, Aptos: You are all in to clear. Eugene V. [\*\*95] Debs wires giving you full protection. Tie up everything at once. George Elliott, Chairman."

"7/3, 1894. To J. M. Smith, Tres Pinos: Fight is ours, and win we must. George Elliott, Chairman A.R.U."

"7/3, 1894. To W. Johnson, San Jose, Care Eureka Hotel: Do not move. Committee will see you to-morrow morning. George Elliott."

"7/3, 1894. To F. W. Gillett, San Luis Obispo: You are a brick. Debs wires that we will win. George Elliott."

I have now directed your attention to some of the testimony that tends to show the communications that passed between the various lodges of the American Railway Union and their members concerning the boycott and strike, and the concert of action that was had in pursuance of such communications. I have also called your attention to some of the statements of Knox and others as to the purpose of the boycott and strike, and the purpose they had in view in taking the action they did. To review all the testimony in the case bearing on this point would take too much time, and will not be necessary, in view of the argument of counsel for the defendants, who admits the concert of action claimed by the government, but denies that it involved a [\*\*96] criminal purpose. With respect to these telegrams, and the testimony I have referred to in connection therewith, you will bear in mind that many of them have been admitted in evidence with the consent of counsel for defendants; the genuineness of others has been denied; and the testimony as to still others is, by reason of the contradictory nature of the testimony, involved in more or less uncertainty. As you are the sole judges of the credibility of the witnesses, and of all the evidence introduced in the case, whether it be oral or written or documentary, you will determine the genuineness of such of these telegrams as are in controversy, and this you will do from all the circumstances in the case. In passing upon the telegrams not admitted as genuine, you will be justified in resorting to all [\*733] those facts and circumstances in the case which will tend to establish their genuineness, or, on the other hand, serve to show their want of genuineness. For example, you may consider the occasions and occurrences to which the telegrams purport to relate; whether they would have been sent, but for such occurrences; the relation they bear to the events which you may deem the [\*\*97] evidence establishes to your satisfaction, and beyond a reasonable doubt; their tenor and subject-matter; the fact that the sender or the recipient, as the case might be, was connected with the American

Railway Union. In fact, all those circumstances and incidents which may be rationally and naturally connected may be considered by you in passing upon their authenticity, and the probability of their having been sent and received by the parties whose names appear upon said messages. The importance and materiality of these telegrams as showing, or tending to show, that the conspiracy charged in the indictment did in fact exist, is for you to determine. There are two important facts, however, to which it is proper for the court to call your attention, in your consideration of this question, and these are that most, if not all, of these telegrams were sent, or purport to have been sent, -- whether they were or not is, as I have stated, for you to determine, -- by and to members of the American Railway Union, and in the greater number of instances by those in authority in that organization, and who the testimony I have referred to, and other evidence adduced during the trial, tends to [\*\*98] show were actively concerned in the strike, and took part in it with the avowed purpose of preventing the movement of all Pullman cars. Another significant circumstance, to which I call your attention, is that you are to consider whether these telegrams related to any of the facts charged in the indictment as constituting the conspiracy to commit the acts with which these defendants are accused, and whether they had any bearing or connection in any way with the acts charged in the indictment as means to effect the object of the conspiracy, and with reference to which -- or some of which -- acts the prosecution has introduced evidence showing, or tending to show, the conspiracy and overt acts, and the connection of these defendants with such conspiracy and acts. If you are satisfied from the evidence that these messages related to, formed a part of, or had any bearing upon the object of the conspiracy, and the means to effectuate such object, charged in the indictment, and the overt acts alleged to have been committed in furtherance of such conspiracy, it is a circumstance which you may consider in determining the existence of such conspiracy. You will consider whether they establish, [\*\*99] or tend to establish, the concert or purpose and action which constitute important elements in this case as to the existence of the conspiracy charged; particularly, where a number of telegrams of similar purport and tenor are sent to different places at or about the same time, and all proceeding, or purporting to proceed, from the same person or local lodge of the American Railway Union. Thus, the telegrams sent by Knox, who, as testified to, was chairman of the mediation committee at Sacramento, [\*734] and whose jurisdiction as such extended over a good part of the Pacific coast, or of Roberts, the president of the Oakland lodge or union, or of Bishop, its secretary, or of Douglass, Vice, Elliott, Riordan, and such others as the evidence shows, or tends to show, sent telegrams of the same general character, these persons being officially connected with the American Railway Union, -- whether these show, or tend to establish, a unity of design, a community of purpose, an express or tacit understanding to do the acts charged in the indictment.

It is claimed by the defendants that, while there may have been some concert of action on the part of the members of the American Railway [\*\*100] Union with respect to the boycott and strike, the purpose of such concerted action was merely to advise members of that organization to quit work until the controversy between Pullman and his employes should be settled. As I have explained to you before, even this purpose would become a criminal conspiracy, if the concerted action were knowingly and willfully directed, by the parties to it, for the purpose of obstructing and retarding the passage of the mails of the United States, or in restraint of trade and commerce among the several states. The government claims, however, that the concerted action on the part of the American Railway Union had something more to it than merely advising its members to quit work. It is claimed that the language of the telegrams, to which reference has been made, indicates that it was the purpose of the strikers to prevent the movement of railway trains belonging to the Southern Pacific Company, by actual and unlawful obstruction; and in this connection the question will arise in your minds, if these telegrams were intended merely to advise members of the American Railway Union to quit the service of the company, why did they not so state that purpose [\*\*101] in plain language? It would have been an easy thing to have said, "We advise you to quit work." Why, then, telegraph such instructions as these, -- if these telegrams were sent: "Stop all Pullman sleepers." "Tie up everything." "Hold Nos. 4 and 2 sure." "Tie up strong." Furthermore, if it were simply the purpose of the American Railway Union to advise its members to quit work, why did Mr. Knox use this language in his statement of the situation to the Citizens' Protective Association of Sacramento on July 7th, last? "Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with." Why did Mr. Mullen, on the same occasion, say "that this was a fight between capital and labor, and that from the chief justice of the United States, down through all the branches -- judicial and legislative departments -- of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation"? [\*\*102] And why did Mr. Compton,

at the same time, say "that the A.R.U. organization would not resort to any desperate means, so long as the railroad company would deal [\*735] with them without using armed force"? Was this language used on those occasions consistent with the peaceful and lawful methods of procedure now claimed by Mr. Knox to have been the purpose and action of the members of the American Railway Union during the period of the strike?

But it is claimed by the prosecution that the purpose of the strikers to interpose actual and unlawful obstructions to the movement of railway trains, both passenger and freight, is further shown by certain acts alleged in the indictment and concerning which testimony has been introduced. I will therefore now direct your attention to that feature of the case.

One of the means alleged, in the indictment, that was adopted to promote, carry out, effect, and execute the conspiracy, was (1) that the conspirators were to "forcibly take and keep possession and control of all yards, depots, tracks, and trains of cars on said lines of railway and to forcibly hold and detain the same."

Sacramento.

The following testimony relates to what [\*\*103] occurred at Sacramento, and it is claimed that it tends to prove the feature of the charge now under consideration:

Felix Tracy, agent of Wells, Fargo & Co. at Sacramento, called for the government, testifies on direct examination that: On the 27th of June, train No. 84, which ran from Sacramento to San Francisco by the way of Stockton, on which the express was, was held in Sacramento, and not sent out. The main office in Sacramento was at Sixth and K. He went down to the depot office to ascertain why it was not sent out. He ascertained that the train was not going out, and that the express was held there. The express was taken out of the train and held until they could send it away by different modes of conveyance. The express matter was destined for points between Sacramento and San Francisco, also Los Angeles; and matter for New Orleans also goes out on that train, connecting at Lathrop or Tracy. He could not tell positively whether there was or not any express matter on that train for New Orleans without examining the record. On the morning of the 29th, the express on train No. 4, which is the overland train from the East by the way of Ogden, was held at Sacramento, and [\*\*104] he transferred the express from this train to the steamer. Sent it from Sacramento; that is, that portion of it for San Francisco, down on the steamer from Sacramento. This train was held at Sacramento about 10 o'clock in the morning. His recollection is that there was some freight or express matter on this train from New York for one place. The witness thus relates the manner in which he transferred this express:

"I saw that the train was held there and not moved. I saw a large crowd there, and the time for the steamer to leave Sacramento was about ten o'clock; that is, the regular time. I was satisfied, if I was going to get that express to San Francisco, that I must act very quickly. I did not know whether the steamer would be permitted to leave, or whether I would be permitted to transfer the express from this car to the steamer. Consequently I ordered two wagons -- the large two-horse wagon and the single wagon -- to [\*736] the express car, with the idea that we might carry that express up to 6th and K. \* \* \* I did not tell only one or two employees. I did not state to them what I was going to do. We loaded it in as quick as we could, and took the express over [\*\*105] to the steamer, and transferred it to the steamer. There was a great deal of excitement both at the depot and the steamer landing. I heard men at the steamboat landing ask the employees of the steamer not to go out."

The witness further states: That a train which left San Francisco on the 28th of June was delayed at Rocklin. He sent up several days afterwards, and had the express brought back to Sacramento, and he saw himself that there was express there going to Ogden, and east of that, from San Francisco and other points. He saw the waybills. With reference to the detention of train No. 84 on the 27th of June, as testified to above by Tracy, Mr. Knox gives the following version of the cause of its detention, which I have heretofore referred to in another connection: He states that there was a train due to leave there at 10:25, known as No. 84. They asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. They thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, [\*\*106] and some one ran down out of the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood

there for a couple of weeks. As to the detention of train No. 4 on the 29th, Mr. Knox testifies, in substance, that Mr. Saulpaugh, the engineer, declined to go out on the train, and that the fireman also refused to go with the Pullman cars, and that this was the cause of its not going out.

Barry Baldwin, United States marshal, who was at Sacramento from the 1st of July until the middle of August, called for the United States, testified, on direct examination, upon being asked in what condition the tracks and the cars and engines in and about the depot at Sacramento were on the evening of Sunday, July 1st, that they were in great disorder. Engines were driven head to in places, and wheels blocked, and obstructions -- cars -- placed across the tracks. The cars were placed in such a manner as to impede the business. Saw no steam arising from any of the engines. They were in such a position that the trains and engines could not have free movement. Mr. Knox denies the truth of this statement, and in answer to the question: **[\*\*107]** "Q. What was the condition of the yard?" says:

"It was simply trains had been run in there, and the men refused to put them away, because they would not work until those men had been reinstated, and they simply died on the track of their own free will. No one injured them at all. So far as any obstruction on the track, there were none at all, except that one block I spoke of under that engine to keep her from running down hill into another engine."

Mr. Baldwin further testified on his direct examination that the depot was constantly overrun with men; that it was in the possession of the strikers. Mr. Knox states that this is not correct; that the depot was in the possession of the railroad officials all the time. **[\*737]** Mr. Baldwin further states, in relation to the effort made on July 5th to couple the engine to delayed train No. 4, that it was standing on the track. It had come in there and had been stopped there. In the morning before commencing at all, he went to the mail car, and saw the postal clerk there, and made him open the car, and went into the car, and saw that the mail was there in the car, and that it was the mail that was ordinarily carried on that train, **[\*\*108]** and had come down from the post office, and that is the way he ascertained. The crowd surged in through the depot. The crowd was heaviest around the engine, and standing in the way of the engine, and obstructing its coming up to the train. He had to get down and move them foot by foot to get the engine through. He got on the engine again, and it was moved up to the train, and, just as they reached the train, the crowd broke past and swept through the depot, and broke the train and rolled back the cars, -- the passenger coaches. There were some seven cars rolled back. Possibly 500 people took part in rolling back these coaches. They rolled them back at once with their hands, without any difficulty, there were so many of them.

Greenlaw, a witness for the defendants, testifies: That he heard cheering and hollering down at the east end of the depot. That he went down there. That when he got there the Pullman cars had been uncoupled. That there was quite a crowd around Marshal Baldwin when he got there. That he saw they were trying to get at Baldwin, and he did his best to defend him. That a fellow -- he thinks it was Jack Harris -- picked Marshal Baldwin up and started to **[\*\*109]** carry him out of the crowd. While he was up in the air on Jack Harris' shoulder he drew his revolver. He said, "Let me down." Jack Harris let him down on the ground, and he shoved the pistol up under Greenlaw's nose. Greenlaw states that he said: "Don't point that thing at me. I have been trying to defend you." Marshal Baldwin said: "I will shoot the first man that lays his hand on me." Just then Mr. Galliner broke into the crowd, -- a great, large man, -- and he said: "What's the matter, Marshal Baldwin?" or, "Baldwin." Baldwin said: "These boys won't leave me alone." Galliner then said: "Leave him alone. He is all right, boys. Go away and leave him alone." That the crowd then dispersed and went over to the depot and Third street bridge. Mr. Baldwin also further testifies: That on July 4th there were larger crowds at the Sacramento depot than on the previous day. Nothing had been done towards cleaning up the yard; no work had been done from the previous day up to that time. That an attempt was made on that day by the militia to take possession of the depot. That at the termination of the militia's efforts the depot was still in the possession of the strikers. That from **[\*\*110]** that time on to the 11th of July, in the morning, the depot, grounds, and tracks and yards around the depot were in the possession of the strikers. The witness Greenlaw, called for the defense, contradicts Mr. Baldwin's testimony on this point, and states that there were more outsiders at the depot than there were strikers; that the strikers were doing the same that the crowd was, -- looking on. No effort was made to **[\*738]** keep them out. They just stood there in the depot. He did not see the militia make any effort to get in. In relation to the stoppage of the movements of all trains between the 3d and 11th days of July, Mr. Baldwin states that there was nothing moved out (of the Sacramento depot) between those dates.

Red Bluff.

The following testimony relates to the possession taken by the strikers of the yard, depot, and trains at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, called for the government, testified as follows: That he was roundhouse foreman at Red Bluff for the Southern Pacific Company in the months of June and July last; that he recollects an attempt to move the Sacramento local No. 12 from Red Bluff on [\*\*111] or about the 29th day of June last; that it was composed of the day coach, smoker, and mail car; that he and Mr. Jones and Mr. Robb, the conductor, endeavored to move this train. After explaining the position of the train on the track by means of a diagram on the blackboard, he states:

"We were on the back of the mail car, -- myself, Mr. Jones, and Robb. We set the levers to couple on. When we got very near there, Mr. Ray threw one of the levers down onto the coach, so that we could not couple it. There was Ray, Clodtfelder, and Shepler. He told us we could as well give it up. We had done our part, and they would do theirs. That we could not couple that train together. Clodtfelder was the man that made that remark. We stayed there and talked quite a while. Mr. Robb made the remark they were too many for us. We could not make it up. We would have to give it up. The engine stood there for about an hour, and the engineer brought her back to the roundhouse. The mail car stayed there a few feet away from the coach, not coupled."

J. P. Heaney, a witness called for the defense, testified: That he was a brakeman for the Southern Pacific Company in June and July last. That [\*\*112] he belonged to the Brotherhood of Railroad Brakemen and the American Railway Union at Sacramento. That he went to Red Bluff on the 28th of June. The following morning (the 29th) he went to the depot. As he turned the corner he saw no engine there. He walked along leisurely, and when he got down to the depot he inquired why the engine was not out. He was told that a strike had been declared. He saw the fireman, and asked him what he thought about it. The latter said he did not know. The witness said: "Will we go, or will we not?" and he told the fireman that he would like awful well to go, but that he would hate to go into Sacramento and have the boys holler "Scab" at him when he got there. That he would not do that for all the jobs he ever saw. That they talked around there a little while, and finally concluded not to go out. He took off his cap and uniform and gave the job up then. He was told that they were obstructing the mail; that that was a mail train. In answer to the question, "Who told you that?" he states:

"I don't know. I think it was some of our men who spoke to me about it. I think it was Montanya and Harper. They said it was a mail train, and we ought [\*\*113] to go on it. I says: 'All right. If it is a mail train, we will go.' I went down and says: 'I will go with the mail car, and nothing else.' I [\*739] told Mr. Jones and Mr. Robb so, -- that I would go with the mail car. I spoke to the fireman about it, and asked him what he thought. He says: 'Yes, we ought to go with the mail, anyhow.' I asked him to get the engine. He started to get the engine, came down, -- the train was in on the side track, -- and I let the engine in, and went up and cut the mail car from the coaches, and backed the engine up on it, coupled on, and pulled out on the main line. Put my uniform on again, and told Robb and Jones that I was ready to go. They said that I could not go with that train; to put the whole train on, or there would be nothing go. I says: 'That is all I intend to go with. If you won't let me go with that, I won't go.'"

J. C. Shepler, called for the defense, admits that he was present upon the occasion, on the morning of the 29th of June, related by the witness Day. He states that he had nothing to do with the uncoupling the mail from the rest of the train, -- the Sacramento local No. 12.

The persons Ray and Clodtfelder, who [\*\*114] are implicated by Day in the uncoupling of train No. 12 on the 29th of June, were not called as witnesses.

Day further testifies, with relation to the stoppage of the Oregon express, train No. 15, on the 1st day of July: That he was not down at the train when she came in. After she was there a little while he went down. He saw the train had been cut in three different parts. This was somewhere about 9. He went down to the rear end of the train to see Mr. Kilburn. He saw the two sleepers were cut off and backed down over one crossing, the two coaches and a tourist car were cut in another section and standing on the crossing, and the two mail cars and engine standing in front of the depot, on the main track. At the south end there were two Pullmans; next came a tourist car, day coach, and smoker, and an express car and baggage car was with those coaches and smoker, and the next was two mail cars and engine, -- one a mail car and the other a box car. Men were working there taking off the appliances for

connecting the train. He saw Mr. Shade there at work; also saw Richard Roe, and a fireman of the name of Hill. Hill's first name is Joe. Mr. Heaney was around there. He did [\*\*115] not see him doing anything. There was probably a couple of dozen around there. He saw Mr. Shade and Clodtfelder cut the hose and the Miller hooks behind the mail car. They did that in his presence, when he went down to get the engine to pull her up. He looked at the couplings in the afternoon. He saw the safety chains taken off, and the nuts and keys at the back of the Miller hooks had been taken off.

J. C. Shepler, the same witness whose testimony has been previously referred to on the part of the defense, denies that he assisted in taking any nuts or chains or bolts, or in any way interfering with the Portland express which came in on the 1st of July; that he saw no one in any way interfering with the couplings or brake chains, or any of the nuts or bolts connected with the train. He admits, however, that he saw a couple of chains lying on the ground there. He admits, also, that he was at the station when the train came in, and that there was a crowd about the train. He states that he does not know who uncoupled the train.

Joseph B. Hill, called for the defense, and the person referred to by the witness Day as the fireman who was engaged, with others, [\*740] in taking [\*\*116] off the appliances for connecting the Portland express on July 1st, states that he was present when the express train came in; that there was quite a crowd about there. He denies that he ever did anything to prevent the coupling of the engine and mail car to the coaches of the Portland express.

J. P. Heaney, called for the defense, testifies that he was around the depot on the 1st of July when the Portland express came in, or shortly after it came in. He gives the following version of the uncoupling of the train:

"Mr. Jones came up there and wanted to know if we would put the train away. I believe I spoke up and said that we would put the train away if he would tell the engineer to obey our signals. He said he would. He went up there and told the engineer. After he told the engineer, we gave him a backup signal, and cut the train in three pieces, so as to clear the different crossings there. There are three crossings there that have got to be cut. If we would run the train all down there, we would stop the wagon transportation. We cut the train in three pieces, and let it stand there."

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, [\*\*117] testified that on June 29th an attempt was made to move the Red Bluff and Sacramento local. This train carried coaches, the ordinary baggage car, and a mail car. It carried no sleepers. This train is due to leave Red Bluff at 5:15 in the morning. He attempted to move the train. The strikers had cut the train in two, -- cut the mail car off. He could not say who cut it off. He did not see them cut it off. He attempted to put it on again and start the train in regular form. Mr. Clodtfelder and Mr. Ray prevented him from coupling it. Mr. Day and Mr. Robb, the conductor, assisted him in trying to put that train together. Mr. Day is the foreman of the roundhouse. They backed the train together. He set the Miller hooks to couple; set one of them to couple, and stepped over to the other platform to couple the other hook. Threw the lever up, as it were. Clodtfelder held it and prevented him from doing it. Mr. Ray got onto the other platform and threw back the other lever, so that it would not couple. The effect of this was that they could not couple the cars together. They were endeavoring to couple the mail car and the coaches. The mail and express and baggage were all [\*\*118] in the one car at that time. He knows that that train had not been cut in two in that manner under the authority of the company. At the time that he endeavored to put this train together, Clodtfelder told him: "You cannot couple this train. You have made your attempt. You have done your part. Now we will do ours." The witness told him that his overpowering force -- there were 50 to 2 of them -- prevented them from coupling it. There was quite a large crowd about at that time. They were all opposing the railroad. They sympathized with the men who were stopping the train. They refused to assist the witness in starting the train, although he called on quite a number of them. They said they would not move any trains until the matter was settled. Clodtfelder and Ray said that the mail car could go. He thinks it was Clodtfelder who said that, or Demmick. Demmick was one of the leaders. They said the mail car could go by itself; no other cars of any kind, -- Pullmans or day coaches, -- none but the mail car. [\*741] Knows a man named Joe Hill. He was a fireman. He was on strike at that time. He went to couple this train together on the morning of the 29th. Hill also [\*\*119] took an active part in preventing that. As they started the engine and mail car to couple onto the coaches, Hill tried to apply the air. By "applying the air" the witness means that he opened the automatic air valve of the air hose at the rear of the mail car. That would set the brakes if there had been air enough on the car, but there was not enough pumped, and they went ahead.

As previously stated, Hill denies that he interfered with this train in any way.

It is to be noticed that this testimony of William H. Jones is corroborative of that of J. C. Day, the preceding witness.

South Vallejo.

The following testimony related to the possession by the strikers of the yard, tracks, and trains at South Vallejo:

Michael Keefe, yard engineer for the Southern Pacific Company at South Vallejo, called for the United States, testified as follows:

"The engines and yards of the Southern Pacific Company on the 10th and 11th of July were not in a condition for service. All the engines were killed; there was no steam in them."

The same witness further testifies:

"The number of my engine was No. 1. It was a switch engine. Some men took the engine away from me. One of them was [\*\*120] Thomas Kelly; another was named Laurie; another was named Smith; another Hale. These men ran the engine off an open switch. They ran it off the track. This was on Tuesday, July 10th; about that time. They then hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose."

It would be hard for him to state the particular parts each man played. He did not exactly locate them at the time, or what they were doing, because he was talking with them. He tried to get on his engine. He got on the side. They would not let him get on. He thinks it was Smith who would not let him get on. He prevented him getting on. Kelly was a fireman for the company up to the time of the strike. He was out on strike. Laurie also went out on strike. He was a fireman. Smith was a stranger to him. He was the man that came there. Smith and Hale were the ones that came to Vallejo and made that trouble. Does not know where Smith came from. Thinks Hale told him he came from Folsom. Thinks Hale said he was a baggage man, a train man. He did not say why he came to Vallejo. The same witness further testifies that on the following [\*\*121] day, he thinks it was, engine 1,190 was killed at South Vallejo. She came from Calistoga that morning. She pulled a mail train. Does not think that there were any Pullman cars on that train. He saw the engine killed. He was on the engine. He ran the engine. Smith came there, with a good many others, and took the engine away from him, and killed it. They took it right [\*742] on the main track. They put the fire out, also disconnected the hose, and let the water out; also out of the boiler.

San Jose.

The following testimony relates to the possession taken by the strikers of the depot, yard, tracks, and trains at San Jose:

James Hewitt, called for the United States, testified: That he was the engineer of the San Jose train No. 19, running between San Francisco and San Jose. That he left San Francisco at 5:10. Was due at San Jose at 7 o'clock in the evening. That it was a mail train, having a combination mail and express and baggage car. That it carried no Pullmans. That he arrived on time. Going into the yard, people rushed from the depot onto the track, and he had to stop. This happened about 400 or 500 feet this side of the depot. The people rushed up the [\*\*122] track, and he had to stop or else run over them. Knows a man named McClintock, and also a man named Runyon. When he stopped, Mr. McClintock came up on the front part of the engine, and came through the window on the left-hand side. The window was open. He came in and stepped over to him, and says: "I will take charge of this engine, Jim." Then Hewitt said to him: "Harry, you have got the main track blocked. This is as far as I am going. Let me put this train on the side track and put the engine in the roundhouse." Mr. Runyon stepped up and said: "No, sir. We will kill her right here." During this time there was a deputy United States marshal on the engine with the witness, -- one on each side in the gangway. They tried to keep the crowd off. They overpowered the one on the left-hand side. McClintock asked him what business he was doing there, or what he was doing there. He said he was a deputy United States marshal, and showed him his badge. At that time they were trying to get hold of the fireman. McClintock, after he asked him to show his authority, which he did, says: "We can't help that. Boys, take him

away." They took the fireman off of the engine. That left the [\*\*123] witness and McClintock and Runyon on the engine, and a lot of boys came up over the baggage car and came up on the tender. After that the witness had some conversation with McClintock with regard to putting the engine away and putting the train on a side track. He told him they had the main track blocked. It was not necessary to hold him there. Wells-Fargo's agent stepped up on the right-hand side, spoke to McClintock, and asked him to pull the train down to the crossing, where they could get out their express, mail, and baggage. He says: "All right. Boys, cut off the baggage car." Which they did, and pulled down to the crossing or over the crossing, right in the front part of the depot, and stopped the engine there. One of the gang says: "No one shall move this engine but McClintock." The witness sat down on the fireman's side, and took hold of the bell cord. They got down to the depot. McClintock told him he had better get off and go home; that he would not be responsible for his life. The witness said: "You never mind about my life. I guess I can take care of myself." They got the engine as far as they could get her.

[\*743] W. S. Runyon, the person referred to [\*\*124] by witness Hewitt in the testimony just quoted, was called on behalf of the defendants, and testified, in brief, that he was a locomotive fireman in the employment of the Southern Pacific Company in June last; that he belonged to the Brotherhood of Locomotive Firemen, and also to the American Railway Union; that he was a member of the executive committee of the American Railway Union in San Francisco; that during the strike he went to San Jose, on the evening of July 5th; that he went there of his own accord, to suppress any acts of violence or any deeds of violence that might possibly be committed there, as he understood there were some very troublesome people in that locality. His statements as to what took place at San Jose, and his connection therewith, in his own words, are as follows:

"I left San Francisco shortly after five o'clock of the evening of July 5th, and got onto the train here in San Francisco, and rode until we got to San Jose. As we were going in the yard at San Jose, the train slowed up slightly, and when about midway between the roundhouse at San Jose and the depot she came to a standstill. The people in the coaches commenced to get out. I, in company with [\*\*125] a Mr. McQuade, of the Southern Pacific, got out. There was a large delegation of people on the tracks and around the depot. Q. What was done? State what you saw there, -- what occurred. A. As I said, the train stopped. I got out, in company with Mr. McQuade, and stood on the outskirts of the crowd. They were doing a lot of scuffling around one place and another, and talking, and so on, and finally a remark was made that they would do Hewitt up, -- the man who had charge of the train. I edged my way through the crowd. In the near vicinity I saw a number of men who had those white ribbons on their coat lapels. I said to them: 'I am what you ordinarily term a "striker," and a member of the A.R.U. As you are sympathizers with us, I should like to get your assistance to suppress any violence that might be perpetrated on Mr. Hewitt.' I got up to the engine, and, as I did, those gentlemen followed me. I says to Mr. Hewitt: 'You need not have any fear of doing you up, Jim. If I can possibly lend you any assistance, I shall certainly do so.' He was in a very excited condition; about as pale as my shirt bosom is at the present time. After a while the engine and the train was run [\*\*126] down to a crossing or street just north of the depot. They stopped, and cut off all the coaches, with the exception of a combination car that they have for baggage and Wells-Fargo's matter. After they severed the connection between the baggage and smoker, the engine and baggage car went on the south side of the depot, to leave this here crossing clear. Mr. Hewitt changed his overalls. When he left his engine I stepped down behind him. As I did so, the other gentlemen who had the white ribbons on, and who I asked to accompany me, came along, and we walked alongside of Mr. Hewitt until he got through the crowd, and then he left. While he was walking through the crowd they jeered at him some, but there was no acts of violence. After Mr. Hewitt got away there was quite a number of men on the tender of the engine, -- men and boys, -- upon what is termed the 'running board.' I got them to disperse and leave the engine alone."

The witness admits seeing Mr. McClintock there at that time. The testimony of Mr. Hewitt as to what took place at the engine being read to him, he stated that some of the statements were correct and others not. He states that Mr. Hewitt suggested putting [\*\*127] the train on the side track. He testifies that the statement said to have been made by him, viz.: "No, sir. We will kill her right here," -- is false. He states that there were several thousand people at that time there. In answer to the question: "Q. Hewitt states here that you and McClintock were trying to get hold of the fireman," -- he replied: "He is a liar. I did not. I had nothing to do with the fireman, and [\*744] did not see any one pull him off the engine at all. The fireman was off of the engine five or six minutes before I got on the engine."

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (2) "by causing to be assembled, and by assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places on said lines of railway, in said state and Northern district of California, and by gathering in great numbers in said yards and depots, to wit, \* \* \* and other places around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and [\*\*128] trains."

Sacramento.

The following testimony relates to the assembling of crowds at Sacramento:

Felix Tracy, the agent of Wells, Fargo & Co., testified on direct examination: That there were no trains moving after the 29th of June. He saw a good many men down there at the station that were not at work, -- railroad men. He saw them there, and he saw them in other parts of the city. There were more people at the depot from the 28th or 29th of June, up to the time of the United States soldiers going there, -- some time about the 10th or 11th of July, -- than usual, a good many more than usual. There were more there on the 3d of July, more there on the 4th of July, than it was customary to see there. He noticed that whenever he went down there. It will be remembered that Mr. Baldwin's testimony that there were crowds around the station is to the same effect. On the other hand, Mr. Knox denies emphatically that the depot was in the "possession of the strikers."

Mr. Baldwin, United States marshal, testified on direct examination that the station and the tracks were overrun with people, -- people in the caboose and cars, and around them, sitting on the steps.

Mr. Knox admits [\*\*129] this, but denies that he or his committee of the American Railway Union had anything to do with their coming there.

James Sims, called for the defendants, testified that the American Railway Union committee used one of the cars as an office on the 29th of June.

Mr. Baldwin further testifies, as to the crowd around delayed train No. 4, on July 3, 1894, that they were on the track and across the track, and they would not move out of the way of the engine. He had to get down from the engine and get in front of the engine and push them back and move them back, and the engine came foot by foot. They were threatening, and one man threw a rock at them. The same witness further testifies that he was at the depot subsequent to July 3d, and that the strikers continued to occupy the depot grounds. Being asked how he knew they were strikers, the witness stated that there was a crowd there. He was around among these men, and they were constantly informing him that they were strikers, -- that they were employees of the railroad [\*745] company out on a strike. He was constantly talking with them, and walking among them, and they would address him and talk about the disturbances. That [\*\*130] is the way he ascertained that they were strikers. The crowds never left. There was always more or less of a crowd of men there, night and day. With reference to the character of the crowd that was there late in the afternoon of the 6th of July, he states that they were strikers. Some of them said they were there to protect the property of the railroad company, and take care of it; and they were around on the cars, and it was the same crowd in character, except that they were men. The cars of the railroad company were being occupied by men, by strikers. Some of them were occupied apparently for sleeping quarters. They occupied cabooses on the tracks in the yard.

Thomas Compton, one of the mediation committee at Sacramento, called for the defense, testified that they "had our men stationed from one end of the yards to another, to see that the men did not get excited and do any damage to the property, and requested other men who came in on trains not to go out any more."

C. E. Leonard, a city trustee of Sacramento last June, and in the employ of the railroad company before the strike, testifies that there was a very large assemblage of people at the depot of the railroad company [\*\*131] on the 3d of July.

San Jose.

The following testimony relates to the assembling of crowds at San Jose:

Frank Arnold, a railway postal clerk on the route from San Francisco to San Luis Obispo, testifying as to the crowd at San Jose, says on direct examination that there were several thousand people around the train that came in on July 5th. They were all around the train, -- inside of it, on the platform, swarming all over it. On cross-examination he says that they were occupying all the spaces in the depot, on the railroad car platforms, and so on.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (3) "by threats, intimidations, personal assaults, and other force and violence, to prevent the engineers, firemen, conductors, brakemen, switchmen, and other employes of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways."

Sacramento.

The following testimony relates to threats, intimidations, and acts of violence at Sacramento:

Mr. Baldwin, speaking of the strikers at the Sacramento depot on July 3d, testified on direct examination [\*\*132] that they were threatening, and there was one man that threw a rock at them. It struck the cab of the engine, just below where Mr. Clark was standing -- between Mr. Clark and himself. He further testifies that there were crowds around the semaphore. The crowd was demonstrative at this time. There were men threatening them as they took the engine through, -- hooting. He recollects one man saying, "I will fix you." He seemed [\*746] to be particularly addressing himself to the witness that time, -- the people on the engine. Heard expressions of anger and defiance. They were angry.

Respecting this testimony of Mr. Baldwin, Greenlaw testifies that there was a good deal of yelling there. Some were "hollering." But he did not hear any threats made. He did not see any forcible means used to prevent the taking out of the train. No threats whatever were made towards Mr. Baldwin. He denies that he incited any people to do anything that day, or that he threatened Mr. Baldwin, or any one. He admits that he called some persons on the engine "scabs," but denies the statements imputed by Mr. Baldwin, in his testimony, to him.

While it is to be observed that Mr. Baldwin was not [\*\*133] an employe of the railroad company, yet the testimony, if true, is significant with respect to the actions of the crowd towards Clark, the engineer, and the others on the engine.

Anthony Green, called for the defense, testified that he was captain of police of the city of Sacramento, and was such in June and July last; that he was present on the 3d of July at the depot; that he himself saw no acts of violence committed, but he admits, on cross-examination, that he did not see the cars actually shoved back by the crowd. He testified that he heard the crowd yelling at those who were in the cab of the engine that was being moved from the roundhouse to the delayed train No. 4; that such exclamations were used as follow: "Don't you go out;" "Don't you take that train out;" "Stand by one another;" "Don't be a scab;" "Don't take the places of those men who are working;" "Come out of there;" "Don't you take that engine out;" "Don't fire that engine;" "I appeal to you as a man;" "Come down out of there;" "Don't go out," -- and such questions as those, appealing to them; that he was in the cab himself several days, mornings and nights; that he stood in the first one.

Red Bluff.

The following [\*\*134] testimony relates to what occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that he was not at liberty to go on the engine. He was told to keep away from the engine and let it alone. A brakeman by the name of Harper and two or three other men told him that. He does not know them. He thinks Harper was on strike. He was out with them. This occurred, according to the witness' testimony, on July 1, 1894. The same witness further states, after describing how engine 1,248 was killed by Van Devinter, Richard Roe, and Harper, that he had a conversation with Van Devinter about the matter. He told him he was doing very wrong, and Van Devinter said he did not think it was any of his damned business what he was doing. They told him if he did not get out of the

roundhouse they would have him carried out on a board. Harper made that remark. Richard Roe and Van Devinter, and one or two others he did not know, were present. This was at the time they were killing engines.

[\*747] South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific [\*\*135] Company, running out between South Vallejo and Santa Rosa, whose engine was killed, testified as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. This was near 7:30 or 7:35 in the morning. It could not have been far from that. He was running the train, -- conductor. He left North Vallejo, and between North and South Vallejo he found an engine on the main line. The engine was called a "killed" engine, -- no steam in it. As they pulled up near that engine, a crowd of men came out and fixed theirs the same way. They were obliged to stop by this "dead" engine. He thinks he must have been very near on time. He makes connection, with passenger and mail cars, with a boat that runs between North and South Vallejo and Vallejo Junction. At Vallejo Junction connection is made with the San Ramon passenger train. It is a mail train that runs between San Ramon and the Oakland pier. He asked a man named Smith to let him couple on and push the dead engine on the siding, so that he could get the train down to the depot. This man refused to do it, saying he was there under orders, and had to obey his orders to stop the train [\*\*136] where it was. Smith showed him a card with his (Smith's) name on it, -- an A.R.U. card.

William James, fireman of one of the Alameda local trains, testified, in answer to the question, "Did you have any trouble at tower No. 2 that day?" as follows: "The train was stopped by a mob of men, and I was taken off the engine." He further states that about 75 or 100 men got in front of the engine. The engineer stopped when they gave him the stop signals. The crowd, all of them, gave signals, -- all those that were on the track. He could not see who they were. They took him through the crowd, and wanted him to go and join the A.R.U. They took him half way to the roundhouse, he would judge about 400 feet. Engineer Willard came out and told them it was a free country, and he would go where he wanted to, and with that they let go of him.

Many witnesses on both sides have testified as to the personal assault claimed to have been made on Mr. James. The testimony is contradictory as to what actually took place at that time. I think, however, this feature of the case is sufficiently fixed in your minds to enable you to determine the actual facts of the case without any extended comments [\*\*137] from me.

(With the usual admonition to the jury, an adjournment was here taken until tomorrow, Tuesday, April 2, 1895, at 10 o'clock a.m.)

Tuesday, April 2, 1895, at 10 o'clock a.m.

When the court adjourned last evening, I was directing your attention to testimony tending to show the means conspired to be used in carrying out the conspiracy. First, I called your attention to the testimony tending to show, or to disprove, that the conspirators [\*748] forcibly took and kept possession and control of all yards, depots, tracks, and trains of cars on said lines of railway, and forcibly held and detained the same; second, that they caused to be assembled, and assembled with, large crowds of persons in said depots and yards of said Southern Pacific Company at various points and places on said lines of railway in said state and Northern district of California, and by gathering in great numbers in said yards, and depots, to wit, \* \* \* and other places, around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of said railways, preventing the movement and passage of said engines, cars, and trains; third, that by threats, intimidations, personal [\*\*138] assaults, and other force and violence, they prevented the engineers, firemen, conductors, brakemen, switchmen, and other employes of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways. I will now proceed to direct your attention to the testimony tending to show other means conspired to be used in carrying out the conspiracy.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (4) "by forcibly disconnecting air brakes upon such trains, -- mail, passenger, and freight."

Red Bluff.

The following relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified on direct examination that the Oregon express reached Red Bluff about 4:30 or 4:35 in the morning of July 1st last; that it comes from San Francisco, -- Oakland. Portland, Or., is its destination. She was on her regular trip. She was stopped at Red Bluff. The train was cut in two. The train came into the station, and they cut it in two; that is, they uncoupled it and uncoupled the hose. He was just passing [\*\*139] there. He did not see the man who did it. There was a mob of men there. He elbowed his way through the crowd. As he passed, he heard the air holes pump as they do when they are open. The air was cut behind the mail car. The local cars followed first, then the baggage car, the express car, smoker, coaches, and Pullman. That is the way the train is made up. They all follow the mail car. They were all in the rear of the part cut off. The effect of that cut was to stop the movement of the train. That was about 5:30, a few minutes after they arrived.

Without repeating the testimony given by the defense, it is sufficient to say that the witnesses on their behalf, with reference to the Red Bluff occurrences, deny having had anything to do with the stoppage of the Portland express.

South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, testifying as to what occurred to his engine on [\*749] July 10th, says that they hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose. They ran the engine [\*\*140] off the open switch. The testimony of this witness respecting what occurred to engine 1,190 on the following day has already been referred to under a previous head.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (5) "by putting out the fires in the engines, and drawing the same."

South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running between South Vallejo and Santa Rosa, whose engine was killed between North and South Vallejo on July 12th, called for the United States, testified, with reference to putting out the fires on his engine, as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. They pulled the fire out of the engine. They shut the water off first in the tank valve, and started to pull the fire out. He asked them to turn the water back first, and then pull the fire on the engine, which they did. He asked them to do that to keep from burning the engine. The effect of letting the water out of the engine with the fire in it, he thinks, would be [\*\*141] apt to burn the bricks considerable.

West Oakland.

The following testimony relates to what occurred at West Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland testified that a number of engines were killed in and about the shops in the latter part of June and early part of July last. He could not give the numbers. There were 8 or 10 engines with fire in them, and the fire was let out of them, and all the engines were emptied that were full; that is, all the engines that were about the place were emptied of water, -- water let out of them. This was done by the strikers.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (6) "by throwing switches, in order to prevent the passage of such trains through depots and stations."

Red Bluff.

The following testimony relates to occurrences at Red Bluff with reference to delayed train No. 15 on July 3d last:

William Jones testified as to the throwing and spiking of switches as follows: That, after the Portland express which arrived at Red Bluff on July 1st stood there a while, the engineer said he wanted coal, and Mr. Day, the foreman at the roundhouse, [\*\*142] and the witness, took the engine and the mail car, as it was coupled on, -- two mail cars, - - there was a freight car which they said contained mail. [\*750] It was with the mail car. It had United States mail locks on it. He did not see the inside of it. Mr. Monteith: "We will admit that car had mail." The witness, continuing, stated that they took it to the coal pile to give the engine coal. They passed over one of the switches in the yard, and while they were gone the switch was thrown and spiked to the side track, so that when the train backed down it could not back to the balance of the train. It was forced to go to the siding. The switch was opened. It was thrown off the main track to the siding, and spikes driven to hold it there, and the switch blocked. They could not have passed over it if it had been spiked. It was a switch in which the car could not go off the track. They could not have gone over it. It was not the case. The target was in its proper place and position. No orders were given by the railroad company for either the spiking of the switch or locking the switch. Such orders would come through him.

Charles F. Cadwalader, called for the United [\*\*143] States, testifies that he saw Hehorn, Shade, Ray, and others spiking a switch on July 1, 1894.

W. H. Winter, also a witness for the government, testified that he saw the switch spiked, but the only person whom he can identify as having participated in the spiking is Hehorn.

Milton D. Clark, called for the United States, testified that he saw the spiking of the switch. He identifies Hehorn as the person who held spikes in his hand; Shade is the man who drove in the spikes; and that Ray was in the crowd with them.

John Kelly, a witness called for the United States, also testifies as to the spiking of the switch. He states that he was a member of the American Railway Union; that he was a fireman for the Southern Pacific Company; that he went out on strike at Red Bluff; that he did so because he was a member of the American Railway Union. He identifies John Shade as just in the act, when he saw him, of leaving with a spike-hammer and a couple of spikes in his hands. This switch, he states, connected with the main line. There were 30 or 40 men around there at that time. He gives the names of others, besides Shade, who were in the neighborhood of this switch, as Peter Ives, S. [\*\*144] P. Roller, Jack Shepler, and Clodtfelder. He states that Roller locked the switch after it was spiked. As to the relation these persons bore to the strike, the witness testified that Roller was a brakeman, and that he was on strike at that time. He was an A.R.U. man. Ives was a car foreman up there. He was also on strike and an A.R.U. member. Clodtfelder and Shepler were on strike at that time. They are members of the A.R.U. Knows a man named Demmick. Knows a man named Harper. He (Harper) was there that morning. He is a brakeman, and a member of the A.R.U., and out on strike. Knows a man named Heaney. He did not see him there.

The persons referred to by the witnesses for the prosecution as having participated in the spiking of the switch, which prevented the engine and mail car of the Portland express from getting back to the passenger and Pullman coaches, or, more strictly speaking, those [\*751] who have testified, deny that they have been guilty of the acts charged, or did anything in any way which contributed to the spiking of the switch.

South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the [\*\*145] Southern Pacific Company at South Vallejo, called for the government, testified that on July 12th last he was making up a passenger train for Calistoga and the vicinity; that it was a mail train, and that it did not carry any Pullmans. He took the engine and made up the train with it, to get ready to go out again. He was going to the roundhouse with the engine. He saw a gang of men. He thought that he would get to the shops before they took the engine away from him. The switch was set for the side track. He would have got to the shop, he thinks, but this man closed the switch on him, so he stopped. Had he gone on he would have run off

the track. It was an open switch. The crowd remained there. The engine was killed after that, and was there a day or two.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (7) "by opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railways were situated."

Sacramento.

The following testimony relates to what occurred at Sacramento:

T. W. Heintzelman, a master mechanic in the employ of the Southern Pacific Company at Sacramento, called [\*\*146] for the United States, testified that he experienced some difficulty, on June 29th, in attempting to get train No. 4, which is a mail train, and came from Ogden, out of Sacramento, -- in attempting to get her through. He testifies that he was requested by his superintendent, Mr. Wright, to back up the engine and mail car and express car, -- he thinks it was coupled to the engine, -- to couple on to the balance of the train that was left in the upper yard, and pull it down the depot. He did so. While pulling the train down in the depot, something was thrown at him while he was on the engine. After he saw what it was, -- it proved to be a monkey wrench, -- he got the train down to about its usual stopping place, and stopped there. After considerable persuasion he got the engineer and a fireman on the engine, and got the train started. The train had not moved a great ways -- about 50 yards -- when the drawbridge was swung open, and the train had to stop. This is the drawbridge across the Sacramento river. There was no vessel in sight to occasion the opening of the bridge. It was opened only for the purpose of stopping the train at that time. There was quite a crowd running down [\*\*147] by the drawbridge just prior to the time it was opened.

Mr. Knox gives the following version of what transpired respecting the opening of the drawbridge: He says that on the morning of the 29th No. 4 came in. He guesses she got in about 6 o'clock, -- somewhere around there. She came in with an engine, mail, baggage, [\*752] and express car. He went to Mr. Saulpaugh, -- he was the engineer that was going out on that train, -- and asked him if he was going to do any switching there. He said no, he was not; they would have to get some one else to do their switching. Mr. Wright came down there when they were talking, and asked him if he would back up to Sixth or Seventh street, he believes he said, and get the balance of the train. Mr. Saulpaugh suggested that it would be a pretty good idea to get Mr. Clark or Mr. Heintzelman to do that. They sent for Mr. Clark. The witness here stated that before this strike was ordered it was an understood thing with Mr. Wright and the committee that they should do all in their power to prevent any damage being done. On his (Wright's) side he was to give them permission to talk to the crews, engineers, conductors, firemen, and brakemen, [\*\*148] and see if they could induce them to stay with them. When Mr. Clark came over they had the right to talk to him to see if they could induce him not to back up to get the cars. After they talked with him a while he turned around and said he did not want any of this in it. They simply asked him if he wanted to scab on his own son. His son was working there. He said he did not want to have anything to do with this, and turned around and went away. Heintzelman came, after some time, got up on the engine, and the first thing Knox saw was a monkey wrench coming out of the engine, which pretty nearly hit him. They backed up. While they were up there, he, with the balance of the committee, went through the shops, to notify the men that the strike had been decided on. While they were going through the shops a man was sent over after them to tell them that the drawbridge was open, and to ask them to come and see if they could not get it closed. He ran over there, and sent some men out in a boat to close the bridge, -- Mr. Hatch and Mr. Jefford, and two or three more. They closed the bridge, and he went back and told Mr. Saulpaugh that the bridge was closed. After the bridge was closed, [\*\*149] he told Mr. Hatch to go up to Mr. Wright's office and get a lock, -- a Yale lock, -- and put it on there, so that the bridge could not be opened. Mr. Hatch went and got the lock and locked it on the bridge, so that they couldn't open it.

Both Hatch and Jefford corroborated Knox with respect to the latter's statement that he sent them to close the bridge, and Hatch, further, as to the lock being procured at Knox's instance, and being placed by Hatch on the bridge.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (8) "by burning and destroying bridges, trestles, culverts, over which such trains necessarily and usually would pass."

Trestle No. 2, Near Sacramento.

The following testimony relates to the wreck of train No. 4 at trestle No. 2, near Sacramento:

Mr. Baldwin, who saw the wreck of the delayed train No. 4 at trestle No. 2 about two hours after it occurred, testified on direct examination that the baggage and mail cars were off the track. When he says "baggage," it might have been express cars with the baggage. [\*753] One mail car was badly damaged; also a baggage car badly damaged; also two mail cars slightly [\*\*150] damaged. These cars were on the side, smashed over. Some of them had reached the water. He made an examination of the trestle. The engine apparently had gone probably three or four car lengths before it went off the trestle. The trestle is about 300 or 400 feet in length. He found that the east end of it, especially the north side, was badly smashed in, as though the bridge had been weakened and smashed down; the bents slivered up, the ties all broken very much more on that end of the bridge than further along, right at once where the engine struck the bridge. The trestle was very badly crushed in on the east side, towards Sacramento, immediately where it joins the track, the embankment, two or three car lengths from where the engine lay in the water. Then the train lay all along the trestle on to the embankment. The trestle, where it joined the embankment, was very badly slivered; there was only a piece of about six or eight inches where the ties were solid enough to walk on. The trestle was all crushed in below the ties at that corner.

The testimony of Mr. Baldwin tends to show that the trestle was blown up, and that delayed train No. 4 was wrecked. I will not take up [\*\*151] your time in reading to you all the testimony introduced by the prosecution tending to show that the trestle was blown up by members of the American Railway Union, and was a part of the conspiracy to obstruct and retard the mails, and restrain interstate commerce, nor such testimony as has been put in by the defense contradictory of such design, or as to the participants engaged in such affair, or as to being or playing any part in the policy or plan of the members of the American Railway Union in carrying on the strike between themselves and the Pullman cars. The details of this unfortunate catastrophe, as told by the witnesses on the stand, are doubtless fresh in your minds. The testimony tends to show that a train was made up in Sacramento on July 11th last for Oakland, to be sent by the way of Davisville. It left Sacramento a few minutes past 12 o'clock, under charge of Conductor Reynolds, with Samuel Clark as the engineer and Danicamp for fireman. On the train was Postal Clerk J. A. Brown, in charge of the United States mail. Lieut. Skerrey and a number of United States soldiers were on the train for its protection, some of the troops being on the engine. The train consisted [\*\*152] of four mail cars, baggage, passenger coaches, and a Pullman. About two miles west of Sacramento, in crossing trestle No. 2, the engine and four of the cars were thrown from the track into the slough. Clark, the engineer, and four soldiers were killed. The jurisdiction to try and punish the parties who were guilty of murder in this dastardly affair belongs to the state. It is only for you to ascertain who were the parties to the conspiracy that brought about this terrible result, that you may determine who were responsible for the minor offenses involved in the stoppage of the United States mails and interstate commerce. You will recall the testimony of the boy Sherburn, who drove the wagon carrying Worden and others out to a point near trestle No. 2 just prior to the time [\*754] the wreck occurred, and the testimony of Knoblauch, Reed, and Winney as to the declarations and conduct of the parties who, the testimony tends to show, were sent out by the American Railway Union along the line of the road, and for a purpose. What was that purpose? To guard the road, or to wreck that train? It is for you to determine.

Another of the means alleged in the indictment to promote, [\*\*153] carry out, effect, and execute the conspiracy is (9) "by loosening, removing, and displacing the rails of the tracks of said railroad."

Trestle No. 2, Near Sacramento.

The following testimony relates to the track at trestle No. 2, near Sacramento:

Mr. Baldwin, who testified that he saw the wreck of delayed train No. 4 shortly after the catastrophe, testified that he made a little diagram of the position of the rails. The north rail was swung over across the south rail. It apparently

had been forced over, lifted over. He found there, right at the joint a nut, three washers, and two spikes. They were loose.

Red Bluff.

The following was testified to as having occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that the spikes and the bolts were pulled out of a rail on the main line. This was between 1 and 2 in the morning of July 1st last. He went to the coal bin, just a little ways from the turntable, to see if the coal bin was all right, and there were four men right across the other side of the fence, working at the rail. They had shovels there. He went to the turntable, and stood there talking to the [\*\*154] fireman, when the four men came down with those tools in their hands. They came right from the direction where the rail was tampered with. He could hear them working with shovels, scratching away dirt and covering it up. He was not there more than a couple of minutes. He went back to the roundhouse. He saw John Shade, John Salstrum, Robert Lang, and George Werhing coming from this direction. Mr. Shade had a claw bar in his hand. Salstrum and Lang had a shovel apiece. He did not see anything in Werhing's hands. A claw bar is a long bar made in the shape of a claw, for drawing spikes. He examined that rail an hour afterwards, and found the spikes pulled from a rail and a half, the bolts taken from the fishplates and left lying on the ground. He put the bolts back himself.

J. F. Heaney, called for the defense, who was at Red Bluff on the occasion detailed by the preceding witness, with reference to the displacing of the rail states that he may know John Shade, Salstrum, Lang, and Werhing, but he does not know them by name; that he is pretty sure that they did not belong to the A.R.U. at that time; that they had no connection with him there.

Another of the means alleged [\*\*155] in the indictment to promote, carry out, effect, and execute the conspiracy is (10) "by greasing the rails."

[\*755] Red Bluff.

The following testimony was given as to what transpired at Red Bluff with reference to greasing of rails:

John Kelly, a fireman employed by the Southern Pacific Company prior to the strike, but who went out with the A.R.U., testifies on direct examination, as to the part he took, with other members of the A.R.U., in greasing the rails north of Red Bluff, that on July 1st, at about 3 o'clock in the morning, he was about four miles north of Red Bluff; that he was greasing the track; that there were with him Bill Ray, Joe Hill, Clodtfelder, and Archie Montanya; that Montanya is a member of the A.R.U.; that he was on strike; that they went about four miles further than Red Bluff, and greased the track, coming towards Red Bluff, for about three miles. This was done with engine oil. Both rails were greased. They just rubbed it on. There is a down-hill grade from Red Bluff, going north, for about a mile, and then for about three miles it is up hill. It is a pretty steep grade. They got the oil with which they greased the rails from the roundhouse, [\*\*156] -- from the oil tanks. They had oil cans from the engines, and buckets with which to carry it. They got through greasing about 4 o'clock. There was not any oil left in one of the tanks.

The witnesses J. C. Shepler, William Sheehan, and J. B. Hill all deny that they participated in, or know anything about, the greasing of the rails as testified to by the witness Kelly.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (11) "by stopping trains upon railway crossings, and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches."

Sacramento.

The following testimony was given as to what took place at Sacramento with reference to obstructing one of the railway crossings:

C. A. Newton, night yardmaster for the Southern Pacific Company, called for the United States, testified on direct examination that the three main tracks leading into the Sacramento depot were blocked with trains and engines from the 1st to the 11th of July, -- blocked east, west, and south. One of the tracks leads in off the Western Division, called "South"; one leads off the Sacramento Division, called [\*\*157] "East"; one leads in from the California Pacific, "West," -- that is called the "California Pacific Division." These tracks lead both in and out. The roundhouse is situated north of the depot. There are several tracks leading from the roundhouse to the main track. There is one track direct to the roundhouse from the main track, that one can go to the roundhouse straight from, without doing any switching. There is another track that one can switch in off the main track, and there are several switches to throw to get to the roundhouse. All of these tracks were blocked between the 1st and 11th of July. By "blocked" he means trains and engines were on the tracks. The engines were dead; they had no steam in them. Some of the trains were made up, and some of them, that were coming into the yard, [\*756] that were stopped on the main track. On Sunday, the 1st of July, the yard was in such a condition that trains could not pass through the Sacramento depot east or west. He knows the exact condition of the tracks on the 1st of July last. The main track from the west had, on the crossing leading to the roundhouse, No. 4 engine, just about to enter the crossing to go to the roundhouse. [\*\*158] Then there was an engine that came in on No. 69, on the 29th of June. Both pilots came together right on the crossing. That blocked the main track to the roundhouse and another track, that we used to let freight trains up and down on, called the "old main track." Crossing Washington, which is on the other side of the river, in Yolo county, the coaches, the smoker, and the mail car and the baggage car stood there in Washington. One of the coaches was shoved part of the way in on a siding, and the other coaches run down against it. That blocked that track. On the Western Division there were some three or four freight and passenger trains down on the main track, mixed up, part on a siding and part on the main track. On the Sacramento Division the cars were sandwiched in every way, -- off the track and on the track, coaches among sleepers, and fruit cars, and everything else. That made the blockade complete. As night master he has control of the movement of all trains and engines in the Sacramento yard.

The testimony of Greenlaw, Compton, Knox, and others is to the effect that they had nothing to do with this obstruction, and that the American Railway Union did not countenance, [\*\*159] nor was in any way responsible for, it.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (12), "by compelling the employes of said railroad company to leave their trains, shops, and the work of said company while in the performance of their duties."

Oakland.

The following testimony relates to what occurred at Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland, called for the United States, testified on direct examination that men in his shops were prevented from doing any work. He cannot name any of the parties who prevented his men from working, but they had a machinist working in there, with a helper, and they were taken out by a crowd that came in there. He could not now recognize any of the faces of the crowd. The same witness further testified that the crowds that came in took out the men that they had to work there, -- pushed them out of the shops, -- they took hold of them with their hands and shoved them out. Cannot name or designate or identify any men who were forced out of the shops, who were forcibly prevented from working. Cannot identify the men by their employment in the shops. [\*\*160] This was on the 4th of July. He saw four men pushed out. He saw the stationary engineer taken out. He was surrounded by a gang that were forcing him out, -- telling him to get out. They put their hands on him. Referring to the persons who thus prevented the men in the shops from working, the witness stated that one would not see the same parties there [\*757] every time. In the forenoon there were probably 150 or 200 men. In the afternoon, about 4 o'clock, he should judge about 300 came in, and so it was. There were small bodies coming in frequently. These crowds were composed partly of strikers, -- he would not say largely.

Red Bluff.

The following testimony relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, called for the United States, testified that on the 4th of July he did not remain in the continued occupancy of the telegraph office at Red Bluff. The telegraph office is his office. It is under his charge. It is the railroad office, the railroad wires doing the business of the railroad company. Mr. Clodtfelder and Mr. Demmick took possession of the office, and ordered him and his [\*\*161] operator out. This was at 9:30 of the morning of the 4th of July. He asked them what for. He was told, "We have decided to close this office, and we want you to get out," and they locked it up. He immediately had the operator cut out the instruments, and locked the office and left. Both Demmick and Clodtfelder are operators, and have run both stations. They were on the strike at the time. Before the strike they were brakemen. He regained possession of the telegraph office at 6 o'clock in the evening. They, Clodtfelder and Demmick, opened it for their own use at about 1 o'clock. He was notified that he could come back to the office. Mr. Harper, another brakeman, -- a striker, -- also a leader, notified him that they had opened the office for their own benefit, or their own use, and he could come there and see nothing was disturbed. He did so. He went down after about half an hour. Mr. Demmick and Mr. Clodtfelder, Mr. Shepler, Mr. Heaney, came in at one time. Those that remained there all the time were Clodtfelder and Demmick. They used the office. His operator was telegraphing for them. The lines were working, and they were using the keys. Clodtfelder and Heaney both [\*\*162] told him he could have possession of the office. Then he took possession. The night operator comes on at 6 and they took possession of the office until probably half past 9 or 10 of the evening, when another gang came in and said they had decided to close the office, and out they went. The other gang were Frierson and Roller. Both were brakemen. They were on strike. He thinks there were others there with Frierson and Roller at that time. There were about 17 there after the station train had left for Sacramento, -- about, 15 or 17. He does not recollect who was there particularly, but those two men came to the office. They said: "We have decided to close your office." He asked, "For what reason?" They could not give any reason at first. They went out and consulted together, several of them, outside on the platform. They held a meeting. They came back, and he said, "Have you decided why you are going to close me up?" or "that you are going to close me up?" They said, "Yes, we are going to close you up for the same reason that you were closed this morning." That is all the reason they gave.

[\*758] J. C. Shepler, called for the defense, admits that the telegraph office [\*\*163] was taken possession of by the men who were out on strike that day, and that he may have been there while it was in the exclusive control of those men, but he denies that he, with others, put Jones out, or told him he had to get out.

Finally, the indictment charges that it was sought to promote, carry out, effect, and execute the conspiracy "by using all such other forcible means as to them should seem expedient to prevent for an indefinite period the use of the said railway for the transportation of the mails of the United States and interstate commerce."

Red Bluff.

The following testimony relates to Red Bluff:

Miller Hooks.

John Kelly, previously referred to as one who went out on the strike at Red Bluff, and who had been previously employed by the Southern Pacific Company as a fireman, called as a witness for the government, testified on direct examination that he recollects train No. 15 coming into Red Bluff about half past 4 (of July 1st last). The train was prevented from going on. The bolts were taken out of the Miller hooks. He only noticed Will Ray, Richard Roe (Joe Hill) engaged in doing this, and he was there himself. He noticed what they were doing. These [\*\*164] men whom he has mentioned were members of the A.R.U. They were among the strikers. They took the bolts out of the Miller hooks, so that they could not pull the train, and marked them all, and put them in a sack.

Joseph B. Hill, the person referred to in the testimony of the witness Kelly, just quoted, was called for the defense, and stated that he was present when the Portland express came in; that he did not see any safety chains or brake chains taken off, nor did he see any one at work taking off bolts or nuts from that train. He states, however, that all

this could have been done without his knowing it; that there was quite a crowd around the station at the time the train came in. He states that he did not see Ray there, nor Richard Roe.

Dunsmuir.

The following testimony relates to Dunsmuir:

Ejected from Telegraph Office.

James Agler, superintendent of the Shasta Division, from Red Bluff to Ashland, Or., called for the United States, testified as to his being dispossessed from the telegraph office at the station as follows: That he has a telegraph office at the station at Dunsmuir; that on the 4th of July, from 10:30 until 12:15 p.m., he was dispossessed. After detailing [\*\*165] how a crowd of 30 or 40 strikers rushed into the office, the witness states that Conductor Seyler was the man who did the talking. He said: "We are in here, and we have got to have this office." He (witness) said: "I don't see how you can [\*759] do this." Seyler replied: "We have got to have it." That it looked a little shaky. Agler told the dispatcher: "You had better go home. It seems they want the office, and I guess they are going to have it." He went out. Agler passed out, and went upstairs to the resident engineer's office, and was upstairs there 25 or 30 minutes. The witness then goes on to state who was there, and whether those persons had been in the employ of the railroad company. To the question, "Q. Were these men who came into your office at that time then in the employ of the Southern Pacific Company?" he answers, "A. No, sir; they were not. Q. Of what class was the crowd made up? A. Employes; train men, car men, machinists of all the different departments. There was a large crowd of them. A Juror: Q. Men who had been in the employ of the company? A. Yes, sir. Q. They were not at that time? A. No, sir." The witness further states that after going [\*\*166] upstairs he saw these people get the engine No. 1,762 out of the roundhouse, which pulled the irregular train out of Dunsmuir. At 12:15 he was notified by them that they were ready to turn the office back to him. He thereupon went to the office. At 12:20 they pulled out.

Dunsmuir.

The following testimony also relates what took place at Dunsmuir:

Irregular Train from Dunsmuir to Sacramento.

The same witness (Agler) testifies as to this irregular train substantially as follows: That on the 4th of July a train went from Dunsmuir to Sacramento. Did not know who ordered it out. Saw the engine getting out. Saw the train made up. It was not a regular train. Had an engine and two cars. The instructions from the railroad officials concerning the movement of trains came to no other person than himself. He states that he received no instructions from his superiors in the Southern Pacific Company concerning the movement of this train. The train went without his authority. Witness knew a good many men that went on that train. Some 45 left Dunsmuir on it. He saw one Seyler, Littlefield, Walther, Roberts, Price, Parrish. These men had been employes of the railroad company [\*\*167] up to the 28th of June. H. L. Walther was running the engine. Conductor Seyler seemed to be in charge of her. He noticed guns in the car. He had a conversation with Seyler just before the train pulled out. He explained to him that the coach and engine that was carrying Mrs. Stanford from Red Bluff to Dunsmuir had the right of way, and that he did not want him to leave there with a train that he had no right to. Seyler replied, "We have received a message from Sacramento and must go there, and are going." Then they pulled out.

In this connection it might be well to refer to the following telegram, Exhibit No. 687, which reads:

"July 4, 1894. To H. L. Walther, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

[\*760] It will be noticed that this telegram is dated on the same day that this irregular train in charge of Walther left Dunsmuir.

Walthers, who was called for the defense, admits that on the morning of July 4th a message arrived in Dunsmuir, purporting to have come from Mr. Knox at Sacramento, asking the men to come down, -- asking their assistance, -- to come to Sacramento. [\*\*168] Walthers testified as follows:

"The message was read to all those present, members and outsiders, men and employes in general, and they all signified their intention of going. They all said they would go, and they left in a body, went down there, prepared an engine and coach, met the mail agent, and told him we were going to Sacramento. I could not state positively whether we asked him to go with us, or whether he put the question."

He states that they had a number of guns on the train, -- perhaps 35. He states that the train was running without any orders at all. There were no orders from the company to run the train. He further states that he does not think Mr. Agler could have stopped his train.

M. C. Roberts, who was the secretary of the American Railway Union at Dunsmuir, of which Walthers was president, testifies to substantially the same facts as Walthers.

You will also recall that there is testimony with reference to an irregular train from Truckee to Sacramento, which arrived at the latter place about July 4th; and another from Lathrop to Sacramento, on the night of July 10th. You will observe that, so far, I have not alluded to the testimony tending to show [\*\*169] acts committed by the defendants at Palo Alto on the 6th of July, although the indictment brings that place within the range of such testimony as I have referred to tending to show the means to be employed in carrying out the conspiracy. I have, however, deferred reference to this testimony until we reach the consideration of the overt acts charged to have been committed by the defendants, when such testimony may then be considered in the double aspect, namely, as tending to show, not only the overt acts required to be established by the statute, but also as tending to show the means whereby the conspiracy was to be carried out.

I have now directed your attention to the testimony which it is claimed by the prosecution tends to establish the means whereby the conspiracy was to be promoted, carried out, effected, and executed; that is to say, it is claimed that such means were, in fact, used, and were part and parcel of the conspiracy; that the acts concerning which testimony has been given were unlawful acts, which entered into and became part of the crime of conspiracy to prevent the use of the Southern Pacific Railways in this district for the transportation of the United States [\*\*170] mails and interstate commerce. I have, however, not attempted to exhaust the testimony presented for the prosecution and defense, nor are you to conclude or assume that, in your deliberations upon these matters, you are confined to the testimony referred to by me. I have merely attempted to classify the general features in such a way that you may be able to apply the law, as I shall give it to you, to the facts as you may find them. It is for you to determine beyond a reasonable doubt, not alone from the testimony I [\*761] have alluded to, but from any and all parts of the evidence, whether any one or more of such acts as have been referred to was or were, in fact, committed; and, if you should so determine, whether any one or more of them was or were the means conspired to be used to promote, carry out, effect, and execute the object of the conspiracy, as charged in the indictment. For, after all, the real question is not whether these acts were, in fact, committed, but whether these acts, or some of them, was or were the means to be used to carry out the conspiracy. You will observe that it is not necessary, to establish this element of the conspiracy, that you should find [\*\*171] that all the means charged were to be used in carrying out its purpose. If you find beyond a reasonable doubt that there was a conspiracy to commit the offense charged, it will be sufficient if you also find beyond a reasonable doubt that one of the acts charged was to be the means for carrying out and executing that conspiracy. We have now arrived at a stage of the case where we may properly refer to the law applicable to the conditions which it is claimed prevailed during the occurrences now under consideration. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United States. Moreover, it is no defense in this case to say that the railroad company obstructed and retarded the passage of the mails, or entered into a conspiracy in restraint of trade and commerce. If the railroad company violated the law, it should be punished, but we are here now charged with the sole and only duty of determining whether these defendants at the bar have been engaged in a conspiracy as charged in the indictment; and [\*\*172] the testimony to which I have referred, bearing upon this question, suggests certain questions of law, to which I will now direct your attention.

The testimony tends to show, as you will remember, that the boycott of the Pullman cars was declared by Debs at Chicago on June 26th, to take effect at noon on that day. It did not, however, take effect at Sacramento until about midnight or early on the morning of the 27th, and its first operation in this district appears to have been to stop train No. 84 at Sacramento, due to leave there at 10:25 in the morning, for Oakland, by the way of Tracy. This train, when regularly made up, carries a Pullman car which comes from Chicago to Sacramento on train No. 2. The Pullman car is destined for Los Angeles, and is carried from Sacramento to Lathrop, where it is attached to the train for Los Angeles. The members of the American Railway Union at Sacramento refused to handle this car, by reason of the boycott declared by Debs at Chicago the day before. This train carried the mails. Knox, speaking of this train, says:

"They [meaning the railroad officials] refused to allow the engine to go without the Pullman car on. We tried to induce **[\*\*173]** Mr. Wright to let her go, because it was a mail train, and we did not want to be parties to holding the mail. He refused."

He says further:

"That train stood there until leaving time, when it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of **[\*762]** the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks."

A mail train is a train as usually and regularly made up, including, not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such a train, as a mail train, would include the Pullman car as a part of its regular make-up. The obligation which the railway company is under, as a common carrier, to employ such resources as it can command in the transportation of passengers, mails, express, and freight, without unnecessary delay, is one thing. The claim that the employes of a railroad company have the right to say what cars shall constitute a train is quite another thing. It is not for the employes of the railroad company to say whether a Pullman car shall **[\*\*174]** constitute part of a mail train or not.

In the case of U.S. v. Clark, in the district court of the United States for the Eastern district of *Pennsylvania (23 Int. Rev. Rec. 306)*, Fed. Cas. No. 14,805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. \* \* \* The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go, but the passenger train should not. They uncoupled the mail, and afterwards coupled it, for **[\*\*175]** the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads, it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars to accompany it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that, while nominally they permit the mail car to go, they really, by preventing the transit of other passenger cars, interfere with the transportation of the mails."

The law as thus declared by two learned judges many years ago is the law to-day. Apply that law to this [\*\*176] case as you find the facts to be in relation to train No. 84 at Sacramento on June 27th; and also to train No. 2 at Sacramento on June 29th; and train No. 4 at Sacramento on June 28th, 29th, and July 3d, 4th, and 11th; train No. 69, from Red Bluff to Sacramento, on June 29th, stopped at Broderick; train No. 16, from Portland to San Francisco, stopped [\*763] at Dunsmuir, June 28th; train No. 15, from San Francisco to Portland, stopped at Red Bluff, July 1st; train No. 42, Santa Rosa to South Vallejo, stopped at South Vallejo, July 12th; train No. 19, from San Francisco to San Jose, July 5th; train No. 13, stopped at Palo Alto, July 6th; train No. 33, known as the "San Ramon Train," stopped at Sixteenth street station, Oakland, July 3d; and train No. 1, known as the "Santa Cruz Narrow-Gauge Train," at Alameda pier, July 4th. I do not understand that the testimony tends to show that there was any mail or express on the three local trains stopped in the vicinity of tower No. 2, West Oakland, on July 4th.

It is contended on behalf of the defense in this case that the boycott declared by the American Railway Union on June 26th, and the strike declared on June 29th, were in themselves [\*\*177] lawful. The logical effect of this contention would be that, if any unlawful acts were committed during the pendency of the boycott and strike, they should be separated from these general and admitted acts of the American Railway Union. This feature of the case calls for the most careful consideration of the law as declared by the courts.

In [Thomas v. Railway Co., 62 Fed. 803](#), Judge Taft, in the United States circuit court for the Southern district of Ohio, determined that the boycott of Pullman cars, as it was enforced in Ohio, was unlawful. The facts in that case were substantially the same as in this case. He said:

"The employes of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They came into no actual relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury [\*\*178] upon the companies that was very great, and it was unlawful, because it was without lawful excuse. All the [HN11](#)[ employes had the right to quit their employment, but they had no right to combine to quit their employment, in order thereby to compel their employer to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the character or reward of their services. It is the motive for quitting and the end sought thereby that makes the injury involved unlawful, and the combination by which it is effected an unlawful combination. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. Boycotts, though unaccompanied by violations or intimidations, have been pronounced unlawful in every state of the United States where the [\*\*179] question has arisen, unless it be Minnesota. They are held to be unlawful in England. \* \* \* But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting all the employes of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest [\*764] degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employes. The merits of the controversy between Pullman and his employes have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was [\*\*180] to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise. More than this, the combination is in the teeth of the act of July 2, 1890, which makes it an offense to restrain interstate commerce." [62 Fed. 821](#).

In U.S. v. Elliott, [Id. 801](#), Judge Thayer, in the United States circuit court for the Eastern district of Missouri, states the law in the following language:

**HN12** [+] "A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means. [Pettibone v. U.S., 148 U.S. 197, 13 Sup. Ct. 542; Com. v. Hunt, 4 Metc.](#) [\*\*181] (Mass.) 111."

In Arthur v. Oakes, 11 C.C.A. 209, [63 Fed. 324](#), Mr. Justice Harlan of the supreme court of the United States, sitting in the circuit court of appeals for the Seventh circuit, states the law in the following terms:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of its employes would be unlawful which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, and thereby disabling or rendering unfit for use engines, cars, and other property in their hands, or by interfering with their possession, or by actually obstructing their control and management, or by using force, intimidation, threats, or other unlawful methods against the receivers or other agents, or against employes remaining in their service, or by using like methods to cause the employes to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall [\*\*182] not be unreasonably obstructed. They endanger the personal security and personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter and attempt to enter the service of those against whom such combinations are specially aimed."

The right of labor to organize for its own benefit and protection, as I have before explained to you, is a substantial right, which the laboring class is entitled to enjoy to the greatest extent consistent with the rights of others. The limitation is that in the exercise of this right the property and rights of others must be respected. It remains for you to apply this law to the facts in the case at bar.

I will now direct your attention to the overt acts charged against these defendants.

#### Overt Acts of Defendants.

George Cornwall, an engineer on train No. 13, going down towards San Jose, and No. 6, coming up, on the 6th of July, testified to what occurred at Palo Alto as follows: That he was the engineer on [\*765] train No. 13 on the 6th day of July last; that they took No. 6's time in coming back. It was express train No. 13, from San Francisco. It went down as [\*\*183] far as this side of Santa Cruz crossing. They carried the mail and had a mail car. He saw some mail on the train. \* \* \* They stopped at all the main points going along. Left San Francisco at 3:15, he thinks. He returned towards San Francisco. He backed up a train to Lawrence's Station. He ran around it, got on the other end, and pulled it back. Going down, the mail car was on behind; when he was coming back it was in front, next to the engine. He backed up from Lawrence's Station towards Palo Alto station, at the switch there. Reached Palo Alto somewhere about 5 o'clock. It was after 5, pretty near 6, when he got back there. He don't recollect exactly. The mail had not been taken off the train before it reached Palo Alto. At Palo Alto they stopped, uncoupled, and went in on the turntable track. He knows Clark, Rice, Mayne, and Cassidy. \* \* \* He first saw some of them on his engine. This was at Palo Alto. He went in to turn around on the turntable. He got about half way turned around, and was saying something to the brakeman, -- he forgets what it was, -- when Mayne said: "Never mind those fellows. We will take charge of this engine." Then Mayne began to shake the [\*\*184] grates, and was going to open the blow-off cock. He could not get it open until he loosened the nut underneath. He was trying to loosen it with a coal pick. Cornwall told him: "Don't break it off. Take the monkey wrench and unscrew it." Rice gave him the wrench, and told Mayne to go under it, as he knew more about it than he did. Mayne then went under. These men let the water out of the tank; shook the fire down. Mayne tried it, but thinks Rice did most of the shaking. Mayne was on the engine. He said he would take charge of her, and commenced shaking the grates. Cornwall was saying

something to the brakeman, and he said: "Never mind them. We will take charge of this engine." Cornwall looked around, -- that was the first time he saw them, -- and he saw three or four of them there, and seven or eight on the ground; seven or eight all together. He saw Rice, Cassidy, and Mayne. He knows a man named Clark, but is not acquainted with him much. Believes he knows him by sight. Could not swear whether Clark was there with those men or not. The hose was uncoupled. One side was uncoupled by Cassidy; the other side, he could not say. The hose was uncoupled between the tank and [\*\*185] the engine. The effect of uncoupling that hose was to let the water all out of the tank if the valve was open on top. \* \* \* It is necessary to go under this engine to unscrew the nut. He handed Mayne the wrench, and saw him go under. The turntable was then turned half around. Cornwall wanted them to turn it around, that he might clean the fire out of the ash pan, so that it would not burn the grates. Some one did turn it around, and he ran her over the pit where they put out the ashes. Then the boys went up to the other engine, and, as everything was all quiet down there, he put his coat on, and went up too. He had a talk with Mayne about the mail. He called him to one side and spoke to him. He said: "Mr. Mayne, aren't you [\*766] afraid you will get into trouble by stopping the mail?" Mayne said: "Damn the mail. You ain't got no mail." Cornwall said: "You have fired on this train long enough to know we do carry the mail all the time." And then Mayne went away, and that is the last Cornwall saw of him to speak to him. \* \* \* There is very seldom a Pullman car on that train. His engine was killed at that time. After these men left his engine, they went up to Mr. Minatt's [\*\*186] engine and killed that one. He saw what was going on there. He saw her blowing off, and some one backed her on a split switch in front of the ticket office, and blew the steam right into the ticket office. The back drivers were partly off. It would take five minutes to get her on, if they had another engine there to do it. Could not see who was on the Minatt engine from the time it was moved from its position. There was too much steam. He could not say that these same men were there. Supposes they were. He believes he heard some of them say: "Come on. Let us go up to the other engine." \* \* \* On cross-examination the witness stated that he did not tell those men that they were interfering with the United States mail train when he was on the turntable there, for the reason that there were so many around there he did not think of it. \* \* \* Nothing said, to his knowledge, at the time that engine was killed, with reference to its being a mail train, by either party. It had a mail car on, though, and mail in it going north and south. \* \* \* This conversation that he had with Mayne was close by the depot, on the other side of the track. He called him to one side, close by where [\*\*187] Minatt's engine was. No one else heard it. Is sure that no one else heard it. That is the only conversation he had with him. Did not have a conversation with him to this effect, in which he said: "Aren't you afraid you will get into trouble about stopping the mail?" Mayne said: "No. I did not know there was any mail on the train, and, if there was, it is pretty late in the day to tell me." \* \* \* Thinks there were more than four there. About seven or eight. Somewhere in that neighborhood. He had one brakeman and a fireman. He thinks he was helping turn around. He did not offer any resistance to them. They came on him so quickly that he did not think about much of anything.

W. R. Sowers testified that he was a brakeman in the employ of the Southern Pacific Company. That he was such on the 6th of July last. That he was on Conductor Gould's train as brakeman. Saw what happened to the engine of that train run by Cornwall. When they came into Palo Alto, coming back as No. 6, he cut the engine off from the train and took it over to the turntable, and started to turn it. He had the engine half or a third turned around, when there were five or six different parties came from [\*\*188] over the field, -- five or six different men. They were all together, as close as they could be, coming towards the engine. They came over and proceeded to kill the engine. One of the gentlemen in the crowd spoke to him and said: "You don't need to turn it any further. You remain in Palo Alto over to-night. You have run far enough to-day." Does not know who that man was. He was a tall gentleman, with a black mustache. He would know any of the gentlemen that were [\*767] with them at that time by sight, but not by name. (The defendants Mayne and Cassidy being directed to stand up, the witness identified them both.) After one of these men told him that he need not turn the engine further, but that he could remain in Palo Alto, the light-headed gentleman (Mr. Cassidy), who was on the left-hand side of the engine, and had something in the way of a hammer or monkey wrench, assisted to uncouple the hose between the tender and engine. He could not see who was on the other side. Did not notice who was in the cab. Mr. Mayne was in the cab, but what he was doing the witness does not know. He could not see unless he got into the cab. There were a couple of others in the cab at [\*\*189] that time. Nothing else occurred, that he knows of, outside of uncoupling the hose between the tender and the engine, letting the water out, and blowing the steam off. Saw the steam escaping. Water escaped from the boiler. That engine was killed at that time. The fire was shook down. He supposes it was all out. \* \* \* Mr. Mulder was in the cab before these men reached the cab. Mulder was helping to turn the engine. Mulder was on the

opposite side from where he was. After they killed the engine, these men went from his engine over to Palo Alto station. \* \* \* They were going at a moderate little trot. They were not running very fast, or anything like that. \* \* \* Is acquainted with the signals that are used on passenger trains. This was a regular train.

Peter Mulder was fireman on the engine of which Cornwall was engineer. He was present when Cornwall's engine was killed, but he is unable to identify the defendants as being the persons who assisted in killing the engine. The material parts of his testimony are as follows: Having returned as far as Palo Alto, they stopped the train, uncoupled, backed it on the turntable, to turn the engine around, because she was headed [\*\*190] the other way, and they were going to San Francisco. As soon as the engine stopped on the turntable, he got off the engine, to help push the engine round. \* \* \* He was alone on the back end. He don't know whether any more were on the forward end with Long, or not. The engine was between them. Just as he put his shoulder to the lever to push it around, he saw some men coming from the back end of the engine towards the engine. They were walking pretty fast. Some were running a few steps. Some of them went up on the engineer's side of the engine; some of them stayed behind the engine. One of them turned open the air pipe under the engine while he was pushing around. He looked round and saw the air was blowing out of the hose. He stepped up and shut it off. Some one says, "God damn, leave that alone." With that this person opened it again, and Mulder went up on the engine. They pushed the engine partly around a little ways. Mulder got up on his seat, and sat down to see what was going on. Cornwall, the engineer, at the time he (Mulder) got up, was sitting on the seat box. \* \* \* The engine was killed. Saw the squirt hose used. One of the men said to him, "Turn that squirt [\*\*191] hose on." Mulder said, "No, I will have nothing to do with this," and with that he reached by him and turned it on himself. They opened the door of the fire box, and squirted the water over [\*768] the fire, and killed it. They had already shaken the grates a little, although the fire was not altogether shaken down. This person was trying with a pick to open the blow-off cock, and the engineer told him it could not be opened that way; he would have to take a wrench and go underneath and loosen the nut before he could turn it. The engineer handed him a monkey wrench. One of the men went underneath and loosened the nut, and they blew the water out of the boiler and out of the tank. There were engaged in that work at least six, if not seven. He thinks there were seven, -- three behind the tank when he left there, and four in the cab when he got up there.

T. J. Long was also a brakeman on the train pulled by Cornwall's engine. He accompanied the engine to the turntable, to assist in turning it around. He saw the killing of the engine, but is unable, like Fireman Mulder, to identify the defendants, or to distinguish the part they took in the disabling of the engine. He noticed [\*\*192] some of the men coming down in the train with him. He recognizes Cassidy as being a member of that party. Cannot say as to Mayne, nor as to Rice and Clark.

C. B. Gould was the conductor of the train whose engine, of which Cornwall was engineer, was killed. He states that he left San Francisco on July 6, 1894, at 3:05, on train No. 13. The time was 2:20, but they waited for troops to take to San Jose. It was a mail train, having a mail car. He had baggage and express and mail, smoker, and, he thinks, two or three coaches. He had no Pullman cars, -- no Pullman sleepers. He went as far as Santa Clara crossing, left the troops there, and returned immediately as No. 6; that is, on train No. 6's time. Those were his orders. It was a mail train returning. Left Santa Clara crossing at 5:15 p.m. Reached Palo Alto at 5:55. The engine had been backed all the way from Santa Clara crossing, there being no turntable between that place and Palo Alto. Arrived at Palo Alto, he left the train on the south switch. The engine was sent on to the turntable, to turn her, so that the pilot and engine would come first. He told his men to go up with the engineer and fireman and turn the engine, [\*\*193] while he went to the depot to get orders, if there were any to obtain. It was his intention to take that train right through to the city. Did not intend to stay at Palo Alto more than about 10 minutes. It would have taken them only a couple of minutes had they not turned the engine. He had just arrived at the ticket office when some one sang out to him, "I saw some one running towards your engine." He ran to the engine from the ticket office. When he reached her she was virtually dead. Saw Rice, Clark, Cassidy, and Mayne around the engine when he reached it. Rice was shaking the grate. The hose of the engine was cut; that is, it was uncoupled. That is the hose between the tender and the engine. Did not see who cut it. While examining the engine, he noticed Cassidy, Mayne, and others make a run for the other engine, of which Engineer Minatt was in charge. She had just arrived with a train from San Francisco. He followed them up. When he arrived, it also had been killed. With the exception of seeing Rice [\*769] shaking the grate, he did not see any of the acts connected with the killing of the

two engines. In answer to the question, "Did you have any conversation [\*\*194] with Mr. Rice and Mr. Clark in respect to this act?" the witness stated:

"After this was over I went to the telegraph office and notified the super-intendent what had been done. Shortly after, I passed down track to go to my train, which was on the main track below, to protect it, and I met Mr. Rice and Mr. Clark coming towards the ticket office. I said to Mr. Rice and Mr. Clark: 'Well, you have tied us up.' He said: 'Yes. Well?' I said: 'This is a very wrong, unlawful act, and you have no grievances whatever against the Southern Pacific company, or any other company;' that is, speaking of them as the A.R.U.'s. I says: 'It was only to make the railroad companies whip Pullman, or, in other words, bring him to their terms.' He stated: 'We had orders to do this, and we have done it.'"

Rice, Clark, Mayne, and Cassidy remained around Palo Alto about 20 or 30 minutes. Possibly it might have been more. There were no other engines at Palo Alto save those two. They laid there until the next morning, until they got another engine to pull these engines to Menlo Park, and filled them with water and got up steam, so that they were able to make the trip out. Got back to San Francisco [\*\*195] about half past 10 or 11 o'clock the next morning. Were due in San Francisco the night before.

Edward J. Kincaid, assistant agent at Palo Alto, called for the United States, testified that his attention was attracted to Cornwall's engine by hearing some one holler, "They have got it." He was then in the ticket office, and ran out, and saw four or five men coming from the field between the county road and the railroad track. He saw the men climb over the fence and climb up on the engine. The engine was half turned around on the turntable, and he did not see what they were doing to her, but he states that steam soon began to issue from the boiler, and the engine was turned clear around and run onto a side track, and there the steam was blown off. This crowd remained around the engine probably about six or seven minutes. They then went to Minatt's engine, and climbed up on the engine and told them to get out, -- told the fireman to get out. They then let the steam and water out of the engine. Knows Rice, Clark, and Cassidy by sight. Does not know the others. He saw them there at the time these two engines were killed. Saw them mingling with the crowd. The only one he saw [\*\*196] on the engine, to recognize, was Rice. Did not see either Clark or Cassidy on the engine. But they could have been on the engine, and still he might not have seen them. Could not see what they were doing. On redirect examination he states that he could see that the hose between the engine and tender was uncoupled, hanging down, and he could see under this hose where the water had run out.

Robert Dannenburg, station agent at Palo Alto, also agent for Wells, Fargo & Co., and Western Union operator, called for the prosecution, testified that he saw some five or six men coming from the county road towards the railroad track east, at a sort of dog trot; that they went to Cornwall's engine; that he saw them stop the turntable when about half way around, but he could not distinguish [\*770] who it was that stopped the turntable. He saw steam escaping from the engine, and shortly after they (the crowd) turned the engine clean around, and ran over the ash pit. Ran her off the turntable, right onto the track. He could not see any particular thing that was done on the engine from where he was. The crowd then went over to Minatt's engine. He saw Rice board that engine, and also [\*\*197] another man. All that he saw with reference to Minatt's engine was two or three men climbing the engine. He did not see the rest of it. But, probably two or three minutes after these men boarded the engine, he saw steam blowing off from the engine. Saw Cassidy, Mayne, Clark, and Rice in the neighborhood of those engines at these times. Distinguished them near Minatt's engine, but could not see what they were doing.

E. F. Minatt, called for the United States, testified that he was an engineer on the Southern Pacific system, running on the Coast Division; that he was an engineer on or about the 6th of July last. He went off on No. 17 according to the time card, which leaves San Francisco at 4:25 in the afternoon, but he thinks they were 10 minutes late on that day. Pulled a local train between San Francisco and Palo Alto. He reached Palo Alto that day. He was to return from Palo Alto the next morning at 6:40. Four of the boys, -- two of them fired for him before, and he pulled the other two as brakemen (Cassidy and Mayne, they both fired for him, and a fellow named Rice, a brakeman, and Clark), -- they came to his engine. He was down on the ground and they got up. He thinks [\*\*198] Rice -- he is not sure -- commenced to shake the fire out of the grates down into the ash pan. Cassidy and Mayne commenced to uncouple the hose. They wanted to blow the water out of the boiler, and let it out of the tender. At this time Rice came around, and the witness said to him, "Boys, don't damage the engine." They said they would not; only let the

water out of the boiler and tender; and they did that. There was such a crowd around there that he could not tell how many there were. Cassidy, Mayne, Rice, and Clark were actively taking part and killing the engine. Mr. Cassidy, he thinks, and Mr. Mayne, both had a hand in loosening the blow-off cock. The witness gave them a wrench to do it, -- to unloosen the blow-off cock, -- and they did it. After they had blown the water partly out of the boiler, -- the water was about out of the tender, -- the young man Clark got up and backed her out through an open switch. Witness hollered to him, and told him the switch was wrong. He got the tender out and the back drivers out over this switch, then he undertook to run her ahead on the main track, and derailed her. She stood there like that until they sent a man from San Francisco [\*\*199] to pull her on. \* \* \* There were some exclamations made of "Hip, hip, hurrah for the A.R.U." There was such a crowd around there -- such a jam -- that he could not get to the engine from the crowd. Who it was did it he don't know. The only man that he saw at the time of the hurrahing was Clark. The latter was on the engine after he derailed her. He did not see Mayne or Cassidy or Rice at the time the hip, hip, hurrahing was going on. After the excitement [\*771] was over, he saw the parties going towards Menlo Park. He saw Mayne, Cassidy, Rice, and Clark going towards Menlo Park.

Edward C. Murray, a witness for the United States, testified that he was the railway postal clerk who accompanied train No. 13, coming back on the same train, -- it coming back as No. 6; that is, on No. 6's time. He testifies as to its being a mail train. He did not see the engine killed. He testifies as follows:

"Q. State what mail, if you recollect, you took up or delivered on the way down, or coming back. A. I received mail from all stations between San Francisco and Lawrence, inclusive. Coming back, I received mail from Lawrence, Mountain View, and Mayfield. Q. Did you have a mail [\*\*200] car, or not, on that train? A. Yes, sir. Q. Did you reach Palo Alto? A. Yes, sir. Q. Did you go beyond Palo Alto that day. A. Not that night; no, sir. \* \* \* Q. What time were you due at San Francisco with that mail? A. 6:26."

As to Conversations Had with Clark.

R. M. Donne states that he was a conductor on the Coast Division, and that he was at San Mateo on the evening of the 6th of July, and the morning of the 7th. He saw Cassidy, Rice, and Clark there that night (the 6th). Also saw a gentleman with them who weighed about 180 pounds; had a smooth face; was heavy set. He had a talk with Clark that night. He spoke to him outside of the ticket office, and asked him if he would come inside of the office with him (Donne), and that he would introduce him to their assistant general passenger agent, and several others. He acceded, and came in. F. S. Douty, the secretary of the Pacific Improvement Company; H. R. Judah, the assistant general passenger agent; L. H. Fuller, an employe in the ticket auditor's department; the station agent, Mr. Peckham; and his assistant, Mr. Elmes, -- were present. He testifies as to the conversation as follows:

"I introduced Mr. Clark [\*\*201] to these men, and he was asked by Mr. Douty why they wanted to tie up the Coast Division. Well, he said that the boys on the other side were complaining that they were not taking any part in this affair; that they had the other side tied up, also the Narrow Gauge, and they had to do something on this side. Q. Do you recollect anything further that was said at that time? A. Nothing more, except that he was asked whether they had any grievances against the Coast Division. He replied by saying, 'No; not particularly.'"

F. S. Douty, a witness on the part of the government, narrates the conversation that passed between himself and Clark as follows:

"I think the conversation with Mr. Clark, after the introductions were over, by asking his reasons for this strike, -- to get some information. He said that the Pullman Company had not treated the boys right, so that they had to strike on any road where Pullmans were used. I suggested that no Pullmans were used on this division. He said, in effect: 'No; but the boys on the other side' (referring to the Oakland side) 'are kicking, thinking that we are not doing enough here; so we have to keep our end up.' I said, 'Why do you have [\*\*202] to keep your end up?' 'Well, we belong to an organization where we have taken an oath to stand together.' And he added, 'If we don't win this fight, I will go to China.' I said, 'Have you got any complaint to make against this Coast Division?' He said, 'No; there is no kick coming.' I asked him if it was what he called a 'sympathetic strike'; if he was striking in sympathy. He said, 'Yes,' he thought that was substantially it, so far as the Coast Division was concerned. I am giving the essence of my recollection, without trying to repeat the language."

[\*772] Upon being asked if he could give the names of any other person with Clark, he says one was called Cassidy; another, Rice.

H. R. Judah, who was present at the conversation carried on between Mr. Douty and Mr. Clark, thus gives his version of it:

"Mr. Douty took the leading part in opening the conversation, and in a general, pleasant way, asked Mr. Clark what was the object of their tying up the Coast Division. \* \* \* I cannot give the exact language, but, according to my recollection, Mr. Clark replied that the men on the other side (having reference to the Oakland side) had complained that nothing had been done on [\*203] the Coast Division in the way of tying up trains, and that they felt it necessary to do something (or words to that effect). Then Mr. Douty asked him -- I think that was the next question that was asked -- why the Coast Division should be singled out, you might say, entirely disconnected with the balance of the system, in so far as Pullman cars were concerned. Mr. Clark replied, in substance, that that did not cut any figure in the matter at that time; that they were into this fight, and that they were going to stay with it; and, furthermore, said that if they lost their cause he was going to China, -- he would not live in this country. The conversation was carried on by all of us. Questions would be asked, but I cannot recall every single question that was asked, or every answer that was given. In substance, it is the same as Mr. Douty has given, and Mr. Peckham. My memory might be refreshed if some questions were asked of me, but, in the main, what I have said covers the ground. Of course, a good deal was said to Mr. Clark, to try and persuade him to have the men cease on the Coast Division; to allow that to be an exception, as there did not exist, in fact, any cause for complaint [\*204] on the part of those employed on the division, and if they continued in blocking the traffic it must be on the ground of sympathy, and nothing else. Then Mr. Clark reiterated -- in fact, he reiterated on two or three occasions -- the fact that they were in this fight, and they proposed to see it through."

The witnesses Peckham and Elmes testify substantially to the conversation between Clark and Douty as detailed above.

On page 644, vol. 8, of the testimony, appears the following admission:

"Mr. Monteith: We will admit that both of these defendants are members of lodge No. 345 of the American Railway Union, located in San Francisco. Mr. Knight: Q. In the latter part of June? Mr. Monteith: In all of June, and all of July last. Mr. Foote: Let that be taken down. Mr. Monteith: We will admit anything of that kind. We have nothing to conceal about it. Our side of the case is an open book."

Testimony on Behalf of Defendants.

The defendant John Mayne testified: That he was a locomotive fireman on the Coast Division last spring. That he was hostler at San Francisco at the time of the strike. He had charge of the engines after they came in off the road, put the necessary [\*205] supplies on, put the engines in the house, and got other engines out to go out on the road. Had been employed on the railroad about six years. Understands all the duties of a fireman. Was familiar with the rules of the company at the time of the strike. Belonged to the Brotherhood of Locomotive Engineers and the American Railway Union. That he attended meetings of the A.R.U. in the last part of June. He belonged to the San Francisco lodge. He attended a meeting on the night of the 29th of June. The lodge met on Mission street, between Fifth and Sixth. After the admission of members there was a message read stating that the members of the local union 310, in Oakland, had declared a strike on account of the discharge of [\*773] men. He identifies Exhibit No. 296 as the message, as near as he could remember. It reads as follows:

"June 29, 1894, Oakland, Calif. To J. E. Riordan, 118 Sixth St., Room 71, S.F.: American Railway Union three hundred ten has declared strike takes effect twelve thirty a.m. to-day. T. J. Roberts, President."

He further states that he thoroughly understood the cause of the strike. His union never participated in the boycott against the Pullman [\*206] cars. With regard to the strike at Oakland, a motion was made, and a standing vote taken, that they indorse the action of the Oakland Union in striking, and that a strike be declared by their lodge for the reinstatement of the discharged employes. So far as this lodge was concerned, there was no other purpose in striking than the reinstatement of these men. After the strike was declared, the next action of the meeting was the

appointment of an executive committee. Harry Bederman, George Elliott, Pete Farrel, and W. S. Runyon were appointed on that committee. They had full power to manage the strike, and all the business connected with it. The union did not reserve any authority to itself. After the appointment and authorization of this committee, the next business transacted was a discussion in regard to handling the mail. This was on the night the strike was ordered. The meeting of the 29th, some one made a motion (he thinks, Mr. Achorn) that the lodge take a vote as to whether they were willing to handle the mail or not. A standing vote was taken. Everybody in the hall stood up, in favor of handling the mails at all times. He did not hear any reference to interstate commerce. [\*\*207] After that they held a meeting every day, -- sometimes twice a day. He thinks he attended all meetings up to the afternoon of the 6th. Does not remember anything that was done, except routine business connected with the admission of new members, and so forth. He was in San Francisco on the 5th of July. Saw Cassidy every day. Has known him about six years. For the last three years he has been almost a constant companion of Cassidy. They roomed together, boarded together, and were together evenings, and all the time. Saw him on the 5th. On the morning of July 5th, Cassidy and he, after breakfast, attended a meeting of the union. After the meeting they went around town, -- he does not know just where, now; and in the afternoon they went to Valencia street, and took the train bound south, -- bound for San Jose. He invited Cassidy to go down with him to San Jose, to see his folks, on the morning of the 6th. He had been with him all the morning from the time they got up. He asked the agent if there would be a train along in the afternoon. The latter informed him there would. He asked him for two tickets to San Jose. He notified him they were only carrying passengers as far [\*\*208] as Mayfield. He bought two tickets for Mayfield, and handed one to Cassidy. He thinks it was about 3:30 o'clock when he got on the train. It was an ordinary train. There was a mail car on the hind end of it. Next to the mail car there was a car load of passengers. He tried to get into the car, and did not know what was in it, and the brakeman refused him admission. He then took the car immediately ahead of that. Cassidy did not get in at the same time he did. He saw Clark and Rice on that day. [\*774] When he got on at Valencia street, he was reading a newspaper. When he finished with the paper, he went into the smoking car. When he arrived there, there were quite a few people in the smoking car. There he saw Rice and Clark, and he believes Cassidy was in the smoker at the time. Rice and Clark and a number of passengers were talking to a captain of the militia, -- he supposes it was a captain; he had stripes on his uniform. Just before they got to Redwood, the captain left the car, and went back through the train. Fred Clark came and sat down alongside of him. They chatted along the way. Mayne asked him where he was going. He said he intended to go to San Jose, [\*\*209] but he only had a ticket for Mayfield. When they got to Mayfield he and Cassidy got off, and Rice and Clark also, and a great number of the other passengers. The first thing they did was to look for a conveyance. He found nothing there; no wagons around the depot. They talked the matter over, and finally concluded to go back to Palo Alto. There are a couple of crews which run in there, and they thought they could get definite information of whether train 19 was coming out that afternoon or not. If there was no way of getting to San Jose they would have come back to the city. They walked up the county road very leisurely. Stopped just outside of Mayfield, and looked at the cavalry. There was a company of cavalry camping just outside of Mayfield. Walked up the county road to almost opposite Palo Alto. Cassidy complained that his shoes were hurting him, and wanted them to wait a moment. They jumped over the fence; sat down under a tree in University Park. They stayed there 10 or 15 minutes. While they were sitting there an engine came in on the turntable. They all got up and looked at it. He does not know whether he suggested that they go and kill it, or whether Rice did. [\*\*210] He knows that Rice and he got over the fence, and went over and killed the engine. Rice and he were in advance of the rest. He did not know whether the rest were coming or not. He did not look around to see. They got to the engine first. He went up on the left-hand side, over the timber of the turntable, and thinks Rice went on the right-hand side. When he got on the engine, Engineer Cornwall was standing up with his head out of the window. There was a fireman, a man with overalls, and a man in citizen's clothes, turning the turntable. Cornwall was saying: "A little ahead. How is that, pard? A little ahead," -- repeating that remark two or three times. He (Mayne) said to him, "That is all right, George; she is all right where she is." Cornwall said, "What are you going to do?" Mayne replied, "Nothing in particular." Cornwall then stated, "Don't hurt my engine, boys." To which Mayne replied, "We have no intention of hurting your engine." That was all that was said. He caught hold of the grates, and started to shake the fire out. He tried to shake the fire out. It was in such a condition -- it was all clinkered -- that it would not go through the grates. He was about [\*\*211] to give it up, when the idea struck him that he could put it out with a squirt on the left-hand injector. He put on the injector, turned the water into the fire box, and drowned the fire out. \* \* \* About the time he thought the fire was quenched, he asked the engineer if he thought [\*775] it would be safe to let the water out. The latter stooped down, looked into the fire box, and said he thought

it was all right. Then Mayne took the coal pick, and tried the blow-off cock. He suggested to the engineer that they had better run the engine off the turntable, on account of the blow-off pipe coming against the timber of the turntable, and it would scald the paint on the engine. He approved of that, and the table was turned back for the straight track, and the engineer ran the engine off over the ash pit. Mayne tried the blow-off cock, and he could not open it. The engineer told him he would have to get down underneath with a monkey wrench, and loosen up the nut in the bottom of the car. Cornwall gave him the monkey wrench. Mayne jumped down on the ground. It was necessary for him to get under the engine, so he took off his hat and coat, and handed it to the engineer. The [\*\*212] latter held his hat and coat while he opened it, and until he got back on the engine. \* \* \* There was nothing said, further than what he has stated. The engineer requested them not to hurt his engine. He said: "Boys, don't hurt my engine. I like my engine." And he repeated that remark two or three times, and that was all that was said. \* \* \* Just before he finished killing the engine, Rice came back from up towards the depot, and after he let about four inches of water out of her he went back into the cab, and opened the blow-off cock. Then he stood by the water glass, and watched it until the water went out of sight in the glass. Then he closed the blow-off cock. He did not know but what the fire might kindle up again, and he was not taking any chances on it. He shut the blow-off cock as soon as the water went out of sight. After they killed the engine, Rice and he walked up to the depot. There was a crowd of 20 people up there, he supposes. Just before they reached the depot, the other engine that Minatt was running was blowing out against the side of the stationhouse, -- a little station, six by six. He said to him (Rice): "That won't do. You don't want to spoil the [\*\*213] paper in there." He mentioned the paper and instruments. Rice went up on one side, and he on the other. They moved the engine ahead a foot, so that she would clear the building. Rice was moving the engine, and he had hold of the brake wheel. About the time they moved a foot, some one hollered, "Whoop! you are off the track." They stopped immediately. The water was all, or nearly all, out. He kicked the blow-off cock shut, and got down off the engine. He had nothing whatever to do with the killing of Minatt's engine. He got up there. The fire was all out, and the water almost all out. He had a talk with Engineer Cornwall just before they left Palo Alto. Cornwall was up at the station. Cornwall called him over, and said to him: "Pard, don't you think you have done something pretty serious, in stopping the mail?" Mayne replied: "No, I don't think so. Even so, this is a hell of a time to tell us of it now, when it is all over." Mayne then turned round and walked off. He denies having made the statement testified to by Cornwall, as follows: "I says, 'Mr. Mayne, aren't you afraid you will get into trouble by stopping the mail?' He [Mayne] said, 'Damn the mail. You ain't [\*\*214] got no mail.'" Cornwall replied, "You have fired on this train long enough to know [\*776] we do carry the mail all the time." He, on the contrary, affirms that statement was just exactly as he gave it, word for word. He further states that he had no knowledge of any mail train coming along at that time, and before he killed the engine; did not know that a mail train was due at that time on the schedule. Is familiar with the surroundings at Palo Alto. The train could not be seen from that turntable. He remained in Palo Alto about 40 minutes; then went over to Menlo Park. Cassidy told him he had heard that Haydock had telegraphed to the constable at Palo Alto to arrest them. The first thing they thought of was to move over to Menlo Park. They stayed in Menlo Park an hour, or may be an hour and a half. Ate supper over at the hotel. Then they tried to get a rig. The livery stable man wanted too much. He suggested to the boys that they walk over to Redwood; there was a friend of theirs over there who would drive them up. They walked to Redwood, got a rig there, and they were taken as far as San Mateo. Got to San Mateo between half past 10 and 11 o'clock. Did not do anything [\*\*215] in particular, only sat on the platform and talked with the boys around there. On cross-examination the defendant Mayne testified that he bought his ticket as far as he could go in the direction of going home, -- to San Jose. The distance from Mayfield to San Jose is 16 miles. He was there when the train left. He made no effort to get on and buy a ticket from the conductor, and proceed on his journey, when he saw it going further on, although his destination was his home, at San Jose. He did not think they were carrying passengers any further than Mayfield. He supposed he would find the regular Palo Alto crews at Palo Alto. He knew that two trains laid over at Palo Alto at night. From where he was, he could not see the train coming back. He did not hear it coming. He was over 200 yards from the road. He admits that, although he neither heard nor saw the train come in, he suddenly started over to kill a live engine. He had fired on that train. He knew that Cornwall sometimes went on that engine. He knows all the engineers on the Coast Division. He states that he did not know what engine was on the train that he went up on, but he admits that he knew train 6 was due at [\*\*216] San Francisco at 6:30. Being asked to repeat the circumstances under which he jumped up and ran for that engine, he states that when the engine came over the switch, just before she came on the turntable the cylinder cocks were opened, and made a lot of noise, -- steam blowing off. They got up and looked at the engine. He don't know now

whether he suggested to Rice, or the latter suggested to him, "Let's go and kill her." They did not debate the question at all. They went and killed her.

"Q. What was your purpose in killing a live engine there? A. I have not any good reason for killing the engine. We wanted to be doing something, I suppose. We wanted a frolic. Q. Did you not know that a live engine could pull a train? A. I did. Q. And a dead one could not? A. And a dead one could not. Q. Did you not kill that engine because you did not want it to pull a train? A. I did not know one was there at the time. Q. Did you not know that a live engine usually pulls a train? A. Yes, sir. Q. Did you not know that to kill that live engine was to disable it from pulling a train? A. I did. Q. Yet you killed it, and for no purpose? A. I did not know there was a train [\*\*217] there, attached to it. I thought it was a light engine. [\*777] It is customary -- Q. I do not want anything about customary. I want you to answer my question. Now, Mr. Mayne, did you not know that to kill that live engine would render it impossible to take a train that might be there back to San Francisco? A. I did not think anything about it. Q. You just went up there out of pure deviltry? A. Yes, sir. Q. You did not know whether there was a train or not, or whether or not there was any mail, or not any mail, and you killed it out of pure deviltry? A. I did not debate it. I thought it was a light engine, and went over there and killed her for no reason whatever. Q. Did you not do it for that reason? A. For deviltry? Q. Yes; from a pure spirit of mischief and deviltry. A. I guess you might as well put it that way. Q. Without caring what the result was? A. That is as good an answer as any."

Referring to the conversation he had with Cornwall about the mail, he states that, if he had stopped the mail, it was too late to start it then. The engine was killed. He made no effort whatever to repair that which he was told was a violation of the law. He left [\*\*218] because he did not know just exactly what the consequences would be. He went off towards San Francisco. He went in company with these men, -- Clark, Cassidy, and Rice.

John Cassidy, the other defendant on trial, testifies, substantially, that he was a fireman employed by the Southern Pacific Company last spring; that he had been such for about eight years; that he belongs to the Brotherhood of Locomotive Firemen, and San Francisco Lodge, No. 345, of the American Railway Union; that he attended the meeting of that union on June 29th; that "every one was there, and there was a telegram read about the Oakland strike, or about the Oakland boys going out on a strike, and we indorsed their action. \* \* \* We all decided to strike." He states that most of the members of his union were employed on the Coast Division; that at that meeting, besides ordering a strike, they took in a number of new members, and appointed a crew to go down, and go out with the mail the next morning. They also appointed a mediation committee. The witness' statement as to the invitation tendered him by Mayne to go down to San Jose on July 6th, to visit Mayne's folks, agrees substantially with the latter's testimony. [\*\*219] The witness further states that he first saw Rice and Clark on July 6th, somewhere between San Mateo and Redwood City, on the train. He got off the train at Mayfield. He states that, after an ineffectual attempt to secure a conveyance to San Jose --

"We concluded to go back to Palo Alto. We went back to Palo Alto to see if train 19 was coming through. When we got up about opposite Palo Alto, on the way up, there was some cavalry marching back from Santa Cruz; some regular troops. They were in the field. We stopped and talked with them for quite a while. We walked on until we got opposite Palo Alto. I had a new pair of shoes on. I told the fellows they could go on the rest of the way, if they wanted, but I was going to take my shoes off. I climbed over a fence in the park, took off my shoes, and laid down in the grass. They all got over the fence, too. We were sitting there, or laying there, telling stories and yarns, for about ten or fifteen minutes, when we heard the cylinder cock of an engine blowing off. Some of the boys got up, and looked over the fence, and saw an engine. Some one says, 'There is an engine on the turntable,' and they started for it. I had to [\*\*220] put my shoes on, and, I believe, my coat. Somebody else had their coat off. They were on the engine before I got there. I got there just as quick as I could, after I got my shoes and coat on. There were two or three in the cab of the engine. I went around to the left, and started to take off or uncouple the tank hose. [\*778] I turned around, and happened to see Minatt's engine up the track, and I quit my job, and went up to Minatt's engine. Q. What did you do with Minatt's engine? A. Between Minatt and myself, we loosened the blow-off cock, and blew the water out. The fire was already out of it. I had to crawl under the engine to do it. The tank valve was open, and the water was running out of the tank. Q. Did Minatt offer any resistance? A. No; he stood off, and seemed tickled. He gave me a wrench to do it; told me where I could get one. I had to lay down flat. There is an air drum under the deck, and I had to lay down flat, and crawl under it. Q. Was Mayne there when you

were killing that engine? A. No, sir. Q. Who was there besides Minatt and yourself? A. I think Clark and I did that job. I am pretty sure Clark was there."

Upon being asked by his [\*\*221] counsel if he knew what the indictment charged, he states that he does, but that he never did anything except to let water out of that engine. Respecting the cause of his leaving Palo Alto that night, he states that somebody in the crowd told him that the division superintendent, Haydock, had ordered the constable at Palo Alto to arrest them; that they thereupon went over the county line to Menlo Park, and subsequently to San Mateo. On cross-examination, being interrogated as to his motive in running towards Cornwall's engine to assist in killing her, he states that he went because the others did; that he helped kill the engine because the rest of them were killing it; that he simply wanted to be with the crowd, or, to use his own language, "I suppose I wanted to be in the swim." Respecting the killing of Minatt's engine, he states that he thinks he was the first man to reach it; that when he did he got up and looked into the fire box; the fire was out of her; he started in to open the blow-off cock; that the effect of this was to let the water out; that he let nearly all of the water out; that the effect of this was to kill the engine. He also states that, while engaged in killing [\*\*222] Minatt's engine, he heard some one holler, "Three cheers for the A.R.U." Being asked to give his reason for killing Minatt's engine, he states it was "to have a good time." He states that he would have done what he could towards killing Cornwall's engine if the other engine (Minatt's) had not been there. Further, that he did not think of any consequences that might ensue, from the killing of those engines, to him; that the only reason that prompted him to kill those engines was "to keep my hand in."

F. W. Clark, one of the defendants in the indictment, but not on trial, was called for the defendants, and testified, briefly, that he was a brakeman on the Coast Division of the Southern Pacific Company, and had been such for about two years; that he was braking between San Francisco and Monterey, on freight trains; that he knows Rice; that he met him on the morning of the 6th of July at the A.R.U. meeting; that, after the meeting adjourned, Rice asked him to go down to San Jose with him; that they could not get tickets for San Jose, and they went as far as Mayfield. On cross-examination he states that he met Cassidy and Mayne on the train between San Mateo and Redwood City; that he [\*\*223] stayed with them all the while until they got back to San Mateo; and that he finally came to San Francisco with them. He states that, when they got opposite University Park, Cassidy complained that his shoes were hurting him. They thereupon climbed over the fence [\*779] of the park, and sat down under the shade of a tree. After they had been sitting there about 10 minutes, he heard a noise of steam blowing out of a cylinder cock of an engine. He rose up, and looked over, and saw an engine going on to the turntable. Either Mayne or Rice said: "There is an engine. Let's kill her." They jumped over the fence. He followed them over to the engine. When he reached there, Mayne got up on the engine, -- on the left side, -- and Rice on the right side. He got up behind Rice. Cornwall was standing by his lever. He had his head inside the cab when he (Clark) first got up. Then he stuck his head out, and said to some one in front of the engine: "What do you want? A little more ahead. Is she all right, pard?" He believes it was Mayne who replied, "She is all right where she is, George." Cassidy was some distance behind. The witness stayed on Cornwall's engine about a couple [\*\*224] of minutes, and then went over to Minatt's engine. Cassidy also went over. Rice got on the engine, and Cassidy did also. The witness got up behind Cassidy. There was no fire in the fire box; the witness took out a hammer from the tool box on the tank, and disconnected the hose, and took the packing off, and pulled the strainer out, and put the hook and hammer and strainer back in the box. Respecting the conversation he had with Douty, Judah, Donne, and others in the station at San Mateo, he testifies that he was called by Conductor Donne, who said to him: "There is some people in here who want to have a talk with you." He asked: "Who are they?" Donne said: "Douty and Judah. They want to talk with you about the strike. This is no put-up job to put you in a hole, or anything like that." He states that he went in, and was introduced to Douty and Judah. He believes it was Douty who asked them what they had struck for. He told them members of the Oakland Union had been discharged for refusing to handle Pullman cars, and that the union over there had ordered a strike, and Union 345, in San Francisco, -- the union he was a member of, -- indorsed the action of Union 310, and they [\*\*225] struck. Douty said: "What do you want to strike on the Coast Division for? They are not hauling any Pullman cars here." And he wanted him (Clark) to go back to San Francisco, and declare the strike off. Clark told him (Douty) that he could not declare the strike off. Respecting his motive in participating in the killing of the engines, the testimony is as follows:

"Q. (on cross-examination). What was your idea in killing these engines, where there were no Pullmans running on that end of the line, unless it was to help out those that were striking against the Pullmans? A. I do not know. I

was with the others, and helped them. Q. You were with the others, and helping them? A. Yes, sir. Q. And you had no idea in the world as to what the object was? A. No, sir."

This concludes the review of the testimony relating to the overt acts charged as having been committed by the defendants at Palo Alto. It is for you to say whether it establishes, to your satisfaction and beyond a reasonable doubt, that the defendants committed any of the following acts charged in the indictment, to wit:

"(1) Forcibly taking possession and control of the \* \* \* engines \* \* \* of the Southern [\*\*226] Pacific Company, by (1) \* \* \* (2) threats, intimidations, [\*780] personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employes of said company having charge of said \* \* \* engines, etc.

"(2) By forcibly and violently preventing the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto, by (1) gathering in crowds, etc.; (2) by placing physical obstructions upon said track; (3) by displacing the switches; (4) by forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employes while engaged as aforesaid; (5) by uncoupling the cars of said trains, and disconnecting the same; (6) by removing said cars from said tracks; (7) by withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein [I call your particular attention to this charge, and the evidence relating to the overt acts under this head]; (8) by displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery [\*\*227] of said engines and cars, and of the rails of said railways, thereby loosening said rails; (9) by other violent, forcible, and unlawful acts and means, to the grand jurors unknown."

As I have before explained to you, it is not necessary that the government should prove that all the overt acts charged were committed by the defendants. If you are satisfied, beyond a reasonable doubt, that they committed any one of the acts charged, it will be sufficient, in determining this element of the offense involved in the crime of conspiracy.

Whether the Southern Pacific Company was in June and July last a railway corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, and express matter, in this district, and over the lines of the railways mentioned in the indictment, is a material fact in the case, which you will be required to find, as you would any other material fact; that is to say, beyond a reasonable doubt. You will recall the testimony of Mr. Lansing upon this point, and the circumstance that no testimony was offered to contradict him in any particular.

[\*\*228] Whether train No. 6, at Palo Alto, on July 6th, was a regular or special train, is immaterial. The testimony tends to show that the train carried the mail, and that it was being carried over post route No. 176,002. Whether some other train was annulled or not is also immaterial. The question is, was this train carrying the mail under the sanction of the postal authorities? If it was, it was a mail train, in the eye of the law.

It is claimed by counsel for the defendants that an intent to obstruct and retard the passage of the mails cannot be inferred against these defendants unless they had knowledge that the mails were on board the train when they killed the engine on the turntable. In the language of Judge Grosscup in the case of U.S. v. Debs (in the United States district court of [Illinois](#)) [65 Fed. 211](#):

"I do not concur in this view. The defendants are properly chargeable with an intent to do all the acts that are the reasonable and natural consequence of the acts done. The laws make all the railways post routes of the United States, and it is within every one's knowledge that a large portion of the passenger trains on these roads carry the mail. There is no stretch, [\*\*229] therefore, either of law or common sense, to presume the person obstructing one of those trains contemplates, among other intents, the obstruction of the mail."

[\*781] And in [U.S. v. Debs, 64 Fed. 764](#), Judge Woods, of the circuit court, uses the following language:

"The rule is well settled, and I suppose well understood, that [HN13](#) [↑] all who engage, either as principals, or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the

criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. \* \* \* 'A man may be guilty of a wrong which he did not specifically intend (says Bishop), if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable.'"

But, [\*\*230] aside from this responsibility which the law imposes upon those who commit unlawful acts, the testimony of the defendants Mayne and Cassidy may throw some light on the real motive that actuated the defendants in killing the engine at Palo Alto. When asked by Cornwall if he did not think he had done something serious in stopping the mail, he admits that he replied: "Even if I have, this is a hell of a time to come and tell us of it, after it is all over." And, hearing, soon after, that an officer was after them, the defendants fled from that place. Was the motive "deviltry," as Mayne says; and the consequences, whatever they might be? Was the motive "to be in the swim," as Cassidy says; and the consequences, whatever they might be? If so, how can they avoid responsibility for such consequences?

In considering the testimony relating to the whole case, it will be for you to determine whether there was such a general conspiracy as claimed by the government, involving the members of the American Railway Union in a combination and concert of action to obstruct and retard the passage of the mails of the United States, and in restraint of trade and commerce, and whether these defendants [\*\*231] were members of that conspiracy; but you may also consider the case, under this indictment, within much narrower limits. A conspiracy may have been formed between these defendants, at Palo Alto, while Mayne, Cassidy, Clark, and Rice were sitting under the tree at University Park, to commit an offense against the United States, in obstructing and retarding the passage of the United States mails, and in restraint of trade and commerce, and in pursuance of such conspiracy they committed the overt act of killing the engine on the turntable; and if you believe from the testimony, beyond a reasonable doubt, that they did at that time form a conspiracy to commit such an offense and committed the act they did in pursuance of that conspiracy, it will be your duty to find the defendants guilty on the facts involved in that occurrence alone, without regard to the testimony relating to occurrences elsewhere.

#### Reasonable Doubt.

This is a criminal case. HN14[] The presumption of innocence is in favor of the defendants. A mere preponderance of testimony, in a criminal case, is not sufficient to justify a verdict of guilty. The burden [\*782] of proof is upon the prosecution, and it must prove [\*\*232] every material fact, and establish the guilt of the defendants to your satisfaction, beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors, so that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the accused. By 'reasonable doubt,' I mean a reasonable doubt arising out of the evidence, and not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns are involved, -- a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. When such a doubt exists, the accused is entitled to its benefit, and should be acquitted. But where the evidence is satisfactory to the impartial mind that the crime was committed; that the defendant committed it as charged, -- when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence, properly, there can be no reasonable doubt, and the prisoner should be convicted.

#### [\*\*233] Jury Sole Judges of Credibility of the Witnesses.

Now, in relation to all the testimony in this case, you, gentlemen of the jury, are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. HN15[] A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives; by contrary evidence. And you are the exclusive judges of his credibility. In judging the credibility of the witnesses in this case (and their testimony is, to some extent, conflicting), you may believe the whole or any part of

the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in doing so consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, the relations which he bears to the government or the defendants, the manner in which he might be affected by the verdict, and the [\*\*234] extent to which he is contradicted or corroborated by other evidence, if at all, and any construction that tends to shed light upon his credibility, and to determine the amount of credence to which each statement is entitled at your hands, as reasonable and intelligent men; but, in this respect, you must remember that your power and duty to judge the effect of evidence is not arbitrary. It must be exercised with legal discretion, and in subordination to the rules of evidence. This is a government of law, and you are charged with its administration in this case without fear, favor, or partiality. An honest, fair, and impartial trial of persons accused of crime is the highest obligation we owe to society. The law, properly administered, affords protection alike to the high and the low, to the rich and the poor. Popular clamor should not direct [\*783] it, nor the insinuating influence of prejudice turn it aside. Courts never appeal to the passions, prejudices, or sympathies of a jury, in favor of a prosecution, or against the accused. They seek only equal and exact justice, and appeal only to reason. In this light only is the case presented to you by the court, and it is [\*\*235] with the utmost confidence in your reason and intelligence, and in the fullest belief that you highly appreciate the important duty imposed upon you, that I commit this case to your careful and patient consideration.

NOTE. The jury, after deliberating four days and nights, failed to agree, and were discharged. On the final ballot, 10 jurymen voted for conviction, and 2 for acquittal, upon the count for conspiracy to retard the mails, and 8 for conviction, and 4 for acquittal, on the count for conspiring to obstruct and interfere with interstate commerce.

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End of Document

## **United States v. Addyston Pipe & Steel Co.**

Circuit Court of Appeals, Sixth Circuit

February 8, 1898

No. 498

**Reporter**

85 F. 271 \*; 1898 U.S. App. LEXIS 2157 \*\*

UNITED STATES v. ADDYSTON PIPE & STEEL CO. et al.

**Prior History:** [\*\*1] Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

### **Core Terms**

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contracts, monopoly, manufacture, commerce, prices, restraint of trade, cases, pipe, interstate commerce, void, restrain, territory, covenant, parties, common law, coal, transportation, courts, bid, combinations, anti-trust, conspiracy, articles, chief justice, main purpose, reserved, tending, sales, sugar, salt

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

#### [HN1](#) Antitrust & Trade Law, Sherman Act

If the contract of association is void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the federal antitrust law if the trade it restrains is interstate.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

#### [HN2](#) Price Fixing & Restraints of Trade, Horizontal Market Allocation

No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Partnership Agreements

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

Tax Law > ... > Sales & Exchanges > Business Property > Trade & Business Property

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

### **HN3** **Types of Contracts, Partnership Agreements**

A contract for the sale of property or of business and good will, or for the making of a partnership or a corporation, is not saved from invalidity if it can be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. In such cases the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

### **HN4** **Monopolies & Monopolization, Attempts to Monopolize**

In order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Real Property Law > Construction Law > General Overview

### **HN5** **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

An agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > ... > Exports & Imports > Duties, Fees & Taxes > General Overview

International Trade Law > General Overview

### **HN6** **Antitrust & Trade Law, Sherman Act**

Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. Contracts in restraint of such solicitations, negotiations, and sales are contracts in restraint of interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

### **HN7** Antitrust & Trade Law, Sherman Act

The negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce, and so within the regulating power of Congress even before the transit of the goods in performance of the contract has begun.

**Counsel:** J. H. Bible and Edward B. Whitney, for the United States.

Frank Spurlock, for appellees.

**Opinion by:** TAFT

## Opinion

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[\*278] Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, delivered the opinion of the court.

The first section of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890 (26 Stat. 209), declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopoize, or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. The fourth section of the act gives the circuit courts of the United States jurisdiction to hear and determine proceedings in equity brought by the district attorneys of the United States under the direction of the attorney general to restrain violations of the act.

Two questions are presented [\*\*2] in this case for our decision: First. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? Second. Was the trade thus restrained trade between the states?

The contention on behalf of defendants is that the association would have been valid at common law, and that the federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 Sup. Ct. 540, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control, and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. [\*\*3] Whether or not there is substance in such a distinction, -- a question we do not decide, -- it is certain that, **HN1** if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of [\*279] trade, it is within the inhibition of the statute if the

trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] App. Cas. 25; *Hornby v. Close*, L.R. 2 Q.B. 153; Lord Campbell, C.J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; Hannen, J., in *Farrer v. Close*, L.R. 4 Q.B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance **[\*\*4]** of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified **[\*\*5]** and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

Chief Justice Parker, in 1711, in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, 190, stated these objections as follows:

"First. The mischief which may arise from them (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. **[\*\*6]** Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."

**[\*280]** The reasons were stated somewhat more at length in *Alger v. Thacher*, 19 Pick. 51, 54, in which the supreme judicial court of Massachusetts said:

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils **[\*\*7]** of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in *Alger v. Thacher* have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain [\*\*8] covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, [\*\*9] only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. [\*281] This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.

In a case of this last kind, *Mallan v. May*, 11 Mees. & W. 652, Baron Parke said:

"Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights [\*\*10] of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good will, and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry. \* \* \* And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. \* \* \* In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards [\*\*11] having a rival in the same business."

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the

partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to [\*\*12] the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. Under the first class come the cases of *Mitchel v. Reynolds*, 1 P. Wms. 181; *Fowle v. Parke*, 131 U.S. 88, [9 Sup. Ct.](#) 658; *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 534; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Cloth Co. v. Lorsont*, L.R. 9 Eq. 345; *Whittaker v. Howe*, 3 Beav. 383; *Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419; *Tode v. Gross*, 127 N.Y. 480, 28 N.E. 469; *Beal v. Chase*, [\*282] 31 Mich. 490; *Hubbard v. Miller*, 27 Mich. 15; *National Ben. Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N.W. 806; *Whitney v. Slayton*, 40 Me. 224; *Pierce v. Fuller*, 8 Mass. 222; *Richards v. Seating Co.*, 87 Wis. 503, 58 N.W. 787. In the second class are *Tallis v. Tallis*, 1 El. & Bl. 391, and *Lange v. Werk*, 2 Ohio St. 520. In the third class are *Machinery Co. v. Dolph*, 138 U.S. 617, 11 Sup. Ct. 412, Id., 28 Fed. 553, and *Matthews v. Associated Press*, 136 N.Y. 333, 32 N.E. 981. In the fourth class are *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, and *Hitchcock v. Anthony*, Id. 779, both decisions of this court; *Navigation Co. v. Winsor*, 201<sup>\*\*131</sup> Wall. 64; *Dunlop v. Gregory*, 10 N.Y. 241; *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335. While in the fifth class are the cases of *Homer v. Ashford*, 3 Bing. 322; *Horner v. Graves*, 7 Bing. 735; *Hitchcock v. Coker*, 6 Adol. & E. 454; *Ward v. Byrne*, 5 Mees & W. 547; *Dubowski v. Goldstein*, [1896] 1 Q.B. 478; *Peels v. Saalfeld*, [1892] 2 Ch. 149; *Taylor v. Blanchard*, 13 Allen, 370; *Keeler v. Taylor*, 53 Pa. St. 467; *Herreshoff v. Boutineau*, 17 R.I. 3, 19 Atl. 712.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that [HN2](#)<sup>↑</sup>] no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner v. Graves*, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this [\*284] branch of the law (see Lord Macnaghten's judgment in *Nordenfeldt v. Maxim Nordenfelt Co.*, [1894] App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of [\*285] protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse [\*283] the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which [\*286] it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore,

that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. In *Mitchel v. Reynolds*, 1 P. Wms. 181, the leading early case on the subject, in which the main object of the contract was the sale of a bake house, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, **[\*\*17]** Chief Justice Parker laid down the rule that it must appear before such a covenant could be enforced that the restraint was not general, but particular or partial, as to places or persons, and was upon a good and adequate consideration, so as to make it a proper and useful contract. Subsequently, it was decided in *Hitchcock v. Coker*, 6 Adol. & E.454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one, and that the operation of the covenant need not be limited in time. More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some cases by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. *Whittaker v. Howe*, 3 Beav. 383; *Cloth Co. v. Lorsont*, L.R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 535. See, also, *Fowle v. Park*, 131 U.S. 88, [9 Sup. Ct. 658](#); [Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419](#). But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose **[\*\*18]** of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have **[\*284]** set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it. The cases assuming such a power in the courts are *Wickens v. Evans*, 3 Younge & J. 318; [Collins v. Locke, 4 App. Cas 674](#); *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (U.C.) 540; [Kellogg v. Larkin, 3 Pin. 123](#); **[\*\*19]** [Leslie v. Lorillard, 110 N.Y. 519, 18 N.E. 363](#).

In *Wickens v. Evans*, three trunk manufacturers of England, who had competed with each other throughout the realm to their loss, agreed to divide England into three districts, each party to have one district exclusively for this trade, and, if any stranger should invade the district of either as a competitor, they agreed "to meet to devise means to promote their own views." The restraint was held partial and reasonable, because it left the trade open to any third party in either district. In answer to the subjection that such an agreement to divide up the beer business of London among the London brewers would lead to the abuses of monopoly, it was replied that outside competition would soon cure such abuses, -- an answer that would validate the most complete local monopoly of the present day. It may be, as suggested by the court, that local monopolies cannot endure long, because their very existence tempts outside capital into competition; but the public policy embodied in the common law requires the discouragement of monopolies, however temporary their existence may be. The public interest may suffer severely while new competition **[\*\*20]** is slowly developing. The case can hardly be reconciled with later cases, hereafter to be referred to, in England and America. It is true that there was in this case no direct evidence of a desire by the parties to regulate prices, and it has been sometimes explained on the theory that the agreement was solely to reduce the expenses incident to a business covering the realm by restricting its territorial extent; but it is difficult to escape the conclusion that the restraint upon each two of the three parties was imposed to secure to the other a monopoly and power to control prices in the territory assigned to him, because the final clause in the contract implies that, when it was executed, there were no other competitors except the parties in the territory divided.

*Collins v. Locke* was a case in the privy council. The action was brought to enforce certain articles of agreement by and between four of the leading master stevedore contracting firms in Melbourne, Australia, who did practically all the business at that port. The court (composed of Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) describes the scope and purposes of the agreement and the view of **[\*\*21]** the court as follows:

"The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means, -- that is, by [\*285] provisions reasonably necessary for the purpose, -- though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

No attempt is made to justify the view thus comprehensively stated, or to support it by authority, or to reconcile it with the general doctrine of the common law that contracts restraining competition, raising prices, and tending to a monopoly, as this is conceded by the court to have been, are void. The court ignores the public interest that prices shall be regulated by competition, and assumes the power in the court to uphold and enforce a contract securing a monopoly if it affect only one port, so as to be but a partial restraint of trade. The case is directly at variance with the [\*\*22] decision of the supreme court of Illinois in More v. Bennett, 140 Ill. 69, 29 N.E. 888, hereafter discussed, and cannot be reconciled in principle with many of the other cases cited.

The Canadian case of Ontario Salt Co. v. Merchants' Salt Co. is another one upon which counsel for the defendants rely. That was the decision of a vice chancellor. Six salt companies, in order to maintain prices, combined, and put their business under the control of a committee, and agreed not to sell except through the committee. It was held that because it appeared that there were other salt companies in the province, and because the combiners denied that they intended to raise prices, but only to maintain them, the contract of union was not in unlawful restraint of trade. The conclusion and argument of the court in Salt Co. v. Guthrie, 35 Ohio St. 666, hereafter stated, would seem to be a sufficient answer to this case.

Kellogg v. Larkin, 3 Pin. 123, was an early case in Wisconsin, in which the action was on the covenant of a warehouseman in a lease of his warehouse, by which he agreed to devote his services to the lessee at certain compensation, and not to purchase or store wheat in the Milwaukee [\*\*23] market. The covenant was held valid. Had nothing else appeared in the case, the conclusion would have been clearly right, because such a covenant might well have been reasonably necessary to the protection of the lessee in his enjoyment of the warehouse and the good will of the lessor. But it further appeared that this lease, with the covenant, was only one of many such executed by the warehousemen of Milwaukee to the united grain dealers of that city, to enable the latter to obtain absolute control of the wheat market in Milwaukee. The court held the latter combination valid also. The decision cannot be upheld, in view of the more modern authorities hereafter referred to.

The case of Leslie v. Lorillard, 110 N.Y. 519, 18 N.E. 363, would seem to be an authority against our view. In that case a stockholder sought to restrain the payment of an annual payment about to be made by the Old Dominion Steamship Company under a contract by which it bought off the Lorillard Steamship Company from continuing in competition with it in carrying passengers and freight between New York and Norfolk. The contract was held valid, although it had no purpose except the restraining of competition, [\*\*24] and, so far as appears, the obtaining of the complete control of the business. The case is rested on Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419, which was a case of the purchase of property and good will. It proceeds on the [\*286] general proposition "that competition is not invariably a public benefaction; for it may be carried on to such a degree as to become a general evil," and thus leaves it to the discretion of the court to say how much competition is desirable, and how much is mischievous, and accordingly to determine whether a contract is bad or not. The case is directly opposed to Anderson v. Jett, 89 Ky. 375, 12 S.W. 670, hereafter cited. It should be said that nothing appears in the report of the case to show directly that the purpose of the contract was to reserve the entire business to the Dominion Company, or to secure to it the power of regulating prices, but this natural inference from the terms of the contract is not negatived.

The case of Mogul Steamship Co. v. McGregor, Gow & Co., [1892] App. Cas. 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages, brought by a company engaged in the tea-carrying [\*\*25] trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to

customers dealing exclusively with the members of the association, and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the house of lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful [\*\*26] in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the Mogul Steamship Co. Case has in this discussion makes for, rather than against, our conclusion.

Two other cases deserve mention here. They are *Roller Co. v. Cushman*, 143 Mass. 353, 9 N.E. 629, and *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N.E. 1005. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity [\*\*27] for courts to give effect to the varying economical opinions of its individual [\*287] members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in *Telegraph Co. v. Crane*, 160 Mass. 50, 35 N.E. 98, held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe.

There are other cases upon which counsel of defendants rely, which, in our judgment, have no bearing on the issue, or, if they have, are clearly within the rules we have already stated. One is a case in which a railroad company made a contract with a sleeping-car company by which the latter agreed to do the sleeping-car business of the railway company on a number of conditions, one of which was that no other company should be allowed to engage in the sleeping-car business on the same line. *Chicago, St. L. & N.O.R. Co. v. Pullman Southern Car Co.*, 139 U.S. 79, 11 Sup. Ct. 490. The main purpose of such a contract is to furnish sleeping-car facilities to the public. The railroad company may discharge this duty itself to the public, and allow no one else to do it, or it may hire some one to do it, and, to secure the necessary investment of capital in the discharge of the duty, may secure to the sleeping-car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to, and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public. Exactly the same principle applies to similarly exclusive contracts with express companies, and stock-yard delivery companies. *Express Cases*, 117 U.S. 1, 6 Sup. Ct. 542, 628; *Stock-Yards Co. v. Keith*, 139 U.S. 128, 11 Sup. Ct. 461; *Butchers' & Drovers' Stock-Yards Co. v. Louisville & N.R. Co.*, 31 U.S. App. 252, 14 C.C.A. 290, and 67 Fed. 35. The fact is that it is quite difficult to conceive how competition would be possible upon the same line of railway between sleeping-car companies or express companies. Such contracts involve the hauling [\*\*29] of sleeping cars or express cars on each express train, the assignment of offices in each station, and various running arrangements, which it would be an intolerable burden upon the railroad company to make and execute for two companies at the same time. And the same is true of contracts with a stock delivery company. The railway company could not ordinarily be expected to have more than one general station for the delivery of cattle in any one town. It would only be required by the nature of its employment to furnish such facilities as were reasonably sufficient for the business at that place. There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement, which may be enforced by any member of the public, to [\*288] wit, that the charges allowed shall not be unreasonable, and the business is of such a public character [\*\*30] that it is entirely subject to legislative regulation in the same interest.

Having considered the cases upon which the counsel for the defendants have relied to maintain the proposition that contracts having no purpose but to restrain competition and maintain prices, if reasonable, will be held valid, we must now pass in rapid review the cases that make for an opposite view.

In [People v. Sheldon, 139 N.Y. 251, 34 N.E. 785](#), all the coal dealers in the city of Lockport, N.Y., entered into a contract of association, forming a coal exchange to prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C.J. ([page I\\*\\*311 264, 139 N.Y.](#), and [page 789, 34 N.E.](#)):

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, [Judd v. Harrington, 139 N.Y. 105, 34 N.E. 790](#); [Leonard v. Poole, 114 N.Y. 371, 21 N.E. 707](#); [De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. \(Com. Pl.\) 14 N.Y. Supp. 277](#).

In [Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173](#), five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of trade and competition, and tending to injure the public. In [Nester v. Brewing Co., 161 Pa. St. 473, 29 Atl. I\\*\\*321 102, 45](#) brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise, the contract was held void, as in restraint of trade, and tending to a monopoly.

In [Salt Co. v. Guthrie, 35 Ohio St. 666](#), the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The supreme court of Ohio held the contract void. Judge McIlvaine, who delivered the opinion of the court, said:

**[\*289]** "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon **[\*\*33]** the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are [Emery v. Candle Co., 47 Ohio St. 320, 24 N.E. 660](#), and [Hoffman v. Brooks, 11 Wkly. Law Bul. 258](#).

In [Anderson v. Jett, 89 Ky. 375, 12 S.W. 670](#), two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In [Chapin v. Brown, 83 Iowa, 156, 48 N.W. 1074](#), the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In [Craft v. McConoughy, 79 Ill. 346](#), five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. [\*\*34] This was held void, as in restraint of trade, and tending to create a monopoly. In [More v. Bennett, 140 Ill. 69, 29 N.E. 888](#), articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a consequent reduction of prices, was held void. The court said:

"A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

As already said, this case is in direct conflict with [Collins v. Locke, 4 App. Cas. 674](#), discussed above. To the same effect as More v. Bennett are [Ford v. Association, 155 Ill. 166, 39 N.E. 651](#), and [Bishop v. Preservers Co., 157 Ill. 284, 41 N.E. 765](#).

In [Association v. Niezerowski, 95 Wis. 129, 70 N.W. 166](#), the suit was on a note given in pursuance of the secret rules of an association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

[\*290] "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations."

In [Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581](#), four power companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess [\*\*36] of sales over a fixed proportion of the total sales. The contract was held void.

In [Oil Co. v. Adoue, 83 Tex. 650, 19 S.W. 274](#), five owners of cottonseed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guaranteed profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monopoly, even though the evidence failed to establish that it effected a monopoly.

In [Association v. Kock, 14 La Ann. 168](#), eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In Hilton v. Eckersley, 6 El. & Bl. 47, it was held that an agreement between 18 cotton manufacturers of submit to the control of a committee of their number for 12 months the question [\*\*37] as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In Urmston v. Whitelegg, 63 L.T. (N.S.) 455, a case in the queen's bench division, before Day and Lawrence, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at not less than any higher price fixed by the committee, on penalty of £ 10 for each violation. Day, J., said:

"If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, to the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; But the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal [\*\*38] in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employee. Where such relation exists between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection [\*291] of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the [HN3](#) [ ] contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain [\*\*39] competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are [Richardson v. Buhl](#), 77 Mich. 632, 43 N.W. 1102; [Anot v. Coal Co.](#), 68 N.Y. 558; [People v. Milk Exchange](#), 145 N.Y. 267, 39 N.E. 1062; [People v. Refining Co.](#), 54 Hun, 366, 7 N.Y. Supp. 406; [State v. Nebraska Distilling Co.](#), 29 Neb. 700, 46 N.W. 155; [State v. Standard Oil Co.](#), 49 Ohio St. 137, 30 N.E. 279; [Manufacturing Co. v. Klotz](#), 44 Fed. 721; [Distilling & Cattle Feeding Co. v. People](#), 156 Ill. 448, 41 N.E. 188; [Carbon Co. v. McMillin](#), 119 N.Y. 46, 23 N.E. 530; [Harrow Co. v. Hench](#), 83 Fed. 36; [Factor Co. v. Adler](#), 90 Cal. 110, 27 Pac. 36; [Lumber Co. v. Hayes](#), 76 Cal. 387, 18 Pac. 391.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a quasi public employment. They are [Gibbs v. Gas Co.](#), 130 U.S. 396, 9 Sup. Ct. 553; [People v. Chicago Gas Trust](#) [\*\*40] Co., 130 Ill. 268, 22 N.E. 798; [Stockton v. Railroad Co.](#), 50 N.J. Eq. 52, Atl. 964; [West Va. Transp. Co. v. Ohio River Pipe-Line Co.](#), 22 W. Va. 600; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; [Railroad Co. v. Collins](#), 40 Ga. 582; [Hazlehurst v. Railroad Co.](#), 43 Ga. 13.

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly [\*\*41] called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity [\*292] of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron

pipe amounts to a considerable percentage **[\*\*42]** of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. The details of the way in **[\*\*43]** which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themseleves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part **[\*\*44]** of the price. But this certainly does not **[\*293]** take the contract of association out of the annulling effect of the rule against monopolies. In *U.S. v. E.C. Knight Co.*, 156 U.S. [1](#), [16](#), [15](#) *Sup. Ct.* 255, Chief Justice Fuller, in speaking for the court, said:

"Again, all the authorities agree that, [HN4](#)<sup>↑</sup> in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge **[\*\*45]** unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed \$15 a ton. It could have been delivered at Atlanta at \$17 to \$18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was \$24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe **[\*\*46]** is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have must interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that [HN5](#)<sup>↑</sup> an agreement between intending bidders at a public auction or a public

letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. Breslin v. Brown, 24 Ohio St. 565; Atcheson v. Mallon, 43 N.Y. 147; Loyd v. Malone, 23 Ill. 41; Wooton v. Hinkle, 20 Mo. 290; Phioppen v. Stickney, 3 Metc. (Mass.) 384; Kearney v. Taylor, 15 How. 494, 519; [\*294] Wilbur v. How, 8 Johns. 444; Hannah v. Fife, 27 Mich. 172; Gibbs v. Smith, 115 Mass. 592; Swan v. Chorpenning, 20 Cal. 182; [\*\*47] Gardiner v. Morse, 25 Me. 140; Ingram v. Ingram, 49 N.C. 188; Brisbane v. Adams, 3 N.Y. 129; Woodruff v. Berry, 40 Ark. 251; Wald, Pol. Cont. 310, note by Mr. Wald, and cases cited. The case of Jones v. North, L.R. 19 Eq. 426, to the contrary, cannot be supported. The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings in within that term of the federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. The invariable custom in sales of pipe required the seller to deliver the pipe at the place where it was to be used by the buyer, and to include in the price [\*\*48] the cost of delivery. The contracts, as the answer of the defendants avers, were invariably made after public letting at the home, and in the state, of the buyer. The pay territory, sales in which it was the professed object of the defendants to regulate by their contract of association, included 36 states. The cities which were especially reserved for the benefit of the defendants were Atlanta and Anniston, reserved to the Anniston mill, in Alabama; New Orleans and Chattanooga, reserved to the Chattanooga mill, in Tennessee; St. Louis and Birmingham, reserved to the Bessemer mill, in Alabama; Omaha, reserved to the South Pittsburg mill, in Tennessee; Louisville, New Albany, and Jeffersonville, reserved to Dennis Long & Co., of Louisville; and Cincinnati, Newport, and Covington, reserved to the Addyston mill, in Ohio. Under the agreement, every request for bids from any place, except the reserved cities, sent to any one of the defendants, was submitted to the central committee, who fixed a price, and the contract was awarded to that member who would agree to pay for the benefit of the other members of the association the largest "bounus." In the case of the reserved cities, the [\*\*49] successful bidder having been already fixed, The association determined the price and bonus to be paid. The contract of association restrained every defendant except the one selected to receive the contract from soliciting (in good faith) for making a contract for pipe with the intending purchaser at all, and restrained the defendant so selected from making the contract except at the price fixed by the committee. In cases of pipe to be purchased in any state of the 36 in pay territory, except 4, each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract in that state for the sale of pipe to be delivered across state lines; five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. With respect to sales in Ohio, Kentucky, [\*295] Tennessee, and Alabama, the effect of the contract of association was to bind at least three, sometimes four, and sometimes five, of the defendants not to make a contract at all in those states for the sale and delivery of pipe from another state; and if the job were assigned, as it might be, to one living in a different [\*\*50] state from the place of the contract and delivery, its effect would be to bind him not to sell and deliver pipe across state lines at less than a certain price. It thus appears that no sale or proposed sale can be suggested within the scope of the contract of association with respect to which that contract did not restrain at least three, often four, more often five, and usually all, of the defendants in the exercise of the freedom, which but for the contract would have been theirs, of selling in one state pipe to be delivered from another state at any price they might see fit to fix. Can there be any doubt that this was a restrain of interstate trade and commerce? Mr. Justice Field, in County of Mobile v. Kimball, 102 U.S. 691, 696, said.

**HN6** [↑] "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

In Robbins v. Taxing Dist., 120 U.S. 489, 7 Sup. Ct. 592, a law of Tennessee, which imposed a tax on ally "drummers" who solicited orders on samples, was held unconstitutional in so far as it applied to the drummer [\*\*51] of an Ohio firm, who was soliciting orders for goods to be sent from Ohio to purchasers in Tennessee, on the ground that it was a tax on interstate commerce. In delivering the opinion of the court in that case, Mr. Justice

Bradley said ([page 497, 120 U.S.](#), and page 596, [7 Sup. Ct.](#)) that a tax on the sale of goods, or the offer to sell them before they are brought into the state, was clearly a tax on interstate commerce. He further said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The principle thus announced has been reaffirmed by the court in [Corson v. Maryland, 120 U.S. 502, 7 Sup. Ct. 655](#); in [Asher v. Texas, 128 U.S. 129, 9 Sup. Ct. 1](#); in [Stoutenburgh v. Hennick, 129 U.S. 141, 9 Sup. Ct. 256](#); and in [Brennan v. City of Titusville, 153 U.S. 289, 14 Sup. Ct. 829](#). The point of these cases was emphasized by the distinction taken in [Emert v. Missouri, 156 U.S. 296, 15 Sup. Ct. 367](#), in which the validity of a law of Missouri, imposing a tax on peddlers, was in question. The plaintiff in error, convicted under the law of failure to pay the tax, was the [\*\*52] selling agent of a New Jersey sewing machine manufacturing company, who carried the machine for sale with him in his wagon. If was held that in such a case, the machine having become part of the mass of property in the state, the tax on the peddler was not a tax on interstate commerce.

If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense, -- such that the states are excluded by the federal constitution from a right to regulate or tax the same, -- it seems clear that contracts in restraint of such solicitations, [\*296] negotiations, and sales are contracts in restraint of interstate commerce. The anti-trust law is an effort by congress to regulate interstate commerce. Such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of congress to regulate interstate commerce, must, of necessity, be the commerce which congress may regulate, and which, by the terms of the anti-trust law, it has regulated. We can see no escape from the conclusion, therefore, that the contract of the defendants was [\*\*53] in restraint of interstate commerce.

The learned judge who dismissed the bill at the circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the supreme court in the case of U.S. v. E.C. Knight Co., 156 U.S. 1, [15 Sup. Ct. 249](#). In that case the bill filed under the [antitrust law](#) sought to enjoin the defendants from continuing a union of substantially all the sugar refineries of the country for the refining of raw sugars. The supreme court held that the monopoly thus effected was not within the law, because the contract or agreement of union related only to the manufacture of refined sugar, and not to its sale throughout the country; that manufacture preceded commerce, and although the manufacture under a monopoly might, and doubtless would, indirectly affect both internal and interstate commerce, it was not within the power of congress to regulate manufactures within a state on that ground. The case arose on a bill in equity filed by the United States under the anti-trust act, praying for relief in respect of certain agreements under which the American Sugar-Refining Company [\*\*54] had purchased the stock of four Philadelphia sugar-refining companies with shares of its own stock, whereby the American Company acquired nearly complete control of the manufacture of refined sugar in this country. The relief sought was the cancellation of the agreements of purchase, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act. The chief justice, in delivering the judgment of the court, said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. \* \* \* Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of [\*\*55] commerce into play, it does not control it, and it affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. \* \* \* The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought,

sold, or exchanged for the purpose of such transit among the states, or pur in the way of transit, may be regulated: but this is because they form part of interstate trade or commerce. The fact [\*297] that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control [\*\*56] of the state, and belongs to commerce."

The chief justice then refers to the prior case of *Coe v. Errol*, 116 U.S. 517, 6 Sup. Ct. 475, in which it was held that logs were not made subjects of interstate commerce by the mere intent of the owner to ship them into another state, so that taxation upon them could be regarded as a burden upon interstate commerce, until that intent had been carried so far into execution that "they had commenced their final movement from the state of their origin to that of their destination." *Kidd v. Pearson*, 128 U.S. 1, 9 Sup. Ct. 6, is also referred to. In that case it was held that a law of Iowa, which forbade the manufacture of spirituous liquoro except for certain purposes, was not in conflict with the *commerce clause of the federal constitution*, although it appeared by proof that the liquor was to be manufactured only with intent to ship the same out of the state. The chief justice further said:

"It was in the light of well-settled principles that the act of July 2, 1880, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states [\*\*57] or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, constacts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. \* \* \* There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle [\*\*58] complainants to a decree."

We have thus considered and quoted from the decision in the Knight Case at length, because it was made the principal ground for the action of the court below, and is made the chief basis of the argument on behalf of the defendants here. It seems to us clear that, from the beginning to the end of the opinion, the chief justice draws the distinction between a restraint upon the business of manufacturing and a restraint upon the trade or commerce between the states in the articles after manufacture, with the manifest purpose of showing that the regulating power of congress under the constitution could affect only the latter, while the former was not under federal control, and rested wholly with the states. Among the subjects of commercial regulation by congress, he expressly mentions "contracts to buy, sell, or exchange goods to be transported among the several states," and leaves it to be plainly inferred that the statute does embrace combinations and conspiracies which have for their object to restrain, and which necessarily operate in restraint of, the freedom of such contracts. The citation of the case of *Coe v. Errol*, [\*298] was apt to show that [\*\*59] merchandise, before its shipment across state lines, was not within the regulating power of congress, and, a fortiori, that its manufacture was not; while *Kidd v. Pearson* clearly made the distinction between the absence of power in congress to control manufacturing merely because the manufacture intends to add to interstate commerce with the product, and the power which congress has to prevent obstructions to interstate transportation in the product when made. But neither of these cases controls the one now under consideration. The subject-matter of the restraint here was not articles of merchandise or their manufacture, but contracts for sale of such articles to be delivered across state lines and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, but are interstate commerce. It can hardly be that a combination in restraint of what is interstate commerce does not directly affect and burden that commerce. The error into which the circuit court fell, it seems to us, was in not observing the difference between the regulating power of congress over contracts and negotiations for sales of goods [\*\*60] to be delivered across state lines, and that over the merchandise, the subject of such sales and negotiations. The goods are not within the control of congress until they are in actual transit from state to another.

But [HN7](#)[<sup>↑</sup>] the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce, and so within the regulating power of congress even before the transit of the goods in performance of the contract has begun.

The language of the chief justice in the last passages quoted above from his opinion, upon which so much reliance was placed by the circuit court and the defendants' counsel at the bar, is to be interpreted by the facts of the case before the court. The statement in the opinion that congress did not intend by the anti-trust act to limit and restrict the rights of persons and corporations in the mere acquisition, control, or disposition of property, or to regulate the prices at which such property should be sold, or to make criminal the acts of persons or corporations in the acquisition and control of property which the states of their residence or creation sanctioned or permitted, does not [\*\*61] imply that congress did not intend to strike down any combination which had for its object the restraint and attempted monopoly of trade and commerce among a given number of states in specified articles of commerce, and the resulting power to regulate prices therein. The obstacle in the way of granting the relief asked in U.S. v. E.C. Knight Co. was (to use the language of the chief justice) that "the contracts and acts of the defendant related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the state or with foreign nations." The supreme court distinctly adjudged that "what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations." That the defendants in the present case combined and contracted with each other for the purpose of restraining trade [\*299] and commerce among the states covered by their agreement, in the articles manufactured by them, is too clear to admit of dispute. In the E.C. Knight Co. Case there was, the supreme court said, "nothing in the proofs to indicate [\*\*62] any intention to put a restraint upon trade or commerce." In the present case the proofs show that no one of the companies in this pipe-trust combination was allowed to send its goods out of the state in which they were manufactured except upon the terms established by the agreement. Can it be doubted that this was a direct restraint upon interstate commerce in those goods? To give the language of the opinion in the Knight Case the construction contended for by defendants would be to assume that the court, after having in the clearest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which decided both. We cannot concur in such an interpretation of the opinion.

Counsel for the defendants also find in the language of Mr. Justice Peckham, in the case of [U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 313, 326, 17 Sup. Ct.](#) 540, an argument against our conclusion in this case. The question in that case was whether the antitrust act applied to railroad companies which combined in establishing traffic rates for the transportation of [\*\*63] persons and property. It was vigorously contended on behalf of the railroad companies that the act was never intended to apply to them, because congress had already provided for their regulation by the interstate commerce law. In meeting this position, Mr. Justice Peckham used the following language ([page 313, 166 U.S.](#), and page 548, [17 Sup. Ct.](#)):

"We have held that the trust act did not apply to a company engaged in one state in the refining of sugar under circumstances detailed in the case of U.S. v. E.C. Knight Co., 156 U.S. [1, 15 Sup. Ct.](#) 249, because the refining of sugar under those circumstances bore no distinct relation to commerce between the states or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon."

Again, upon [page 326, 166 U.S.](#), and page 553, [17 Sup. Ct.](#), Justice Peckham repeats the same idea:

"[In the Knight Co. Case, supra](#), it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is [\*\*64] readily seen from these cases that, if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."

This is not a declaration that cases might not arise within the statute which were not combinations of common carriers in relation to interstate transportation. The language used means nothing more than that, if such combinations were excluded from the effect of the act, the great and manifest scope for the operation of a federal statute on such a subject would be denied to it. To give the language more weight would be to violate the first canon for the construction of a judicial opinion laid down by chief Justice Marshal in Cohens v. Virginia, 6 Wheat. 264, 340, 399:

[\*300] "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. [\*\*65] The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all case is seldom completely investigated."

In re Greene, 52 Fed. 104, cited for the defendants, is to be distinguished from the case at bar in exactly the same way as the Knight Co. Case. The indictment against Greene, drawn under the antitrust act, charged him with being a member of a combination to acquire possession and control of 75 per cent. of the distilleries of the country, for the purpose of fixing the price of whisky, and controlling the trade in it between the states. The immediate object of the combination was a monopoly in manufacture. The effect upon interstate trade in whisky was as indirect as was the monopoly of the refining of sugar in the Knight Co. Case upon interstate trade in that article.

The case of Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., 35 U.S. App. 16, 14 C.C.A. 14, and 66 Fed. 637, cannot be regarded as an authority upon either of the questions considered in this case, because of the division [\*\*66] of opinion among the judges. It was a suit brought by a watch manufacturing company against 20 other companies to recover damages for a boycott of the plaintiff. The averment was that the defendants had agreed not to sell any goods manufactured by them to any person dealing with the plaintiff, and had caused this to be known in the trade, and that they fixed an arbitrary price for the sale of their goods to the public, and, because plaintiff's competition interfered with their maintaining this price, they were using the boycott against plaintiff, to stifle competition. The pleadings were not drawn with care to bring the case within the anti-trust law. The question arose on demurrer to the bill. Judge Lacombe held that the facts stated gave rise to no cause of action; Judge Shipman held that the averments were not sufficient to show that the trade restrained was interstate; and Judge Wallace dissented, on the ground that a cause of action was sufficiently stated, and that the restraint was upon interstate commerce. These varying views decided the case, but they certainly furnish no precedent or authority.

There is one case which seems to be quite like the one at bar. It is [\*\*67] the case of U.S. v. Jellico Mountain Coal & Coke Co., 46 Fed. 432, a decision by Judge Key at the circuit. The owners of coal mines in Kentucky entered into a contract of association with coal dealers in Nashville, by which they agreed that the mine owners should only sell to dealers who were members, and the members should only buy from mine owners who were members, and that the dealers should sell at certain fixed prices, of which the mine owners should receive a proportionate part, after payment of freight, and that prices might be raised by a vote of the association, in which case the addition to the price should be divided between the dealers and [\*301] the mine owners. The contract recited that it was intended to establish and maintain the price of coal at Nashville. It was held to be an attempt to create a monopoly in the interstate trade in coal between Kentucky and Nashville, Tenn., and it was enjoined.

It is pressed upon us that there was no intention on the part of the defendants in this case to restrain interstate commerce, and in several affidavits the managing officers of the defendants make oath that they did not know what interstate commerce was, and, therefore, [\*\*68] that they could not have combined to restrain it. Of course, the defendants, like other persons subject to the law, cannot plead ignorance of it as an excuse for its violation. They knew that the combination they were making contemplated the fixing of prices for the sale of pipe in 36 different states, and that the pipe sold would have to be delivered in those states from the 4 states in which defendants' foundries were situate. They knew that freight rates and transportation were a most important element in making the price for the pipe so to be delivered. They charged the successful bidder with a bonus to be paid upon the shipment of the pipe from his state to the state of the sale. Under their first agreement, the bonus to be paid by the successful bidder was varied according to the state in which the sale and delivery were to be made. It seems to us

clear that the contract of association was on its face an extensive scheme to control the whole commerce among 36 states in cast-iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.

Much has been said in argument as to the enlargement of **[\*\*69]** the federal governmental functions in respect of all trade and industry in the states if the view we have expressed of the application of the anti-trust law in this case is to prevail, and as to the interference which is likely to follow with the control which the states have hitherto been understood to have over contracts of the character of that before us. We do not announce any new doctrine in holding either that contracts and negotiations for the sale of merchandise to be delivered across state lines are interstate commerce (see cases above cited), or that burdens or restraints upon such commerce congress may pass appropriate legislation to prevent, and courts of the United States may in proper proceedings enjoin. In re Debs, 158 U.S. 564, 15 Sup. Ct. 900. If this extends federal jurisdiction into fields not before occupied by the general government, it is not because such jurisdiction is not within the limits allowed by the constitution of the United States.

The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust **[\*\*70]** act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act "shall be forfeited to the United States," continues "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." This requires a like procedure to that prescribed in sections **[\*302]** 3309-3391, Rev. St., and involves a trial by jury. The only remedy which can be afforded in this proceeding is a decree of injunction.

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.

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End of Document



## Waters-Pierce Oil Co. v. State

Court of Civil Appeals of Texas, Austin

March 9, 1898, Decided

No Number in Original

**Reporter**

19 Tex. Civ. App. 1 \*; 44 S.W. 936 \*\*; 1898 Tex. App. LEXIS 175 \*\*\*

Waters-Pierce Oil Company v. The State of Texas.

**Prior History:** [\*\*\*1] Appeal from Travis. Tried below before Hon. R. E. Brooks.

The following were among the assignments of error urged by appellant:

"31. The Court erred in admitting, over the objections of defendant, the testimony of W. C. Dugger, to the effect that this defendant's agent at Galveston, Arthur M Finlay, had never objected to any of the acts of said Dugger, done in obedience to the instructions of Waggoner and other agents, all as shown by exceptions duly reserved in the statement of facts."

"36. The court erred in refusing to admit in evidence the testimony of William Grice, for this defendant, to the effect as to whether or not he, as division manager, had ever had any authority from any officer of the Waters-Pierce Oil Company to sell oils in Texas on condition that they would be resold at a fixed price, which testimony was excluded by the court and exception saved, as shown by statement of facts."

The court ruled as follows: "I will permit defendant to show what his powers were as agents; that is, if it was in writing, to show what the writings were, to produce the writings, to show that the writings he received were all he received on the question of his powers as [\*\*\*2] agent, you can show it in a negative way. I will permit you to show what instructions that have been destroyed were, not what they were not."

"38. The court erred in refusing to admit in behalf of defendant the testimony of H. C. Pierce, to the effect that if any contracts or agreements in violation of the laws of Texas were made by agents in Texas, they were not authorized either by himself or any other officer of the Waters-Pierce Oil Company, all as shown by exception duly saved in statement of facts.

"39. The court erred in striking out from the circular of defendant, of date December 31, 1895, the following words as incompetent, upon objection by the State 'such arrangements, if made, were effected without the authority or knowledge of the company, and contrary to its policy and previous instructions on the point,' all as shown by the statement of facts."

**Disposition:** Affirmed.

## **Core Terms**

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oils, contracts, parties, transactions, interstate commerce, regulations, do business, buy, police power, commodities, railways, trusts, combinations, rights, commerce, deprive, conditions, products, cases, tends, terms, carriers, alleges, matters, due process of law, assigned error, public welfare, transportation, selling, evil

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Readjustments > Formation > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Readjustments > General Overview

#### **HN1** [] **Public Enforcement, State Civil Actions**

A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: (1) to create or carry out restrictions in trade, or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of Texas; (2) to increase or reduce the price of merchandise, produce, or commodities; (3) to prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce; and (4) to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity or merchandise, produce, or commerce, intended for sale, use or consumption in this state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

#### **HN2** [] **Public Enforcement, State Civil Actions**

A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: to make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > Acts Through Agents

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

#### **HN3** [] **Powers, Acts Through Agents**

A corporation can only act through its agents and servants, but a corporation is not liable for all the acts of its agents or servants. It is liable, however, for the acts of its agents done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents which have been acquiesced in or ratified by the governing body of said corporation.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

#### **HN4** **Public Enforcement, State Civil Actions**

The Court of Civil Appeals of Texas has no jurisdiction over, and the laws of Texas do not apply to interstate commerce—that is, to commerce between the different states of the United States.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN5** **Public Enforcement, State Civil Actions**

The law against trusts in Texas became a law on March 30, 1889, and was amended in 1895.

Constitutional Law > Substantive Due Process > Scope

Governments > Police Powers

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### **HN6** **Constitutional Law, Substantive Due Process**

The rights flowing from *U.S. Const. amend. XIV*, which rights are of a citizen to contract concerning his property without the state depriving the citizen of his property or imposing restraints and burdens upon the property without due process of law, extend to corporations as well as persons. But a consideration of these questions necessarily leads to the inquiry whether the statutes that are assailed arise out of an exercise of the general police authority of the State.

Governments > Police Powers

#### **HN7** **Governments, Police Powers**

The State may, in the exercise of its police power, legislate concerning many matters which, but for the authority in this respect, would be unauthorized. This power—generally stated as the "police power of the State"—extends to a variety of subjects which need not be enumerated, as it is generally admitted that matters and subjects which affect the general welfare and public interests are within the supervision of this power. But the power does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another's. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedes*. From this source come the police powers, which are nothing more or less than the powers of

19 Tex. Civ. App. 1, \*144 S.W. 936, \*\*936L898 Tex. App. LEXIS 175, \*\*\*2

government, inherent in every sovereignty, that is to say, the power to govern men and things. Under these powers, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good.

Governments > Police Powers

**HN8**  **Governments, Police Powers**

The State can prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity.

Governments > Police Powers

**HN9**  **Governments, Police Powers**

The police power of the State is the authority vested in the legislature to enact all such wholesome and reasonable laws as they may deem conducive to public good.

Contracts Law > ... > Perfections & Priorities > Perfection > General Overview

Governments > Local Governments > Police Power

Contracts Law > ... > Secured Transactions > Perfections & Priorities > General Overview

Governments > Police Powers

**HN10**  **Perfections & Priorities, Perfection**

All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public welfare. Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare. By the general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which, no question ever was, or upon acknowledged general principles can be made. The police power, so called, inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from disturbing conflicts.

Governments > Police Powers

**HN11**  **Governments, Police Powers**

The State in the exercise of its police power in the selection of remedies looking to the suppression of evils harmful to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation under a capricious exercise of the police power, but a useful regulation in the interest of the public welfare.

19 Tex. Civ. App. 1, \*144 S.W. 936, \*\*936L898 Tex. App. LEXIS 175, \*\*\*2

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Police Powers

**HN12** [  ] **Public Enforcement, State Civil Actions**

Included in the list of subjects that may be acted upon by the State in the exercise of its police power is the restraint of trade. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce which, when carried out, affect the interests of the public.

Governments > Police Powers

**HN13** [  ] **Governments, Police Powers**

The rights of the individual must yield to the public wants, and his conduct and all property held by him is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. While power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.

Constitutional Law > Bill of Rights > State Application

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

Governments > Police Powers

**HN14** [  ] **Bill of Rights, State Application**

This is one of the inherent rights of sovereignty, and it is as much in place that it shall be exercised when the public interest requires, as it is the duty of the State, by stringent laws, to protect society from the depredations of the thief and the ravages of the murderer. When it is once admitted that a matter is a subject of police supervision, the expediency and wisdom of the means resorted to are subjects solely confided to the legislative department of the State, subject, however, to limitations imposed by the organic law of the nation in excluding from their jurisdiction, for many purposes, certain matters of control solely reserved to the national government-such, for instance, as many of the matters relating to interstate commerce. It is not meant by that a Legislature may conclusively declare a matter subject to its police authority, when in fact such is not the case-for that is a question which the courts may determine-and under the guise of that power, by a system of confiscation and spoliation, which has no place in the government, deprive a citizen of his rights, but, as said before, when it is once determined that the subject dealt with really concerns the public welfare, it lies wholly within the police authority of the State, through its law makers, to determine how it shall be handled and dealt with.

Constitutional Law > Bill of Rights > State Application

Governments > State & Territorial Governments > Licenses

Governments > Police Powers

**HN15** [  ] **Bill of Rights, State Application**

By adequate laws looking to the suppression of evil, the State, through the exercise of its police power, must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty, as is attested from many of the provisions of the codes of Texas and of others and the constructions that have been given to them. The freedom of speech, the liberty of person, and life itself must be surrendered, when the public interests and the order of good government so require. The liberty of the citizen, which embraces the legal right to his property, and to lawfully contract concerning it, stand upon no higher ground.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Governments > Police Powers

#### **HN16[] Bill of Rights, Fundamental Freedoms**

However broad the right of everyone to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws.

Constitutional Law > Bill of Rights > State Application

Governments > Police Powers

Torts > Transportation Torts > Rail Transportation > General Overview

#### **HN17[] Bill of Rights, State Application**

If legislative authority exists to restrain the conduct of owners in a particular way in the use of their property, deemed injurious to the public welfare, and the Legislature has acted in the manner required in passing laws, due process of law exists, in so far as it is necessary to find legal authority for prohibiting the act. Legal restraints imposed upon the use of property do not deprive the owner of it without due process of law.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Process

Real Property Law > Eminent Domain Proceedings > Procedures

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

#### **HN18[] Eminent Domain Proceedings, Process**

The Texas law against trusts in Texas do not arbitrarily, by legislative decree, ipso facto, operate upon the liberty of the citizen or upon his property, and deprive him of these rights, but provide for an orderly procedure in the courts of the State, with a right of the accused to be heard before being condemned. Whenever a burden is imposed upon property for the public use, whether it be for the whole State, or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice,

19 Tex. Civ. App. 1, \*144 S.W. 936, \*\*936L898 Tex. App. LEXIS 175, \*\*\*2

with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law.

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview](#)

[Constitutional Law > Equal Protection > Nature & Scope of Protection](#)

#### **HN19** [blue] **Public Enforcement, State Civil Actions**

Texas's laws against trust are constitutional in many respects as has been decided in challenges that the laws are class legislation, and deny to certain citizens and classes equal protection of the laws; that the classification of subjects upon which the laws should bear, and those who are exempted from its operation, are purely capricious and arbitrary, in that there are no differences in the conditions of the classes which would justify the distinction made between them.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

[Governments > Police Powers](#)

[Torts > Transportation Torts > Rail Transportation > General Overview](#)

#### **HN20** [blue] **Railroads & Rail Transportation, State & Local Regulation**

The right of the Legislature to classify railways as a special subject of legislation and impose duties, burdens, and restrictions upon them which are not imposed upon other carriers, are based upon the principle that they are public corporations and engaged in a public business, and that further, on account of the dangerous character of their business and by reason of benefits received, the power exists to impose duties and burdens upon them which are not applied to other carriers. But really, the true principle and doctrine upon which legislation of this character is bottomed, as affecting railways as a class, is that the public interests and welfare require that in the use of their property and the performance of their business it be conducted in a way least harmful to the public and most beneficial thereto consistent with the right of ownership in the property. It is the public interest and welfare that is involved in the business they carry on and conduct that really gives the State, in the exercise of its police power, jurisdiction over their affairs.

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Governments > Police Powers](#)

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

#### **HN21** [blue] **Public Enforcement, State Civil Actions**

The general welfare of the people is no more important to be observed in restraining and controlling railways in their relation to the commerce of the country than is the public interest to be subserved by laws which restrain and prevent trusts and combinations concerning such commerce, and which seek to prevent conspiracies entered into for the purpose of affecting the prices of commodities which are useful and necessary to the enjoyment of life. In

each case the interest of mankind requires that the selfishness of human nature, which seeks alone to advance its individual interests, shall, in the use of property and in conduct, be so far restrained, as may be compatible with individual right and liberty, as will prevent harm and injury to the public.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

[Governments > Legislation > Types of Statutes](#)

[Torts > Transportation Torts > Rail Transportation > General Overview](#)

[Governments > Legislation > Enactment](#)

[Governments > Police Powers](#)

#### **HN22** [] **Railroads & Rail Transportation, State & Local Regulation**

Regulations to prevent harm and injury to the public by classifying railways as a special subject of legislation and imposing upon the railways duties, burdens, and restrictions that are not imposed upon other carriers, may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

[Governments > Legislation > General Overview](#)

[Torts > Transportation Torts > Rail Transportation > General Overview](#)

#### **HN23** [] **Railroads & Rail Transportation, State & Local Regulation**

The hazardous character of the business of operating railways would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without discrimination, made subject to the same liabilities. It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to other persons and corporations using steam in manufactories.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

[Governments > Legislation > Interpretation](#)

[Governments > Police Powers](#)

#### **HN24** [] **Railroads & Rail Transportation, State & Local Regulation**

The state legislature, in the pursuit of its police power, in selecting subjects upon which it shall bear, cannot capriciously and arbitrarily classify those subjects, and impose burdens on some and relieve others, when in the nature of things they are similarly situated and no reason could exist for the distinction. But, viewing the subject of classification from any standpoint, if reasons for the distinction can in any event exist the legislation must be credited with being founded upon it. Doubtless the several legislatures, in passing statutes regulating railways as a distinct class of carriers, evidently contemplated that, from the magnitude of the service in which they were engaged and the relations they bore to the public and the injury that might result to the public welfare if they were not restrained, requiring rules and regulations for their conduct which were not necessary to be applied to other carriers because of their limited capacity and extent, the public were not so much concerned with the conduct of their business, and that they were not so situated as to seriously, in these particulars, affect or injure the public. It is not the duty of the State to discover the reasons and circumstances upon which these laws may rest, but the burden is upon the appellant to demonstrate that the classification was capricious and unauthorized.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

#### [HN25](#) [blue icon] **Case or Controversy, Constitutionality of Legislation**

In the absence of such facts showing the contrary, the presumption is in favor of a law's constitutionality.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > State & Territorial Governments > Legislatures

#### [HN26](#) [blue icon] **Case or Controversy, Constitutionality of Legislation**

The domestic welfare of the people of Texas is within the keeping of its Legislatures, and they are supposed to best know their wants and necessities, and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy and that are necessary in order to extinguish or prevent evil and harmful conditions affecting the general interest and the public welfare. These are matters political and relate to the economic affairs of government, and are peculiarly within the knowledge of the law-making department thereof. The remedies, therefore, lie within the legislative province and are, to some extent, confided to their discretion and wisdom. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Evidence > Inferences & Presumptions > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

Governments > State & Territorial Governments > Legislatures

#### [HN27](#) [blue icon] **Public Enforcement, State Civil Actions**

The Legislatures of the State, in making conclusions regarding antitrust matters pertaining to railways, are supposed to have acted intelligently and with a knowledge of the conditions and dangers confronting the people from combinations and trusts; and it requires little enlightenment to discover that the disturbing classes which were and now are so injuriously affecting the public welfare are the buyers, sellers, and dealers in the articles in use by the people of Texas. The unbridled license of these classes which in many instances was exercised, had, within

Texas as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the layman as well as the lawgiver could discern it.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

### **HN28** [+] **Jury Trials, Province of Court & Jury**

Where there is any evidence, however slight it may be, the court must leave it to the consideration of the jury.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

### **HN29** [+] **Public Enforcement, State Civil Actions**

Texas's Act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute against trusts. Except where the foreign corporation is in the employ of the federal government or is engaged strictly in matters of interstate commerce, such bodies are entitled to no rights or privileges except those which may be conferred upon them as an act of grace by the State.

Business & Corporate Law > Foreign Corporations > General Overview

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Police Powers

### **HN30** [+] **Business & Corporate Law, Foreign Corporations**

The laws of the State that apply to domestic corporations and individuals in prohibiting certain conduct apply with equal force to foreign corporations. The State, in granting them privilege to do business, does not absolve them from responsibility and contract to relieve them from the operation of laws which expressly apply to them. The police power of the State cannot be bartered away, and there exist no contractual rights which are not subject to its exercise. Regarding the clause of the Constitution of the United States which forbids the States from passing any laws impairing the obligation of contracts, it has been held without dissent that the clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed expedient. All contracts and all rights are subject to this power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well being of the community may require, or as circumstances may change, or as experience may demonstrate the necessity. The principle is applicable to charters of corporations.

Evidence > Inferences & Presumptions > General Overview

### **HN31** [+] **Evidence, Inferences & Presumptions**

In no controversy of a civil nature would it be proper for the courts of Texas to give a jury charge to the effect that a jury must find in the favor of defendant unless its guilt of the conduct complained of was established beyond a reasonable doubt.

## **Headnotes/Summary**

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### **Headnotes**

#### **Unlawful Combination -- Foreign Corporation -- Permit to Do Business -- Forfeiture.**

A course of dealing between a foreign corporation and dealers in oil, binding the latter to buy only of the former, to sell only at a fixed price, and not to sell to competing dealers, constituted such violation of the Acts of May 30, 1889, and April 30, 1895, prohibiting combinations in restraint of trade, as warranted the forfeiture of such corporation's permit to do business in the State, except as to interstate commerce.

#### **Unlawful Combination -- Constitutional Law -- Police Power.**

The laws prohibiting combinations in restraint of trade (Acts March 30, 1889, and April 30, 1895) are a legitimate exercise of the police power of the State, and are not within the prohibition of the Constitution of the United States or that of the State of Texas, either as denying to certain citizens or classes the equal protection of the laws, or depriving them of property without due process of law.

#### **Pleading -- Anti-Trust Law -- Interstate Commerce.**

See pleading held to charge a foreign corporation with engaging in domestic as well as interstate commerce, and hence to be subject to regulation by the State.

#### **Evidence Showing Domestic Commerce.**

See evidence held to show transactions constituting domestic commerce and subject to State regulation.

#### **Foreign Corporation -- Illegal Combination -- Forfeiture of Permit as to Domestic Commerce.**

Courts may pronounce judgment against a foreign corporation, engaged in both interstate and domestic business and found guilty of unlawful combinations in restraint of trade, forfeiting its permit to do business in the State as to domestic, but leaving unaffected its rights as to interstate commerce.

#### **Foreign Corporation -- Forfeiting Permit -- Impairing Contract.**

The right granted a foreign corporation to do business in the State for a term of years was subject to forfeiture for violation of the statutes, and such forfeiture did not impair the obligation of the contract granting it such permit.

#### **Agency -- Criminal Act.**

A corporation may become bound by the acts of its agents within the scope of their duty, though the act involves a criminal responsibility on the part of the agent.

#### **Agency -- Knowledge of Principal.**

See evidence held sufficient for holding a corporation responsible for unlawful contracts in restraint of trade made by its agents, on the ground that, with knowledge, it acquiesced in and accepted the benefits of their agreements.

#### **Contracts in Restraint of Trade -- Evidence.**

On the issue of unlawful trade combinations by a corporation, evidence tending to show the methods of its agents in doing business in the State and knowledge thereof by the corporation, is admissible.

### **Best Evidence.**

Testimony of a witness that no objections were made by defendant's agent to his acts as reported to such agent, was not objectionable as implying a statement of the contents of such reports.

### **Agency -- Evidence.**

An agent can not testify that he was not authorized by his principal to do certain acts, nor the principal that he did not authorize them.

### **Evidence -- Self Serving Declarations.**

Statements in a circular letter issued by defendant, to the effect that certain transactions by its agents were without its authority or knowledge, were not admissible in its behalf.

### **Evidence -- Civil Cases -- Reasonable Doubt.**

An action to forfeit the permit to a corporation to do business is a civil controversy and the charge need not be proven beyond a reasonable doubt.

**Counsel:** John D. Johnson and Clark & Bolinger, for appellant.

M. M. Crane, Attorney-General, and T. A. Fuller, Assistant, for appellee.

**Judges:** FISHER, Chief Justice.

**Opinion by:** FISHER

## **Opinion**

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[\*3] [\*\*936] FISHER, Chief Justice. -- The object of this suit, the laws under which it is brought, and the issues [\*\*\*3] involved, are so accurately stated in the admirable charge of the trial court, that we set it out in full, as giving all the information needed upon these questions.

"1. This is a suit by the State of Texas, as plaintiff, against the Waters-Pierce Oil Company, a private corporation, and E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, as defendants, to cancel the permit of said Waters-Pierce Oil Company to do business in this State and to enjoin all of said defendants from further transacting the business of said company in this State, on account of an alleged violation of the laws of this State against trusts by said company, its agents, and employes.

"2. The plaintiff alleges that the defendant, Waters-Pierce Oil Company, is a private corporation, incorporated under the laws of the State of Missouri, for the purpose of dealing in petroleum and its products and in selling the same in the State of Missouri and other States, and that on July 6, 1889, said company filed its articles of incorporation in the Secretary of State's office in this State, and secured a permit to transact its said business in the State of Texas for a term of ten years, as provided [\*\*\*4] by the laws of this State, and that since said date defendant company has been transacting its said business in this State and has divided this State into five general divisions for the purpose of transacting its said business, and that the defendants, E. T. Hathaway, F. A. Austin, William Grice, J. W. Keenan, and Lewis Fries are the respective managers of defendant company in said general divisions of this State, and have appointed various local agents throughout this State for the transaction of its business.

"3. Plaintiff further alleges that the defendant company has violated the law of this State against trusts by making and entering into a contract with and becoming a member of the Standard Oil Trust, which contract and agreement is set out in full in plaintiff's petition, and for doing certain other acts in connection with said Standard Oil Trust agreement.

"3 1/2. Plaintiff also alleges that the defendant company has violated the law of this State against trusts by entering into a contract with the Eagle Refining Company, with C. W. Robinson, with J. L. Lewis, and Stillwell Bros., as set out in plaintiff's petition and introduced in evidence before you

[\*4] "4. Plaintiff [\*\*\*5] further alleges that, since July 6, 1889, said defendant company has been and still is engaged in dealing in and selling the products of petroleum in this State, and that during that time said company has made and is still making, through its agents in this State, contracts and agreements by and between said company and other parties dealing in, buying, and selling similar oils in his State, by the terms of which agreements said parties, for a valuable consideration paid them by defendant company, agreed and contracted that they would not buy any oils from any other person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said company has further contracted with certain of said persons as aforesaid, for a valuable consideration paid by defendant company to said parties, by the terms of which said parties contracted and agreed to buy from and sell the oils of defendant company exclusively, and not to sell the oils so bought, as aforesaid, to anyone buying from or dealing with any other person or corporation dealing in such oils in [\*\*937] competition with said defendant company. And further, that said company, since [\*\*\*6] July 6, 1889, has made and entered into other contracts and agreements by and between it and various others dealing in, buying, and selling oils, by the terms of which said parties agree with said company to purchase its said oils and to sell the same to others desiring to purchase the same, at prices fixed and established by it or its agents and officers; the names and dates and contracts above referred to are set out in plaintiff's petition.

"5. Plaintiff further alleges that prior to July 6, 1889, and also since that date, the defendant company entered into certain contracts in writing with certain parties in Brownsville, Texas, by the terms of which said parties bound themselves to buy all their oil from defendant company for a fixed period, in consideration of certain rebates allowed them by defendant company, and also agreed to sell such oil at a price fixed by defendant company, and that such contracts as were entered into prior to 1889 have been carried out and executed and business done thereunder by said parties since that date to the present time; the parties with whom said contracts were made and the terms thereof are set out in plaintiff's petition.

"6. Plaintiff alleges [\*\*\*7] that all of said contracts above mentioned were made by the agents of said defendant company, and were authorized by it and were fully ratified and carried out by it after same had been so made, and that the same were a violation of the laws against trusts of this State; that the products of petroleum are articles of prime necessity to the people of this State, and that, by reason of said acts and contracts, said defendant company has forfeited its right to transact business in this State; and prays for an injunction prohibiting the defendant company, its agents and employes from further violating said statute, and for a decree canceling the permit of said company to do business in this State.

[\*5] "7. The defendants answer by a general denial of all the allegations of plaintiff's petition, and especially answer that the Waters-Pierce Oil Company is the real defendant in this action, and that the other parties named as defendants are simply its agents in the State of Texas.

"It further says that the State of Texas is estopped from canceling defendant's permit to do business in this State, because that on July 6, 1889, through its proper officers, and in pursuance of the provisions [\*\*\*8] of the law of this State, it did for a sufficient and lawful consideration issue to said company a permit to do business in this State for a term of ten years from that date, and that said permit was a valid and binding contract between it and the State of Texas.

"8. Defendant further pleads that it is a foreign corporation, of the State of Missouri, having its principal office in said State of Missouri, and that the business transacted by it in the State of Texas was interstate commerce and not subject to the laws of the State of Texas.

"Defendant denies that it ever became a member of or a party to the Standard Oil Trust agreement, or that it acted with said trust or was controlled by said trust in any way; that said trust was dissolved March 21, 1892.

"Defendant denies that it ever entered into any of the contracts or agreements with the parties named in plaintiff's petition, for the sale of its oil, and that if any such contracts or agreements were entered into, as set forth in plaintiff's petition, with anyone representing the defendant company, either as agent, attorney, employe, servant, or otherwise, the same was never known to the defendant company, nor did it ever sanction [\*\*\*9] or ratify such contract, either directly or indirectly; wherefore, they pray that plaintiff take nothing by this suit.

"9. Upon the law of the case, you are instructed as follows: Under the laws of this State, a trust is defined as follows:

**HN1[]** "A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes:

"(1) To create or carry out restrictions in trade, or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

"(2) To increase or reduce the price of merchandise, produce, or commodities.

"(3) To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.

"(4) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity or merchandise, produce, or commerce, intended for sale, use or consumption in this State.

**HN2[]** "(5) To make or enter into or execute [\*\*\*10] or carry out any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any [\*6] article or commodity or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale [\*\*938] or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

"10. Now, if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying, and selling oils, [\*\*\*11] as named and set out in plaintiff's petition, since July 6, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively, for any specified time, and from no other source, in consideration of rebates allowed them by the defendant company, or for any other valuable consideration; or if you find that said company, so acting through its duly appointed and authorized agents, since said date, made, entered into and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves, for a valuable consideration, to buy all their oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company; or if said defendant company, so acting since said date, made and entered into and carried out in this State, a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated [\*\*\*12] themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company, and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents, so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty,

and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made, then you are instructed that the defendant would be guilty of violating the law against trusts of this State; and if you so find the facts to be as above stated, you will return a verdict for the plaintiff against the defendant, Waters-Pierce Oil Company.

"11. You are further instructed that HN3[<sup>↑</sup>] a corporation can only act [\*7] through its agents and servants, but a corporation is not liable for all [\*\*13] the acts of its agents or servants. It is liable, however, for the acts of its agents done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents which have been acquiesced in or ratified by the governing body of said corporation.

"12. Now if you find from the evidence that any or all of the contracts mentioned in section No. 10 of this charge, were made and carried out by the defendant company, acting through its agents with the parties therein named, but you do not find that said agents were authorized by the governing body of said corporation to make said contracts, nor that said contracts were made in the scope of the duty and employment of such agents, and do not find that said contracts, if any were made, were known to, or acquiesced in, or consented to by the governing body of said corporation, after being made by said agents, then you will return a verdict for the defendant company.

"13. But if you find said contracts mentioned in section No. 10 of this charge were entered into by the defendant company, acting through its agents, [\*\*\*14] and that said agents were acting in the scope of their employment and agency in making said contracts, or, if said contracts were not authorized by the governing body of said corporation, that it acquiesced in or consented to or ratified said acts after knowing the same had been entered into, then said defendant company would be liable for such acts.

"14. You are further instructed that HN4[<sup>↑</sup>] this court has no jurisdiction over, and the laws of this State do not apply to interstate commerce, -- that is, to commerce between the different states of the United States. Shipments of oils or other products, made by the Waters-Pierce Oil Company from points without this State to its agents within this State is interstate commerce until such oils are sold by said company in the original packages in which it was shipped into this State, and as such is not subject to the laws of this State, regulating the sale thereof, and if the evidence introduced before you shows any of the contracts set out in plaintiff's petition were made in reference to interstate commerce. then you will not consider such contracts further, as the laws of this State do not cover such transactions; but, on the other hand, if [\*\*\*15] the Waters-Pierce Oil Company shipped oils from points beyond this State to its agents, to points within this State, and after their receipt in this State the same were sold by said agents in this State, to parties in this State in broken packages or by retail, and not in the original packages in which said oils were shipped into this State, then such business is not interstate commerce, and is subject to the laws of this State; you are further instructed that, even though the contract may have reference to interstate shipments of oils, yet if the parties go farther and contract that such oils, after being sold by said Waters-Pierce Oil Company to parties in this [\*\*939] State, shall be sold by said parties at a price fixed by the duly authorized agents of defendant company, then you are informed that such [\*8] dealing with said oils, after its sale to parties in this State, is not protected by the interstate commerce laws, but such contracts, if made, are subject to the laws of this State.

"15. You are instructed that HN5[<sup>↑</sup>] the law against trusts in this State became a law on March 30, 1889, and was amended in 1895, and the defendant company obtained its permit to do business [\*\*\*16] in this State on July 6, 1889, and all transactions in evidence before you, of date prior to July 6, 1889, are immaterial in this case, except where such contracts were continued and carried out subsequent to July 6, 1889, and for the purpose of showing the course of dealing of said company in this State, and such transactions prior to July 6, 1889, are no ground for forfeiture of defendant's permit to do business.

"16. There has been certain evidence introduced before you tending to show efforts and inducements offered by the agents of the defendant company to parties to handle oils of defendant company exclusively, and tending to show refusal of the agents of said company to sell parties handling other oils than those of defendant company, and of discrimination in prices against parties handling other oils than those of defendant company, and of cutting of prices

by defendant company, to break down competition; none of these things are unlawful, and was only admitted as bearing upon the question of the course of dealing of defendant company in this State, and as bearing upon the question, whether or not the defendant company made or entered into the contracts, or any of them, as [\*\*\*17] set out and mentioned in section number 10 herein, and as to whether or not such contracts or course of dealing, if any such there was, was known to the governing officers of the defendant company, or was authorized by them.

"17. There has been introduced in evidence before you a certain contract, known as the Standard Oil Trust agreement, and certain evidence tending to show that the defendant Waters-Pierce Oil Company became a member of and entered into said agreement; you are instructed that the evidence is not sufficient to show that defendant became a member of said organization, if at all, in a manner that violates the trust laws of this State, and you will, therefore, disregard all testimony upon this branch of the case.

"18. There has also been introduced in evidence before you certain evidence in regard to a contract made by the defendant company with the Eagle Refining Company, and also with C. W. Robinson, with J. L. Lewis and Stillwell Bros., in the State of Texas, by which they purchased the business of such concerns; you are instructed that such transactions as these are not believed to be in violation of the laws of this State, and the evidence in regard to these transactions [\*\*\*18] will only be considered by you as bearing upon the course of dealing of defendant company in this State.

"19. The questions for you to determine in this case are:

"(1) Were any of the contracts mentioned in section 10 of this [\*9] charge made and entered into and carried out by the defendant company in this State, since July 6, 1889, acting through its agents.

"(2) Whether such agents were acting in the scope of their authority and employment in making such contracts, or, if not, whether same were ratified or acquiesced in by defendant company after they were so made.

"(3) Whether said contracts, if any, relate to interstate commerce or to business within this State.

"20. In determining whether or not the agents of defendant company were authorized to make the contracts alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, the same does not necessarily have to be shown by positive or direct testimony, but may be shown by circumstances, and you will take into consideration all the facts and circumstances in evidence before you in determining this question.

"21. You will return a verdict for the defendants Hathaway, [\*\*\*19] Austin, Grice, Keenan, and Fries, as they are only the agents of defendant company and not liable in this suit. If you find a verdict for the plaintiff, you will say, 'We the jury find for the plaintiff, the State of Texas, against the defendant, Waters-Pierce Oil Company, and in favor of the individual defendants,' naming them. If you find for the defendant company, you will say, 'We the jury find for all the defendants, and that plaintiff take nothing by this suit.'

"22. The burden of proof is on the plaintiff to show, by a preponderance of the evidence, the facts necessary to entitle it to recover.

"23. The jury are the exclusive judges of the credibility of the witnesses, the facts proven, and the weight to be given the testimony, but are bound to receive the law from the court and be governed thereby."

A verdict was rendered for the State, against the Waters-Pierce Oil Company, but against the State in favor of Hathaway and the other defendants, upon which verdict judgment was entered denying to the Waters-Pierce Oil Company the right to do any business in Texas, and revoking and canceling its permit to do business in Texas, and perpetually enjoining said company and its agents [\*\*\*20] from doing business in Texas, but adding this provision, by way of qualification, viz: "Nothing herein contained shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State."

[\*\*940] *Opinion.* -- It is needless for us to set out the evidence upon which we base our conclusions of facts, as it is sufficient for us to state that we find that there is evidence which tends to establish the combination of facts as set out in the tenth subdivision of the charge of the court, and that these facts constitute a violation of the anti-trust laws of this State; and that the appellant, through its agents, with knowledge of the facts, was connected with those transactions, and that there is some evidence which supports the two propositions of law given in the subsequent portion of [\*10] the fourteenth subdivision of the charge, which takes the conduct complained of out of the domain of interstate commerce.

From these conclusions, we find that the facts warrant the judgment rendered, and that it should not be disturbed, unless for some legal grounds affecting its validity. The appellant is a foreign corporation, [\*\*\*21] domiciled in Missouri, engaged in the business of shipping and selling oils within this State, and there is some evidence which shows that they are dealing in oils as a business within this State.

The charge of the court sufficiently defines what, under the statutes of this State, is an illegal trust and combination, and we may add that the first act upon the subject, which went into effect March 30, 1889, exempted from its operation agricultural products and live stock, while in the hands of the producer and raiser; and the second act, which went into effect April 30, 1895, which was intended to repeal the Act of 1889 (and was in its general features much similar to that act), contained the same exemption as to agricultural products and live stock while in the hands of the raiser or producer, with also an exemption from its operation of labor organizations created for the purpose of maintaining a standard of wages. Both acts provide for a forfeiture of the charter of domestic corporations and of permit of foreign corporations to do business in this State, as a penalty for the infraction of the provisions of the statutes.

It is insisted that the statutes in question illegally infringe [\*\*\*22] upon the liberty of the citizen to contract concerning his property, and deprive him of his property and impose restraints and burdens upon it, without due process of law. [HN6](#) The *fourteenth amendment to the Constitution of the United States*, from which these rights flow, extends its benefits in these respects to corporations, as well as persons. [Railway v. Beckwith, 129 U.S. 26, 28](#); [Turnpike Co. v. Sandford, 164 U.S. 578, 41 L. Ed. 560, 17 S. Ct. 198](#). But a consideration of these questions necessarily leads to the inquiry whether the statutes that are assailed arise out of an exercise of the general police authority of the State; for upon a solution of that question much depends the proper answer to be given to the contention of appellant.

[HN7](#) The State may, in the exercise of its police power, legislate concerning many matters which, but for the authority in this respect, would be unauthorized. This power -- generally stated as the "police power of the State" -- extends to a variety of subjects which need not be enumerated, as it is generally admitted that matters and subjects which affect the general welfare and public interests are within the supervision of this power. The court in the [\*\*\*23] case of [Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77](#), speaking of this power, say: "But it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another's. This is the very essence of government, and has found expression in the maxim, "sic utere tuo ut alienum non laedes." From this source come the police powers, which, as was said by Chief Justice Taney in the [License Cases, 5 How. 554, 583](#), "are nothing more or less than the powers of government, inherent in every sovereignty, \* \* \* that is to say, \* \* \* the power to govern men and [\*11] things." Under these powers, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good."

[HN8](#) "The State can now as before prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity." [Railway v. Beckwith, 129 U.S. 26, 29](#).

[HN9](#) "The police power of the State is the authority vested in the Legislature to enact all such wholesome and reasonable laws \* \* [\*24] \* as they may deem conducive to public good." [State v. Moore, 104 N.C. 714](#); same case, 17 Am. St. Rep., 698.

[HN10](#) "All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public welfare. 'We think it is a settled principle,' says Chief Justice Shaw, in Commonwealth v.

Alger, 7 Cush. 84, 'growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare.' Judge Redfield, in a passage often cited with approval, speaking of the police power, says: 'By this general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which, no question ever was, or upon acknowledged [\*\*\*25] general principles can be made.' [Thorp v. Railway, 27 Vt. 140](#). The police power, so called, inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from disturbing conflicts." [Berthoff v. O'Reilly, 74 N.Y. 509](#).

**HN11**[] The State in the exercise of this power in the selection of remedies looking to the suppression of evils harmful to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation under a capricious exercise of the police power, but a useful regulation in the interest of the public welfare. Cool. Const. Lim., 6 ed., 707-720.

**HN12**[] In enumerating the subjects which may be acted upon by the State in the exercise of its police power, Mr. Tiedeman, in his valuable work on Limitations of Police Powers, names combinations in restraint of trade, section 96; and as said in [United States v. Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540](#): "Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade [\*\*\*26] and commerce which, when carried out, affect the interests of the public."

This is certainly a just acknowledgement of the power, for there are few acts which individuals may engage in that are more harmful in their [\*12] effects upon the interests of the people generally than trusts and combinations concerning the commodities useful to mankind.

**HN13**[] The rights of the individual must yield to the public wants, and his conduct and all property held by him is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. "As said in [Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77](#), while power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." [Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273](#).

**HN14**[] This is one of the inherent rights of sovereignty, and it is as much in place that it shall be exercised when the public interest requires, as it is the duty of the State, by stringent laws, to protect society from the depredations [\*\*\*27] of the thief and the ravages of the murderer. When it is once admitted that a matter is a subject of police supervision, the expediency and wisdom of the means resorted to are subjects solely confided to the legislative department of the State, subject, however, to limitations imposed by the organic law of the nation in excluding from their jurisdiction, for many purposes, certain matters of control solely reserved to the national government, -- such, for instance, as many of the matters relating to interstate commerce. It is not meant by this that a Legislature may conclusively declare a matter subject to its police authority, when in fact such is not the case -- for that is a question which the courts may determine, -- and under the guise of that power, by a system of confiscation and spoliation, which has no place in our government, deprive a citizen of his rights, but, as said before, when it is once determined that the subject dealt with really concerns the public welfare, it lies wholly within the police authority of the State, through its law makers, to determine how it shall be handled and dealt with. [Railway v. Mathews, 165 U.S. 1, 16](#).

**HN15**[] By adequate laws looking to the suppression [\*\*\*28] of evil, the State, through the exercise of its police power, must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty, as is attested from many of the provisions of the codes of this State and of others and the constructions that have been given to them. The freedom of speech, the liberty of person, and life itself must be surrendered, when the public interests and the order of good

government so require. The liberty of the citizen, which embraces the legal right to his property, and to lawfully contract concerning it, stand upon no higher ground.

In *Soon Hing v. Crowley*, 113 U.S. 703, 28 L. Ed. 1145, 5 S. Ct. 730, the court said: "The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. **HN16**[<sup>1</sup>] However broad the right of everyone to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised [\*13] subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the [\*\*\*29] actions of men notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws." *Crowley v. Christensen*, 137 U.S. 86, 34 L. Ed. 620, 11 S. Ct. 13.

The objection to the statutes that they deprive the owner of his property without due process of law is equally untenable. It was not the design of the *fourteenth amendment of the Constitution of the United States* to interfere with a just and proper exercise of the police power by the *States. Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357; *Davis v. Massachusetts*, 167 U.S. 43, 42 L. Ed. 71, 17 S. Ct. 731. And when we determine, as we have, that the measures in question provided by these statutes were proper police regulations, we go far towards conclusively answering the objections to the statutes on the ground that they deprive the owners of their property, without due process of law. **HN17**[<sup>1</sup>] If legislative authority exists to restrain the conduct of owners in a particular way in the use of their property, deemed injurious to the public welfare, and the Legislature has acted in the manner required in passing laws, due process of law exists, in so far as it is necessary to find legal authority [\*\*\*30] for prohibiting the act. Legal restraints imposed upon the [\*\*942] use of property do not deprive the owner of it without due process of law: *Railway v. Mathews*, 165 U.S. 1, 23; *Railway v. Humes*, 115 U.S. 512, 519; *Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357; *Walston v. Nevin*, 128 U.S. 578, 32 L. Ed. 544, 9 S. Ct. 192; *Railway v. Gibbes*, 142 U.S. 386, 387; *Bertholf v. O'Reilly*, 74 N.Y. 509; *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273.

In the case last cited, the Supreme Court, in passing upon a statute of Kansas which in effect deprived owners of intoxicating liquors of their right to pursue the avocation of selling and disposing of that class of property, at length reviewed this question, and also that aspect of those statutes which tended to interfere with the liberty of the citizen. The conclusion was reached that the matter was the subject of police regulation, and the restraints imposed upon the use of the property in the prohibited way did not illegally affect the liberty of the citizen or deprive him of his property without due process of law.

**HN18**[<sup>1</sup>] The statutes here in question do not arbitrarily, by legislative decree, ipso facto, operate [\*\*\*31] upon the liberty of the citizen or upon his property, and deprive him of these rights, but provide for an orderly procedure in the courts of the State, with a right of the accused to be heard before being condemned. Whenever a burden is "imposed upon property for the public use, whether it be for the whole State, or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law." *Davidson v. New Orleans*, 96 U.S. 97, 24 L. Ed. 616.

**HN19**[<sup>1</sup>] The statutes are next assailed upon the ground that they are class legislation, and deny to certain citizens and classes equal protection of the [\*14] laws, and that the classification of subjects upon which the laws should bear, and those who are exempted from its operation, are purely capricious and arbitrary, in that there are no differences in the conditions of the classes which would justify the distinction made between [\*\*\*32] them. Therefore, for this reason, it is contended that the statutes are obnoxious to the fourteenth amendment of the Constitution.

That the statutes in these respects are constitutional, has, in effect, been admitted by the courts of this State in the following cases: *Brewing Association v. Houck*, 27 S.W. 692; same case in 30 S. W. Rep., 869; *Brewing Co. v. Templeman*, 90 Tex. 277, 38 S.W. 27; *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S.W. 29.

We might be content with resting a disposition of this question upon these cases, but the gravity of the question and the earnestness with which the law is assailed command a more extended consideration of the subject. Of the many additional cases which may be cited, which by analogy sustain those noticed, are Fidelity and Casualty Co. v. Allibone, 90 Tex. 660, 40 S.W. 399; Insurance Co. v. Levy, 33 S.W. 992; Campbell v. Cook, 86 Tex. 630, 26 S.W. 486; Railway v. Mackey, 127 U.S. 205, 209; Railway v. Beckwith, 129 U.S. 26, 29; Railway v. New York, 165 U.S. 628, 633; Express Co. v. Seibert, 142 U.S. 339, 35 L. Ed. 1035, 12 S. Ct. 250; Railway v. Humes, 115 U.S. 512, 519; Soon Hing v. Crowley, 113 U.S. 703, 28 L. Ed. 1145, 5 S. Ct. 730; Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357; Crowley v. Christensen, 137 U.S. 86, 34 L. Ed. 620, 11 S. Ct. 13; Hays v. Minnis, 120 U.S. 68; Bank v. Penn, 167 U.S. 461, 42 L. Ed. 236, 17 S. Ct. 829; Railway v. Mathews, 165 U.S. 1, 23; Powell v. Pennsylvania, 127 U.S. 678, 32 L. Ed. 253, 8 S. Ct. 992; State v. Moore, 17 Am. St. Rep., 697, 104 N.C. 714, 10 S.E. 143.

In discussing the great mass of case law which touches upon this subject, those that relate to railways as a class of carriers are sufficient as a basis for demonstrating our views. It is true that many of these cases which recognize HN20[<sup>1</sup>] the right of the Legislature to classify railways as a special subject of legislation and impose duties, burdens, and restrictions upon them which are not imposed upon other carriers, are based upon the principle that they are public corporations and engaged in a public business, and that further, on account of the dangerous character of their business and by reason of benefits received, the power exists to impose duties and burdens upon them which are not applied to other carriers. But really, the true principle and doctrine upon which legislation of this character is bottomed, as affecting [\*\*\*34] railways as a class, is that the public interests and welfare require that in the use of their property and the performance of their business it be conducted in a way least harmful to the public and most beneficial thereto consistent with the right of ownership in the property. It is the public interest and welfare that is involved in the business they carry on and conduct that really gives the State, in the exercise of its police power, jurisdiction over their affairs. Now, HN21[<sup>1</sup>] the general welfare of the people is no more important to be observed in restraining and controlling railways in their relation to the commerce of the country than is the public interest to be subserved by laws which restrain and prevent trusts and combinations concerning [\*15] such commerce, and which seek to prevent conspiracies entered into for the purpose of affecting the prices of commodities which are useful and necessary to the enjoyment of life. In each case the interest of mankind requires that the selfishness of human nature, which seeks alone to advance its individual interests, shall, in the use of property and in [\*\*943] conduct, be so far restrained, as may be compatible with individual right [\*\*\*35] and liberty, as will prevent harm and injury to the public.

The cases of Campbell v. Cook, Railway v. Mackey, Railway v. Mathews, and Railway v. Beckwith, *supra*, are instances of legislation creating and enforcing regulations concerning only railways as a class of carriers. They were not applied to other carriers. But the statutes operated with equal effect upon all railways.

In these cases the rule laid down in Barbier v. Connolly, 113 U.S. 27, 31, was applied, to the effect that HN22[<sup>1</sup>] "regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly [\*\*\*36] situated, is not within the amendment."

The view of the court in these and similar cases, is fully illustrated by what is said in Railway v. Mackey, 127 U.S. 205, where a statute making railway corporations liable for damages resulting to employes by reason of the negligence of their fellow servants was held constitutional. HN23[<sup>1</sup>] "The hazardous character of the business of operating railways would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without discrimination, made subject to the same liabilities. As said by the court below, it is simply a question of legislative

discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to other persons and corporations using steam in manufactoryes."

**HN24**[<sup>1</sup>] The Legislature, in the pursuit of its police power, in selecting subjects [\*\*\*37] upon which it shall bear, can not capriciously and arbitrarily classify those subjects, and impose burdens on some and relieve others, when in the nature of things they are similarly situated and no reason could exist for the distinction. But, viewing the subject of classification from any standpoint, if reasons for the distinction can in any event exist the legislation must be credited with being founded upon it. Doubtless the several Legislatures, in passing statutes regulating railways as [\*16] a distinct class of carriers, evidently contemplated that, from the magnitude of the service in which they were engaged and the relations they bore to the public and the injury that might result to the public welfare if they were not restrained, requiring rules and regulations for their conduct which were not necessary to be applied to other carriers because of their limited capacity and extent, the public were not so much concerned with the conduct of their business, and that they were not so situated as to seriously, in these particulars, affect or injure the public. It is not the duty of the State to discover the reasons and circumstances upon which these laws may rest, but the burden [\*\*\*38] is upon the appellant to demonstrate that the classification was capricious and unauthorized.

We can not say that the law upon its face establishes its want of reason, or that circumstances and conditions existing in this State, in relation to the subjects dealt with in the acts and the evils sought to be suppressed, did not authorize the classification made in the statutes. This view might relieve us of any duty looking towards a discovery of reasons which might have been in the legislative mind for the distinction and classification. The law is not palpably in violation of the fourteenth amendment of the Constitution, but whether it is so, depends much upon the facts and conditions existing at the time which would make it unjust to discriminate between the classes. **HN25**[<sup>1</sup>] In the absence of such facts showing the contrary, the presumption would be in favor of its constitutionality. State v. Moore, 17 Am. St. Rep. 698; *State v. Addington, 77 Mo. 110*; *Powell v. Pennsylvania, 127 U.S. 678, 32 L. Ed. 253, 8 S. Ct. 992*.

**HN26**[<sup>1</sup>] The domestic welfare of the people of this State is within the keeping of its Legislatures, and they are supposed to best know their wants and necessities, and the policy that [\*\*\*39] shall govern its internal affairs, and the remedies needful in the pursuit of this policy and that are necessary in order to extinguish or prevent evil and harmful conditions affecting the general interest and the public welfare. These are matters political and relate to the economic affairs of government, and are peculiarly within the knowledge of the law-making department thereof. The remedies, therefore, lie within the legislative province and are, to some extent, confided to their discretion and wisdom. *Hennington v. Georgia, 163 U.S. 299, 41 L. Ed. 166, 16 S. Ct. 1086*; *Powell v. Pennsylvania, 127 U.S. 678, 32 L. Ed. 253, 8 S. Ct. 992*. In this last case it is said "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

In the pursuit of this policy conditions might exist which would justify the Legislature in creating and providing remedies adequate to suppress the evil, when applied to one class of subjects, which might not, in their opinion, be necessary to be applied to other classes. For the danger to the public [\*944] welfare from the pursuit of the evil by the one class may be of [\*\*\*40] such magnitude and lead to such disastrous consequences that corrective measures are absolutely essential to the order of good government and to the repose and stability of society; while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable [\*17] and the acts denounced so difficult of consummation at their hands in injurious effects upon the welfare of the people that corrective measures are not necessary to be applied to them. Now, combinations and trusts in restraint of trade and the existence of monopolies which place it within the power of those combining to affect and elevate the prices of commodities in use by the peoples of the world for their enjoyment and necessities are harmful to the welfare of the public whenever and wherever such conditions are permitted to exist. With a knowledge of this fact within the mind of the law makers, the Legislature of this State, in the light of history, and with a knowledge of current events, may, with much reason, have concluded that the danger from trusts and combinations which in their operation would injuriously affect the people would be at the hands of the buyer and seller and dealer [\*\*\*41] in commodities, and not at the hands of the producers, and that by reason of the generally admitted necessity of the producers to readily and speedily dispose of their products and the difficulties in their way to a successful combination relating to the disposition of their products, little if any danger to the public would be apprehended from that source. **HN27**[<sup>1</sup>] The

Legislatures of the State are supposed to have acted in this matter intelligently and with a knowledge of the conditions and dangers confronting the people from combinations and trusts; and it requires little enlightenment to discover that, at the time these laws were passed and now, the disturbing classes which were and now are so injuriously affecting the public welfare are the buyers, sellers, and dealers in the articles in use by the people of this State. The unbridled license of these classes which in many instances was exercised, had, within this State as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the layman as well as the lawgiver could discern it.

Whatever condition may exist elsewhere concerning the conduct of the producing class [\*\*\*42] in affecting through combinations the prices of their productions, it can not be said to exist in this State, if at all, to any appreciable extent, at least not to such an extent as to be an evil of such proportions as to necessarily require corrective measures for its suppression. All these facts were known to the Legislature and evidently influenced them in selecting the subjects to which the law should apply. *Plessy v. Ferguson, 163 U.S. 537, 550*. And as said in *Railway v. Mackey, supra*, "It was simply a matter of legislative discretion, whether the same liabilities" should be applied to the classes which were exempted from the operation of the statute. This case is quoted with approval by the recent case of *Railway v. Mathews, 165 U.S. 1, 25*.

The conditions of the classes embraced in the act and those excluded are not altogether similar, and there are many distinguishing features between the two which suggest the power in the one to successfully combine and which deny it to the other. The infant twenty years of age may possess the mental requisites to contract as one sui juris, and may as well [\*18] understand the responsibilities of citizenship, and be as capable of intelligently [\*\*\*43] exercising the functions of office and the duties of a citizen as an adult. The adult female often possesses as much intelligence as man, and appreciates the rights and duties of citizenship, and possesses a knowledge of the affairs of government; but in these instances a distinction is observed between their rights, on the one hand, and those of adults and males on the other. But in those cases, the power of the lawmakers to confer privileges upon the one class and deny them to the other has never been successfully questioned. But they are as much within the protection of the fourteenth amendment to the Constitution as those of other classes. It is somewhat difficult to perceive why mechanics, as a class of laborers, should be entitled to more privileges and advantages than are conferred upon other classes of laborers and servants. But laws of this class, which provide means for mechanics in the collection of their debts, are not extended to other classes of laborers; and, as said in *Railway v. Mackey*, such statutes are not obnoxious to the fourteenth amendment.

These are simply haphazard illustrations that have just occurred to us, of many that could be given, showing the power [\*\*\*44] of the lawmakers to classify subjects when, in their wisdom and discretion, reasons therefor may be suggested to them which, when viewed from the standpoint of some other body of lawmakers or of some court which may be called to pass upon such statutes, may not be fully understood or appreciated.

The learned counsel for appellant, in their most able presentation of this question in their brief, contend that the views here expressed are opposed to the case of *Railway v. Ellis, 165 U.S. 150*.

That case does not conflict with the views we entertain upon this subject. It is distinguishable upon the ground that there it was held that the Legislature did not have the power to arbitrarily and capriciously, without reason, distinguish between classes similarly situated. We do not oppose this view, but hold, as we have endeavored to show, that the classification made by the law in question was not of the character denounced in the case cited.

[\*\*945] If the clause in the Act of 1895 which exempts from its operation labor organizations for the purpose of maintaining their wages would render that statute obnoxious to the fourteenth amendment to the Constitution, which we do not think to [\*\*\*45] be the case, the entire act would be void and could not operate as a repeal of the former law of 1889; so that if it should be determined that this latter act was unconstitutional, the former act would be in force, and would not be subject to the objections urged against it, for the reasons stated by us in passing upon these objections; and therefore the State could maintain a case under this act.

In response to the first proposition urged under the fourth, eighteenth, twenty-sixth, and forty-second assignments of errors, it is sufficient to say that the petition went further than simply charging the appellant with transporting and

shipping into Texas its oils; but in effect charged that it was engaged in business in Texas, in disposing of oils, and had [<sup>19</sup>] made and entered into contracts and agreements with various merchants within this State, and others dealing in oils, to buy and sell the oils of the defendant exclusively; and further agreed not to sell the oils so bought from the defendant company to anyone buying from or dealing with any other corporation, or person, dealing in competitive oils. These allegations in effect allege that the appellant was actually engaged [<sup>46</sup>] in business within this State, and had made and entered into such contracts with reference to the handling, disposition, and sale of oil in this State with merchants and local dealers, of the character denounced in the case of *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S.W. 29.

In response to the second proposition under these assignments, it can be said that it does not conclusively appear that all of the transactions testified about by the witnesses, occurring between the appellant and certain merchants at Brownsville, Texas, related solely to interstate commerce. There were some facts testified about by these witnesses which made it proper for the jury to consider what was the nature and effect of the transactions that occurred at Brownsville. It would have been improper for the court to have given the charge requested by the appellant upon this subject. [HN28](#)[<sup>1</sup>] Where there is any evidence, however slight it may be, the court must leave it to the consideration of the jury.

The court, in rendering its judgment canceling and forfeiting the permit of the appellant, provided that it should not relate to and interfere with the right of appellant, in dealing in matters of interstate commerce. The [<sup>47</sup>] appellant, in its third proposition under these assignments, complains of this judgment, because, as the statute provides for a forfeiture of the permit, the court had no power to render judgment forfeiting the permit so as to apply to dealing in oils locally within this State. The contention is that, as the statute required a forfeiture of the permit to do business in all respects, the court had no power to limit that right in its judgment.

It was decided in the case of *Fuqua v. Brewing Co.*, *supra*, that it was not the purpose of these statutes to undertake in any way to regulate or to prohibit transactions of interstate commerce, and it was clearly proper for the court to give to the statute this application. If the statute could be applied to domestic commerce and transactions occurring within the limits of this State, the court could give it application, and its inability to extend it to matters of interstate commerce would not affect its power in this respect.

It is contended in the eighth assignment of error that it was not competent for the State to impair the contract authorizing the appellant to do business in this State. After the Act of 1889 went into effect, the State [<sup>48</sup>] granted to appellant authority to engage in its business within this State for a period of ten years. [HN29](#)[<sup>1</sup>] The Act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. Except where the foreign corporation is in the employ of the Federal government or is engaged strictly in matters of interstate commerce, such bodies are entitled [<sup>20</sup>] to no rights or privileges except those which may be conferred upon them as an act of grace by the [State. Mining Co. v. Penn](#), 125 U.S. 173.

[HN30](#)[<sup>1</sup>] The laws of the State which apply to domestic corporations and individuals in prohibiting certain conduct apply with equal force to foreign corporations. The State, in granting them privilege to do business, does not absolve them from responsibility and contract to relieve them from the operation of laws which expressly apply to them. The act in force when the appellant entered this State informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of obligation and as binding upon the appellant as if it had been expressly made a part [<sup>49</sup>] of the permit. But there is another ground upon which this question may rest. The police power of the State can not be bartered away, and there exist no contractual rights which are not subject to its exercise. Speaking of police powers, Judge Cooley, in his work on Constitutional Limitations, section 707, says: "The occasion to consider this subject in its bearing upon the clause of the Constitution of the United States which forbids the States from passing any laws impairing the obligation of contracts, has been frequent and varied, and it has been held without dissent that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection [<sup>946</sup>] of the rights of individuals as may be deemed expedient. All contracts and all rights are subject

to this power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well being of the community may require, or as circumstances may change, [\*\*\*50] or as experience may demonstrate the necessity." Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273. And this principle is applicable to charters of corporations. Cool. Const. Lim., sec. 709; Railway v. Mathews, 165 U.S. 1, 18.

We can not agree with the appellant that it could not become bound by the acts of its agents performed in this State within the scope of their duty, because the conduct complained of, for which the State is seeking to make it responsible for the acts of its agents, involves a criminal responsibility in addition to their civil liability; and does not interpose any objection to the application of the principles of the law of agency which would make the appellant responsible to the State for a violation and infraction of its laws which it was guilty of through its agents while performing their duty with reference to the business confided to them. Meecham on Agency, secs. 745, 746; George v. Gobey, 128 Mass. 289. The charge of the court on the subject of agency was correct, it did not trench upon the province of the jury, and stated what we understand to be the correct rule upon that subject.

In reply to the twenty-fourth and twenty-fifth assignments [\*\*\*51] of error, we think there was testimony authorizing the instructions given by the court complained of. There is evidence which tends to show that such [\*21] combinations and agreements were entered into as were violative of the spirit and meaning of the anti-trust statutes, and the evidence shows that these agreements were entered into by appellant through its agents, and there is some testimony which tends to connect the appellant with this conduct, -- that it knew of it. The fact that reports were made to it by these agents tends to establish that it had knowledge of these contracts and the violation of the law in the respect complained of by the State, and that it accepted the fruits and benefits of these agreements.

The evidence complained of, in the twenty-second, twenty-seventh twenty-eighth, twenty-ninth, thirtieth, thirty-second, thirty-third, and thirty-fifth assignments of errors was admissible, controlled as it was by the charge of the court, which is also complained of. It tended to show, as a circumstance bearing upon the main issues in the case, the method of doing business in this State by the appellant. One principal reason why this testimony was admitted was for [\*\*\*52] the purpose of showing that the appellant had knowledge of the transactions complained of by the State, that had some bearing and relation to that question. They were transacted by the trusted agents of the appellant, and we can not assume that the appellant did not have notice of this conduct; but, as said before, there are some facts which tend to indicate that it did have notice and received the benefits of the transactions and agreements entered into by the agents with the local merchants of this State.

The court did not err in admitting the testimony of witness Dugger, nor did it err in refusing to admit the evidence of witness Grice, as complained of in the thirty-first and thirty-sixth assignments of errors. Nor did it err in refusing to admit the testimony of witness Pierce, as set out in the thirty-eighth assignment of error, nor did it err in the ruling complained of in the thirty-ninth assignment of error.

No extended discussion is required upon the rulings complained of by these assignments, and it is sufficient to say that we have given them the consideration which their importance demands, and we reach the conclusion announced.

It is further contended, although the [\*\*\*53] question is not properly raised, that the appellant was entitled to a charge to the effect that the jury must find in its favor unless its guilt of the conduct complained of was established beyond a reasonable doubt. Whatever may be the rule that exists in other jurisdictions, we do not think a charge of that nature would have been applicable in this case. This is a civil controversy; and as has been previously said by this Court in an opinion in which a number of cases were cited, HN31 [↑] "In no controversy of a civil nature would it be proper for the courts of this State to give such a charge." Pace v. Mortgage Co., 43 S.W. 36.

We find no error in the record and the judgment is affirmed.

*Affirmed.*

Writ of error refused.

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## ***State ex rel. Crow v. Firemen's Fund Ins. Co.***

Supreme Court of Missouri

July 15, 1899, Decided

No Number in Original

**Reporter**

152 Mo. 1 \*; 52 S.W. 595 \*\*; 1899 Mo. LEXIS 201 \*\*\*

The State ex inf. Crow, Attorney-General, v. Firemen's Fund Insurance Company et al.

**Disposition:** [\*\*\*1] Writ of ouster awarded.

### **Core Terms**

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rates, defendant corporation, insurance company, lightning, storm, social club, Underwriters', insuring, local agent, anti-trust, pool, fire damage, slips, premium, contracts, policies, do business, confederation, insurance business, local resident, trusts, cases, fire insurance company, practices, furnish, conspiracy, deprive, fire insurance, daily report, combinations

### **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Financing > Grants & Reservations > Joint Ventures & Partnerships

Insurance Law > Claim, Contract & Practice Issues > Premiums > General Overview

Insurance Law > Industry Practices > General Overview

#### **HN1 Contracts, Sales of Goods**

1897 Mo. Laws 208, § 1 provides, inter alia, that any corporation organized under the laws of Missouri or any other state or country for transacting or conducting any kind of business in the state, or which does transact or conduct any kind of business in the state, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair,

152 Mo. 1, \*1L<sup>52</sup> S.W. 595, \*\*595L<sup>899</sup> Mo. LEXIS 201, \*\*\*1

any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into become a member of or a party to any pool, agreement, contract or combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud.

[Business & Corporate Law](#) > ... > [Duties & Liabilities](#) > [Knowledge & Notice](#) > General Overview

## [\*\*HN2\*\*](#) Duties & Liabilities, Knowledge & Notice

A local agent's knowledge is the knowledge of his company, and his acts are the acts of his company.

[Antitrust & Trade Law](#) > ... > [Monopolies & Monopolization](#) > [Conspiracy to Monopolize](#) > General Overview

[Business & Corporate Compliance](#) > ... > [Trusts](#) > [Trust Administration](#) > [Construction & Interpretation of Trusts](#)

## [\*\*HN3\*\*](#) Monopolies & Monopolization, Conspiracy to Monopolize

When people set out to do acts that are either mala in se or mala prohibita they do not put up a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may be of the same character, and while such laws are penal in their nature and should be strictly construed, nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds.

[Torts](#) > [Business Torts](#) > [Fraud & Misrepresentation](#) > General Overview

## [\*\*HN4\*\*](#) Business Torts, Fraud & Misrepresentation

While fraud is not to be assumed without proof, it is nevertheless often shown by circumstances than any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. And where this occurs repeatedly, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences. Whenever fraud is the matter in issue, any unusual clause in an instrument, any unusual methods of transacting the business, apparently done with the view for effect and to give to the transaction of the business an air of honesty, is of itself a badge of fraud.

[Antitrust & Trade Law](#) > ... > [Monopolies & Monopolization](#) > [Conspiracy to Monopolize](#) > General Overview

[Criminal Law & Procedure](#) > ... > [Inchoate Crimes](#) > [Conspiracy](#) > Elements

[Criminal Law & Procedure](#) > ... > [Inchoate Crimes](#) > [Conspiracy](#) > General Overview

[Criminal Law & Procedure](#) > ... > [Inchoate Crimes](#) > [Conspiracy](#) > Penalties

## [\*\*HN5\*\*](#) Monopolies & Monopolization, Conspiracy to Monopolize

152 Mo. 1, \*1L<sup>52</sup> S.W. 595, \*\*595L<sup>899</sup> Mo. LEXIS 201, \*\*\*1

A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

## **HN6** **Monopolies & Monopolization, Conspiracy to Monopolize**

A trust is a contract, combination, confederation, or understanding, express or implied, between two or more persons to control the price of a commodity or service, for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

## **HN7** **Monopolies & Monopolization, Conspiracy to Monopolize**

In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantages, which flow from free competition. For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

Governments > Legislation > Interpretation

## **HN8** **Legislation, Interpretation**

When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid. In adopting a title the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject matter covered by the act; mere matters of detail need not be stated in the title.

Constitutional Law > Substantive Due Process > Scope

## **HN9** **Constitutional Law, Substantive Due Process**

It is a misconception of the *Fourteenth amendment to the Constitution of the United States* to suppose that any person acquires any vested rights by complying with existing police regulations or comity laws which can not be affected by subsequent changes in such regulations or laws.

## **Headnotes/Summary**

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### **Headnotes**

1. **Insurance Trust:** Combination to Fix Rates for Fire Insurance, etc. The statute provides that "any corporation organized under the laws of this or any other State or county for transacting or conducting any kind of business in

this State, . . . which shall enter into . . . any pool, trust, agreement, confederation or understanding with any other corporation, . . . person or association of persons, to regulate or fix . . . the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated and fixed, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit . . . the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this act." It was shown that prior to the enactment of this statute, the Association of Fire Underwriters of Missouri was maintained for the purpose of establishing and maintaining rates at which property in the State was insured, and one Fetter of Kansas City was employed to fix such rates and see they were maintained. After the statute was enacted, this association realized its practices were violative thereof, and ceased to exist, and Fetter on his own account published a book of rates which were the same as those previously fixed and maintained by the association. This book he sold to the defendant insurance companies, and all their local agents at St. Joseph had it, and all policies in that town were written according to the rates therein, and when there was a variance the general agent was, at the first, notified by a slip attached to the daily report turned over by the local agent to the secretary of a club, composed of the local agents of all the defendant companies except five, but later when it was deemed "inexpedient" to commit such matters to writing, the local agent was verbally notified by the secretary, and if he did not conform his policy to the Fetter rates he was called to account. The club had no constitution or by-laws and its president testified that it would put nothing to writing that would lay its members liable to prosecution, and that what was done towards maintaining rates was "understood" by the members. The daily report to the secretary included the policies written by the agent during the day, inclosed in an envelope addressed to the companies, and this the secretary after examining the policies, sealed and mailed to the company. The secretary was recommended by Fetter and had formerly been employed in his business, and the local agents contributed one dollar per month for each company towards his support, which was usually held back by the agents in their monthly remittances to the companies, and Fetter was paid by the companies for his books by charging a per cent on the entire business done by each company in the State. *Held*, that the club is a plain, palpable but bungling pool, trust, agreement, combination, confederation and understanding organized to evade said anti-trust statute. *Held*, also, that the knowledge of the local agents who composed the club, is the knowledge of the companies, and their acts are the acts of their companies. *Held*, also, that the companies be ousted of all the rights, privileges and franchises conferred by the laws of this State and of their licenses to do business in this State. *Held*, also, that, although five of the defendant companies were not members of the local club, yet as they have made common cause with the other defendants by the pleadings and their joint answer, the judgment of ouster will include them, too.

*Held*, by Gantt, C. J., that the five companies against whom the evidence failed to establish the charges, could not be held to have admitted the allegations of the petition because they joined in the answer denying the constitutionality of the statute.

*Held*, by Valliant, J., in a separate opinion, that the evidence is not sufficient to convict any of the defendants of the offense charged.

**2. Insurance Trust:** Combination to Fix Rates for Fire Insurance, etc Acts of Agents. If the acts and practices of agents of corporations are in violation of law, the companies must suffer therefor. The company must control its agents, and see to it that they do not violate the law while attending to the business of the company.

**3. Pleading:** Admissions: General Denial. The closing of the answer with a general denial of all the allegations of the petition not admitted therein to be true, avails nothing if the specific defenses pleaded are all predicated upon the facts charged being true.

**4. Trust:** Occasional Violations of Trust Agreements. The fact that certain parties to a trust were treacherous to each other, and in their desire to do business violated the trust agreement and occasionally wrote policies for less than the fixed rate, does not tend to disprove the existence of the trust.

**5. Trust:** Evidence of Existence. The existence of a trust may be as conclusively proved by facts and circumstances as by direct, written evidence.

6. **Trust:** Definition. A trust is a contract, combination, confederation or understanding, express or implied, between two or more persons, to control the price of a commodity or service, for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly. There is no difference in principle in contracts in restraint of trade and trusts. The difference is in extent and methods.

7. **Trust:** Intention of Members. If the practice of the members of a club composed of local insurance agents had the effect of maintaining fixed rates of insurance, it constituted them a trust, no matter whether the members intended it to have that effect or not.

8. **Statute:** Title: Constitutional. The title of the anti-trust law of 1891, and the amendments thereto in 1895 and 1897, does not infringe on the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title." The subject of insurance against loss or damage by fire, lightning or storm is not a different subject from that contained in the title, which is, "An Act providing for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases."

9. **Statute:** Freedom of Contracts: Constitution: Due Process of Law. Said statute is not unconstitutional. It is not true that it "deprives insurance companies of their property, life or liberty without due process of law" on the theory that "it renders it unlawful for insurance companies to contract among themselves for the reasonable adjustment and maintenance of insurance rates." It permits any company to contract with any person who desires to insure his property upon any terms that they may agree upon. It does prohibit one company from agreeing with any other company *not to contract* with such person except upon terms which the confederating companies have previously fixed. The statute refuses to permit a company to strip itself of the power freely to contract. It guarantees to both insurance company and insured the free, unrestricted power to lawfully contract. It does not infringe upon the liberty of the citizen to contract concerning his property and prohibit him the enjoyment of his property and impose restraints and burdens upon it without due process of law.

10. **Statute:** Freedom of Contracts: Unrestrained. There is no such thing in civilized society as the unrestrained power to contract.

11. **Statute:** Discrimination between Home and Foreign Companies. Said act does not discriminate between foreign and domestic insurance companies, but expressly applies to all alike.

12. **Statute:** Vested Rights under Police Regulations. Nor as to foreign insurance companies doing business in this State when the law was enacted, does it violate that part of the U.S. Constitution that "no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," as no person acquires any vested rights by complying with existing police regulations or comity laws which can not be affected by subsequent changes in such regulations or laws.

**Counsel:** Edward C. Crow, Attorney-General, and Sam B. Jeffries, Assistant Attorney-General, for informant.

(1) The anti-trust statute of Missouri does not infringe upon the liberty of the citizen to contract concerning his property and prohibit him the enjoyment of his property and impose restraints and burdens upon it without due process of law. Road Co. v. Sanford, 164 U.S. 592; Waters-Pierce Oil Co. v. State, 44 H. R. W. R. 938; U. S. v. Joint Traffic Ass'n, 171 U.S. 505. These statutes are founded upon a proper exercise of the general police authority of the State. Beach on Trusts and Monopolies, sec. 13; Munn v. Illinois, 94 U.S. 124; Railroad v. Beckwith, 129 U.S. 29; State v. Moore, 104 N. C. 710; Thorp v. Railroad, 27 Vt. 140; Bertholf v. O'Rielly, 74 N. Y. 521. The State, in the exercise of this power in the selection of remedies looking to the suppression of evil and harm to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation in the capricious exercise of the police power, but a useful regulation in the interest of the public welfare. Cooley's [\*\*\*2] Const. Lim. (6 Ed.), pp. 707-720. In enumerating subjects which are acted upon by the State in the exercise of its police power, a late writer on limitations of police powers names combinations in restraint of trade. In U. S. v. Trans-Missouri Freight Ass'n, 166 U.S. 322, the court said: "While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone.

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All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever." Tiedeman on Lims. of Police Powers, sec. 96a; Railroad v. Mathews, 165 U.S. 16; Crowley v. Christenson, 137 U.S. 89. The Federal Supreme Court has decided that it was not the design of the Fourteenth Amendment to the Constitution of the United States to interfere with the just and proper exercise of the police power by the States. Barbier v. Connolly, 113 U.S. 31; Davis v. Mass, 167 U.S. 47; Oil Co. v. State, 44 S. W. Rep. 938. (2) If legislative authority does exist to restrain the conduct of owners of property in a particular way in the use of their property so as to work injury to the public welfare, and the legislature has acted [\*\*\*3] in the manner required by the Constitution in passing laws, then due process of law exists in so far as it is necessary to find legal authority for passing a statute similar to our anti-trust act, prohibiting all combinations in restraint of trade. Legal restraint imposed upon the use of property does not deprive the owner of it of due process of law. Railroad v. Mathews, 165 U.S. 23; Railroad v. Hume, 115 U.S. 519; Barbier v. Connelly, 113 U.S. 31; Walston v. Nevin, 128 U.S. 582; Railroad v. Gibbes, 142 U.S. 387; Bertholf v. O'Reilly, 74 N. Y. 519; Mulger v. Kansas, 123 U.S. 653; Davidson v. New Orleans, 96 U.S. 104. (3) The anti-trust statute is not obnoxious to the Fourteenth Amendment to the federal constitution, as being class legislation. U. S. v. Pipe Co., 85 Fed. Rep. 285; Association v. Houck, 27 S. W. Rep. 696; Brewing Co. v. Templeman, 38 S. W. Rep. 27; Puqua v. Chicago Milk Shippers' Ass'n, 155 Ill. 166; U. S. v. Trans-Missouri Freight Ass'n, 166 U.S. 299; People v. Railroad, 121 N. Y. 616; Hathaway v. State, 38 Tex. Crim. App. 261; People ex rel. v. American Tobacco Company (1897), 2 Chicago, L. J. Weekly, p. 249; Casualty Co. v. Alibone, 90 Tex. 660; Ins. Co. v. Levy, I<sup>\*\*41</sup> 33 S. W. Rep. 992; Campbell v. Cook, 86 Tex. 684; Railroad v. Mackay, 127 U.S. 209; Railroad v. Beckwith, 129 U.S. 29; Railroad v. New York, 165 U.S. 623; Soone Hing v. Crowley, 113 U.S. 708; Bank v. Penn, 167 U.S. 462; Railroad v. Mathews, 165 U.S. 17; State v. Moore, 104 N. C. 714. (4) No covenant in restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party. U. S. v. Pipe Co., Fed. Rep. 282; Frisbie v. U. S., 157 U.S. 160; Holden v. Hardy, 169 U.S. 391; Martin v. Hunter's Lessee, 1 Wheat. 304; Blair v. Ridgely, 41 Mo. 63. (5) Insurance combines to fix, maintain and control rates of insurance tend to and do suppress competition and such combines violate the anti-trust statute of Missouri. Hartford Fire Ins. Co. v. Raymond, Ins. Com., 70 Mich. 485; Beechley v. Mulvihill, 70 N. W. Rep. 107; American Fire Ins. Co. v. State, 26 Ins. L. J. 861; State v. Phipps, 50 Kan. 609; People v. North River Sugar Refining Co., 121 N. Y. 582; People I<sup>\*\*51</sup> v. Milk Exchange, 154 N. Y. 267; People v. Chicago Gas Trust Co., 130 Ill. 268; People v. Distilling and Cattle Feeding Co., 156 Ill. 448; U. S. v. Addyston Pipe and Steel Co., 85 Fed. Rep. 271; Moore v. Bennett, 140 Ill. 69; Cooke's Trade and Labor Combinations, p. 120; Greenhood on Public Policy, pp. 854-55-56-57; 3 Ins. Law Magazine, p. 42. (6) Agreements between insurance companies to fix and maintain rates tend to the suppression of competition and constitute a strict monopoly. Lawrence v. Kidder, 10 Barb. 64; Dunlop v. Gregory, 10 N. Y. 244; Beach on Industrial Trusts, secs. 10 and 11; People v. Sugar Refining Co., 54 Hun. 354; Sandiego Water Co. v. Flume Co., 108 Cal. 549; California Steam Navigation Co. v. Wright, 6 Cal. 259; U. S. Trans-Missouri Freight Ass'n, 166 U.S. 290. And monopolies are against common right. Craven v. Rodgers, 101 Mo. 243. (7) Where a corporation uses its franchises for the purpose of establishing a trust, or enters into a trust to create a monopoly and stifle competition, the State can forfeit the corporate franchise. People v. North River Sugar Refining Co., 121 N. Y. 582; People v. Milk Exchange, 145 N. Y. 267; State v. Standard Oil Co., 49 Oh. St. I<sup>\*\*61</sup> 137; People v. Chicago Gas Trust Co., 130 Ill. 268; People v. Distilling and Cattle Feeding Co., 156 Ill. 448. The scheme inaugurated in the city of St. Joseph was intended to and did constitute a monopoly in the fixing of insurance rates in the hands of the respondent companies because it created a common rate and abolished competition. The "Social Club" fixed the rate of insurance and dominated the business. This created a trust. Hartford Fire Ins. Co. v. Raymond, Ins. Com., 70 Mich. 485; State v. Krebs, 64 N. C. 604; People v. Sugar Refining Co., 121 N. Y. 624; Beach on Industrial Trusts, secs. 219-220; People v. W. T. B. Co., 47 N. Y. 586; London v. Van Acker, 1 Ld. Ryan 499; E. S., etc., Co. v. People, 121 Pa. St. 154; People v. F. Co., 27 Barb. 445; Com. v. Bank, 21 Pick. 542; Railroad v. Cave Co., 113 U.S. 384; State v. Railroad, 45 Wis. 590; People v. Railroad, 27 Barb. 452; F. Co. v. Hyde Park, 97 U.S. 666; People v. North River Sugar Refining Co., 121 N. Y. 582. (8) The acts of the agents of the foreign insurance corporations, in entering into a combination to fix rates of insurance in violation of the antitrust law, bind the corporations where reports are made to the companies [\*\*\*7] and they accept the benefits of said organization. Waters-Pierce Oil Co. v. State, 44 S. W. Rep. 936; Ins. Co. v. Raymond, 70 Mich. 485; State ex rel. v. Aetna Ins. Co., 150 Mo. 113. (9) It is no answer to a combination of this kind to say that it should be permitted to exist for the reason that it has reduced the prices of insurance, even though such were true. That policy may be

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necessary to crush competition. Such combinations have been frequently condemned by courts as unlawful and against public policy. [Hoeker v. Vandewater, 4 Denio 349](#); [Stanton v. Allen, 5 Denio 434](#); [Coal Co. v. Coal Co., 68 Pa. St. 186](#); [Craft v. McConoughy, 79 Ill. 346](#); [Hannah v. Fife, 27 Mich. 172](#); [Alger v. Thatcher, 19 Pick. 51](#). In numerous cases restrictions have been condemned, notwithstanding they produced for a while the lowering of prices. [Anderson v. Jett, 89 Ky. 375](#); Hoffman v. Brooks, 23 Am. L. Reg. 648; [People v. Milk Exchange, 145 N.Y. 267](#).

Given Campbell and Waddill, Ellerbe & Hereford for respondents.

(1) This suit is in the nature of a public accusation, and if the State makes out its case, the judgment is penal, and in such case the burden of proof is upon the State to prove the charges [\*\*\*8] as alleged. 5 Thompson's Com. on Corps., sec. 6804; State ex. inf. v. [Bland, 144 Mo. 534](#); High ex. Remedies, sec. 710; State [ex rel. v. Talbots, 123 Mo. 69](#); 2 Spell ex. Relief, secs. 1850, 1851, 1860. (2) The overwhelming weight of evidence establishes the fact that the Underwriters' Social Club of St. Joseph, Mo., was not created, formed or organized, conducted or carried on for the purpose of fixing or maintaining rates of insurance in that city, or for the purpose of controlling rates of insurance in any respect, and that it did not either fix, control or maintain rates of insurance according to Fetter's estimates. [Anderson v. U. S., 171 U.S. 604](#). (3) None of the respondents authorized directed or acquiesced in the acts of their local agents, in becoming members of the Underwriters' Social Club of St. Joseph, Mo., during the period covered by this suit, and none of the defendants, were aware or informed at any time prior to the production of this suit, that said club was engaged in the business of fixing or maintaining rates of fire insurance, or in any way, charged with doing same, in the city of St. Joseph, Mo. (4) The information filed by relator, does not state facts sufficient [\*\*\*9] to constitute a cause of action. State ex inf. v. [Bland, 144 Mo. 534](#). (5) The Act approved April 2, 1891, as amended by the Acts of April 11, 1895, and March 24, 1897, is repugnant to the Constitution of the State of Missouri, for the following reasons: First. It infringes the provisions of section 28 of article IV, which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title. [State v. Schofield, 41 Mo. 49](#); [St. Louis v. Teifel, 42 Mo. 578](#); [State v. Bensinger, 76 Mo. 346](#); [State v. Blackstone, 115 Mo. 427](#); State ex rel. v. County Court, 128 Mo. 427; [Witzman v. Railway Co., 131 Mo. 612](#); State ex rel. v. Hover, 134 Mo. 10; [Paul v. Virginia, 8 Wall. 168](#); [Philadelphia Fire Ass'n v. N. Y., 119 U.S. 110](#); [Gloucester Co. v. Russia Cement Co., 154 Mass. 92](#); [Hooper v. California, 155 U.S. 655](#). Second. It violates section 30 of article II, which provides that no person shall be deprived of life, liberty or property without due process of law. [State v. Loomis, 115 Mo. 316](#); [State v. Julow, 129 Mo. 177](#); Cooley, Const. Lim. (6 Ed.), 481, 483. (6) That said Act, as amended, is unconstitutional, in that section 1, of said Act, is violative of section [\*\*\*10] 1 of the XIVth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law, in this, that each of said companies having fully complied with the laws of the State, having paid the fees, made all the deposits, secured the necessary license required by law, they were each authorized to do business in this State, under the protection of the laws of the State, and that said Act deprives them of the right to carry on their business in a fair and just manner among themselves and not in any manner injurious to the public or any other person in the State, and deprives them of the right of making necessary and reasonable contracts relating to the business of insurance, and discriminates against them and in favor of other domestic and foreign fire insurance companies who are not embraced within the terms of said law. [Duncan v. Missouri, 152 U.S. 377](#); [Marchant v. Railroad, 153 U.S. 390](#); [Barbier v. Connolly, 113 U.S. 27](#); [Missouri v. Lewis, 101 U.S. 22](#). (7) Courts are extremely reluctant to adjudge a forfeiture of franchise, [\*\*\*11] especially in a case of this character. [Topeka v. Topeka Water Co., 49 Pac. Rep. 79](#); State [ex rel. v. Republican, 9 Mo. App. 114](#); People v. Railroad, 67 Ill. 1; State ex inf. v. [Lincoln Trust Co., 144 Mo. 562](#); High, Ex. Remedies, sec. 229; Spell, Ex. Relief, secs. 1777, 1828, 1829.

**Judges:** MARSHALL, J. Burgess, Sherwood and Brace, JJ., concur in all the opinion, Gantt, C. J., and Robinson, J., concur in all except the judgment as to the five companies specified in the last sentence, and dissent as to that. Valliant, J., dissents.

**Opinion by:** MARSHALL

## Opinion

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[\*10] [\*\*596] In Banc.

*Quo Warranto.*

MARSHALL, J. -- This is an original proceeding by *quo warranto* to oust seventy-three fire insurance companies of their corporate rights, privileges and franchises under the laws of Missouri, on account of a violation by them of the laws of [\*11] this State relating to "Pools, Trusts and Conspiracies; unlawful combinations." The defendant companies are organized under the laws of other States or foreign countries, and are doing an insurance business in Missouri by reason of and compliance with the comity laws of this State.

The petition, after stating the necessary facts as to [\*\*\*12] the character and organization of the defendants and their compliance with the laws of Missouri in respect to foreign insurance companies doing business in this State, is as follows:

"That afterwards on the \_\_ day of November, 1896, each and all of defendant corporations unlawfully, illegally and willfully misused and abused their said franchises, rights and privileges as fire insurance companies authorized to do business under the laws of the State of Missouri, in this, to wit: That each and all of said defendant corporations having an agent and representative in the city of St. Joseph, a city of less than one hundred thousand inhabitants, did then and there, through and by means of a certain organization, known as the Underwriters' Social Club of said city (which said Underwriters' Social Club of said city was organized and has been maintained and is now maintained with the knowledge and consent, and according to the desire and wish of said defendant corporations, and for the sole purpose of the advancement of the business interests of said defendant corporations in said city of St. Joseph) create, enter into, become a member of and a party to a certain pool, trust, agreement, [\*\*\*13] combination, confederation and understanding with each other and other fire insurance corporations and associations of persons to regulate, fix and control the price or premium to be paid for insuring property in St. Joseph, Buchanan county, Missouri, against loss or damage by fire, lightning and storm; and to maintain and control said price when so regulated and fixed, and to prevent competition in said business in said city.

"That each and every one of said corporations, being so represented in said city of St. Joseph, by a local resident fire [\*12] insurance agent, legally and fully authorized by each of said several defendant corporations to act for their respective corporations in all matters relating to the insurance of property against loss or damage by fire, lightning and storm in said city, said agents, and each of them, did then and there, with the knowledge and consent and according to the wish and desire of the said respective defendant corporations, which the said agents represented, and for the sole and only purpose of advancing the business interests of said defendant corporations then and there willfully, unlawfully and knowingly did agree, confederate and combine [\*\*\*14] with each other to form and organize on the \_\_ day of November, A. D. 1896, a certain organization whose membership was composed exclusively of local resident fire insurance agents, representatives alone of defendant corporations; and said organization was then and there perfected by the said local resident agents of defendant corporations by the election of a president, secretary, treasurer and other officials whose names, except those of the secretary and president, are to the relator unknown, but who were at said time and are now local resident fire insurance agents representing different ones of the defendant corporations; that the said organization so formed was the Underwriters' Social Club of St. Joseph, Missouri, and it was formed by said local resident agents of said defendant corporations solely for the purpose of advancing the interest of said respective defendant corporations, and for the purpose of maintaining what is known in insurance circles as "correct practices;" or in other words, for the purpose of keeping up the agreed rate on all the different classes of risks of insurance; that the said rates so agreed upon to be maintained in said city of St. Joseph [\*\*\*15] were fixed by one W. J. Fetter of Kansas City, Missouri, as relator is informed and believed; that \_\_ Wise is president of said Underwriters' Social Club, and that Mr. E. F. Scott is secretary of said organization, and was brought from the office of Mr. Fetter in Kansas City, Missouri, as relator is informed, for the purpose of assuming the duties of secretary of said [\*13] Underwriters' Social Club of St. Joseph, Missouri; that among other things the duties of Mr. E. F. Scott were to check the daily reports of the different agents belonging to said Underwriters' Social Club and to see that the policies written by said agents were all written at the

agreed rate as fixed by said W. J. Fetter, and promulgated in the rate book sent to the resident local agents of defendant corporations; that the said secretary, E. F. Scott, was and is paid a salary, and that the method of paying the same is as follows: The local resident agents of defendant corporations each proportionately contributed according to the amounts assessed against them, respective sums sufficient in the aggregate to pay the monthly salary of said E. F. Scott, as secretary of said Underwriters' Social Club of [\*\*\*16] St. Joseph, Missouri; each of said resident local agents of defendant corporations deduct the amount so contributed by said respective local agents of defendant corporations to the monthly salary of E. F. Scott from the monthly remittances of said respective local resident agents to the said respective defendant corporations represented by said local resident agents, and said respective defendant corporations acquiesced in said deduction from the remittances due from their said respective local resident agents and credited said local resident agents with the amount paid by each of said agents toward the salary of said E. F. Scott.

"That said W. J. Fetter of Kansas [\*\*597] City, Missouri, styles himself an insurance expert, and that as such insurance expert he supplies the rates to be charged on all classes of risks by fire, lightning and storm in the State of Missouri, outside of the cities of Kansas City and St. Louis; and that the defendant corporations, each and all of them, do not write any insurance on any class of risk for fire, lightning and storm insurance, except at the rate fixed and agreed upon in the city of St. Joseph by the Underwriters' Social Club of St. Joseph, [\*\*\*17] which rate is obtained from a rate book coming to members of said organization in a blank envelope from Kansas City, Missouri; [\*14] that the rate so established, and at which all insurance agents against loss by fire, lightning and storm is written in the city of St. Joseph, by the local resident agent of defendant corporations is supplied said resident local agents in a rate book which comes from Kansas City, Missouri, in a blank envelope, and said Underwriters' Social Club of St. Joseph, Missouri, is organized and maintained by defendant corporations and their agents for the purpose of maintaining said rates so furnished as aforesaid; that if the resident local agent of any of said defendant corporations writes insurance against loss by fire, lightning and storm in St. Joseph, Missouri, at a rate not in accordance with that fixed in said rate book and agreed upon by the said Underwriters' Social Club of St. Joseph, Missouri, said defendant corporation in which said insurance is written instructs its local resident agent to cancel said policy or policies.

"That the general nature and object of the said combination and confederation so made as aforesaid by defendant corporations, [\*\*\*18] by the means and in the manner aforesaid, in the city of St. Joseph, is, first, to fix and regulate and control the certain price and premium to be paid for insuring property against loss or damage by fire, lightning and storm in said city of St. Joseph, Missouri; and, second, to maintain the said certain price or premium when so regulated or fixed for insuring property against loss or damage by fire, lightning and storm in said city; and that the said defendant corporations through their said local resident agents in St. Joseph, Missouri, have entire control of and have monopolized to the exclusion of all others, and to the great detriment of the public, the business of writing insurance against loss or damage by fire, lightning and storm in the city of St. Joseph, Missouri, and that the purpose and intention of said defendant corporations has been and is now to unlawfully and willfully thus combine and confederate with each other to monopolize and control absolutely and prevent competition in the business of writing [\*15] insurance against losses by fire, lightning and storm in the said city of St. Joseph, Missouri, and the said defendant corporations, through said Underwriters' [\*\*\*19] Social Club of St. Joseph, Missouri, and in pursuance of the object, purpose and intention of said defendant corporations have willfully and unlawfully agreed, combined and confederated with each other, and with other fire insurance companies (doing business under the insurance laws of the State of Missouri), to form an insurance trust and pool in St. Joseph, Missouri, to regulate, fix and maintain the price and premium to be charged by each of said defendant corporations for insuring the different designated classes of risks on property against loss or damage by fire, lightning and storm in St. Joseph, Missouri; and the said defendant corporations and other insurance companies acting with them, in pursuance of the said agreement, combination, confederation and trust, and through the said Underwriters' Social Club of St. Joseph, Missouri, are each of them, through their respective resident local agents, willfully and unlawfully maintaining said agreed price and premium upon the respective classes of risks on property against loss by fire, lightning and storm in St. Joseph, Missouri, and which said rate so fixed in said rate book aforesaid, and so agreed to by members of said Underwriters' [\*\*\*20] Social Club of St. Joseph, Missouri, aforesaid, is the minimum rate charged in St. Joseph, Missouri, by all said defendant corporations for insuring the different designated classes of property against loss or damage by fire, lightning and storm; and that said rate aforesaid, so fixed as aforesaid, is

the minimum rate the said agents of said defendant insurance companies are allowed to charge by said defendant corporations in the city of St. Joseph, Missouri.

"And by reason of the premises aforesaid, relator now charges and avers that since the \_\_ day of November, A. D. 1896, and up to the present time, said defendant corporations in the city of St. Joseph, Missouri, have grossly offended against the laws of this State, and have willfully, [\*16] flagrantly and grossly abused and misused their corporate authority, franchises and privileges, and have willfully and unlawfully assumed and willfully usurped franchises and privileges not granted to said defendant corporations by the laws of the State of Missouri, by then and there entering into and becoming a member of and a party to said trust, combination and confederation and pool as aforesaid, in said city of St. Joseph, \*\*\*21 Missouri, to monopolize the business of writing insurance against loss or damage by fire, lightning and storm, and to by means of said combination and confederation prevent competition in said business, and to regulate, fix and maintain the price and premiums to be paid for insuring property against loss or damage by fire, lightning and storm in St. Joseph, Missouri.

"And relator further here now charges and avers that the action of the defendant corporations as hereinbefore set out is a willful, malicious and gross perversion of the franchises granted to said defendant corporations by the State of Missouri, and an illegal, willful usurpation of privileges not granted \*\*598 to them, and which said gross and willful usurpation of privileges and franchises not granted them is of great and permanent injury to the public.

"Wherefore your relator herein, the Attorney-General, prosecuting in this behalf for the State of Missouri, prays that said defendant corporations, each and all of them, severally be excluded from all corporate rights, privileges and franchises under the laws of the State of Missouri, and that their rights and certificates to do business under the insurance laws \*\*\*22 of this State be declared forfeited and that proceedings at law may be issued against defendant corporations that they may each and every one of them be ousted of their said several franchises and corporate privileges."

The defendants answered jointly, as follows: "Defendants in the above entitled cause, by leave of court, file this their amended answer, and protesting that the information filed [\*17] in said cause against these defendants is not sufficient in law, for their joint and several amended answers thereto, say that they admit that they are severally and respectively corporations legally organized under the laws of their respective States and countries, for the purpose of carrying on the business respectively stated in said information; that they have respectively complied with the laws of the State of Missouri relative to foreign insurance companies desiring to write fire and other insurance in this State; that they have been respectively duly licensed by the Superintendent of Insurance of this State to write said insurance in the State of Missouri; and that they have been from the date of their respective licenses, and are now writing fire insurance and insurance \*\*\*23 against loss by lightning and storm in the State of Missouri, in so far as they are respectively, by said license, authorized to write such insurance.

"And further answering these defendants say that the said act of the General Assembly of the State of Missouri, entitled "An Act providing for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases," approved April 2, 1891, and the amendments thereto, approved April 11, 1895, and March 24, 1897, is violative of the provisions of the Constitution of the State of Missouri and of the United States as follows:

"1. The title to said act infringes that part of section 28 of article IV of the Constitution of the State of Missouri, which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, in this, that the subject of insurance against loss or damage by fire, lightning or storm, is a different subject and not germane to the matters contained in the title of said act; and defendants plead that said law, in so far as it attempts to cover the subject of such insurance, is unconstitutional and void.

"2. The Constitution of the State \*\*\*24 of Missouri, section 30, article II, provides 'that no person shall be deprived of [\*18] life, liberty or property without due process of law;' and defendants say that the said act and the amendments thereto, especially as set forth in section 1 of said amended act 1897, does deprive defendants of their liberty without due process of law inasmuch as it renders it unlawful for defendants to contract or agree among themselves or with the agents of other insurance companies, or for their agents, to contract and agree among

themselves, for the reasonable adjustment and maintenance of rates of premium to be charged for insurance against fire, lightning or storm in this State.

"3. Section 1 of said amended act contravenes and infringes section 10 of article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, inasmuch as each of defendants, prior to the enactment of said law made the deposits and paid the fees and moneys required by the insurance laws of this State to secure to themselves respectively the right to carry on their said business in said State, had complied with all the requirements of the insurance [\*\*\*25] laws of said State, and were respectively duly authorized to conduct and carry on their said business in said State; thereby in virtue of said payments and said laws of the State of Missouri, there was vested in each of said defendants, at the time of their admission into said State, the right to contract and be contracted with, and to continue and carry on their said business in a reasonable, usual and lawful manner. And defendants say that until the enactment of said law they and their agents had, in the safe, reasonable and usual course of their business, been making and entering into contracts or agreements with each other for the conservation of their business, and the protection of their policyholders, by adjusting, agreeing upon and maintaining reasonable rates of insurance against fire, lightning and storm, in said State; defendants say that said act does not deprive said defendants and each of them, of their said vested rights in forbidding them or their agents to make or enter into such contracts [\*\*19] or agreements and impairs the obligations of the contracts entered into by and between each of them, and said State of Missouri at the time of their respective admission [\*\*\*26] into this State, that therefore said act is unconstitutional and void.

"4. Section 1 of the amended act is in violation of section 1 of the XIVth amendment of the Constitution of the United States, which provides 'that no State shall deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the law,' in this, that said act and section provides for a difference and discriminates between foreign insurance companies and domestic insurance companies, and discriminates and makes a difference and distinction between foreign insurance companies insuring [\*\*599] property in this State against loss or damage by fire, lightning or storm and all other foreign and domestic insurance companies doing other kinds of insurance business in this State, by providing by section 1 of said amended act, that it should be unlawful for any corporation organized under the laws of this or any other country, insuring property against loss or damage by fire, lightning or storm, to make any agreement and to have any understanding with any other insurance company or with the agents thereof to fix or regulate the premiums to [\*\*\*27] be paid for insuring property in this State against fire, lightning or storm, or to maintain said premiums when so regulated or fixed, or to fix or limit the price or premium to be paid for insuring property against such loss, or damage in the State; and these defendants say that each and every one of them did comply with the laws of this State before being admitted to do business in this State, and that in said compliance they have paid the fees and made all necessary deposits and secured the necessary licenses required by the insurance laws of this State, and that having done and performed all that was required by law, they were each of them, duly authorized to do the business of insurance in this State, and that thereby the right to do said business was secured [\*20] and vested in each of them by the laws of the State of Missouri, and that they have been respectively conducting said business under the said laws of this State, and have paid and are paying sums of money for the right to conduct their said business in this State; and defendants say that said act deprives them of the right to carry on their business in a manner fair and just among themselves and not in any manner [\*\*\*28] injurious to any other person in the State, and that said act deprives them of the right of making the necessary and proper contracts relating to the business of insurance, and discriminates against them and in favor of other domestic and foreign insurance companies, who are not embraced in said law, and that said act is unconstitutional and void.

"5. That section 6 of said amended act is violative of section 1 of article XIV of the amendments of the Constitution of the United States, in that it provides 'that in all proceedings to have such forfeiture declared, proof that any such person who has been acting as the agent of any such foreign corporation in transacting its business in this State, has been, while acting as such agent, in the name, behalf or interest of such foreign corporation, violating any provision of the preceding sections of this act, shall be received as *prima facie* proof of the act of the corporation itself;' and defendants say that said act discriminates and makes a difference and distinction between foreign insurance companies doing the business of insuring against fire, lightning and storm and domestic insurance companies doing like business in like situation, [\*\*\*29] by providing rules of evidence and pleading in judicial

proceedings under said act against foreign insurance companies, different and more onerous than those provided for domestic insurance companies who may be engaged in the same business and do the same thing, and defendants therefore say that said act is unconstitutional and void.

"6. And defendants plead that sections 9 and 10 of said Act, are violative of section 1 of the XIVth amendment [<sup>\*21</sup>] to the Constitution of the United States, in that it imposes upon defendants and other corporations mentioned in said act, in case judgment is rendered against defendants in proceedings under said act, attorney's fees of not less than twenty-five dollars or more than five hundred dollars, and the expenses of attorneys for the State incurred in the prosecution of such suits, when such fees are not imposed upon other corporations or judgment defendants under the laws of this State; and defendants say that said law discriminates and makes a distinction and difference between defendants as aforesaid and the State of Missouri, by imposing such fees on defendant corporations against whom judgments are rendered, when in like situation where [<sup>\*\*\*30</sup>] judgments should be rendered against the State in such proceedings, no attorney's fees or expenses are imposed upon or provided to be collected from the State; and defendants say that therefore said law is violative of the Constitution of the United States and is null and void.

"7. And further answering these defendants deny each and every allegation in said information contained, not hereinbefore admitted to be true.

"And defendants having fully answered pray to go hence respectively dismissed with their costs in this behalf expended."

The reply is a general denial of the new matter set up in the answer.

Upon these issues a vast volume of oral testimony has been taken. Briefly stated the ultimate facts established by the evidence are these: All of the defendants are corporations organized under the laws of sister States or of foreign countries, and are doing a fire insurance business in Missouri under licenses issued to them by the Superintendent of Insurance of this State. With the exception of The Newark Fire Insurance Company, Norwalk Fire Insurance Company, London Assurance Corporation, Citizens Insurance Company of New York, Union Insurance Company of Philadelphia, and [<sup>\*22</sup>] [<sup>\*\*\*31</sup>] Equitable Fire & Marine Insurance Company of Providence, R. I., all of the defendant companies are represented by agents at St. Joseph, Missouri, and all those agents had been prior to and were at the date of the institution of this proceeding, members of the Underwriters' Social Club of St. Joseph, Missouri.

Prior to the taking effect of the amendment of 1895 (Laws 1895, p. 237) to the laws relating to "Pools and Trusts," which for the first time brought fire insurance companies explicitly and specifically within the ban of the [<sup>\*\*600</sup>] law prohibiting trusts, there existed in Missouri an association called the "Association of Fire Underwriters of Missouri," which was organized for the purpose of controlling rates of insurance in this State. W. J. Fetter was employed to fix such rates, and all insurance was required to be controlled by the rates fixed by him. When the act of 1895 went into effect, Fetter addressed the following letter to all the companies doing a fire insurance business in Missouri:

"MISSOURI FIRE INSPECTION AND ADVISORY BUREAU.

*"Inspection of fire risks and estimates of rates furnished to order.*

*"Also maps of rated towns not mapped by Sanborn-Perris Map [<sup>\*\*\*32</sup>] Co. Offices: American Bank Building.*

"Kansas City, Mo., June 11, 1895.

"Dear Sir: -- You are probably aware that an amendment has been made to the anti-trust law of Missouri to include fire insurance companies, thus prohibiting all combinations of persons or corporations from making or maintaining fire insurance rates. My arrangement with the Association of Fire Underwriters of Missouri for state rating will therefore cease on 20th inst., and the State Board will then no longer exercise jurisdiction over rates.

"In view of these facts I have concluded to make estimates of fire insurance rates and publish maps, on my own volition, [\*23] without any connection with any board whatever, and without combination with any companies or individuals. These rates so made will be published and sold to any person or company desiring to buy them. The price of the rate books, and corrections from time to time, will depend in some measure on the amount of work made necessary by the greater or less volume of business transacted in the State by the company. It is estimated, however, at about 8-10ths to 9-10ths of one per cent of the premiums. For his work bills will be sent quarterly.

"The [\*\*\*33] local board of St. Louis and Kansas City being exempted from the operation of the law, have separate arrangements for rating, and will have no control of nor responsibility for the above proposed system of rating.

"Soliciting your subscription to my rate-books and supplements in cities or towns where you are represented, I remain," etc.

The prior and subsequent proceedings are best told by the testimony of Fetter himself.

*"W. J. Fetter testified on behalf of informant, as follows:*

"I have been in the insurance business in Missouri forty nine years, excepting two years that I was in Saline county, and have been in Kansas City sixteen years.

"Witness was here handed a list of the companies that were defendants in the suit, and he said that he had heard that they were all doing business at St. Joseph. I furnish estimates for Kansas City, Missouri; have been doing so since '91. I furnish them anywhere in the State they are asked for if I can. I furnish them in towns where they are asked for except St. Louis. Am satisfied that the rates furnished by me in the book known as the "Fetter Rate Book" for different towns of the State, are the basis of rates upon which a considerable [\*\*\*34] amount of the business of the State is written. I do not know whether there is an agreement among the agents at St. [\*24] Joseph or not. Have no real knowledge about the situation at St. Joseph. I have heard loose talk, and have heard it as a fact, that my rates are used. I do not furnish the rates to the agents at St. Joseph, but furnish the rates direct to the companies. I sell the book directly to the insurance companies. That is, I furnish the book either to the companies or the general agents of the companies, not to the local agents. I furnish my rate book to the general agents of all the companies that do business in St. Joseph. There are corrections that go with the book from time to time, and I supply those and they are sent direct to the companies. I had a young man named E. F. Scott in my office at Kansas City. He was a dry goods clerk when he came to my office and got acquainted with some of my boys and they asked me if I could not get him a job. He kept on coming there, and I gave him work at \$ 10 a week, and he did good service and I increased his salary, and after a while somebody asked me if I knew a good clerk, some man that was good in figures, and I said yes [\*\*\*35] I know a man, and they said they would like to see him. Well, I did not say anything to him; I thought maybe they would not employ him; I telephoned to him to come to the depot; that I had something I wanted to know about; and he came down and I introduced him to two insurance agents from St. Joseph, one of them was Mr. Buckingham, and I do not remember the other gentleman's name. I introduced Mr. Scott to them and he was employed, and I supposed that he was hired to work in the insurance business, but I never asked what his duties were. The general agent for Missouri of the Fireman's Fund Insurance Company is Mr. Chard of Chicago, and in the period from November, '96 to July, '97, I think I furnished the special agent of the Fireman's Fund a rate book for Missouri. The record in my office would simply show that I furnished it to the company. I did at one time send my rate books direct to the company, but I concluded that was wrong, or, rather, inexpedient. My rate books cover all of Missouri [\*25] except Kansas City and St. Louis, except some few towns not surveyed and examined. I mean by this, small towns. If the companies want towns rated we go and make an estimate. These rate [\*\*\*36] books are not furnished annually, but just as they are made. The last book I made for St. Joseph, Missouri, was in 1897. I can not say what the companies do with the rate book. I furnish them for St. Joseph. I sell the rate books to any company that wants to buy them. I do not know of anyone else in Missouri, outside of St. Louis and Kansas City, from whom the old line fire insurance [\*\*601] companies buy rate books and rate sheets. Before the anti-trust law was passed, I was employed by the State Board for Missouri, on a salary, and I covered the same territory that I do now. The State Board was composed of seventy or eighty persons. Now I am not so tied down by rules and regulations, and I feel at liberty to increase or decrease the rates as I think feasible. For instance, at Jefferson City, Mr. Orear thought my rates were a little too high, and he wanted me to look into it. I

found that the buildings had improved; that they had put in more fire proof buildings, and I made a reduction in the rates. I do not account to anybody for that: I just make it of my own volition, and two or three other places the same way. I have more discretion now than I had before, or, rather I exercise [\*\*\*37] more. It is the tariff the companies accept at Jefferson City as fixed by myself. I get my rates in the following way: Take for instance St. Joseph. I take a brick building. An ordinary brick building at St. Joe, with gravel roof, makes the basis rate sixty cents, and then if the side walls do not extend two feet higher than the roof, that is where they are exposed, we add five cents. If there is a sky light that goes on to the building we add for that. If wooden cornice, not iron, add to the rates; if elevator in three or four story building, we add for that, and all similar charges add something for each. Then if an exposure -- other buildings might burn it -- we add to it in proportion to the hazard for exposure; and then the [\*26] question of the area comes in, the size of the building. If a very large building we have a very small charge to it, and when the rate of the building is made up then we add for the stock being more perishable; or when a building is easier damaged by smoke, water, etc., from ten to twenty-five cents, more or less. There are two classes of stock, the preferred and the non-preferred. This is the method by which I get at the rate, and I get the personal [\*\*\*38] knowledge of the buildings by going to St. Joseph and examining them. I had the rate book for St. Joseph printed in St. Joe, and it took me nine months to get it printed. I paid for having the book made. *When the anti-trust law of '91 went into effect, we paid no attention to it, as we thought it did not include us, and I furnished rates for St. Joseph then just the same as I had been doing before...I furnished the rates for St. Joseph before 1895, I made a book for St. Joseph before that time. Before the anti-trust law, I was employed on a salary to make the rates and furnish them for the different towns, St. Joseph as well as the others...After the anti-trust law of 1895 became operative, I read the law. It seemed to me that the law provided against combinations to make rates.* The State Board was then abolished. I sent out a circular to the companies and stated in substance that the State Board was out of existence, and that I proposed to make estimates of rates and sell them to the companies, without any connection or association with anything at all and sell these rates at a given price -- this book at a given price, and that included the keeping up of the books, too. *These [\*\*\*39] books I offered to make were of the same kind and character I had been making.* I asked the companies to purchase my books and some purchased them and some did not. *The agents that got my rate books at St. Joseph and the correction slips I furnish, got them from the companies.*"

Witness was here handed a copy of the petition containing a list of the companies against which suit is brought, and [\*27] was asked if he had examined this list of companies, and he said he had, and that he furnished a portion of these companies with his rate book between November, 1896, and July, 1897 and he designated as those that he had furnished the rate book to as follows: Aetna of Hartford, Orient of Hartford, Phoenix of London, British America, Westchester Insurance Company, Atlas, Commercial Union, London & Lancashire, Lion's, Lancashire, London Assurance, Union & Crown, London & Globe, Imperial, Manchester, Northern, North British, Palatine, Royal Insurance Company, Sun Insurance Office, Aachen & Munich, Hamburg-Bremen, Prussian National, German of Freeport, Traders' Insurance Company, Springfield Fire & Marine, Michigan, Detroit, St. Paul, Merchants' of Newark, The Agricultural, Caledonian, [\*40] American Fire Insurance Company of New York, Citizens' of Missouri, Commercial Union, German American, Hanover, Home, Niagara, Queen, Westchester, Glens Falls Insurance Company of North America, Union Insurance Company of Philadelphia, Pennsylvania Fire, Merchants' Insurance Company of New Jersey, Providence-Washington, Scottish Union & National, Concordia, Milwaukee Mechanics, Brooklyn.

"I know Mr. Buckingham at St. Joseph, and from November, '96 to July, '97, he was in the insurance business, and a local resident agent of various companies at St. Joseph; and he came to inquire about some one to do a certain class of work. I recommended Mr. Scott. The companies responded to my circular that they would buy the rates. I suppose the agents at St. Joseph got the rates from the companies, as I mail no rates from my office in Kansas City to the agents at St. Joseph, Missouri. I did at one time send the slips direct to St. Joseph. I do send the slips direct to the agents sometimes in this way: The companies buy my rates and they will say to me, 'I want you to send a copy to Mr. John Smith at Sedalia; he has not a copy'; and they want me to send to this one and to that one; and the agent [\*\*\*41] at St. Joe wants me to send slips, [\*28] and if the companies order me to I send the slips, but not otherwise. I did that a short time and I concluded I would not do it any more, but if the companies order me [\*\*602] to send the slips or books to any town in Missouri, except Kansas City, I will do so.

"Q. Can you name any of these companies that were doing business as is charged in this petition in the city of St. Joseph, between November, 1896, and July, 1897, at whose instance you sent any of those slips? A. As I understand the fact, several, I think, have them, but to say that they do I could not. I was told recently that an agent there at St. Joseph who has the agency of the Northern and of the Home, and two or three companies that way, did, but I do not know, and there are no records in my office that would indicate whether or not I sent the slips or rates direct to the agents at St. Joseph, Missouri; but I probably did, occasionally, between November, 1896, and July, 1897. I think probably in the interim of time from November, 1896, to July, 1897, I did forward the slips, as well as the books, to some resident agent at St. Joseph, Missouri, I might have a record in my [\*\*\*42] office, my books might show, probably I have. We have a list of the companies who take the slips and the rate books. Some of them do not want anything but this town and that town, but otherwise they get everything. We just send them to the company indiscriminately, and only send direct to the resident agents, either the slips or books, by direction of the company. *I would send the slips regularly to resident agents at St. Joseph on condition that every agent have an order from some company of his, so that all the agents get the books; but in the absence of directions I send the slips to the companies.* To the best of my knowledge, the insurance business at St. Joseph is generally done at the rate fixed in my rate book and my slips...The rate I fixed is based on the proposition that the companies will, by securing the rate I name, be enabled, according to insurance statistics, to meet losses, pay expenses and [\*29] a fair dividend on the capital, and that is what we term an adequate rate. I aim to make an adequate rate. I suppose that is the reason the companies want my rates. I charge the companies about eight or nine-tenths of one per cent of the volume of business. That [\*\*\*43] is the only way I can fix it. I can only do this work for the companies on a per cent of the business, and I get the volume of business of the companies from Mr. Orear, Superintendent of Insurance. This nine-tenths of one per cent is nine-tenths of one per cent of all the premiums, and for that I furnish the companies with my rate book and corrections, and such mass of information as they may desire and that I may have in my possession; and that is my compensation complete from the companies. I pay my own clerical force in my office. This book is a St. Joseph book." [Here book was shown witness]. "This is the only rate book published by myself for the city of St. Joseph. The policy that is written and the reports that are made of the daily business in St. Joseph does not come to my office."

Cross-examination: "I make the Fetter rate book. I sell it to any insurance company that desires it. I make it as an insurance expert. The use of a rate book of this kind is to give the agents an idea of the risks and the adequacy of the rate."

Re-direct examination: "My compensation is governed by the volume of business done by an insurance company. I sell this book to any company that wants [\*\*\*44] to buy. I have been doing that since the anti-trust law went into effect. *The rates were made about on the same basis by myself after the antitrust law became operative as before.*"

After the act of 1895 became operative, the agents of the defendant companies (except those above pointed out) got together and formed the Underwriters' Social Club of St. Joseph. The president of the club, Mr. Wise, said: "We can not in this club recognize anything in writing that would lay ourselves liable to a prosecution under the late law passed regarding trusts in Missouri. Consequently, anything that is [\*30] done regarding the maintenance of rates shall be understood among the members of the club."

Accordingly no constitution or by-laws were ever adopted or put into writing. The secretary of the club was E. F. Scott, who had formerly been a dry goods clerk, and for a short time before he went to St. Joseph was a clerk in Fetter's office in Kansas City. He had no other experience in the insurance business. The club had two rooms. In one the secretary had a copy of Fetter's rate book, a map, a desk and a few chairs. In the other there were some chairs. It had no regular time for holding [\*\*\*45] meetings. Sometimes it met once a week and sometimes not once in three or four weeks. One of the members defined its purpose to be, "that one of the objects of the club was social and advisory to our business. The social nature of the club was talking to each other about Lloyds insurance companies and the mutuals and inquiring about how business was and generally anything appertaining to our business . . . There were no billiard nor card tables in the room. No periodicals kept there. I guess there was a desk. I never took an inventory of it. I couldn't tell whether there was a carpet on the floor."

Another described the purposes of the club as follows: "To the extent of smoking cigars one of the objects was to cultivate good-fellowship, another object was to become better acquainted with each other and with the methods of doing business; also to become better acquainted with all risks in St. Joseph, and get wider and more general information about insurance business and about conducting insurance business; another object was to secure a uniformity of policies, as in adjustment of partial losses the losses become extremely complicated, and it requires the highest order of ability to [\*\*\*46] adjust such a loss. Concurrency is therefore [\*\*603] insisted upon by the manager, Mr. Scott; that is one of the things accomplished by the club. That is, it is deemed beneficial to the insurer and makes it easier to adjust any losses. In speaking of the objects [\*31] of the club, I use the words 'correct practices,' which covers all this, and means the application of concurrency and the application of a general form to a big scattered risk. *I also stated that the object was to maintain rates.*"

The salary of the secretary was made up by the members contributing one dollar a month for each company represented by the members. Some of the members charged this to their companies direct and it was allowed. Others put it in as "postage" or other expenses and their companies allowed it in that form.

After the formation of this club, the fire insurance done by the agents of the defendant companies was carried on in this way: the secretary had a list of the numbers of all policies in the agent's office, so as to enable him to keep check on every daily report that went to the company; the daily report contained the name of the company by which the policies were written, the name [\*\*\*47] of the assured, the date of issuance and of expiration, the amount of insurance, premium, rate, general form of policy, the property insured with its location. These daily reports were made out by the agents, placed in stamped but unsealed envelopes addressed to the company issuing the policy, and the envelopes were turned over to the secretary of the club for inspection and to be sealed and mailed by him. He kept no record of anything that was done in his office, but at first, if there was a variance between the rate specified in the policy and that fixed by the Fetter rate, the secretary would put a small slip on the report to notify the general agent of the company of the variance; afterwards it was thought "inexpedient" to have any such matters in writing, so the secretary simply notified the agents verbally of any variance and demanded to know the reason therefor. In this way every daily report from an agent to his company passed under the inspection of the secretary, and he alone mailed all reports to the companies. To prevent an agent from writing a rate in the policy in conformity to the Fetter rate and afterwards [\*32] giving the insured a rebate, all the agents also [\*\*\*48] submitted all their monthly statements to the secretary and he inspected them and likewise mailed them. Several times an agent was detected not living up to the Fetter rate, and then the club met and the offending agent was called on for an explanation, which was accepted as satisfactory and "everybody arose to their feet and expressed a determination to live up to the rates" (Fetter's rates). There was an unwritten by-law of the club prescribing that "where a member was caught cutting a rate there was to be a penalty of not to exceed \$ 50, for the first two offenses, and after that loss of his agency." Some of the general managers of the defendant companies testified that they had never heard of the club or its practices until this proceeding was begun; others testified that they had expressly refused to allow their agents these club expenses and had charged them back to the agent; while the manager of the Queen Insurance Company wrote the local agent as follows: "While we are not fully advised as to the situation in St. Joseph, yet, at the same time we understand that all agents, with the exception of your good self, are now members of the Social Club. In the interest of harmony [\*\*\*49] and correct practice we trust you will find it convenient to associate with the organization referred to, as it will undoubtedly redound to our mutual welfare."

I.

The special provision of the Statutes of Missouri under which this proceeding is prosecuted and which it is claimed the defendants have violated is section 1 of the Act of 1897 (Laws 1897, p. 208) and is as follows:

**HN1**[] "Section 1. Any corporation organized under the laws of *this or any other state or country* for transacting or conducting any kind of business in this State, or which does transact or conduct any kind of business in this State, or any partnership or individual, or other association of persons whatsoever, [\*33] who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or

damage by [\*\*\*50] fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into become a member of or a party to any pool, agreement, contract or combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this act: Provided, however, that the provisions of this section shall not apply to agreements of fire insurance companies, or their agents, or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, [\*\*604] lightning or storm in cities in this State which now have or which may hereafter acquire a population of one hundred thousand inhabitants or more; and provided, further, that if such insurance companies or their agents, or the board of fire underwriters doing business in any such city, shall combine in such city, either [\*\*\*51] directly or indirectly, or agree or attempt to agree, directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located wholly outside of such city against loss or damage by fire, lightning or storm, such company so violating the provisions of this act, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this State, and shall become liable to all the [\*34] penalties and forfeitures provided for by the provisions of this act."

The first question, therefore, is whether the defendant companies have entered into or become members of or parties to a pool, trust, agreement, combination, confederation or understanding to fix the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm or to maintain said price when so regulated or fixed.

There is no room for doubt that prior to the amendment of 1895, which specifically brought insurance companies within the purview of the anti-trust laws, the Association of Fire Underwriters of Missouri, was organized and maintained for the purpose of establishing and maintaining [\*\*\*52] the rates at which property in Missouri would be insured against loss or damage by fire, and that Fetter was employed by the association to fix such rates and see that they were maintained. Neither can it be doubted that when the Act of 1895 became effective that association realized that its practices were violative of that act and hence the association ceased to exist. This is clearly shown by the testimony of Fetter and by his letter of June 11th, 1895, above referred to. After the passage of that act Fetter, on his own account, published a book of rates which were the same as the rates that had been fixed and maintained by the Association before the law went into effect. This book, with correction-slips keeping it up to date, he sold and delivered to the defendant insurance companies direct, except that when specially instructed by a company he sent them to the local agent instead of to the company and having it (and the correction-slips) reach the agent through the company. All of the local agents of the defendant companies at St. Joseph, had the books and the slips. Except in very extraordinary cases, all policies were written according to the Fetter rates, and when there was [\*\*\*53] a variance the general agent was, at first, notified by a slip attached to the daily report, and later when it was considered "inexpedient" to commit such matters to writing, [\*35] the local agent was notified, and if it was not corrected the local agent was called to account therefor. Fetter had no fixed price for his book and slips but charged each company eight or nine-tenths of one per cent of the volume of business done by each.

After the Act of 1895 became a law, the local agents of all the defendant companies, except those above noted, formed the Underwriters' Social Club of St. Joseph. The president distinctly stated that it would not put anything in writing that would lay the members liable to prosecution under the Act of 1895 relating to trusts, and that everything that was done regarding the maintenance of rates would have to be understood by the members. No written constitution or by-laws were ever adopted. The club had no regular meetings, no club furnishings, paraphernalia or usual accompaniments. When it met each man smoked his own cigars, and talked about Lloyds insurance companies and the mutuals, about "concurrency" and "correct practices," which was but another [\*\*\*54] name for maintaining the Fetter rates, or else called a member to account for a variance from the Fetter rates, and although "whitewashing" him, "everybody arose to their feet and expressed a determination to live up to the rates." When the club was formed a committee was appointed to select a secretary (doubtlessly one who was peculiarly social), and the committee went to Kansas City and consulted Fetter, who kindly let them have one of his clerks, whom he had taken out of a dry goods store a short time before and who was therefore presumably "social," even if he was not an insurance expert, and knew nothing about St. Joseph or its insurable risks. This young man was taken to St.

Joseph and made secretary of this Social Club. He was installed in a room, with a copy of Fetter's book, a map of St. Joseph, a desk and a few chairs. In order that he might not become lonesome in the club rooms (where the members assembled only on rare occasions to smoke their respective cigars, talk about Lloyds, the mutuals, concurrency, [\*36] correct practices, call an offending member to account for writing a policy at a rate that varied from Fetter's, and stand up and promise to live up to the [\*\*\*55] rates), and just to be social, each of the local agents of the defendant companies sent him their daily reports, already inclosed in unsealed envelopes, addressed to their respective companies, and just to be social he examined each report and so as not to forget his former benefactor, he compared the rates specified in each policy with the Fetter rates, and if there was a variance put a slip on the report calling the attention of the general agent of the company to the variance, until it was discovered that this practice was "inexpedient" and in conflict with the expressed policy of this social club not to put anything in writing that would lay the [\*\*605] members liable to a prosecution under the anti-trust laws, and then he adopted the more social process of notifying the local agents personally of the variance. Of course each agent only wanted to keep up this daily social communication with the secretary of the club; and of course, the secretary only wanted to be social when he insisted upon concurrency, correct practices and the exclusive right to seal and mail all the reports from the local agents to the companies; and of course, the monthly reports were likewise submitted [\*\*\*56] to the secretary for social reasons and not for the purpose of advising him that the agent had not circumvented Fetter's rates by giving the insured a rebate from the rate written on the face of the policy; and of course the higher officers of the defendant companies did not know (after it was deemed inexpedient for the secretary to put slips on the daily reports showing variances from the Fetter rates) that their naughty local agents belonged to the social club, whose practices might, if put in writing, make them liable to prosecution under the anti-trust laws, and hence had forbidden them to be social, notwithstanding they did know that the policies were all written according to the Fetter rates and were the same as they were before the anti-trust laws were enacted; and of course the general managers wondered [\*37] why they had taken the trouble and gone to the expense of maintaining the Association of Fire Underwriters of Missouri and had paid Fetter a salary to fix and maintain a rate in Missouri before the passage of the anti-trust law in 1895, when after that law went into effect their local agents could maintain the same old rates, either unassisted and at no expense to [\*\*\*57] their companies or else by means of a social club, which cost the companies nothing!

But we decline to believe anything of the kind. The formation of the club immediately after the passage of the Act of 1895, is admitted. The maintenance of the old Fetter rates as established and practiced by the Association of Fire Underwriters of Missouri, which was abolished immediately after the passage of the Act of 1895 because it would violate that law, is not denied. The character of the club arrangements and that it had no constitution or by-laws and only occasional meetings is conceded. The fact that all daily and monthly reports were submitted to this inexperienced young man, who was not an insurance expert, by all the local agents of the defendant companies, and that he alone had a right to seal and mail the reports to the companies is confessed. The fact that each company paid Fetter for his book and correction slips a percentage on the volume of its business, and that the book and slips were sent by Fetter to the company and by the company to the local agent or else by Fetter to the local agent direct when ordered so to do by his company, is proved and not controverted. And the conclusion [\*\*\*58] is inevitable and irresistible that the Underwriters' Social Club of St. Joseph is a plain, palpable, but bungling, pool, trust, agreement, combination, confederation and understanding organized to evade the antitrust laws of Missouri but wholly inefficient for such a purpose. The local agents did it and all knew it, and their HN2↑ knowledge is the knowledge of their companies, and their acts are the acts of their companies. (Nickell v. Phoenix Insurance Co. of Brooklyn, 144 Mo. 420, 46 S.W. 435.) For it could not be tolerated [\*38] for a moment that an insurance company could hide under the skirts of its agents and violate the anti-trust laws of our State with impunity. These corporations can only act through agents and if their agents' acts or practices are in violation of their orders, they must suffer the consequences, for the law must be enforced whether the act violating it is done by one or another of the agents of the corporation. The company can and must control its agents, and must see, at its peril, that its agents do not violate the law while attending to the business of the company. This is the rule as to libels, assaults, malicious torts by agents of incorporated companies [\*\*\*59] and there is greater reason for it being the true rule in cases involving the anti-trust laws. In fact, unless it was so, no company could ever be convicted of a violation of those laws, for they would do as the president of the Social Club said the club must do, put nothing in writing that would make them liable to prosecution; keep no records; leave no tangible evidences or tracts of their doings.

152 Mo. 1, \*38L<sup>52</sup> S.W. 595, \*\*605L<sup>899</sup> Mo. LEXIS 201, \*\*\*59

A few illustrations of the liability of a corporation for the willful or malicious torts of its agents, committed while in the prosecution of the company's business committed to their care although the act is unknown to the president, board of directors or manager of the corporation, will be sufficient to point the rule: For libel, [Buckley v. Knapp, 48 Mo. 152; Johnson v. St. Louis Dispatch Co., 65 Mo. 539](#), and this extends to liability for criminal libel. [State v. Boogher, 3 Mo. App. 442; Brennan v. Tracy, 2 Mo. App. 540](#). For malicious prosecution, [Boogher v. Life Association, 75 Mo. 319](#). For assault and battery, [Perkins v. Railroad, 55 Mo. 201](#). For conversion, [Sherman v. Commercial Printing Co., 29 Mo. App. 31](#). For trespass, [Favorite v. Cottrill, 62 Mo. App. 119](#).

In this case, however, [\*\*\*60] the companies can not be heard to say that they did not know of or sanction the acts of their agents for they have answered jointly, and boldly confess that they are writing insurance in this State because they have been [\*39] licensed to do so; and then they challenge the constitutionality of the Act and assert that it violates five different provisions of the Constitution of Missouri or of the United States, and contend that having been admitted to do business in this State before the passage of the Act of [\*\*606] 1895, they acquired a vested right to do so in a manner fair and just among themselves, which vested right can not be taken away from them by the Act of 1895, without violating the [XIV amendment to the Constitution of the United States](#). In short their answer is a clear admission that they have violated and do violate the Act of 1895, but they declare that they have committed no offense in so doing because they say that act is unconstitutional. It is true that the answer closes with a general denial of all the allegations of the petition not admitted by the answer to be true, but this avails nothing in view of the character of specific defenses pleaded which are [\*\*\*61] all predicated upon the facts charged being true. If this be not the meaning of the answer then so much of it as raises so many constitutional questions amounts only to a moot court proceeding, for if it be true that the defendants have never done the acts charged but have observed the requirements of the Act of 1895 and avoided its inhibitions, then it is wholly immaterial in this case whether the Act is constitutional or not. It is only upon the theory that they have violated it, that they can be heard to question its constitutionality. And this is clearly the idea of the pleader in this case, and is the only way in which the general denial can be made to consist with the specific defenses. [[Mississippi Valley Trust Co. v. McDonald, 146 Mo. 467, 48 S.W. 483.](#)]

This brings us to the question whether the acts done constitute a pool, trust, conspiracy or unlawful combination. The evident purpose of the Social Club was to maintain the Fetter rates. To accomplish this, their practice was for each agent to submit to their common agent -- the secretary of the club -- a daily report of all the policies written by each. This was done to enable him to see that they were not writing policies [\*\*\*62] at a [\*40] less rate than the Fetter rates. It could have been for no other purpose, for he was not an insurance expert and they were experts, so they did not need his judgment or advice as to whether the risk was a proper or safe one. He could only watch them and see that they followed "correct practices," that is, charged the Fetter rates. They could each have done this without him, but he was employed to watch them all for the benefit of each; to catch anyone who attempted to cheat his confederates in the trust. This could have been the only purpose of submitting all the daily and monthly reports to him and having him mail them to the companies. The companies all knew what rates their agents were to charge, for the Fetter books and slips were bought by the companies and furnished to their agents as a part of their supplies. They knew that the Fetter rates were charged and lived up to, because they could see that fact from every policy they issued. So that the purpose, plan, pool and trust is plain. The practice under the trust is also plain. The fact that the parties to the trust were treacherous to each other, and in the desire for business, violated the trust agreement and [\*\*\*63] occasionally wrote policies for less than the Fetter rate, does not even tend to disprove the existence of the trust, for it is the experience of all lawful as well as unlawful associations that some of the members will violate the common agreement for a selfish purpose, and hence penalties are usually provided (as they were in this case) for such violations. Of course there was no written agreement forming the trust, for that was "inexpedient" and might make the members liable to prosecution under the trust laws, as the president of the club well and wisely remarked when the club was formed. [HN3](#)<sup>↑</sup> When people set out to do acts that are either *mala in se* or *mala prohibita* they do not put up a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may [\*41] be of the same character, and while such laws are penal in their nature and should be strictly construed [[State ex rel. v. Talbot, 123 Mo. 69, 27 S.W. 366](#); [State ex inf. v. Bland, 144 Mo. 534, 46 S.W. 440](#)], nevertheless a pool or [\*\*\*64] trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds, and

as was well said by Campbell, J., in *Webber v. Jackson*, 79 Mich. 175, 44 N.W. 591, HN4<sup>↑</sup> "While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. And where this occurs repeatedly, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences;" and as was equally as well said by Sherwood, C. J., in *Baldwin v. Whitcomb*, 71 Mo. 651, "Whenever fraud is the matter in issue, any unusual clause in an instrument, *any unusual methods of transacting the business*, apparently done with the view for effect and to give to the transaction of the business an air of honesty, is of itself a badge of fraud."

Pools and trusts are not of modern origin. The courts, at common law, ferreted them out and placed the [\*\*\*65] stamp of disapproval on them. Then they usually took the form of contracts in restraint of trade or creating monopolies. As early as the case of *Mitchell v. Reynolds*, 1 P. Wms. 181, Chief Justice Parker laid down the rule that such contracts were void if they were general, and Best, C. J., in *Homer v. Ashford*, 3 Bingham 328, said: "The law will not permit anyone to restrain a person from doing what the public [\*\*607] welfare and his own interests require that he should do." The same rule was laid down by Parke, B., in *Mallan v. May*, 11 M. & W. 653. In those early days there was no legislation against such practices, but from the beginning the courts have recognized the dangers attending such combinations and in the absence [\*42] of criminal, penal or prohibitive statutes have refused to enforce such contracts. It is not necessary here to review the cases where courts have held contracts valid which only partially restrained trade. It is only necessary to call attention to the fact that in exceptional cases the main purpose of the contract was lawful and the restraint was only a necessary incident or ancillary to the contracts, "to protect the covenantee in the enjoyment of [\*\*\*66] the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party." [*United States v. Addyston Pipe & Steel Co.*, 54 U.S. App. 747.]

In the case just quoted Taft, circuit judge, delivered the opinion of the court, which was concurred in by Mr. Justice Harlan and Lurton, circuit judge, and we might well leave the law of the case at bar to depend upon that decision, for it is a most lucid, learned and luminous exposition of all the law, ancient and modern, upon the questions here under consideration, so much so in fact, that any attempt to enlarge upon the authorities cited and reviewed and the reasoning employed by the learned judge, would prove futile, feeble and foolish. After reviewing the instances where pools and trusts have undergone judicial scrutiny and condemnation, Judge Taft says: "Upon this review of the law and the authorities we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, [\*\*\*67] was void at common law because in restraint of trade and tending to a monopoly." And so it is here. But the common law remedy of refusing to enforce such contracts proved insufficient to prevent the blighting injuries to the public interests which modern trusts produced, and hence is has been found necessary by the National and State legislatures to enact drastic laws against trusts, pools, unlawful combinations and conspiracies, which will prevent [\*43] and punish them and not leave them to exist and enforce their contracts among themselves, denying them only the aid of the courts, as at common law. The General Assembly of Missouri has done its duty in this respect. Our statutory law has been progressive. The Act of May 18th, 1889 (Laws 1889, p. 96), entitled "An Act entitled an act for the punishment of pools, trusts and conspiracies, and as to evidence in such cases," as was to be expected, was not efficient to meet all cases, and it was therefore found necessary to amend it in 1891 (Laws 1891, p. 186). Even this proved insufficient, and it was amended again in 1895 (Laws 1895, p. 237). Again the law was found not comprehensive enough to meet all cases (like this case, for [\*\*\*68] instance) and the General Assembly proved itself equal to the exigencies of the occasion and passed the Act of 1897, under which this proceeding was instituted (Laws 1897, p. 208). This Act in express terms covers the case at bar, and the courts would be recreant to their duty, their past meritorious rulings, and to the principles they profess to practice and to teach, if they let the game out of the legislative trap in which it has been caught, by any forced construction of law or any distortion of the facts or any maudlin sentimentality superinduced by the magnitude of the interests involved.

The Underwriters' Social Club of St. Joseph is a pool, trust and conspiracy organized and maintained by the defendant companies, and is therefore an unlawful combination, and subject to the penalties prescribed by the Act

of 1897. [HN5](#) "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means." [United States v. Addyston Pipe & Steel Co., 54 U.S. App. 764.]

[HN6](#) A trust is a contract, combination, confederation or understanding, express or implied, between two or more persons to control the price of a commodity or service, [\[\\*\\*\\*69\]](#) for the benefit of the parties thereto, and to the injury of the public, and [\[\\*44\]](#) which tends to create a monopoly. As was said by Chief Justice Fuller in [United States v. Knight Co., 156 U.S. 16](#), "Again, all the authorities agree that [HN7](#) in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." In the [United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540](#), it was said: "For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it." Just so here, the practice of the members of the Social Club had the effect of maintaining the Fetter rates and hence constituted it a trust, no matter whether the members intended it to have that effect or not (and we have no [\[\\*\\*\\*70\]](#) doubt they did so intend it), and no matter whether they also intended it to be "social" in the manner hereinbefore indicated or not.

In the olden times such practices were called contracts in restraint of trade. Now-a-days they are called trusts. There is no difference in the principle. There is a difference in the extent and [\[\\*\\*608\]](#) methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks, when considered alongside of those of to-day. When the evils to the public interests that flow from these trust combinations are attempted to be described, words become mere weaklings in their power of expression, and one stands appalled at the helplessness of the people outside of judicial aid. This case strikingly illustrates the condition and calls aloud for the enforcement of the statute.

The facts establish the case laid against the defendants, and the statutory results must follow, if the statute is valid.

[\[\\*45\]](#) II.

The defendants challenge the constitutionality of the anti-trust law of Missouri, and cite two specific provisions of the Constitution of Missouri, and the [XIV amendment of the Constitution of the United States](#) which the Act, [\[\\*\\*\\*71\]](#) or some part of it, violates, and we will consider the points in the order they are pleaded.

1st. The title of the Act of 1891 and the amendment thereof in 1895 and 1897 is said to infringe "that part of [section 28 of article IV of the Constitution of Missouri](#), which provides that no bill shall contain more than one subject which shall be clearly expressed in its title, in this; that the subject of insurance against loss or damage by fire, lightning or storm, is a different subject and not germane to the matters contained in the title of said Act."

The title of the Act of 1891 is, "an Act providing for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases."

In [Ewing v. Hoblitzelle, 85 Mo. 64](#), it was held that: [HN8](#) "When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid." In State [ex rel. v. Miller, 100 Mo. 439, 13 S.W. 677](#), Black, J., said: "In adopting a title the legislature may select its own language, and may use few or many [\[\\*\\*\\*72\]](#) words. It is sufficient that the title fairly embraces the subject-matter covered by the act; mere matters of detail need not be stated in the title." These cases have been many times cited approvingly and have never been overruled and state the law to-day. If a combination, arrangement or understood course of dealing to fix and maintain prices or premiums to be charged for insuring property against loss by fire constitutes a pool or trust or conspiracy then the title of the Act of 1891 and its amendatory Acts covers and embraces [\[\\*46\]](#) it. That it is a pool or trust or conspiracy is fully shown by what is hereinbefore said. It follows that this contention is untenable. The Supreme Court of Kansas reached the same conclusion in the case of [In re Petition of Pinkney, 47 Kan. 89, 27 P. 179](#).

2d. It is claimed that section 30 of article II of the Constitution of Missouri provides that "no person shall be deprived of life liberty or property without due process of law," and that this Act violates that provision because, "it renders it unlawful for defendants to contract or agree among themselves or with the agents of other insurance companies or for their agents to contract and agree [\*\*\*73] among themselves for the reasonable adjustment and maintenance of rates of premium to be charged for insurance against fire, lightning or storm in this State."

This is a total misapprehension of the Act. It does not prohibit any company or the agent of any company from contracting with any person who desires to insure his property upon any terms they two may agree upon. This is the extent and true meaning of the right to contract.

It does prohibit any company by itself or through its agents contracting with any other company or its agent *not to contract* with the insured except upon terms which such insurance companies or their agents have previously established. In other words, it protects the company against the temptations of a trust or monopoly by refusing to permit it to strip itself of the power to freely contract, for under the arrangement shown in this case the applicant for insurance is free to contract but the company and its agent has already limited and qualified its power by its previous contract with another company or its agent. The law has made this provision more out of regard for the otherwise helpless insurer than from tender consideration for the insurance [\*\*\*74] company, but it incidentally preserves what it is here claimed it denies, the free, unrestrained power to contract by both parties to it. Such laws [\*47] have not only been adjudged constitutional by the Supreme Court of the United States ([United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540](#); [United States v. Joint Traffic Association, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25](#)), and by the United States Court of Appeals (United States v. Addyston Pipe & Steel Co., 54 U.S. App. 723), but the principles they announce have been expressly sanctioned by the Supreme Courts of New York ([People v. Sheldon, 139 N.Y. 251, 34 N.E. 785](#)), of Pennsylvania ([Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173](#)), of Ohio ([Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666](#)), of Kentucky ([Anderson v. Jett, 89 Ky. 375, 12 S.W. 670](#)), of Iowa ([Chapin v. Brown Bros., 83 Iowa 156, 48 N.W. 1074](#)), of Illinois ([Craft v. McConoughy, 79 Ill. 346, More v. Bennett, 140 Ill. 69, 29 N.E. 888](#)), of Wisconsin ([Milwaukee Masons' and Builders' Association v. Niezerowski, 95 Wis. 129, 70 N.W. 166](#)), of California ([Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 P. \[\\*\\*\\*751\] 581](#)), of Texas ([Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 19 S.W. 274](#)), and of Louisiana ([India Bagging Assn. v. Kock & Co., 14 La. Ann. 168](#)).

There is no more merit in this contention that there would be that a law was unconstitutional which prohibited two or more persons from conspiring to commit murder, or burglary or any other felony. [\*609] There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government to legislate is complete, so that while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar right of others. This principle underlies and runs through all governments and societies,, and it is the corner stone of the police power of the State.

3d. It is contended that section 1 of the Act is in violation of section 1 of the 14th amendment to the Constitution of the United States which provides: "That no State shall deprive any person of life, liberty or property without due [\*48] process of law, nor deny to any person [\*\*\*76] within its jurisdiction the equal protection of the laws," because it discriminates between foreign and domestic insurance companies, and because these defendants had, prior to the enactment of this law, complied with the laws of the State of Missouri, and "that said Act deprives them of the right to carry on their business in a manner fair and just among themselves and not in any manner injurious to any other person in the State, and that said Act deprives them of the right of making the necessary and proper contracts relating to the business of insurance."

Section 1 of the Act of 1897 makes no distinction between foreign and domestic insurance companies, but on the contrary expressly covers, "any corporation organized under the laws of this or any other State or country." So the postulate of this proposition is not true and hence the conclusion fails.

**HNG[↑]** It is a misconception of the [14th amendment to the Constitution of the United States](#) to suppose that any person acquires any vested rights by complying with existing police regulations or comity laws which can not be affected by subsequent changes in such regulations or laws. Such compliance is equally the duty of the citizen

and [\*\*\*77] the stranger, and both are treated alike by this section of the Act of 1897. Hence the protection which the Constitution of the United States affords has not been denied or abridged by the passage of this law. This is too plain to need the citation of authority to support it, and is fully illustrated in the cases hereinbefore referred to.

4th. It is insisted that section 6 of the Act of 1891 as amended by the Act of 1895, violates the [14th amendment to the Constitution of the United States](#), in that it discriminates between foreign and domestic companies by making the Act of the agent *prima facie* proof of the act of the company as to foreign companies, while such is not the case as to domestic companies.

[\*49] It might be conceded for the purposes of this case that this section is void for this reason, but that would avail these defendants nothing, for this section is not involved in this case, and no *prima facie* presumptions are invoked by the Attorney-General or indulged in by the court. The case has been tried and submitted and will be decided just as any other case involving a question of fact is tried, and the defendants have been accorded every privilege and presumption [\*\*\*78] in their favor that any litigant can have or is accorded in any other kind of a case -- even more so, for the proceeding being penal in its nature, it is strictly construed, and its abuse or violation must be clearly proven. [State [ex rel. v. Talbot, 123 Mo. 69, 27 S.W. 366.](#)]

Aside from this, however, this section is clearly separable from the remainder of the Act, and if eliminated from it, the remainder of the Act, and particularly sections 1 and 6a, would constitute a sufficient law to reach and cover the offenses here charged, and this being the case it is wholly immaterial -- in fact, a mere academic question -- whether section 6 is or is not constitutional. [[County Court of St. Louis Co. v. Griswold, 58 Mo. 175.](#)]

5th. It is further argued that sections 9 and 10 of the Act violate the [14th amendment of the Constitution of the United States](#), because they allow an attorney's fee of not less than \$ 25 nor more than \$ 500 to be taxed against defendants in such cases, while no such fees are taxable against defendants in ordinary cases.

What is said above as to section 6 applies to this contention with equal force. Besides, no such question, claim or demand is set up in this case, [\*\*\*79] and it will be time enough to consider it when a proper case involving such a claim is presented. A decision, in this case, of that proposition, might well be regarded as *obiter dictum*.

We have thus at great length set out the facts and circumstances disclosed by the record and the evidence, examined and [\*50] reviewed the law bearing upon the case, and with a lively appreciation of the effects and consequences to the seventy-three defendants, have reached the only conclusion which is possible on the facts under the law, that the defendants are guilty of the offense charged against them of deliberately forming a trust to fix and maintain the price or premium to be charged and paid for insurance against loss or damage by fire, lightning and storm, contrary to the provisions of the laws of this State, and having reached this conclusion, it only remains to pronounce and enforce the penalty which the law has fixed and prescribed in such cases.

The judgment of the court is that the defendants be ousted of all rights, privileges and franchises conferred by the laws of this State and of their certificates to do business under the insurance laws of this State, and that they pay [\*\*\*80] the costs of this proceeding, and that execution issue therefor.

As before indicated, the evidence does not show that the Newark Fire Insurance Company, Norwalk Fire Insurance Company, London Assurance Corporation, Citizens' Insurance Company of New York, Union Insurance Company of Philadelphia or Equitable Fire and Marine Insurance Company of Providence, R. I., or their agents, were members of the [\*\*610] Underwriters Social Club of St. Joseph, but as they have made common cause with the other defendants by the pleadings and joint answer, they will be treated in the same way as the other defendants and the judgment of ouster will include them. Burgess, Sherwood and Brace, JJ., concur in all the opinion, Gant, C. J., and Robinson, J., concur in all except the judgment as to the five companies specified in the last sentence, and dissent as to that. Valliant, J., dissents.

**Dissent by:** GANTT; VALLIANTVALLIANT, J.

## **Dissent**

GANTT, C. J. (*Dissenting*). -- Concurring with my learned brother that the relator failed to establish [\*\*612] by the testimony that five of the defendants or their agents were guilty of the charges against them in the information I am wholly unable to agree to [\*\*\*81] his conclusion that because they challenged the [\*51] constitutionality of the statute under which they are prosecuted in common with their confederates, that they should for that reason be held to have confessed the allegations of the information.

As I understand the law, each defendant is liable only when it is shown to have been a party to the trust.

The fact that it was sued in common with others and filed a joint answer denying its liability, and also the constitutionality of the act, does not amount to a plea of confession and avoidance. I regard this part of the opinion and the conclusion against them as a radical departure in the construction of pleadings, and hence I dissent.

Robinson and Valliant, JJ., concur with me in these views.

(*Dissenting*). -- I entirely agree with the majority of the court in the opinion that the acts charged in the information constitute an offense against the anti-trust statutes of this State, and I also agree that these statutes are constitutional and valid. I further agree that if the agents through whom the respondents have conducted their business in this State have been guilty of the offense charged in the information the respondents [\*\*\*82] can not escape the condemnation of the law on the plea that they did not authorize or were ignorant of the unlawful conduct of their agents. But the evidence in my opinion is not sufficient to convict them of the offense charged.

It is shown by the evidence that the local agents of the respondent corporations were associated together in an organization called the Underwriters' Social Club, which was in its general character more of a business than a social society, though it was not devoid of the latter characteristics. In weighing the evidence the name of the society adopted falls rather into the side of the scales against the respondents, because it seems to indicate to that extent an intention to mislead. But it appears that that club was the successor of one [\*52] that had for its purpose, or at least for one of its purposes, the maintaining of certain rates of premiums which, whatever its legal status might have been before, became when the antitrust statutes were adopted, unlawful, and in organizing the new society it may be that the members in choosing this name only desired to distinguish it, as far as a mere name could do so, from its predecessor, of which one Lancaster [\*\*\*83] was the active officer.

A great deal of testimony is devoted to what is called the Fetter book and the use made of that book by the respondents. The author of the book is W. J. Fetter, an insurance expert of fifty years' experience. It is published on his own account, and sold to all insurance companies who will buy. The general purpose of the book is to indicate to the insurer the rate of premiums to be charged for insurance on the various classes of property in the locality, and to classify the property. According to the evidence these rates are estimated from data derived from surveys and maps of the city drawn with special reference to furnishing information to the insurers as to the nature of the risk, and from personal inspection of the property, and are calculated by an experienced actuary. It is a book of technical information for all persons interested in that business and is estimated in value like all technical works in proportion to its reputation, or in proportion to the reputation of its author. When used and relied upon the effect is that the insurance agent writes a policy without making a personal inspection and survey of the property, and the book being not only [\*\*\*84] in the hands of the local agent but also in the home office of the company, the latter may pass on the policy without a special survey and certificate of inspection. The evidence shows that the book is in extensive use and that a large proportion of the business of the respondents in St. Joseph during the period covered by this inquiry was based on the rates given in the Fetter book.

There is nothing unlawful in the character of the book, [\*53] and nothing unlawful in the insurance companies basing their business ventures on the information it contains, and even if the evidence showed that all their business was transacted on that basis, that would not of itself bring them under the condemnation of the law. The use that a fire insurance company, standing alone, may see fit to make of the book, is no more to be condemned than the use that a merchant may make of the daily price current reports or than that which a life insurance

company may make of the tables of experience and of the prices at which such an insurance may be safely carried, compiled and computed by reputable authors and actuaries.

But there is a use to which the book might be put that would be unlawful, and that [\*\*\*85] is the use to which it is charged in the information these respondents have put it, that is, that they have made it a standard of rates by agreement among themselves which shall not be lowered.

The evidence shows that before the anti-trust statutes were enacted there was a compact to maintain those or similar rates, and it shows that this so-called Social Club was organized just after that law went into effect and the organizers had that law very much in mind. There was testimony in support of the information tending to show that whilst the ostensible object of the society was innocent, its real object was to violate the law. But on the other hand, whilst the testimony of the respondents was weak in support of the idea of its being a social club, yet it very satisfactorily showed that its main object was the regulation among themselves of the insurance business transacted by its members in particulars in which their mutual convenience was promoted, the public interest not prejudiced and the law not violated.

The testimony in support of the charge of the unlawful agreement to maintain rates is chiefly that of two witnesses who were, or had been, members of the club, and between whom [\*\*\*86] and the other members there seems to have arisen some unpleasant feeling growing out of their business. Whilst both [\*54] of these [\*\*611] witnesses testify that there was such an unlawful agreement, yet they state it rather as their conclusion; their understanding of a tacit agreement. They say that no written agreement to that effect was made and they do not state what if anything the members said among themselves that would constitute such an agreement. They undertook to give what they said the president said at the organization which was, in substance, that they could not put anything in writing that would lay themselves liable to prosecution under the anti-trust law, and that whatever was done on the subject of maintaining rates would have to be understood among the members. One of these witnesses said that if a member wrote a policy below the Fetter rate, the secretary would send it back to him and he would be required to take it up; when the witness was asked what would happen if the member failed to take up the policy, he said that usually there would be a big row and a whitewashing; when asked to state an instance in which a member had been thus disciplined, he was [\*\*\*87] able to remember but one, and that he so vaguely stated that it did not clearly appear either that the member had violated the supposed rule or that any penalty followed. Another one of these witnesses testified that there was a penalty prescribed for cutting the rate which was a fine of \$ 50 for the first two offenses and after that loss of his agency. On cross-examination he said that the agreement to submit to that \$ 50 fine was in writing signed by all the members of the club. That is in contradiction of his own previous statement and that of the other witness just mentioned, to the effect that no agreement on that subject was reduced to writing for fear of the law.

The evidence showed that the club had a secretary whom it paid \$ 75 a month. This secretary had been obtained by a committee sent by the club to Kansas City to consult Mr. Fetter on the subject, and was recommended by him as an efficient man for their business, he having been a clerk in Fetter's office. All policies written by the members, and their daily [\*55] reports were sent to the secretary who examined them, and if the policies were found correct he forwarded them to the company, if anything wrong was discovered, [\*\*\*88] either in the policies or reports, he sent them back to the agent for correction. The State's testimony tended to show that this was for the purpose of preventing any agent from cutting the rate. The testimony for respondents tended to show that the secretary was selected because of his skill in insurance business and to aid the members in their technical work; all policies were sent to him for his judgment as to their being properly written; if there was anything wrong in the form of the policy, or in the description of the property, it was his duty to note the correction and return it to the writer; when a number of policies were written by different agents on the same property it was desirable that they should all be what in technical language they call "concurrent," that is substantially in the same form; it was the secretary's duty to see that such policies were concurrent, and if one was found to be what they call "non-current" his duty was to note the difference and return it to the writer for correction; this could be done only by having a common agent of this kind or by the more inconvenient method of a meeting of all the agents interested; in a few instances when he first [\*\*\*89] began his office, the secretary noted on policies that they were written below the rate indicated in the Fetter book, which was the usual standard, and returned them to the writers for such action as they might see fit to take, but it

was done as a mere suggestion, the secretary took no further action on it, and he soon discontinued doing so; that he had nothing to do with fixing or maintaining the rates; that he made inspections of risks and when a change in the property or occupancy occurred he reported it to Mr. Fetter at Kansas City, who, if in his opinion the change required it, prepared for distribution to all his subscribers slips indicating a change in the rate of premium that should be made.

[\*56] The testimony of the president, secretary and several members of the club was taken and they all testify that there was no agreement to maintain rates.

It is not every association of men engaged in the same business that is condemned by our anti-trust statutes, even though the object of the association be to facilitate the conduct of their business and promote their mutual interests. Such associations are not unusual nor necessarily injurious to the public well being. It was [\*\*\*90] pointed out by witnesses in this case that there are features of the insurance business which render an association of the kind in question convenient and profitable to men engaged in the business, and that such an association may be conducted without in any particular violating the law.

The fact that before the anti-trust laws were enacted insurance companies were banded in an association to maintain rates doubtless conduces to place any society they may now form under suspicion, especially at a period when the public mind is excited on the subject of trusts. But when there is a legitimate purpose for which they may organize, and when we are told by reputable witnesses that such was the purpose of this organization and that there was no agreement to maintain rates, we have no right to disregard the testimony or overweigh it with suspicion.

I have given the evidence in this case a careful study and am satisfied that on the main question of fact the decided preponderance is in favor of the respondents, and the finding should be that they are not guilty of the acts charged and the judgment that they be discharged.

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## Kevil v. Standard Oil Co.

Superior Court of Cincinnati, Ohio

1900, Decided

No Number in Original

**Reporter**

11 Ohio Dec. 114 \*; 1900 Ohio Misc. LEXIS 141 \*\*; 8 Ohio N.P. 311

H. C. KEVIL v. STANDARD OIL CO.

**Disposition:** [\*\*1] Demurrer overruled.

### **Core Terms**

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Oil, transportation, allegations, anti-trust, commodity, contracts, territory, prices

### **Headnotes/Summary**

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**Headnotes**

**CONTRACTS.**

**1. CONTRACT FOR EMPLOYMENT--SURRENDER OF BUSINESS.**

An agreement to give a person employment at stipulated wages if he will give up his business and enter the service of the other party in a business of a similar nature, is not in violation of the act of April 18, 1898, 93 O. L., 143, and popularly known as the anti-trust law.

**2. CONTRACT NOT TOO INDEFINITE TO BE ENFORCED.**

Such a contract when properly construed as a contract to employ so long as the employer was engaged in that business and had work which the employee could do and desired to do and was able to do satisfactorily, is not too indefinite for enforcement.

**3. SUCH AGREEMENT IF TERRITORY NOT TOO EXTENSIVE.**

Such an agreement not to go into a similar business is valid if the prohibited territory is not more extensive than is necessary to enable the party contracting to enjoy the fruits of the contract. What extent of territory constitutes a reasonable limit is a question depending upon the particular circumstances of the contract.

**Counsel:** Rogers Wright, for plaintiff.

Stallo, Richards & Shaw, and B. P. Hollister, for defendant.

**Judges:** SMITH, J.

**Opinion by:** SMITH

## Opinion

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[\*114] SMITH, J.

This case comes before me on a demurrer to the petition, the material allegations of which are as follows:

That on or about November, 1898, the plaintiff was engaged in the oil business in the city of Covington, Kentucky, buying oil from wholesale dealers and delivering the same in smaller quantities to divers customers, and that the business was a remunerative one.

That the Standard Oil Company is a corporation whose business is the manufacture of petroleum and its products, "that it was incorporated in 1870, and subsequently became a party to a certain trust agreement, constituting what is known as the Standard Oil Trust, and all of its stock is held by the trustees of said trust. By said agreement a large number of individuals, partnerships and corporations, dealing in oil, put all the property employed in the oil business into the hands of nine trustees who were to manage the same in accordance with the trust agreement, thus creating a gigantic monopoly, which controls the entire oil business in the United [\*\*2] States."

That on or about December 16, 1898, the defendant entered into a contract with plaintiff, that if plaintiff would abandon his business, it would provide him with employment in one of its establishments within a reasonable time thereafter, and would pay him a reasonable salary for his services, and that until the defendant could provide such employment it would pay to plaintiff the sum of nine dollars a week.

[\*115] That in pursuance of said agreement plaintiff discontinued his business, sold his horses, wagon and other assets, and his business thereby was broken up and destroyed; that defendant paid to plaintiff the sum of nine dollars a week until the last day of April, 1899, when the defendant refused any further payments and notified the plaintiff that it would no longer pay him any further sums and would not provide him any employment; that since April, 1899, plaintiff has endeavored to procure employment, but has been unable to do so; that by reason of said action of defendant, his business has been destroyed, and he has been unable to earn a livelihood for himself and family, and has been damaged in the sum of twenty thousand dollars, for which he asks judgment.

[\*\*3] The question is, does the petition state a cause of action?

The position of the defendant is that under the law passed in this state in April, 1898, 93 O. L., 143, and popularly known as the antitrust law, the agreement set out in the petition is null and void, being a combination of property, skill and capital such as is forbidden by that statute; and that therefore the plaintiff cannot recover on the contract.

The two sections of this statute which the defendant contends support its position are the first and eighth, which are as follows:

"SECTION 1. *Be it enacted by the general assembly of the state of Ohio*, that a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure, whereby its price [\*\*4] to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to [\*116] pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such [\*\*5] article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

"SECTION 8. That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity."

It is difficult to understand why the plaintiff has inserted in his petition the allegations that the stock of the defendant company is held in common with that of other companies in a trust under what is known as the Standard Oil Trust, because such transfer of the stock does not destroy the corporation, and the action here is not against the Standard Oil Trust, but against the corporation, the Standard Oil Company, which the petition alleges through its officers entered into the contract with the plaintiff. The allegations, therefore, in regard to its stock being placed in trust in common with a number of other corporations may be rejected as surplusage. But if the allegations of the petition are to be construed as meaning that the contract was made for the benefit of the trust, this inference alone would not prevent a recovery, because it does not appear that [\*\*6] at the time the contract was made the plaintiff was informed as to the internal affairs of the corporation. And a contract cannot be declared invalid because the intention of one of the parties is illegal. Such intention to invalidate the contract must be mutual.

The main contention of the defendant, that the contract set out in the petition is invalid, however, is based upon the broad language of the anti-trust statute, of which both parties are presumed to have knowledge, and the decision of our Supreme Court in which the constitutionality of the act was upheld. State ex rel. v. Buckeye Pipe Line Co., [61 Ohio St. 520, 547, 56 N.E. 464.](#)

The last mentioned case was a proceeding in *quo warranto*, in which it was alleged that the defendant had combined with nineteen other corporations for the purpose of preventing competition in the production, transportation and refining of petroleum, and of fixing and maintaining the prices at which its various products should be sold. It was a combination of different companies solely for the purpose of restraining competition and maintaining prices.

But in deciding the last mentioned case the court distinctly says that, "The contract [\*\*7] which we are asked to denounce is not incidental to the sale of property, or any interest therein. It does not concern the good will of any business. It does not contemplate the formation of any corporation or other company for the carrying on of any business. In the subject of the contract the interests of the contracting parties are not adverse; they do not even diverse. The agreement according to the allegations [\*117] of the petition has no purpose whatever except to prevent competition in the production, transportation and refining of petroleum to the end that there may be received from the consumers of its products higher prices than would prevail under the condition of open competition. Counsel for the defendants admit that such a contract is within the inhibitions of the act, but deny the power of the legislature to inhibit it."

But as the contract set out in the petition is not a contract of combination solely for the purpose of restraining competition and maintaining prices, but is one in which a business is abandoned and good will as well as personal services transferred, the question whether such a contract falls with the inhibition of the anti-trust law is not passed [\*\*8] upon by State ex rel. v. Buckeye Pipe Line Co., *supra*, and as far as I am informed is presented in this state now for the first time since the passage of that law.

In United States v. Addyston Pipe and Steel Co., 54 U.S. App. 723, the distinction between a case such as the one at bar and that which our Supreme Court had before it in State v. Buckeye Co., *supra*, is clearly stated and the law applicable to the two classes of cases thoroughly reviewed. In that case there was a combination of corporations solely for the purpose of restraining competition and maintaining prices and the federal anti-trust law was held applicable to it and constitutional, just as in State v. Buckeye Co., the Ohio statute was held applicable and constitutional.

But it will appear from an examination of the case of United States v. Addyston Co., *supra*, that the circuit court of appeals passed upon the question whether the federal anti-trust law applied to a case where the restraint imposed by the agreement is merely ancillary to the main purpose of a contract and not the sole object of the contract. And in that case it was held that at common law contracts by which a business is purchased and [\*\*9] the purchase agrees to go out of the business for a certain length of time, and with respect to a certain territory, are valid, such restraints of trade being ancillary to the main purpose of the contract and necessary to the contractee in the enjoyment of the legitimate fruits of the contract. Thus in contracts by a merchant who sells his business to another, the merchant may agree that he will not engage in the business in the same territory for a certain length of time. In The Paragon Oil Co. v. Hall, [4 Ohio Cir. Dec. 576](#), and in Hitchcock v. Coker, 6 Ad. & El. 438, it was held that the covenant need not be limited as to time; and in other cases cited in United States v. Addyston Pipe Co., *supra*, it was held that the covenant need not be restricted as to territory if such covenants are ancillary to the main contract and are necessary to the proper enjoyment of the subject of the contract.

[\*118] It was held in the United States v. Addyston Pipe Co., *supra*, case that such contracts were unaffected by the federal anti-trust law, and such I believe to be the proper construction of the Ohio anti-trust law.

The sole inquiry remaining then is whether [\*\*10] the contract set up in the petition falls in this excepted class, not covered by the anti-trust law, and it is clear that it does.

The allegations of the petition are that the plaintiff agreed with the defendant to go out of business and go into the employ of the defendant. The allegations do not state for what period of time the contract was to continue, nor that the plaintiff was never to go into the same business again. But I think it is fairly to be inferred that the plaintiff was to have employment so long as the defendant was engaged in the oil business; that during that time the plaintiff was not to go into his former business; and that the agreement related to the territory of Covington.

In Lange v. Werk, [2 Ohio St. 519](#), it was held that an agreement not to go again into business in Hamilton county was valid; while in Lufkin Rule Co. v. Fringeli, [57 Ohio St. 596, 49 N.E. 1030](#), it was held that an agreement not to go into business in the United States or the state of Ohio was invalid, such restraint being regarded as too general and therefore against public policy and void.

In both cases, however, the court recognizes that where one sells his business [\*\*11] to another, or goes himself into another firm or corporation, with whom he contracts not to set up in business for himself in opposition to the new business with which he has connected himself, that the agreement is valid if the prohibited territory is not more extensive than is necessary to enable the party contracting to enjoy the fruits of the contract. In this case there can be no doubt that the territory covered by the contract is reasonable.

A case almost identical to this is Carnig v. Carr, 35 L.R.A. 512, (Mass.), Feb'y, 1897. In that case it was held that

1. "An agreement to give a person permanent employment at stipulated wages if he would give up his business and enter the services of the other party in the same occupation is not too indefinite to be capable of enforcement when properly construed as a contract to employ him so long as the employer was engaged in that business, and had work which the employee could do and desired to do and was able to do satisfactorily.
2. "A contract whereby one is induced to give up his own similar business is not lacking in mutuality because he does not bind himself to continue in the employment.

11 Ohio Dec. 114, \*118L 900 Ohio Misc. LEXIS 141, \*\*11

4. "The restraint of an [\*\*12] employee from engaging in business so long as he continues in the employment of a person who agrees to give him permanent employment does not make the contract unlawful or against public policy."

The demurrer will be overruled.

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## WOODBERRY v. MCCLURG

Supreme Court of Mississippi

March, 1901, Decided

No Number in Original

**Reporter**

78 Miss. 831 \*; 29 So. 514 \*\*; 1901 Miss. LEXIS 131 \*\*\*

MADISON W. WOODBERRY ET AL. v. MONROE MCCLURG, ATTORNEY-GENERAL.

**Prior History:** [\*\*\*1] FROM the circuit court, first district, of Hinds county.

HON. ROBERT POWELL, Judge.

The appellants, Woodberry and others, were plaintiffs in the court below; McClurg, attorney-general, the appellee, was defendant there. The facts are stated in the opinion.

**Disposition:** Judgment affirmed.

### **Core Terms**

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Gravel, attorney-general, charter of incorporation, railroad corporation, proposed charter, capital stock, gravel pit, incorporation, manufacturing, mercantile, legality, powers

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Governments > Legislation > Types of Statutes

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

### **HN1[] Public Enforcement, State Civil Actions**

It is a principle of law that a corporation created under the general laws takes its authority from such general laws, and not from the articles of association, and a corporation created under chapter 25, annotated code 1892 (Mississippi), can only exercise the powers prescribed by that chapter. By that chapter it is clear that every corporation is intended to be a distinct and separate entity, and reading, in the light of Mississippi statutes and the principles of common law relating to corporations, the first clause of § 5, chapter 88, acts 1900 (the anti-trust law), the court construes it to mean, as therein expressly declared, that no corporation shall directly or indirectly purchase

or own the capital stock, or any part thereof, of any other corporation, and that, too, without any question of competition between them.

## Headnotes/Summary

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### Headnotes

#### 1. CORPORATIONS. *General laws. Corporate powers. Code 1892, ch. 25. Charter.*

The powers of a corporation created under general laws are derived from the statute and not from its charter provisions, and a corporation chartered under code 1892, ch. 25, can only exercise the powers therein prescribed.

#### 2. SAME. *Distinct entity. Laws 1890, p. 125. Stock in other corporations.*

Every corporation chartered under the general laws of this state is intended to be a distinct and separate entity, and under laws 1900, ch. 88, sec. 5, so providing, no such corporation can rightfully purchase or own the capital stock, or any part thereof, of any other corporation, whether or not a competing one.

#### 3. ATTORNEY-GENERAL. *Official opinions. Judiciary.*

The courts will not undertake to control the attorney-general in the matter of his official opinions.

**Counsel:** Shannon & Street and Frank Johnston, for appellants.

The clause, sec. 5, ch. 88, laws 1900, "If such other corporation be engaged in the same kind of business and be a competitor therein," applies to both of the clauses preceding it--that is to say, it applies as well to the clause against a corporation, acquiring the capital stock of other corporations, as to the clause against a corporation acquiring the franchise, plant or equipments of other corporations. It is one entire sentence, with simply a comma before the word "nor." Ordinary grammatical construction of the sentence will demonstrate this.

Bearing in mind that the law under consideration was passed to define trusts and combines, and to provide for the suppression thereof, and to preserve to the people of this state the benefits derived from competition; and remembering that a trust or combination could not be created by one corporation, [\*\*\*2] engaged in a certain kind of business, acquiring part or all of the capital stock of another corporation, engaged in a different kind of business, the unsoundness of the attorney-general's contention is apparent.

If the attorney-general's construction of this law is correct, a corporation may purchase the franchise, plant and equipments of a noncompetitive corporation, thereby getting absolute control of the whole thing with full power to dictate its full policy, and yet he would not allow the same corporation to purchase one share of stock in a noncompetitive corporation, in which latter event, its interest would be so small that it would have no control over its policy.

The effect of the construction contended for by the attorney-general will be looked to by the court in construing the statute. This is more extensive and far reaching than may appear at first view. Upon such construction an incorporated bank could not invest its surplus in the stock of any railroad company or other corporations, whose stock is quoted and sold every day in the stock exchanges of the country.

No insurance company could invest its surplus or earnings in the stock of any other corporation [\*\*\*3] whatever. Savings banks, incorporated, would be restricted in their business investments to bonds or mortgages, and the stock exchanges of the world would be closed against them. In a word, every corporation in this state incorporated by the state, would be shut out of every stock exchange in the world, so far as dealings in stocks are concerned.

The interest of the individual stockholder would be seriously and injuriously affected by such a construction. No stockholder could sell his stock to a Mississippi corporation, but could only sell to individuals. Nor could any

stockholder borrow money from any incorporated bank or financial institution in the state on his stock as collateral security, for no bank would take as collateral security a certificate of stock that it could not own.

The purpose to effect such extensive and radical changes in the business in the state cannot reasonably be attributed to the legislature.

Monroe McClurg, attorney-general, pro se.

An attorney-general, in giving his opinions to the governor as to whether a proposed charter is violative of the constitution and laws of the state, should resolve all doubts against the proposed charter for [\*\*\*4] the same reason that the courts determine doubtful questions as to whether corporations possess certain powers against the corporation. All grants of power by the sovereign are to be strictly construed against the grant. The best interpretation of the law is the law itself. Section 8 of chapter 88 of the laws of 1900 is too plain and unambiguous to call for aids of construction outside of its own clear and logical language and meaning. The clear purpose and intent of the statute, as gathered from its own language, is (1) to deny the right to any corporation, as such, to purchase or own any of the capital stock of any other corporation, and (2) to deny one corporation the right to purchase or to acquire the franchise, plant or equipments of a competing corporation.

No man can conceive of a more powerful scheme for forming the most powerful combinations than that contended for by appellants. A single bank or a railroad company, a telegraph, express or telephone company might subscribe for or in some other manner "purchase or own" a majority of the capital stock of every noncompeting corporation in the state, and allow such other corporations to share in its stocks and profits. Nor [\*\*\*5] is it easier to find a better illustration than the charter under consideration. A gravel company, organized for the purpose of owning and operating gravel pits, together with all other powers incidental thereto and necessary to the successful operation of the gravel pits, demands the power to "purchase, subscribe for, take and hold, sell and deal in the stock of and shares of the capital stock of any corporation, joint stock company or association organized under or chartered by the laws of any state of the United States, or under or by the laws of the United States; Provided, Such corporation, association or joint stock company is not a competitor or engaged in the same kind of business." How can such powers reasonably conduce to the lawful operation of a gravel pit? Who can imagine the extent of such powers? We must presume that full advantage will be taken of every power granted.

Section 883 of the code requires "clear and definite statement of the purposes for which the corporation is created . . . and the powers to be exercised." Here it is clearly and definitely stated that the purpose is to operate a "gravel pit," and it may be expected that all powers necessary to the [\*\*\*6] successful operation of the pit should be granted, but nothing beyond that. So that, looking to this statute merely as a side light by which to read section 5 of the act of 1900, it is made the more evident that the power to invest in the capital stock of other noncompeting corporations is not within the reasonable contemplation of the powers to successfully operate a gravel pit.

**Judges:** TERRAL, J.

**Opinion by:** TERRAL

## **Opinion**

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[\*\*515] [\*835] TERRAL, J., delivered the opinion of the court.

M. W. Woodberry and five other citizens of Jones county applied to the governor of the state of Mississippi for a charter of incorporation of the Laurel Gravel Company. The governor referred the proposed charter to the attorney-general for his opinion as to its legality. The attorney-general declined to make such certificate, whereupon this writ of mandamus was brought against him to test the legality of the proposed charter.

A statement of the proposed articles of incorporation will best present the question for consideration.

The articles are styled, "Charter of incorporation of Laurel Gravel Company." Section 1 declares the purposes are to purchase and operate a gravel pit or pits and do a general mercantile [\*\*\*7] and manufacturing business. Section 4

provides that the Laurel gravel pit corporation may acquire and operate saw and planing mills, own and operate electric light plants, build and own hotels, may purchase, hold and deal in the stock or shares of any incorporation organized under the laws of the United States or of any of the several states of the union, provided such corporation is not a competitor with it in business.

That the powers attempted to be lodged in the Laurel Gravel Company would be illegal, if granted, we cannot doubt. They would make it a stupendous monster, capable of swallowing [\*836] into its insatiable maw all the mercantile and manufacturing institutions of the entire country, because none of them would be in any competition with it in the gravel business. Incorporated under chapter 25 of the code of 1892, which precludes the chartering of railroad corporations under it, yet, in direct conflict with § 832, it gives power to the Laurel Gravel Company to purchase and hold the capital stock of every railroad corporation of North America, because no one nor all of these transportation companies would be in competition with its gravel business.

**HN1**[] It is a principle [\*\*\*8] of law that a corporation created under the general laws takes its authority from such general laws, and not from the articles of association ([People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798](#)), and a corporation created under chapter 25, annotated code 1892, can only exercise the powers prescribed by that chapter. By that chapter it is clear that every corporation is intended to be a distinct and separate entity, and reading, in the light of our statutes and the principles of common law relating to corporations, the first clause of section 5, chapter 88, acts 1900 (the anti-trust law), we construe it to mean, as therein expressly declared, that no corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation, and that, too, without any question of competition between them. The question here made was passed upon at the request of the attorney-general. We assume no authority to pass upon his official opinions.

We approve and commend the advice of the attorney-general as sound, wholesome and patriotic, and

*Affirm the judgment below with costs.*

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## Metcalf v. American School Furniture Co.

Circuit Court, W.D. New York

May 13, 1901

No Number in Original

**Reporter**

108 F. 909 \*; 1901 U.S. App. LEXIS 4574 \*\*

METCALF v. AMERICAN SCHOOL-FURNITURE CO. et al.

### **Core Terms**

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stockholder, damages, stock, treble damages, conspiracy, anti-trust, demurrer, demands

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

#### [HN1](#) [down arrow] **Private Actions, Standing**

Section 7 of the federal antitrust act of July 2, 1890, is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

#### [HN2](#) [down arrow] **US Department of Justice Actions, Civil Actions**

It is clear that the right to maintain a suit in equity is not expressly conferred by the antitrust act of July 2, 1890. Indeed, such right is by implication denied: First, because a private person is given (§ 7 of the act) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney

general (§ 4 of the act), are charged with the duty of commencing suits in equity. If it were intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose they would have said so in unambiguous terms?

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

### **HN3** **Private Actions, Costs & Attorney Fees**

The antitrust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees; and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States, by its district attorney, on the authorization of the attorney general.

**Counsel:** **[\*\*1]** Seymour, Seymour & Harmon, for orator.

Davies, Stone & Auerbach (Joseph Auerbach and Brainard Tolles, of counsel), for defendants American School-Furniture Co. and Oakman and Turnbull, trustees.

Maulsby Kimball, for defendants Buffalo School-Furniture Co. and others.

**Opinion by:** HAZEL

## **Opinion**

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**[\*909]** HAZEL, District Judge. The orator, Caroline Metcalf, holder of 569 shares of stock in the Buffalo School-Furniture Company, is a citizen of Connecticut. She brings this bill in equity in behalf of herself and all other stockholders having like interests with her, not citizens of New York, against the Buffalo School-Furniture Company, incorporated in the state of West Virginia, but transacting its business and having its property in the state of New York; Oliver S. Garretson, Henry R. Hoffeld, Frederick C. Garretson, Edward C. Shafer, Robert L. Cox, and Albert D. Garretson, directors of that corporation, owning 80 per cent. of the capital stock, all of whom are residents of the state of New York; the American School-Furniture Company, a corporation of the state of New Jersey; and Walter G. Oakman and George R. Turnbull, residents of the state of New York, who claim to have an interest **[\*\*2]** in the property described in the complaint, as trustees for the holders of bonds of the defendant American School-Furniture Company. She alleges that the directors of the defendant Buffalo School-Furniture Company, without her consent, **[\*910]** and the defendant American School-Furniture Company, on the 2d day of March, 1899, entered into an unlawful combination and conspiracy whereby it was agreed that there should be no competition in the United States in the purchase and sale of school furniture and similar articles, and that the defendants contracted, combined, and conspired to restrict, restrain, monopolize, and control trade and commerce among the several states in school furniture; that this was done to increase and control the price in contracts for the delivery of school

furniture and the like among the several states and with foreign nations, and within the several states. The bill, at great length, alleges conspiracy, and after stating that the nominal capital of the defendant American School-Furniture Company is \$10,000,000, all of which, after the formation of that corporation, was issued for property, or for options for property, held by promoters of the company, **[\*\*3]** not exceeding \$3,000,000 in value; that the defendant American School-Furniture Company borrowed \$1,000,000, which still constitutes a liability, and which loan the promoters were able to obtain on the property acquired; that a large secret profit was made out of the transaction; that the consideration for the transfer of the property of the Buffalo School-Furniture Company to the American School-Furniture Company was the sum of \$137,461 in cash, \$15,000 in notes, 1,300 shares of the common stock, and 1,300 shares of the preferred stock, of the American School-Furniture Company, -- it is further alleged that no business whatever has been actually carried on by the defendant Buffalo School-Furniture Company since the transfer; that its board of directors, acting beyond their power, intend to wind up and dissolve the company and distribute all of its assets, including the stock of the American School-Furniture Company, among its stockholders, pro rata, although the American School-Furniture Company and the aforesaid directors know said stock to have no value. It is further alleged that the total capital stock of the Buffalo School-Furniture Company is \$350,000, divided into 3,500 shares, **[\*\*4]** of the par value of \$100 each; that the complainant requested the Buffalo School-Furniture Company to bring an action in equity to undo the transactions herein complained of, and recover its real estate and other assets from the defendant American School-Furniture Company; that she has exhausted all the means within her reach to obtain within the corporation itself the redress of her grievances; that the property and earning capacity of the Buffalo School-Furniture Company will be destroyed; and that she brings this bill for the benefit of herself and all the stockholders of the Buffalo School-Furniture Company who may be similarly situated who are not residents of the state of New York. It is further alleged that this fraudulent combination and scheme were fully consummated by the defendant directors and the American School-Furniture Company, and that complainant has never consented thereto; that she being without remedy by the strict rules of the common law, prays that the American School-Furniture Company and the defendants the directors of the Buffalo School-Furniture Company may be decreed to be personally liable to her in the premises for treble **[\*911]** the damages which **[\*\*5]** she has sustained, and that the transfer of the real estate and all of the property and assets of the Buffalo School-Furniture Company may be set aside; that it be restored, reconveyed, and again vested in the Buffalo School-Furniture Company, and that her damages may be ascertained and trebled; that a receiver be appointed; that the treble damages that may be adjudged and awarded to her may be charged as a lien upon said real estate formerly of the Buffalo School-Furniture Company; that the lien may in this proceeding be foreclosed; and that she be paid the damages and treble damages awarded and adjudged to her out of the proceeds of such sale.

The defendants have all demurred to the bill on grounds of multifariousness and want of equity. This suit is properly brought by the plaintiff as a shareholder in the Buffalo corporation, suing, as she alleges, for herself and for and on behalf of all other stockholders not residents of the state of New York. The Buffalo School-Furniture Company is under control of the guilty parties, and they have refused to sue when requested by the complainant so to do. *Hawes v. City of Oakland*, 104 U.S. 450, 26 L. Ed. 827; 2 Cook, Corp. § 701; De **[\*\*6]** *Neufville v. Railroad Co.*, 26 C.C.A. 306, 81 Fed. 10; *Porter v. Sabin*, 149 U.S. 478, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Weir v. Gas Co. (C.C.)* 91 Fed. 940.

The primary question immediately arises whether this individual demand for damages is not inconsistent and antagonistic to the equitable relief sought in the bill, and whether these are not demands for equitable and legal relief upon distinct and independent grounds. Innumerable acts are alleged to have been committed in pursuance of the conspiracy. It is also claimed that the conspiracy formed and carried out by the directors was and is in violation of the act of congress of July 2, 1890. Her grievance for which she demands relief is that of a minority stockholder suing for herself and several other stockholders. The damages alluded to in the bill, which she demands for her sole and individual benefit, appear to be the treble damages awarded to a person who is injured in his business or property by the acts of any other person or corporation forbidden or declared to be unlawful by the federal anti-trust law. It is strenuously clared to be unlawful by the federal anti-trust law. It is strenuously insisted that the subject-matter **[\*\*7]** of this case, because of the diverse citizenship of the parties, is properly before the court, irrespective of the act of 1890, and that, as the bill states a cause of action in favor of the dissenting stockholder without reference to that statute, a court of equity, having thus obtained jurisdiction of the subject-matter, may

administer all the relief which justice demands; that the damages sought are incidental to the demand for equitable relief, and the court has power to completely adjust all the rights of the parties. *Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N.Y. 96.* It is a general rule that a court of equity, having acquired jurisdiction of the subject-matter, may mold its decrees according to the circumstances of each case. The damages, however, sought to be recovered in this suit, in the light of the demand set out in the complaint, at paragraphs 24, 26, 28, and 31, cannot be regarded [\*912] as supplemental to the revesting of the property or incidental to the relief sought by the bill. The relief sought, other than the individual demand for treble damages, is in equity. Section 7 of the federal act of 1890 *HN1* is declaratory of a common-law right [\*\*8] which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort. *Blindell v. Hagen (C.C.) 54 Fed. 40; Pidcock v. Harrington (C.C.) 64 Fed. 821; Gulf, C. & S.F.R. Co. v. Miami S.S. Co., 30 C.C.A. 142, 86 Fed. 407; Block v. Distributing Co. (C.C.) 95 Fed. 978.* It inures in the case at bar to the complainant individually, and not to her as a stockholder, as an additional asset of the corporation. All other relief sought, if granted, must in the end belong and come into the hands of the corporation, to the advantage of the stockholders thereof. Cook, Corp. § 701, and cases cited; *Church v. Railroad Co. (C.C.) 78 Fed. 526; Whitney v. Fairbanks (C.C.) 54 Fed. 985.* This case is clearly distinguishable from *De Neufville v. Railroad Co., 26 C.C.A. 306, 81 Fed. 10,* cited by counsel for complainant. In that case the relief was demanded in form in favor of the complainant individually, but in law belonged to the corporation of which the complainant was a stockholder, while in this [\*\*9] case the treble damages sought by virtue of the anti-trust act would belong to the individual complainant, and not to the corporation of which she is a stockholder. In the case of *Pidcock v. Harrington, supra,* Judge Coxe said, in relation to the anti-trust act:

*HN2* "It is clear that the right to maintain in such a suit [in equity] is not expressly conferred by the act. Indeed, such right is by implication denied: \* \* \* First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose they would have said so in unambiguous terms?"

To the same effect is the decision of Judge Baker in *Southern Indiana Exp. Co. v. United States Exp. Co. (C.C.) 88 Fed. 659,* affirmed by the circuit court of appeals in 35 C.C.A. 172, 92 Fed. 1022. The learned district judge said:

*HN3* "The [\*\*10] anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees; and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States, by its district attorney, on the authorization of the attorney general."

Without deeming it necessary to specifically set out all of the grounds of demurrer of the various defendants interposed herein, it may be said that the chief grounds argued by counsel were the multi-fariousness of the bill, and want of equity in favor of the orator generally. [\*913] The bill, at great length, alleges conspiracy in restraint of trade and commerce, negligence, and ultra vires acts of the directors of the Buffalo School-Furniture Company, resulting in the depreciation of the value of its stock and property. I think that the bill, with its inferences, sufficiently avers a conspiracy in restraint of trade and commerce [\*\*11] to enable the complainant to give proof of the charge in support of her allegation. If these alleged unlawful acts are proven, injury has been sustained by the corporation, and therefore equity will afford relief. This would entitle the plaintiff, as a stockholder, to equitable relief.

The objection that the bill is demurrable because it lacks equity fails. The defendants Oakman and Turnbull have filed a plea in addition to their demurrer. It is not strictly necessary for the court to pass upon the sufficiency of this plea, having come to the conclusion that the demurrer filed by these same defendants must be sustained. The court is of the opinion, however, that the benefit of the plea should be saved to the hearing, in accordance with the rule laid down in Story, Eq. Pl. §§ 697, 698. The motion for a temporary injunction is denied. Demurrers sustained, with costs to the various defendants; complainant having leave to amend within 30 days.

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## National Salt Co. v. United Salt Co.

Court of Common Pleas of Cuyahoga County, Ohio

February 8, 1902, Decided

No Number in Original

**Reporter**

12 Ohio Dec. 386 \*; 1902 Ohio Misc. LEXIS 18 \*\*

NATIONAL SALT CO. v. THE UNITED SALT CO. ET AL.

**Disposition:** [\*\*1] Demurrer overruled.

### **Core Terms**

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Salt, stockholders, stock, parties, trust company, cases, cause of action, contracts, combinations, certificates, demurrer, allegations, deposited, preferred stock, consolidation, anti-trust, alleged agreement, percent, provisions, executory, joined, shares of stock, pari delicto, trade in, installments, commodity

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

#### [HN1](#) **Compulsory Joinder, Necessary Parties**

Ohio Rev. Code Ann. § 5006 provides: any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

#### [HN2](#) **Pleading & Practice, Joinder of Claims & Remedies**

Ohio Rev. Code Ann. § 5019 states: the plaintiff may unite several causes of action in the same petition, whether they are such as have heretofore been denominated legal or equitable or both, when they are included in either of the following classes: (1) the same transaction, (2) or transactions connected with the same subject of action.

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN3](#) **Antitrust & Trade Law, Sherman Act**

An act to define trusts, 93 Ohio Laws 143, forbids independent corporations to enter into combinations to restrict competition in trade with a view to exacting from consumers higher prices than would prevail under the conditions of open competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Controlling Shareholders > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

#### **HN4[] Monopolies & Monopolization, Conspiracy to Monopolize**

A trust is created where a majority of the stockholders in competing corporations consolidated their interest by conveying all their property to a corporation organized for the purpose of taking their property, when the necessary consequence of the combination is to control prices, limit production or suppress competition in such a way as to create a monopoly.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Executory Contracts

Contracts Law > Standards of Performance > Partial Performance > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Contracts Law > Defenses > Illegal Bargains

#### **HN5[] Types of Contracts, Executory Contracts**

The law will not aid a party to such contract, that is, an illegal contract, either in its enforcement while it is executory or in its rescission when it is executed. When such contract has been partially performed by both parties so that the evil purpose of the contract has been in part effected by the co-operation of both parties, then as to such part performance the condition of the parties is the same as though the contract had been fully executed. The parties are in pari delicto, and the law will not aid either of them in enforcing performance or in undoing what has been done; hence, under such circumstances, the vendee can not maintain an action to recover from the vendor the money paid on the contract. A plaintiff who founds his cause of action on an illegal or immoral act has no standing in a court of equity, and where both parties have been engaged in an unlawful transaction, the court will neither lend its active aid to the one party to get rid of the securities taken upon such transaction nor assist the other party in retaining them, but will leave both to their strict legal rights.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

#### **HN6[] Monopolies & Monopolization, Conspiracy to Monopolize**

So long as the illegal acts contemplated by contracts remain wholly unexecuted, the party who has paid money to obtain their performance may repent of the wrongful purpose, abandon his contract and recover back the money so paid. The law will aid him in such a case in the furtherance of a policy which aims to prevent wrongdoing by encouraging such repentance and abandonment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Criminal Activities

Contracts Law > Defenses > Illegal Bargains

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

## **HN7 [+] Monopolies & Monopolization, Conspiracy to Monopolize**

While courts will not enforce an illegal contract between the parties, if an agent of one of the parties has in the illegal enterprise received money or property belonging to its principal, he is bound to turn it over to him and can not shield himself from liability on the ground of the illegality of the original transaction.

## **Headnotes/Summary**

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### **Headnotes**

#### **TRUSTS--CONTRACTS--PARTIES--PLEADING.**

##### **1. VIOLATION OF SEC. 4427-1, REV. STAT.--VALENTINE ANTI-TRUST LAW.**

The petition in this case, the principal features of which are stated in the opinion of the court, states a cause of action and brings the case within the provisions of the Valentine Anti-Trust Law, 93 O. L. 143, Sec. 4427-1, Rev. Stat., *et seq.*

##### **2. JOINDER OF PARTIES IN SUCH CASE.**

A corporation having unlawfully entered into a contract to form a combination with another to control the output, trade and price of a commodity in Ohio, in violation of Sec. 4427-1, Rev. Stat., making certain combinations of capital unlawful, in effecting which stock and other property is deposited with a trust company pending the performance of certain conditions relating to the consolidation, the trust company, the consolidated company and such stockholders of the first mentioned corporation as have not joined in a proceeding by it to declare such contract null and void and asking for the return of all stock to the proper corporations and other relief in equity, are proper parties defendant under Sec. 5006, Rev. Stat., requiring the joining of all parties whose interests are adverse, etc.

##### **3. JOINDER OF CAUSES.**

It is not an improper joinder of causes of action, under Sec. 5019, Rev. Stat., permitting the joining in one petition of several causes of action included in or connected with one transaction, to ask for the setting aside of a contract between two corporations by which they unlawfully combined to restrain trade contrary to Sec. 4427-1, Rev. Stat., and an accounting for equitable relief, notwithstanding the proceeding concerns a number of parties.

##### **4. SECTION 4427-1, REV. STAT., CONSTITUTIONAL.**

Courts should not declare laws unconstitutional unless they are clearly so. Therefore, the court of common pleas held Sec. 4427-1, Rev. Stat., *et seq.*, 93 O. L., 143, defining trusts and declaring them unlawful, constitutional and not against public, as in restraint of trade; and particularly inasmuch as the Supreme Court had held the act to be constitutional in a case involving questions not inconsistent with those in case at bar.

##### **5. RULE AS TO AIDING PARTIES TO ILLEGAL CONTRACTS.**

The law will not aid a party to an illegal contract either in its enforcement when executory or in its rescission when executed, but when the illegal acts remain wholly unexecuted the party who has paid money for their performance, may repent of the wrongful purpose, abandon the contract and recover back the money so paid. Whether where a contract part executed, but mostly executory, and its securities are pledged with a trustee subject to sale in case of default, and neither party in possession of the fruits of the contract, will be rescinded, *quaere*.

## 6. PARTIES NOT IN PARI DELICTO.

A corporation having unlawfully combined with another contrary to the provisions of Sec. 4427-1, Rev. Stat., the anti-trust law of Ohio, the non consenting stockholders having no knowledge of the transaction when made, having never assented thereto, but instead demanded the rescission of the contract by which the illegal combination was effected, and upon refusal of the officers either to rescind or bring suit for rescission, instituted a proceeding in the name of the corporation, are not in *pari delicto*, and it appearing that the contract is executory and the property in the hands of a trustee, and neither party has obtained the fruits of the wrong, a revision thereof will not be denied.

**Counsel:** Ford, Snyder, Henry & McGraw, for plaintiff, cited:

Misjoinder of parties: Section 5006, Rev. Stat.; [Powers v. Bumcratz, 12 Ohio St. 273](#); [Neill v. Trustees, 31 Ohio St. 15](#); [Railroad v. Schuyler, 17 N.Y. 592](#); [Bensieck v. Cook, 19 S.W. 642 \[110 Mo. 173\]](#); [33 Am. St. Rep. 422](#); [Alnutt v. Leper, 48 Mo. 319](#); [Fultz v. Waters, 2 Mont. 165](#); [Bigelow v. Sanford, 57 N.W. 1037 \[98 Mich. 657\]](#); [Pate v. Hinson, 16 So. 527 \[104 Ala. 599\]](#); [Gardner v. Samuels, 47 P. 935 \[116 Cal. 84\]](#); [58 Am. St. Rep. 135](#); [Gutridge v. Vanatta, 27 Ohio St. 366](#); [Penn v. Hayward, 14 Ohio St. 302](#).

Misjoinder of causes of action: Sections 4971, 5058, 5059, Rev. Stat.; [Robinson v. Flint, 16 How. Prac. 240](#); [Globe Ins. Co. v. Boyle, 21 Ohio St. 119](#); [Converse v. Hawkins, 31 Ohio St. 209](#); [Gutridge v. Vanatta, 27 Ohio St. 366](#); [Powers v. Bumcratz, 12 Ohio St. 273](#).

Misjoinder of separate causes of action against several defendants: Larwill v. Burke, 10 Circ. Dec. 605 [19 R. 449].

As to whether the plaintiff is a proper party plaintiff: Sections 1777, 1778, Rev. Stat.; [McClain v. McKisson, 54 Ohio St. 673 \[47 N.E. 1114\]](#); Knorr v. Miller, 3 Circ. Dec. 297 (5 R. 609) [Aff. 27 Bull. 64]; [\[\\*\\*2\] Elyria Water Works Co. v. Elyria, 57 Ohio St. 374 \[49 N.E. 335\]](#); Henry v. Railway, 5 Dec. 41 (2 N. P. 118); Larwill v. Burke, 10 Circ. Dec. 605 (19 R. 449); [Dodge v. Woolsey, 59 U.S. \(18 How.\) 331](#); [Dewing v. Perdicaries, 96 U.S. 193](#); [Hawes v. Oakland, 104 U.S. 450](#); [Detroit v. Bean, 106 U.S. 537](#) [1 S. Ct. Rep. 560]; [Allen v. Wilson, \[28 Fed. Rep. 677\]](#); [De Neufville v. Railway, 81 Fed. Rep. 10, 11](#); [Ball v. Railway, 93 Fed. Rep. 513](#); [Rogers v. Railway, 91 Fed. Rep. 299](#); [Farmers Loan & Trust Co. v. Railway, 9 O. F. D. 49 \[67 Fed. Rep. 49\]](#); [Ranger v. Cotton Press Co., 52 Fed. Rep. 611, 613](#); [Hill v. Railway, 41 Fed. Rep. 610](#); [Secor v. Singleton, 41 Fed. Rep. 725, 727](#); [Harding v. Glucose Co., 55 N.E. 577 \[182 Ill. 551\]](#); [Carter v. Glass Co., 85 Ind. 180, 186](#); [Pasteur Vaccine Co. v. Burkey, 54 S.W. 804 \[22 Tex. Civ. App. 232\]](#); Cravens v. Carter--Crume Co., 13 O. F. D. 000 [92 Fed. Rep. 479; 34 C. C. A. 479]; [United States v. Fuel Co., 13 O. F. D. 000 \[105 Fed. Rep. 93, 104\]](#); Anheuser--Busch Brew. Co. v. Houck, 30 S.W. 869 [88 Tex. 184]; [People v. Sheldon, 34 N.E. 785 \[139 N.Y. 251\]](#); 23 L. R. A. 221; 36 Am. St. Rep. 690]; [Morris Run Coal Co. v. Coal Co., 68 Pa. 173](#); [Anderson \[\\*\\*3\] v. Jelt, 12 S.W. 670 \[89 Ky. 375\]](#); 6 L. R. A. 390]; [Chapin v. Brown, 48 N.W. 1074 \[83 Iowa 156](#); 12 L. R. A. 428; 32 Am. St. Rep. 297]; [Craft v. McConoughy, 79 Ill. 346 \[22 Am. Rep. 171\]](#); [Vulcan Powder Co. v. Powder Co., 31 P. 581 \[96 Cal. 510\]](#); 31 L. R. A. 242]; [Association v. Keck, 14 La. Ann. 168](#); [Judd v. Harrington, 34 N.E. 790 \[139 N.Y. 105\]](#); [People v. Sugar Refining Co., 24 N.E. 834 \[121 N.Y. 582\]](#); 9 L. R. A. 33; 18 Am. St. Rep. 843]; [Pittsburgh Carbon Co. v. McMillin, 23 N.E. 530 \[119 N.Y. 46\]](#); 7 L. R. A. 46]; [People v. Milk Exchange, 39 N.E. 1062 \[145 N.Y. 267\]](#); 27 L. R. A. 437; 45 Am. St. Rep. 609]; [Comer v. Burton-Lingo Co., 58 S.W. 969 \(Tex. Civ. App. 1900\)](#); Cooke, Trade & Labor Comb., 141, 142.

The petitioner is entitled to a decree: Edgar v. Fowler, 3 East, 222; Cotton v. Thurland, 5 Term R. 405; Wharton on Cont., Sec. 354; [Fisher v. Hildreth, 117 Mass. 558](#); Tyler v. Carlisle, 9 A. 356 [79 Me. 210; 1 Am. St. Rep. 301]; [Bernard v. Taylor, 31 P. 968 \[23 Ore 416\]](#); 18 L. R. A. 859; 37 Am. St. Rep. 693]; Taylor v. Bower, 1 Q. B. D. 291; [Vischer v. Yates, 11 Johnson 23](#); McAllister v. Gallaher, 3 Penrose & Watts, 468; [Conklin v. Conway, 18 Pa. 329](#); [Tarleton v. \[\\*\\*4\] Baker, 18 Vt. 9 \[44 Am. Dec. 358\]](#); Livingston v. Wootan, 1 Nott & McCord, 178; [Perkins v. Eaton,](#)

3 N. H. 152; Ball v. Gilbert, 12 Metc. 397; McKee v. Manice, 11 Cush. 357; Moore v. Trippe, 1 Spencer, 263; Heincke v Francis, 3 Dutcher, 55; Perkins v. Hyde, 6 Yerger, 288; Stacy v. Foss, 19 Me. 335 [36 Am. Dec. 755]; Wheeler v. Spencer, 15 Conn 28; Forrest v. Hart, 3 Murphy, 458; Wood v. Duncan, 9 Porter, 227; Shackelford v. Ward, 3 Ala. 37; Hardy v. Hunt, 11 Cal. 343 [70 Am. Dec. 787]; DeWees v. Miller, 5 Harrington, 347; Whitwell v. Carter, 4 Mich. 329; Conners v. Ragland, 15 Mon. (B.) 634; Hutchings v. Stilwell, 18 Mon. (B.) 776; Love v. Harris, 18 Mon. (B.) 122; Alvord v. Burke, 21 Ga. 46; Alexander v. Mount, 10 Ind. 161; Frybarger v. Simp son, 11 Ind. 59; Smith v. Bickmore, 4 Taunt. 474; Hastelow v. Jackson, 8 B. & C. 221; Bate v. Cartwright, 7 Price, 540; Hodson v. Ternl, 1 C. & M. 802; Robinson v. Mearns, 6 Dow & Ry. 26; Varney v. Kickman, 5 C. B. 271; Martin v. Hewson, 10 Excheq. 737; 29 Eng. & Eq. 424; Barrett v. Neill, Wright, 472; Norton v. Blinn, 39 Ohio St. 145; Merrit v. Willard, 4 Keyes, 208; Woodworth v. Bennett, 43 N.Y. 273; Tenant v. Elliot, 1 B. & P. 3; Farmer [\*\*5] v. Russel, 1 B. & P. 296; Johnson v. Lansley, 12 C. B. 468; Hooker v. DePalos, 28 Ohio St. 251; Kahn v. Walton, 46 Ohio St. 195 [20 N.E. 203]; Spring Co. v. Knowlton, 103 U.S. 49; Block v. Darling, 140 U.S. 234, 239 [11 S. Ct. Rep. 832]; Pullman Palace Car Co. v. Transportation Co., 171 U.S. 138, 151 [18 S. Ct. Rep. 808]; L'Herbette v. National Bank, 38 N.E. 368 [162 Mass. 137]; 44 Am. St. Rep. 354]; Anthony v. Machine Co., 18 A. 176 [16 R.I. 571]; 5 L. R. A. 575]; McCutcheon v. Capsule Co., 71 Fed. Rep. 787, 795, 796 [36 U. S. App. 586]; 19 C. C. A. 108; 31 L. R. A. 421]; Anson Cont. (1st Am. from 8th Eng. ed.), 266; Hampden v. Walsh, 1 Q. B. D. 189; Barclay v. Pearson, 2 Ch. 154; Leake Cont. (3 ed. Eng.) 672; Taylor v. Bowers, L. R., 1 Q. B. D. 291; 46 L. J. Q. B. 39; Lawson Cont., p. 54; Anson Cont. (4 ed.), 200; Harriman Cont. 130; Merz Capsule Co. v. Capsule Co., 67 Fed. Rep. 414; Western Union Tel. Co. v. Railway Co., 11 Fed. Rep. 1; Planters Bank v. Bank, 83 U. S. (16 Wall.) 483; Harding v. Glucose Co., 55 N.E. 577 [182 Ill. 551]; State v. Standard Oil Co., 49 Ohio St. 137 [30 N.E. 279]; 34 Am. St. Rep. 541]; Cook Corp. (4 ed.), Secs. 644, 645, 646, 647, 734, 735; [\*\*6] Thompson Corp., Secs. 4471, 4476, 4477, 4479, 4511; Smith v. Hurd, 12 Metc. 371; 4 Am. & Eng. Enc. of Law (1 ed.), 280, 281, and notes; Hawes v. Oakland, 104 U.S. 450; Huntington v. Palmer, 104 U.S. 482; Greenwood v. Freight Co., 105 U.S. 13; Taylor v. Miami Exp. Co., 5 Ohio, 162, 164, 167, 169 [22 Am. Dec. 785]; Goodwin v. Canal Co., 18 Ohio St. 169, 182, 183; Dodge v. Woolsey, 59 U. S. (18 How.) 342; Ware v. Grand Junction Co., 2 Russ. & M. 470; Gifford v. Railway Co., 10 N. J. Eq. 171; Stevens v. Railway, 29 Vt. 545; Bissell v. Railway, 22 N.Y. 258; Kean v. Johnson, 1 Stock Ch. 401; Field Corp., par. 141, 142; De Neufville v. Railway, 81 Fed. Rep. 10, 12, 13; Dannmeyer v. Coleman, 11 Fed. Rep. 97; Bell v. Donohue, 17 Fed. Rep. 710; Barnes v. Kornegay, 62 Fed. Rep. 671; Rogers v. Railway, 91 Fed. Rep. 299; Ball v. Railway, 93 Fed. 513; Farmers' L. & T. Co. v. Railway, 9 O. F. D. 230 [67 Fed. Rep. 49]; Hodges v. Screw Co., 1 R.I. 312 [53 Am. Dec. 624]; Robinson v. Smith, 3 Pai. Ch. (N. Y.) 222 [24 Am. Dec. 212]; Peabody v. Flint, 6 Ellen (Mass.) 52; Bremer v. Boston Theater, 104 Mass. 378; Hersey v. Veazie, 24 Me. 9 [41 Am. Dec. 364]; Smith v. Poor, 40 Me. 415 [63 Am. Dec. 1\*\*71 672]; Kennebec, etc. Ry. v. Railway, 54 Me. 173, 181; Forbes v. Whitlock, 3 Edw. Chy. (N. Y.) 446; Greaves v. Gouge, 69 N.Y. 154; Butts v. Wood, 37 N.Y. 317; Barr v. Railway, 96 N.Y. 444; Ryan v. Railway, 21 Kas. 365; Brown v. Van Dyke, 8 N. J. Eq. 795 [55 Am. Dec. 250]; Knoop v. Bohmrick, 23 A. 118 [49 N. J. Eq. 82]; Allen v. Curtis, 26 Conn. 456; Chetlain v. Insurance Co., 86 Ill. 220; Wright v. Mining Co., 40 Cal. 20; Wickersham v. Crittenden, 28 P. 788 [93 Cal. 17]; Messina v. Goldwaite, 64 Tex. 125 [7 Am. Rep. 281]; Wallace v. Bank, 15 S.W. 448 [89 Tenn. 630]; 24 Am. St. Rep. 625]; Rothwell v. Robinson, 38 N.W. 772 [39 Minn. 1; 12 Am. St. Rep. 608]; Slattery v. Transportation Co., 4 S.W. 79, 91 Mo. 217; 60 Am. Rep. 245; Byers v. Rollins, 21 P. 894 [13 Colo. 22]; Miller v. Murray, 36 Fed. Rep. 627; Detroit v. Dean, 106 U.S. 537 [1 S. Ct. Rep. 560]; State v. Buckeye Pipe Line Co., 61 Ohio St. 520 [56 N.E. 464, 467]; Newby v. Railway, 1 Sawyer (U. S.), 63; Memphis v. Dean, 75 U. S. (8 Wall.) 64; La Grange v. State Treas., 24 Mich. 468, 473, 474; Armstrong v. Society, 13 Grant Ch. (U. C.) 552.

## ARGUMENT.

The petitioner is not bound by the written contract between [\*\*8] the parties, but may produce evidence establishing his allegations as to the surrounding circumstances, the conditions of trade in Ohio, the actual consummation of the consolidation, etc.: United States v. Hopkins, 82 Fed. Rep. 529; The New York Ice Trust Cases, Attorney General, In Re, 22 App. Div. 285; United States v. Pipe and Steel Co., 85 Fed. Rep. 271; State v. Insurance Co., 52 S.W. 595 [152 Mo. 1]; American Straw Board Co. v. Straw Board Co., 65 Ill. App. 502.

The constitutionality of the Valentine Trust Act as applied to the facts set forth in plaintiff's petition. State v. Buckeye Pipe Line Co., 61 Ohio St. 520 [56 N.E. 464]; United States v. Freight Assn., 166 U.S. 290 [17 S. Ct. Rep. 540]; United States v. Traffic Assn., [171 U.S. 505 19 S. Ct. Rep. 25]; State v. Oil Co., 49 Ohio St. 137 [30 N.E. 279]; 5 L.

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R. A. 145; 34 Am. St. Rep. 541]; [Waters-Pierce Oil Co. v. Texas](#), 177 U.S. 28 [20 S. Ct. Rep. 518]; [Lange v. Werk](#), 2 Ohio St. 520; [Crawford v. Wick](#), 18 Ohio St. 190 [98 Am. Dec. 103]; [Lufkin Rule Co. v. Fringeli](#), 57 Ohio St. 596 [49 N.E. 1030]; 41 L. R. A. 185; 63 Am. St. Rep. 736], disapproving [Diamond Match Co. v. Roeber](#), 13 N.E. 419 [106 N.Y. 473]; [\*\*9] 60 Am. Rep. 464]; [National Harrow Co. v. Hench](#), 76 Fed. Rep. 667 [Aff., 83 Fed. Rep. 36; 27 C. C. A. 349]; [National Harrow Co. v. Bement](#), 21 App. Div. 290; State v. Jacobs, 10 Dec. 252 (7 N. P. 261); [Baily v. Association](#), 52 S.W. 853 [103 Tenn. 99]; 46 L. R. A. 561]; [Central Ohio Salt Co. v. Guthrie](#), 35 Ohio St. 666, 672; [Nester v. Brewing Co.](#), 29 A. 102 [161 Pa. 473]; Moore v. Bennett, 29 N.E. 888 [140 Ill. 69; 15 L. R. A. 361; 33 Am. St. Rep. 216]; [Texar Standard Cotton Oil Co. v. Adoue](#), 19 S.W. 274 [83 Tex. 650]; 15 L. R. A. 598; 29 Am. St. Rep. 690]; [Dunphy v. Newspaper Assn.](#), 16 N.E. 426 [146 Mass. 495].

The Valentine act is constitutional: [State v. Buckeye Pipe Line Co.](#), 61 Ohio St. 520 [56 N.E. 464].

Irrespective of the statute, contracts in restraint of trade are void: [Crawford v. Wick](#), 18 Ohio St. 190 [98 Am. Dec. 103]; [Lange v. Werk](#), 2 Ohio St. 520; [Central Ohio Salt Co. v. Guthrie](#), 35 Ohio St. 666; [Scofield v. Railway Co.](#), 43 Ohio St. 571 [3 N.E. 907]; [Emery v. Candle Co.](#), 47 Ohio St. 320 [24 N.E. 660]; 21 Am. St. Rep. 819]; [State v. Standard Oil Co.](#), 49 Ohio St. 137 [30 N.E. 279]; 34 Am. St. Rep. 541]; Field Cordage Co. v. National Cordage Co., [\*\*10] 3 Circ. Dec. 613 (6 R. 615); Paragon Oil Co. v. Hall, 4 Circ. Dec. 576 (7 R. 240); [Lufkin Rule Co. v. Fringeli](#), 57 Ohio St. 596 [49 N.E. 1030]; 41 L. R. A. 185; 63 Am. St. Rep. 736].

The contract is ultra vires: [Painesville & H. Ry. v. King](#), 17 Ohio St. 535; [Elevator Co. v. Railway](#), 5 S.W. 52 [85 Tenn. 703]; 4 Am. St. Rep. 798]; [Strauss v. Insurance Co.](#), 5 Ohio St. 60; [Hayes v. Gas Light & Coke Co.](#), 29 Ohio St. 330; [Bank v. Flour Co.](#), 41 Ohio St. 552; [Central Ohio Gas & Fuel Co. v. Capital City Dairy Co.](#), 60 Ohio St. 96 [53 N.E. 711]; [City of Findlay v. Pendleton](#), 62 Ohio St. 80 [56 N.E. 649]; Benedict v. Bank, 6 Dec. 320 [4 N. P. 231]; [Andres v. Morgan](#), 62 Ohio St. 236 [56 N.E. 875]; Shaw v. Installation Co., 10 Re. 233 (19 Bull. 292); Hill v. Hotel Co., 11 Re. 281 (25 Bull. 425); Vos v. Building Assn., 8 Re. 682 (9 Bull. 194); [Pearce v. Railway](#), 62 U.S. (21 How.) 441; [Thomas v. Railway](#), 101 U.S. 71; [Central Trans. Co. v. Car Co.](#), 139 U.S. 24 [11 S. Ct. Rep. 478].

As to whether plaintiff is entitled to relief in this case: [Norton v. Blinn](#), 39 Ohio St. 145, 148; [Emery v. Ohio Candle Co.](#), 47 Ohio St. 322 [24 N.E. 660]; 2 Am. St. Rep. 819; Kihlken] v. [Kihlken](#), 59 Ohio [\*\*11] St. 121 [51 N.E. 969]; Rogers v. Corre, 6 Circ. Dec. 602 (10 R. 346); Moore v. Cassily, 9 Circ. Dec. 505 (16 R. 708); Barrett v. Neill, Wright, 472; [Townsend v. Bogert](#), 27 N.E. 555 [126 N.Y. 370; 22 Am. St. Rep. 835]; [Wallace v. Bank](#), 15 S.W. 448 [89 Tenn. 630]; 24 Am. St. Rep. 625]; [Baldwin v. Canfield](#), 1 N.W. 261 [26 Minn. 43]; Wickersham v. Crittenden, 28 P. 788 [93 Cal. 17]; Currier v. Railway, 35 Hun. 355; [Slattery v. Transportation Co.](#), 4 S.W. 79 [91 Mo. 217]; 60 Am. Rep. 245; Peabody v. Flint, 6 Allen [Mass.] 52, 57; [Ribon v. Railway Co.](#), 83 U.S. (16 Wall.) 446.

There are a large number of cases in Ohio and elsewhere which say that no relief will be given to either party to an illegal agreement, but such cases are supported by the proposition that one party or the other seeks relief based upon the affirmance of the illegal agreement: [Goudy v. Gebhart](#), 1 Ohio St. 262; [Trimble v. Doty](#), 16 Ohio St. 119; [Hooker v. De Palos](#), 28 Ohio St. 251; [Cooper v. Rowley](#), 29 Ohio St. 547; [Harper v. Crain](#), 36 Ohio St. 338, 343 [38 Am. Rep. 589]; [Kahn v. Walton](#), 46 Ohio St. 195 [20 N.E. 203]; [Insurance Co. v. Hull](#), 51 Ohio St. 270 [37 N.E. 1116; 46 Am. St. Rep. 571]; [Markley](#) [\*\*12] v. [Mineral City](#), 58 Ohio St. 430 [51 N.E. 28; 65 Am. St. Rep. 776]; Shirey v. Ulsh, 1 Circ. Dec. 554 (2 R. 401); Carter v. Lily, 2 Circ. Dec. 204 [3 R. 364]; Railroad Co. v. Morris, 6 Circ. Dec. 640 (10 R. 502); [Spring Co. v. Knowlton](#), 103 U.S. 49; [Irwin v. Williar](#), 110 U.S. 499 [4 S. Ct. Rep. 160]; [Gibbs v. Gas Co.](#), 130 U.S. 396 [9 S. Ct. Rep. 553] [Merz Capsule Co. v. Capsule Co.](#), 67 Fed. Rep. 414; [Pullman Palace Car Co. v. Transportation Co.](#), 65 Fed. Rep. 158; [Pullman Palace Car Co. v. Transportation Co.](#), 171 U.S. 138 [18 S. Ct. Rep. 808]; [Harding v. Glucose Co.](#), 55 N.E. 577 [182 Ill. 551]; [Levin v. Gas Light Co.](#), 64 Ill. App. 393; [Schubert v. Gas Light Co.](#), 41 Ill. App. 181; [Griffin v. Piper](#), 55 Ill. App. 213; [Pratt v. Short](#), 79 N.Y. 437 [35 Am. Rep. 531]; Cameron v. Havemeyer, 25 Abb. (N. C.) 438; [Vulcan Powder Co. v. Hercules Powder Co.](#), 31 P. 581 [96 Cal. 510; 31 Am. St. Rep. 242]; [Radcliffe v. Smith](#), 76 Ky. 172; [Anthony v. Household S. M. Co.](#), 18 A. 176 [16 R.I. 571; 5 L. R. A. 575].

A different rule prevails, however, where the party repents in due season, asks to withdraw from the contract, does withdraw from it, tenders back what he has received, and [\*\*13] asks restitution of what is his. If the repentance

comes in due season, and restitution can be made, courts will take jurisdiction of the matter and grant the relief. This is especially so where the movement is made on behalf of and for the benefit of stockholders who took no part in and had no knowledge of the transaction: Eddy Combinations, Secs. 1138, 1139, 1140; Leslie v. Lorillard, 40 Hun. 392; *Sampson v. Shaw*, 11 Mass. 145 [3 Am. Rep. 327]; *Wells v. McGeoch*, 35 N.W. 769 [71 Wis. 196]; *Clancy v. Salt Mfg. Co.*, 62 Barb. 395; *Nester v. Brewing Co.*, 29 A. 102 [161 Penn. St. 473]; 24 L. R. A. 247; 41 Am. St. Rep. 894]; *Wright v. Cudahy*, 48 N.E. 39 [168 Ill. 86]; *Richardson v. Buhl*, 43 N.W. 1102 [77 Mich. 632]; 6 L. R. A. 457].

Ultra Vires: Pullman's Palace Car Co. v. Transportation Co., 11 S. Ct. Rep. 478; *Atlantic & Pac. Tel. Co. v. Railway*, 1 Fed. Rep. 745; *New-castle Northern Ry. v. Simpson*, 23 Fed. Rep. 214; *Memphis & L. R. R. Co. v. Dow*, 19 Fed. Rep. 388; *Bissell v. Railway*, 22 N.Y. 258; *Mallory v. Oil Works*, 8 S.W. 396 [86 Tenn. 598]; *Thomas v. Railroad Co.*, 101 U.S. 71, 86; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655 [19 Am. Rep. 781]; *Miners Ditch Co.* [\*\*14] v. Zellerbach, 37 Cal. 543; *Davis v. Railway*, 131 Mass. 258; *Long v. Railway*, 8 So. 706 [91 Ala. 519]; *Boyce v. Coal Co.*, 16 S.E. 501 [37 W. Va. 73]; *Day v. Buggy Co.*, 23 N.W. 628 [57 Mich. 146].

Outhwaite, Linn & Thurman, for plaintiff, cited:

This petition states a cause of action under the Valentine Act and under the common law: *State v. Oil Co.*, 49 Ohio St. 137 [30 N.E. 279]; 15 L. R. A. 145; 34 Am. St. Rep. 541].

As to whether the plaintiff is entitled to relief: *Central Transportation Co. v. Car Co.*, 139 U.S. 24 [11 S. Ct. Rep. 478]; *Pullman Palace Car Co. v. Transportation Co.*, 171 U.S. 138 [18 S. Ct. Rep. 808]; *Thomas v. Railway Co.*, 101 U.S. 71; *Spring Co. v. Knowlton*, 103 U.S. 49; *De Neufville v. Railway Co.*, 81 Fed. Rep. 10 [51 U. S. App. 374]; 26 C. C. A. 306]; *New Castle & N. Ry. v. Simpson*, 21 Fed. Rep. 533; *Merz Capsule Co. v. Capsule Co.*, 67 Fed. Rep. 414.

Action by non-assenting stockholders: *Dodge v. Woolsey*, 59 U.S. (18 How.) 331; *Hawes v. Oakland*, 104 U.S. 450; *Sims v. Street Ry.*, 37 Ohio St. 556, 565; *Day v. Buggy Co.*, 23 N.W. 28 [57 Mich. 146]; *Taylor v. Railway Co.*, 13 Fed. Rep. 152; *Kent v. Mining Co.*, 78 N. Y 159; Beach on Priv. Corp. [\*\*15], Sec. 433.

John H. Clarke, for defendants, cited:

The public policy of Ohio in dealing with parties to an illegal contract: *Kahn v. Walton*, 46 Ohio St. 195 [20 N.E. 203]; *Hooker v. De Palos*, 28 Ohio St. 251; *Williams v. Englebrecht*, 37 Ohio St. 383; *Markley v. Mineral City*, 58 Ohio St. 430 [51 N.E. 28]; 65 Am. St. Rep. 776].

Henderson, Quail & Siddall, for defendant, cited:

The plaintiff is presumed to be authorized to transact its business in the state of Ohio: *Brady v. Palmer*, 10 Circ. Dec. 27 (19 R. 687).

The plaintiff is not entitled to relief on account of the pledge of the United Salt Company's stock: 5 Thompson on Corporations, Sec. 6172; *Macomb v. Association*, 31 N.E. 613 [134 N.Y. 598]; *McMurray v. St. Louis, etc., Co.*, 33 Mo. 377; *Greenpoint Sugar Co. v. Whitin*, 69 N.Y. 328; *Coman v. Lackey*, 80 N.Y. 345; Jones on Pledges & Col. Sec., Secs. 4, 12, 14; *Robinson v. Fitch*, 26 Ohio St. 659; *Root v. Davis*, 51 Ohio St. 29 [36 N.E. 669]; 23 L. R. A. 445]; *Vanstone v. Goodwin*, 42 Mo. App. 39; *Mechanics, etc., Ass'n v. Conover*, 14 N.J. Eq. 219; *Wilson v. Little*, 2 N.Y. (2 Comst.) 443 [51 Am. Dec. 307]; *Hermann v. Car Trust Co.*, 101 Fed. Rep. 41 [41 C. C. A. [\*\*16] 176].

Virgil P. Kline, on demurrer:

The constitutionality of the Valentine trust act as applied to agreement set forth in plaintiff's petition: *State v. Buckeye Pipe Line Co.*, 61 Ohio St. 520 [56 N.E. 464]; *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28 [20 S. Ct. Rep. 518]; section 1 of the Bill of Rights of the Constitution of Ohio; section 19 of the Constitution; *Meredith v. Zinc & Iron Co.*, 37 A. 539 [55 N.J. Eq. 211]; *Marsh v. Russell*, 66 N.Y. 288; *Lorillard v. Clyde*, 86 N.Y. 384; *Central Shade Roller Co. v. Cushman*, 9 N.E. 629 [143 Mass. 353]; *Diamond Match Co. v. Roeber*, 13 N.E. 419 [106 N.Y. 473]; 60 Am. Rep. 464]; *Leslie v. Lorillard*, 18 N.E. 363 [110 N.Y. 519 534; 1 L. R. A. 456]; *Matthews v. Associated Press*, 32

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N.E. 981 [136 N.Y. 333]; 32 Am. St. Rep. 741]; Jones v. Fell, 5 Fla. 510, 515; Railroad Tax Cases, 13 Fed. Rep. 722, 743; United States v. Pipe & Steel Co., 85 Fed. Rep. 271; Coquard v. Oil Co., 49 N.E. 563 [171 Ill. 480].

Even if the contract is illegal, is the plaintiff entitled to the relief prayed for? 1 Pomeroy on Eq. Jurisp., p. 397; Moore v. Adams, 8 Ohio, 372 [32 Am. Dec. 723]; Roll v. Raguet, 4 Ohio, 400, 418 [22 Am. Dec. 759]; [\*\*17] Raguet v. Roll, 7 Ohio (pt. 1) 76, 77; 2 Kent's Commentaries, 366; 2 Stack Ev. 87; Hooker v. De Palos, 28 Ohio St. 251; Kahn v. Walton, 46 Ohio St. 195 [20 N.E. 203]; Insurance Co. v. Hull, 51 Ohio St. 270 [37 N.E. 1116]; 25 L. R. A. 37; 46 Am. St. Rep. 571]; St. Louis, V. & T. H. Ry. Co. v. Railway Co., 145 U.S. 393 [12 S. Ct. Rep. 953].

Plaintiff cannot avoid its agreement on the ground of its being ultra vires: Dunhene v. Insurance Co., 12 Re. 608 (1 Dis. 257, 261); Royal British Bank v. Turquand, 6 L. & B. L. 325, 330; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543 [99 Am. Dec. 30]; Miller v. Insurance Co., 21 S.W. 39 [92 Tenn. 167]; 20 L. R. A. 765, 771]; Bissell v. Railway Co., 22 N.Y. 258, 290; Farmers' & Mech. Bank v. Bank, 16 N.Y. 125 (69 Am. Dec. 673); Hill v. Hotel Co., 11 Re. 281 (25 Bull. 425); Bosche v. Horse Co., 7 Circ. Dec. 374 (14 R. 289); Larwill v. Fund Society, 40 Ohio St. 274, 284; Hays v. Gas Light & Coal Co., 29 Ohio St. 330, 340; Armstrong v. Karshner, 47 Ohio St. 276, 296 [24 N.E. 897].

Brief for defendant, William A. Dutton.

If the agreement which is made is within the clear legal rights of the parties, the intent of the transaction cannot [\*\*18] affect the validity: Letts v. Kessler, 54 Ohio St. 73, 82 [42 N.E. 765]; 40 L. R. A. 177]; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189 [56 N.E. 1033]; Kelley v. Ohio Oil Co., 57 Ohio St. 317, 328 [49 N.E. 399]; 39 L. R. A. 765; 63 Am. St. Rep. 721].

Guaranteeing of dividends: Cramer v. Lepper, 26 Ohio St. 59 [20 Am. Dec. 756]; Union Bank v. Bell, 14 Ohio St. 200, 210; Jones v. Insurance Co., 40 Ohio St. 583.

Laches: Taylor v. Railway Co., 13 Fed. Rep. 152, 157, 159; Credit Co. v. Railway Co., 15 Fed. Rep. 46, 47 (Clause 5 of syllabus 53, clause 8 of syllabus 55, and clauses 3 and 4 of syllabi 155, 157, 159).

Upon the claim of plaintiff that the contract is not executed, but that the property is still in the hands of a stakeholder: 2 Rapalje's Law Dictionary, "stakeholder;" Fisher v. Hildreth, 117 Mass. 562.

**Judges:** STONE, J.

**Opinion by:** STONE

## Opinion

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[\*394] STONE, J.

This case is before the court on demurrer to the petition, the grounds of the demurrer being:

1. A misjoinder of parties defendant.
2. Several causes of action are improperly joined.
3. Separate causes of action against several defendants are improperly joined.
4. The petition does not [\*\*19] state facts sufficient to constitute a cause of action.

The petition alleges in substance that the National Salt Company is a corporation, organized under the laws of the state of New Jersey, to manufacture and sell salt, with power to act outside of that state, and was engaged in

selling salt in the state of Ohio, and as such was a competitor to the defendant, the United Salt Company; that the United Salt [\*395] Company is an Ohio corporation and was under its charter engaged in the business of producing, manufacturing and selling salt in the state of Ohio, and was a competitor of the plaintiff in said business within the state of Ohio, and in so operating its business was able to and did control more than seventy-five per cent. of the salt business within the state of Ohio; that the American Trust Company is an Ohio corporation, and that the defendant stockholders were owners of the United Salt Company stock and received certain certificates of indebtedness issued by the National Salt Company, countersigned by the American Trust Company; that the plaintiff brings the action on request of certain of its stockholders who have never assented to the transaction, and on its own [\*\*20] behalf; that the plaintiff, The National Salt Company, and the defendant. The United Salt Company, and defendant stockholders, desiring to combine their capital stock and acts to create and carry out restrictions in the trade in salt within the state of Ohio and to limit or reduce within the state of Ohio the production of salt and to increase or reduce the price of said commodity within this state and to prevent competition within this state in manufacturing, making, producing, transporting, selling or purchasing salt, made and entered into in the manner and form hereinafter stated certain alleged agreements, by which the plaintiff and the United Salt Company and the defendant stockholders, agreed to pool, combine and unite within the state of Ohio said interests which they and each of them had connected with the sale and transportation of said common article (salt), that its price in the state of Ohio might be affected; that in order to carry out this intention and purpose, the plaintiff and defendant stockholders, on September 22, 1899, executed the written documents, copies of which are annexed to the petition.

The plaintiff sets out the transaction in substance as follows: An [\*\*21] agreement on the part of the National Salt Company and the stockholders of the United Salt Company whereby the United Salt Company stockholders agree to exchange the shares of stock held by them in the United Salt Company for the shares of stock in the National Salt Company, together with a cash consideration or payment on the basis of one share of stock of the United Salt Company in exchange for one and one-fourth share of the common and one and one-fourth shares of the preferred stock of the National Salt Company, the cash consideration being \$ 106.25 per share.

The United Salt Company stockholders transferred their stock to the National Salt Company, which latter endorsed it in blank, and deposited with the American Trust Company as trustee or depositary, this stock being of the par value of \$ 993,400, to be delivered to the National Salt Company, when the National Salt Company had performed certain other covenants and had paid \$ 1,055,489.50 in cash, in ten equal semi-annual installments represented by certain debt certificates issued by the National Salt Company to the United Salt Company stockholders. [\*396] The stock certificates so deposited with the American Trust Company [\*\*22] were endorsed in blank by the United Salt Company.

The National Salt Company deposited with the American Trust Company as trustee \$ 1,250,000 par value of its preferred stock and \$ 1,250,000 par value of its common stock, to be delivered to the former stockholders of the United Salt Company after the dividends declared thereon had been applied to reduce the cash payment agreed to be paid, which was to be paid in ten equal semi-annual installments beginning January 1, 1900, the agreement and option being dated July 20, 1899, and the option exercised October 2, 1899. That pending the payment of this cash consideration the United Salt Company stock was deposited with the American Trust Company as trustee, to secure the due performance on the part of the National Salt Company of its agreement to pay the United Salt Company stockholders the \$ 106.25 per share in money.

The stock of the National Salt Company to which the stockholders were entitled under this agreement was also deposited with the American Trust Company as trustee to hold until the full payment of the consideration, so as to secure to the National Salt Company the application of the dividends paid on such stock during the [\*\*23] time of the running of the ten semi-annual installments.

It is alleged that the American Trust Company accepted the trust and is now acting thereunder.

It is also alleged that the National Salt Company issued its certificates of common and preferred stock to the amount of one and one-fourth shares of preferred stock and one and one-fourth shares of common stock for each share of the stock of the United Salt Company, to W. T. Hunter, the nominee of the American Trust Company, and such certificates were deposited with the American Trust Company as trustee. The American Trust Company then

issued trust certificates to the defendant stockholders, certifying that after the National Salt Company had paid the cash consideration and after the dividends had been properly applied, they would be entitled to the stock from it. It is alleged that three installments have been paid on the certificates of indebtedness.

It is alleged that while the transaction between plaintiff and defendants, the United Salt Company and the defendant stockholders, took the form of the alleged agreements set forth in the petition, the real transaction was as hereinbefore set forth, and that the pretended purchase [\*\*24] and sale of all of the stock issued and outstanding of the United Salt Company in exchange for cash and stock of the National Salt Company was for the purpose of combining the business of the United Salt Company and the National Salt Company in the state of Ohio into one combination and under one control, with a view and intent and for the purpose of restraining trade in said commodity in said state and preventing the competition theretofore existing between plaintiff and the United [\*397] Salt Company in the purchase and sale of salt in the state of Ohio, so that they might be enabled to control, increase and decrease the price of salt in the state of Ohio at will; that in order to conceal the real object and purpose of the transaction and for the purpose of avoiding the antitrust law of the state of Ohio, and to avoid the appearance of corporate action on the part of both companies, the transaction took the form of a purchase and sale or exchange between the individual stockholders of the United Salt Company and plaintiff; that in order to further conceal the real object and purpose of the transaction, it was agreed that the business of the combination should be conducted in [\*\*25] the name of the United Salt Company, and thereafter said business of said combination was so conducted in the state of Ohio. That thereafter and from September, 22, 1899, said combination between plaintiff and defendants became and was complete and effective, and thereafter and by reason of said combination in the sale of salt in the state of Ohio between plaintiff and the United Salt Company ceased and the trade in said commodity was thereafter restricted in the state of Ohio.

That the alleged agreement providing for a cash payment of \$ 106.25 per share for each share of the United Salt Company and the issuing of certificates of indebtedness was a mere subterfuge, the real agreement being that the National Salt Company should make a guarantee of seven per cent. upon its preferred stock and ten per cent. upon its common stock to the stockholders of the United Salt Company who received that stock in exchange for the United Salt Company stock, and that thereby a preference was given to those stockholders over and above the stock in the National Salt Company held by the other stockholders therein, and that such *making* of preferred stock and guaranteeing of a dividend thereon was [\*\*26] without power on plaintiff's part to make and was void.

It is further alleged that under the terms of the deposit of stock of the United Salt Company by the National Salt Company with the American Trust Company, such stock can be sold in case of default in payment of any of the installments of the cash consideration; and that the plaintiff's charter provided that no mortgage shall be created without first obtaining the consent in writing of the holders of seventy-five per cent. of the preferred stock outstanding at the time, and also the like consent of the holders of seventy-five per cent. of the common stock, and that no such consent was given to mortgage this stock, and the same is *ultra vires* and void.

It is averred that said alleged agreement were and are of no effect, are still executory and have not been executed, and being void and of no effect and being still unexecuted, plaintiff, on behalf of said requesting stockholders and on behalf of all of its stockholders as well as of itself, offers to release and relinquish to the defendants and each of them [\*398] or their nominees or assigns, all interests or rights pretended to be transferred to it by said alleged agreements.

[\*\*27] The plaintiff therefore prays that the alleged agreements may be declared null and void, that the parties be placed in their original position by a return of the United Salt stock to the United Salt Company stockholders, and by a return of the National Salt Company stock to the National Salt Company, and for other relief.

The first ground of demurrer is a misjoinder of parties defendant.

**HN1** [↑] Section 5006, Rev. Stat., provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."

This is an action in equity, and relief is sought against the trustee, the American Trust Company, the defendant stockholders of the United Salt Company, as well as against all parties who had acquired interests in any of the property delivered under the agreement prior to the commencement of the suit. If relief is had against the trustee, the other defendants are interested in the nature and extent of that relief, because it will affect each of them. If the plaintiff is entitled to relief against the stockholders, the trustee, who is a stakeholder, [\*\*28] is an essential party to make it effective. If relief is granted against the certificate holders, both the trustee and the stockholders are necessary parties, that full relief may be had and a determination of their respective rights secured. It is reasonably clear that no defendant is joined who has not an interest in the controversy adverse to the plaintiff and who is not a proper party to a determination of the questions involved. We think the claim of misjoinder is not well taken.

Neither does it appear to the court that there are several causes of action improperly joined in this petition. The petition states one cause of action.

**HN2**[] Under Sec. 5019, Rev. Stat.: "The plaintiff may unite several causes of action in the same petition, whether they are such as have heretofore been denominated legal or equitable or both, when they are included in either of the following classes: (1) "The same transaction," (2) "or transactions connected with the same subject of action."

The petition, in our opinion, treats of one transaction, or one transaction is the subject of the action.

Neither does it appear to the court that separate causes of action against several defendants are improperly [\*\*29] joined. There is no separate cause of action against several defendants, and therefore there can be no improper joinder, in the opinion of the court. There is but one cause of action, an action in equity that concerns a number of parties and against whom relief is sought, arising out of the same transactions, and in a sense, may be regarded as an action for an accounting and for relief, as it affects all the parties to the transaction. The subject is the alleged [\*399] illegal contract entered into between the plaintiff and the defendants, and it is not perceivable to the court that separate causes of action are here improperly joined, within the meaning of our statute.

This brings me to the consideration of the really important question presented by the demurrer, namely, does the petition state facts sufficient to constitute a cause of action? The defendants claim the petition does not, for the reasons, (1) that the act entitled "An act to define trusts," etc., 93 O. L., page 143, Sec. 4427-1, Rev. Stat., et seq., commonly called the Valentine anti-trust--law is unconstitutional, and (2) that if the law is constitutional, the plaintiff is *in pari delicto* with the defendants [\*\*30] and not entitled to relief and that the court must in this and in cases involving illegal contracts, leave the parties where it finds them, by dismissing the petition.

The validity of this act was challenged in [State v. Pipe Line Co., 61 Ohio St. 520 \[56 N.E. 464\]](#), and was sustained.

The language of the syllabus in that case is as follows:

"The act entitled **HN3**[] 'An act to define trusts, etc.,' 93 O. L., page 143, in so far as it forbids independent corporations to enter into combinations to restrict competition in trade with a view to exacting from consumers higher prices than would prevail under the conditions of open competition, is an exercise of legislative power not repugnant to any limitation prescribed by either the state or federal constitution."

It is urged by counsel for the defendants that the case at bar is one involving a contract for the ordinary purchase and sale of property, and that this decision does not cover such a transaction as this. It will be observed that the petition follows very closely the language of the Valentine act, and, so far as applicable, the precedent for such a petition in [State v. Pipe Line Co., supra](#), as well as in [State v. I\\*\\*31 Standard Oil Co., 49 Ohio St. 137 \[30 N.E. 279\]](#); 15 L. R. A. 145; 34 Am. St. Rep. 541. The pleader has taken the language of the Valentine act to plead a combination and trust, and inserted allegations to the effect that the whole transaction was for the purpose of combining the business of two parties and restraining trade and preventing competition so that they might be enabled to control and increase or decrease the price and production of salt within the state of Ohio at will. That "it was agreed among themselves that the business of the combination to be effected by them should be conducted in the name of the United Salt Company, and thereafter said business of said combination was so conducted in the state of Ohio." Further, "thereafter by reason of said combination competition in the sale of salt in the state of Ohio

between plaintiff and said United Salt Company ceased, and the trade in said commodity was thereafter restricted in the state of Ohio."

Furthermore it is alleged that the United Salt Company, one of the parties to this consolidation or combination, before the consolidation, controlled more than seventy-five per cent. of [\*\*32] the salt business within [\*400] the state of Ohio; that the parties made a combination by exchanging their stock, thereby combining the two enterprises into one and carrying on the business under the name of the United Salt Company; that the competition between the parties ceased and that the trade in said commodity was thereafter restricted. With these allegations in the petition, the truth of which is admitted by the demurrer, it can not well be contended that the record presents a mere case of a sale of stock in one company to another company, a former competitor, whereby incidentally and only incidentally the former competition ceased. The transaction set forth in the petition is an unlawful agreement to affect the trade in Ohio, carried out by an exchange of securities, and that the agreement has been carried out to the extent stated and has had its effect on that trade. To what extent the allegations of this petition can be sustained upon the trial of the case and to what extent the agreements referred to in the petition and which are annexed to the petition but not made a part of it will sustain the averments of the petition is not the question before the court, but simply [\*\*33] whether the admitted facts present a case that brings it within the Valentine act. Taking this petition as it stands, we cannot avoid the conclusion that the case is within the provisions of this law and that the decision of the Supreme Court in State v. Pipe Line Co., supra, is decisive and controlling as to the constitutional question presented upon this demurrer.

Chief Justice Shauck, in announcing the opinion, says in part:

"We do not, however, deem it necessary or prudent to pass upon all objections which are urged against the act. It is quite familiar doctrine that in determining the constitutional validity of statutes their different provisions are not necessarily subject to the same conclusion. They are not, unless they constitute a single scheme, and are so interdependent that it could not be rationally presumed that any of them would have been made if it had not been supposed that all could be enforced. The application of this doctrine to the act before us is quite clear in view of the differences in the nature of the several combinations which are forbidden and in the character of those against whom the prohibition is directed. \* \* \*

"We are, therefore, to consider [\*\*34] only those provisions of the act which are relevant to the cases before us. \* \* \* The agreement, according to the allegations of the petition, has no purpose whatever except to prevent competition in the production, transportation and refining of petroleum, to the end that there may be received from the consumers if its products higher prices than would prevail under the condition of open competition. Counsel for defendants admit that such a contract is within the inhibitions of the act, but deny the power of the legislature to inhibit it. \* \* \* The definite proposition of counsel upon this point is that although the act is an exercise of legislative power, it transcends the provisions of the state and federal constitutions which [\*401] render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and they include the right to make contracts. But it is settled that these guaranties are themselves limited by the public welfare or the exercise of the police power. Although that power may not be conclusively defined, its nature and attributes have been the subject of much [\*\*35] investigation. In all considerate discussions of the subject it is conceded that in the exercise of this power the legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. That contracts like these are hurtful in that sense has been held in more cases than it would be practicable to cite. They abound throughout nearly three centuries of the development and administration of the common law in England and America. We cite, because of their full consideration of the subject and their direct application to legislation of this character, United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; United States v. Joint Traffic Association, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25; United States v. Addyston Pipe & Steel Co., 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96. "These cases," says the Judge, "are applicable, since the provisions of the federal anti-trust statute are not substantially different from those of the Ohio act which are brought under consideration in these cases and there is no substantial difference between the [\*\*36] contracts or constitutional provisions involved. That the contracts there considered were in restraint of commerce between states, served only to bring the subject within federal jurisdiction. The considerations affecting the validity of the

legislation are in all respects as applicable here as there. Since the contract alleged in these petitions is for the sole purpose of restraining trade or limiting competition, we find no decision which doubts that they are in a legal sense hurtful to the public. \* \* \* Such contracts have been uniformly held to be unlawful."

The allegations of this petition contain the usual averments that are to be found in most of these contracts which the courts have so uniformly held to be unlawful. Whether these averments are sustained and justified by the written agreements which are annexed to the petition it is not our province to inquire for the agreements are not made a part of the petition, and we look to the petition only in determining whether it states a cause of action.

As stated by the Supreme Court in the case just considered, the anti-trust laws of the United States and of various states are not materially different in their provisions. The [\*\*37] anti-trust law of Illinois varies in no essential particular from the Valentine act, indeed they may be said to be almost identical in arrangement and phraseology, and the Supreme Court of Illinois, in *Harding v. Glucose Co., 182 Ill. 551 /55 N.E. 577*, had occasion to consider the character of the anti-trust law in that state, in an action brought by individual stockholders [\*402] to prevent a combination and a consolidation of competing corporations. Six different companies or partnerships, for the purpose of combining in one company, the business of manufacturing glucose, entered into agreements or gave options for the sale of their respective properties to the company to be organized under the laws of New Jersey, I believe, with a capital of forty million dollars. These contracts and agreements made provision as to how compensation should be made, either in money or in stocks, common and preferred, of the consolidated company. All these contracts, agreements and options were deposited with the Illinois Trust Company as trustee, as incidental to the carrying out of the scheme and plan proposed. The plaintiffs, who were dissenting stockholders in one of the constituent [\*\*38] companies owning and operating a glucose plant, at Peoria, Illinois, brought an action to enjoin the carrying out of the proposed consolidation. The bill contained the usual averments to be found in this class of actions involving anti-trust law. The court, upon full hearing, sustained the petition and granted the relief sought. The court, among other things, held as follows: (I read from the fifth subdivision of the syllabus.)

**HN4** [↑] "A trust is created where a majority of the stockholders in competing corporations consolidated their interest by conveying all their property to a corporation organized for the purpose of taking their property, when the necessary consequence of the combination is to control prices, limit production or suppress competition in such a way as to create a monopoly."

Further quoting from the syllabus:

"The public policy of the state of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly."

Undoubtedly the public policy of Ohio has been against trusts and combinations in restraint of trade. This public policy has found expression judicially in the case of *Central Ohio Salt Co. v. Guthrie, 1\*\*391 35 Ohio St. 666; Emery v. Ohio Candle Co., 47 Ohio St. 320 /24 N.E. 660*; 21 Am. St. Rep. 819]; State v. Oil Co. *49 Ohio St. 137, 167 /30 N.E. 279*; 15 L. R. A. 145; 34 Am. St. Rep. 541], and other cases that might be cited. It has found *legislative expression and sanction* in the passage of the so-called Valentine act.

Counsel for the defendants, in support of their contention, have cited very many cases which they deem applicable to this case, in which courts in different jurisdictions have held certain combinations or consolidations of persons and partnerships to be perfectly valid and lawful. We think this case and the question involved in it, must be determined and decided in view of the legislation of this state and the judicial interpretation made there under, or in other states upon similar laws.

This petition, in the opinion of the court, sets up a state of facts and has the important averments that are to be found in any of the [\*403] cases to which my attention has been called where judicial construction has been given to anti-trust laws considered and, I believe, uniformly sustained. [\*\*40] I see no ground for distinction between the allegations in this petition and those to be found in the cases to which I have referred. We are of the opinion that the decision of the Supreme Court sustaining the Valentine act is a decision binding and conclusive upon the question presented here. It would be presumptuous, probably, for an inferior court, in view of this decision and the facts as

stated in this petition, to reach any other conclusion, especially so in the light of the well recognized rule that the court will not declare laws unconstitutional unless they are manifestly and clearly so.

2. Is the plaintiff *in pari delicto* with the defendants, and, therefore, not entitled to the relief prayed for? Counsel for defendants contend that the petition shows such a state of facts and contains such averments, that they are entitled to invoke in their behalf the principle announced in *Hooker v. De Palos*, 28 Ohio St. 251, and *Kahn v. Walton*, 46 Ohio St. 195 [20 N.E. 203], namely, that in regard to contracts that are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them, while they remain executory either in whole [\*\*41] or in part, nor when executed will it aid either party to place himself *in statu quo* by a rescission, but will, in both cases, leave the parties where it finds them.

In *Hooker v. De Palos, supra*, it is held that HN5<sup>↑</sup> the law will not aid a party to such contract, that is, an illegal contract, either in its enforcement while it is executory or in its rescission when it is executed. When such contract has been partially performed by both parties so that the evil purpose of the contract has been in part effected by the co-operation of both parties, then as to such part performance the condition of the parties is the same as though the contract had been fully executed. The parties are *in pari delicto*, and the law will not aid either of them in enforcing performance or in undoing what has been done; hence, under such circumstances, the vendee can not maintain an action to recover from the vendor the money paid on the contract.

In the Walton case the holding is that a plaintiff who founds his cause of action on an illegal or immoral act has no standing in a court of equity, and where both parties have been engaged in an unlawful transaction, the court will neither lend its active [\*\*42] aid to the one party to get rid of the securities taken upon such transaction nor assist the other party in retaining them, but will leave both to their strict legal rights.

Other cases have been cited in support of this general doctrine, but these sufficiently illustrate the principle involved.

There is an exception to the general rule, which is stated in the language of the court in *Hooker v. De Palos, supra*, namely, HN6<sup>↑</sup> so long as the illegal acts contemplated by such contracts remain wholly unexecuted, the party who has paid money to obtain their performance may [\*404] repent of the wrongful purpose, abandon his contract and recover back the money so paid. The law will aid him in such a case in the furtherance of a policy which aims to prevent wrongdoing by encouraging such repentance and abandonment.

This action is brought, not to recover upon the contract, but for a rescission and through rescission to bring about a surrender to the respective parties the property or securities that were the subject of the transaction. The petition alleges that the contract is executory, although, in considering the averments of the petition in other respects, it is clear enough that [\*\*43] the contract has been in part executed. Money has been paid on account of it to parties to this suit. The contention of the defendants is that it has been in the main, if not wholly, executed. We are of the opinion that the contract is in a large measure executory. The stock of the National Salt Company designed ultimately for delivery to the defendant stockholders was issued in the name of Sanford, nominee of the American Trust Company, and is in possession of the trust company. The shares of stock in the United Salt Company, upon delivery to the National Salt Company, were immediately endorsed in blank and delivered to the American Trust Company as security for the performance of certain features of the contract on the part of the National Salt Company, and it is alleged in the petition that the stock thus pledged as security is subject to sale by the trustee in case of default on the part of the National Salt Company in the payment of certain obligations arising under the contract. Neither party is in possession of the fruits of this contract. All of the securities which were the subject of sale or exchange, are in the possession of the trustee, subject to be so held for a period [\*\*44] of five years from the date of the contract.

But passing this question as to the extent to which this contract is executory, we may inquire, do the principles announced in the cases to which I have just called attention apply in this case, or is there a clear distinction to be drawn between these cases and the case at bar?

Is the plaintiff *in pari delicto*? The demurrer admits that the suit is brought on the demand of certain non-consenting stockholders of the National Salt Company, and that the suit is brought in the name of the National Salt Company because of such demand. It is alleged that these non-consenting stockholders had no knowledge of the transaction at the time the agreement was made; that they never assented thereto; that as soon as they learned of the existence of the agreement they demanded of the company that it proceed forthwith to have the contract rescinded, and in the event of its refusal to take such action, they propose to take legal steps on their own behalf. So it can be said with reason that the suit is brought in the name of the non-consenting and protesting stockholders, for the reason that the general rule is that the stockholder has no right to bring [\*\*45] suit in a matter that affects the corporation. That is for the corporation to do. If the officers of the corporation, after demand [\*405] by the stockholders, refuse to bring such action, then the stockholders may bring it. Is it not then, in legal contemplation, the action of the non-consenting stockholders? If so, and the authorities would seem to support this proposition, the principle of the cases to which I have referred would seem to have no application. The case has in it this feature not to be found in any of the cases to which I have referred. The property that is the subject of the controversy and which was made the basis of the transaction, namely, the stock of the constituent companies, is all in the hands of a trustee and, therefore, the question is very naturally suggested, whether the rule that, HN7[] while courts will not enforce an illegal contract between the parties, if an agent of one of the parties has in the illegal enterprise received money or property belonging to its principal, he is bound to turn it over to him and can not shield himself from liability on the ground of the illegality of the original transaction. Norton v. Blinn, 39 Ohio St. 145. [\*\*46] Whether the plaintiff, under the averments of this petition can recover back the money paid under the contract may well be doubted.

It seems to us that there is a clear distinction and difference between the case at bar and those in which the courts of this state have denied relief to parties *in pari delicto* and that a different rule would best comport with the interests of the public and the rights of the parties in this action. The property involved, according to the averments of the petition, is in the hands of a third party, under an illegal and unlawful contract. Certainly the trustee has no right to retain and have the fruit of an unlawful enterprise, and I am unable to find any good and sufficient reason why this petition as against a demurrer does not state a cause of action.

The demurrer is, therefore, overruled.

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## Bement v. National Harrow Co.

Supreme Court of the United States

Argued April 9, 10, 1902 ; May 19, 1902

No. 215

### **Reporter**

186 U.S. 70 \*; 22 S. Ct. 747 \*\*; 46 L. Ed. 1058 \*\*\*; 1902 U.S. LEXIS 2180 \*\*\*\*

BEMENT v. NATIONAL HARROW COMPANY

**Prior History:** [\*\*\*\*1] ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

## **Core Terms**

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contracts, patents, manufacture, parties, harrows, license, commerce, letters patent, void, invention, act of congress, telephone, monopoly, terms, violation of the act, conditions, interstate, discovery, licensee, patentee

## **LexisNexis® Headnotes**

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Contracts Law > Defenses > Illegal Bargains

### [HN1](#) **Defenses, Illegal Bargains**

Anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action.

Contracts Law > Defenses > Illegal Bargains

Criminal Law & Procedure > Sentencing > Fines

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### [HN2](#) **Defenses, Illegal Bargains**

The first section of the Antitrust Act, 26 Stat. 209 (1890), provides that every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court.

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Ownership > Conveyances > General Overview

### **HN3** Ownership & Transfer of Rights, Assignments

An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Ownership > Patents as Property

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

### **HN4** Ownership & Transfer of Rights, Assignments

The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

### **HN5** Conveyances, Assignments

The owner of a patented article can charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

## **Lawyers' Edition Display**

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## **Headnotes**

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FÍ Í ÁMÉRÍKA ÉS A LÍGÁJÚDÓ ÉS A LÍMÁI ÁSÉDÁÉTÉ I ÉRTÉKELÉSI LÍFJEGÁMEJESÓYÓLÁGFI ÉRTÉKELÉS

Error to state court -- conclusiveness of findings of fact in a suit in equity -- Federal anti-trust act -- violation of, as defense to suit on contract -- validity of conditions in license from patentee. --

Headnote:

1. The findings of fact made in a state court in a suit in equity are conclusive upon the Supreme Court of the United States on writ of error to that court.
2. The defense that a contract is in violation of the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.
3. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints or monopolies.
4. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.
5. The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows.
6. An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.

## **Syllabus**

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Any one sued upon a contract may set up, as a defence, that it is a violation of an act of Congress.

The object of the patent laws is monopoly, and the rule is with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and the fact that the conditions in the contracts keep up the monopoly, does not render them illegal. The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision, as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others.

Upon the facts found, there was no error in the judgment of the Court of Appeals, and it is affirmed.

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THIS was a writ of error to the Supreme Court of the State of New York, to which court the record had [\*\*\*\*2] been remitted after a decision of the case by the Court of Appeals. The action was brought by the plaintiff below, the defendant in error here, a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties, in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over twenty thousand dollars, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the Supreme Court and an order made granting a new trial, but on appeal from such order the Court of Appeals reversed [\*\*\*\*3] it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows: It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames and attachments applicable thereto, eighty-five of which patents were enumerated, and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, (in the State of Michigan,) and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction [\*\*\*\*4] employed by the defendant, during the term of such patents or either or any thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

- (1) The defendant was to pay a royalty of one dollar for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica in the State of New York.
- (2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows [\*\*\*\*5] to any person, firm or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.
- (3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in schedule B, which was made a part of the license, except as thereafter provided.
- (4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.
- (5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of ten cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.
- (6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any [\*\*\*\*6] other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another

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licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of five dollars, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture, for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth [\*\*\*\*7] harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

(9) The plaintiff agreed that after the license was delivered it would not grant licenses or let to any other person the right to manufacture the articles named of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff [\*\*\*\*8] might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, [\*\*\*\*9] and the agreement was to be construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was one dollar, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs and assigns.

Schedule A which followed contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was therein stated that "A maximum discount of forty-two per cent may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States, also States of New York,

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Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant [\*\*\*\*10] corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south, and west of Virginia, West Virginia and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the [\*\*\*\*11] action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It also alleged that all of the various contracts were in violation of the act of Congress, approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress, (26 Stat. 209,) entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The case was referred [\*\*\*\*12] to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D.C. & H.C. Reed & Company, of Kalamazoo, Mich.; G.B. Olin & Company, Perry and Canandaigua, N.Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J.M. Childs & Company, of Utica, N.Y.; and A. W. Stevens & Son, of Auburn, N.Y., who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, [\*\*\*\*131] and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent lawsuits followed; Suits were begun against the defendants herein, and against their

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customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the [\*\*\*\*14] six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a 'float' and the others a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts and privileges under patents. The defendant's president, [\*\*\*\*15] Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

"This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the Supreme Court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait et al. v. National Harrow Company et al.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately cancelled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which [\*\*\*\*16] time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of \$ 29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of \$ 16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted and agreed to take the stock of [\*\*\*\*17] the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of \$ 45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of \$ 45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

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"The transaction between the National Harrow Company of New York and this defendant had, in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was founded on a good, valuable and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation [\*\*\*\*18] of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above, and the defendant and its customers, was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did, settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

"I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable [\*\*\*\*19] in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letters patent and to grant licenses under United States letters patent and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased [\*\*\*\*20] from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing the [\*\*\*\*21] New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

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"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of \$ 13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B, and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, [\*\*\*\*22] and still fails, neglects and refuses to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various violations of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of over twenty thousand dollars. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal [\*\*\*\*23] combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the Supreme Court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resumption, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel: "That the foregoing record, as amended and corrected in this stipulation, [\*\*\*\*24] contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment, and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The plaintiff then appealed to the Court of Appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The court therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon [\*\*\*\*25] the report of the referee.

**Counsel:** Mr. Clark C. Wood, Mr. Edward Cahill and Mr. Henry J. Cunningham for plaintiff in error.

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Mr. Edwin H. Risley for defendant in error.

**Judges:** Fuller, Brewer, Brown, Shiras, Jr., Peckham, McKenna; Harlan, Gray and White took no part in the decision of this case.

**Opinion by:** PECKHAM

## Opinion

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[\*83] [\*\*752] [\*\*\*1065] MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

In this court we are concluded by the findings [\*\*\*1066] of fact made in a state court in a suit in equity, as well as in an action at law. *Dower v. Richards*, 151 U.S. 658, 666; *Israel v. Arthur*, 152 U.S. 355; *Egan v. Hart*, 165 U.S. 188; *Hedrick v. Atchinson, Topeka & Santa Fe Railroad Company*, 167 U.S. 673, 677.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. Act of July 2, 1890, c. 647, 26 Stat. 209. That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee [\*\*\*\*26] are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that [\*84] the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that taken together they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale and price in all portions of the United States, and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former alleged contracts are not mentioned in the report of the referee excepting, as he stated, they had been declared void as against public policy, and as being in restraint of trade because they extended beyond the life of the patents therein mentioned, and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately cancelled by the parties thereto.

The referee made no finding of [\*\*\*\*27] any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that [\*\*753] the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the plaintiff and the National Harrow Company of New York, and among other contracts the plaintiff executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow [\*\*\*\*28] business conducted by the defendant, and that it was founded upon a good, valuable and adequate consideration between the parties; that as a part of such consideration [\*85] the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

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The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind [\*\*\*29] of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction, and that all the contracts in evidence were and are legal, valid and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust or illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are, and were, intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby [\*\*\*30] interpreted.

When he speaks of all the contracts in evidence, the referee [\*86] plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding, that all the agreements made by defendant with the [\*\*\*1067] plaintiffs were valid. That agreement is set forth in the margin. <sup>1</sup>

<sup>1</sup> "Escrow Agreemnt.

"This memoranda of agreement, made and entered into this 1st day of April, A.D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan.

"Whereas, the said National Harrow Company is the owner of a large number of latters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D.B. Smith & Company, A.W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndean Manufacturing Company, D.C. & H.C. Reed & Company, L.C. Lull & Company, Williams Manufacturing Company, W.S. Lawrence, McSherry Manufacturing Company, D.O. Everst & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

"And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations, to be signed and executed by said respective persons, firms and corporations --

"Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

"But in case any of the above-named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

"Witness the signatures of the parties.

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[\*\*\*\*31] [\*87] There is no finding by the referee that this agreement was ever signed by any one other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is, that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncancelled. In the absence of any finding as to the escrow agreement having been signed by others, it [\*\*754] must be regarded as unimportant, and we are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district [\*\*\*\*32] in [\*88] which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that HN1<sup>↑</sup> any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action.

HN2<sup>↑</sup> The first section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to [\*\*\*\*33] sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when proved it is a valid defence to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question [\*\*\*1068] is that the agreements concern articles protected by letters patent of the Government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. HN3<sup>↑</sup> An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize [\*89] others to sell it. As stated by Mr. Justice Nelson, in Wilson v. Rousseau, 4 How. 646, 674, [\*\*\*\*34] in speaking of a patent:

"THE NATIONAL HARROW CO.,

By CHAS. H. CHILDS, Pres't.

"EDWARD NORRIS.

"E. BEMENT & SONS,

By A. O. BEMENT, Pres't.

"Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

"Dated this 1st day of April, 1891.

EDWARD NORRIS."

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"The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant v. Raymond*, 6 Pet. 218, 241:

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our Government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators or assigns, [\*\*\*\*35] for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the [\*\*755] grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received: [\*90] if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. [\*\*\*\*36] The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Company v. Eureka Specialty Company*, 47 U.S. App. 146, 160, it is stated regarding a patentee:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so [\*\*\*\*37] clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in [Hoe v. Knap](#), 27 Fed. Rep. 204, is not supported by reason or authority."

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes under the statute requiring an inspection and imposing a penalty for [\*91] the violation of the statute, and it was held that the enforcement of the statute was within the proper police powers of the State, and that it interfered with no right conferred by the letters patent. [Patterson v. Kentucky](#), 97 U.S. 501.

There are decisions also in regard to telephone companies operating [\*\*\*\*38] under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render as equal service to all who applied and tendered the

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compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any [\*\*\*1069] public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company and could not exercise the franchise of a common carrier of messages with such exceptions to the grant. See *Missouri ex rel &c. v. Bell Telephone Company*, 23 Fed. Rep. 539; *State ex rel. &c. v. Delaware &c. Company*, 47 Fed. Rep. 683; and *Delaware* [\*\*\*\*39] & *Atlantic &c. Company v. Delaware ex rel. &c.*, 3 U.S. App. 30.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Company v. Eureka Specialty Company, supra*. Notwithstanding these exceptions, HN4↑ the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

[\*92] The contention that they do not affect interstate commerce, is not correct. We think the licenses do by their terms and by their plain meaning refer to, include and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia [\*\*\*\*40] and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the State of Michigan. As these [\*\*756] contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290; *United States v. Joint Traffic Association*, 171 U.S. 505; *Addystone Pipe &c. Company v. United States*, 175 U.S. 211. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such [\*\*\*\*41] a construction of the act we have no doubt was never contemplated by its framers.

*United States v. E.C. Knight company*, 156 U.S. 1, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the States or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while [\*93] speaking of such manufacture: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts provision is expressly made, not alone for manufacture, but for the sale of the manufactured [\*\*\*\*42] product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addystone Pipe & Steel Company v. United States*, 175 U.S. 211, 238. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. This execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee.

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This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured [\*\*\*\*43] under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. HN5  
 ↑] The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee [\*\*\*1070] shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not [\*94] to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition [\*\*\*\*44] in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, [\*\*\*\*45] which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the [\*\*757] parties to this suit, designated A and B, and containing like conditions relating to the patents respectively, owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted [\*95] a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an [\*\*\*\*46] opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must, therefore, be

*Affirmed.*

MR. JUSTICE HARLAN, MR. JUSTICE GRAY and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

## **State v. Shippers Compress & Warehouse Co.**

Supreme Court of Texas

June 19, 1902, Decided

No. 1125

**Reporter**

95 Tex. 603 \*; 69 S.W. 58 \*\*; 1902 Tex. LEXIS 206 \*\*\*

State of Texas v. Shippers Compress and Warehouse Company

**Prior History:** [\*\*\*1] Error to the Court of Civil Appeals for the Third District, in an appeal from Travis County.

**Disposition:** *Affirmed.*

### **Core Terms**

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compress, charter, cotton, railroads, bales, shipment, commerce, forfeit, anti-trust, annually, public warehouse, average number, elevator, junction, railroad company, do business, concentration, destination, properties, products, situated, license, parties, revoke, void

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

**HN1[**

See Act of 1895, art. 5313 (Texas).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

**HN2[**

See Act of 1895, art. 5314 (Texas).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

**HN3[**

See Act of 1895, art. 5315 (Texas).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### [\*\*HN4\*\*](#) **Regulated Practices, Price Fixing & Restraints of Trade**

In so far as the Act of 1895, art. 5313 (Texas), comes within the terms of the Connolly case, it is invalid; it will not support an action by the state to recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the antitrust law.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Foreign Corporations > Qualifications

Governments > State & Territorial Governments > Licenses

Business & Corporate Law > Foreign Corporations > General Overview

#### [\*\*HN5\*\*](#) **Regulated Practices, Price Fixing & Restraints of Trade**

The Act of 1895, art. 5313 (Texas), tested by the decision of the Supreme Court of the United States, is valid to the extent that it authorizes the state to revoke the license of a foreign corporation, or to forfeit the charter of a domestic corporation, for acts done which are forbidden by the antitrust law.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

#### [\*\*HN6\*\*](#) **Corporate Formation, Corporate Existence, Powers & Purpose**

Tex. Rev. Stat. art. 642, subd. 28, expresses a purpose for which a corporation may be formed in the following terms: the construction or purchase and maintenance of mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale, and storage of products and commodities by grain elevators and public warehouse companies, and the loan of money by such elevator or public warehouse companies.

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

#### [\*\*HN7\*\*](#) **Acts & Mental States, Actus Reus**

In determining the question of intention, the court must consider as true every fact which can be fairly inferred from the evidence.

## **Headnotes/Summary**

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### **Headnotes**

**Trust Law -- Constitutionality.**

Conforming the rulings in this State as to the constitutionality of the "trust law" ( *Houck v. Brewing Association*, 88 Texas, 189) to the decisions of the *Supreme Court of the United States ( Connolly v. Union Sewer Pipe Company, 184 United States, 540)* it is held that the "trust law" of 1895 (Revised Statutes, articles 5313-5315), by exempting from its operations agricultural products, etc., in the hands of the producer, violates the *fourteenth amendment to the Federal Constitution* securing equal protection of the laws, to the extent that it will not support an action by the State to recover a penalty for a violation of the law nor afford a defense to an action on a right originating in its violation; but it is held to be constitutional and valid so far as to authorize the revocation of the license of a foreign corporation or the forfeiture of the charter of a domestic one for violation of its provisions. *Waters-Pierce Oil Co. v. State*, 177 U.S., 28.

### **Trust Law -- Restricting Aids to Commerce.**

The creation of [\*\*\*2] a corporation for the purchase, etc., of cotton compresses, expressing such purposes in the language of the statute authorizing its incorporation (Revised Statutes, article 642, subdivision 28), does not furnish evidence of an intention to violate the trust law in doing the things which the law authorized it to be created for and to do, though such charter contemplates extension of its business over a large part of the State; the right to forfeit its charter depends on the intent with which it was procured, and it is for the State to establish that such intent was the prevention of competition in the aids to commerce, forbidden by the law.

### **Corporation -- Creation for Unlawful Purpose -- Evidence.**

The acquisition by the corporation, on the same day, of six compresses in localities distant from each other, might afford evidence that it was the purpose of its promoters, in organizing it, to acquire such properties; but as the act was lawful, it did not in itself afford evidence of an unlawful purpose in creating the corporation.

### **Compressing Cotton -- Preventing Competition -- Regulations of Railroad Commission.**

Under the rules adopted by the Railroad Commission [\*\*\*3] regulating the compressing of cotton, competition in the rates of compressing is not probable and barely possible, and an intent to prevent competition by the purchase by one company of several independent compresses, could not be taken as evidence of an intent to suppress such competition.

## **Syllabus**

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The State procured writ of error from a judgment of the Court of Civil Appeals affirming that of the trial court, which had denied it recovery and from which it had appealed.

**Counsel:** *C. K. Bell*, Attorney-General, for plaintiff in error. -- Where the incorporators of a corporation obtain a charter for an illegal purpose they thereby perpetrate a fraud upon the State, on account of which the State can, in a proper judicial proceeding, recall or forfeit the charter granted to them. *Debenture Co. v. Louisiana*, 180 U.S., 330; *Distilling Co. v. People of Illinois*, 156 Ill., 448; *People of Illinois v. Gas Trust Co.*, 130 Ill., 268; 2 Mora. on Priv. Corp., sec. 769.

Any action by a corporation whereby the directors or shareholders in it are enabled to and do, through the corporation, effect a combination of their capital, skill, and acts for the purpose of preventing competition between aids to [\*\*\*4] commerce constitutes the corporation itself a trust and renders it, alike with those who under its guise accomplish their illegal purposes, guilty of a violation of and subjects it to the penalties prescribed by the law which defines trusts. Rev. Stats., art. 5313; *Const. of Texas, art. 1, sec. 26*; *Railway v. Baptist Church*, 108 U.S., 317; *People of New York v. Sugar Ref. Co.*, 2 Law. Rep. Ann., 38; *State of Ohio v. Oil Co.*, 15 Law. Rep. Ann., 158; *Ford v. Milk Shippers' Assn.*, 27 Law. Rep. Ann., 303; *People v. Sugar Ref. Co.*, 9 Law. Rep. Ann., 43; *Harding v. Glucose Co.*, 55 N. E. Rep., 598; *Moore v. Bennett*, 140 Ill., 80; *Salt Co. v. Guthrie, 35 Ohio St., 666*; *Gibbs v.*

Smith, 115 Mass., 592; Swan v. Chorpenning, 20 Cal., 182; People v. Gas Trust Co., 130 Ill., 378; People v. Nussbaum, 66 N. Y. Supp., 136; 1 Mora. on Priv. Corp., section 1; Taylor on Corp., sec. 50.

The court erred in rendering a judgment for the defendant and in failing to render a judgment for the State forfeiting the charter of the defendant corporation, because the evidence established the fact, as found by the court, that the defendant had misused and abused its powers in violation of the policy and of the Constitution [\*\*\*5] and laws of the State, and had usurped and exercised powers not conferred upon it, in a manner that produces injury to the public by affecting the welfare of the people, in this: (a) That it acquired and thereby brought under one management and prevented and is preventing competition between existing competing cotton compresses, the same being competing aids to commerce. (b) That it acquired and thereby brought under one ownership and management existing competing cotton compresses, the same being competing aids to commerce, for the purpose of closing them down. (c) That it acquired and thereby brought under one ownership and management existing competing cotton compresses, the same being competing aids to commerce, and thereby created and is now maintaining a monopoly in the business of compressing cotton.

A corporate franchise is granted and held upon condition that it be exercised for the attainment of the objects specified, and when a corporation is guilty of acts contrary to either the statute or common law, the charter of the corporation may be forfeited. Rev. Stats., art. 3528; Insurance Co. v. State, 86 Texas, 274; 1 Eddy on Combinations, 607; Coal Co. v. Coal Co., 68 [\*\*\*6] Pa., 186; 2 Mora. on Priv. Corp., sec. 1024; People of New York v. Sugar Ref. Co., 2 Law. Rep. Ann., 39; People v. Live Stock Exchange Co., 39 Law. Rep. Ann., 377.

A corporation which exceeds its powers in any important particular commits a breach of an implied condition of the contract, and may be properly held subject to the penalty of a forfeiture. Insurance Co. v. State, 86 Texas, 274; Debenture Co. v. Louisiana, 180 U.S., 320; 5 Thomp. on Corp., 609; 2 Cook on Corp., 633; 1 Eddy on Combinations, sec. 607.

At the hearing of this case in the District Court and on its submission in the appellate court it was assumed that the anti-trust statutes of 1889 and 1895 were valid, but the Court of Civil Appeals, following the holding of the Supreme Court of the United States in the case of Connally v. Union Sewer Pipe Company, based their decision, affirming the judgment appealed from, upon the ground that each of these enactments were unconstitutional. It is respectfully submitted that the constitutionality of the statutes referred to is not involved in this case, the sole purpose of which is to forfeit the charter of the defendant corporation.

A charter of a corporation is a contract [\*\*\*7] between the sovereignty which grants it and the incorporators. The State grants a charter subject to any conditions which it may see proper to impose. It could reserve the right to repeal the charter at any time and for any reason, or without reason. 4 Thomp. on Corp., sec. 4512. When the corporators accept the charter they accept it subject to this right, and are estopped from raising the question of the legality of the terms of the contract which they have made. There is no difference in this respect between the charter of a domestic corporation and the permit granted to a foreign corporation authorizing it to transact business within the State.

In the case of the [Waters Pierce Oil Company v. State of Texas, 177 United States, 28](#), in which the constitutionality of the Texas anti-trust statutes of 1889 and 1895 were presented, the Supreme Court of the United States held that it was immaterial whether they were constitutional or not; that although discriminations were imposed by these statutes (discriminations which have since been held by the same court to have rendered the law nugatory), still the corporation acceded to the conditions (however reasonable or unreasonable, discriminatory [\*\*\*8] or otherwise they may have been) upon which the State was willing to and did grant it the desired permit, and that for the violation of these conditions the permit could be canceled. If the Waters Pierce Oil Company had been a domestic corporation its charter could have been canceled as its permit was, and this entirely regardless of the question as to whether or not the statutes of 1889 and 1895 were constitutional.

In the case of [Connally v. Union Sewer Pipe Company, 184 United States, 540](#), it is expressly stated by the justice who rendered the opinion of that court, that if the defendant in that case had been a domestic corporation its charter could have been forfeited. This is entirely in accord with the decision in the case of the Waters Pierce Oil Company v. State, and is in line with the holding of the courts, including the Supreme Court of the United States. Doyle v.

Insurance Co., 94 U.S., 535; People v. Fire Assn., 92 N. Y., 311; Vose v. Cockroft, 44 N. Y., 415; Phyfe v. Eimer, 45 N. Y., 103.

*A. M. Carter and Crane, Greer & Wharton* [from brief in appellate court], for defendant in error. -- There is no evidence that the incorporators or promoters of the defendant [\*\*\*9] company had any illegal purpose in procuring the charter of defendant company, which the Attorney-General, in his brief, admits to be valid on its face. Hooper v. Gates, 39 S. W. Rep., 1079; Tobler v. Austin, 53 S. W. Rep., 706; Wolff v. Hirschfield, 57 S. W. Rep., 572; McClurg's Appeal, 58 Pa. St., 51; Kelsy v. Pf. C. Co., 19 Abb. M. C., 434; 45 Hun, 15; People v. Nussbaum, 66 N. Y. Supp., 134; Morse v. Mason, 103 Mass., 560; Match Co. v. Roeber, 106 N. Y., 483; 1 Eddy on Com., sec. 620; Craft v. McConoughy, 22 Am. Rep., 171.

The Legislature did not intend by the acts of 1889 and 1895, or either of them, to prohibit the organization of corporations for the purpose of purchasing competing properties. That end was sought to be attained only by the Act of 1899, which does not include compress companies within its aims. Anti-Trust Acts 1889; Anti-Trust Act 1895; Anti-Trust Act 1899; Insurance Co. v. State, 86 Texas, 250.

It is not unlawful for an individual or a corporation to merely acquire competing properties. 1 Eddy on Com., sec. 620; Match Co. v. Roeber, 106 N. Y., 483; Craft v. McConoughy, 22 Am. Rep., 171.

It was not unlawful for the promoters of the defendant corporation [\*\*\*10] to procure the charter in question, it being authorized by statutes of the State. Rev. Stats., art. 642, subdiv. 28.

Two lawful acts committed in a lawful way, namely, the procuring of a charter in a manner authorized by law and the acquisition of property thereunder, do not prove a criminal conspiracy, but the intention to defraud or to restrain trade, if it existed, must be proven by evidence aliunde. 6 Am. and Eng. Enc. of Law, 2 ed., 840 and note thereto, 864 and note thereto; Blain v. State, 33 Texas Cr. App., 236; Atkinson v. State, 34 Texas Cr. App., 424; Menges v. State, 25 Texas Cir. App., 710; 2 Bish. New Crim. Proc., 237-247.

*Crane, Greer & Wharton* [on writ of error], for defendant in error. -- If the anti-trust statute of 1895 is void because in conflict with the Constitution of the United States, it is a nullity, and is not binding on any person, natural or artificial, or on any corporation, domestic or foreign, and can not impose any duty or inflict any penalty on any corporation. Coal Co. v. Barton, Sup. Court Rep., Dec. 5, 1901, p. 5; Insurance Co. v. Morse, 20 Wall., 445-459; Southern Pacific Co. v. Denton, 146 U.S., 207; Commonwealth v. Coal Co., 97 Ky., [\*\*\*11] 243; Bigelow v. Nickerson, 30 Law. Rep. Ann., 340; Rece v. Newport News, 32 W. Va., 170-173.

The charter of the defendant company is a contract between it and the State, which can not be forfeited except for violation of the contract itself, or for the violation of a valid law of the State. Dartmouth College v. Woodward, 4 Wheat., 518, 519; Rev. Stats., arts, 2901, 4343; State v. Railway, 24 Texas, 80; People v. Manhattan, 9 Wend., 357; State v. Turnpike Co., 2 Sneed (Tenn.), 254.

The Court of Civil Appeals having decided that there was no evidence of any combination, or any agreement in violation of the statute, this court is without jurisdiction to revise its ruling and to determine to the contrary, and to substitute its decision on a question of fact for the decision of the Court of Civil Appeals. Const., art. 5, sec. 6; Rev. Stats., art. 940; Warren v. City of Denison, 89 Texas, 557; Agency Co. Case, 86 Texas, 179; Dillingham v. Richards, 87 Texas, 247; Railway v. Levine, 87 Texas, 440; Schley v. Blum, 22 S. W. Rep., 667.

*Baker, Botts, Baker & Lovett*, also for defendant in error. -- The anti-trust statutes of this State are in contravention of section 1, article 14, [\*\*\*12] of the amendments of the Constitution of the United States, providing that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and are therefore void.

Since the statutes are in contravention of the Federal Constitution, they are absolutely void, and can not authorize the forfeiture of defendant's charter, or be given any effect whatever as laws.

The transactions in question are not illegal under the common law, and if they were, the penalty of forfeiture could not be inflicted.

Even if the anti-trust statutes are entitled to any effect whatever in this case, they are not applicable to the occupation or service of compressing cotton, for there being no element of barter or sale involved, combinations affecting that business are not prohibited by such statutes.

The anti-trust statutes of this State were not intended to prohibit the purchase and sale of property where the restriction of competition is merely an incident but not the controlling object and purpose. An intent to suppress or restrict competition is the gist of the offenses denounced by the statute; [\*\*\*13] and no such intent appears in this case.

Rates for the compression of cotton are subject to regulation by the Railroad Commission, and are therefore not within the operation of the anti-trust statutes in any event.

**Judges:** Brown, Associate Justice.

**Opinion by:** BROWN

## **Opinion**

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[\*607] [\*\*59] The Attorney-General instituted this suit in the District Court of Travis County, Fifty-third District, against [\*608] the defendant in error, a corporation chartered under the general law of the State of Texas, on the 10th day of June, 1901, by a charter which authorized it "to construct or purchase and maintain mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale, and storage of products and commodities by grain elevator and public warehouse companies, and the loan of money by such elevator and public warehouse companies." The place of business of said corporation being designated as "in the counties of Dallas, Ellis, Navarro, Henderson, Smith, Kaufmann, Van Zandt, Wood, Raines, Rockwall, Hunt, Hopkins, Delta, Fannin, Collin, Grayson, Cook, Montague, Clay, Jack, Wise, Denton, Tarrant, Parker, Eastland, [\*\*\*14] Jones, Taylor, Wichita, Johnson, Hood, Erath and Hill."

It is charged that the incorporators, "Neil P. Anderson, B. L. Anderson, C. J. Sorrells, P. R. Freeman, Richard Clark, W. E. Campbell, and F. J. Phillips each made and entered into a combination of their capital, skill, and acts, and an agreement, confederation, and understanding with each of the others, and all together, for the purpose of creating and carrying on restrictions in trade and commerce and preventing competition in the aids of commerce."

It is alleged that said parties agreed to buy and acquire certain properties situated in the northern part of the State of Texas, and thereby prevent competition between the said cotton compresses, and, in pursuance of said agreement, the said parties executed and filed a charter in the form required by law; that in pursuance of the said agreement and by virtue of the authority conferred by the charter, the corporation, on the 11th day of September, 1901, purchased three compresses in the city of Dallas, -- being the only compresses in that city; a compress at Terrell; one at Gainesville, and one at Cisco, -- all of said compresses being competing aids to commerce, were bought [\*\*\*15] and acquired for the purpose of, and did in fact, create and carry out restrictions in trade and commerce, and are preventing competition between aids to commerce. The petition declares that these acts were in violation of the anti-trust law of Texas and worked a forfeiture of the charter of the said corporation, and the court is asked, upon a hearing, to declare the said charter to be forfeited.

The case was tried before the Hon. F. G. Morris, judge of the Fifty-third District, Travis County, who rendered judgment against the State of Texas, from which judgment appeal was taken to the Court of Civil Appeals of the Third Supreme Judicial District, which court affirmed the judgment of the trial court.

We make the following condensed statement of the facts agreed upon by the parties:

The corporation was regularly chartered on the 10th day of June, 1901, by filing with the Secretary of State a written charter containing all of the essentials prescribed by the statute. The purposes declared in the charter are those alleged in the State's petition hereinabove copied, **[\*609]** and the places designated in the charter are the same alleged in the said petition.

The City of Dallas **[\*\*\*16]** is situated about the center of the north half of the State of Texas, 76 miles south of Red River. The town of Terrell is on the Texas & Pacific and Midland Railroads, about 30 miles east of the city of Dallas. The town of Gainesville is situated on the Missouri, Kansas & Texas and Gulf, Colorado & Santa Fe railroads, about 88 miles northwest of the city of Dallas; and the town of Cisco is situated on the Texas & Pacific and Texas Central railroads, 146 miles west of the city of Dallas.

That in the year 1901 there were raised in the counties in which the corporation was authorized to do business 1,431,000 bales of cotton.

There are about seventy compresses in the State of Texas, the location of each of which is not necessary to be stated here, but was agreed upon by the parties. The Clarksville Compress Company, a Texas corporation, owned a compress in Dallas, which was operated until about the 10th day of March, 1901; the defendant purchased the properties of the said compress company on the 11th day of September, 1901. The Dallas New Cotton Compress Company, organized under the laws of Texas, owned a compress in the city of Dallas, which the defendant purchased and acquired **[\*\*\*17]** on the 11th day of September, 1901. The Texas Compress Company, a Texas corporation, owned a compress in the city of Dallas, which the defendant in error acquired on the 11th day **[\*\*60]** of September, 1901. The Texas Compress Company, likewise a Texas corporation, owned a compress in the city of Terrell, which the defendant purchased on the 11th day of September, 1901. The Gainesville Compress and Warehouse Company, a Texas corporation, owned a compress in the city of Gainesville, which the defendant purchased on the 11th day of September, 1901. The Cisco Compress Company, a Texas corporation, owned a compress in the town of Cisco, which the defendant purchased on the 11th day of September, 1901.

We make a condensed statement of the rules and regulations of the Railroad Commission of Texas concerning the compression of cotton, presenting those provisions which bear upon the question before the court:

(1) The railroad companies are required to pay the cost of compressing cotton, which can not exceed 10 cents per hundred pounds.

(2) All cotton must be compressed at the shipping point if there be an accessible compress at that place.

(3) If there be no compress at the point **[\*\*\*18]** of shipment, then the cotton must be compressed at the press nearest to the point of shipment and in the line of transportation towards the final destination of the cotton, being seventy miles from the point of destination.

(4) At the request of the shipper, the railroad company may carry the cotton to a place for compression not in the line of shipment, if it be the nearest compress to the place from which the shipment is made.

**[\*610]** (5) If the point at which the shipment originates be a junction between two or more railroads, at which there is no compress, and the shipper shall direct the cotton to be compressed at another junction of the same railroads, if either railroad can, in accordance with the rules of the commission, carry the cotton to the junction for compression, then either of the other roads may carry it to the same place, although in doing so the cotton would be carried by other compresses on the line of the carrying road.

(6) The concentration of cotton shall be made at a point in the direction of the destination of the shipment, except that in case the shipper shall request the railroad company to carry the cotton for concentration to a point not in the **[\*\*\*19]** direction of the shipment, but on its own line of road, if such point be nearer to the origin of the shipment.

(7) If it be desired to concentrate cotton at a point which is the junction of two or more railroads and the cotton to be concentrated is offered for shipment at another point or junction of the same railroads, if either railroad company

can, in accordance with the rules, carry the cotton to the desired point for concentration, then either of the other railroads may carry it over their own line to the same point of junction, although in doing so it would be carried by other compresses.

The defendant in error has operated all of the compresses bought by it in compliance with the rules of the Railroad Commission, except that the compress purchased of the Clarksville Compress Company was dismantled for removal before it was purchased, and has not been operated; and the Texas compress at Dallas was out of repair, and the cotton crop so light that the other compress could do all the work that was required; hence the Texas compress has not been operated during the last year.

The capacity and average annual business of each compress purchased by the defendant is as follows: [\*\*\*20] Clarksville compress, capacity 60,000 bales, average number of bales compressed annually 12,500; the Texas compress, capacity 60,000, average number of bales compressed annually 30,000; the Dallas new compress, capacity 100,000 bales, average number compressed annually 50,000; the Terrell compress, capacity 60,000 bales, average number compressed annually 40,000; the Gainesville compress, capacity 75,000 bales, average number of bales compressed annually 65,000; the Cisco compress, capacity 60,000 bales, average number of bales compressed annually 40,000.

To be profitable, a compress must turn out 25,000 bales annually. If run to their full capacity, the above named compresses would yield a net profit of 20 cents per bale. All compresses in the State of Texas charge the rate fixed by the commission, -- 10 cents per hundred pounds.

Before the incorporators filed the charter they consulted competent counsel, who advised that the transaction would not violate the anti-trust law.

The Act of 1895, under which this action was brought, contains the following provisions:

[HN1](#) [↑] "Art. 5313. A trust is a combination of capital, skill, or acts by two [\*611] or more persons, firms, corporations, [\*\*\*21] or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in \* \* \* aids to commerce \* \* \*.

[HN2](#) [↑] "Art. 5314. Any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this chapter shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

[HN3](#) [↑] "Art. 5315. For a violation of any of the provisions of this chapter by any corporation mentioned herein, it shall be the duty of the Attorney-General or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the State where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence."

The State seeks to forfeit the charter of the defendant corporation because the incorporators combined "to restrict aids to commerce, [\*\*611]" and procured the charter with intent to carry [\*\*\*22] out that purpose. The defendant insists that the law is unconstitutional, therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the anti-trust law of 1889 to be constitutional, and [ILLEGIBLE WORD] is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct; that the law is not in contravention of the Constitution of the State nor of the United States. *Houck v. Brewing Assn.*, 88 Texas, 189. In the case of [ILLEGIBLE WORD] v. The Union S. and P. Co., 22 Supreme Court Reporter, 431, the Supreme Court of the United States held that a statute of the State of Illinois, in all essential particulars the same as the act of 1895, was in conflict with the [fourteenth amendment to the Constitution of the United States](#) because it excepted "agricultural products and live stock while in the hands of the producer or raiser." We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision we shall hold that [HN4](#) [↑] in so far as the law of 1895 comes within the terms of the

Connolly case, it is invalid; it [\*\*\*23] will not support an action by the State to recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the anti-trust law. But to the extent that the statute of this State is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decision that it is constitutional and valid, and therefore enforceable by the State.

In the case of Waters Pierce Oil Company v. The State of Texas, 177 United States, 28, the very question that is now before this court was decided by the Supreme Court of the United States. In that case the State sued to revoke the license of the Waters Pierce Oil Company to do business in Texas, alleging as a reason therefor that it violated the anti-trust [\*612] law of 1889. The judgment of the State court forfeited and revoked the license of the corporation to do business in Texas, and the case was taken to the Supreme Court of the United States upon a writ of error. The question was sharply presented upon the specific objection that the statute was void because of the very reasons [\*\*\*24] upon which the court held the Illinois statute void in the Connolly case; but the Supreme Court of the United States held that under the law of 1889 the license to do business in Texas might be revoked, although the statute should be held void upon the grounds claimed by the corporation, which was conceded in the Connolly case. The judgment of the State court in the former case could not have been affirmed except by holding the statute to be constitutional, or if void as to the enforcement of the penalty, it was valid in so far as it reserved the right to the State to revoke the license because of the violation of the anti-trust law. There is no difference between that case and the present; we therefore hold that [HN5](#)[<sup>↑</sup>] the law of 1895, tested by the decision of the Supreme Court of the United States, is valid to the extent that it authorizes the State to revoke the license of a foreign corporation, or to forfeit the charter of a domestic corporation, for acts done which are forbidden by the anti-trust law.

The defendant in error claims that there is no evidence tending to prove that the incorporators secured the charter and organized this corporation "to create and carry out restrictions [\*\*\*25] in aids to commerce," and that the judgment should be affirmed, notwithstanding the State might have the right to forfeit the charter if the proof established a violation of the anti-trust law. We are of opinion that this contention is sound, and that there is no evidence which tends to support the charge upon which the forfeiture of the defendant's charter is sought.

[HN6](#)[<sup>↑</sup>] Article 642, Revised Statutes, subdivision 28, expresses a purpose for which a corporation may be formed in the following terms:

"The construction or purchase and maintenance of mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale, and storage of products and commodities by grain elevators and public warehouse companies, and the loan of money by such elevator or public warehouse companies."

The charter expresses the purpose of the corporation in the very language of the statute; therefore it can not be said that the purposes for which it was organized, as expressed in the charter, furnish any evidence of an intention to violate the law. The corporation could lawfully do everything expressed in the charter, and might [\*\*\*26] lawfully buy all of the compresses that it purchased. The right to forfeit the charter depends upon the intent with which it was procured, and it devolved upon the State to establish an unlawful intent to justify the forfeiture claimed.

[HN7](#)[<sup>↑</sup>] In determining the question of intention, we must consider as true every fact which can be fairly inferred from the evidence, and we are of opinion that the acquisition, on the same day, of six compresses situated in localities distant from each other, will support the inference that the [\*613] purpose of the promoters in organizing the corporation was to acquire those properties, and if the facts show that in doing so they have violated the law, then we are of opinion the evidence would justify the conclusion that their intention in forming the corporation was to accomplish the unlawful purpose. It is not unlawful for the corporation to buy all of the properties that it acquired, nor was it unlawful for it to acquire them all at the same time, and we see nothing in that fact which tends to show that the object, at [\*\*62] the time of organizing the corporation, was to do a lawful act to effect an unlawful purpose.

It is contended on behalf [\*\*\*27] of the State that the effect of this purchase was to restrict aids to commerce and to destroy competition between the purchased compresses. We must bear in mind that we are searching for the intention of the parties in filing the charter, and to arrive at that must look at the facts from their standpoint. The evidence shows that seventy compresses existed in the State of Texas, located in various parts of the State, which at the time, and since, charged 10 cents per hundred pounds for compressing cotton; hence there was at that time no competition as to charges between any compresses in the State. It is true the Railroad Commission had no direct control over the rates to be charged for compressing cotton; but by fixing the amount to be paid by the railroad companies, the commission indirectly but effectually fixed the sum to be received by compresses, and by regulating the delivery of cotton, by the railroads, for compression, the compress at each point was protected in its legitimate business and confined to its own territory. Competition between compresses is not probable and barely possible under those rules. There being no competition between any of the compresses purchased [\*\*\*28] by the defendant corporation, competition was not destroyed or restricted, -- it did not exist. Taking the rules of the Railroad Commission into account, we can not understand how the corporation expected to restrict competition between those properties, for under those rules it was impossible for the compress at Gainesville to compete with the compress at Terrell, at Dallas, or at Cisco, because if cotton should be started south at any point south of Gainesville, the rules required it to be compressed at the next press on its line of shipment in the direction of its final destination, by any route it would pass intermediate compresses, and could not reach Dallas for compression; this is true also of Cisco; neither could cotton be carried for compression from or through Terrell to Dallas, and all cotton shipped from intermediate points must be carried to the nearest compress in the direction of its destination. No competition could exist between compresses at Dallas and Terrell. But it is claimed that competition was destroyed between the three compresses in Dallas. The evidence shows that rates were never changed, and fully and fairly explains why the two compresses were not operated [\*\*\*29] in Dallas last season. It is asserted that if the three compresses had remained separate at Dallas, one or more of them might have reduced the price of compressing cotton. This is so remote a probability that, under existing conditions, it can not have weight in determining the question of [\*614] intent. We are of the opinion that there was no evidence upon which the court could have entered a judgment forfeiting the charter of the defendant corporation; we therefore affirm the judgments of the Court of Civil Appeals and of the District Court.

*Affirmed.*

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## **State ex rel. Crow v. Armour Packing Co.**

Supreme Court of Missouri

March 20, 1903, Decided

No Number in Original

### **Reporter**

173 Mo. 356 \*; 73 S.W. 645 \*\*; 1903 Mo. LEXIS 257 \*\*\*

THE STATE ex inf. CROW, Attorney-General, v. ARMOUR PACKING COMPANY, HAMMOND PACKING COMPANY, CUDAHY PACKING COMPANY, SWIFT & COMPANY, ARMOUR & COMPANY, and HENRY KRUG PACKING COMPANY.

**Disposition:** [\*\*\*1] Writ of ouster awarded conditionally.

### **Core Terms**

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meat, prices, butchers, dressed, coolers, beef, pork, pool, packing company, combinations, retail, cured, products, dealers, fresh, lard, prevent competition, rebates, consuming public, do business, commodities, coal, employees, selling, plants, fine, confederation, manufactured, conspiracy, franchises

### **LexisNexis® Headnotes**

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Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Energy & Utilities Law > Financing > Grants & Reservations > Joint Ventures & Partnerships

### **HN1 [blue icon] General Partnerships, Management Duties & Liabilities**

Mo. Rev. Stat. § 8965 (1899) makes it unlawful for any persons, associations, partnerships, or corporations to become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated, or fixed, or to enter into any such pool to fix or limit the amount or quantity of any such articles.

173 Mo. 356, \*356L<sup>A</sup>3 S.W. 645, \*\*645L<sup>A</sup>903 Mo. LEXIS 257, \*\*\*1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

## **HN2** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Mo. Rev. Stat. § 8966 (1899) prohibits any combinations that are designed or tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Law > Foreign Corporations > General Overview

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

## **HN3** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Mo. Rev. Stat. § 8971 (1899) punishes the violation of the law by a forfeiture of the corporate rights and franchises, if it be a home corporation, or a forfeiture of its right to do business in this state if it be a foreign corporation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## **HN4** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity is, in the contemplation of law, an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices; where it appears that the parties acted under the agreement, an indictment for conspiracy is sustainable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

## **HN5** Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

In order to vitiate a contract or combination it is not essential that its result shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN6** Regulated Practices, Price Fixing & Restraints of Trade

The law will not permit any one to restrain a person from doing what his own interests and the public welfare require he should do.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **Regulated Practices, Price Fixing & Restraints of Trade**

The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of; or it may be a suspensive judgment of ouster with a fine accompaniment; or it may be a simple fine if it appears that the trust, pool or conspiracy complained of and proved, has been abandoned. In short, the character of the judgment rests in the discretion of the court.

## **Headnotes/Summary**

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### **Headnotes**

**1. Conspiracy in Restraint of Trade:** Proof: Agency: Solicitors: Competency. In a *quo warranto* proceeding to oust certain packing house companies from doing business in the State on the ground that they had formed a pool, trust and conspiracy to fix and maintain the price of dressed beef within the State, the evidence which went to establish the pool or trust consisted of the statements of managers of the "coolers," where the dressed beef carcasses were cooled and kept till sold, or of solicitors engaged in the business of soliciting orders from retail butchers, the butchers dealing exclusively with these agents. These statements related to the price at which sales could be made and the reasons for such prices, and to schemes and subterfuges for billing the goods at a price stated or as of certain quantities, and afterwards giving a rebate of the price or sending more meat than the bills called for, and were made by the solicitors or managers of the coolers when engaged in making sales or when allowing such rebates. They were statements of agents touching the business of the companies then being transacted by such agents, who were their only agents whom the buying public saw. *Held*, that such statements were made by the authorized representatives of the companies, and were admissible in evidence against them for the purpose of establishing such pool or trust, and were just as competent as if they had been made by the highest officer of the company or had been solemnly adopted by the directors or stockholders and entered on the minutes of their meeting.

**2. Conspiracy in Restraint of Trade:** Proof: Facts in Evidence. The testimony of nine butchers who did business with the five packing companies in a certain city showed that they all got rebates in money or pounds of beef, which in every instance were given by respondents' cooler managers or solicitors, who had exclusive charge of respondents' sales and who said they could not sell the meat for less than a certain price because all the companies had an agreement as to prices which were fixed every Wednesday; that these prices were given to such agents every Thursday, and if any such agent cut the price so given, his company would be fined and that, therefore, they circumvented their fellow-conspirators by giving rebates in prices and weights. The butchers further testified that they had tested these statements by going to the coolers of the respective respondents, and trying to buy their meats at prices cheaper than those made by the agents, but in every instance the prices were exactly as the several agents had stated them; that on various occasions a cooler manager or solicitor had ascertained that a purchaser had got a rebate from another company and he would immediately obtain from such purchaser the papers showing the rebate and take them away with him, and afterwards the agent of the company granting the rebate had complained that the purchaser had got him into trouble by permitting the facts to become known. That on various occasions these agents told the butchers they had better lay in a supply of meat before a certain day, as the prices would go up on that day, which they uniformly did at all the coolers. That in all coolers "concession" meat, or meat that had remained on hand so long that it had become discolored or moldy, was sold, but before it could be sold for less than the established price the managers of the other coolers were called in to examine it and if they believed it to be otherwise than first-class they "conceded" that it might be sold for a price less than the agreed price, and thereupon the manager sold it at the best price he could get. It further appeared that as soon as the ouster proceeding was begun all these arrangements and agreements stopped. Eleven butchers, former managers

and inspectors of respondents' coolers in another large city, testified to the same effect. And as to dressed pork in that city, it was admitted by the agents of the five companies that they had an association for fixing and maintaining prices, whose members met once a week, hired a secretary at a salary, and fined each member of the combine for each violation of the prices agreed upon. *Held*, that these facts abundantly prove that the said respondents had formed a pool, trust and conspiracy to fix and maintain the price of dressed beef within the State, under sections 8965, 8966, and 8971, Revised Statutes 1899, and authorize the court in ousting them from doing business within this State, or otherwise punishing them as the court may deem best for the public good.

**3. Conspiracy in Restraint of Trade:** Proof: Facts in Evidence: Defenses. Nor is it any defense or bar to such action of ouster that respondents' business has greatly increased in late years, that they employ a large number of persons, that they pay large sums in wages, that the cattle-raising business has greatly increased since they began business, that such business would be injured if respondents were ousted from doing business in the State, that respondents regulate the prices of meat by the prices of cattle, and that much loss would result to resident companies if they were not allowed to operate their plants; nor is the fact that the butchers are as bad as respondents are, in that while they bought "concession" beef at reduced rates and were given rebates in order to draw their trade from other companies or to keep it, they did not sell "concession" meat any cheaper to the public, nor give the public any benefit of the rebates; nor is the fact that the butchers belonged to a union, which fixed the price of beef to consumers, and kept newcomers out of the field; nor is the fact that the combine in one of the cities was never lived up to, their members proving false to their trust agreement so often that they could not make the trust agreement effective.

**4. Conspiracy in Restraint of Trade:** The Evils of a Trust. Pools, trusts and conspiracies to fix and maintain the prices of the necessities of life, strike at the foundations of government; instill a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business and make them bread-winners while they are yet almost infants, because the head of the house can not earn enough to feed and clothe them. The wisdom and experience of all ages and all peoples have demonstrated the necessity for laws against such combinations and for the rigid enforcement of them.

**5. Conspiracy in Restraint of Trade:** The Evils of a Trust: Public Policy: Constitutionality of Statute. The Missouri statutes against pools, trusts and combinations between independent dealers to fix and maintain the price of an article of prime necessity, are constitutional. But such combinations are against public policy and void, as a matter of American common law, irrespective of whether there is any statute on the subject or not.

**6. Conspiracy in Restraint of Trade:** Complete Monopoly. In order to be declared invalid as against public policy, or as in violation of the Missouri statutes, it is not essential that the combination constitute a complete monopoly in the things it sells.

**7. Conspiracy in Restraint of Trade:** Ouster: Punishment. The punishment to be imposed against corporations for entering into a pool, combination and trust, to fix and maintain prices of an article of prime necessity, rests in the sound discretion of the court. And the record showing that the respondents, immediately on the beginning of a quo warranto proceeding by the Attorney-General, abandoned their pool and trust organized for the purpose of fixing and maintaining the price of dressed beef, each is ordered to pay a fine of \$ 5,000, and costs within thirty days, and failing to do so that the writ of ouster go.

**Counsel:** Edward C. Crow, Attorney-General, for informant.

The Missouri statute, article 1, chapter 143, Revised Statutes 1899, has been passed upon by this court and held valid and constitutional. State ex inf. [Firemens' Fund Insurance Co., 152 Mo. 45](#). Such laws have been adjudged constitutional by the United States Supreme Court. [United States v. Trans-Missouri Freight Association, 171 U.S.](#)

558. The following State Supreme Courts have also held such laws constitutional: People v. Shealen, 139 N. Y. 251; Missouri River Coal Co., v. Barclay Coal Co., 68 Pa. St. 173; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Anderson v. Jett, 89 Ky. 375; Chapin v. Brown, 83 Ia. 156; Craft v. McAnoughy, 79 Ill. 346; More v. Bennett, 140 Ill. 69; Milwaukee Masons and Builders Association v. Niezerounki, 95 Wis. 129; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 150; Texas Standard Oil Co. v. Adowe, 83 Tex. 650; India Bagging Co. v. Kick & Co., 14 La. Ann. 168. The acts of the managers and salesmen and agents of respondents bind the corporations. A corporation can only act through agents, and if the agents' acts or practices are in violation of law, the [\*\*\*2] corporation must suffer the consequences. A corporation can and must control its agents and must see at its peril that its agents do not violate the law while attending to the business of the company. 152 Mo. 38. The Supreme Court of Missouri, as well as the courts of other States, hold that a corporation is liable for the acts of its agents, committed while in the prosecution of the company's business entrusted to their care, although the act is unknown to the president or board of directors of the corporation. 152 Mo. 381; 47 Mo. 442; 75 Mo. 325; 48 Mo. 152; 3 Mo. App. 442; 2 Mo. App. 540; 55 Mo. 214; 29 Mo. 38; 62 Mo. App. 119; Cooley on Torts (2 Ed.), 119, 120; 44 S. W. 936; 70 Mich. 485; 150 Mo. 113. The officer or agent of the corporation represents the corporation when he is acting within the scope of his duties, and his knowledge, while so engaged, with reference to matters pertaining to that branch of the business of the corporation, is the knowledge of the corporation. Elliott on Private Corporations, 247. The admissions and statements of an agent made while he is acting in the course of the performance of his duties as agent, with reference to any existing state of affairs [\*\*\*3] of the business in which he is engaged, become a part of the res gestae and are clearly admissible against the principal. 48 Mo. 41. In this case, however, no effort has been made to show that the president and board of directors and the chief officers of the corporation did not have knowledge of the acts of their agents in fixing, maintaining and controlling the prices of the packers' products in this State. In the insurance cases, the officers of the companies were put upon the stand and they testified that the acts of the agents were without authority from them and that they knew nothing of them, but the court held that as the company received the benefit of the acts of the agents and that as the agents were entrusted with the care and conduct of the business of the corporation in this state, their acts bound the corporation. In the case at bar, there is no such denial made by the president and board of directors of the corporation, and respondents stand silent in the face of the proof of the facts that their general managers and salesmen who were entrusted with the conduct of their business and the sale and disposition of their products direct to the butchers and the consuming [\*\*\*4] public in this State, made and entered into a combination to fix, regulate, maintain and control the prices to be paid for dressed beef, pork and cured meats. The acts of agents of a corporation within the scope of their employment are the acts of the corporation, and are evidence against it. The Supreme Court of this State in 1871, in the case of Northrup v. Mississippi Valley Ins. Co., 47 Mo. 442, said: "A corporation acts through its officers; and the admissions of such officers made in the execution of the duties imposed upon them concerning matters in which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation." Pitts v. Steele Mercantile Company, 75 Mo. App. 232. Declarations and admissions of officers and agents of a corporation are admissible in evidence against the corporation for any purpose for which and under the same circumstances under which declarations and admissions of a natural person are admissible against him, although neither expressly authorized or ratified by the corporation, if they were made by an officer or agent in the course of a transaction on behalf of the corporation, [\*\*\*5] and within the scope of his general power. 3 Clark & Marshall on Corporations, pp. 2216, 2217, 2218; Kirkstall Brewery Co. v. Railroad, L. R. Q. B. 468; Railroad v. Pearson, 17 Court of App. 401; 70 Fed. 303; 115 Ala. 334; 106 Cal. 337; 6 Colo. 365; 18 Conn. 484; 70 Ga. 86; 103 Ga. 376; 134 Ill. 481; 153 Ind. 119; 77 N. W. (Ia.) 504; 59 Kans. 111; 175 Mass. 471; 113 Mich. 284; 51 N. H. 116; 15 N. J. Eq. 469; 55 N. J. L. 158; 157 N. Y. 694; Steinback v. Ins. Co., 62 App. Div. (N. Y.) 133; 8 N. D. 215; 11 Oh. St. 153; 179 Pa. St. 271; 50 S. Car. 25; Ward v. Tenn. Coal Co., 57 S. W. 193; 91 Tex. 551; 23 Wash. 610; 11 W. Va. 94; 104 Wis. 173. An express agreement to fix, regulate and control the prices of the packers' product is proven in this case. The proof of this express agreement as to the fresh pork is competent evidence against each of the respondents tending to prove the conspiracy between respondents to fix, regulate and control the price to be paid for dressed beef, because it proves an unlawful agreement and relationship to exist between respondents with reference to carrying on a portion of the business that they all engaged in, to-wit, the pork business. 38 Oh. St. 581; 46 [\*\*\*6] Mich. 268; 2 Day (Conn.) 205; 25 Conn. 486; 6 T. R. 527; 2 Esp. N. 719; 25 Ill. App. 350; 34 Ark. 649; 126 Ill. 150; 6 Am. and Eng. Ency. of Law, pp. 864 and 865; 1 Cush. (Mass.) 189. But the State is not required to prove that the agreement was made in express terms to fix and maintain the prices of dressed beef. State v. Walker, 98 Mo. 104; United States v. Ringskoff, 6 Bissell (U.S.) 259; United States v.

Goldberg, 7 Bissell (U.S.) 175; Drake v. Stewart, 22 C. C. A. 104; Gardner v. Preston, 2 Day (Conn.) 205; [Speis v. People, 122 Ill. 213](#); [Archer v. State, 106 Ind. 426](#); [Taylor County v. Standlee, 79 Ia. 666](#); [Bloomer v. State, 48 Md. 521](#); [Kelly v. People, 55 N. Y. 565](#). Ordinarily conspiracies must be proved by circumstantial evidence. [Bradford v. Sanner, 40 Pa. St. 9](#). An agreement between conspirators may be implied or expressed. [2 Fed. 754](#); [67 Fed. 698](#); [44 Fed. 896](#); [89 Ala. 121](#); [Spies v. People, 122 Ill. 170](#); 6 Am. and Eng. Ency. of Law, 840. Where corporations receive the benefit of the acts of the agents and the fruits of the business transacted by them, the corporations are bound by the agents' acts. [44 S. W. 936](#); Elliott on Pri. Corp., sec. 247; [152 Mo. 37](#); [144 Mo. 420](#). It is [\*\*\*7] not necessary to invoke the provisions of section 8971, Revised Statutes 1899, making acts of a foreign corporation *prima facie* proof of the act of the corporation, and the State invokes no *prima facie* presumptions under this statute, because agency of the managers and salesmen of respondents has been proven in this case just as it would be in any other where the question of the fact of agency is to be determined. If a conspiracy to fix, maintain, regulate and control the prices to be paid for dressed pork, beef and cured meats between respondents and others has been proven, then the acts and declarations of one of the respondents or its agents in the conduct of the business of respondent, is evidence against all of the respondents. [98 Mo. 104](#); 2 Pet. (U.S.) 359; [91 U.S. 426](#); [144 U.S. 263](#); [44 Fed. 896](#); [67 Fed. 698](#); 7 Wall. (U.S.) 132; 22 C. C. A. 104; [124 Mo. 1](#); [116 Mo. 605](#); Spies v. People, 3 Am. St. 320; 6 Am. and Eng. Ency. of Law (2 Ed.) 866, 870, 871; 7 Allen (Mass.) 541. This is the rule in civil as well as in criminal cases. [43 N. H. 36](#). The facts proven show a violation of the common law of Missouri by the respondents. Combinations and agreements which destroy or have a tendency [\*\*\*8] to destroy competition in trade, by fixing, regulating and controlling the price of a commodity, are illegal at common law. [140 Ill. 80](#); [171 Ill. 484](#); [170 Ill. 551](#); [121 N. Y. 582](#). And if we had no antitrust statute in Missouri, the facts established in this case would make the respondents guilty of an unlawful combination and agreement at common law. [85 Fed. 282](#). Our Legislature has a right to declare, and has declared, that all corporations, foreign as well as domestic, violating our antitrust act, shall forfeit their right to do business in [Missouri](#). [100 Mass. 531](#); [10 Wal. 410](#); [28 Oh. St. 521](#); 6 Kans. 245; [152 Mo. 1](#).

Karnes, New & Krauthoff, and Frank Hagerman for respondents.

(1) The report is founded upon hearsay and incompetent evidence. [Adams v. Railroad, 74 Mo. 513](#); 1 Greenl. Ev. (14 Ed.), sec. 114; 1 Am. and Eng. Ency. Law (2 Ed.), 695; Dorne v. Mfg. Co., 11 Cush. (Mass.) 205; [Barber v. Bennett, 62 Vt. 50](#). The res gestae was the sale to the butcher -- not as to whether the principal was in some combination. There was no pretense that the persons who made the statements had formed a combination, but the statement was that some one else higher in authority did so. (2) [\*\*\*9] It is only fair to the commissioner to say that his idea must have been that the doctrine of the [Insurance Cases, 152 Mo. 1](#), was that no corporation charged with a violation of the [antitrust law](#) could question the authority of any employee, and hence all statements of all employees could be shown. Such a rule applies to no other kind of case and would make such a discrimination as would deprive respondents of the protection of the [fourteenth amendment to the Federal Constitution](#). The Insurance Cases teach no such doctrine, for the rule is as stated in 9 Am. and Eng. Ency. of Law (2 Ed.), 590. [Milwaukee Harv. Co. v. Tymich, 68 Ark. 225](#); s. c., [58 S. W. 252](#); [Winchester, etc., Co. v. Creary, 116 U.S. 161](#); [Railroad v. Arnett, 111 Fed. 854](#); [Gembel v. Adams, 54 Iowa 389](#); s. c., [6 N. W. 582](#); [Corbin v. Adams, 6 Cush. 93](#); [Batchelder v. Emery, 20 N. H. 165](#). (3) The alleged high prices in beef at the time of filing of the information was because of the high price of the live animals. The testimony on this subject is: The prices of the live animal controlled the price of the fresh meat. When the price of the live animal went up the price of the fresh meat likewise increased. It so happened that [\*\*\*10] in the spring of 1902 the prices were unusually large, based on the short supply of cattle, and the high price of grain and the drouth. The testimony of R. H. Allen is especially valuable in this connection and it finds strong support in the article of Fred C. Croxton, one of statisticians of the United States Bureau of Statistics, entitled: "The Advance in Beef Prices," found in the January, 1903, number of the Review of Reviews (pp. 69-74.) Many of the State's witnesses expressly conceded that the advance in price was only in accordance with the advance in the price of the live animal. (4) The Attorney-General is insistent upon a judgment of ouster. A suspensive judgment of ouster was entered in the Insurance Cases and without careful thought a like judgment might be suggested in these cases. Unlike the case of the Insurance Companies, Swift & Company and Hammond Packing Company have extensive packing house plants at St. Joseph, and any kind of judgment of ouster would absolutely prevent the use of the property if section 8972, of the Revised Statutes 1899, be valid, or at least create such a cloud on the title as to render difficult any future sale of the property. (5) Even if a [\*\*\*11] judgment of ouster should go, it should be limited to ousting respondents from the particular illegal act charged, i.

e., from fixing or maintaining prices to local butchers on the sale of fresh meats from the coolers at St. Joseph and St. Louis. The respondents have large and extensive packing houses; they buy millions of dollars of live stock in this State and ship their products to all portions of the State. These acts are separate and distinct from the mere sale of fresh meats to local butchers from local coolers, which was an infinitesimal part of respondents' business. Therefore, a judgment should go no further than to declare "respondents are ousted from the alleged right or privilege of being parties to any combination to fix and maintain the prices on fresh meats sold from the coolers at St. Joseph and St. Louis to the local butchers in those cities." Such is the extent of the offense or illegal right exercised. There is no doubt of the right to render a restricted judgment of ouster. This was decided in *State ex inf. v. Lincoln Trust Co.*, 144 Mo. 599, where the court refused to enter a general ouster because of illegal acts but restricted the judgment to one of ouster against [\*\*\*12] the particular illegal acts. So it has elsewhere been decided. *State ex rel. v. Portland Natural Gas & Oil Co.*, 153 Ind. 483; s. c., 53 N. E. 1092; *State ex rel. v. Railroad*, 47 Oh. St. 130; s. c., 23 N. E. 928; *State ex rel. v. Standard Oil Co.*, 49 Oh. St. 137; s. c., 30 N. E. 291. Such a course was pursued in *Yore v. Superior Court*, 108 Cal. 431; s. c., 41 Pac. 477; *State v. Turnpike Co.*, 10 Conn. 167; *State v. Topeka*, 30 Kan. 653; s. c., 2 Pac. 592; *State v. Regents*, 55 Kan. 389; s. c., 40 Pac. 656; *People v. Railroad*, 15 Wend. (N. Y.) 113; *Com. v. Canal Co.*, 43 Pa. St. 301. These cases only apply the well-settled rule that in quo warranto the character of judgment rests entirely within the discretion of the court. *State v. Bernoudy*, 36 Mo. 281; *Weston v. Lane*, 40 Kan. 479; s. c., 20 Pac. 260; 5 Thompson on Corporations, sec. 6812. So it was decided in *State ex rel. v. Omaha & Council Bluffs Ry. & Bridge Co.*, 91 Iowa 517; s. c., 60 N. W. 126, a case against a foreign corporation failing to take out a license, and where the judgment was of ouster unless defendant should within sixty days qualify under the foreign corporation act. (6) No judgment of ouster should be entered. (a) A [\*\*\*13] general judgment of ouster would be unequal and unfair to Swift & Company and Hammond Packing Company. These companies have large packing houses at St. Joseph. A general judgment of ouster prevents the future use of this property (R. S. 1899, sec. 8972) by respondents or their assigns. Nelson Morris & Company have a like plant at St. Joseph. It is a copartnership, and can not be ousted, and yet it was found to be a party to the combination. Hence, for the same offense, Swift and Hammond lose their property and their right to do business, leaving their rival with its property and master of the St. Joseph business, and thus the court, by a stroke of the pen, creates an absolute monopoly. Armour Packing Company and Cudahy Packing Company have plants in Kansas City, almost adjoining the State line. They can cease doing business in this State but they still have their packing houses and can continue to serve the public elsewhere. They are found to have been in the same combination with Swift and Hammond, yet the latter must close and lose their packing houses while their lucky conspirators save theirs. It is, therefore, manifest that a general judgment of ouster would operate unequally, [\*\*\*14] imposing upon those found equally guilty unequal penalties. (b) The following are other packers dealing in fresh meats at St. Joseph: Morton Gregson & Company, of Nebraska City, Nebraska; Wolff Packing Company, of Topeka, Kansas; Thudium Company, of Leavenworth, Kansas; and Morrell & Company, of Ottumwa, Iowa. These packers sold at the same prices as respondents, including the Krug Packing Company. No effort was made to charge or prove a case against any of them, though manifestly, if there was a combination, they, in maintaining the same prices, were privy to it. (c) The beef packers in St. Louis are Armour Packing Company, Swift & Company, Nelson Morris & Company, Cudahy Packing Company, St. Louis Dressed Beef Company, Thomas Stringer, Missouri Packing Company, Union Stock Yards Company, Prendeville & Brother, Steitz & Company, John Ball and William Tamme, and the evidence is about as strong against some of these packers as it is against any of the respondents, including that objected to as hearsay. No prosecution was instituted against any of them. (d) At the St. Louis coolers the following are engaged in pork packing and were in the alleged combination as to fresh pork: Philip [\*\*\*15] Keim, Henry Sartorius, John H. Belz & Company, Louis Gruensfelder, Krey Packing Company, Wissmath & Sons, Charles Heil, D. W. Grant and Laux & Son. Of these Laux & Son, Krey Packing Company, Wissmath & Sons, Charles P. Heil and Louis Gruensfelder openly concede that they were in combination held to be unlawful. No effort is made to prosecute them, though confessedly guilty, and even if it be claimed that they turned State's evidence, and therefore are freed from punishment, it is enough not to punish any of these concerns, and the State ought not to reward them by ousting respondents so as to permit them to do all the business without competition. As to the Krug Packing Company, the report states that no effort was made to press the case against it. (e) At St. Joseph the butchers say that, although they got great concessions in prices, they never gave any benefit thereof to any customer. (f) These same butchers at St. Joseph, Missouri, were in a union or voluntary organization for the purpose of fixing and maintaining prices to the consumers of meat as harmful to the public as anything claimed against respondents.

Judges: MARSHALL, J.

Opinion by: MARSHALL

## Opinion

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[\*\*645] [\*368] In [\*\*\*16] Banc

Quo Warranto.

MARSHALL, J. -- This is a proceeding by quo warranto, instituted by the Attorney-General ex-officio, to oust the defendant corporations from their franchise to do business in this State, because of alleged violations by them of their powers and privileges.

The information charges that between August 22, 1899, and May 9, 1902, they "entered into an agreement, confederation, combination, pool and understanding among themselves, and with each other and Nelson Morris & Company, and Schwartzchild & Sulzberger, and other corporations and persons, to regulate, fix, and control the price to be paid by retail butchers and others for all dressed pork, beef and cured meats and [\*369] lard, slaughtered, manufactured and prepared and offered for sale or to be sold in the State of Missouri; and to maintain and control said prices for said products in this State when so regulated and fixed; and to prevent competition in said business in preparing, marketing and selling said products in this State between themselves and others engaged in like business; and that respondents and those others above named have maintained the said prices of dressed beef and pork and fresh [\*\*\*17] meat, cured meat and lard so prepared, sold and offered for sale by them in this State, by and through their officers, managers, agents, salesmen, servants and employees acting for and in behalf of said corporations, and that by the acts and conduct of said corporations through their officers, salesmen, managers, agents, [\*646] servants, and employees competition in the sale of dressed beef, dressed pork, fresh beef and cured meats of all kinds and lard in the markets of Missouri, has been unlawfully prevented and destroyed, to the great detriment of the public."

The information charges that "respondents and those who have combined with them, own, control and supply to the general public, ninety per cent of the dressed pork, beef and meats and all smoked and cured pork, beef and meats and lard and all fresh beef and pork and meats slaughtered, manufactured and cured and prepared and offered for sale or sold for general consumption in the State of Missouri, and that the object and purpose of said combination and agreement is to fix, regulate and maintain the price to be paid by the consuming public for said products above mentioned, and to control said price when so fixed, maintained [\*\*\*18] and regulated and to destroy competition among themselves and others engaged in like business;" it is charged that "the officers, managers, agents, servants, and employees of the respondents, legally and fully authorized by each of the said several respondents to [\*370] act for them and in their behalf in matters relating to the sale and price to be charged for the products above mentioned have since the 21st day of August, 1899, met and continuously from time to time since said day continued to meet, when they have deemed it necessary, and unlawfully agreed and combined to fix and maintain from week to week and day to day an agreed price on the different grades, classes and kinds of dressed beef, fresh beef, dressed pork, hams, bacon, cured meats and lard, which should be sold or offered for sale to the retail butchers and others and the consuming public in Missouri; that at said meetings the officers, managers, employees, and agents of respondents would and did agree upon and fix the price which the respondent corporations through their officers, agents and employees would sell in Missouri from week to week and day to day, the products above mentioned to the consuming public; [\*\*\*19] that said meetings were held by the said officers, agents and representatives of the respondents for the purpose of fixing and maintaining the agreed price to be charged in St. Louis, Kansas City, St. Joseph and elsewhere in Missouri for the products manufactured, prepared and sold by the respondents; that at said meeting so held from time to time as aforesaid, and for the purpose of controlling and monopolizing the market and preventing competition in the sale of dressed meat, cured meat, pork and lard, and in order that a common uniform price should be charged the retail butchers and the consuming public and all others in the State of Missouri by the agents of all the respondents for the same or similar grades of dressed beef, pork,

cured meats and lard, the said officers, managers and agents would agree upon the prices at which all the different classes and kinds of the products above mentioned should be sold in the State of Missouri."

The information then charges that, "the said prices which should be so charged in Missouri for the [\*371] said different commodities having been agreed upon as aforesaid at the said meetings, all the officers, managers, agents and servants of [\*\*\*20] respondents charged and entrusted with the sale to butchers and others of said products throughout Missouri were notified of the prices agreed upon for the period of time during which it had been agreed said prices should be charged, and that the officers, managers, agents and employees of respondents entrusted and charged with the sale to retail butchers, meat dealers, and all others of said products in Missouri, were directed and required to sell said products for said period theretofore agreed upon at the prices fixed and not below the said prices agreed upon at said meeting so held as aforesaid." The information then alleges that "after the prices to be charged had been fixed and agreed upon as aforesaid, the said officers, managers, agents and employees of respondents did not sell and have not sold any of the kinds, classes, and grades of the products above mentioned, in this State to retail butchers, meat dealers and the consuming public, except at the prices fixed and agreed upon." It is then charged that "the agreement and combination so made in the manner as aforesaid, has prevented and does prevent competition in Missouri among respondents and others engaged in the same line [\*21] or lines of business in this State, and that said acts of respondents have deprived and do deprive the public of free, full and wholesome competition in the sale of the commodities above mentioned, to the great damage and detriment of the public."

Informant then charges that "the general nature and object of the said combination, pool, agreement and confederation so made as aforesaid by the said respondent corporations by the means and in the manner aforesaid, are:

"First, to fix, regulate, maintain and control by the respondents the price and prices to be paid for all classes, kinds, brands and grades of dressed beef, dressed [\*372] pork, hams, bacon and all kinds of cured meats and lard, sold to the retail butchers and dealers in all kinds of fresh and cured meat and the consuming public in the cities of St. Joseph, Kansas City, St. Louis and throughout the State of Missouri.

"Second, to maintain the said price or prices when so fixed as aforesaid to be paid for all classes, kinds and brands of dressed beef, dressed pork, hams, bacon and all other cured meats and lard by the retail butchers, dealers in meat and the consuming public in the cities of St. Joseph, Kansas City, [\*22] St. Louis and throughout the State of Missouri; and

"Third, that it is one of the objects of said combination, agreement, pool and confederation [\*647] so made as aforesaid by the respondent corporations by the means and in the manner aforesaid to prevent, prohibit and avoid competition among themselves and others in the sale in Missouri of the said commodities dealt in and handled by the said respondents."

The information then charges that "the respondents by the means and manner aforesaid have obtained control of and monopolized to the exclusion of all others, the business of selling all classes and kinds and grades and brands of dressed beef, dressed pork, hams and bacon and cured meats and lard, to the retail butchers, dealers in meat and the consuming public in the State of Missouri to the great detriment of the public."

It is then charged that "by reason of the monopoly and control and exclusion of competition in the sale of said commodities aforesaid in the manner and means aforesaid, the respondents and their agents, officers and managers, have been enabled and now are selling to the butchers and dealers in meat and the consuming public in Missouri, certain grades of [\*23] dressed beef, pork, hams, bacon, cured meats and lard of an unwholesome and inferior quality, to the great detriment of the public."

[\*373] It is then charged that "the purpose and intention of respondents have been and now are to willfully and unlawfully combine and confederate as aforesaid, with each other, to monopolize and control absolutely and prevent competition in the business of dressed beef and meats as aforesaid in the State of Missouri, and that said respondents are now willfully and unlawfully maintaining said illegal agreement and unlawfully and illegally fixing

and controlling prices in the manner aforesaid for said commodities, and which said price for the aforesaid commodities so fixed by the respondent and others acting with them as aforesaid is the minimum price to be charged by respondents throughout the State of Missouri for the different classes, kinds, grades and brands of dressed meat and pork, hams, bacon and cured meats and lard, and that said prices so fixed as aforesaid are the minimum prices at which agents, employees and officers of respondents are allowed to sell said products throughout Missouri."

It is then charged that "by reason of the premises [\*\*\*24] and facts aforesaid since the 21st of August, 1899, and up to the present time, respondent corporations have grossly offended against the laws of this State and willfully and flagrantly and grossly abused and misused their corporate authority and franchises and privileges and have willfully and unlawfully assumed and willfully usurped authority and privileges not granted said corporations by the laws of Missouri by entering into and becoming a member of and a party to said trust, combination, confederation and pool as aforesaid, to monopolize and control the business of selling dressed beef, dressed pork, ham, bacon and all cured meats and lard in the State of Missouri and by means of said combination aforesaid to prevent competition in said business and to regulate, fix and maintain the price or prices to be charged retail butchers, dealers in meat and the consuming public for the aforesaid [\*374] products, and that in pursuance of the aforesaid agreement so made, respondents are now unlawfully and willfully monopolizing and regulating, fixing, maintaining and controlling the prices to be paid by retail butchers, dealers in meat and the consuming public for the products above [\*\*\*25] mentioned, and that the action of the respondent corporations as hereinabove set out, is a willful and malicious perversion of the franchises granted to said corporations by the State of Missouri, and an illegal, willful usurpation of privileges not granted to them and is a great and permanent injury to the public."

The prayer of the petition is "that respondent corporations each and all of them severally be excluded from all corporate rights and franchises under the laws of the State, and that their rights, authority, license and certificate to do business under the laws of Missouri be declared forfeited, and that each of them and every one of them be ousted from their several franchises, corporate rights and privileges."

The Krug Packing Company answered separately, denying generally the allegations of the information.

The other respondents answered jointly, setting up many specific defenses. On motion of the Attorney-General the court struck out all of the defenses except the sixth paragraph of the second defense pleaded, which "first alleged the corporate organization of each of the above named Armour, Hammond and Cudahy and Swift packing companies as corporations and their [\*\*\*26] right to do business in Missouri, and then respondents denied that they ever made or entered into an agreement, confederation, combination, pool or understanding, by and among either of them or any other person or corporation to regulate, fix and control the price to be paid by retail butchers or any one else for any kind of pork, beef, cured meats or lard, slaughtered or manufactured, prepared or offered for sale or to be sold in the State of Missouri and elsewhere, [\*375] or to maintain or control the prices thereof in this State or to prevent competition in business between respondents and others engaged in like business, nor did respondents ever take any part in maintaining any such agreement, combination, pool or understanding. That none of the officers, managers, agents, servants or employees of this respondent at any time with the consent of the respondent or otherwise agreed and combined to fix or maintain an agreed price of the products handled by respondents which should by respondents be sold or offered for sale to the retail butchers or others or to the consuming public in Missouri, and that respondents never did agree upon or fix the prices at which they would sell [\*\*\*27] in Missouri such products. Respondents then [\*\*648] denied generally each and every allegation in the information contained except as in this paragraph six of the second defense admitted. Respondents then denied that they ever agreed, entered into, or became a member of or a party to any pool, trust, agreement or understanding with any other person or persons or association of persons, to regulate and fix the price of any article or commodity whatsoever, or the price to be paid therefor; respondents then deny that they were ever parties to any contract, agreement or combination, designed or made with a view to lessen or which tended to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State. Respondents then also denied that they had ever sold to any one any kind of dressed beef, dressed pork, ham, bacon, cured meats and lard, which is or was unwholesome and of an inferior quality, and which was a detriment to the public.

It will be seen that this paragraph is in substance a general denial, and raised a general issue upon the pleadings.

All of the respondents, except the Krug Packing Company, which is a Missouri [\*\*\*28] corporation, are corporations [\*376] organized under the laws of sister States, and have complied with the laws of this State with respect to foreign corporations, and have been licensed to do business in this State. Armour & Company has never done any business in this State, and never was a member of any pool or guilty of any of the acts charged. The Krug Packing Company is not shown ever to have been guilty of the acts charged. This proceeding is therefore quashed as to them, and in speaking of the respondents hereinafter, reference is had only to the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company and Swift & Company. Of these the Hammond Packing Company and Swift & Company have extensive packing plants at St. Joseph, Missouri. The Armour Packing Company and the Cudahy Packing Company have extensive plants in Kansas City, Kansas. Swift & Company, the Cudahy Company, the Armour Packing Company, have "coolers" in St. Joseph and St. Louis, and the Hammond Packing Company has a "cooler" in St. Joseph. The Armour Packing Company, the Cudahy Packing Company and Swift & Company, have no "coolers" in Kansas City, Missouri, but they sell their meats [\*\*\*29] at their plants in Kansas City, Kansas, to the butchers and their customers in Kansas City, Missouri, and deliver them to said butchers and customers in Kansas City, Missouri.

Of the other corporations and persons alleged to have been with the respondents in the combination, Schwartzschild & Sulzberger Company had its plant in Kansas City, Kansas, and had "coolers" in Kansas City and St. Joseph, Missouri, and Nelson Morris & Company had their plant in East St. Louis, Illinois, and had "coolers" in St. Louis, Kansas City and St. Joseph.

The case was referred to Hon. I. H. Kinley, a member of the Kansas City bar, as special commissioner to take the testimony and make and report a [\*377] finding of the facts, and with leave to the parties to file exceptions thereto.

The report of the special commissioner covers twenty-five printed pages and is too voluminous to be embodied herein. In brief, he finds:

1. That the respondents, together with Nelson Morris & Company, between August 21, 1899, and May 9, 1902, entered into "agreements, confederations, combinations and understandings between themselves, to fix, regulate and control the prices of dressed beef, and fresh pork, slaughtered, [\*\*\*30] manufactured, prepared and offered for sale, or to be sold by respondents to the retail butchers and others at St. Joseph, Missouri, and that respondents, with Nelson Morris & Company, agreed among themselves and with each other to maintain and control the prices of such dressed beef and fresh pork, and that in pursuance of said agreements to fix, maintain, and regulate the prices for which said dressed beef and fresh pork should be sold, said respondents above named, during said time between August 21, 1899, and May 9, 1902, have sold to the butchers at St. Joseph, Missouri, said dressed beef and fresh pork at the prices so fixed, regulated and maintained, except where such respondents gave rebates in money or in pounds of meat to their customers."
2. The commissioner makes a similar finding of fact as to dressed beef in St. Louis, except that he finds that the Hammond Packing Company did not do business in that city and was not in the combination, but that the St. Louis Dressed Beef Company was in the combination in that city with the respondents.
3. The commissioner finds that the respondents, and others, in St. Louis, "about 1899 or 1900, formed a voluntary association for the [\*\*\*31] purpose of meeting once a week at some hotel or place designated and discussing and fixing the list prices to be charged the butchers for fresh pork, and at these meetings these representatives agreed among themselves and with [\*378] each other to maintain these prices as fixed under a penalty of paying a fine of five dollars for each sale under such fixed price. They employed a secretary at ten dollars per week, and paid the same by assessments on the members of the organization. These fines were expended for incidental expenses of the meetings and cigars. This organization, these meetings and agreements were testified to by several who were parties thereto and participated in the agreements and fixed prices for which each should sell fresh pork to the butchers in St. Louis, and that in pursuance of said combination, agreement and conspiracy said respondents maintained the prices so fixed in selling such fresh pork to the butchers at St. Louis, except where the prices were cut as aforesaid, and those testifying stated that they did not keep such agreements and did not [\*\*649] intend to when they were made, and the most of the witnesses testified that the prices agreed on [\*\*\*32] were reasonable."

4. The commissioner finds that respondents at St. Joseph, St. Louis and Kansas City sell to the trade from sixty-five to eighty per cent of all the dressed beef and from fifty to sixty per cent of all the dressed pork that is handled in those cities, but that such sales amount to "comparatively a very small portion of their business in selling fresh beef, fresh pork and provisions throughout this and foreign countries."

5. The commissioner finds that as soon as the Attorney-General began the initiatory steps in this case all of the respondents abandoned all of the said combinations.

6. The commissioner finds that at St. Joseph and St. Louis, after meat had been in the coolers a certain length of time, the owners were allowed to sell it at a price less than the price fixed, and this is what is termed "concession meat."

7. The commissioner excluded evidence showing that if a butcher did not pay his bills to the respondent [\*379] with whom he dealt by Wednesday of each week, he was put on the C. O. D. list of all the respondents and persons in the combine, and that the members of the combine had a meeting every Wednesday night to hear such reports and make [\*\*\*33] such order.

8. Over the objection of the Attorney-General the commissioner permitted the respondents to show how the cattle business in Kansas City had increased from \$ 4,210,605 in 1890 to \$ 1,655,966,699 in 1901, but afterwards excluded all except what related to the years 1899, 1900 and 1901. The commissioner also allowed the respondents to show the number of animals the respondents killed, the number of persons they employ, and the amount they pay for salaries and expenses. He refused to allow the respondents to show by various cattle-raisers that the cattle-raising business has become more profitable since the respondents have been engaged in business, and that it would be injured if the respondents were ousted from doing business in this State.

Both sides have filed voluminous exceptions to the findings of fact by the commissioner. The case has been argued orally at length and exhaustive briefs have been filed. The evidence has been printed in full, covering two volumes aggregating nine hundred and forty-nine pages, while the brief of the informant covers one hundred and six printed pages, and the two briefs of the respondents cover two hundred pages.

I.

HN1[<sup>A</sup>] The statute of this [\*\*\*34] State (R. S. 1899, sec. 8965), relating to "Pools, Trusts and Conspiracies," makes it unlawful for any persons, associations, partnerships, or corporations to become a member of or a party to "any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any other person or association [\*380] of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated, or fixed," or to enter into any such pool to fix or limit the amount or quantity of any such articles. HN2[<sup>A</sup>] Section 8966 prohibits any combinations that are designed or tend "to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State." And HN3[<sup>A</sup>] section 8971 punishes the violation of the law by a forfeiture of the corporate rights and franchises, if it be a home corporation, or a forfeiture of its right to do business in this State [\*\*\*35] if it be a foreign corporation. Other penalties and forfeitures are imposed by section 8968, but are not involved in nor sought to be enforced in this proceeding.

The commissioner reported that over the objections of the respondents he had admitted "the statements and admissions of the managers of these coolers and solicitors of respondents showing that such combinations and agreements to fix and regulate prices as aforesaid had been made and entered into by respondents; without such testimony it is doubtful if the existence of such combination could be found, but if such statements and admissions are admissible, as I have ruled them to be, then" he found that the respondents were guilty.

To appreciate the force of what is thus said it is necessary to understand how the respondents did business in this State. Great care has been taken to show that the business done by the respondents in this State is but an "infinitesimal" portion of the total business it does all over the world. The business done in this State is not done

from the slaughtering or packing plants of the respondents, nor is it conducted or [\*381] personally managed by any of the higher officers or agents of the [\*\*\*36] respondents, but it is all done through "coolers" and the agents of the respondents who manage the "coolers" and transact the business.

The commissioner finds the facts in this regard, and the conceded facts show the finding is correct, to be as follows: "A 'cooler' as shown by the testimony, consists of two or more rooms, at least one of which is refrigerated, the temperature being kept down from about thirty-four to forty degrees Fahrenheit; fresh meat is taken from the packing house and placed in this refrigerating room for sale to the butchers in the city where the cooler is located. As a rule the packers only sell to the butchers who sell to the [\*\*650] public from their shops. At each cooler is a 'cooler manager' in charge thereof, one or more city solicitors, who solicit trade of the butchers, and a driver, who, from a wagon driven by him, delivers the meat to the butcher, who has purchased it. As a rule the butcher goes to the 'cooler,' inspects the carcass he wishes to buy, and if it suits him he purchases it and it is delivered to him at his shop, and he pays therefor at the cooler."

In other words, the purchasers deal exclusively with either the solicitors, who urge [\*\*\*37] them to buy, or with the manager of the cooler. The drivers, of course, only deliver the goods. There is also a bookkeeper or cashier and an auditor at each cooler, who are subordinate to the manager, but in referring to the statements and admissions of the agents of the respondents these subordinate agents are not intended, but the managers of the coolers and the solicitors or salesmen are alone referred to.

The statements and admissions referred to, were made by the solicitors when engaged in the business of soliciting orders from the retail butchers, and related to the prices at which sales could be made and the reasons for such prices, and to schemes and subterfuges for billing the goods at a price stated or as of certain [\*382] quantities and afterwards giving a rebate of the price or for sending more meat than the bills called for -- or, as it is termed by the witnesses, of allowing a rebate in cash or in pounds of meat -- or they were made by the managers of the coolers when engaged in making sales or when allowing such rebates. They were, therefore, statements made by these persons who were employed by the respondents, and who transacted all the respondents' business [\*\*\*38] of selling in this State, were made while so engaged, and related to the business being transacted. They, were, therefore, statements of agents touching the business of the principal then being transacted by such agents, and such agents were the only representatives of the respondents that the buying public ever saw or dealt with. They quoted the prices to the public. They made and carried out the arrangements for rebates. They delivered the goods and collected the bills. They were, therefore, statements made by the authorized representatives of the respondents, while in the transaction of their business and touching the business. They were, therefore, admissible in evidence and were just as binding upon the respondents as if those statements had been made by the highest officer of the company or had been solemnly adopted by the directors or stockholders of the company and entered on the minutes of their meeting. [[Northrup v. Ins. Co., 47 Mo. 435](#); [Benevolent Assn. v. Kribben, 48 Mo. 37](#); [Adams v. Railroad, 74 Mo. 553](#); [Boogher v. Life Association of America, 75 Mo. 319](#); State ex inf. v. [Ins. Co., 150 Mo. 113, 134, 51 S.W. 413](#); [Nickell v. Ins. Co., 144 Mo. 420, 46 S.W. 435](#); State [\*\*\*39] ex inf. v. [Ins. Co., 152 Mo. 1, 52 S.W. 595](#).]

The testimony introduced by the State was abundant to show that the respondents were members of a combination or pool to fix and maintain prices. The State called as witnesses nine butchers who did business with the respondents in St. Joseph whose testimony showed that they all got rebates in money or pounds [\*383] of meat from the respondents, and that in every instance they were given by the solicitors or cooler managers, who said they could not sell the meat for less than a certain price because all of the respondents had an agreement as to prices which was fixed every Wednesday by the head men of the packing plants, and the prices -- given by them to the cooler managers on Thursday -- by the cooler managers and solicitors were given to the trade, and that if any one cut the price he would be fined, so they circumvented their fellow-conspirators by giving rebates as herein described. That such a combination existed at the time charged in this case is further shown by the facts and circumstances outside of any admissions and statements of the agents of the respondents. The witnesses testified that they had tested the various respondents [\*\*\*40] by going to the several coolers, of the different respondents, on the same day, and trying to buy cheaper from one than was offered them by another, and in every instance they found the prices to be exactly the same at all of the coolers. It further appeared that on various occasions a

manager or solicitor ascertained that a purchaser had gotten a rebate from one of the other companies, and he would immediately secure from the customer the papers showing the rebate and take them away with him, and afterwards the agent of the company that had granted the rebate complained that the purchaser had gotten him into trouble by allowing the fact to become known. In fact, it appears that in every instance when a rebate was granted, secrecy was strictly enjoined upon the customer. It further appeared that on various occasions the cooler managers or solicitors would tell the butchers they had better lay in a supply of meat before a certain day, as the prices would go up on that day, and that in every instance the prices did go up uniformly at the time specified, at all the coolers of all the respondents. It further appeared that at all of the coolers "concession meat," [\*384] as it is called, [\*\*\*41] was sold. By "concession meat" is meant meat that has remained so long on hand in the cooler that it has become discolored or mouldy or not exactly what would be termed as first-class, but as some of the witnesses call it, unfit for sale, but not exactly unfit for use after it had been trimmed up. When any cooler had such meat on hand, the manager of another or of other [\*\*651] coolers would be called in and they would examine it and if they believed it to be of such a character, they would "concede" to the manager of the cooler having such meat, the right or privilege to sell it for a price less than the agreed price. The manager who had obtained such concession would then sell it or try to sell it to the trade, at such price as he could get for it.

It further appeared that no butcher could buy meat from any packer that did not do business in St. Joseph, because packers located elsewhere refused to sell to them, stating as a reason that St. Joseph was the respondents' territory and such outside packers were afraid to invade their territory.

It further appeared that when the Attorney-General took the initiatory steps in this case, the respondents immediately dissolved, discontinued [\*\*\*42] and stopped the pool and combination arrangements.

The State called eleven witnesses in St. Louis, butchers, city meat inspectors and former managers of the respondents' coolers, who testified to the same facts, circumstances and conditions in St. Louis, as to dressed beef in St. Louis. As to dressed pork the State called five witnesses, who were themselves members of such a pool, trust or combination, who testified that the respondents (except the Hammond Packing Company) were also members of the pool; that the representatives of the pool, trust or combination met every week at either the Southern or Lindell Hotels; that the prices were fixed by an arbitrator named McCall, who was paid a salary of ten dollars a week, [\*385] raised by assessments on all of the members, and if any one cut the prices he was fined five dollars; that the combination ran for two or three years and until the institution of this suit, when it was abandoned. As to the existence of a combination as to dressed pork, therefore, the facts and circumstances show it as plainly as they do in regard to dressed beef, and in addition, five of the conspirators testified directly to it.

It is quite too plain for [\*\*\*43] doubt that persons or companies who are engaged in the same line of business, in the same place, do not bill goods at one price and give rebates in money or goods or weights, and do not give notice of an uniform advance of rates at a certain date, always followed by such a rise, and do not maintain an uniform selling price, and do not call in their competitors and get them to "concede" to them a right to sell shopworn or old goods at a price less than such uniform price, and do not gather up papers or bills of their competitors showing that they have been selling below a certain price, and do not abandon, dissolve and discontinue their understandings or combinations as soon as the legality thereof is called in question by the State's officers, unless there has been an unlawful pool, trust or combination to fix and maintain prices. Such acts and circumstances and practices speak as loudly, as directly and as certainly, and tell as strong and conclusive a tale of wrongdoing in those regards as any witness could possibly testify to it or any resolution formally adopted by the directors or stockholders could prove it.

Independent, therefore, of any admissions or statements of the managers [\*\*\*44] of the coolers or of the solicitors, which, however, were clearly admissible, the State has made out a case against the respondents under the facts and circumstances of the case. The commissioner, therefore, reached the right conclusion, and properly followed the rules of law as to the admissions [\*386] and statements of the managers of the coolers and solicitors, as laid down in the cases hereinbefore cited, but he was in error in saying that outside of such admissions and statements it is doubtful if the charges against the respondents could be sustained.

As against all such direct testimony, admissions and statements the respondents offer no proofs, call no witnesses, and remain absolutely mute. They do not even do, as was done in State ex inf. [Atty.-Genl. v. Ins. Co., 152 Mo. 1](#), call the chief officers of the conspirators and show that they never knew of nor authorized any such arrangements or combinations by their agents. They do not show or pretend that they have not reaped the benefits of such arrangements or combinations for all the years they existed. They simply let the State's showing stand uncontradicted, and content themselves with claiming that the admissions and [\*\*\*45] statements were not made at the time the agents were engaged in transacting the business they were given power to transact, but were made before or after the said time, which an analysis of the evidence shows is not the fact, and with further showing how their business has increased in the last ten years, how many persons they employ, how much wages they pay, how the cattle-raising business has increased since they began business, and how it would be injured if they are ousted of their right to do business in this State, how they regulate their prices by the price of cattle, how much loss the resident companies would suffer by reason of not being allowed to operate their plants, how the butchers in St. Joseph are as bad as they are, and worse, because while they sell concession beef to the butchers at reduced prices, and give butchers rebates to get their trade from each other or to retain their trade, the butchers do not sell concession meat any cheaper to the public, nor do they give the public the benefit of any rebates, and that the butchers belong to a union, which fixes the price of meat for [\*387] the consumers and keeps newcomers out of the trade, and prohibits or tries [\*\*\*46] to prohibit the packers from selling directly to the trade, and that as to the dressed pork combine in St. Louis, it was never lived up to, and never was intended to be lived up to, and the members were false to their trust [\*\*652] agreements so often that they could not make the combination effective.

None of these matters constitute any defense or bar to this action. The commissioner admitted the testimony bearing on most of these matters for the purpose of enabling the court to be fully advised as to all the conditions when it came to fixing the punishment to be imposed.

"Competition is the life of trade." Pools, trusts and conspiracies to fix or maintain the prices of the necessities of life, strike at the foundation of government; instill a destructive poison into the life of the body politic; wither the energies of competitors, blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome [\*\*\*47] food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them breadwinners while they are yet almost infants, because the head of the house can not earn enough to feed and clothe his family.

The people are helpless to protect themselves. The powers that be must protect them, or as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken and its perpetuity threatened. Missouri ( State ex inf. [Atty.-General v. Insurance Co., 152 Mo. 1](#)); New York ( [People v. Sheldon, 139 N.Y. 251](#)); [\*388] Pennsylvania ( [Coal Co. v. Coal Co., 68 Pa. 173](#)); Ohio ( [Salt Co. v. Guthrie, 35 Ohio St. 666](#)); Kentucky ( [Anderson v. Jett, 89 Ky. 375](#)); Iowa ( [Chapin v. Brown, 83 Iowa 156](#)); Illinois ( [Craft v. McConoughy, 79 Ill. 346](#), and [More v. Bennett, 140 Ill. 69, 29 N.E. 888](#)); Wisconsin ( [Builders' Assn. v. Niezerowski, 95 Wis. 129](#)); California ( [Vulcan Powder Co. v. Powder Co., 96 Cal. 510](#)); Texas ( [Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 19 S.W. 274](#)); Louisiana ( [India Bagging Co. v. Kock, 14 La. Ann. 168](#)), and the Supreme [\*\*\*48] Court of the United States ( [U.S. v. Trans-Missouri Freight Association, 171 U.S. 505](#) ) have held statutes which prohibited such combinations or trusts to be constitutional, and further, that all such combinations or agreements are against public policy and void at common law, and as a matter of American common law, irrespective of whether there is any statute on the subject or not.

The rule is well stated in the syllabus to [People v. Sheldon, 139 N.Y. 251, 34 N.E. 785: HN4](#) [↑] "A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity [the combination was to fix and maintain the price of coal] is, in the contemplation of law, an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices; where it appears that the parties acted under the agreement, an indictment for conspiracy is sustainable."

The court further aptly says:

"But the question here does not, we think, turn on the point whether the agreement [\*\*\*49] between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition [\*389] among the coal dealers, one upon which the law affixes the brand of condemnation. It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the 'exchange' was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified in case of persistent [\*\*\*50] default by the member that 'he is not entitled to the privileges of membership in the exchange.' No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange.

"The cases of *Hooker v. Vandewater* (*4 Denio 349*), and *Stanton v. Allen* (5 Id. 434) are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals, to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were [\*\*653] void, on the ground that they were agreements to prevent competition, and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious [\*390] to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5th Denio, [\*\*\*51] the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. [See, also, *People v. Fisher*, 14 Wend. 10; *Arnot v. P. & E. Coal Co.*, 68 N.Y. 558.] The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. [\*\*\*52] If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury, is sanctioned by the decisions in this State, and that the jury were properly instructed that if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendants."

[\*391] In *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834, it was held, as stated in syllabus, that "as corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their functions, maims and cripples their separate activity, and takes away free and independent action, affects unfavorably the public interests." Accordingly where a number of persons, including the defendant in that case, [\*\*\*53] entered into an agreement, the purposes of which were declared to be, "1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit. 2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar. 3. To furnish protection against unlawful combinations of labor. 4. To protect against inducements to lower the standard of refined sugar. 5.

173 Mo. 356, \*391<sup>A</sup> S.W. 645, \*\*653<sup>A</sup> 903 Mo. LEXIS 257, \*\*\*53

Generally to promote the interests of the parties hereto in all lawful and suitable ways," and each of the parties transferred all its shares of stock to a board and the board managed the whole business, it was held to be against public policy, in restraint of trade and void.

It is not essential that the combination or trust shall constitute a complete monopoly. For as was said by Mr. Chief Justice Fuller, in *United States v. Knight*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249: "Again, all the authorities agree that [HN5](#)[<sup>A</sup>] in order to vitiate a contract or combination it is not essential that its result shall be a complete monopoly; it is sufficient [\*\*\*54] if it really tends to that end and to deprive the public of the advantages which flow from free competition."

As was well said by Best, C. J., in *Homer v. Ashford*, 3 Bing. 326: [HN6](#)[<sup>A</sup>] "The law will not permit any one to restrain a person from doing what his own interests and the public welfare require he should do."

[\*392] If it be true that a combination or trust among the respondents has increased the cattle business in this State and has encouraged the stock-raising business and its prohibition hereafter will injure or destroy such business, or if such trust arrangements have given employment to so many people and put in circulation so many millions of dollars of money in this State, or if it be that the home corporations would lose their plants entirely if their franchises were taken away from them, such considerations would not amount to a defense, or excuse for the offense charged. They are matters that should have been thought of before the offense was committed. So long as the law puts the stamp of condemnation on all arrangements, agreements, pools, trusts and conspiracies to fix and maintain the prices of articles of prime necessity, the courts have no option but to enforce [\*\*\*55] the law.

The wisdom and experience of all ages and all people have demonstrated the necessity for such laws, and for the rigid enforcement of them. And even after so many years of unfailing enforcement of such laws, the terrors and consequences thereof have not been sufficient to deter people from violating them.

The conclusion is irresistible that the defendants are guilty of being members of a trust, pool or conspiracy to fix and maintain the prices of dressed beef and dressed pork in this State at the times charged in the petition, except as before stated, Armour & Company, and the Henry Krug Packing Company, as to whom the writ must be quashed.

## [\*\*654] II.

This leaves only the question of punishment. [HN7](#)[<sup>A</sup>] The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of ( State [\*393] ex inf. v. *Lincoln Trust Co.*, 144 Mo. 562, 46 S.W. 593; State *ex rel. v. Gas & Oil Co.*, 153 Ind. 483, 53 N.E. 1089; State *ex rel. v. Railroad*, 47 Ohio St. 130; State *ex rel v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279; *Yore v. Superior* [\*\*\*56] Court, 108 Cal. 431, 41 P. 477; State *v. Turnpike Co.*, 10 Conn. 167; State *ex rel. v. Topeka*, 30 Kan. 653, 2 P. 587; *People v. Railroad*, 15 Wend. 113; *Commonwealth v. Canal Co.*, 43 Pa. 295); or it may be a suspensive judgment of ouster with a fine accompaniment ( State ex inf. v. *Ins. Co.*, 152 Mo. 1, 52 S.W. 595), or it may be a simple fine if it appears that the trust, pool or conspiracy complained of and proved, has been abandoned. In short, the character of the judgment rests in the discretion of the court. [5 Thompson on Corp., sec. 6812; *Weston v. Lane*, 40 Kan. 479, 20 P. 260; State *ex rel. v. Railroad*, 91 Iowa 517; State ex inf. v. *Bernoudy*, 36 Mo. 281.]

Under all the circumstances, a judgment of absolute ouster is not necessary, but the ends of justice will be satisfied by the imposition of a fine, and the payment of all the costs in the case. It is accordingly ordered that the respondents, the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company and Swift & Company, each pay to the clerk of this court within thirty days from this date, the sum of five thousand dollars as a fine, and that they also pay the costs in this case. And it is further [\*\*\*57] ordered that if the respondents or any of them fail to pay said fine, and costs, within said time then they or those so failing be ousted of all rights, privileges and franchises of every nature and kind, conferred upon them by the laws of this State, and be forever prohibited from doing business in this State.

173 Mo. 356, \*393<sup>7</sup> S.W. 645, \*\*654<sup>19</sup> Mo. LEXIS 257, \*\*\*57

All concur.

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## Supreme Lodge United Benev. Ass'n v. Johnson

Court of Civil Appeals of Texas

November 14, 1903, Decided

No Number in Original

### **Reporter**

77 S.W. 661 \*; 1903 Tex. App. LEXIS 877 \*\*

SUPREME LODGE UNITED BENEV. ASS'N v. JOHNSON.

**Subsequent History:** Reversed by [\*Supreme Lodge United Benevolent Ass'n v. Johnson, 98 Tex. 1, 81 S.W. 18, 1904 Tex. LEXIS 205 \(Tex., May 26, 1904\)\*](#)

**Prior History:** [\*\*1] Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by J. E. Johnson against Mrs. W. F. Walker, the Supreme Lodge United Benevolent Association, garnishee. From a judgment for plaintiff, garnishee appeals. Affirmed.

## **Core Terms**

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associations, fraternal, orders, certificate, exemption, insurance company, classification, conferred

**Counsel:** W. R. Booth, for appellant.

Q. T. Moreland, for appellee.

**Judges:** CONNER, C. J.

**Opinion by:** CONNER,

## **Opinion**

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[\*662] CONNER, C. J.

The facts in this case are as shown by the trial court's conclusions. Therefrom it appears that appellant is a duly incorporated fraternal insurance organization under the laws of Texas, with its chief place of business in Tarrant county; that its business is conducted for the sole benefit of its members and beneficiaries, and not for profit; that it has a lodge system, with ritualistic form of work and elective representative form of government; and that the fund from which it pays its beneficiaries is derived from a monthly assessment against its members, and that in all other respects it conforms to our laws relating to fraternal beneficiary associations, as set forth in title 49a, Supp. Sayles' Civ. St. 1899-1900. It further appears that one W. F. Walker died on the 26th day of March, 1902, holding a certificate of the appellant association for the sum of \$1,000, payable [\*\*2] to his wife, Mrs. W. F. Walker, by virtue of which appellant is now indebted in the sum of \$500; that after the death of her husband Mrs. Walker became justly indebted to the appellee in this case, who sued her upon such indebtedness in the justice court, and at the same time duly sued out garnishee process, which was served on the appellant association. Appellant pleaded that the fund due on the certificate mentioned was exempt from such process, and from the judgment of the justice court

against this contention an appeal to the county court was taken, where a like judgment was rendered, and hence this appeal.

The exemption claimed in the justice and county courts rests upon section 11 of the act relating to fraternal beneficiary associations, approved May 12, 1899 (title 49a, Supp. Sayles' Civ. St. 1899-1900; Gen. Laws 1899, p. 199, c. 115), which is as follows: "Sec. 11. The money or other benefits, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under the provisions of this act, shall not be liable for the debts of the beneficiary or holder of any certificate, and shall not be subject to garnishment or other process at the suit **[\*\*3]** of any creditor, nor shall it be taken, seized, appropriated or applied by any legal or equitable process or by operation of law to the debts of the certificate holder or any beneficiary named in such certificate or any person who may have any rights thereunder." Appellee's contention, with which the trial courts agreed, is that said section conflicts with section 1 of the fourteenth amendment to the Constitution of the United States, providing that no state shall deny the equal protection of its laws to persons within its jurisdiction; and also with section 3, art. 1, of the Constitution of Texas, providing that no man or set of men is entitled to exclusive, separate, public emoluments or privileges but in consideration of public services. Delicate as it undoubtedly is to declare an act of the co-ordinate legislative branch of our state government void for violation of constitutional principles, it is nevertheless the duty of the courts to unhesitatingly do so when such act is clearly within the prohibition of the fundamental law of the land. And this we conceive to be the condition of the act of the Legislature we are now called upon to consider. The principles upon which such conclusion is based are so fully stated and discussed in the cases hereinafter named and in the authorities therein cited that **[\*\*4]** we will attempt to be as brief as possible. An Ohio law relating to fraternal associations containing exemption in substantially the same terms as those from our own law hereinbefore quoted was declared to be unconstitutional and void in the case of Williams v. Donough, 65 Ohio St. 499, 63 N.E. 84, 56 L.R.A. 766, which counsel for appellee presses upon us as in point in this case. Appellant insists, however, that insuring fraternal beneficiary associations were classed by the Ohio law together with insurance companies generally, and hence that is inapplicable. But, however this may be, it seems clear that in our insurance laws the Legislature has very plainly distinguished insurance companies generally from fraternal beneficiary associations such as appellant. By our laws they are evidently given distinct and different classification. See Sayles' Civ. St. 1888-89, tit. 53, c. 3, relating to insurance companies **[\*663]** generally; title 49a, Supp. Sayles' Civ. St. 1899-1900, relating alone to fraternal beneficiary associations; and Ins. Co. v. Parker (Tex. Sup.) 72 S.W. 168-620; Life Association v. Mettler, 185 U.S. 308, 22 Sup. Ct. 662, 46 L.Ed. 922. And in our judgment such differing classification is not a mere arbitrary one, resting on insufficient reason. As said by the Supreme Court of the United States in construing Texas insurance statutes: "The ground for placing **[\*\*5]** life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations of the character mentioned in the Texas statutes is not an arbitrary classification, but rests on sufficient reason." See Life Association v. Mettler, *supra*. From which it follows, as we conclude adversely to appellee's contention, that the law under consideration cannot be declared unconstitutional for the reason that special benefits and privileges are conferred upon fraternal beneficiary associations that are not conferred upon other classes of insurance organizations. For it is well settled that legislation is not open to the constitutional objections urged "if all persons or associations brought under its influence are treated alike under the same conditions." Campbell v. Cook (Tex. Sup.) 26 S.W. 486, 40 Am. St. Rep. 878; Ins. Co. v. Chowning (Tex. Sup.) 26 S.W. 982, and authorities therein cited. The converse of the proposition, however, is as firmly and plainly maintained by the authorities, and it is upon this ground that we think the law under consideration invalid. Section 16 of the same act is as follows, viz.: "Sec. 16. The provisions of this act shall not apply to nor include the Order of Railway **[\*\*6]** Conductors, Order of Locomotive Engineers, Order of Locomotive Firemen or Brotherhood of Railway Trainmen or Order of Railway Telegraphers, which issue policies of insurance or benefit certificates only to members of their respective organizations, and said organizations shall be exempt from the provisions of this act." There is nothing in the record to show that the orders named in section 16 may reasonably receive a different classification from associations such as appellant. For aught that appears, such orders may now have every characteristic essential to bring them within the definition of fraternal beneficiary associations as defined in the first section of the act. We think it apparent from the section itself that in the feature of insurance, at least, such orders are substantially fraternal beneficiary associations, although the method of deriving the benefit fund and other immaterial features may be different. In other words, it appears, as we think, from the whole law, that the orders named in section 16 now are, or at least may hereafter by voluntary action become, in all

substantial features fraternal beneficiary associations, and that the law as a whole, therefore, is **[\*\*7]** invalid as discriminative in the matter of privileges conferred and burdens devolved between designated associations and other associations of the same general classification.

The act under consideration in the public interest requires fraternal beneficiary associations, as conditions to their right to engage and continue in the business of insurance, to make certain reports, to pay valid final judgments against them within 60 days, to pay certain fees of office, to obtain certificate of authority from the commissioner of insurance, etc. These are all burdens from which the orders named in section 16 are expressly relieved whatever be their present or future character, while, on the other hand, the associations doing business under the act and their certificate holders have conferred upon them the important privilege of an insurance fund entirely freed from the claims of creditors; a privilege not conferred upon the orders designated in section 16, or upon insurance beneficiaries thereof. Such discrimination, in our judgment, plainly violates the fundamental doctrine of equal rights to all and special privileges to none. Nor do we think that we can dispose of the objections to the act **[\*\*8]** by rejecting section 16, which alone seems subject to constitutional conflict. The rule, briefly, is that where the unconstitutional portion is essentially and inseparably connected in substance with that which is constitutional, the whole must be rejected. See Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, followed by our Supreme Court in the case of State v. Compress Co., 95 Tex. 611, 69 S. W. 58. In the case first cited the court held in effect that an exemption of "agricultural products and live stock while in the hands of the producer or raiser" in the antitrust law of the state of Illinois invalidated the act. And in the case cited from our Supreme Court the Texas anti-trust law of 1895 (Laws 1895, p. 112, c. 83), exempting from its operation, among other things, labor organizations, was, in obedience to the Connolly Case, in effect held (save as therein limited) violative of constitutional safeguards. The exemptions indicated in the anti-trust laws named were, in effect, held to be so interwoven and inseparably connected with other portions as to taint the whole. Say the court in disposing of the Connolly Case: "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each **[\*\*9]** other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces **[\*664]** by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the twelfth section declares that the statute shall not apply to agriculturists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when evidently the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated **[\*\*10]** by the statute unless agriculturists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional, as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the twelfth section." So in the law before us a sweeping exception of the orders named in section 16 is made. It certainly was not the legislative intention that any one or more of the specified orders should ever be subject to the restrictions of the act. Such, however, would be the necessary effect of a mere rejection of section 16 in event said orders either now have or should hereafter assume the substantial characteristics of fraternal benefit associations, and it is by no means clear that the Legislature would have enacted the law without the exceptions noted.

We conclude that the trial courts reached the proper conclusion, and it is accordingly ordered that the conclusions of fact and law shown by the record be adopted, and the judgment affirmed.



## **Chicago, Wilmington & Vermillion Coal Co. v. People**

Court of Appeals of Illinois, Chicago, First District

1904, Decided ; May 12, 1904, Opinion Filed

Gen. No. 11,267.

**Reporter**

114 Ill. App. 75 \*; 1904 Ill. App. LEXIS 387 \*\*

The Chicago, Wilmington & Vermillion Coal Company, et al., v. The People of the State of Illinois.

**Prior History:** **[\*\*1]** Criminal prosecution for conspiracy in violation of Anti-Trust Act. Error to the Criminal Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1903. Affirmed.

Statement by the Court. The plaintiffs in error (who hereinafter will be designated as defendants) were indicted at the January term, 1903, of the Criminal Court of Cook county.

The first count alleged that on January 5, 1903, in said county of Cook the defendants "unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit: To then and there in restraint of trade and to the injury of the public trade unlawfully create, enter into and become members of and parties to a pool, trust, agreement, combination, confederation and understanding with each other wrongfully to regulate and fix the price at which coal should be sold in the said State of Illinois, which said coal was then and there an article of necessity to the said public and consumers thereof in the said State of Illinois, to the great damage and injury of all purchasers of said coal and contrary to the statute, and **[\*\*2]** against the peace and dignity of the same people of the State of Illinois."

The second count charged that they "then and there unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit: To then and there in restraint of trade and to the injury of the public trade, unlawfully create, enter into and become members of and parties to a pool, trust, agreement, combination, confederation and understanding with each other wrongfully to regulate and fix the price at which coal should be sold in the said State of Illinois, which said coal was then and there an article of necessity to the said public and consumers thereof in the said State of Illinois, to the great damage and injury of all purchasers of said coal, contrary to the law and against the peace and dignity of the same people of the State of Illinois."

The third count set forth that they "then and there unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit: To then and there in restraint of trade and to the injury of the public trade, **[\*\*3]** unlawfully regulate and fix the price at which coal should be sold in the said State of Illinois, which said coal was then and there an article of necessity to the said public and consumers thereof in the said State of Illinois, said coal being then and there a commodity and article of merchandise, contrary to the statute and against the peace and dignity of the same people of the State of Illinois."

It is stated in the fourth count that they "then and there unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit: To then and there in restraint of trade and to the injury of the public trade, unlawfully regulate and fix the price at which coal should be sold in the said State of Illinois, which said coal was then and there an article of necessity to the said public and consumers thereof in the said State of Illinois, said coal being then and there a commodity and article of merchandise, contrary to the law and against the peace and dignity of the same people of the State of Illinois."

The fifth count declared that they, each being then and there engaged in or interested in the [\*\*4] business of selling coal to the general public and to consumers of said coal, did then and there wickedly and unlawfully create, enter into and become members of and parties to a pool, trust, agreement, combination, confederation and understanding with each other, then and there to unlawfully regulate and fix the price at which coal should be sold in the State of Illinois, which said coal was to be thereafter mined, produced and sold in the State of Illinois, and was then and there an article of necessity to the said public and consumers thereof in the said State of Illinois, said coal being then and there a commodity and article of merchandise, whereby and by force of the statute in such case made and provided, the said defendants, and each of them, are deemed and adjudged to be guilty of a conspiracy to defraud, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

The first count is drawn under section 46 of the Criminal Code. The second is based upon the common law concerning combinations to regulate and fix the price of a necessary of life. The third alleges a conspiracy to do an illegal act injurious to public trade, and concludes [\*\*5] "contrary to the statute." The fourth is at common law charging a combination to regulate the price of coal, an article of necessity, etc. The fifth alleges the formation of a pool to unlawfully regulate and fix the price at which coal should be sold in the State of Illinois, and is based upon the AntiTrust Law of 1891.

In each of these counts it is the conspiracy, and not the object sought to be accomplished by it, that is the subject of indictment. In all these counts each defendant is designated by its proper name. The only words of description following the several names are "a corporation."

A motion in writing to quash the indictment was filed for each defendant. These motions are identical except as to the name of the defendant in whose behalf it is filed. This motion was overruled; to which action each of the defendants then and there excepted.

A jury having been duly waived, and the cause having been by agreement of all parties submitted for trial by the court, the People, to sustain the issue upon their part, offered in evidence the following statement of facts:

"For the purposes of submitting the issues of fact and law in the above entitled case to the [\*\*6] court for trial and decision upon the indictment herein (it being hereby expressly understood that the admissions and agreements herein made are made for such purposes only, and shall not be binding upon the defendants herein in any other proceeding at law or in chancery or of whatsoever nature), the following statement of facts is hereby agreed to by and between the respective parties hereto, and each of them, and it is further agreed that the said statement shall be received as evidence of such facts upon the trial of the above entitled cause, to wit:

- (1) That the Northern Illinois Soft Coal Association is a voluntary association, which was formed and organized about fifteen or twenty years ago, then composed of various corporations and individuals engaged in the business of operating in and mining soft coal in the northern part of the State of Illinois.
- (2) That said association has been in existence from the date of the formation thereof to the present time, and assumed the name and style aforesaid in the year 1897.
- (3) That at the first meeting thereof, one A. L. Sweet, then an officer of The Chicago, Wilmington & Vermillion Coal Company, one of the defendants herein, [\*\*7] was chosen and acted as president of said meeting, and one Edward T. Bent, an authorized representative of the Oglesby Coal Company, one of the defendants herein, was chosen and acted as secretary of said meeting; that at said meeting there were various authorized representatives of different coal companies then operating in and mining soft coal in the northern part of said State of Illinois, including some of the defendant companies herein, and that various meetings of said association have been held since the formation thereof up to and including December 13, 1902, at most of which said A. L. Sweet has acted as the president and presiding officer thereof, and said Bent as the secretary thereof, each of whom was duly authorized to act at said association meetings for said Chicago, Wilmington & Vermillion Coal Company and said Oglesby Coal Company, respectively.

(4) That said association has never adopted any constitution, by-laws or provisions for penalties or terms of admission to or expulsion from said association; that the several defendant companies, through their authorized representatives, have from time to time held meetings, which were called by said Bent as secretary [\*\*8] of said association, and that all of said meetings have, since some time in the year of 1897, been held in Chicago, in the County of Cook and State of Illinois, and that assessments for routine expenses were levied and paid upon and by said companies, the last being levied and paid September 20, 1902.

(5) That at said meetings discussions were had and resolutions passed respecting the subject of wages, transportation and prices at which the several defendant companies and others there represented, as aforesaid, should sell the coal so mined by them on the market to consumers thereof in the State of Illinois and elsewhere; that between July 1, 1891, and July 1, 1897, no action was taken by said association at its said meetings with respect to prices of said coal.

(6) That during the existence of said association the said Edward T. Bent has acted as the secretary of said association, and as such has called said meetings by sending notices thereof to the defendant companies and other coal mining companies so operating in and mining coal in Northern Illinois, and that after each meeting, with a few exceptions, he has transmitted to each of the defendant companies, and said other [\*\*9] coal mining companies, copies of the proceedings had at said meeting.

(7) That at a meeting of said association held in Chicago, aforesaid, March 26, 1900, the following resolution was adopted and a copy thereof transmitted to the defendant companies, and said other coal mining companies represented in said association, as aforesaid, to wit:

'NORTHERN ILLINOIS SOFT COAL ASSOCIATION.

CHICAGO, ILL., March 26, 1900.

DEAR SIR: At a meeting of this association held this day, the following were unanimously adopted:

Resolved, That the price on mine run coal be ten (10) cents per ton less than on standard lump; that when coal is sold through jobbers, the shipping company shall see that full circular prices are maintained by said jobbers; that the maximum commission to jobbers shall be ten (10) cents per ton; that no factory or steam coal shall be sold through jobbers or local dealers at less than established prices thereupon, except to parties or at points fully approved and listed; that no firms shall be recognized as linemen, except as duly approved and listed; that no coal shall be sold to listed linemen, except direct and without commission to any jobber; that [\*\*10] no coal shall be sold to linemen at a fixed price for any specified time; and that listed linemen may be sold from time to time at ten (10) cents per ton less than existing circular prices.

Resolved, That until further action of the association, the circular price to dealers be \$ 2.15 for standard lump and \$ 2.25 for chunks at mines.

A committee, consisting of Messrs. Booth, Lemmon and Bent, was appointed to prepare a list of points at which selling factory or steam coal through local dealers is permissible, and the dealers entitled to a commission thereupon; and an official list of linemen entitled to a ten (10) cents per ton commission from circular prices. Please send at once to one of the members of the committee a list of the points (such as Rockford and Freeport) where you consider it necessary to sell steam and factory coal through dealers, and what dealers at such points you understand should properly participate in this business, and also a list of linemen ("elevator" and "lumber") who, and who only in your view, should get ten (10) cents concession from established circular prices.

The desire is to restrict these concessions to the utmost extent practicable, [\*\*11] so please drop all names possible. The list finally compiled will be uniform throughout the northern field, so that no company's interests will be prejudiced.

Yours truly,

E. T. BENT, Sec'y.'

(8) That following a meeting of said association called as aforesaid, and held in Chicago, September 26, 1902, the following circular was prepared and sent out by said secretary to said defendant companies and said other coal mining companies represented in said association as aforesaid, to wit:

'NORTHERN ILLINOIS SOFT COAL ASSOCIATION.

CHICAGO, ILL., Sept. 26, 1902.

DEAR SIR: At a meeting held this day the following was unanimously adopted:

Resolved, That prices of association coal, including steam and all other business, except on such continuous sales as are legally or morally binding, effective Oct. 1, '02, and subject to change without notice (quotations to be made Sept. 29, 1902), shall be as follows:

Ottawa.

Third Vein Standard Lump	\$ 2 90	delivered.
Chunks	3 00	delivered.
Streator and Cardiff Standard Lump	2 80	delivered.

Joliet.

Third Vein and Wilmington Stand-		
ard Lump	2 80	delivered.
Chunks	2 90	delivered.

Streator.

Standard Lump	2 70	delivered.
Chunks	2 80	delivered.

Lemont and Lockport.

Standard Lump	2 40	mines.
Chunks	2 50	mines.

Chicago.

Wilmington (no switching)	2 75	delivered.
Third Vein and Streator	Open.	

Rockford and Freeport.

Standard Lump	2 95	delivered.
Chunks	3 05	delivered.

Galena.

Standard Lump	3 40	delivered.
Chunks	2 50	delivered.

Dixon.

Standard Lump	2 90	delivered.
Chunks	3 00	delivered.

Davenport, Rock Island, Moline,

Chicago Heights, St. Paul, Min-

neapolis, Milwaukee and Ft.

Madison. Open.

Clinton, Lyons and Fulton.

Mendota and Amboy.

Standard Lump	3 25	delivered.
Chunks	3 35	delivered.
Standard Lump	2 80	delivered.

Chunks	2 90	delivered.
Lostant.		
Third Vein and Wilmington Standard Lump	2 75	delivered.
Streator and Cardiff Standard Lump	2 60	delivered.
Chunks	2 70	delivered.
Rochelle and Malta.		
Standard Lump	3 20	delivered.
Chunks	3 30	delivered.
Sterling and Rockford Falls.		
Standard Lump	3 00	delivered.
Chunks	3 10	delivered.
Aurora.		
Standard Lump	3 00	delivered.
Chunks	3 10	delivered.
Batavia, DeKalb, Sycamore, Waukegan, St. Charles and Geneva.		
Standard Lump	3 00	delivered.
Chunks	3 10	delivered.
Elgin, Earlville and West Chicago.		
Standard Lump	3 05	delivered.
Chunks	3 15	delivered.
Belvidere.		
Standard Lump	3 15	delivered.
Chunks	3 25	delivered.
Alton.		
Standard Lump	2 40	at mines.
Chunks	2 50	at mines.
LaCrosse.		
Standard Lump	2 40	at mines.
Chunks	2 50	at mines.
West Chicago to Belvidere, not inclusive and not including Elgin.		
Standard Lump	2 40	at mines.
Chunks	2 50	at mines.
Crystal Lake to Rockford, not including Rockford, and to Lake Geneva, inclusive.		
Standard Lump	2 40	at mines.
Chunks	2 50	at mines.
Elsewhere, all lines.		
Standard Lump	2 40	at mines.
Chunks	2 50	at mines.

[\*\*12] Mine run coal thirteen cents less than standard lump. Otherwise regulations of circular letter March 26, 1900, continue effective. The foregoing prices are minimum, and any member is at liberty to charge more for any size at his discretion.

Yours truly,

E. T. BENT, Sec'y.'

(9.) That following a meeting of said association, called, as aforesaid, and held in Chicago, aforesaid, October 13, 1902, the following circular was prepared and sent out by said secretary to said defendant companies and said other coal mining companies represented in said association, as aforesaid, to wit:

'NORTHERN ILLINOIS SOFT COAL ASSOCIATION.

CHICAGO, ILL., October 13, 1902.

DEAR SIR: At a meeting held this day the following was unanimously adopted:

Resolved, That prices of association coal, including steam and all other business, except on such continuous sales as are legally or morally binding, effective October 15, 1902, and subject to change without notice, and acceptance of orders to be subject to price ruling on date of shipment, shall be as follows:

Ottawa.

Third Vein Standard Lump and Egg	\$ 3 90	delivered.
Chunks	4 00	delivered.
Streator and Cardiff.		
Standard Lump and Egg	3 80	delivered.
Joliet.		
Third Vein and Wilmington Stand-		
ard Lump and Egg	3 80	delivered.
Chunks	3 90	delivered.
Streator and Cardiff Standard Lump		
and Egg	3 70	delivered.
Chunks	3 80	delivered.
Lemont and Lockport.		
Standard Lump and Egg	3 40	at mines.
Chunks	3 50	at mines.
Chicago.		
Wilmington (no switching)	3 75	delivered.
Third Vein and Streator	Open.	
Rockford and Freeport.		
Standard Lump and Egg	3 95	delivered.
Chunks	4 05	delivered.
Galena.		
Standard Lump and Egg	4 40	delivered.
Chunks	4 50	delivered.
Dixon.		
Standard Lump and Egg	3 90	delivered.
Chunks	4 00	delivered.
Davenport, Rock Island, Moline,		
Chicago Heights, St. Paul, Min-		
neapolis, Milwaukee and Ft.		
Madison. Open.		
Clinton, Lyons and Fulton.		
Standard Lump and Egg	4 25	delivered.
Chunks	4 35	delivered.
Mendota and Amboy.		

Standard Lump and Egg	3 80	delivered.
Chunks	3 90	delivered.
Lostant.		
Third Vein and Wilmington Stand-		
ard Lump and Egg	3 75	delivered.
Chunks	3 85	delivered.
Streator and Cardiff Standard Lump		
and Egg	3 60	delivered.
Chunks	3 70	delivered.
Waukegan, Ill.		
Standard Lump and Egg	3 40	delivered.
Chunks	3 50	delivered.
Rochelle and Malta.		
Standard Lump and Egg	4 20	delivered.
Chunks	4 30	delivered.
Sterling and Rock Falls.		
Standard Lump and Egg	4 00	delivered.
Chunks	4 10	delivered.
Aurora.		
Standard Lump and Egg	4 00	delivered.
Chunks	4 10	delivered.
Batavia, DeKalb, Sycamore, St. Charles		
and Geneva.		
Standard Lump and Egg	4 00	delivered.
Chunks	4 10	delivered.
Elgin, Earlville and West Chicago.		
Standard Lump and Egg	4 05	delivered.
Chunks	4 15	delivered.
Belvidere.		
Standard Lump and Egg	4 15	delivered.
Chunks	4 25	delivered.
Alton.		
Standard Lump and Egg	3 40	at mines.
Chunks	3 50	at mines.
LaCrosse.		
Standard Lump and Egg	3 40	at mines.
Chunks	3 50	at mines.
West Chicago to Belvidere, not inclusive		
and not including Elgin.		
Standard Lump	3 40	at mines.
Chunks	3 50	at mines.
Crystal Lake to Rockford, not including		
Rockford, and to Lake Geneva, inclu-		
sive.		
Standard Lump and Egg	3 40	at mines.
Chunks	3 50	at mines.
Elsewhere, all lines.		
Wilmington and Third Vein Stand-		

and Lump and Egg	3 40	at mines.
Chunks	3 50	at mines.
Streator and Cardiff Standard Lump		
and Egg	3 30	at mines.
Chunks	3 40	at mines.

[\*\*13] Mine run coal thirteen cents less than standard lump. Otherwise regulations of circular letter March 26, 1900, continue effective. The foregoing prices are minimum, and any member is at liberty to charge more for any size at his discretion.

Yours truly,

E. T. BENT, Sec'y.'

(10) That following a meeting of said association, called, as aforesaid, and held in the city of Chicago, aforesaid, December 13, 1902, the following circular was prepared and sent out by said secretary to said defendant companies and said other coal mining companies represented in said association, as aforesaid, to wit:

'NORTHERN ILLINOIS SOFT COAL ASSOCIATION.

CHICAGO, ILL., December 13, 1902.

DEAR SIR: At a meeting held this day the following was unanimously adopted:

Resolved, That at the pending annual meeting of the Illinois Coal Operators' Association, this district nominate for its members of the State Executive Committee Messrs. Sweet, Dalzell and Taylor.

Resolved, That at the pending annual election of the Illinois Coal Operators' Association this district urge the re-election of President Garrison and the other existing state officers.

Resolved, That on [\*\*14] and after December 16, until further notice, circular prices on association coal, with differentials, as established in circular October 13, 1902, including steam and all other business, except on such continuous sales as are legally or morally binding and subject to change without notice, and acceptance of orders to be subject to prices ruling on date of shipment, shall be \$ 2.90 per ton for Standard Lump and Egg; \$ 3.00 for Chunks and \$ 2.50 per ton for No. 1 Nut at mines; and

Resolved, Further, that no price shall be made for Chicago; that local points in Illinois on the 'Chicago & Alton,' 'Wabash' and 'Santa Fe' be adjusted locally by the shippers in interest, and that all special prices other than as above in special list of October 13, 1902, be reduced 50 cents per ton; and

Resolved, Further, that no quotations, as above, be made by mail, word or in person, prior to December 13, 1902.

Yours truly,

E. T. BENT, Sec'y.'

(11) That each of the said defendant companies was represented at one or more of the meetings aforesaid, held on September 26, 1902, October 13, 1902, and December 13, 1902, by duly authorized representatives, and most of said defendant companies [\*\*15] have been so represented at several previous meetings since the year 1897; that at said meetings held September 26, October 13 and December 13, 1902, the prices at which soft coal, so mined, as aforesaid, should be sold in the State of Illinois and elsewhere was discussed, and the prices thereof were designated, which it was agreed should be set forth in a circular and forwarded by the secretary, aforesaid, to the said defendant companies, and it was further agreed thereat that said defendant companies should send out to the trade, dealers and consumers of soft coal in the State of Illinois and elsewhere, circulars in conformity to said circular prices and in accordance with the action so taken, as aforesaid.

(12) That after the transmission, as aforesaid, of said resolutions, some of said defendant companies sent out circulars to the trade, dealers and consumers of said soft coal in the State of Illinois and elsewhere, stating the prices at which the said coal, so mined, as aforesaid, by them respectively, would thereafter be sold in said State of Illinois and elsewhere, as aforesaid, said prices mentioned in said circulars being in conformity with those stated in said resolutions.

[\*\*16] (13) That all but one, to wit, Bell & Zoller Coal Company, of said defendant companies, and said other coal mining companies represented, as aforesaid, at said meetings of said association, were at the time of the holding of said meetings, as aforesaid, engaged in the business of operating in and mining soft coal in the said State of Illinois, and all of said defendant companies in the selling thereof to consumers thereof in the State of Illinois and elsewhere, which said coal was then and there an article of necessity to the consumers thereof and a commodity and article of merchandise, mined and to be mined, produced and to be produced, and sold, and to be sold upon the market to the public and to consumers thereof in the said State of Illinois and elsewhere.

(14) The defendant corporations include the larger producers in Northern Illinois. The state is divided into nine commercial coal-producing districts, of which the Northern Illinois is called the 'First.' The 'First' district produced during the fiscal year ending June 30, 1902, about 6,000,000 tons out of the 30,000,000 tons produced throughout the State of Illinois during the same time.

This coal is sold in direct [\*\*17] competition with other districts of Illinois and Eastern coal.

Over two-thirds of the produce of the First district is sold under contract for the year in competition with other producers thereof to railroad companies at prices affording little or no profit and in some cases at an actual loss.

The cost of mining coal is mainly made up of wages. The wage scale is maintained by reason of selling free coal in the fall and winter at such prices by cooperation between producers in Northern Illinois as can be obtained in competition with other districts and states. The mining rate paid in the First district is the highest in the state.

The First district shipped to Chicago in 1902, 174,210 tons of bituminous coal, out of a total shipment thereto of 8,712,451 tons of coal of all kinds, of which 7,434,613 was bituminous.

July 4, 1897, a national strike of bituminous miners was inaugurated and continued in the First district until December 1, when mining wages were advanced in what is known as the Wilmington field, the Streator field and Third Vein field, both of which are in the First district, aforesaid.

The following January the system of annual trade agreements [\*\*18] in the coal mining industry of Pennsylvania, Ohio, Indiana and Illinois was inaugurated, resulting in a reduction in hours of labor from ten to eight per day, and a further advance in wages on April 1, 1898. These agreements were entered into between the United Mine Workers of America and the Coal Operators at a joint annual convention, composed of representatives from said workers and operators, respectively, in said four states, and like agreements as to wages being binding on miners and operators for the entire fiscal year, beginning April 1 of each year, and subject to no change.

At this time, January, 1898, the Illinois Coal Operators' Association, a state association, to which most of the coal operators in the state belong, was organized for the purpose, and the purpose only, of dealing with organized labor and participating in the interstate joint movement aforesaid.

April 1, 1900, a further advance, of wages was fixed by agreement at an annual convention, as aforesaid, for the mining rate in Northern Illinois.

The abnormal demand for coal during the last few months was caused primarily by reason of the strike in the anthracite region, which began May 1, 1902, and [\*\*19] ended November 1, 1902. The shortage in production of coal by reason thereof amounted to 25,000,000 tons of anthracite coal, the equivalent of 50,000 tons of bituminous coal.

Whereupon said defendants, and each of them, objected to the introduction of the first thirteen paragraphs as numbered of said agreed statement of facts, and each and every part thereof, on the ground that the same was incompetent, irrelevant and insufficient, which objections the court overruled, and permitted said agreed statement of facts, and each and every part thereof, to be received as evidence in said cause.

To which ruling the defendants, and each of them, then and there excepted.

Which was all the evidence offered or introduced by either party upon the trial of said cause."

At the close of the evidence each of the defendants submitted to the court written propositions and asked the court to hold the same and each of them as law in this case, and requested the court to mark upon each of them the word "held," in accordance with the statute, etc. But the court refused to consider such propositions, and also refused to mark them "held" or "refused." To which refusal each defendant then [\*\*20] and there excepted.

Upon the hearing the court found each of the defendants guilty in manner and form as charged in the indictment, and fixed the punishment of each of the defendants at a fine of \$ 500. Thereupon each of the defendants filed a written motion for a new trial. The court overruled this motion; to which action each of the defendants then and there excepted. These motions are the same, except that each contains the name of the defendant in whose behalf it is filed. Thereupon each of the defendants filed a written motion in arrest of judgment, which the court overruled. To which action each of the defendants then and there excepted. These motions, except as to the name of the defendant presenting the same, are alike.

(The reasons set out as grounds for quashing the indictment, for a new trial, and in arrest of judgment, need not be here stated, as they form the basis of the arguments presented to us for and against the defendants. In so far as we deem them material they will be noticed in the opinion which follows.)

The court thereupon entered a separate judgment against each defendant, finding it guilty of the crime of conspiracy to do an illegal act injurious [\*\*21] to public trade upon the indictment in this cause on the said finding of guilty, and that it be and is sentenced to pay a fine of \$ 500, and pay the costs of these proceedings, taxed at \$ 13.18, and that execution issue therefor.

From these several judgments the present writ of error was sued out.

**Disposition:** Judgment affirmed.

## Core Terms

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conspiracy, indictment, common law, prices, coal, circular, repeal, soft coal, Northern, meetings, words, statement of facts, consumers, monopoly, salt, accomplished, combinations, conspirators, cases, tends, lump, no necessity, trial court, authorities, commodity, territory, by-law, counts, courts, pool

## LexisNexis® Headnotes

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Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > Defenses > Illegal Bargains

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

**[HN1](#)**  [Types of Contracts, Oral Agreements](#)

A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty actionable combination. It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## **HN2** Appeals, Standards of Review

If there be one count in an indictment sufficient to sustain a sentence and judgment of the court, it makes but little difference in what manner the remaining counts are disposed of. If there be one good count in the indictment, a general finding that the defendant is guilty will not be disturbed because the indictment contains other counts which are bad.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## **HN3** Inchoate Crimes, Conspiracy

Where the object of the conspiracy is unlawful, the means by which it is to be accomplished are not material ingredients in the offense; and therefore in such a case it is never necessary to set them forth. The offense is complete the moment the conspiracy is made, whether any acts be done in pursuance of it or not. Such acts form no part of the offense, and the statement of them in the indictment is but surplusage.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## **HN4** Monopolies & Monopolization, Conspiracy to Monopolize

All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the necessities of life, are monopolies, and ought to receive the condemnation of all courts.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## **HN5** Mens Rea, General Intent

If a conspiracy to do an illegal act be set forth in an indictment, the charge is complete without the addition of words alleging a criminal intent in the doing of the act. In stating such an offense the criminal intent appears *prima facie* in the statement of the act itself.

Governments > Legislation > Interpretation

#### **HN6** **Legislation, Interpretation**

When there is a clear repugnance between two laws, and the provisions of both cannot be carried into effect, the latter law must prevail as the last expression of the legislative will.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

#### **HN7** **Legislation, Expiration, Repeal & Suspension**

If a subsequent statute revises the whole subject of a former one, and is intended as a substitute for it, it operates as a repeal of the former, although it contains no express words to that effect.

Governments > Courts > Common Law

Governments > Legislation > Effect & Operation > General Overview

#### **HN8** **Courts, Common Law**

Where a statute is not repugnant to the common law, the latter is not abrogated, in the absence of express words, or of affirmative implication repealing the common law.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

International Trade Law > State Legislation > General Overview

International Trade Law > General Overview

#### **HN9** **Monopolies & Monopolization, Conspiracy to Monopolize**

To vitiate a combination such as the Anti-trust Act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN10** **Monopolies & Monopolization, Conspiracy to Monopolize**

A combination, the object of which is to prevent general competition and to control prices, is detrimental to the public, and consequently unlawful.

## Headnotes/Summary

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### Headnotes

1. COMBINATION IN RESTRAINT OF TRADE--*when, criminal*. A systematic attempt, covering a period of years, by an association made up of large producers of coal, to control the output, sale and price of a certain kind of coal within certain territory of Illinois, is a criminal combination in restraint of trade, both at common law and under the statutes of Illinois.
2. COMBINATION IN RESTRAINT OF TRADE--*what deemed common law offense*. A combination by an association of persons which has a tendency to diminish production, to limit competition, and to increase prices, was and is a common law offense and punishable in this state, notwithstanding the prices fixed by such association may have been fair and reasonable, and notwithstanding, further, such association may not, in fact, have advanced the price of the product involved in such illegal combination.
3. PROPOSITIONS OF LAW--*failure to mark*. A failure to mark propositions of law, either given or refused, is equivalent to a refusal thereof.
4. JUDICIAL NOTICE--*of what, not taken*. Judicial notice will not be taken of a report of the grand jury which is voluntary upon its part and not made pursuant to any law providing therefor.
5. INDICTMENT--*what will not be considered in determining validity of*. The report made by a grand jury as its voluntary act will not be considered in determining whether an indictment returned by it is valid or invalid.
6. INDICTMENT--*when, sufficient to sustain conviction*. If one count of an indictment is good, a general finding that the defendants are guilty will not be disturbed because the indictment contains other counts which are bad.
7. CONSPIRACY--*when offense of, complete*. Conspiracy as a criminal offense is complete when the agreement to do the unlawful act in question is entered into.
8. CONSPIRACY--*what indictment for, need not set forth*. An indictment for conspiracy need not set out the means by which the conspirators intended to accomplish their unlawful purposes.
9. CONSPIRACY--*when indictment for, is sufficient*. An indictment charging the statutory offense of conspiracy is sufficient if in the language of the statute pertaining thereto.
10. CONSPIRACY--*when indictment for, sufficiently charges intent*. If a conspiracy to do an illegal act be set forth in an indictment, the charge is complete without the addition of words alleging the criminal intent in the doing of the act; in stating such an offense the criminal intent appears *prima facie* in the statement of the act itself.
11. CONSPIRACY--*when indictment for, sufficiently charges intent*. Where an indictment alleges that a conspiracy was entered into "unlawfully, fraudulently, maliciously and wickedly," it is sufficient, even in those cases where the object for which the combination was formed was not unlawful until forbidden by statute.
12. CONSPIRACY--*how existence of, established*. The evidence of combination, ordinarily, must be gleaned from conduct; the test is not what an agreement may profess but what it actually accomplishes. Proof of an agreement actually entered into is not essential; the mere tacit understanding between conspirators to work to a common purpose is all that is essential to an actionable combination.

13. CONSPIRACY--common law with respect to, not abolished in this state. The common law concerning conspiracies is not abolished by statute in Illinois.

14. CONSPIRATORS--joint responsibility of. Each member of an unlawful association and conspiracy is bound by the acts of all its or his fellows done in furtherance of the object to accomplish which the combination is formed.

15. ANTI-TRUST ACT--provision of, unconstitutional. The provision, added by amendment to the Anti-Trust Act, which exempts combinations, where their principal object or effect is to maintain or increase wages, is unconstitutional and void.

16. ANTI-TRUST ACT--what need not be alleged or proved to establish violation of. In a prosecution for a violation of such act, it is not necessary to allege and prove the place of organization of the corporation defendant.

17. ANTI-TRUST ACT--how corporation violating, should be prosecuted. A prosecution against a corporation violating this act is properly by indictment, although it may, at the election of the people, be by action of debt to recover the penalty prescribed by such statute.

18. UNCONSTITUTIONAL LAW--no defense to criminal charge. An unconstitutional act, in legal contemplation, is not a law and affords no protection to a criminal charge.

19. COMMON LAW--how far, in force in this state. By statute the common law of England, so far as applicable, is adopted in this state, and such adoption includes all the statutes or acts of the British Parliament made in aid and to supply the defects of the common law, prior to the fourth year of James 1, (except three chapters specifically mentioned) which are of a general nature and not local to that kingdom.

20. COMMON LAW--when, not superseded by statute. When the common law and a statute differ, the common law gives place to the statute only where the latter is couched in negative terms or where it is made so clearly repugnant that it necessarily implies a negative.

21. REPEALS BY IMPLICATION--rules with respect to. When there is a clear repugnancy between two laws and the provisions of both cannot be carried into effect, the latter law must prevail as the last expression of the legislative body; also, if the subsequent statute revises the whole subject-matter of a former one and is intended as a substitute for it, it operates as a repeal of the former, although it contains no express words to that effect; but repeals by implication are not favored.

22. STATUTORY CRIME--effect of creation of, upon analogous common law offense. The adoption of a statute with reference to a crime does not abolish the doctrines and practice of the common law in relation thereto so far as that crime is not covered by the act. Where the statute has not in express words defined the crime and fixed the punishment, the common law remains in full force and vigor, and if it be abated by statute, when that statute is repealed it springs up anew.

23. CRIMINAL CODE--section 46 of, relating to the offense of conspiracy, not repealed. This section of the Criminal Code was not repealed by the enactment of the Anti-Trust Act of 1891.

24. "MAY"--how construed. It is true that "may" oftentimes means "must" but it always retains its primitive meaning unless common fairness and the rights of the parties litigant demand that it be supplanted by "must," or unless it is used in a sentence which creates an exception in favor of the public.

25. TRUST--definition of. A pool or trust is a combination having the intention and power or tendency to monopolize business or to control production or to interfere with trade or to fix and regulate prices, and the like, and under the statutes of this state the application of the rule does not depend upon the number of those who may be implicated, nor the extent of territory covered by the combination, but does depend upon the existence or non-existence of a tendency to injure the public.

**Counsel:** MASTIN & MOSS and LAWRENCE & FOLSOM, for plaintiffs in error.

CHARLES S. DENEEN, State's Attorney, and ALBERT C. BARNES, Assistant State's Attorney, for defendant in error.

**Judges:** MR. JUSTICE BALL.

**Opinion by:** BALL

## Opinion

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[\*94] MR. JUSTICE BALL delivered the opinion of the court.

It appears from the agreed statement of facts that the association, formed years ago by the defendants and other coal mining companies of Northern Illinois, is a voluntary one. In 1897 it assumed the name of the "Northern Illinois Soft Coal Association," having a president and secretary. Its expenses are paid out of assessments levied upon its members. Its meetings, which were held in the city of Chicago, were called by notices sent out by the secretary. Copies of the proceedings had at each meeting, with a few exceptions, were sent to the several defendants.

At a meeting of the association [\*\*22] held March 26, 1900, it was resolved "That the price of mine run coal be ten (10) cents per ton less than standard lump; that when coal is sold through jobbers the shipping company shall see that full circular prices are maintained by said jobbers; that the maximum commission to jobbers shall be ten (10) cents per ton," etc. "That until further action of the association the circular price to dealers be \$ 2.15 for standard lump, and \$ 2.25 for chunks at mines." Then follows directions to the members as to the selection of the retail dealers who are permitted to handle association coal, accompanied by this statement: "The desire is to restrict these concessions to the utmost extent practicable, so please drop all names possible. The list finally compiled will be uniform through the Northern field, so that no company's interests will be prejudiced."

After a meeting of the association held September 26, 1902, under that date the secretary sent out "to said defendant companies and said other coal mining companies represented in said association" a circular, which reads, in part:

"At a meeting held this day the following was unanimously adopted:

'Resolved, That prices of association coal, [\*\*23] including steam and all other business, except on such continuous sales as are legally or morally binding, effective October 1, '02, and subject to change without notice (quotations to be made September 29, 1902,) shall be as follows:

Ottawa.

Third Vein Standard Lump	\$ 2 90 delivered.
Chunks	3 00 delivered.
Streator and Cardiff Standard Lump	2 80 delivered."

In this manner the price of coal is set forth and established in some forty other cities and towns in Northern Illinois. The list ends:

"Elsewhere, all lines.

Standard Lump	\$ 2 40 delivered
Chunks	2 50 delivered

Mine run coal thirteen cents less than standard lump. Otherwise regulations of circular letter March 26, 1900, continue effective. The foregoing prices are minimum, and any member is at liberty to charge more for any size at his discretion."

At a meeting of the association held October 13, 1902, a similar resolution was adopted, and a like detailed list of cities and towns in Northern Illinois and prices was sent out to the several defendants. This circular closed as follows: "Mine run coal thirteen cents less than standard lump. Otherwise regulations of circular letter March 26, 1900, continue [\*\*24] effective. The foregoing prices are minimum; and any member is at liberty to charge more for any size at his discretion."

At a meeting December 13, 1902, the association resolved "that on and after December 16, until further notice, circular prices on association coal with differentials, as established in circular October 13, 1902, \* \* \* shall be \$ 2.90 per ton for standard lump and egg; \$ 3.00 for chunks, and \$ 2.50 per ton for No. 1 nut at mines; and, resolved further, that no price shall be made for Chicago; that local points in Illinois on the 'Chicago & Alton' 'Wabash' and 'Santa Fe' be adjusted locally by the shippers in interest, and that all special prices other than as above in special list of October 13, 1902, be reduced fifty cents per ton; and resolved further, that no quotations, as above, be made by mail, word or in person prior to December 15, 1902."

[\*96] The statement of facts further shows:

"(1) That each of the said defendant companies was represented at one or more of the meetings aforesaid, held on September 26, 1902, October 13, 1902, and December 13, 1902, by duly authorized representatives, and most of said defendant companies have been so represented [\*\*25] at several previous meetings since the year 1897; that at said meetings held September 26, October 13, and December 13, 1902, the prices at which soft coal, so mined as aforesaid, should be sold in the State of Illinois and elsewhere was discussed, and the prices thereof were designated, which it was agreed should be set forth in a circular and forwarded by the secretary, aforesaid, to the said defendant companies; and it was further agreed thereat that said defendant companies should send out to the trade, dealers and consumers of soft coal in the State of Illinois and elsewhere, circulars in conformity to said circular prices and in accordance with the action so taken, as aforesaid."

That after the receipt of the several circulars some of the defendants sent out their own circulars to the trade, stating the prices of coal as mentioned in the association resolutions.

That all of the members of said association, except the Bell & Zoller Coal Company, during all this time were engaged in mining soft coal and selling it to consumers in the State of Illinois and elsewhere, "which said coal was an article of necessity to the consumers thereof, and a commodity and article of merchandise, [\*\*26] mined and to be mined, produced and to be produced, sold and to be sold upon the market to the public and to consumers thereof in the State of Illinois and elsewhere."

And that the defendants include the larger producers of coal in Northern Illinois.

Whether or not a criminal conspiracy upon the part of the defendants is shown by the statement of facts, is a question which was submitted to the consideration of the learned trial judge who heard this cause. He found this issue against the defendants, and we agree with him in that conclusion. If a systematic attempt, covering years [\*97] of time, by an association made up of the larger producers of coal in the northern part of the State of Illinois to control the output, sale and price of soft coal in every city and railroad town in that territory "and elsewhere," and to dictate who should and who should not locally handle that coal, be not criminal in its character, then pools, trusts and combinations have nothing to fear from the law.

The defendants presented to the trial court twenty-two written propositions of law to be by him marked "Held" or "Refused." He did neither. This non-action upon his part is claimed to be reversible [\*\*27] error. Assuming that the court in a criminal case submitted for trial without a jury is governed by section 41 of the Practice Act, (a question we do not decide,) the effect to neglect to mark the propositions presented is the same as if each of them was marked "Refused." Calef v. Thomas, 81 Ill. 478. The defendants do not discuss the law as laid down in these propositions, but confine their argument to the supposed error in refusing to consider them. In such case it is not our duty to search them for possible errors in law. They stand before us as "refused." Every statement of law contained in these propositions is repeated in the motions to quash and in the motions in arrest of judgment. Hence

these propositions need not be set out herein nor be considered separately, since, if neither of the above motions is well founded, the trial court did not commit error in this regard.

The grand jury which found this indictment made a written report to the Criminal Court concerning the respective amounts of hard and of soft coal received in the city of Chicago during the year 1902, and their deductions therefrom. We are asked to take judicial notice of that report and to consider [\*\*28] its contents in our efforts to reach a proper conclusion in this case. We cannot so do. Such report is the voluntary act of the grand jury, for which there is no authority in the law. That body performed its whole duty when it passed upon all criminal cases of which it had knowledge, and returned to the court all the true bills it found. The indictment is the completed act of the [\*98] grand jury; and that paper stands upon its merits or falls because of its demerits, wholly uninfluenced by any report, written or verbal, which the "accusing jury" may make to the court under whose guidance it has performed its labors. This rule of exclusion of that which is immaterial is carried so far that the United States courts refuse to look into the debates in Congress in search of information as to the meaning of the language of a statute passed by that body. [U.S. v. Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.](#)

The objection made by the defendants to the introduction in evidence of the first thirteen paragraphs of the statement of facts, because the means employed by the defendants in carrying out the object of the conspiracy are not set forth in the indictment, [\*\*29] cannot be sustained. As will be shown hereafter, the offense of conspiracy to do an unlawful act is complete when the agreement is entered into. Hence it is not necessary to state in the indictment the means by which the conspirators intended to accomplish their unlawful object. While this is true, it does not relieve the state from the necessity of showing that the conspiracy existed; and therefore any acts of the defendants which fairly tend to establish the conspiracy, done and performed by them in furtherance of the object of their conspiracy, may be offered and received in evidence.

The defendants are not profited by the apparently voluntary nature of the association, nor by its lack of stringent by-laws, or want of penalties as against any offending member. The law discerns reality through whatever disguises it may assume. When inexperienced men form a combination to control a necessary of life they are very apt to furnish in the written agreement to combine all the evidence needed to convict them of this offense. But those who have seriously studied the subject do not make this mistake. Little can be learned from their admissions, written or otherwise. The evidence of combination, [\*30] if there be such, must be gleaned from their conduct. The test is not what the agreement professes, but what it accomplishes. Proof of an agreement actually entered into is not necessary. [\*99] [HN1](#) [↑] A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty actionable combination. [Patnode v. Westenhaver, 114 Wis. 460, 90 N.W. 467.](#) "It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties." [Harding v. Am. Glucose Co., 182 Ill. 551, 55 N.E. 577.](#)

The contention that the prosecution has not shown that the acts of the association were assented to by each defendant, and that therefore the findings of guilty cannot be sustained, is not well taken. The statement of facts shows three meetings of the association in 1902, at all of which the prices of soft coal were discussed and fixed, and it was ordered at each of such meetings that these prices should be sent out to the trade. The results of these meetings were sent to each defendant by their [\*\*31] secretary, and many of the defendants sent out circulars to their local agents containing the same information. All of the defendants were members of the association in 1902, and had been such for some years previous to that date. Each defendant was represented by its duly authorized representatives at one or more of these meetings. Each and every of the defendants obeyed the resolutions passed at these meetings. Under these circumstances, and under an unbroken line of authorities extending back for 200 years, it is now too late successfully to assert that each member of this association and conspiracy is not bound by the acts of all its fellows done in furtherance of the object to accomplish which the combination was formed. When a combination and conspiracy is shown, the law does not individualize. Responsibility rests upon each for the acts of his fellows which tend to advance the purposes of the combination. "When two or more conspire together to commit an actionable wrong, everything said, done or written by any one of them in execution or furtherance of their common purpose, is deemed to be so said, done and written by every one, and is a relevant fact as against each." [Hamilton v. Smith, 39 Mich. 222.](#) [\*\*32] [\*100] See also, [Lasher v. Little, 202 Ill. 551;](#) Cooley of Torts, 127; [U.S. v.](#)

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Cassidy, 67 F. 698; Spies v. People, 202 Ill. 551; Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924; Hawarden v. Coal Co., 111 Wis. 545, 87 N.W. 472; London v. Horn, 206 Ill. 493, 69 N.E. 526 (in which Allen v. Flood, 67 L. J. Q. B. 119, is disapproved).

Counsel for defendants say that the association did not fix prices for soft coal until after the passage of the Act of 1897, with its proviso relating to wages, and they interpose that proviso as a shield against this prosecution. There are two answers to this contention: *First* there is no evidence to show that the association or its members were moved to fix such prices and to decide who should handle their product by any sympathy for the workman, or by any desire to raise his wages, or with any intention of carrying this proviso into effect. It is true that at such meetings "discussions were had and resolutions passed respecting the subject of wages, transportation and prices" at which the defendants should sell their coal; but in none of the [\*33] resolutions adopted, nor in any of the circulars sent out is the question of wages referred to. It is well known that such corporations are not organized or run as eleemosynary institutions, and that benevolence is not a necessary element in the mining and sale of coal by corporate bodies. Hence it is not strange that the learned trial judge found the evidence in this record insufficient to acquit the defendants of the offense charged, on the ground that "the principal object or effect" of the association and of its acts "was to maintain or increase wages;" nor that we agree with him in that conclusion. The scope of the agreement, not the possible self-restraint of the parties to it, is the test of its validity. The parties to this combination had the power to raise the price of soft coal within the territory over which it operated. Cummings v. Union B. S. Co., 164 N.Y. 401, 58 N.E. 525; Craft v. McConoughy, 79 Ill. 346; Morris Run C. Co. v. Barclay C. Co., 68 Pa. 173. *Second.* The proviso never was the law. In The People v. Butler S. F. Co., 201 Ill. 236, 66 N.E. 349, the Supreme Court held it to be unconstitutional, "as being [\*34] an [\*101] unlawful discrimination in favor of the persons sought to be exempted by the amendment from the operation of the Act of 1891, as amended by the Act of 1893." The defendants cannot use a law "that never was" as a shield to protect them against liability for acts which are forbidden by law. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed." Norton v. Shelby Co., 118 U.S. 425, 442, 30 L. Ed. 178, 6 S. Ct. 1121.

The defendants assert that the trial court erred in overruling the motion to quash the indictment, and also in overruling the motion in arrest of judgment.

It is urged (1) that the indictment does not charge nor does the agreed statement of facts establish a criminal conspiracy at common law, and therefore counts 2 and 4, each of which alleges a common law offense, cannot be sustained; (2) that the indictment does not charge nor does the agreed statement of facts establish a criminal conspiracy under the law of 1874, and therefore counts 1 and 3, drawn over that statute, cannot be sustained; [\*35] and (3) that the fifth count of the indictment, which follows the wording of the Act of 1891, cannot be sustained because it does not allege (nor was it proved) where the defendants severally were incorporated; and because the form of the action should be debt, and not by indictment.

**HN2** If there be one count in this indictment sufficient to sustain the sentence and judgment of the court, it makes but little difference either to the People or to the defendants, in what manner the remaining counts are disposed of. Hazen v. Com., 23 Pa. 355. If there be one good count in the indictment, a general finding that the defendant is guilty will not be disturbed because the indictment contains other counts which are bad. Duffin v. People, 107 Ill. 113; Lyons v. People, 68 Ill. 271.

To determine the issue here presented it is necessary to ascertain the common law rule governing combinations intended to fix the price or to control the market of any necessary of life.

[\*102] In King v. Norris, 2 Kenyon's Notes of Cases, 300, decided in the King's Bench by that great common law judge, Lord Mansfield, it is said: "This was a motion for leave to file an information [\*36] against the defendants, who were separate proprietors of salt works at Droitwich, for a conspiracy to raise the price of salt there, by entering into an article, whereby they bound themselves, under a penalty of # 200, not to sell salt under a certain price, which exceeded the price then received for it. \* \* \* The articles were now cancelled and destroyed; but notwithstanding that, the court were unanimous for making the rule absolute; and Lord Mansfield declared, that if an agreement was made to fix the price of salt, or of any other necessary of life (which salt emphatically was) by

people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to show their sense of the crime, and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced. He mentioned an indictment upon one of the last home circuits against the bakers of the Town of Farnham for such an agreement."

In Mitchel v. Reynolds, 1 Peere Williams 181, 197 (decided in 1711), Parker, C. J., declared that "in all restraints of trade, where **[\*\*37]** nothing more appears, the law presumes them bad."

In State v. Buchanan, et al., 5 Harris & J. (Md.) 317, decided in 1821, the defendants were indicted in one count for an executed conspiracy to cheat and defraud the president, directors and company of the Bank of the United States, and in a second count for a conspiracy only to cheat and defraud the same parties. The defendants' demurrer was sustained by the trial court; whereupon the State took the case to the Court of Appeals by writ of error. Counsel for the State, in support of the propositions that conspiracy was an offense at common law, that the statute *de conspiratoribus*, passed in the thirty-third year of the reign of Edward I., did not introduce a new rule, but merely was **[\*103]** in affirmation of the common law, and that the *gravamen* of the offense consisted in the unlawful combination or confederacy to injure a third person, cited more than eighty English cases decided and text books published before the revolution; and *Buchanan*, Judge, after reviewing nearly of these authorities, finds by a course of decisions running through a space of more than four hundred years, without a single conflicting **[\*\*38]** adjudication, nine points clearly settled. Of these we cite, in effect, the following: That the offense of conspiracy is of common law origin, and is not restricted or abridged by the statute 33 Edward I.; that a conspiracy to do any act that is criminal *per se* is an indictable offense at common law; that an indictment will lie at common law \* \* \* for a conspiracy to do an act not illegal nor punishable if done by an individual, when done by the conspirators to effect a purpose which has a tendency to prejudice the public; that a conspiracy is a substantive offense and punishable at common law though nothing be done in execution of it--the conspiracy being the gist of the offense; that in a prosecution for a conspiracy it is sufficient to state in the indictment the conspiracy and the object of it, and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent. The learned judge then goes on to say (p. 352): "From all which it results that every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt **[\*\*39]** purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent, and makes no ingredient of the crime, and therefore need not be stated in the indictment."

In King v. Eccles, 1 Leach Grim. Cases, 274, the defendants were charged with a conspiracy by wrongful and indirect means to impoverish Booth, a tailor, and to hinder **[\*104]** and to prevent him from following his trade; but the acts done or intended to be done were not set out in the indictment. Upon this objection being made, the court declared that the offense did not consist in acts done or agreed to be done, but that the offense was the conspiracy and the object of it; and that therefore the acts need not be stated in the indictment, since the means adopted "were only matters of evidence to prove the charge and not the crime itself."

When our forefathers came to America they brought with them their rights and privileges as free men, and *per consequence* they also brought with them all the laws and customs of England **[\*\*40]** suitable to their new surroundings and necessary for the preservation of those rights and privileges. Such was the understanding and rule of the English colonists; and each state settled by them or by their descendants, in due time, and except as modified by constitution or statute, has so declared. [Boyer v. Sweet, 3 Scam. 119.](#) Our statute adopts the common law so far as the same is applicable to our society and institutions, and all the statutes or acts of the British Parliament made in aid and to supply the defects of the common law prior to the fourth year of James I. (except three chapters specifically mentioned) which are of a general nature and not local to that Kingdom. R. S., Hurd, ch. 28. Hence we must look to the acts of Parliament enacted and to the judicial decisions handed down prior to the fourth year of James I. for evidence of what the common law is. An examination of them shows that the points made and the conclusion reached by the learned judge in [The State v. Buchanan, supra](#), are clear and correct statements of the common law concerning conspiracy as it existed at the time from which we adopted the same.

In [Smith v. People, 25 Ill. 9](#), [\[\\*\\*41\]](#) the defendants were indicted and convicted of a conspiracy to seduce a minor female. The indictment did not set out the means resorted to. Upon error to the Supreme Court it is said: "To attempt to define the limit or extent of the law of conspiracy, as deducible from the English decisions, would be a [\[\\*105\]](#) difficult, if not an impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. In the former case it is not necessary to set out the means used, while in the latter it is, as they must be shown to be unlawful." To the assertion of counsel for the defendants that the term "unlawful" means "criminal," the court said that by the common law governing conspiracies, the term is not so limited; and that it was not necessary in such a case to show that the means to be used by the conspirators were unlawful or criminal.

To the proposition that this offense was but a common law offense, and is not punishable in Illinois where we have a criminal code defining most criminal offenses and prescribing their punishment, [\[\\*\\*42\]](#) the court answered that our criminal code prescribes punishment for offenses not enumerated, which can mean nothing other than common law offenses; thus showing conclusively that it was not the intention of the legislature to repeal that portion of the common law by implication; and reference is made to [Johnson v. The People, 22 Ill. 314](#), where that question is decided.

[HN3](#)<sup>↑</sup> "Where the object (of the conspiracy) is unlawful, the means by which it is to be accomplished are not material ingredients in the offense; and therefore in such a case it is never necessary to set them forth. The offense is complete the moment the conspiracy is made, whether any acts be done in pursuance of it or not. Such acts form no part of the offense, and the statement of them in the indictment is but surplusage." [Hazen v. Com., 23 Pa. 355](#). See also, [State v. Noyes, 25 Vt. 415](#).

In [Thomas v. People, 113 Ill. 531](#), which was an indictment for a conspiracy to wrongfully obtain the goods of another, it was urged that the indictment was insufficient because it failed to set out the means used by the defendants. The court said: "The first count, under the ruling in [\[\\*\\*43\]](#) this state, whatever may be decided elsewhere, is clearly good. To obtain goods by false pretenses is, to every apprehension, [\[\\*106\]](#) an illegal act; and the rule here is, where the act to be accomplished by the conspiracy is illegal, it is unnecessary to specify the means by which it was intended to be accomplished."

"The offense of conspiracy was complete at common law on proof of the unlawful agreement. It is not necessary to allege or prove any overt act in pursuance of the agreement." [People v. Sheldon, 139 N.Y. 251, 34 N.E. 785](#). "The word illegal used in the statute is synonymous with unlawful, and means contrary to any law, whether criminal or civil." [O'Donnell v. People, 110 Ill. App. 250, 263](#), and authorities cited. See also, [State v. Parker, 43 N.H. 83](#); Ry. v. Warburton L. R., 1 C. C. 276; Bishop's Directions and Forms, sec. 283; [Bishop v. Am. P. Co., 157 Ill. 284, 41 N.E. 765](#). Every misdemeanor is a crime. [Van Meter v. People, 60 Ill. 168](#).

Counsel for defendants cite authorities from other jurisdictions to show that the word "illegal" as used in the statute means "criminal" or "unlawful" [\[\\*\\*44\]](#) as distinguished from "void" or "non-enforceable." Such authorities are entitled to great consideration as the settled conclusions of learned men upon questions which they have seriously considered, but they are not to be followed by us when such conclusions are adverse to the decisions of our Supreme Court, since the latter are final and are binding upon us.

From what has been said it appears that the combination shown in the statement of facts and found by the trial court to exist in this case was and is forbidden and punishable by the common law. Such a combination has a tendency to diminish production, to limit competition, and to enhance prices. The defendants are not aided by the fact, if it be a fact, that the prices fixed by the association were fair and reasonable, ([Gibbs v. McNeeley, 118 F. 120](#), and cases cited; [Harding v. Am. Glucose Co., 182 Ill. 551, 55 N.E. 577](#); [People v. Milk Exchange, 145 N.Y. 267, 39 N.E. 1062](#);) or that the association had not in fact advanced the price of coal. That policy may not have been necessary to crush competition. [Richardson v. Buhl, 77 Mich. 632, 43 N.W. 1102](#); [U.S. v. Freight Ass'n, 166 U.S. 290](#); [\[\\*\\*45\]](#) State v. Standard Oil Co., 49 Ohio 186.

[\[\\*107\]](#) [HN4](#)<sup>↑</sup> "All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the necessities of life, are monopolies, and ought to receive the condemnation of all

courts." *Richardson v. Buhl, supra*; see also, *Arnot v. Pittston & E. C. Co.*, 68 N.Y. 558; *India B. Co. v. Kock*, 14 La. Ann. 168.

The first count of the indictment is based upon section 46 of the Criminal Code. It plainly sets out a combination and conspiracy upon the part of the defendants wrongfully, fraudulently and maliciously to regulate, and fix the price at which coal should be sold in the State of Illinois. The charge follows the wording of the Act so closely that the defendants cannot consistently complain that they were Surprised on the trial, or were unable to prepare for their defense by reason of any uncertainty or want of particularity in that regard. Further strictness in pleading is unnecessary. *Cannady v. People*, 17 Ill. 158; *Williams v. People*, 67 Ill. App. 344; *Cole v. People*, 84 Ill. 216.

But it is said that [\*\*46] a criminal intent upon the part of the defendants is not alleged in this count; that such intent is material, and therefore the count, lacking this allegation, is fatally defective. This contention is based upon the words "with the fraudulent and malicious intent," which appear in the first part of the section. Five separate offenses are named in this section. The first, "to injure the person, character, business or property" of another, may or may not be a misdemeanor. That depends upon the intention of the accused. Under certain conditions it is admissible and not unlawful to thus injure another. Hence when that offense is charged the intent of the defendant is material and must be alleged and proved. Bishop's Directions & Forms, sec. 301. The remaining four offenses are in themselves illegal and criminal, and have always been so at common law. *HN5*<sup>↑</sup> If a conspiracy to do an illegal act be set forth in an indictment, the charge is complete without the addition of words alleging a criminal intent in the doing of the act. In stating such an [\*108] offense the criminal intent appears *prima facie* in the statement of the act itself. 1 Bish. N. Crim. Proc., sec. 521, pars. 3 and 4.

[\*\*47] But if such intent should be alleged, the count sets forth that the act was done "unlawfully, fraudulently, maliciously, wrongfully and wickedly," thus clearly charging the intent of the defendants in the formation of the conspiracy and in the objects for which it was created. The terms of the statute are "wrongfully and wickedly." An indictment which alleges that the conspiracy was thus entered into is good, even in those cases where the object for which the combination was formed was not unlawful until forbidden by the statute. *Ulery v. Chicago L. S. Ex.*, 54 Ill. App. 233. It follows that this count is good if section 46 is still in force. It is not asserted that this section is expressly repealed, but it is said that it is abrogated and superseded by the Act of 1891 by implication. The rule is that *HN6*<sup>↑</sup> when there is a clear repugnance between two laws, and the provisions of both cannot be carried into effect, the latter law must prevail as the last expression of the legislative will. *Sullivan v. People*, 15 Ill. 233; *Devine v. Board of Commissioners*, 84 Ill. 590. Also, *HN7*<sup>↑</sup> if a subsequent statute revises the whole subject of a former one, and is intended [\*\*48] as a substitute for it, it operates as a repeal of the former, although it contains no express words to that effect. *People v. Town of Thornton*, 186 Ill. 162, 57 N.E. 841. Repeals by implication are not favored. Had the legislature thought section 46 covered the entire ground of conspiracy relating to injuries of the public trade, they would not have passed the Anti-Trust Act of 1891. Had they thought that the latter Act covered every offense provided for in section 46, we would expect them to repeal the latter section in express words. This they did not see fit to do. Where the legislature neglects to act in such case the courts are slow to declare the first law to be abrogated and superseded by the second. We do not think there is such a repugnancy between these two acts as will warrant us in deciding that section 46 stands repealed. When the common law and a [\*109] statute differ, the common law gives place to the statute only where the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. Black. Com. 89.

But if it were true that section 46 is repealed by the Act of 1891, the third count sets up [\*\*49] the same facts as are contained in the first count, with the conclusion that they are "contrary to law." The first count is drawn over section 46, while the third count is framed at common law. If the facts charged in these counts are sufficient, and we hold that they are, then it is immaterial whether section 46 is or is not in force. The defendants must respond to one or the other of these two counts.

Counsel seem to infer that because certain conspiracies are legislated against, that the common law concerning conspiracies is abolished in this state. However this might be did our Criminal Code cover the *entire* ground of conspiracy, it is clear that it does not. That a conspiracy to commit any felony is indictable at common law was never questioned. This is also true of many misdemeanors. The adoption of a statute with reference to a crime does not abolish the doctrines and practice of the common law in relation thereto so far as that crime is not covered by

the act. Wherever the statute has not in express words defined the crime and fixed the punishment, the common law remains in full force and vigor; and if it be abated by statute, when that statute is repealed it springs up [\*\*50] anew, ever ready to protect the law-observing citizen from the evil designs of the law breaker. *People v. Buchanan, 5 H. & J. 317, supra.* It cannot be supposed that by such repeal the lawmaking power intended to extend perfect immunity thereafter to those who should commit that crime. *State v. Rollins, 8 N.H. 550; State v. F. F. Company, 49 N.H. 240.* But we need not go so far as this argument implies. **HN8** Where the statute is not repugnant to the common law, the latter is not abrogated, in the absence of express words, or of affirmative implication repealing the common law.

"It is every-day practice in the criminal courts to proceed [\*110] against offenders, either under a statute or at the common law, as the prosecuting power elects. Even where an indictment is meant to be drawn on a statute, if it proves defective as such, yet is good at the common law, it stands--the court rejecting the concluding words, 'against the form of the statute' as surplusage." Bishop on Stat. Crimes, sec. 164, also notes to same.

In *State v. Norton, 3 Zab. (N.J.) 33,* where a conspiracy statute did not contain a clause repealing the common law, it was held that [\*\*51] the common law offense of conspiracy is not abolished by such statute, but that every conspiracy which was indictable at common law before the passage of the act is still indictable. That the law-making power did not intend to do away with common law conspiracies when it passed section 46, is shown in the latter part of the section, providing punishment, which reads, "and every such offender \* \* \* and every person convicted of conspiracy at common law, shall be imprisoned," etc. This statute is either declaratory of the common law, or it is in addition thereto. In either case, it leaves the common law in full force outside of the express provisions of the act.

The contention that the indictment should allege and the facts prove that the defendants were incorporated under the laws of this state, or under the laws of some other state or country, for the purpose of doing business in this state, is answered by the words of the statute. The clear intention of the phrase "any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state," is to include all corporations, wherever created. Hence the place of organization [\*\*52] is immaterial, and therefore allegation or proof thereof is unnecessary. The "transacting or conducting any kind of business in this state" must be read in the light of the object of the statute, which is to prevent the forming of pools and combinations in this state for the purposes named in the Act by any and all corporations, wherever organized. To hold that the corporation created outside of this state, without being given specific power to do business [\*111] in this state, may, by virtue of the lack of that specific power, come here and violate the statute and be immune from punishment, is a legal absurdity which is not to be tolerated. Sections 7a and 7b of the Act of 1891 show that what is referred to is the doing of business in this state. "It is the settled doctrine of this state, established by many decisions of this court, that foreign corporations do not come into this state as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations formed in this state, and have no other or greater powers." *Harding v. American G. Co., 182 Ill. 551, 55 N.E. 577.*

Counsel for defendants say [\*\*53] that any one may lawfully fix the price at which he will sell his product, or he may lawfully refuse to sell it at any price. This is true. The injury to the public, if any, from the acts of an individual are infinitesimal; and in the long run they correct themselves. Hence the law places few restrictions upon a man in the management of his own affairs. But "men can often do by the combination of many, what severally no one could accomplish, and even what when done by one would be innocent." *Morris Run v. Barclay, supra.* Whenever the act to be done by such a combination necessarily tends to prejudice the public or to oppress individuals, the combination has always been held to be criminal. "There is a potency in numbers when combined, which the law cannot overlook where injury is the consequence." *Morris Run v. Barclay, supra.* See also, *People v. Chicago G. T., 130 Ill. 268, 22 N.E. 798; State v. Burnham, 15 N.H. 396;* Com. v. Carlisle, Brightley (Pa.) 40; Northern Securities Co. v. U. S., Supreme Court of the United States, opinion delivered March 14, 1904, and cases therein cited.

Defendants say that an action of debt for [\*\*54] the recovery of the penalty prescribed by the statute, and not an indictment, is the proper remedy against a corporation charged with a violation of the Anti-Trust Law of 1891. Section 1 of that Act declares that if any corporation, person, partnership or association shall enter into a pool or combination to regulate [\*112] or fix the price of any article of merchandise or commodity, etc., he or they shall be

deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act. It follows that the doing of the forbidden act is a criminal offense, and it is expressly declared that the prosecution therefor shall be by indictment.

It is true that section 7 says that "the fines hereinbefore provided for *may* be recovered in an action of debt." The word "may" in this section is used in its permissive sense. To hold otherwise would violate the meaning of the words "and be subject to indictment" contained in section 1. It is true that "may" oftentimes means "must;" but it always retains its primitive meaning unless common fairness and the rights of parties litigant demand that it be supplanted by "must;" or unless it is used in [\*\*55] a sentence which creates an exception in favor of the public. In this statute its meaning is plain. By its use the law-making power intended to give the people an election of remedies. [Fowler v. Pirkins, 77 Ill. 271.](#)

A pool or trust is a combination having the intention and power, or tendency, to monopolize business, or to control production, or to interfere with trade, or to fix and regulate prices, and the like. The primary object of a pool or trust is to secure a monopoly, since from that point of advantage it can destroy its competitors, and can control production, sales and prices. However, in practice, a pure monopoly, except in an extremely limited territory, is never reached. Nor does the law call for proof of monopoly in order to declare such combinations unlawful. The statement of facts herein shows that this association is wide in its scope, general in its control of the production and sale of soft coal over the greater part of Northern Illinois, and injurious in its effects upon the consumer and the general public. These things made it an unlawful combination, notwithstanding its control of the product of the market was not exclusive. [Cummings v. Union B. S. Co., 164 N.Y. 401, 58 N.E. 525.](#) [\*\*56]

The statute of 1874 says: "If any two or more persons [\*113] conspire," etc. The Act of 1891 declares, "If any corporation \* \* \* shall create, enter into or become a member of or a party to any pool, trust," etc. Under these statutes it is obviously immaterial whether or not the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of territory covered by the combination; but does depend upon the existence or the non-existence of a tendency to injure the public. [Nester v. Cont. Brew. Co., 161 Pa. 473, 29 A. 102.](#)

In [More v. Bennett, 140 Ill. 69, 29 N.E. 888,](#) it is held as follows: "True, the restraint is not so far-reaching as it would have been if all of the stenographers in the city had joined the association, but so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection. \* \* \* We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who [\*\*57] may wish to obtain the services of law-stenographic reporters."

"To render the contract void it is not necessary that it should create pure monopoly. It would seem that the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply, and to such an extent as to injuriously affect the interests of the public or the interests of a particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restriction imposed by the contract." [Texas Standard O. Co. v. Adoue, 83 Tex. 650, 19 S.W. 274.](#)

In [Foss v. Cummings, 149 Ill. 353, 36 N.E. 553,](#) twelve persons and firms formed a combination to force up the price of corn upon the Chicago market. With this object in view they purchased large amounts of May corn and withheld it from the market. The tendency of this action was to advance the price of one of the necessities of life, and to compel [\*114] consumers to pay an unnatural price therefor. The adventure proved to be a losing one. Appellants brought assumpsit [\*\*58] against others of the combination to recover moneys paid out, etc., in the transaction. Upon the trial the nature and object of the combination were disclosed. The trial court held the law to be that if the combination was entered into for the purpose of advancing the price of corn above what it would be if left free from manipulation, appellants had no right of recovery. The Supreme Court, upon appeal, declare this to be the law. They cite 9 Am. & Eng. Ency., 895, with approval. "All compacts between merchants, speculators or any class of men to elevate or depress the market are injurious to the public interest and in restraint of trade. When such a

114 Ill. App. 75, \*114 L<sup>A</sup> 904 Ill. App. LEXIS 387, \*\*58

purpose is apparent in a contract, it strikes the agreement with nullity. Such a combination of dealers is nothing less than a conspiracy against trade, entered into for selfish purposes, and tending to make the poor poorer and the rich richer. Whether the design is to bring down the price of any commodity to a point below its value in a fair and open market, or to raise it above its true worth, the illegality of the combination is the same. Such designs will not be furthered by the courts, though there may be circumstances under which [\*\*59] the object of such a contract does not sufficiently appear to expose the illegality. If the true character is known, the contract will be held void." The court then says: "It makes no difference that the agreement is only in partial restraint of trade. If the public is injuriously affected (and that is necessarily so when the combination tends to increase the price of a commodity in general use), it is illegal."

"Again, all the authorities agree that in order to vitiate a contract or combination, it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." [U.S. v. Knight, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249](#), cited and followed in [Addyston P. & S. Co. v. U. S., 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96](#).

**HN9** [↑] "To vitiate a combination such as the (anti-trust) Act of [\*115] Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or [\*\*60] international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition." Northern Securities Co. v. U. S., Supreme Court of the United States, *supra*.

In [Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173](#), the combining companies did not include all the coal producers of the district in which they operated, and yet it was held that as the tendency of the association was to prejudice the public or to oppress consumers by unjustly subjecting them to the power of the confederates, the combination was criminal.

In the city of Memphis the master plumbers formed an association, one of the by-laws of which required each member to pay to the association a certain penalty upon all work done in competition with another member. Under this by-law Bailey, a member, owed the association \$ 444, for which it brought suit. It was shown that the demand had no other basis than that by-law. Hence the question arose, is that by-law valid or invalid? The court held that it was destructive of free and natural competition among members, tended to the arbitrary and unreasonable increase of prices [\*\*61] to customers, and therefore was contrary to public policy and void under the common law. The court add: "It is not the number of persons participating in the by-law, or the extent of the territory included, but the injury to the public in that territory, however restricted, that characterizes the interruption of trade as illegal." [Bailey v. Master Plumbers Association, 103 Tenn. 99, 52 S.W. 853](#).

The majority, but not all, of the manufacturers of salt in the valleys of the Muskingum and Hocking rivers entered into an association, the objects of which were to control the prices and grades of salt made by them. Other salt makers sold their product in the localities where the association [\*116] operated. Suit was brought to enforce the association agreement. The defense was that the agreement was unlawful. The court said: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." [Salt Co. v. Guthrie, 35 Ohio St. 666, 672](#). [\*\*62]

"All the cases, ancient and modern, agree that **HN10** [↑] a combination, the object of which is to prevent general competition and to control prices, is detrimental to the public, and consequently unlawful." [People v. N. River S. F. Co., 2 L.R.A. 40](#).

The combination in this case threatened a practical monopoly in an article necessary to the home comfort and to the business success of the individual. Its combined weight and power compelled the consumer to comply with its demands. Its acts tended to increase the price of an article of prime necessity in general use. Such a combination is forbidden by the common law and by the statute as being a conspiracy in restraint of trade.

114 Ill. App. 75, \*116 Ill. App. LEXIS 387, \*\*62

Finding no reversible error in this record, the judgment of the Criminal Court as to each of the plaintiffs in error is affirmed.

*Affirmed.*

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## In re Bell

Supreme Court of Kansas

January, 1904, Decided ; May 7, 1904, Filed

No. 13,750.

**Reporter**

69 Kan. 855 \*; 76 P. 1129 \*\*; 1904 Kan. LEXIS 360 \*\*\*

In re JOHN BELL, Petitioner.

**Prior History:** [\*\*\*1] Original proceeding in habeas corpus. Opinion filed May 7, 1904. Petitioner remanded.

**Disposition:** Case remanded.

### **Core Terms**

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questions, due process of law, guilty of contempt, propounded, adjudged, deprive

**Counsel:** Rossington, Smith & Histed, J. T. Pringle, and R. B. Gilluly, for petitioner.

C. C. Coleman, attorney-general, Edwin A. Austin, Otis E. Hungate, and Thompson, Springer & Price, for respondent.

### **Opinion**

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[\*\*1129] [\*855] *Per Curiam*: This is an original proceeding in *habeas corpus*. On the 8th day of September, 1903, the petitioner, John Bell, who had appeared as a witness before the district court of Shawnee county, pursuant to subpoena, refused to answer certain questions in a proceeding or investigation in that court concerning the existence of combinations of coal operators in violation of the "antitrust law" (Laws of 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874), and was adjudged guilty of contempt and [\*856] committed to the county jail of Shawnee county until he should be willing to answer the questions propounded to him, but not beyond a period of thirty days.

Petitioner charges that he is illegally restrained of his liberty by the sheriff of Shawnee county for the reason that chapter 265 of the Laws of 1897, under which this proceeding was had, is [\*\*\*2] in violation of the fourteenth amendment to the federal constitution, in this, that it deprives one of liberty without due process of law; that it takes property without due process of law; and that it denies the equal protection of the law; all of which provisions are contrary to the guaranties of said constitutional amendment. It is also charged that to require petitioner to answer the questions propounded to him, his refusal so to do having resulted in his being adjudged guilty of contempt, was to deprive him of the rights, privileges and immunities guaranteed by section 10 of the bill of rights. This case arises out of the same proceeding, and involves the same questions, as *The State v. Jack*, ante, page 387, and that decision is decisive of this one.

The petitioner should have answered the questions asked him upon the inquiry, and, hence, he will be remanded.

## **State v. Jack**

Supreme Court of Kansas

January, 1904, Decided ; May 7, 1904, Filed

No. 13,774.

**Reporter**

69 Kan. 387 \*; 1904 Kan. LEXIS 262 \*\*; 76 P. 911

THE STATE OF KANSAS v. JOHN D. JACK.

**Prior History:** [\*\*1] Appeal from Shawnee district court; Z. T. HAZEN, judge. Opinion filed May 7, 1904. Affirmed.

**Disposition:** Judgment affirmed.

### **Core Terms**

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anti-trust, immunity, subpoenaed, combinations, violations, questions, criminal prosecution, district court, witnesses, contempt, immunity afforded, commerce, courts, trusts, fines, coal, constitutional privilege, interstate commerce, legislative power, imprisonment, forfeitures, deprived, pools, violation of the act, due process of law, provide by law, prosecutions, disclosure, punish

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Witnesses > Subpoenas > Challenges & Modifications

Governments > Courts > Court Personnel

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Civil Procedure > Sanctions > Contempt > General Overview

Criminal Law & Procedure > ... > Witnesses > Subpoenas > Service of Subpoenas

Governments > Courts > Clerks of Court

#### **HN1[] Subpoenas, Challenges & Modifications**

Section 10 of ch. 265 of the Act of 1897 states that the several district courts of Kansas and the judges thereof shall have jurisdiction to cause to be issued by the clerk of said court subpoenas for witnesses as may be named in the application of a county attorney or the attorney-general, and to cause the same to be served by the sheriff of the county where such subpoena is issued. Such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have

of the violations of any of the provisions of the act. Any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpoenaed and examined shall not be liable to criminal prosecution for any violation of the act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpoenaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the attorney-general, and he shall, in the proper courts, at once prosecute such violator or violators of the act as the testimony so taken shall disclose. Witnesses subpoenaed as provided for in § 10 shall be compelled to attend from any county in the state.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Courts > Authority to Adjudicate

## **HN2**[ **Equal Protection, Nature & Scope of Protection**

A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal constitution. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states. Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Sanctions > Contempt > General Overview

## **HN3**[ **Jurisdiction, Jurisdictional Sources**

Gen. Stat. § 1923 (1901) gives to district courts general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law. Gen. Stat. § 1924 (1901) provides that district judges shall have and exercise such power in vacation or at chambers as may be provided by law, and shall also have power to punish for contempt in open court or at chambers.

Civil Procedure > Sanctions > Contempt > General Overview

## **HN4**[ **Sanctions, Contempt**

The right of a district court and district judges to punish for contempt, without a jury, is well recognized.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Sanctions > Contempt > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

#### **HN5** Methods of Investigation, Subpoenas

The procedure under § 10 of ch. 265 of the Act of 1897 is an investigation, or preliminary proceeding, and can result in no final judgment, except in a proceeding for contempt against a recalcitrant witness, unless it be the result of a regular judicial trial, conducted in the manner provided by statute. It is a valid exercise of judicial power, and the procedure is due process of law.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Manufacture > General Overview

Evidence > ... > Competency > Disability > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > Penalties

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

Criminal Law & Procedure > Sentencing > Fines

Evidence > Privileges > Self-Incrimination Privilege > General Overview

#### **HN6** Alcohol Related Offenses, Manufacture

Legislative bodies possess the power to grant amnesty to witnesses and compel them to give testimony against themselves. When the testimony sought cannot, by reason of an immunity statute, be used as a basis for, or in aid of, a prosecution which might result in fine or imprisonment, or involve a penalty or forfeiture, the privilege cannot be claimed. Immunity statutes are given a reasonable construction, and when it is apparent to the court that a person is fully protected from the effect of his testimony he should be required to testify, even though it may show him guilty of a criminal offense.

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > Privileges > Self-Incrimination Privilege > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

#### **HN7** Witnesses, Presentation

The protection afforded the witness by the constitution is that of not being a witness against oneself. If the act of which inquiry is made does not constitute a crime, or, if made a crime, it has no punishment prescribed for its violation, or be no longer punishable, or if the act be barred by the statute of limitations, with no action pending, or the law has been repealed, or if the witness has been tried for the offense and acquitted, or convicted and satisfied the sentence imposed by the law, he can claim no exemption from answering questions relating thereto. Likewise the witness is deprived of claiming this exemption from testifying if the legislature, by the enactment of an immunity statute, has provided that he shall not be liable to criminal prosecution for any violation of the act about which he

may testify, nor his evidence used against him in any criminal proceeding. As to prosecutions for those crimes to which his evidence relates, under the immunity act the witness is in the same position, in so far as there is a possibility of using his evidence against him, as though there were no such crimes provided by statute.

Civil Procedure > Sanctions > Contempt > General Overview

Criminal Law & Procedure > Sentencing > Fines

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

#### **HN8** **Sanctions, Contempt**

Section 5 of ch. 265 of the Act of 1897 provides, as a punishment for one convicted of a violation of the act, a fine of not less than \$ 100 nor more than \$ 1,000, and confinement for not less than 30 days nor more than six months. Sections 5 and 6 provide a penalty of \$ 100 per day for each and every day such violation shall continue after conviction. It is further provided by § 5 that every person, company, or corporation who shall violate any of the provisions of the act, be denied the right of, and be prohibited from, doing any business within Kansas. The last provision contemplates the prohibiting of the continuance of, or engagement in, business in the state only when such business is in violation of the act. It does not prohibit persons from continuing or engaging in any lawful business in the state, not conducted or carried on in violation of the act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN9** **Public Enforcement, State Civil Actions**

Section 7 of ch. 265 of the Act of 1897 provides that in any civil action, there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the anti-trust act.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > Privileges > Self-Incrimination Privilege > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN10** **Procedural Due Process, Self-Incrimination Privilege**

The immunity afforded by the anti-trust act is coextensive with the constitutional privilege against self-incrimination. Such immunity is sufficient, and a witness, thus protected, cannot invoke the constitutional privilege of silence.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **[HN11](#)[] US Department of Justice Actions, Civil Actions**

The United States has no jurisdiction over combinations, pools, and trusts, relating to commerce wholly within a state, nor does it acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a state by reason of the fact that the combination covers and regulates commerce which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States; in so far as they interfere with commerce wholly within the state, they are subject only to the jurisdiction of the state.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

### **[HN12](#)[] Preliminary Considerations, Federal & State Interrelationships**

Where two governments like the United States and a state exercise their authority within the same territory, and over the same citizens, the legislation of that which, as to certain subjects, is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them, unless such construction be absolutely demanded.

## **Syllabus**

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SYLLABUS BY THE COURT.

1. ANTI-TRUST LAW -- *Provision for Preliminary Examination of Witnesses Approved*. A proceeding before the district court or judge thereof upon the written application of the county attorney or attorney-general, under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, § 7873), to subpoena witnesses to testify of their knowledge of violations of provisions of the act known as the "anti-trust law," is of the nature of an investigation, or preliminary proceeding, and is a valid exercise of judicial power, the procedure being "due process of law," within the meaning of the [\*fourteenth amendment to the federal constitution\*](#).
2. ANTI-TRUST LAW -- *Exemption Provision of Bill of Rights Held Not Available*. The exemption provided by section 10 of the bill of rights (Gen. Stat. 1901, § 92), that "no person shall be a witness against himself," cannot be claimed by a witness when, by the terms of a statute, the immunity afforded is coextensive with the constitutional privilege of silence.
3. ANTI-TRUST LAW -- *Immunity Provision [\*\*2] Held Coextensive with Constitutional One*. The immunity afforded by section 10 of the [\*\*antitrust law\*\*](#) of 1897 to a witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of that law is coextensive with the constitutional privilege that "no person shall be a witness against himself."
4. ANTI-TRUST LAW -- *Possibility of Prosecution under Federal Anti-trust Law Will Not Excuse Witness from Testifying*. A witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of the anti-trust law cannot refuse to give his evidence on the ground that the immunity provided by section 10 of the act does not afford protection against the use of his evidence in a prosecution against him for violations of the federal [\*\*antitrust law\*\*](#).
5. ANTI-TRUST LAW -- *Prohibition of Doing Further Business in the State Construed*. The provision of section 5 of the anti-trust law of 1897, that every person, company or corporation violating any of the provisions of the act be denied the right of, and prohibited from, doing any business within the state, contemplates the prohibiting of the continuance of, or the engagement in, business only when such [\*\*3] business is in violation of the act.

6. ANTI-TRUST LAW -- *Provision of Defense in Civil Action Construed.* The provision of section 7 of the anti-trust law of 1897, that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has, within one year, been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to, and growing out of, transactions prohibited by the act.

7. ANTI-TRUST LAW -- *Law Held Not in Contravention of Fourteenth Amendment to the Federal Constitution.* The anti-trust law of 1897 is held not to be in contravention of the provisions of the [fourteenth amendment to the constitution of the United States](#), but to be a valid exercise of legislative power.

**Counsel:** C. C. Coleman, attorney-general, Otis E. Hungate, county attorney, Edwin A. Austin, and Thompson, Springer & Price, for The State.

Rossington, Smith & Histed, J. T. Pringle, and R. B. Gilluly, for appellant.

**Judges:** ATKINSON, J. All the Justices concurring.

**Opinion by:** ATKINSON

## **Opinion**

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[\*389] The opinion of the court was delivered by

ATKINSON, J.: This is an appeal by John D. Jack from a judgment of [\*4] imprisonment for contempt by the district court of Shawnee county. Appellant, as a witness, refused to answer certain questions in a proceeding, or investigation, in that court concerning the existence of unlawful combinations of coal-operators, and was adjudged guilty of contempt.

On September 3, 1903, the attorney-general and the county attorney of Shawnee county, proceeding under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, § 7873), filed in the district court of Shawnee county their verified application, informing the court of the existence of unlawful combinations of persons engaged in the operation of coal-mines in Osage county, for the purpose of fixing the price of coal at the mines and the price to be charged to purchasers. It was therein averred that the members of these combinations met monthly in the county of Shawnee and fixed minimum prices to be charged for coal, and agreed that they would not sell it for less than such minimum prices, and that these agreements were carried out and executed by the members. Among others named in said application as having knowledge of the existence of these combinations was appellant, and for him it was therein asked that [\*5] a subpoena issue. The district judge awarded subpoenas upon the application. The court denied the motion of appellant to quash the subpoena issued, and he thereupon appeared in court as a witness, and was asked the following questions:

"Ques. Do you know of any meetings of the operators of Osage county being held in this city [Topeka] at intervals during the last year?

[\*390] "Q. I will ask you if you have any knowledge of a combine's or an agreement's being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of Kansas?

"Q. Have you any knowledge of any meetings of coal-operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

"Q. Do you know of any agreement's having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?"

Appellant refused to answer each of the foregoing **[\*\*6]** questions, assigning the following as his reason therefor:

"I am engaged in operating a coal-mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpoenas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce. I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that, in answering the questions and in submitting myself to an examination as a witness, I may incriminate myself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures, and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights."

The anti-trust law (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874) is vigorously assailed. It is **[\*391]** charged that the act is in violation of the fourteenth amendment to the federal constitution, in that it deprives a person of liberty and property without **[\*\*7]** due process of law, and denies him the equal protection of the law. It is also charged that the requiring of appellant to answer these questions (his refusal so to do being the cause of his imprisonment for contempt) deprives him of the rights, privileges and immunities guaranteed by section 10 of the bill of rights (Gen. Stat. 1901, § 92). The motion to quash the subpoena raised the question whether the proceedings upon the application and the issuing of subpoenas thereunder, as provided by section 10 of the act of 1897, were "due process of law," within the meaning of the fourteenth amendment to the federal constitution. **HN1**<sup>↑</sup> Said section reads:

"The several district courts of this state and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause shown and upon written application of the county attorney or the attorney-general, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application of a county attorney or the attorney-general, and to cause the same to be served by the sheriff of the county where such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge **[\*\*8]** at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpoenaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpoenaed shall be taken down by the reporter of said **[\*392]** court, and shall be transcribed and placed in the hands of the county attorney or the attorney-general, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpoenaed as provided for in this section shall be compelled to attend from any county in the state."

It is urged by appellant that the proceeding provided by this section is not judicial in its character, and is not "due process of law," in that it is not founded upon complaint, information, or indictment. District courts are expressly **[\*\*9]** created by the constitution, and therein given such jurisdiction as may be provided by law (Const., § 6, art. 3), its extent and practice being left to the legislature. Judges of the district courts are expressly created by the constitution, and therein given such jurisdiction at chambers as may be provided by law (Const., § 16, art. 3), its extent being left to the legislature.

The wide scope given to the states in the matter of their judicial tribunals and the character of their procedure, as recognized by the federal government, was clearly set forth in the opinion by Mr. Justice Brewer, in the case of Brown v. New Jersey, 175 U.S. 172, 175, 20 S. Ct. 77, 44 L. Ed. 119, where it was said:

**HN2**<sup>↑</sup> "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal constitution. ( Ex parte Reggel, 114 U.S. 642, 5 S. Ct. 1148, 29 L. Ed. 250; Iowa Central Railway v. Iowa, 160 id. 389, 16 S. Ct. 344, 40 L. Ed. 467; Chicago, Burlington & Quincy Railroad v. Chicago **[\*\*10]**, 166 id. 226, 17 S. Ct. 581, 41 L. Ed. 979.) 'The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same **[\*393]** laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a

right of trial by jury, and on the other side no such right. Each state prescribes its modes of judicial proceeding.' *Missouri v. Lewis*, 101 U.S. 22, 31, 25 L. Ed. 989. . . .

"A perfectly satisfactory definition of due process may perhaps not be easily stated. In *Hurtado v. California*, 110 U.S. 516, 537, 4 S. Ct. 111, 121, 28 L. Ed. 232, Mr. Justice Matthews, after reviewing previous declarations, said: 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.' In *Leeper v. Texas*, 139 U.S. 462, 468 11 S. Ct. 577, 579, 35 L. Ed. 225, Chief Justice [\*\*11] Fuller declared 'that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied.' "

**HN3** Section 1923, General Statutes of 1901, gives to district courts general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law. Section 1924 provides that district judges "shall have and exercise such power in vacation or at chambers as may be provided by law, and shall also have power . . . to punish for contempt in open court or at chambers." **HN4** The right of the district courts and district judges to punish for contempt, without a jury, is well recognized. (*In re Millington, Petitioner, &c.*, 24 Kan. 214; *The State, ex rel., v. Durein*, 46 id. 695, 27 P. 148; 7 A. & E. Encycl. of L., 2d ed., 66; *Interstate Commerce Comm. v. Brimson*, 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047.) By section 10 of the act of 1897 the legislature conferred upon district **[\*394]** courts and judges thereof the power to order the issue of subpoenas for witnesses, upon written application, and to compel them to attend and testify, with **[\*\*12]** authority to punish as for a contempt upon a refusal so to do. In the case of *Interstate Commerce Comm. v. Brimson, supra*, the court upheld a somewhat analogous provision of the interstate-commerce act wherein the circuit court is given power to entertain an application of the commission, issue subpoenas, examine witnesses, and commit for contempt where a witness refuses to testify. **HN5** The procedure under section 10 is an investigation, or preliminary proceeding, and can result in no final judgment, except in a proceeding for contempt against a recalcitrant witness, unless it be the result of a regular judicial trial, conducted in the manner provided by statute. It is a valid exercise of judicial power, and the procedure is "due process of law."

The case of *The State v. Smiley*, \* [65 Kan. 240, 69 P. 199](#), was an appeal from a judgment of conviction for a violation of this law. It was there charged that the act imposed such limitations upon freedom of contract as to constitute a deprivation of the right of property, contrary to the [fourteenth amendment to the federal constitution](#). This court held that it did not conflict with the right to acquire property **[\*\*13]** by lawful contract, the guaranty of which is secured by the federal constitution, and that the forbiddance of membership in combinations in restraint of trade was a valid exercise of legislative power.

It is contended by appellant that compliance with the requirement to answer the foregoing questions would have deprived him of the privileges and immunities guaranteed to him by section 10 of the bill **[\*395]** of rights, which provides that "no person shall be a witness against himself." This is not only a constitutional right, but it is also a fundamental principle of the common law, embodied in the maxim that "no man can be compelled to criminate himself." This proceeding before the district court was of the nature of an investigation to inquire whether there had been criminal violations of the anti-trust law. If appellant were guilty of any of the offenses of which inquiry was made by the questions which **[\*\*14]** he refused to answer, he was liable to criminal prosecution under this law. He assigned as a reason for his refusal to answer the questions that in doing so he might criminate himself under the anti-trust law, he being an operator of coal-mines in the state, and dealing in their output. The legislature, by section 10 of the act of 1897, provided immunity to witnesses subpoenaed to testify concerning violations of the act in the following language:

"Any person subpoenaed and examined shall not be liable to criminal prosecution, for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding."

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\* Affirmed by supreme court of the United States, February 20, 1905 ([25 S. Ct. 289](#)).--REP.

Was appellant, as a witness upon this investigation, entitled to invoke the protection of section 10 of the bill of rights? Was he entitled to plead the privilege of silence? If the immunity against prosecution, provided for by section 10 of the anti-trust law, afford the witness upon such investigation the protection against future prosecutions that is guaranteed to him by section 10 of the bill of rights, then appellant was not entitled to invoke the protection of the latter provision; nor was he entitled [\*\*15] to plead the privilege of silence. ( [Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110](#); [\*396] [Brown v. Walker](#), 161 id. 591, 16 S. Ct. 644, 40 L. Ed. 819.)

It is well settled that [HN6](#)[<sup>1</sup>] legislative bodies possess the power to grant amnesty to witnesses and compel them to give testimony against themselves. This power has been recognized as a public necessity in the enforcement of laws. Congress and the legislatures of many states have enacted immunity statutes for the purpose of securing convictions for such offenses as gambling, bribery, the manufacture or sale of intoxicating liquors, usury, combinations in restraint of trade, and like offenses, in which two or more persons participate to constitute the crime, the necessities of the case and the difficulty of obtaining witnesses to establish the offense, punish the offenders, and suppress the crime, being deemed sufficient to warrant the extending of immunity to a participant in order to constitute him a competent witness against the other offenders. The constitutional privilege that a person shall not be required to be a witness against himself is of great value to the citizen accused. [\*\*16] However, the authorities, state and federal, recognize the rule that when the testimony sought cannot, by reason of an immunity statute, be used as a basis for, or in aid of, a prosecution which might result in fine or imprisonment, or involve a penalty or forfeiture, the privilege cannot be claimed. Immunity statutes must be given a reasonable construction--not a strained and artificial one, and when it is apparent to the court that a person is fully protected from the effect of his testimony he should be required to testify, even though it may show him guilty of a criminal offense.

It is claimed, however, that the immunity afforded by section 10 of the anti-trust law is not sufficient to constitute a substitute for the privilege of silence [\*397] guaranteed the witness by section 10 of the bill of rights. The legislature determines what acts of the individual shall constitute a crime against the state, and what shall constitute the punishment of an offender, upon conviction. It determines within what period a prosecution for the commission of an offense shall be commenced, and may determine, within constitutional limitation, what shall and what shall not constitute evidence [\*\*17] competent to be used upon the trial of an [HN7](#)[<sup>1</sup>] offender. The protection afforded the witness by the constitution is that of not being a witness against himself. If the act of which inquiry is made do not constitute a crime, or, if made a crime, it have no punishment prescribed for its violation, or be no longer punishable, or if the act be barred by the statute of limitations, with no action pending, or the law have been repealed, or if the witness have been tried for the offense and acquitted, or convicted and satisfied the sentence imposed by the law, he can claim no exemption from answering questions relating thereto. Likewise the witness is deprived of claiming this exemption from testifying if the legislature, by the enactment of an immunity statute, have provided that he shall not be liable to criminal prosecution for any violation of the act about which he may testify, nor his evidence used against him in any criminal proceeding. As to prosecutions for those crimes to which his evidence relates, under the immunity act the witness is in the same position, in so far as there is a possibility of using his evidence against him, as though there were no such crimes provided by statute.

[\*\*18] It is urged that the amnesty provided by section 10 is not complete, as it affords no immunity to a stockholder in any such corporation. There is nothing in the record disclosing appellant to be a stockholder, [\*398] an officer, or an agent, or otherwise connected with any corporation that might, in any manner, be affected or suffer, as the result of his disclosure as a witness. The constitutional provision was intended for the protection of the witness; "the hurt must be to himself"; he himself must be included in the terms of the law before he can have just grounds for complaint. (*The State v. Smiley*, *supra*.) However, it was never intended that the immunity afforded the witness by this act should extend to, and protect, the stockholders, officers and agents of a corporation, as such; the immunity extends to the witness alone; it was not contemplated that it would be made use of as a pretext for securing immunity to others. That the immunity afforded the witness, to be complete, must extend to the officers, agents and stockholders of a corporation, as contended by appellant, is too remote.

[HN8](#)[<sup>1</sup>] Section 5 provides, as a punishment for one convicted of a violation of the act, [\*\*19] a fine of not less than one hundred dollars nor more than one thousand dollars, and confinement for not less than thirty days nor more than six months. Sections 5 and 6 provide a penalty of one hundred dollars per day for each and every day

such violation shall continue after conviction. It is further provided by section 5, that every person, company or corporation who shall violate any of the provisions of the act, be denied the right of, and be prohibited from, doing any business within this state. The last provision contemplates the prohibiting of the continuance of, or engagement in, business in the state only when such business is in violation of the act; it was not intended thereby to prohibit persons from continuing or engaging in any lawful business. in the state, not conducted or carried on in violation [<sup>\*</sup>399] of the act. Viewed in the light of the interpretation thus given it, the provision is a valid exercise of legislative power, and is not open to the charge made against it by appellant that it constitutes, in effect, banishment from the state.

The provisions of [HN9](#)[<sup>↑</sup>] section 7 that in any civil action there may be pleaded in defense that the plaintiff, or any person interested [\*\*20] in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, as held in [Barton v. Mulvane, 59 Kan. 313, 52 P. 883](#), under a very similar provision of the anti-trust act of 1889 (Laws 1889, ch. 257), contemplates only civil actions relating to, and growing out of, transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted, the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry.

It was the intention of the legislature, by section 10 of the act, to afford the witness complete immunity against criminal prosecution, fines, imprisonment, penalties, and forfeitures, for any violation of the act about which the witness might give evidence upon a proceeding or investigation by the state to acquire information as to violations of the act; and also to afford the witness complete immunity against such testimony's being used against him in any proceeding of a criminal nature. [\*\*21] [HN10](#)[<sup>↑</sup>] The immunity afforded by the act is coextensive with the constitutional privilege. A statute providing such immunity is sufficient; a witness, thus protected, cannot invoke the constitutional privilege of silence. ( [Counselman v. \[\\*400\] Hitchcock, supra](#); [Brown v. Walker, supra](#); [The People v. Butler Street Foundry, 201 Ill. 236, 66 N.E. 349](#); [Bradley v. Clark, 133 Cal. 196, 65 P. 395](#).)

Appellant assigned as a further reason why he should not answer the questions propounded to him that the immunity afforded does not protect him against criminal prosecution, fines and forfeitures for violations of the federal anti-trust law; that the proceeding before the district court was an investigation to inquire whether there had been a violation of the state anti-trust law; that appellant, as a witness in the district court upon the inquiry, stated that the product of the mines of Osage county was the subject of both domestic and interstate commerce.

If the product of the mines of Osage county were the subject of interstate commerce, as stated, and appellant, as an operator of these mines, violated the provisions of the federal anti-trust [\*\*22] law, and thereby became liable to criminal prosecution, fines and forfeitures thereunder, could he, in an investigation in the state courts to inquire if there had been violations of the state anti-trust law, refuse to testify, if the immunity provided did not protect him against the possibility of criminal prosecutions, fines and forfeitures for violations of the federal anti-trust law? It is not to be presumed that the examination, upon inquiry, will go beyond violations of the state law. If such examination be confined to its legitimate scope, it will not include, but will exclude, all acts which might connect it with interstate commerce, in violation of the federal anti-trust law. Under its power to regulate interstate commerce the United States may legislate upon the subject of private contracts relating to such commerce, and prohibit combinations, pools, and trusts, so far as they relate to inter-state commerce, [<sup>\*</sup>401] but it [HN11](#)[<sup>↑</sup>] has no jurisdiction over combinations, pools, and trusts, relating to commerce wholly within the state; nor does the United States acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a state, by reason [\*\*23] of the fact that the combination covers and regulates commerce, which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States; in so far as they interfere with commerce wholly within the state, they are subject only to the jurisdiction of the state. ( [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136](#).) [HN12](#)[<sup>↑</sup>] Where two governments like the United States and a state exercise their authority within the same territory, and over the same citizens, the legislation of that which, as to certain subjects, is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them, unless such construction be absolutely demanded. ( [Commonwealth v. Gagne, 153 Mass. 205, 26 N.E. 449, 10 L. R. A. 442](#).)

In the case of *Brown v. Walker*, *supra*, Brown, who was auditor of the Alleghany Railway Company, was subpoenaed as a witness to give testimony before a federal grand jury upon an investigation concerning alleged violations of the interstate-commerce act by the railway company. He refused to testify, **[\*\*24]** claiming that to answer the questions would tend to accuse and criminate him. He was adjudged to be in contempt. Proceedings in *habeas corpus* were instituted in the United States circuit court and he was remanded to the custody of the marshal. An appeal was had to the United States supreme court. It was claimed there by appellant that the immunity provided **[\*402]** by the interstate-commerce act was insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself. The immunity provided by the act was by the court held sufficient. Mr. Justice Brown, in delivering the opinion of the court, with reference to the construction of the immunity clause of the act said:

"It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose -- not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead **[\*\*25]** of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid unless, as was observed by Mr. Chief Justice Marshall, in *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 128, 3 L. Ed. 162, 'the opposition between the constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.'"

It was further claimed, in this same case, that the amnesty provided by the interstate-commerce act, though sufficient to grant immunity from prosecution by the federal courts, did not afford immunity against prosecution in the state courts. In treating the proposition and the improbability of being subjected to the criminal laws of another sovereignty, after having quoted extensively, with approval, from the opinion of Lord Chief Justice Cockburn upon that subject, Mr. Justice Brown said:

"But even granting that there was still a bare possibility that by his disclosure he might be subjected to **[\*403]** the criminal laws **[\*\*26]** of some other sovereignty, that, as Chief Justice Cockburn said in *Queen v. Boyes*, 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the house of commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such danger it was never the object of the provision to obviate. The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even **[\*\*27]** be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the state, or even against the prosecutor, if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing."

The anti-trust act of Illinois requires corporations doing business in the state to make and file annually with the secretary of state a verified statement which is termed an "anti-trust affidavit." In *People v. Butler Street Foundry, supra*, a proceeding to recover the penalty of fifty dollars per day for failure to make and file such affidavit, as a defense to such action it was charged that the requirement of the making of the affidavit was a violation of the constitutional provision of the state, that "no person shall be compelled **[\*404]** in any criminal case to give evidence against himself." The act provided immunity against criminal prosecutions for truthful disclosures of matters required to be shown by the affidavit; and by the affidavit a disclosure of any connection of the corporation with any combination, pools, trusts, and the like combines, in **[\*\*28]** restraint of trade or commerce, was required. It was urged that the immunity was not coextensive with the constitutional privilege, and that it did not cover prosecutions under laws of other states or under laws of the United States. In passing upon the validity of the act it

was held that, while it might be broad enough to include trusts, pools and combines formed with parties outside the state, yet, in construing the act, the court must consider it as relating to trusts, pools and combines formed within the state. As to the sufficiency of the immunity provision challenged, it was held that it was complete as against prosecution by the federal authorities or by the authorities of other states, as the affidavit required, to the making of which immunity was extended, need relate only to trusts, pools and combines within the state. In making reference to the sufficiency of the immunity afforded by the act, as applied to violations of the federal law, the court said:

"The possibility that the affidavit required by section 7a of the anti-trust act of 1891 might contain disclosures tending to show a violation of the antitrust law of some other state, or of the United States, is not [\*\*29] a real and probable danger of criminal prosecution within the constitutional privilege against giving self-incriminating evidence."

The anti-trust law is a valid exercise of legislative power, and is not violative of the fourteenth amendment to the federal constitution, as claimed by appellant. Section 10 of the act contemplates that, in the [\*405] proceeding or investigation before the district court or the judge thereof, to discover if there have been violations of the state anti-trust law, the inquiry will be confined to violations of that law. The record discloses that the examination of appellant was confined to its legitimate scope, within which the immunity afforded him by section 10 was coextensive with the constitutional privilege invoked for his protection. The possibility that his answers to the inquiries might disclose violations of the federal law, and the evidence thus given be used against him in a criminal prosecution for a violation of that law, was not a real and probable danger.

Appellant should have answered the questions asked him upon the inquiry. The judgment of the court below is affirmed.

All the Justices concurring.

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## Graf v. Master Horse-Shoers' Protective Ass'n

Superior Court of Cincinnati, Ohio

January 12, 1904, Decided

No Number in Original

**Reporter**

15 Ohio Dec. 18 \*; 1904 Ohio Misc. LEXIS 63 \*\*; 1 Ohio N.P. (n.s.) 423

PETER GRAF ET AL. v. MASTER HORSESHOERS' PROTECTIVE ASSN.

**Disposition:** [\*\*1] Plaintiffs entitled to a decree in their favor.

### **Core Terms**

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shoes, by-law, horseshoeing

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN1](#) **Public Enforcement, State Civil Actions**

Contracts, agreements, combinations or arrangements between persons in the same business, the tendency of which is to impair competition and to enhance prices, to the injury of the public, are against public policy and therefore illegal and void; and if the combined action of members of an association is to prevent competition among such members and to increase prices to the public any resolution or by-law whose object is to effect such combined action is illegal and void.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Defenses > Illegal Bargains

#### [HN2](#) **Public Enforcement, State Civil Actions**

When parties enter into an illegal agreement the courts regard them as in pari delicto and consequently will leave them where they find them, affording no relief to either of them either in law or equity. But this statement is too broad as it is subject to a number of exceptions, one of which is that where a contract prohibited by law is not malum in se but malum prohibitum, and has not been fully executed, either party may rescind the contract and have relief against it both in law and equity. The principle upon which the exception is made is that public policy is best subserved by granting a locus penitentiae to a party, and by permitting him to disaffirm the contract prevent the execution of it.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Defenses > Illegal Bargains

### **HN3** **Public Enforcement, State Civil Actions**

In accordance with the doctrine applicable generally to agreements illegal as against public policy, no proceeding, whether legal or equitable can be maintained, as between such parties, to enforce any provision of the agreement, though it may be otherwise as to a proceeding in disaffirmance of the agreement.

## **Headnotes/Summary**

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### **Headnotes**

#### **MONOPOLIES--CONTRACTS--ASSOCIATIONS.**

##### **1. COMBINATIONS TO IMPAIR COMPETITION AND CONTROL PRICES, AND RESOLUTIONS OR BY-LAWS TO EFFECT SUCH PURPOSES, ILLEGAL.**

All contracts, agreements, combinations or arrangements between persons, partnerships or corporations engaged in the same business, the tendency of which is to impair competition and enhance prices, to the injury of the public, are against public policy, illegal and void. Hence, a resolution, adopted by a horseshoers' association composed of proprietors and employers engaged in carrying on the business of horseshoeing in a particular city, and whose combined action is to prevent competition among themselves and control prices to the injury of the public, "that any member suspected of shoeing horses below the regular price list be notified to make an affidavit to same; if he refuses he be fined the sum of \$ 25, to be enforced by the chairman," and a by-law of such association to the effect that unless the fine be paid within thirty days such member shall be suspended from membership, the tendency of both being to effect such combined action of the members of the association, are illegal and void; *a fortiori*, where defendant is an incorporated association and, therefore, limited to acts which neither violate the statutes or common law of the state.

##### **2. STATUS OF UNLAWFUL TRADE COMBINATION NOT CHANGED BECAUSE MEMBERS ARE NOT EMPLOYES.**

The *status* of an unlawful combination to prevent competition and enhance prices to the injury of the public, is not changed by reason of the fact that the members of the combination are employers instead of employees and may themselves do the same work as the employees.

##### **3. MEMBER NOT ESTOPPED FROM ENJOINING ENFORCEMENT OF ILLEGAL RESOLUTIONS OR BY-LAWS OF ASSOCIATION.**

A member of an association who assisted in passing a resolution which has a tendency to prevent competition among the members and enhance prices to the injury of the public, and which inflicts a penalty upon or provides for the ultimate expulsion of any member for a violation of the schedule of prices fixed by the association, may enjoin its enforcement against him for such violation. The principle that one *in pari delicto* can have no relief at law or in equity, and that he who comes into equity must come with clean hands, have no application where the matter involved is merely *malum prohibitum* and executory, and not *malum in se*; and, as an action to enjoin the enforcement of such resolution and by-law is in disaffirmance thereof, plaintiff is entitled to relief upon the principle that public policy is best subserved by granting a *locus penitentiac* to the complaining party and, permitting him to disaffirm, thus prevent their object.

4. WHETHER ASSOCIATION OF PROPRIETORS TO MAINTAIN PRICE BETWEEN ITS MEMBERS IS ILLEGAL,  
QUAERE.

Whether Sec. 4427-1 Rev. Stat. *et seq.* (commonly called the Valentine **antitrust law**) applies to an association composed of individuals, partnerships and corporations engaged in carrying on the business of horseshoers, all of whom are proprietors or employers, and which fixes, from time to time, a price list for work done in the business and imposes a penalty for a violation of such schedule of prices by any member, *quaere*.

**Counsel:** John C. Healy and A. L. Herrlinger, for plaintiffs.

H. D. Peck, for defendant.

**Judges:** SMITH, J.

**Opinion by:** SMITH

## **Opinion**

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### [\*18] SMITH, J.

Plaintiffs are partners under the firm name of P. Graf & Son and are engaged in carrying on the business of horseshoers in the city of Cincinnati; [\*19] and the defendant, The Master Horseshoers' Protective Association, is a corporation not for profit.

The association is regularly incorporated under the laws of Ohio; is composed of about seventy-five members consisting of individuals, partnerships and corporations doing business in the city of Cincinnati and its declared object is "the promotion of the interests of the master horseshoers of the association; to preserve and disseminate valuable business information; and to adjust as far as practicable all controversies and misunderstandings."

The plaintiffs paid an initiation fee of \$ 50 to become a member of the defendant association.

The association from time to time fixes a price list for work done in the horseshoeing business; and in July, 1902, a resolution was adopted, "That any member suspected of shoeing horses below the regular [\*2] price list be notified to make an affidavit to same; if he refuses he be fined the sum of \$ 25, to be enforced by the chairman."

In June, 1903, the following price list was adopted:

4	New shoes, each 50 cents. Per set Driving or pleasure horse extra.	\$ 2.00
4	Shoes reset, each 35 cents. Per set Shoes toed, each 40 cents. Per set	1.25 1.50
	Shoes sharpened, each 40 cents. Per set	1.50
	Bar shoes, each \$ 1.	
	Bar shoes toed or heeled, each 50 cents.	
	Bar shoes sharpened, each 50 cents.	
	Drop shoes, each 25 cents.	
	Whitman & Barnes shoes. Per set	5.00
	All other pads, etc. Per set	5.50
	Sending man to stable, per hour	1.00

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All city work, 4 new shoes	2.50
All city work, 4 shoes reset or sharpened	2.00
Old shoes for city, each	50

On or about October 1, 1903, the president of the association called upon Peter Graf, one of the members of plaintiff firm, and requested him to make affidavit that he had not done work for the National Ice Company and other persons for a less price than that fixed by the association's scale of prices. He refused to make such affidavit and thereupon the plaintiff firm was fined \$ 25; and by the [\*\*3] rules of the association unless the fine is paid within thirty days the firm will be suspended from membership in the same.

A few days after the imposition of the fine the plaintiff firm brought this action to enjoin the defendant from suspending him or in any way depriving him of his rights in said association by reason of his failure to make the affidavit referred to.

[\*20] It is contended by the plaintiff that the combination of the members of the defendant association is forbidden by the antitrust statute of this state (Secs. 4427-1 to 4427-12 Rev. Stat.), and that as this statute authorizes courts of equity by injunction to prevent a threatened violation of the terms of the statute the plaintiff is entitled under this statute to the relief prayed for.

It is very doubtful, to say the least, whether this statute applies to a combination such as is presented by this case; and by the construction given to this statute by Dempsey, J., in a very carefully considered opinion: *Runck v. Cloud*, 11 Ohio Dec. 444 (8 Ohio N.P. 436)--the statute would not be applicable. As I do not find it necessary to decide this question I pass it by without any expression of opinion [\*\*4] upon it.

It is contended by the defendant that the combination is a lawful one for the reason that combinations of workmen known as trade unions for the purpose of raising their wages are now upheld by the courts, and that this combination falls under that class.

I shall not undertake to define here the rights of workingmen to combine nor the limitations upon such right.

Because the argument of counsel for the defendant based upon the legality of trade unions or workingmen is not applicable to the present case, for the reason that the members of the defendant association are not employes but employers of labor, and each the proprietor of the business in which he works, the fact that such employers may themselves do the same work as the employes does not change the character of the combination. It is a combination of proprietors and employers, not employes.

The principle is well settled that HN1 contracts, agreements, combinations or arrangements between persons in the same business, the tendency of which is to impair competition and to enhance prices, to the injury of the public, are against public policy and therefore illegal and void; and as the combined action of the members of [\*\*5] this association is to prevent competition among such members and to increase the price of horseshoeing to the public any resolution or by-law whose object is to effect such combined action is illegal and void. Emery v. Ohio Candle Co., 47 Ohio St. 320 [24 N.E. 660]; 21 Am. St. Rep. 819; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; State v. Standard Oil Co. 49 Ohio St. 137 [30 N.E. 279].

A case directly in point is that of *Bailey v. Master Plumbers Assn.* 103 Tenn. 99 [52 S.W. 853]; 46 L. R. A. 561]. In that case a by-law of an association of master plumbers of the city of Memphis provided that each member of the association was required to report each week what work he had done, and if such work was done in competition with any other member, the member doing the work was to pay into the [\*21] treasury of the association a fixed sum, according to a schedule agreed on and made a part of the by-law.

The by-law was held to be in restraint of trade and void. It was also held in that case that "it is not the number of persons participating in such by-law or the extent of the territory included, [\*\*6] but the injury to the public in the territory which characterizes the interruption of trade as illegal."

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As the resolution adopted by the defendant fixing a schedule of prices and inflicting a money penalty and suspension for a violation of the schedule has a tendency to prevent competition and enhance prices, it is against public policy and void; and an additional reason for the application of this rule of law is found in this case in the fact that the defendant association is acting under a charter from the state of Ohio and is limited therefore to acts which do not violate either the statute or the common law of the state. [Sayre v. Benevolent Assn., 62 Ky. 143 \[85 Am. Dec. 613\]](#); 1 Thompson, Corporations, Sec. 23.

It is urged for the defendant, however, that conceding the illegality of the resolutions of the defendant the plaintiff cannot complain of them for the reason that he assisted in the passage of the same and in inflicting the penalties thereby provided upon other members; that he is *in pari delicto* with the defendant; and he does not therefore come into a court of equity with clean hands, and therefore can have no relief.

The principle is often broadly [\*\*7] stated that [HN2](#) when parties enter into an illegal agreement the courts regard them as *in pari delicto* and consequently will leave them where they find them, affording no relief to either of them either in law or equity. But this statement is too broad as it is subject to a number of exceptions, one of which is that where a contract prohibited by law is not *malum in se* but *malum prohibitum*, and has not been fully executed, either party may rescind the contract and have relief against it both in law and equity. The principle upon which the exception is made is that public policy is best subserved by granting a *locus penitentiae* to a party, and by permitting him to disaffirm the contract prevent the execution of it.

One of the leading cases on this subject is [Congress & Empire Spring Co. v. Knowlton, 103 U.S. 49 \[26 L. Ed. 347\]](#), in which the principle is declared and applied in an action at law.

The same principle was applied by this court in general term in equity in Hafer v. Railway Co. [9 Ohio Dec. Rep. 470 \(14 Week. L. Bull. 68\)](#), the court relying upon [Congress & Empire Spring Co. v. Knowlton, 103 U.S. 49 \[26 L. Ed. 347\]](#). [\*\*8]

One of the latest cases on this subject is McCutcheon v. Capsule Co. [71 F. 787](#) [19 C.C.A. 108; 37 U.S. App. 586]. In that case certain corporations entered into and partially executed a contract which was illegal on the ground that it was in restraint of trade and tended to [\*22] create a monopoly. One of the parties sought to disaffirm the contract and to have relief in equity.

In deciding that he was entitled to such relief the court said:

"Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay, and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality."

In Cooke, Trade & Labor Combin. Sec. 30, it is said:

[HN3](#) "In accordance with the doctrine applicable generally to agreements illegal as against public policy, no proceeding, whether legal or equitable can [\*\*9] be maintained, as between such parties, to enforce any provision of the agreement, though it may be otherwise as to a proceeding in disaffirmance of the agreement."

In [Huston v. Reutlinger, 91 Ky. 333 \[15 S.W. 867\]](#); 34 Am. St. Rep. 225], it was held that where by-laws in restraint of trade were passed by an association of underwriters and the association was undertaking to suspend or expel a member from the association for a violation of the same, the chancellor would interfere by injunction to prevent the enforcement of such by-laws against an offending member.

To refuse relief to the plaintiffs in this case would have the effect of enforcing an illegal arrangement that had not as yet been carried into execution; whereas to grant them relief would be to permit them to refuse to abide by the arrangement and thus to contribute materially towards its dissolution.

15 Ohio Dec. 18, \*22L904 Ohio Misc. LEXIS 63, \*\*9

I am of the opinion that the plaintiffs are entitled to a decree in their favor.

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## A. Booth & Co. v. Davis

Circuit Court, E.D. Michigan, S.D.

January 19, 1904

No Number in Original

**Reporter**

127 F. 875 \*; 1904 U.S. App. LEXIS 4645 \*\*

A. BOOTH & CO. v. DAVIS et al.

### Core Terms

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Fish, good will, Fresh, Salt, stockholders, territory, indirectly, commodity, restraining, contracts, commerce, proofs, vendor

### LexisNexis® Headnotes

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Antitrust & Trade Law > Sherman Act > General Overview

#### [HN1](#) [] Antitrust & Trade Law, Sherman Act

The Sherman Act's purpose and scope is to avoid all contracts and combinations in the form of trusts or otherwise, or conspiracy in restraint of trade and commerce among the several states and with foreign nations.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN2](#) [] Public Enforcement, State Civil Actions

Michigan's [antitrust law](#) is in terms prospective, and cannot be invoked to defeat a contract lawful when made.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Dissolution & Winding Up > Dissolution > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

#### [HN3](#) [] Public Enforcement, State Civil Actions

Michigan's [antitrust law](#) is directed only against combinations of persons, firms, partnerships, corporations, or associations of persons conspiring to co-operate in violation of its provisions. It contains nothing prohibitive of the acquisition by a person, persons, corporation, or association of the business or property of any person or

association, natural or artificial. All such persons or associations may acquire property and carry on business at as many different places as their capital will warrant, and fix their own prices for their commodities, providing they do not, for that purpose and in its accomplishment, combine with other persons, firms, or organizations to effect any of the ends denounced by the statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

#### **HN4** **Public Enforcement, State Civil Actions**

Agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN5** **Public Enforcement, State Civil Actions**

An agreement which operates merely as a partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN6** **Public Enforcement, State Civil Actions**

In order that a contract may not be unreasonable, a restraint imposed must not be larger than is required for the protection of the party with whom the contract is made; but a contract not to use a trade at a particular place, if it be founded upon a good consideration and be made for a good purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

#### **HN7** **Consideration, Sufficient Consideration**

Damage to a promisee constitutes as good a consideration as benefit to the promisor. Any damage or suspension of a right, or possibility of a loss, occasioned to a plaintiff by the promise of another, if a sufficient consideration for such promise, and will make it binding, although no actual benefit accrued to the party promising.

**Counsel:** **[\*\*1]** Chas. S. Thornton and Henry M. Duffield, for complainant.

Fred A. Baker and E. E. Kane, for defendants.

**Opinion by:** SWAN

## **Opinion**

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[\*875] SWAN, District Judge. In this cause the motion to vacate the restraining order issued herein and the motion for a preliminary order was continued until the further order of the court. The main defense to the bill presented, it was then though, a question to be determined upon plenary proofs rather than upon affidavits. In the expectation that the taking of proofs, then in progress, would obviate the labor of [\*876] digesting the many voluminous affidavits submitted upon the hearing of the motion for injunction, and reviewing upon the proofs and facts in issue, the formal disposition of that motion was postponed with that end in view. The taking of the testimony, however, has been extended by stipulations of the parties, and is not completed. The defendants now urge that their interests will suffer injury by deferring decision until the completion of the proofs. To avert that result, and to facilitate the review of this matter, the conclusions here reached are founded upon the affidavits filed, notwithstanding the unsatisfactory nature of [\*\*2] such data compared with plenary proofs.

The bill is filed to restrain the defendant Davis from a breach of his contract hereinafter set forth, which contract, it is claimed by complainant, was and is a part of the consideration for the purchase by complainant of the property and good will of the Davis Fresh & Salt Fish Company, a corporation organized under and by virtue of the laws of the state of Michigan, and transacting a general fish business, and also engaged in buying, catching, producing, and selling salt and fresh fish. The company had its principal office in the city of Detroit, in said state. It also carried on business at Cleveland, Columbus, and Dayton, Ohio; Louisville, Ky.; Nashville, Tenn.; St. Louis and Kansas City, Mo.; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Lansing, Port Huron, and Detroit, Mich. The bill also seeks to have the Wolverine Fish Company, Limited, restrained from aiding Davis to violate his contract with complainant by employing said Davis in its business.

On August 14, 1898, in consideration of the sum of \$17,473.14, the Davis Fresh & Salt Fish Company sold to William Vernon Booth, of Chicago, [\*\*3] with the consent of all of its officers and stockholders, all of the goods, chattels, and property of every kind, nature, and description to it belonging, or in which it had any interest at that time, and, as part thereof, the good will of the business conducted by it at Detroit, and gave said Booth a bill of sale, with warranty of title, signed by defendant Davis, its president, and James T. Donaldson, its secretary, appended to which was the following, signed by said Davis:

"For and in consideration of one dollar and other valuable consideration, which I acknowledge, I hereby agree to perform the covenants and agreements above made and to be performed by the Davis Fresh & Salt Fish Company.

"Witness my hand and seal this 14th day of September, A.D. 1898."

Said Davis was a stockholder and the principal officer and manager of the vendor corporation, and apparently very desirous that the contract of sale should be completed, and he and other stockholders of the Davis Fresh & Salt Fish Company executed the following agreement:

"This instrument witnesseth, That William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Company, [\*\*4] and has paid therefor the sum of \$17,473 14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we have each agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever, that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employes of the company, engage or in any [\*877] manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally, either in firms or corporations, or as individuals, or in any other way, directly or indirectly interfere with the said [\*\*5] trade or business or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere with or injure the said business, but will during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof we have hereunto subscribed our names and affixed our seals, jointly and severally, this first day of August, A.D. 1898.

"Edgar A. Davis.

"James T. Donaldson.

"Belle R. Harper.

"Ed. E. Kane.

"Belle B. Davis."

The consideration named in the instrument quoted above was paid on or about the 14th of September, 1898, to the Davis Fresh & Salt Fish Company, and by it distributed among its stockholders, defendant Davis receiving his full share thereof. The purchase and agreement recited above were made by said Booth, as agent for complainant, and a formal transfer was made by Booth to his principal of all the property, rights, and contracts involved in the [\*\*6] transaction. The property was duly delivered. The complainant has entered into the possession thereof, and, the bill claims, is continuing such business in Detroit and the other places where the Davis Fresh & Salt Fish Company conducted its business before said sale. The bill seeks an injunction against Davis from violating his said agreement, and against the Wolverine Fish Company, Limited, and other defendants (except Edson, who was not served), from aiding and assisting Davis in the violation of his contract. The answer of the defendants, and the separate answer of defendant Davis, do not dispute the purchase of the property and good will of the Davis Fresh & Salt Fish Company. The defense is, first, that the contract is against public policy and in restraint of trade; that it is void under the provisions of the "Sherman Act," so-called (Act July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3200]), and an act of the Legislature of the state of Michigan, entitled "An act to prevent trusts, monopolies and combinations of capital, skill and arts, and carrying out restraints in trade and commerce," etc., approved June 23, 1899 (Sess. Laws 1899, p. 409, No. 255).

[\*\*7] The Sherman act has no bearing upon this controversy. HN1[<sup>↑</sup>] Its purpose and scope is to avoid all contracts and combinations in the form of trusts or otherwise, or conspiracy in restraint of trade and commerce among the several states and with foreign nations. United States v. E. C. Knight Co., 156 U.S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; United States v. Freight Ass'n, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. The business of the complainant is lawfully conducted by the sale of its commodities at the different points where the business acquired from the Davis Fresh & Salt Fish Company was carried on. It had nothing [\*878] to do with the interstate or foreign trade or commerce subject to congressional legislation. It produced and sold its goods at the several places where it did business, just as its vendor had and as any individual or corporation might do, and it had the same right to engage in such business on complying with the laws in the states in which it was carried on. The statute of HN2[<sup>↑</sup>] Michigan which defendants have invoked as invalidating the contracts and business of the complainant acquired from the Davis Fresh & Salt Fish Company was not passed until a year after [\*\*8] the purchase by complainant of that company's property and good will. It is in terms prospective, and cannot be invoked to defeat a contract lawful when made. Its first section defines a trust as --

"A combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"(1) To create and carry out restrictions in trade or commerce.

"(2) To limit or reduce the production, or increase or reduce the price of merchandise or any commodity.

"(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(4) To fix at any standard or figure whereby its price to the public or consumer shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state."

Examination of the provisions of this act is convincing that it [HN3](#)<sup>↑</sup> is directed only against combinations of persons, firms, partnerships, corporations, or associations of persons conspiring to co-operate in violation of its provisions, [\[\\*\\*9\]](#) and that it contains nothing prohibitive of the acquisition by a person, persons, corporation, or association of the business or property of any person or association, natural or artificial. All such persons or associations may acquire property and carry on business at as many different places as their capital will warrant, and fix their own prices for their commodities, providing they do not, for that purpose and in its accomplishment, combine with other persons, firms, or organizations to effect any of the ends renounced by the statute. The prior Michigan statute of 1889, in existence at the time of the execution of the contracts under which complainant claims, was repealed by an act of 1899. There is grave question as to its validity, and that doubt probably prompted the act of 1899. The transaction by which the complainant acquired the title and interest for which it seeks protection in this cause was an out and out purchase of the vendor corporation's property and good will, and of the ancillary agreement of its stockholders, the breach of which agreement is the gravamen of the complainant's case. That such a transaction is lawful seems clear. In [United States v. Addyston Pipe & Steel Co., 85 Fed. 271-281](#) et seq., 29 C.C.A. 141, 46 L.R.A. 122, Judge Taft considers the question here involved, and in a forcible opinion demonstrates that [HN4](#)<sup>↑</sup> agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid. The opinion has so carefully and fully reviewed the authorities in support of this proposition as to exhaust the subject. The judgment of the Court of Appeals (except in a minor part having [\[\\*879\]](#) no concern with the main question) was affirmed by the Supreme Court of the United States. [175 U.S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.](#) It is therefore a matter of no concern whether or not the complainant is conducting its business in such a way as to reduce the cost of its commodity, and to increase its profits in that way, or by raising the price otherwise. The contract of purchase which it made with the Davis Fresh & Salt Fish Company, and its agreement with the defendant Davis and the other stockholders, by which they engage not to compete, individually or otherwise, directly or indirectly, with the complainant, was a contract wholly collateral to the scheme and method of [\[\\*\\*11\]](#) its business and its rights and equities under the contract of sale; and the agreement with Davis and the other stockholders can be enforced with as much propriety as any other lawful contract or agreement into which it might enter. [Atlanta v. Chattanooga F. & P. Works \(C.C.A., Sixth Circuit, decided Dec. 8, 1903\) 127 Fed. 23.](#) It is well settled that [HN5](#)<sup>↑</sup> an agreement which operates merely as a partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In [Oregon Steamship Navigation Co. v. Winsor, 20 Wall. 67, 22 L. Ed. 315,](#) Mr. Justice Bradley says:

[HN6](#)<sup>↑</sup> "In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the protection of the party with whom the contract is made; \* \* \* but a contract not to use a trade at a particular place, if it be founded upon a good consideration and be made for a good purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

Examining this agreement between complainant and Davis, it will be found that it has no feature which the law condemns. It is limited, as to time, for the 10 years ensuing [\[\\*\\*12\]](#) its date; "and to the territory or immediate vicinity of the territory dealt in by the company, or operated in by ourselves or the agents or employes of the company." Its validity is fully sanctioned by the case of the [Oregon Steamship Navigation Company v. Winsor, 20 Wall. 67, 22 L. Ed. 315.](#) The execution of the contract is admitted by the defendants. It is no answer to its enforcement against Davis that he did not get the consideration he expected from the sale, because, as he alleges, complainant did not carry out an understanding subsequently made with him. The defense that the Davis Fresh & Salt Fish Company had no business and no good will, but its business at the time of the contract was carried on by Davis as trustee for the company, is unconscionable and without merit. The objection that the complainant is a trust and a monopoly is answered by the view taken of the statute of Michigan of 1899, and it is shown by the affidavits that the complainant's business in this line is but a small fraction of that done by other dealers in the same commodities in the territory covered by its operations, and that it is but one of several hundred dealers in that territory.

It is further [\*\*13] claimed that the bill does not aver that the complainant has complied with the statute with regard to foreign corporations. The affidavits submitted by complainant completely negative this objection.

It is urged that the agreement with Davis and the other stockholders is not supported by any consideration. There is no force in this position. [\*880] It recites that the signers do agree, "as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid (\$17,473 14) for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally \* \* \* that we will not during the next ten (10) years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employes of the company, engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employes or assigns," etc. The signers of this instrument are estopped from denying want of consideration [\*\*14] for its provisions. Their express acknowledgement in the instrument is that an inducement to the purchase at the time was their several contracts not to compete, directly or indirectly, as individuals or otherwise, with their vendee during the time and in the territory designated. The effect of such competition, it is obvious, would be to impair the value of the property and good will purchased, and, as has been said, a contract which would insure against this is not in restraint of trade, but valid. In Hendrick v. Lindsay, 93 U.S. 148, 23 L. Ed. 855, it is said:

**HN7** "Damage to the promisee constitutes as good a consideration as benefit to the promisor. In Pillan v. Van Mierop, 3 Burr. 1663, the court say: 'Any damage or suspension of a right, or possibility of a loss, occasioned to the plaintiff by the promise of another, if a sufficient consideration for such promise, and will make it binding, although no actual benefit accrued to the party promising.' This rule is sustained by a long list of adjudged cases."

The restraint upon the defendants secured by this contract, it is clear beyond question from the terms of the contract itself, was regarded by both parties thereto as consideration. [\*\*15] It does not lie in the mouth of Davis, when he had deliberately and for the purpose of inducing the complainant to pay the large sum of \$17,473.14 for the business, which he now states was worthless, to deny that there was any consideration for his agreement. In fact, the denial of what of consideration, and Davis' objections to the contract that the Davis Fresh & Salt Fish Company had no business or good will at the time of the sale, are inconsistent in themselves, and compel the conclusion that, if the vendor corporation had no business, the sale of its property and the inventory upon which it was made was a fraud upon the purchaser, which discredits the claim of Davis that the agreement of himself and fellow stockholders was an independent transaction.

In behalf of the Wolverine Fish Company, Limited, it is urged that it had no knowledge of the agreement entered into by Davis to refrain, directly or indirectly, from engaging in the fish business for himself or others, and that to deprive it of his services and experience is a hardship. The equities of the case in favor of the complainant, in view of the facts, are much stronger than the consideration urged by the Wolverine [\*\*16] Company against being enjoined from the employment of Davis in violation of his contract with complainant. Whatever injury results to the Wolverine Fish Company, Limited, from the enforcement of Davis' contract with complainant, is chargeable, not to the latter, but to Davis himself. If that company is injured, it is because [\*881] of Davis' willful breach of his contract with the complainant, and not by reason of any act or omission of the complainant. It is no answer to the enforcement of complainant's contract that Davis has broken it and entered into relations with others whereby the benefit of his experience and services will operate inevitably to the detriment of the complainant, although Davis' employer did not know of his self-imposed disability. To hold otherwise would sanction the doctrine that one entering into a like contract to that executed by Davis to the complainant might be absolved from his obligations under the contract by hiring his services to one ignorant of his disability. Such a construction of the letter and spirit of like engagements would make them entirely nugatory, and would be grossly unjust to the party who had paid in good faith a valuable [\*\*17] consideration for the property and good will of a business which his vendors collectively and individually have covenanted not to impair or invade.

It results from these views that the complainant is entitled to the injunction restraining Davis from a breach of his contract with the complainant, and restraining the Wolverine Fish Company, Limited, from benefiting in any way by his services and experience in the fish business, as defined in the contract between complainant and Davis, and an injunction will be issued, according to the prayer of the bill, against Davis and the Wolverine Fish Company, Limited.

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## *Needles v. Bishop & Babcock Co.*

Court of Common Pleas of Franklin County, Ohio

February 24, 1904, Decided

No Number in Original

**Reporter**

14 Ohio Dec. 445 \*; 1904 Ohio Misc. LEXIS 19 \*\*; 2 Ohio N.P. (n.s.) 77

NEEDLES v. BISHOP & BABCOCK CO.

**Disposition:** [\*\*1] Demurrer overruled.

### **Core Terms**

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supplies, member of the association, plumbing supply, monopoly

### **LexisNexis® Headnotes**

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Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

#### [HN1](#) **Case or Controversy, Constitutionality of Legislation**

Where an act is claimed to be in violation of the constitution the court must be clearly satisfied that it is so or the act must be upheld.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN2](#) **Public Enforcement, State Civil Actions**

The true test of the illegality of combinations is their tendency to endanger the public, and as to whether or not their necessary consequence is to control prices, limit production, and suppress competition in such a way as to restrain trade and create a monopoly. Furthermore to render such combinations void as against public policy it is not necessary that evil intent or actual injury to the public be shown, but it is sufficient that the inevitable tendency of the combination is to control prices to the detriment of the public. It is true that contracts in partial restraint of trade which do not include all of a commodity or trade nor such as to materially affect the freedom of trade or commerce, are not unlawful. But if the combination operate even in a restricted locality to create a monopoly in the hands of a few individuals of a particular commodity or trade, and to exclude all others in competition, it is in contravention of public policy, illegal and void.

### **Headnotes/Summary**

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**Headnotes****CONSTITUTIONAL LAW--MONOPOLIES--RESTRAINT OF TRADE.****1. STATUTE UPHELD UNLESS CLEARLY UNCONSTITUTIONAL--VALENTINE ANTITRUST LAW.**

A legislative enactment will be upheld unless its unconstitutionality clearly appears. Whether Secs. 4427-1 to 4427-12 Rev. Stat. (commonly called the Valentine antitrust law) are invalid in part, *quaere*.

**2. UNLAWFUL COMBINATION AMONG JOBBERS OF PLUMBING SUPPLIES, WHAT IS.**

A common-law unlawful combination tending to create a monopoly and restrain trade, contrary to public policy, is pleaded in a petition which avers that defendants are the only persons in the particular city engaged as jobbers furnishing plumbers' supplies; that defendants have combined and conspired together by uniting their capital, labor and skill for the purposes of limiting the production of such supplies, and increasing the purchase price thereof to persons not members of the association; that defendants have agreed neither to sell below a certain schedule of prices, sell to any person not a member of the association, nor sell supplies to be used in any building or structure not being plumbed or furnished with plumbing supplies by some member of the association; that they have agreed not to compete with each other in furnishing supplies, or in plumbing buildings; that they will not sell supplies to any person unless some member of the association is employed to furnish the labor to install the plumbing supplies in the building for which they are furnished; and that such combination is formed to enhance the price of supplies without regard to their cost. Plaintiff is entitled, under such petition, to recover whatever damages he has sustained as a direct result of such unlawful combination.

**3. EVIL INTENT OR ACTUAL INJURY TO PUBLIC NOT NECESSARY; TEST OF ILLEGALITY IS TENDENCY TO INJURE PUBLIC.**

Evil intent or actual injury to the public need not be shown to render trade combinations void as against public policy. The test of illegality is their *tendency* to endanger the public, whether or not their necessary consequence is to control prices, limit production and suppress competition in a manner to restrain trade, and create a monopoly.

**4. MONOPOLY IN RESTRICTED LOCALITY IS ILLEGAL--PARTIAL RESTRAINT OF TRADE.**

Contracts in partial restraint of trade which do not include all of a particular commodity or trade so as to materially affect the freedom of trade or commerce, are not unlawful; but if the combination, even in a restricted locality, creates a monopoly of a particular commodity of trade in the hands of a few, and excludes others in competition, it is in contravention of public policy, illegal and void.

**Counsel:** D. F. Pugh, for plaintiff.

Sater & Sater, for defendant:

The petition does not state a cause of action, and the Valentine law is unconstitutional. *Macaulay v. Tierney, 19 R.I. 255 [33 A. 1]*; 61 Am. St. Rep. 770]; *Bohn Mfg. Co. v. Hollis, 54 Minn. 223 [55 N.W. 1119]*; 21 L. R. A. 337; 40 Am. St. Rep. 319]; Eddy, Combinations Secs. 198, 199, 204, 205, 261, 901, 907, and first chapter of Vol. 2; Gage v. State, 24 O. C. C. 724; *State v. Buckeye Pipe Line Co. 61 Ohio St. 520 [56 N.E. 464]*; *Leslie v. Lorillard, 110 N.Y. 519 [18 N.E. 363]*; 1 L. R. A. 456]; Grice, *In re, 79 Fed. Rep. 627*.

**Judges:** BIGGER, J.

**Opinion by:** BIGGER

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**Opinion**

## [\*446] BIGGER, J.

This action is brought by the plaintiff who states that for many years he has been, and is now, by occupation, a plumber, and dealer in plumbing supplies. He brings the action against the defendants for engaging in an unlawful combination to control and regulate the quantity and price of such supplies in this city to his damage. He alleges that it is necessary for him in carrying on his business to purchase these supplies from the defendants who were at the times mentioned all the persons and firms engaged in [\*2] the business of selling and jobbing such supplies, and that by reason of the combination stated he was compelled to close [\*447] up and discontinue his business. The averments of the petition are somewhat voluminous and I will not undertake to state them in detail.

General demurrers have been filed to the petition, and as a second ground of demurrer it is claimed that the act known as the Valentine act, defining trusts and providing penalties as a violation thereof, is unconstitutional and void.

Elaborate briefs have been filed by counsel upon both sides citing numerous cases in support of their respective claims. I have not the time either to formulate or to deliver an opinion at great length upon the questions raised, but will content myself with stating my conclusion with a brief statement for the reasons leading to it.

In the first place HN1[

where an act is claimed to be in violation of the constitution the court must be clearly satisfied that it is so or the act must be upheld. There may be some doubt as to the constitutionality of this act in some of its provisions at least, but that it is as a whole in violation of the constitutional requirements I am not at all clear. But [\*3] I am of opinion that without regard to the constitutionality of the so-called Valentine act, that this petition states a good cause of action against the defendants at common law.

It is averred that these defendants were the only persons engaged in this city, in the business of furnishing plumbers' supplies as jobbers; that these defendants have combined and conspired together by uniting their capital, labor and skill, for the purpose of limiting the production of such supplies in this city, and to increase the purchase price of such articles to all persons not members of the association, to not sell below certain figures fixed by them; that it was further agreed that they should not sell plumbing supplies to any person not a member of the association; that they would not sell such supplies to be used in any building or structure that was not being plumbed or supplies with plumbing supplies by some member of the association; that they would not compete with each other in furnishing such supplies, or in plumbing buildings; that they would not sell plumbing supplies to any person desiring to purchase unless some member of the association was employed to furnish the labor to put the [\*4] plumbing supplies in the building or buildings for which they were furnished.

It is further averred that the combination was formed for the purpose of enhancing the price of such supplies without regard to their cost. There are other averments as to the purposes of the combination, but it seems to me that these averments state a case of unlawful combination tending to restrain trade and to establish a monopoly which is contrary to public policy and unlawful and void; and that the plaintiff is entitled to recover whatever damages he may be able to prove he has sustained as a direct result of such unlawful combination.

HN2[ The true test of the illegality of such combinations, it seems, is their tendency to endanger the public, and as to whether or not their necessary [\*448] consequence is to control prices, limit production, and suppress competition in such a way as to restrain trade and create a monopoly.

Furthermore to render such combinations void as against public policy it is not necessary that evil intent or actual injury to the public be shown, but it is sufficient that the inevitable tendency of the combination is to control prices to the detriment of the public. It is true [\*5] that contracts in partial restraint of trade which do not include all of a commodity or trade nor such as to materially affect the freedom of trade or commerce, are not unlawful. But if the combination operate even in a restricted locality to create a monopoly in the hands of a few individuals of a particular commodity or trade, and to exclude all others in competition, it is in contravention of public policy, illegal and void.

Now the petition avers that these defendants were the only persons and firms handling these supplies in this city as jobbers, and that it was necessary for the plaintiff in his business as plumber to purchase his supplies from some one or more of them. I can well understand how a man of small means engaged in the plumbing business might not be able to keep on hand a complete stock of all sorts of supplies which he might need in the regular course of his business, that it might be impracticable to order such supplies from a distant city and await their shipment. It is probably true that these defendants may unite their capital and their skill in the business of purchasing and supplying plumbers' supplies, and that they may use all lawful means to increase their **[\*\*6]** sale at the expense of their competitors; if they may unite their capital and efforts, then such means are only that wholesome competition which is the life of trade. But if they adopt means whose only tendency is to monopolize the entire business of not only furnishing but also putting in such supplies, refusing to sell to any person not a member of the association, or their organization, including all those engaged in that business in this city, it seems to me the object and purpose of such a combination could be nothing less than the creation of such a monopoly in the hands of the defendant to the exclusion of small dealers and artisans engaged in that particular trade and occupation. The tendency would be to drive those smaller concerns who might not be able to buy and keep on hand such a varied stock as the daily demands of the business might require, into the organization to obtain this protection, and that such a combination, one of whose principles is that there should be no competition between members of the organization, would clearly tend to monopoly, and in restraint of trade and competition would seem to be too clear to admit of any doubt.

I am, therefore, of opinion **[\*\*7]** that the facts stated do make a proper case in favor of the plaintiff. I will not stop to cite or discuss the decided cases which are numerous, but an examination of the cases cited, and others, leads me to the conclusion I have stated and the demurrer is therefore overruled.

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End of Document

## Ft. Worth & D. C. R. Co. v. State

Supreme Court of Texas

May 18, 1905, Decided

No. 1412

**Reporter**

99 Tex. 34 \*; 87 S.W. 336 \*\*; 1905 Tex. LEXIS 155 \*\*\*

Fort Worth & Denver City Railway Company et al. v. State of Texas

**Prior History:** [\*\*\*1] Questions certified from the Court of Civil Appeals for the Third District, in an appeal from Travis County.

### **Core Terms**

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railway company, sleeping, railroad company, railroads, passengers, furnish, lines, mileage, repairs, trains, sleeping car, charges, per car, transportation, parties, terminated, haul, per mile, accommodations, berths, notice, roads, seats, antitrust statute, thousand dollars, exclusive right, per annum, convenience, questions, employes

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN1[] Private Actions, Remedies**

The antitrust Act does not create a new business for any person, nor does it give a new right in the property of others, but the object of the law was to prevent interference with business authorized and carried on in accordance with the laws of Texas.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Rail Transportation > Sleeping Cars

#### **HN2[] Regulated Industries, Transportation**

The demand of the traveling public for sleeping cars and like conveniences imposes upon railroads an obligation as potent as a rule of law; the demand must be complied with, which the carrier may do either by furnishing its own coaches or by contracting with another corporation. In order to justify a sleeping car company in furnishing such accommodations the railroad may give the exclusive right, because it is necessary to permanent and reliable service, which is in the interest of the public.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

### HN3 **Regulated Industries, Transportation**

No corporation or person has a right to have sleeping cars attached to the passenger trains of a railroad company; therefore, to exclude them does not restrict the free pursuit of any business authorized or permitted by law, because such business is not authorized to be pursued on a railroad without the consent of the owner.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

### HN4 **Regulated Industries, Transportation**

The Supreme Court of the United States holds that a railroad company has the right to make contracts whereby it would limit the number of persons or companies who might pursue a business on its train.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Overview

### HN5 **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the antitrust law of 1903 (Act), 1903 Tex. Gen. Laws, defines a monopoly as follows: Section 2. A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this Act. 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

## **Headnotes/Summary**

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### **Headnotes**

#### **Antitrust Law -- Railway -- Sleeping Car Company.**

A contract between a railway and a sleeping car company for the exclusive operation of the sleeping cars of the latter upon passenger trains over the lines of the former for the term of fifteen years, was not violative of section 1 of the Antitrust Law of March 31, 1903 (Acts, 28th, Leg. p. 119), where it did not fix the cost of transportation on such cars, leaving same to be fixed and to be changed at will by the sleeping car company, with the restriction only that it should not exceed the charges made for such service on the lines of competing roads, and where there was no pooling or combination of rates, but each company fixed the charges for its respective service.

**Antitrust Law.**

A contract by which the railway paid mileage to the sleeping car company on the cars run over its road where the annual revenue per car to the latter company from its charges failed to reach a fixed sum had no tendency to affect the cost of transportation by increasing the rates charged by such sleeping car company [\*\*\*2] for its service.

**Antitrust Law -- Restrictions on Freedom of Business.**

Such contract did not create or carry out a restriction in the free pursuit of business authorized by the laws of the State; the railway could discharge its duties to the public in the matter of sleeping cars either by furnishing its own coaches or contracting with another to furnish them; and could make such contract exclusive because no other person or corporation had a right to demand that its sleeping cars should be attached to the passenger trains of the railway to be violated by such exclusive contract.

**Antitrust Law -- Monopoly.**

A contract between a railway and a sleeping car company giving the latter the exclusive right to operate sleeping cars in connection with passenger trains on the road, does not constitute a monopoly such as is prohibited by section 2 of the **Antitrust Law** of 1903, as the term is there defined; it neither brought the direction of the affairs of the two corporations under one management or control, nor did one acquire thereby, the shares, etc., or physical properties of the other.

**Counsel:** *Stanley, Spoonts & Thompson*, for appellant, Ft. Worth & Denver City [\*\*\*3] Railway. -- Independent of the Act of 1903 of the Texas Legislature, commonly known as the antitrust statute, the contract between the defendant railway company and the Pullman Company was a valid and binding contract, not against public policy, and not at all in restraint of trade or commerce. The Express Cases, 117 U.S., 1; The Pullman Cases, 139 U.S., 89; Donovan v. Railway Co., 120 Fed. Rep., 215; Cole v. Rowen, 13 Law. Rep. Ann., 848; Atlantic Exp. Co. v. Railway Co., 18 Law. Rep. Ann., 393; [Barney v. Steamship Co., 67 N. Y. 301](#); Fluker v. Railway Co., 2 Law. Rep. Ann., 843; Kates v. Baggage Co., 16 Am. & Eng. R. R. Cases (N. S.), 140; Lewis v. Railway Co., 81 S. W. Rep., 111.

The contract between the Pullman Company and the railway company is not in conflict with the Act of 1903, and the making or carrying out of said contract would not violate any of the provisions of said law.

The agreement between the Pullman Company and the railway company does not create a trust, a monopoly nor a conspiracy in restraint of trade as prohibited by the Act of 1903.

In order for a trust to be created under the Act of 1903 there must be a *combination* of capital, skill or acts, and [\*\*\*4] the contract between the defendant companies does not create a combination. A combination is a union, -- a joining of two or more factors into one result; a blending by which the original separate identity is merged into a result in which each of the original factors or parties have a common and not a separate interest. A contract may create a combination if it brings about a union of interest, but if it does not, and if each party is contracting at arm's length and seeking to secure the best results, and if after the contract is made the interest of each party in the performance of the contract is separate, no combination will be created and no trust formed.

A monopoly under the Act of 1903 is a combination or consolidation of two or more corporations so as to bring them under the same control and create a trust as defined in said Act, or when one corporation acquires control of the stock of another so as to lessen or destroy competition.

A conspiracy in restraint of trade, under said Act of 1903, results when parties engaged in buying and selling agree to refuse to buy or sell to some other person, or when they boycott some other person.

Before any contract will create a [\*\*\*5] trust, it must be mutual and obligate each party thereto to grant to the other party rights that are exclusive. If the Pullman Company had obligated itself not to furnish cars to any other railway company and the railway company had bound itself to lease cars from no other company than the Pullman

Company, the contract might be injurious to the public and unreasonable; but, in the absence of such mutual covenants, the obligation is unilateral and fails to create any combination.

It is not contended that the railway company can not lawfully lease cars from the Pullman Company. If, by reason of the Act of 1903, the exclusive feature of the contract became unlawful, the contract will be treated as divisible, and those provisions thereof which are not in conflict with the law will be binding, and those in conflict will be held to have been annulled. Queen Ins. Co. v. State, 86 Texas, 250; Gates v. Hooper, 90 Texas, 563; State v. Shipper's Compress Co., 95 Texas, 613; 25 Am. & Eng. Enc. Law (2d ed.), 1110; Lemon v. Pullman, 52 Fed. Rep., 262.

*Andrews, Ball & Streetmann and J. D. Guinn*, for appellant, Pullman Company. -- The contract in question was not a violation of the [\*\*\*6] antitrust law of 1903, because the Pullman Co. was not a competitor of the R. R. Co. and the R. R. Co. giving it the exclusive privilege to furnish cars over its line and connect with its train, it merely operated a part of its own business through the instrumentality which the R. R. Co. had the right to select. Welch v. Windmill Co., 89 Texas, 655; Gates v. Hooper, 90 Texas, 565; Lewis v. Railway Co., 81 S. W. Rep., 111; Express Co. Cases, 117 U.S., 1; Wiggins Ferry Co. v. Railway Co., 27 S. W. Rep., 570; Donovan v. Railway Co., 120 Fed. Rep., 215; Barney v. Steamship Co., 67 N. Y., 301; Kates v. Baggage Co., 16 Am. & Eng. Ry. Cases (N. S.), 140; Pullman Palace Car Cases, 139 U.S., 89; U.S. v. Freight Assn., 166 U.S., 341; Hopkins v. U.S., 171 U.S., 578; U.S. v. W. A. Council, 26 Law. Rep., Ann., 158; Addyston P. & S. Co. v. U.S., 175 U.S., 211; State v. Compress Co., 95 Texas, 603.

The contract in question is not a "combination" as defined in the acts of 1903 and the petition therefore fails to state the violation of the terms of that statute.

C. K. Bell, Attorney-General, Jno. W. Brady, County Attorney, D. A. McFall and Allen & Hart, for appellee. -- The [\*\*\*7] allegations of plaintiff's second amended petition were sufficient to bring the case within the scope of the Act of 1903, and the proof was ample to sustain the judgment rendered by the court under said act. Plaintiff's cause of action was complete upon such pleading and proof and it was not incumbent upon plaintiff to show specifically that the exclusive provisions of the contract complained of had been enforced by showing that there were other competing sleeping car companies, or that other sleeping car companies applied to the railroad company to be allowed to furnish sleeping cars to it, nor is it any excuse to say that the contract did not bind the Pullman Company not to lease sleeping cars to other railroads. Bill of Rights, State of Texas, sec. 26; City of Brenham v. Brenham Water Co., 67 Texas, 561; Texas & P. Co. v. Lawson, 89 Texas, 394; Waters-Pierce Oil Co. v. State, 19 Texas Civ. App., 1; United States v. Trans-Missouri Freight Assn., 166 U.S. 290; United States v. Joint Traffic Assn., 171 U.S. 505; Texas & P. Ry. Co. v. Southern P. Ry. Co., 41 La. Ann., 970; Criminal Code, arts. 15, 16, 17; Gulf C. & S. F. Ry. Co. v. State, 72 Texas, 404; Const., sec. 5, art. 10; secs. [\*\*\*8] 1, 2, 3 and 5, art. 12; Chicago Gas L. and C. Co. v. Gas Light Co., 121 Illinois, 530; State v. Fireman's Fund Ins. Co., 52 S. W. Rep., 595; the People v. North River Sugar Refining Co., 5 Law. Rep., Ann., 386, same case, 2 Law. Rep., Ann., 33; Judd v. Harrington, 139 N. Y., 105; State v. Standard Oil Co., 49 O. State, 137; Arnot v. Pittston Coal Co., 68 N. Y. 559; Kettle River Ry. Co. v. Eastern R. R. Co., 6 Law. Rep., Ann., 111; Diamond Glue Co. v. Glue Co., 187 U.S., 611.

**Judges:** Brown, Associate Justice.

**Opinion by:** BROWN

## Opinion

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[\*36] [\*\*337] This is a certified question from the Court of Civil Appeals of the Third Supreme Judicial District. The statement and questions are as follows:

"The Court of Civil Appeals of the Third Supreme Judicial District certifies that the above styled and numbered cause is now pending and undecided in this court, wherein the State of Texas was plaintiff in the court below, in a

suit against the defendants, the Fort Worth & Denver City Railway Company and the Pullman Palace Car Company, to recover penalties for a violation of the antitrust laws of 1899, and the antitrust statute of 1903.

"The case was tried before the court without a jury, and [\*\*\*9] the trial court concluded that there had been no violation of the antitrust law of 1899, but that there was a violation of the antitrust statute of [\*37] 1903, and assessed a penalty against each of the defendant corporations in the sum of \$ 18,550.

"The findings of fact of the trial court, which we adopt and approve, are as follows:

"First. The Fort Worth & Denver City Railway Company is a railway corporation, chartered by a special act of the Legislature, approved May 26, 1873, which said Act is hereby made a part of this statement of facts, and acting under said charter the said company's railway line was constructed and since its construction has been in operation, and during said time it has operated a line of railway, and still operates a line of railway, from Fort Worth, in Tarrant County, Texas, to Texline, in Dallam County, Texas. The Pullman Company is a corporation organized, chartered and doing business under and by authority of the laws of the State of Illinois.

"Second. That on the 1st day of February, 1899, or the 13th day of March, 1899, the Fort Worth & Denver City Railway Company and the Pullman Palace Car Company made and entered into a contract, [\*\*\*10] such contract being signed in the city of Chicago, Ill., by the vice-president and secretary of said Pullman Palace Car Company, and signed in the city of Denver, Colorado, by the president of the Fort Worth & Denver City Railway Company, and was attested and the seal of the Fort Worth & Denver City Railway Company affixed thereto by the secretary of said last named company at Forth Worth, Texas, and such contract is as follows:

"This agreement, made the 1st day of February, A. D. 1899, between Pullman's Palace Car Company, hereinafter called Pullman Company, party of the one part, and the Fort Worth & Denver City Railway Company, hereinafter called the Railway Company, party of the other part witnesseth:

"Whereas, on the 1st day of March, A. D. 1888, a contract was made between the Pullman Company and the Railway Company, in pursuance of which the sleeping cars of the Pullman Company were to be operated over the lines of the Railway Company for a period of fifteen years from the 1st day of March, A. D. 1888; and

"Whereas, the Railway Company desires to terminate said contract for the purpose of entering into a new contract, and the Pullman Company is willing to enter into [\*\*\*11] such new contract.

"Now, therefore, in consideration of the premises and of the agreements hereinafter contained, the said contract is terminated between the parties hereto, and they agree as follows:

"Article I.

"Section 1. The Pullman Company shall furnish sleeping cars, properly equipped and acceptable to the Railway Company, sufficient in the judgment of the general manager or superintendent of the Railway Company, to meet the requirements of travel over the lines of railroads now owned or controlled by the Railway Company, and over all [\*338] additional railroads which it shall hereafter own or control.

"Section 2. The Pullman Company remaining the owner of all the sleeping cars furnished hereunder, and maintaining the same except as herein provided, shall have the right to collect such fares from railroad [\*38] passengers occupying such cars for the use of seats and berths therein, as are customary on competing lines of railroads where equal sleeping car accommodations are furnished; no more room in said sleeping cars shall be furnished to any person or persons than is usually furnished to passengers by railroad companies which use their own sleeping cars, [\*\*\*12] unless by the assent of the proper officers of the Railway Company.

"Section 3. The Pullman Company shall furnish with each of such sleeping cars one or more employes, as may be necessary, whose duties shall be to collect fares from railroad passengers, occupying said cars, for the use of seats or berths therein, and generally to wait upon and provide for the comfort of passengers therein; such employes at all times shall be subject to the rules of the railway company governing its own employes.

"Section 4. The Pullman Company, except as hereinafter provided, shall keep all such sleeping cars in good order and repair and shall renew and improve the same so far as may be necessary to keep them up to the average standard of approved sleeping cars furnished by the Pullman Company for general use on competing lines.

"Section 5. The Pullman Company shall save harmless the Railway Company from damages, costs and expenses, growing out of, or incident to, any claim that may be made to the effect that any of such sleeping cars or any part thereof, or any improvements therein or thereon, is an infringement upon Letters Patent of the United States covering like cars, or like parts [\*\*\*13] thereof, or like improvements thereon or therein; provided the Railway Company shall first give the Pullman Company written notice of any such claim, when made, in order that it may resist the same should it desire to do so.

"Section 6. The Pullman Company will place its tickets for seats and berths on sale in such of the railroad ticket offices as either party may consider necessary for the convenience and accommodation of passengers.

"Section 7. The Pullman Company shall furnish free passes to the general and division officers of the railway company, for use in said sleeping cars, over the lines of railroad now owned or controlled by the railway company, and over any additional railroads which it may hereafter own or control.

"Article II.

"Section 1. The Railway Company shall haul all said sleeping cars furnished by the Pullman Company hereunder that may at any time be necessary in operating the lines of railroad now owned or controlled by the Railway Company, and any additional railroads which it shall hereafter own or control; and shall use such cars as a part of all passenger trains controlled, in whole or in part, by it, where sleeping cars are required, in such [\*\*\*14] manner as shall best accommodate passenger travel.

"The Railway Company shall also, in consideration of the use of said sleeping cars for the transportation of its passengers, bear the cost of maintaining the running gear and bodies of such cars, and other parts thereof as are essential to ordinary first-class passenger cars, [\*39] and are not incidental to a sleeping car, which cost is understood and agreed to amount to an average of two cents per mile run, and shall, except as hereinafter provided, pay to the Pullman Company, in satisfaction of such obligation, two cents per car per mile for every mile run by said sleeping cars upon the roads of the railway company, or upon the roads of other railroad companies by direction of the officer of the Railway Company.

"The Railway Company shall pay one cent per car per mile for every mile run by tourist or second-class sleeping cars furnished under this contract.

"Section 2. The Railway Company shall haul, without charge to the Pullman Company, said sleeping cars to and from repair shops, and to and from other points on the lines of railroads at any time owned or controlled by it, as may be necessary in order that such sleeping [\*\*\*15] cars may be put in good order and repair or be renewed or improved as required hereunder. No mileage shall be paid on the cars so hauled.

"Section 3. The Railway Company shall furnish and apply to said sleeping cars all necessary lubricating material, ice and water, fuel for heating, and oil, fluids or other proper material for lighting; and shall wash and clean said cars; and shall replace bell cords and couplings and air-brake hose and couplings, as often as necessary.

"Section 4. The Railway Company shall pay to the Pullman Company the cost of repairing and making good all damages to any of its sleeping cars resulting from accident or casualty on the lines of its roads, or on any other roads upon which any of said cars may be run by direction of the Railway Company, except damages resulting from accident or casualty arising from defective heating or lighting apparatus, or from the actual negligence of the employes of the Pullman Company in the line of their employment.

"Section 5. The Railway Company shall promptly make all such repairs as may be necessary to put any of said sleeping cars in good order, whenever requested by the Pullman Company so to do; and shall, [\*\*\*16] without request, make such repairs as may be required at any time to insure the safety of said cars, and when the Pullman

Company is, by the terms hereof, under obligation to make **[\*\*339]** such repairs, shall, at the end of each month, render to the Pullman Company bills therefor, charging the actual cost of material and labor expended on such repairs, with an addition of ten percent to cover general expenses.

"Section 6. The Railway Company shall furnish, free of charge at convenient points, rooms and necessary facilities for airing and storing bedding, linen, supplies and other moveables belonging to or designed for the use of said sleeping cars.

"Section 7. The Railway Company shall require its ticket agents, at such offices as may be designated by either party, to sell tickets for seats and berths in said sleeping cars, without charge to the Pullman Company; the proceeds of such sales to be at the risk of the Pullman Company.

"Section 8. The Railway Company shall furnish free passes to the general and division officers of the Pullman Company, over the lines of **[\*40]** railroads now owned or controlled by the Railway Company, and over any additional railroads, **[\*\*\*17]** which it shall hereafter own or control.

"Article III.

"Section 1. All settlements and payments for mileage and repairs shall be made monthly between the parties hereto; subject, however, to adjustment at the close of each contract year on the following basis:

"Whenever the revenue from the sales of seats and berths on any line shall be at a rate less than five thousand dollars per car per annum, on all the cars employed upon such lines, the Railway Company shall pay two cents per car per mile run by the cars on such line.

"Whenever such revenue upon any line shall be at a rate of five thousand dollars or more, but less than six thousand dollars per car per annum, on all the cars employed upon such line, the Railway Company shall pay one cent per car per mile run by the cars on such line.

"Whenever such revenue upon any lines shall be at a rate six thousand dollars or more per car per annum, on all the cars employed on such line, the Railway Company shall not pay any mileage on the cars on such line.

"If any line shall be operated for a fraction of a year, then the mileage payable by the Railway Company on such cars shall be adjusted at the rate per mile run which **[\*\*\*18]** would be payable thereon continued during the entire year at the same rate during the entire year as during the period of such employment.

"Whenever such revenue equals or exceeds an average of six thousand dollars per car per annum from the whole number of cars furnished, the Railway Company shall not pay any mileage on such cars.

"In determining the number of cars furnished, and the rate of revenue per car per annum, upon any line or upon all lines, twenty percentum shall be added to actual days' service of such cars in order to cover shoppage and idle time of cars.

"Section 2. The Railway Company shall have the right to co-operate with other railroad companies in forming through and continuous lines of sleeping car service; and if it should become necessary for the Railway Company so to cooperate with other railroad companies using sleeping cars not owned by the Pullman Company, the Pullman Company shall have the right to furnish its pro rata of sleeping cars, for services on such through or continuous lines, based upon the mileage of the Railway Company in said lines; and in all cars operated on such through or continuous lines the Pullman Company shall be entitled to **[\*\*\*19]** receive all local fares for the use of seats and berths therein upon the roads of the Railway Company, and its mileage proportion of through and intermediate fares.

"Section 3. If any of the Pullman Company's employes furnished with any of the sleeping cars operated under this agreement, should be injured or killed in consequence of a railroad accident, or casualty, when serving in the line of his duties, the Railway Company shall save harmless the Pullman Company from damages, costs and expenses growing out of or incident to such injury or death, to the extent that the Railway Company would be liable if such

employee were in fact an employe [**\*41**] of the Railway Company when so injured or killed, and the Pullman Company shall save harmless the Railway Company from such damages, costs and expenses to any greater extent; each party to have immediate notice from the other of any claim or suit for such injury or death, and the right to resist or defend such claim or suit.

"Section 4. If either of the parties hereto shall fail to clean or repair, according to its obligation under this agreement, any of said sleeping cars, and shall, after written notice from the other party [**\*\*\*20**] of the neglect complained of, further neglect or refuse to so clean or repair said sleeping cars within a reasonable time, such other party shall have the right to clean said cars and to make or cause to be made all necessary repairs and renewals thereof, and shall, at the next monthly settlement between the parties, be repaid the cost of such portion of the cleaning or repairs as the party in fault is liable for by the terms of this contract.

"Section 5. If either of the parties hereto shall fail to keep or perform any of its agreements hereunder, and shall continue in default for sixty days after written notice of such failure from the other party, then such other party shall have the right to declare this agreement terminated at such time as shall be specified by written notice of its intention to terminate the same.

"Section 6. This agreement shall be construed [**\*\*340**] liberally, so as to secure to each party all the rights, privileges and benefits herein provided or manifestly intended, and if any difference between the parties shall arise which can not be amicably adjusted by and between the parties, it may be submitted to referees, one to be appointed by the Railway [**\*\*\*21**] Company, and one by the Pullman Company, the two, in case of disagreement, to appoint a third; the decision of two of them to be final.

"Section 7. The Pullman Company shall have the exclusive right during the continuance of this agreement, to furnish all sleeping cars for use on all the lines of railroads now owned or in any way controlled by the railway company, including branches and bridges, and on all the additional railroads which it shall hereafter own or in any way control; and also on all passenger trains on which it may, by virtue of contracts or running arrangements with person, companies or corporations owning or controlling other lines of railroad, have the right to use such cars; and the Railway Company, except as provided in Section 2 of this article, shall not contract with any other person, company or corporation to run any sleeping cars on or over any of the lines of railroads aforesaid during the said period.

"Section 8. This agreement shall take effect February 1, A. D. 1899, and shall remain in force for the full term of fifteen years from the date hereof, subject to the right of either party, at its option, to terminate the same on the 1st day of February, [**\*\*\*22**] A. D. 1909, by giving notice in writing to the other party of its intention to do so at least six months before the date last named; unless the same shall be sooner terminated by virtue of the provisions of section 5 or article 3 of this agreement, or by the mutual agreement of the parties hereto.

[**\*42**] "In witness whereof, the parties hereto have signed, sealed and delivered these presents, the day and year first herein written.

"Pullman's Palace Car Company,

"Attest:

"by T. H. Wickes, Vice-President.

"A. M. Weimsheiner, Secretary.

"The Fort Worth & Denver City Railway Company,

"Attest:

"by Frank Trumbull, President.

"Geo. Strong, Secretary.

"Signed at Denver, Colo., March 13, 1899.

"That since the execution of said contract continuously up to the time of the trial of this case, sleeping cars have been operated by the defendants under said contract."

We omit the facts certified which are irrelevant to the questions under our view of the law.

The Court of Civil Appeals certified these questions:

"I. Is the contract in question, as set out in the findings of fact, executed between the Railway Company and the Pullman Company, in view [\*\*\*23] of the facts as stated, in violation of any provision of the first section of the antitrust statute of March 31, 1903, page 119 of the Session Laws of the 28th Legislature?

"II. Does such contract, in view of the facts, constitute a monopoly within the meaning of section 2 of said antitrust statute, or is its tendency to create a monopoly within the meaning of that section?"

The acts forbidden by the law of 1903 are so numerous that we will not undertake an examination of each one separately in this opinion. We have carefully examined the entire Act and each specification in reference to its application to the facts of this case and we are of the opinion that the following are the only provisions of the Act which have a semblance of applicability to this contract:

First. To fix or maintain any standard or figure whereby the cost of transportation shall be in any manner affected or established.

Second. To make any contract by which they shall agree to keep the cost of transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the cost of transportation or by which they shall agree to pool, combine or unite any interest they may have [\*\*\*24] in connection with any charge for transportation.

Third. To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

Without so deciding, we will, for the purposes of this opinion, assume that the facts of the case show a combination between the corporations named, and that the word "transportation" as it occurs in the Act embraces carriage of both passengers and freight. The first inquiry that we shall address ourselves to is, do the facts and the contract set out in the statement upon which the questions are submitted, show that the law has been violated by the corporations through any interference with transportation of passengers. The only reference in the contract to any charges to be made by either company is the stipulation that the Pullman Company should not charge passengers in its cars on the line [\*43] of the Ft. Worth & Denver City Railroad Company more than it charged on the lines of competing railroads. The contract did not require that the charges should be maintained as they were then fixed, nor did it fix any standard of charges by which either company should be governed. No pooling or combining [\*\*\*25] of rates between the said companies was provided for, but each was at liberty to prescribe its own charges and to change them at its pleasure. Neither corporation was entitled to receive any part of the charges made by the other; in fact, there was no semblance of a pooling or combination of rates, nor is there anything in the contract by which it would be possible to hold that the making, maintaining or charging of rates by either company, or by [\*\*341] any other company, corporation or person, would be in the least affected, or could possibly be affected.

Counsel for the State contend that the provisions of the contract by which the mileage to be paid by the railroad company for the use of the sleeping cars was to be regulated by the average amount received from each sleeping car, so that in case the collection on each car should exceed \$ 6000 a year, no mileage should be paid by the railroad company, had a tendency to increase the rates charged on the sleeping cars in order to reach the maximum revenue of each car. Certainly this could not have been an inducement to the Pullman Company to increase its charges, because by increasing its rates and the revenue from each car, [\*\*\*26] it would lose the mileage to be paid by the railroad company; for although its increased revenue might be greater than the mileage, yet the loss of the mileage could not have been an inducement for the increase of the rates. The railroad company

would be benefited by the increased revenue of the other company by a reduction or release from mileage, but it had no power over the charges of the Pullman Company. It is manifest that the contract did not in any way affect or tend to affect transportation or charges therefor.

Did the contract "create or carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this State?" [HN1](#)[] The antitrust Act does not create a new business for any person, nor does it give a new right in the property of others, but the object of the law was to prevent interference with business authorized and carried on in accordance with the laws of the State. It is therefore pertinent to inquire what business interest was in any way affected by this contract? The two companies unquestionably had the right to contract that the one should furnish the sleeping cars and maintain them, thereby furnishing accommodations to the passengers [\[\\*\\*\\*27\]](#) of the other, and to collect fares therefor. So far the contract is in conformity to law. This action rests alone upon the alleged illegality of the provision of the contract which grants to the Pullman Company the exclusive right to furnish sleeping cars for use on all lines of road owned or controlled by the Ft. Worth and Denver City Company, and all roads which it might thereafter acquire or operate. Waiving the fact that at the time the law of 1903 was enacted there was no other persons or company engaged in the like business in Texas, we come to the question, did the railroad company have the lawful right to make a contract with the Pullman Company, whereby it excluded all other companies, for fifteen years, from furnishing to the Railroad Company sleeping cars for use on all [\[\\*44\]](#) of its lines? That question suggests this, did all sleeping car companies have a right to demand of the railroad company to haul their coaches on its railroad? If yea, the contract restricted the free pursuit of a lawful business and constitutes a trust under the Act of 1903, otherwise the law has not been violated by the agreement. The effect of this contract was that the railroad company [\[\\*\\*\\*28\]](#) rented from the sleeping car company its coaches, agreeing to haul them over its lines of road, the sleeping car company furnishing sleeping accommodations and other conveniences to such passengers of the railroad as should desire them. [HN2](#)[] The demand of the traveling public for sleeping cars and like conveniences imposes upon railroads an obligation as potent as a rule of law; the demand must be complied with, which the carrier may do either by furnishing its own coaches or by contracting with another corporation as in this case. In order to justify a sleeping car company in furnishing such accommodations the railroad may give the exclusive right, because it is necessary to permanent and reliable service which is in the interest of the public. This contract in no way interfered with the right of any other sleeping car company, if any existed, to build or furnish its cars to other railroads. Neither the Pullman nor any [HN3](#)[] other corporation or person had a right to have sleeping cars attached to the passenger trains of the Ft. Worth & Denver City Railroad Company, therefore, to exclude them did not restrict "the free pursuit of any business authorized or permitted by law," because such [\[\\*\\*\\*29\]](#) business was not authorized to be pursued on a railroad without the consent of the owner, and, since no such business right existed, it could not be restricted. Lewis v. Railroad Co., 10 Texas Ct. Rep., 423; Kates v. Atlanta Baggage and Cab Co., 107 Ga., 636; Express Cases, 117 U.S., 26; Chicago, St. L. & N. O. Ry. Co. v. Pullman So. Car Co., 139 U.S., 79; Fluker v. Georgia Ry. & B. Co., 81 Ga., 461; Barney v. O. B. & H. Steamboat Co., 67 N. Y., 301.

Lewis v. Railroad Company, above cited, was decided by the Court of Civil Appeals of the Second District in this State and an application for writ of error was refused by this court. In that case the facts showed that the railroad company had granted an exclusive privilege to one person to go upon its trains and solicit of passengers baggage to be hauled from the train to different parts of the city. Lewis was engaged in the same business at Mineral Wells and insisted that he had the right to have a solicitor upon the trains of that railroad with like privilege. The railroad company brought an action to enjoin him from so doing. The injunction was granted and at the trial was perpetuated by the trial court, which judgment was affirmed [\[\\*\\*\\*30\]](#) by the Court of Civil Appeals. It was contended that the contract between the railroad company and the person authorized to solicit on its train was a restriction upon [\[\\*\\*\\*342\]](#) a business authorized and permitted by the laws of this State. In a well considered opinion by Judge Speer, the Court of Civil Appeals held that while Lewis had the right to pursue that business, he could not prosecute it on the train of the railroad company without its consent.

In Kates v. Baggage Company, before cited, the Supreme Court of Georgia, in an elaborate and able opinion, held the railroad company [\[\\*45\]](#) had the right to make a contract with one person, whereby it excluded all others from "the business" of soliciting baggage on its trains.

Express Cases (117 U.S., 1), consisted of three separate suits by express companies against three different railroads, to compel the latter to furnish the same facilities for carrying express matter on the respective railroads that the express companies had enjoyed under contracts which each railroad company had terminated. The issue is clearly stated in this language: "The exact question, then, is whether these express companies can now demand as [\*\*\*31] a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." Practically the same question is presented in this case. Upon a thorough examination of this issue [HN4](#)<sup>↑</sup> the Supreme Court of the United States held that express companies had no such rights, and that a railroad company had the right to make contracts whereby it would limit the number of persons or companies who might pursue such a business on its train.

In Railroad Company v. Pullman Car Company, before cited, a contract almost identical in terms with this was the basis of the action; two cars of the Pullman Company having been destroyed, it brought suit upon the contract to recover for their value, to which the railroad company pleaded that the contract by which it gave the exclusive right to the Pullman Company to furnish sleeping cars for use upon the railroad was void, because it was contrary [\*\*\*32] to public policy and was in restraint of trade. In answer to the contention that the contract was in restraint of trade, the Supreme Court of the United States said: "The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for fifteen years to furnish drawing-room and sleeping cars for the defendant's use, and that the defendant should not, during that period, contract for cars of that kind with any other party, rightfully construed is not unreasonable, and, properly performed, will promote the convenience of the public in that it enables the defendant to have on its lines, at all times, and as the requirements of travel demand drawing-room and sleeping cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, can not, for the reasons stated, be sustained." That case is analogous to this and supports our [\*\*\*33] conclusion.

[HN5](#)<sup>↑</sup> Section 2 of the antitrust law of 1903 defines a monopoly as follows:

"Sec. 2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this Act.

[\*46] "2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

The direction of the "affairs" of neither of the corporations to this contract is brought under the control of the other; nor are the affairs of both corporations brought under the management of another corporation or person. Neither of these corporations [\*\*\*34] acquired the shares or certificates of stock or bonds of the other by this contract, nor does the contract transfer to either company any "franchise, or other rights, or the physical properties" of the other company. The agreement by the railroad company to haul the cars of the Pullman Company did not transfer to the latter any of the franchise of the former by which it was authorized to operate trains over the road. On the contrary, the railroad company in the performance of the contract exercised its franchise. The sleeping cars were the only physical "properties" which were involved, or in any way dealt with in this transaction, and they were not acquired by the railroad company, but remained the property of the Pullman Company. The control which the railroad company acquired over the sleeping cars did not tend to affect or lessen competition either in transportation by the railroad company or in the business of the sleeping car company. We conclude, therefore, that the contract

99 Tex. 34, \*46L<sup>87</sup> S.W. 336, \*\*342L<sup>905</sup> Tex. LEXIS 155, \*\*\*34

[\*\*343] between the two corporations "did not constitute a monopoly within the meaning of section 2 of the antitrust statute."

We answer both questions propounded in the negative.

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## **Wills v. Central Ice & Cold Storage Co.**

Court of Civil Appeals of Texas

May 20, 1905, Decided

No Number in Original

**Reporter**

39 Tex. Civ. App. 483 \*; 1905 Tex. App. LEXIS 349 \*\*; 88 S.W. 265

Joe B. Wills v. Central Ice and Cold Storage Company et al.

**Prior History:** [\*\*1] Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

**Disposition:** Affirmed.

### **Core Terms**

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wagons, contracts, Factory, buy, telephone, ice company, conspiracy, dealers, talked, Fuel, handled, morning, phoned, last year, shipped, started, bought, conversation, answered, replied, retail

### **LexisNexis® Headnotes**

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Torts > ... > Concerted Action > Civil Conspiracy > General Overview

#### **HN1** [down arrow] **Concerted Action, Civil Conspiracy**

A conspiracy can not be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy would give a right of action. It is held that the true test as to whether such action will lie is whether the act accomplished after the conspiracy is formed is itself actionable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

#### **HN2** [down arrow] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to property. However, the latter proposition must be limited to the individual action of the party who asserts the right; one person, from such motives, may not influence another to do the same thing.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

### **HN3** Trials, Judgment as Matter of Law

Although there is slight testimony, if its probative force is so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, it is the duty of the court to instruct a verdict.

## **Headnotes/Summary**

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### **Headnotes**

#### **Conspiracy to Secure Monopoly -- Right of Action -- Test.**

A conspiracy can not be made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action; the true test as to whether such action will lie being whether the act accomplished after the conspiracy is formed is itself actionable.

#### **Conspiracy to Secure Monopoly -- Refusal to Sell to Dealer.**

A person has an absolute right to refuse to have business relations with any person whomsoever, even though the refusal is the result of whim, caprice, prejudice or malice, but one person may not, from such motives, influence another to do the same thing.

#### **Conspiracy to Secure Monopoly -- Fact Case.**

Evidence considered in an action by an ice dealer for damages resulting from an alleged conspiracy to secure a monopoly of the ice business and to boycott plaintiff by refusing to sell him ice, and held not to warrant submitting the case to the jury, since it showed only a refusal by one of defendants to sell ice to plaintiff.

#### **Court and Jury -- Instructing Verdict.**

Where there is slight testimony, but its probative force is so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, it is the duty of the court to instruct a verdict.

**Counsel:** W. M. Holland, for appellant.

1. One who suffers injury by reason of a conspiracy formed for the purpose of preventing competition in trade in commodities in common use, which combinations are declared illegal by statute, has a right of action to recover damages sustained. 8 Cyc. of Law, p. 651; Rourke v. Elk Drug Co., 77 N. Y. Supp., 373; 75 N. Y. App. Div., 145; Murray v. McGarigle (Wis.), 34 N. W. Rep., 522; Montague v. Lowry, 193 U.S., 38; Texas Anti-Trust Statute of 1903; Supp. Sayles Statutes, pp. 559, 560; Delz v. Winfree, 80 Texas, 400; International & G. N. Ry. v. Greenwood, 2 Texas Civ. App., 77; Olive v. Van Patten, 7 Texas Civ. App., 630.

2. The judge is not authorized to direct verdict for the defendants if the plaintiff has introduced any evidence tending to sustain the material allegations of his petition. Newberger & Sons v. Heintze & Co., 3 Texas Civ. App., 261; Ney v. Ladd, 68 S. W. Rep., 1014; Burnett v. Burnett, 11 Texas Ct. Rep., 366; Lee v. International & G. N. R. R., 89 Texas, 588; Joske v. Irvine, 91 Texas, 581.

Read & Lowrance, Crane & Gilbert, **[\*\*2]** Muse & Allen and Cockrell & Gray, for appellees.

1. The court did not err in giving peremptory instruction for the defendant, because there was no evidence to support any of the material allegations in plaintiff's petition. Delz v. Winfree, 80 Texas, 403, 25 S. W. Rep., 50; Olive v. Van Patten, 25 S. W. Rep., 429; Grand Lodge v. Schuetze, 83 S. W. Rep., 241; State v. Shippers C. & W. Co., 69 S. W. Rep., 58; Hunt v. Simonds, 19 Mo., 589; Cooley on Torts (2d ed.), secs. 126, 278, 690.

2. An individual can not recover damages on account of a conspiracy unless the facts alleged and proved constituted damages to him personally, independent of the alleged conspiracy. A person or corporation has an absolute right to refuse to have business relations with any person whomsoever, for any cause, and the law does not force any one to sell to another. *Delz v. Winfree*, 80 Texas, 403; *Grand Lodge v. Schuetze*, 83 S. W. Rep., 241; *Hunt v. Simonds*, 19 Mo., 583, 586; *Cooley on Torts* (2d ed.), secs. 124-126, 278, 690; *Bishop on Non-contract Law*, sec. 354; 6 Am. and Eng. Ency. Law, (2d ed.), 873, 874.

3. It was the duty of the court to instruct a verdict for appellee, because the testimony [\*\*3] adduced at the trial of the case did not, in legal contemplation, amount to "any evidence," and "it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise of suspicion of the existence of the fact sought to be established. *Joske v. Irvine*, 91 Texas, 582; *Improvement & Ry. Co. v. Munson*, 14 Wall., 442, 81 U.S., 442; *Wittkowsky v. Wasson*, 71 N. C., 454; *Banlec v. Railway*, 59 N. Y., 356; *Texas Loan Agency v. Fleming*, 49 S. W. Rep., 1041.

**Judges:** TALBOT, Associate Justice.

**Opinion by:** TALBOT

## **Opinion**

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[\*484] TALBOT, Associate Justice. -- We adopt appellant's statement of the nature of the suit as follows: This suit was instituted by appellant in the Forty-fourth Judicial District Court of Texas on March 24, 1904, against appellees, Central Ice and Cold Storage Company, C. L. Wake-field, doing business as Dallas Ice and Fuel Company, the Peoples' Ice Company, Armstrong Packing Company and Dallas Ice Factory, Light and Power Company. It is a suit in the nature of a civil conspiracy for damages on account of injuries suffered by appellant by reason of an alleged conspiracy entered into by appellees on or [\*\*4] about March 1, 1904, for the following purposes, viz: to secure a monopoly of all the ice manufactured in the city of Dallas for local consumption; to lessen competition and to fix and maintain the price of ice in the city of Dallas; to prevent lawful competition in the dealing of ice in the city [\*485] of Dallas; to boycott appellant and to refuse to sell ice to appellant and to otherwise unlawfully meddle and interfere with appellant's business and deprive him of making a living out of his business as a wholesale and retail dealer in ice.

The defendants answered by general and special exceptions and general and special denial. A jury was empaneled to try the case, but upon the close of plaintiff's evidence the court, upon motion of the defendants, gave a peremptory instruction to the jury to return a verdict in their favor, which was done and judgment entered in accordance therewith. From this judgment appellant has appealed.

The petition discloses a cause of action, and the sole question presented for our determination is, whether or not the evidence was sufficient to require the submission of the case to the jury. C. L. Wakefield, one of the defendants and witness for plaintiff, [\*\*5] testified by deposition: "I am interested in Dallas Ice and Fuel Company. The firm doing business under this name was formed in February, 1904. It was formed for the purpose of buying and selling ice in Dallas. It is a simple partnership composed of C. L. Wakefield, J. E. Cockrell and E. Gray, who alone compose the firm. At the time this suit was filed there were, I think, five factories or companies engaged in the manufacture of ice in Dallas, viz: the Lemp Company, the Armstrong Packing Company, the Dallas Ice Factory, Light & Power Company, the Peoples' Ice Company and the Central Cold Storage Company. I have a contract for the purchase of a certain amount of ice from the Armstrong Packing Company, the Dallas Ice Factory, Light and Power Company, the Peoples' Ice Company and William Lemp. These contracts were made with me and in my name. The contracts are in writing and were made with the executive officers of said three companies and with William J. Lemp, personally. I do not attach copies, because these are contracts relating to a private business and in which the plaintiff in this case is not interested. We bought some wagons and teams from the Lemp people. We bought them outright [\*\*6] and paid for them part money and part in our notes. They have no interest whatever in our business. We have paid about two-thirds of the cost of such wagons and teams in money and owe the balance

on notes. It was not agreed in said contract that the Lemp people should not sell ice to be used in the city of Dallas. They are at perfect liberty so far as our contract is concerned, to sell ice to whomsoever they please and where they please. The Lemp people did run wagons and sell ice to retail dealers last year, but decided not to do so this year. It is our understanding that they have long desired to get out of the retail business. The ice department of the Lemp people have telephone number 712 and Dallas Ice and Fuel Company has telephone number 712 in its office. We pay the additional charge to get our names also on this telephone number. We need phone service there where we get, load and deliver a great deal of ice, and we simply pay for the privilege. My agreement to purchase ice from the Peoples' Ice Company is in writing. I do not attach a copy for reasons already given. The contract is signed by the president and secretary of said company. We were not to take their entire output, [\*\*7] for reasons already given. I decline to go into our private affairs. We have simply complied with our contract with them and have taken and paid for the ice [\*486] we have contracted for. We bought part of their wagons and teams, not all. They sold some of the balance to other retail dealers. Under our contract it was not agreed that the Peoples' Ice Company should sell to no one else in Dallas. They can sell to whom they please, and I understand they are selling other dealers like ourselves. I do not know what you mean by independent dealers. There is no community of interest between our firm and this company. We are as independent dealers as the plaintiff or any one else. Mr. Jones while in our employ made a suggestion that we cut the selling price of ice so as to get more custom for our business. The suggestion was prompted by Fort Worth ice being shipped into Dallas and sold here. He seemed to think the Dallas factories should sell all the ice sold in Dallas. Whether Mr. Jones made this suggestion in our interest, as he was then working for us, or in the interest of the Peoples' Ice Company, of which he is a large stockholder, I do not know. But, in any event, we declined [\*\*8] to adopt the suggestion or make any cut. We understand that Mr. Jones, for the Peoples' Ice Company, sold a lot of white ice at 12 1/2 cents to whosoever would buy it. We know of such sales by hearsay. But, as our consent was not necessary, it was not asked. The Peoples' Ice Company is not a subsidiary company to our firm. We have nothing on earth to do with them save we buy ice from them. It is not a fact that the ice companies operating in Dallas agreed with my company or myself that they were not to sell to any person, firm or corporation dealing in ice in Dallas city, except myself or my company. They can sell ice to whomsoever they please, so far as any contract we have with them is concerned, and on whatever terms they see fit. I did not engage in this business for the purpose of securing a monopoly or a partial monopoly, but did engage in it because I thought by economy, with lawful, honest and fair men for partners, I could do my share of the business and make some money in a legitimate way. Yes, I was formerly manager of Dallas Ice Factory, Light and Power Company. My connection with said company wholly ceased on February 29, 1904, when I resigned to embark in my present business. [\*\*9] It is not a fact that some other party is manager in name only of said Power Company and that I am still its manager in fact. I have nothing whatever to do with said company save that we buy ice from it. I decline to answer the question as to the approximate amount of money, if any, paid by myself or Dallas Ice and Fuel Company to Dallas Ice Factory, Light and Power Company up to the present time. This is a private matter. Mr. Armstrong represented his company in contracting with me for the sale of ice. Said contract was in writing. I decline to give its terms for the reasons already given. The question as to whether said contract was in violation of the antitrust law was mentioned when the subject was first broached. It is a fact that neither myself nor my firm have any agreement, contract or understanding of any kind, form or character with my codefendant, the Central Ice and Cold Storage Company. Neither myself nor Dallas Ice and Fuel Company ever at any time had any understanding, contract or agreement with said codefendant. I never confederated or conspired with any person whomsoever to injure or affect the business of plaintiff or to prevent him from buying ice wherever he could."

[\*\*10] [\*487] Joe B. Wills, plaintiff, testified: that he had been engaged in the ice business since March, 1903; that he was well acquainted with the trade in that business and with the people who bought ice; that prior to the acts of defendants complained of he had a good trade in the ice business; that in addition to his city trade he sold ice to country men living in the little towns near Dallas; that he got the biggest part of his ice last season from Armstrong Packing Company and a good deal from Central Ice and Cold Storage Company, till March 1, but that thereafter they would not sell him ice, though he made efforts to get it from them; that during the latter part of February he phoned Mr. Flippin, the secretary of the Armstrong Company, and asked him about getting ice next year, as he thought there was danger about his getting ice, and that Mr. Flippin replied that he would tell him without authority that Mr. Wakefield was going to get Armstrong's ice, and that while the papers were not signed now, yet he could depend on getting ice elsewhere. That Mr. Wakefield was going to get Armstrong's as well as the other three; that

he phoned Mr. Armstrong in August about getting ice [\*\*11] from him, and he said that he couldn't sell me; that he (Armstrong) had a five years' contract with Mr. Wakefield, and that he didn't have any ice to sell him, Wills, at all; that it was simply Wakefield's ice, and to sell it would simply be selling someone else's ice that did not belong to him, Armstrong; that when he, Armstrong, "pulled" the ice it belonged to Mr. Wakefield and that he had nothing further to do with it when he turned it over to him, Wakefield, and that he, Armstrong, couldn't sell him, Wills, any ice at all. That along about March 1, he, Wills, had a contract with Gardner & Tarver, Earl S. Graham, and T. L. Benning to get ice from them that they had contracted for with the Central Ice and Cold Storage Company. That he got ice through them from Central Ice and Cold Storage Company till the 10th of March, when the Central Ice and Cold Storage Company refused to let him have any more ice; that after this he got his ice from Fort Worth, and had it shipped over the Texas & Pacific and Houston & Texas Central Railroads. That Mr. Jones had made a statement to him about the defendant companies having an agreement; that at the time Jones made the statement he was acting for [\*\*12] the Peoples' Ice Company and represented himself to be an officer of the company. That Jones came to his, Wills, place to see him about cutting off ice from the dealers who were getting ice from Wills. That Jones told him that if he would cut them off that he, Wills, could get all the ice he wanted at the Peoples' Company, or that he, Jones, would arrange it so that he, Wills, could get ice anywhere. That Jones offered him \$ 500 to cut off the Oak Cliff wagons and \$ 4,000 to cut off the Dallas wagons without notice, or to ship them in ice that was inferior. That prior to the alleged unlawful acts of defendants, that he, Wills, was making money out of the ice business. That on March 1, 1904, his business had a value; that it was worth \$ 5,000 to \$ 6,000, the way he, Wills, figured it. That on December 1, of this year, 1904, under the present circumstances, his business was not worth anything.

He further testified: "I begun business in March, 1903; I didn't have any ice business at that time, I was in the fuel business; when I [\*488] started the business I didn't have any trade; I didn't have any ice business worked up at that time, and it was worth very little in March, 1903. [\*\*13] The business gradually grew from the time I started it; I had some mules and wagons when I started; when I first started the whole business was probably worth \$ 800 to \$ 1,100, or something like that; on December 1, 1903, I figured that my ice business was worth \$ 2,000 to \$ 2,500; I am not doing much ice business this winter, but I did more last winter; I have not kept track of the number of pounds of ice I sold last winter, but I sold a great deal of ice compared to what I sold this December. I bought my ice from Armstrong Packing Company and the Central Ice and Cold Storage Company last winter; I ran two wagons last year; I did not sell ice to dealers last year, except to those from the country, who would put it in their wagons and haul it out; I just had two ice wagons running and sold from them; this year, 1904, I ran two wagons to commence with, and then I got another one in July and another one in August; I ran four wagons this year, and two last year; I sold a great deal of ice this year at wholesale, but didn't sell any last year; between December, 1903, and December, 1904, I handled more ice than I did the year previous; I handled a great deal more ice during the year 1904 [\*\*14] than I did during the year 1903; I handled a right smart of ice in March, 1904; I commenced the 10th of March, 1904, and handled a car every other day until about the 20th, and then a car every day; that was in March, 1904; I did build up my business and sold four times as much ice as I had ever sold before; I didn't do anything like that in March, 1903, because I had just started then; in March, 1904, I handled nearly a carload a day, but not over a car a day at any time; I thought it was wise to make a contract early for my supply of ice; I did not try to get every bit of the output of the Armstrong Company; he sent for me to come down and wanted me to handle his ice; he didn't say all of it; he said he wanted me to take about twenty-five tons a day; I was not going to take all of his ice that he could spare; I was not going to contract for all I could get from him; I wouldn't sew myself up to take any certain amount. Along about the first of March I had a contract with Gardner & Tarver, Earl S. Graham and with T. L. Benning, to get ice from them that they had contracted for with the Central Ice and Cold Storage Company; I went to the Central Ice and Cold Storage Company after that [\*\*15] ice; I went there in March -- I commenced, I believe, the first of March, and got ice there the first, second and third of March, and paid Gardner & Tarver for it, and on the 4th of March I saw Mr. Drebelsis, the manager of the Central Ice and Cold Storage Company, and he told me then that they didn't have any ice there to sell to me; that if I got any ice there I would have to buy it from him; that he would be glad to sell me ice, and would sell it to me as long as there was a block in the vaults, and I told him I had already made arrangements with those parties to get part of their ice any time I needed it, and that I didn't see any very good reason why I should change my arrangements with those parties, and he says, "Well, they can't sell any ice to you; they can simply use any ice they get here!" and that was the extent of the conversation, and I said to him that I would not change my arrangements with them; that was on the 5th of March, and I continued to get ice there and had it [\*489] charged to Gardner & Tarver and paid them for it whenever I would see them,

and took a written order there a time or two signed by them, for blank number of pounds and they would fill it out, [\*\*16] I don't know how many times, and had it charged to them, and the 10th morning of March, I went down with Mr. Grigsby and Mr. Trapp who were running a wagon, and had just started up the day before, and I hadn't got any ice on the Texas & Pacific that morning, and I went down and asked Mr. Kiser, their engineer, for some ice, and he says, "No, I can't let you have any," and I told him I had paid Gardner & Tarver and Mr. Benning for it, and wanted it out and he refused to let me have it; the engineer would not let me have the ice; he was the man that had charge of delivering the ice early in the morning before anyone else came down; the time I was there was about three or four o'clock in the morning; he was the night engineer that I speak of. About 11 o'clock on the 17th of last March, I telephoned for number 84 and asked for Mr. Wakefield, and I don't know who answered the phone, but they said he wasn't in and to call his residence, and I called his residence and was not able to talk to him and then I called number 62, the Dallas Ice Factory and asked to speak to their manager, and they said to call the engine room, and give me the number to call, and I called the engine room and they [\*\*17] said Mr. Galloway was not there, and then they gave me still another number, the office of the Dallas Ice Factory, and I called that and asked for Mr. Galloway and didn't get him, and I talked to Mr. Herber, who answered the telephone, and asked him if I could get some ice there; then I phoned to Mr. Flippen at the Armstrong Packing Company; then I phoned number 712, that is Wm. J. Lemp's factory, and was referred to number 46, and asked for Mr. Feickert; I talked over the phone to Mr. Feickert and he said, "We have no ice to sell here, you will have to call Mr. Wakefield, he has our ice." That was the extent of the conversation between me and Mr. Wakefield."

F. A. Gillette testified that he was local freight agent of the Houston and Texas Central Railroad Company. That plaintiff, Wills, shipped considerable ice over his road this year, 1904; that he had a conversation with Mr. Jones with reference to his road shipping ice for Wills. That Jones asked him if his road was shipping ice from Fort Worth for Wills. That he told him that it was, and Jones asked him if there was any money in it for handling the ice, and that he asked Jones what he meant. That since he thought about it he [\*\*18] believed Mr. Jones did ask him if there wasn't some way by which he could decline to haul the ice, and that he told him no, there wasn't; that they were common carriers and had to haul it. None of the other defendants approached me on that subject at any time.

R. Zink testified that last summer he was running a candy kitchen and ice cream parlor on Ross Avenue and Central Avenue, and that he sold ice; that about the first of March he called up Wakefield over the telephone and talked with him with reference to the price of ice; that Wakefield quoted him price and that he told him, Wakefield, that he could make better arrangements and could get ice from Mr. Wills for 25 cents, and Wakefield answered that he could furnish ice only on those terms, and that he, Zink, replied that he could buy ice from Wills [\*490] at 25 cents, and Wakefield said he, Zink, could get it till warm weather came and then he couldn't get it, and then what would he do? That Mr. Wakefield raised the price of ice on his this year as compared with last year.

Joe Bell testified that he was running a store and blacksmith shop at Rylie. That during October he got 1,100 pounds of ice at Lemp's factory for Wills. [\*\*19] That he got it in his wagon, not in Wills's wagon. That his wagon was a farm wagon. That when he went after the ice they asked him if he lived in the country. That when he went after the ice he went to the place where he had always gone after ice, and that they would not let him have it there, but sent him up to the office. That when he formerly bought ice from them he never did have to go to the office after it, and that they never asked him before that where he wanted to take the ice.

A. J. Pulaski testified that he lived at Mesquite. That during the summer he was engaged in the ice and meat business. That this season he had got ice from Dallace Ice and Fuel Company, from Lemp and from Mr. Armstrong. That the only question they asked him was where he was doing business at, and that this question was only asked at Dallas Ice and Fuel Company and at Lemp's, but that Mr. Armstrong was acquainted with him, and he presumed knew where he was doing business.

Ed Tarver testified that he was engaged in the retail ice business; that plaintiff, Wills, got ice from him up to March 10, 1904, that during the latter part of February; he, Tarver, asked Mr. Drebelbis, manager of the Central Ice [\*\*20] and Cold Storage Company, if he, Drebelbis, would object to his, Tarver's, selling ice to Wills, and he replied that he would not; that Wills got ice there until March 10; that Mr. Drebelbis then told him, Tarver, that they, Gardner & Tarver, could not sell Wills any more ice. He, Drebelbis, said that he, Tarver, could neither buy any ice from Wills nor sell any ice to Wills as he was a competitor of theirs.

W. C. Wills testified that he was a brother of the plaintiff; that he was familiar with plaintiff's business and had worked for plaintiff; that plaintiff's business had a value prior to March 1, 1904; that the value at that time was some thousands of dollars, between \$ 5,000 and \$ 6,000; that he left plaintiff's business in July, and that the value of plaintiff's business had depreciated until it was worth only between \$ 200 and \$ 400 at that time.

George Gardner testified that he was engaged in the ice business; that on the last day of February he and Tarver went down to the Central Company's office and talked with Mr. Drebelsis in regard to his factory allowing Mr. Wills to use their ice through them, Gardner & Tarver; that Mr. Drebelsis said he was perfectly willing for them [\*\*21] to let Wills have ice; that this conversation took place about the last day of February, just before the Armstrong contract expired, which was on the first of March; that they, Gardner & Tarver, gave Mr. Wills orders for ice and they were accepted till the morning of March 10, 1904, at which time the Central Ice and Cold Storage Company refused to honor their, Gardner & Tarver's orders in favor if Wills; that the man in charge, Kiser, stated that he had instructions from Drebelsis, [\*491] the manager, not to load out Mr. Wills and Mr. Grigsby; that Mr. Grigsby was a man that had been getting ice there under Mr. Wills -- one of Mr. Wills' men.

The foregoing, we think, is all the testimony, contained in the record, material to a decision of the question presented and an understanding of our ruling.

In the case of *Delz v. Winfree, 80 Tex. 400*, our Supreme Court approves the doctrine, that HN1[<sup>↑</sup>] a conspiracy can not be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action. It is held that the true test as to whether such action will lie is whether the act accomplished after the conspiracy is formed [\*\*22] is itself actionable. In that case the following proposition is also conceded to be correct: HN2[<sup>↑</sup>] "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to property." It is said, however, that the latter proposition must be limited to the individual action of the party who asserts the right; that one person, from such motives, may not influence another to do the same thing.

Now, if we should concede, which we do not, that there was sufficient evidence introduced, which would have justified a finding that the conspiracy had been established, still the record will be searched in vain, we think, for any testimony which would have authorized a finding by the jury that appellees, or either of them, did any act, after such conspiracy was formed, which in itself constituted actionable wrong and on account of which appellant was entitled to recover damages. The nearest approach to any evidence tending to show a cause of action for damages, without the conspiracy alleged, is the testimony of Gardner [\*\*23] and statement of appellant that he had a contract with Gardner & Tarver to get ice from them that they had contracted for with the Central Ice and Cold Storage Company, and that Mr. Drebelsis, manager of said company, on or about the 4th day of March, 1904, told him that Gardner & Tarver could not sell ice to him, and on the morning of March 10, 1904, refused to let him have ice on the order of Gardner & Tarver, and the testimony of Tarver to the effect that on the evening of the 9th of March, 1904, Mr. Drebelsis told him that the firm of Gardner & Tarver could not sell appellant any more ice; that Drebelsis said that he, Tarver, could neither buy ice from appellant nor sell any ice to him. There is no evidence, however, that Gardner & Tarver or either of them, refused to sell appellant ice, or that he sustained any damage whatever by reason of Drebelsis's statement. Nor does the evidence show that Drebelsis ever attempted in any manner to induce Gardner & Tarver or any one else not to sell ice to appellant, unless his statements to appellant and Tarver referred to can be so construed. But applying the principle recognized in the case of *Delz v. Winfree, supra*, we think this testimony [\*\*24] insufficient to show a cause of action against the Central Ice and Cold Storage Company. It had the right to refuse to sell its ice to appellant, either directly or through Gardner & Tarver, and the mere exercise of that right, no matter what may have been the motive for doing so, whether caprice, malice or prejudice, did not render it liable [\*492] to appellant in damages on account of such refusal. As seen in the case cited the assertion of this privilege by the Central Ice and Cold Storage Company could not, legally, be carried beyond its individual action. It did not have the right to influence Gardner & Tarver or any other person to refuse the sale of ice to appellant, and the evidence, as said, fails to show any such attempt on said appellee's part to exercise such influence as amounted to a breach of the privilege mentioned or rule announced. It appears without contradiction that after Drebelsis told appellant that Gardner & Tarver could not sell him ice, the appellee, Central Ice and Cold

Storage Company continued to let him have ice through Gardner & Tarver until March 10, 1904, and that prior to March 10, 1904, appellant had contracted to get his ice from Fort Worth, [\*\*25] and about 10 o'clock a. m. on that day received from Fort Worth a car of ice containing about fifteen tons. It further appears that in the conversation in which Drebelsis told appellant that Gardner & Tarver could not sell him ice, he stated to appellant that if he got any ice from the Central Ice and Cold Storage Company he would have to buy it from him; that he, Drebelsis, would be glad to sell him ice and would do so as long as there was a block in the vault. Appellant replied to this statement, in effect, that he had made arrangements with Gardner & Tarver to get a part of the ice they had contracted to get from the Central Ice and Cold Storage Company and would make no change, and did not thereafter, so far as the record shows, try to buy any ice directly from that company. Nor does it appear that after the morning of March 10, 1904, he ever attempted to do so through Gardner & Tarver or upon their order and was refused. Again, it is shown beyond controversy that this appellee had no contract whatever with the other appellees in regard to the sale of ice. In reference to the other appellees, C. L. Wakefield, Lemp, the People's Ice Company and the Dallas Ice Factory, Light and [\*\*26] Power Company, the evidence fails to show that appellant made any demand upon either of them for the sale to him of any of their ice. The extent of his efforts to get ice from either of these appellees, if it can be said that such was his purpose, will be found in appellant's testimony to the effect that on March 17, 1904, he asked for Mr. Wakefield over telephone No. 84, and was informed by some unknown person to call his residence; that he called his residence and "was not able to talk to him," why, he does not say; that he then called the Dallas Ice Factory, over telephone No. 62, and asked to speak to the manager and was directed to call the engine room, which he did, and they said Mr. Galloway was not there; that after another effort over another telephone to the Dallas Ice Factory he failed to get Mr. Galloway, but that Mr. Herber answered his call and he asked him if he, appellant, could get some ice there, but does not state what reply Mr. Herber made; that he then telephoned Mr. Flippin, of the Armstrong Packing Company, for what purpose he does not say, neither does he say whether or not he reached and talked with Mr. Flippin. That he then telephoned to Wm. J. Lemp's factory [\*\*27] and talked to Mr. Feickert, and that Mr. Feickert, said, "We have no ice to sell here; you will have to call Mr. Wakefield, he has our ice." If at any other time or in any other manner during the period covered by the allegations of his petition appellant tried to buy ice from either of said appellees, it is not disclosed by the record.

[\*493] We think the right of C. L. Wakefield to purchase the ice of his coappellees as disclosed by the evidence before us can not be doubted. If these contracts of either of them, which were in writing, were in violation of our anti-trust statutes or any other law, there is no evidence of the fact contained in the statement of facts sent to this court. Insofar as the testimony shows these contracts were independent of each other, involved only an ordinary business transaction for the purchase of the ice contracted for, and in no way infringed upon the rights of appellant or any other ice dealer. There is no concerted action or scheme shown, whatever may have been the real facts, on the part of these appellees to injure appellant's business or to destroy or forbid competition in trade. It is true the record shows that appellee Wakefield refused [\*\*28] to attach to his deposition copies of these contracts and failed to state the exact terms thereof; and it is argued, in effect, that the withholding of this evidence gives rise to a strong legal presumption of the truth of appellant's allegations. Now, while such conduct may furnish a circumstance tending to show that the terms of the contracts, had they been disclosed, might have affected injuriously the interest of appellees, still it was not of such probative force, either alone or considered together with all the other evidence in the record, as would have authorized a verdict for appellant. It may be that by the failure to produce these contracts and reveal their contents to the court and jury important facts were not disclosed, and the case in that respect and to that extent undeveloped. If, however, any effort was made, further than propounding interrogatories and taking Wakefield's deposition, under the ample provisions of the law to require the production of these instruments or to compel the witness to state their exact contents, instead of his conclusion of their legal effect, it is not shown.

We conclude the evidence adduced was insufficient to sustain the charge of conspiracy [\*\*29] or to authorize a recovery against appellees, or either of them, on account of any of the matters alleged, and that the court correctly instructed a verdict in their favor. The rule is that [HN3](#) though there be slight testimony, yet "if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, it is the duty of the court to instruct a verdict." ([Joske v. Irvine, 91 Tex. 574.](#))

The judgment of the court below is affirmed.

39 Tex. Civ. App. 483, \*493L 905 Tex. App. LEXIS 349, \*\*29

*Affirmed.*

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## *Hunt v. Riverside Co-operative Club*

Supreme Court of Michigan

February 9, 1905, Submitted ; June 29, 1905, Decided

Docket No. 44

**Reporter**

140 Mich. 538 \*; 104 N.W. 40 \*\*; 1905 Mich. LEXIS 605 \*\*\*

HUNT v. RIVERSIDE CO-OPERATIVE CLUB

### **Core Terms**

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plumbers, supplies, wholesale, monopoly, provisions, regulating, enjoined, defendants', eliminated, installing, commodity, estimates, decree, nonmembers, contracts, parties, fixing, prices, transportation, obligated, forbids, selling, percent, objectionable, merchandise, restricting, forbidden

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### [HN1](#) [down arrow] **Regulated Practices, Price Fixing & Restraints of Trade**

See 1899 Mich. Pub. Act no. 255 § 1.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > Defenses > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

#### [HN2](#) [down arrow] **Monopolies & Monopolization, Actual Monopolization**

It is no defense to say that a monopoly has in fact reduced prices. That policy may have been necessary to crush competition. Where it rests in the discretion of a company at any time to raise the price to an exorbitant degree, such combinations have frequently been condemned by courts as unlawful and against public policy. Neither is it an answer to say that the monopoly created, or attempted to be created, is not a complete and perfect monopoly. In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### **HN3** Regulated Practices, Price Fixing & Restraints of Trade

In general, it may be said that 1899 Mich. Pub. Act no. 255 § 1 forbids certain contracts and certain defined trusts. An agreement fixing and regulating the price of labor is not one of these contracts, nor one of these trusts. If it may be said that an agreement fixing the price of labor violates the statute when it forms part of an undertaking which the statute forbids, it must also be said that it does not violate the statute unless it does form part of some undertaking forbidden by the statute.

**Counsel:** [\*\*\*1] *Ormond F. Hunt*, in pro. per.

*J. J. & R. T. Speed*, for defendants.

**Opinion by:** CARPENTER

## **Opinion**

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[\*540] [\*\*41] CARPENTER, J. **HN1** Section 1, Act No. 255, Pub. Acts 1899, reads as follows:

"That a trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase or reduce the price of, merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"5. It shall hereafter be unlawful for two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, to make or enter into or execute or carry out any contracts, obligations [\*\*\*2] or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Under the claim that the purpose of the organization of the first two named defendants was to violate the above-quoted [\*\*\*3] [\*541] section, relator filed this information in equity asking a decree restraining their further operation. Defendants answered, and the case was heard in the court below on pleadings and proof. A decree was granted in conformity with the prayer of the bill. Defendants appeal to this court.

Each of said first two named defendants is an unincorporated association. The Master Plumbers' Exchange was organized in January, 1902. The Riverside Co-operative Club was organized in the following July. The members of

the exchange are master plumbers doing business in the city of Detroit and its vicinity. The importance of that organization is shown by the fact that, of the 168 master plumbers doing business in Detroit, 131 -- and these "the most reputable" modestly states one of defendant's witnesses -- are members of the exchange. The membership of the Riverside Club consists of the master plumbers belonging to the exchange and seven wholesale dealers and manufacturers in plumbers' supplies. (These seven comprise all the manufacturers and dealers in plumbers' supplies in the city of Detroit.) According to the rules and regulations of the Riverside Co-operative Club (these rules [\*\*4] and [\*\*42] regulations constitute an agreement between the members of said club), the price of plumbers' supplies is to be fixed by a committee consisting of one wholesaler and one master plumber. At this price the wholesale members agree to sell without discrimination to the master plumber members, and the master plumber members agree to buy their entire supplies, distributing their trade equitably, from the wholesale members. The wholesalers agree to sell only to qualified master plumbers (this includes plumbers who are not, as well as those who are, members of the club) whose names appear on a list approved by the officers of the club. They also agree to charge nonmembers 15 to 30 per cent. more than members. The master plumber members agree that they will not sell labor or material at prices below those fixed by a schedule approved by the club. The master plumbers [\*542] agree to do no contract work for, and the wholesale members agree to furnish no supplies to, one who has failed to make a satisfactory settlement with any member of the club. According to the rules and regulations of the Master Plumbers' Exchange, each member agrees -- and a heavy penalty is provided [\*\*5] for the failure to perform this agreement -- that in bidding for contract work he will estimate materials according to the cost price fixed by said Riverside Club, and labor at wages specified in said rules; that he will add to these prices at least 30 per cent. for plumbers' and helpers' time, add to this total 5 per cent. to be paid to the exchange, and then add to this total at least 25 per cent. for profit. Each member also agreed to submit such estimate to the clerk of the exchange, who was also clerk of the Riverside Club. While defendants claim that the object of submitting these estimates was to correct errors of computation, there was a more important object, viz., to prevent competition and to enhance the plumbers' profit. This is shown by the following letters from the clerk to one of the members:

October 27, 1902. "I am quite anxious to have the estimates on that Penberthy Injector Company job thoroughly examined. \* \* \* The estimates as they now stand seem to indicate that if the job had been figured fairly by all the competitors on it, you could just as well have secured it at an advance of from \$250 to \$400 over the price at which you did secure it. \* \* \* In this [\*\*6] connection I may also state that some time ago we compared the estimate of the Forrester and Cheney job. Two of these estimates were low and yours the lowest of all, seemed to be very low. We felt at the time these estimates were examined that the cost figures on the job should have been from \$100 to \$150 higher than your cost figure which would have given you a profit of from \$120 to \$180 more than you are now making on the job."

May 7, 1903. (Another letter from the clerk to the same member.)

"Referring again to the letting of that Ford job, I beg to advise you that I am sure that if I could have told Mr. [\*543] Harrigan that his figure was much too low compared with your figure and the figures of Mr. Dickson and Mr. Ryan, he would have 'pulled' his bid and have let the job go to one of the other three men."

There are other agreements between the members of these two associations, but it may be said of them that they are either inconsequential, or that they are designed to further the object shown by the agreements herein stated. The business of the various members was carried on under this agreement for more than a year, or until the filing of this bill, in December, [\*\*7] 1903. Was this agreement forbidden by the statute?

In determining the legality of defendants' undertaking it would be confusing, rather than helpful, to examine and determine the legality of each specific agreement. If it may be said that many of these agreements, considered by themselves, are legal, it may also be said (and this will be made to appear hereafter) that these agreements are merely steps to effect the accomplishment of an illegal object, and for that reason they are also illegal. See Pacific Factor Co. v. Adler, 90 Cal. 110. The legality of defendants' undertaking is to be determined by ascertaining their central and controlling object. We cannot determine this object by looking at either organization as an entity apart from the other. The two organizations are intimately connected -- so intimately that their common clerk testifies that he does not know whether the fund derived from the 5 per cent. addition to contracts by master plumbers, which aggregates \$11,000, belongs to the one or to the other. The two organizations co-operate, and were intended to

co-operate. As members of the Riverside Club the plumbers arrange to purchase their supplies. Under [\*\*\*8] that arrangement each member secures the same prices, and prices more favorable than competing nonmembers can secure. As members of the Master Plumbers' Exchange, these plumbers fix the price at which they will sell these supplies. It is scarcely necessary to say that this agreement restricts, if it does not destroy, competition [\*544] between these members. The advantage that this arrangement gives the plumber members over the plumber nonmembers is obvious. The latter must buy their supplies either in the local markets at excessive prices, or abroad at a great disadvantage. It is scarcely necessary to say that this arrangement was designed to create, and tends to create, a practical, though possibly incomplete, monopoly in favor of the plumber members. As members of the Master Plumbers' Exchange, the plumbers fixed the prices -- thereby restricting competition among themselves -- at which they will sell the supplies, of which they had a practical monopoly. The manifest purpose of the two [\*\*43] organizations, then, is to give to the master plumber members a monopoly of selling plumbers' supplies in the city of Detroit, and at the same time to restrict competition among [\*\*\*9] themselves in effecting such sales.

Much stress is placed on the fact that on December 22, 1903, the day before this bill was filed, defendants' trustees, acting on the advice of their attorney, abrogated the provision which obligated wholesalers to discriminate against nonmember plumbers, and the provision which obligated master plumbers not to sell labor and material below a schedule rate. It is insisted that with these provisions eliminated nothing objectionable remains. As a matter of fact, the trustees had, under the by-laws, no authority to abrogate these provisions. Their action in undertaking to abrogate them was utterly ineffectual until approved at a meeting of defendants' members. This approval did not take place until January 5, 1904, and therefore, at the time this suit was instituted, the objectionable provisions were in full force. If the public authorities had the right to institute this suit and obtain a decree enjoining defendants from enforcing those objectionable provisions, it is difficult to believe that they were bound to dismiss their suit the moment defendants eliminated them from their plan of organization. It may well be said in such a case that the [\*\*\*10] public has a right to some other security than defendants' [\*545] statement that they would thereafter desist from their illegal undertaking. But we do not base our decision upon that proposition, for, as I shall endeavor to show, the elimination of these objectionable provisions did not materially change the character of defendants' undertaking. The master plumbers, though no longer obligated to refrain from competition in selling supplies and labor, remained obligated to refrain from free and unrestricted competition when they installed plumbers' supplies on contracts. In other words, the elimination of the objectionable provisions did not restore freedom of competition. It merely limited the field of restricted competition. After the elimination of the provision expressly obligating the wholesalers to discriminate against nonmembers, they still remained bound to sell only to such nonmembers as should be approved by the joint representatives of the wholesalers and the master plumbers, and they also remained bound to sell to the master plumbers at prices fixed by such joint representatives.

It is obvious that by these remaining provisions the parties to the contract may, [\*\*\*11] if they choose, insure discrimination in favor of the plumber members against the plumber nonmembers. Is it the purpose of the parties to use these provisions to secure discriminations? This may be determined by considering their financial advantages and desires. Discrimination is certainly to their financial advantage. Only by such discrimination can the plumber members control the business of selling plumbers' supplies in the city of Detroit. By controlling that business, both the wholesalers and their associates, the master plumbers, may hope to increase their trade and their profits. Do the parties desire discrimination? If we have not answered this by showing that discrimination was to their financial advantage (and the object of the contract was to secure financial advantage to the parties), additional evidence is furnished by the original provision requiring discrimination. It is true that by the advice of their counsel they [\*546] have eliminated that provision, but we may still, under the circumstances of this case, look to it as evidence of their purpose. See Detroit Salt Co. v. National Salt Co., 134 Mich. 103. Indeed, one must be blind if he does not [\*\*\*12] see that the essential object of the parties in organizing the Riverside Club was to secure such discrimination. When they struck from their rules the provision requiring discrimination they did not change that object. Their purpose remained unchanged. The only effect of eliminating the provision expressly requiring discrimination was to make discrimination an implied, instead of an expressed, part of the contract. We are warranted, therefore, in declaring that the parties now intend, by means of appropriate provisions still remaining in their contract, to secure discrimination. It should be construed in accordance with that intention. I conclude, therefore, that by the

agreement between defendants they have attempted to create a monopoly in the business of selling plumbers' supplies in the city of Detroit and restricted competition among themselves.

It is insisted that agreements restricting competition "for contract work -- that is to say, to work for which work is to be done and materials furnished for a certain lump sum -- are not within the statute of 1899." It is true that a plumber who, under contract, installs his supplies in a building, furnishes the labor which installs [\*\*\*13] said supplies; but it is also true that by the performance of his contract the title of such supplies passes from him to the owner or occupant of the building. These supplies are thus either sold or disposed of. It is unnecessary to determine whether or not the statute prohibits contracts fixing and regulating the price of labor employed in installing the supplies sold, for it certainly does prohibit contracts which restrict competition by fixing the price of the supplies installed; and the statute was therefore violated when defendants agreed to restrict competition in contract work, for the effect and intent of that agreement was "to keep the price" of their supplies "at a fixed or graduated figure, [\*547] \* \* \* so as to \* \* \* preclude a free and unrestricted competition among themselves."

Nor is the agreement of the master plumbers unobjectionable because it leaves some opportunity for competition between them. They have agreed "not to sell \* \* \* an article of [\*\*44] merchandise \* \* \* below a common standard figure or fixed value, \* \* \* so as to \* \* \* preclude a free and unrestricted competition among themselves;" and this the statute in express terms forbids. Moreover, [\*\*\*14] this record warrants our saying that it is the aim and purpose of defendants (and this purpose may be accomplished by their contract) to altogether abolish competition between themselves. But the justification for enjoining the further prosecution of defendants' undertaking does not rest upon the narrow ground that the agreement restricting competition among the master plumbers was unlawful. As heretofore indicated, that rests upon the ground that defendants have undertaken, by means forbidden by the statute, viz., by agreeing to keep the selling price for both wholesale and retail dealers at a fixed or graduated figure, to create a monopoly in the business of selling plumbers' supplies in the city of Detroit, and to secure to themselves the profits of that monopoly.

Defendants' testimony tends to prove that, instead of raising, they have lowered, prices. It is our duty to disregard that testimony.

**HN2** [↑] "It is no answer to say that this monopoly has in fact reduced the price. \* \* \* That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have [\*\*\*15] frequently been condemned by courts as unlawful and against public policy." *Richardson v. Buhl*, 77 Mich., at pages 660, 661 (6 L.R.A. 457).

See, also, [\*People v. Sheldon\*, 139 N.Y. 251 \(23 L.R.A. 221\)](#). Neither is it an answer to say that the monopoly created, or attempted to be created, is not a complete and perfect monopoly.

[\*548] "All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." *U.S. v. E.C. Knight Co.*, 156 U.S., at page 16.

Did defendants violate the statute of 1899 when, by agreeing to keep the selling price -- both the wholesale and retail selling price -- at a fixed or graduated figure, they undertook to create a monopoly of the business of selling plumbers' supplies in the city of Detroit, and to secure to themselves the profits of that monopoly? To answer this question we are not required to enter into a critical examination of the statute. At common law such an agreement was against public policy, and between the parties [\*\*\*16] thereto was void. See *Richardson v. Buhl*, supra; [\*Detroit Salt Co. v. National Salt Co., supra\*](#); [\*Bailey v. Master Plumbers\*, 103 Tenn. 99 \(46 L.R.A. 561\)](#). If the statute of 1899 is constitutional -- and its constitutionality is not questioned -- it was violated by defendants when they made the arrangement set forth in this opinion. Decisions from other courts based upon statutes either precisely like or similar to our own may be cited to sustain this conclusion. See [\*San Antonio Gas Co. v. Texas\*, 22 Tex. Civ. App. 118](#); [\*State v. Ice Co.\*, 96 Tex. 461](#); [\*Harding v. Glucose Co.\*, 182 Ill. 551](#); [\*State v. Armour Packing Co.\*, 173 Mo. 356 \(61 L.R.A. 464\)](#); [\*Walsh v. Ass'n of Master Plumbers\*, 97 Mo. App. 280](#).

The decree in this case not only enjoined defendants from continuing the undertaking heretofore described and all similar undertakings, but it also enjoined them "from fixing and regulating, or attempting to fix and regulate, the price of labor employed in installing plumbing supplies and goods in the city of Detroit and its vicinity." This provision goes further than to enjoin defendants from fixing and regulating the price of [\*\*\*17] labor employed in executing a contract for the installment of supplies unlawfully sold by them. Indeed, if it did not go further than that, [\*549] it was unnecessary to insert it in the decree, because such regulation of the price of labor is sufficiently enjoined by other provisions, viz., provisions which have the effect of enjoining defendants from proceeding with their undertaking and with all similar undertakings. The provision in question prevents defendants, as employers of labor, from making an agreement fixing the wages they will pay their employes for installing supplies. I think it clear that prior to the enactment of the statute of 1899 courts had no authority, at the instance of a representative of the people, to enjoin the making of such agreements. See [Beck v. Protective Union, 118 Mich. 516, 517 \(42 L.R.A. 407\)](#). They have now, then, no such authority unless such agreements are forbidden by that statute. If that statute forbids such agreements, it follows that it forbids all agreements fixing and regulating the price of labor, and that associations, whether of employees or employers, when endeavoring to fix and regulate the price of labor, are engaged [\*\*\*18] in a criminal undertaking. Does that statute forbid such agreements? [HN3](#)[ In general, it may be said that the statute forbids certain contracts and certain defined trusts. An agreement fixing and regulating the price of labor is not one of these contracts, nor one of these trusts. See [Cleland v. Anderson, 66 Neb. 258](#). If it may be said that an agreement fixing the price of labor violates the statute when it forms part of an undertaking which the statute forbids, it must also be said that it does not violate the statute unless it does form part of some undertaking forbidden by the statute. As defendants are, by the provision under consideration, enjoined from [\*\*45] fixing or regulating the price of labor when it does not form a part of an undertaking forbidden by the statute, they are entitled to have that provision eliminated from the decree.

This suit is brought "by Ormond F. Hunt, prosecuting attorney in and for the county of Wayne, State of Michigan, who sues for the people of the State of Michigan." Defendants insist that the prosecuting attorney has no right to maintain this suit. They insist that he had no [\*550] such right before the statute of 1899 was [\*\*\*19] enacted, and that section 2 of that act gives him such right only in cases where the law is violated by some association incorporated under the laws of this State. If we assume that defendants are right in this contention, it by no means follows that the decree should be reversed. The real complainant in this case is the people of the State of Michigan. The prosecuting attorney of Wayne county is merely the representative of the people. Except in form, this is a suit by the people of the State of Michigan, by Ormond F. Hunt, their attorney. The complaint, then, of defendants is this: That the prosecuting attorney who instituted this suit did not have authority or did not prove his authority to institute it. Had this objection been made in the lower court, it may be assumed that it would have been obviated either by an amendment or by an exhibition of proof of authority. No such objection was made until the case was heard in this court. It may therefore be said that, as the objection is only a *formal* one, raised for the first time in this court, it should be disregarded. [Wright v. Wright, 37 Mich. 55](#).

The decree appealed from will be modified as heretofore indicated, [\*\*\*20] and, as so modified, it will be affirmed.

MOORE, C.J., and McALVAY, GRANT, and HOOKER, JJ., concurred.

## **Bobbs-Merrill Co. v. Straus**

Circuit Court, S.D. New York

July 11, 1905

No Number in Original

**Reporter**

139 F. 155 \*; 1905 U.S. App. LEXIS 4678 \*\*

BOBBS-MERRILL CO. v. STRAUS et al.

### **Core Terms**

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dealers, publisher, discount, notice, net price, booksellers, fiction, prices, retail price, retail, purchaser, copies, printed, patent, percent, selling, associations, license, cutting, member of the association, cases, juvenile, monopoly, rules and regulations, conditions, jobbers, restrained, patentee, machine, licensee

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Governments > Police Powers

Patent Law > Ownership > Patents as Property

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

### **HN1 [L] Ownership & Transfer of Rights, Assignments**

The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. That reasoning is employed as to patent rights.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

139 F. 155, \*155L<sup>A</sup>905 U.S. App. LEXIS 4678, \*\*4678

Patent Law > Ownership > Conveyances > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

## **HN2** Ownership & Transfer of Rights, Assignments

The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer, who buys from a jobber with knowledge of such reservation and resells in violation of it, is an infringer of the patent.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Formalities > Publication

## **HN3** Civil Infringement Actions, Presumptions

It is an infringement to do any of the following acts in respect of a copyrighted work: In the case of books, without the consent of the proprietor, in writing, signed in the presence of two witnesses (1) to print or publish; (2) to dramatize or translate; (3) to import; (4) knowingly to sell or expose for sale copies unlawfully made or imported.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

## **HN4** Breach, Breach of Contract Actions

If buyer has agreed that he will not sell a copyright for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty under the copyright statutes of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Initial Ownership

## **HN5** Civil Infringement Actions, Presumptions

The owner of the copyright may not be able to transfer the entire property in one of his copies and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of

control over the sale, as contradistinguished from the power of sale incident to ownership in all property, copyrighted articles, like any other, is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other, swallows it up, and the two cannot coexist in any owner of the copy, except he be the owner at the same time of the copyright; and, they cannot be separated, so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy.

Contracts Law > Personal Property

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Initial Ownership

## **HN6** Contracts Law, Personal Property

The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property.

**Counsel:** **[\*\*1]** Boardman, Platt & Soley (W. H. H. Miller, Albert B. Boardman, and Henry W. Clark, of counsel), for complainant.

Spiegelberg & Wise (John G. Carlisle and Edmond E. Wise, of counsel), for defendants.

**Opinion by:** RAY

## **Opinion**

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**[\*157]** RAY, District Judge. The main facts in this case are not disputed. They may be stated as follows:

(1) The Bobbs-Merrill Company, the complainant, is, and at all times mentioned in the bill of complaint was, a corporation duly organized and existing under the laws of the state of Indiana, engaged in the business of publishing and selling books, and having its principal office in the city of Indianapolis, in the state of Indiana.

(2) The complainant is, and at all times mentioned in the bill of complaint was, the owner and proprietor of a book or novel in one volume, entitled "The Castaway," written by Hallie Erminie Rives.

(3) The allegations contained in paragraphs of the bill of complaint numbered III to VI, inclusive, relating to the complainant's compliance with the copyright laws of the United States, are true. Such paragraphs read as follows:

"III. That your orator is the proprietor of a copyright book or novel in one volume, entitled and known **[\*\*2]** as 'The Castaway.' That the author of said book was Hallie Erminie Rives. That prior to the publication of said book, and prior to the month of May, 1904, the author thereof, said Hallie Erminie Rives, duly sold, assigned, and transferred to your orator all her right, title, interest, and property in and to said book, and your orator thereupon became, and at all times since said sale has been, and still is, the sole and exclusive proprietor and owner thereof.

"IV. That your orator, being then proprietor of said book as aforesaid, and desiring to secure a copyright thereof, before the day of publication of said book duly deposited in the mail within the United States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book, and duly paid to said Librarian of Congress the fees required by law, to wit, fifty cents, for recording said title, and your orator did also, not later than the day of publication of said book in this or any foreign country, to wit, on the 24th day of May, 1904, deposit in the mail within the United States, to wit, in the city of Indianapolis, [\*\*3] in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of said book printed from type set within the limits of the United States.

"V. Your orator is informed and verily believes, and therefore avers, that the Librarian of Congress on the 18th day of May, 1904, duly recorded the name and title of said copyright book in pursuance of the statute in such case made and provided.

"VI. That your orator has given due notice and information of its said copyright by inserting and printing in each and every copy of said book published, upon the page immediately following the title-page thereof, the words and figures: 'Copyright 1904. The Bobbs-Merrill Company. May.'"

(4) No copies of "The Castaway" were sold or otherwise issued prior to securing the copyright thereon.

(5) Each and every copy of "The Castaway" printed, published, or issued by complainant contained at the time of such publication and issue the following notice, printed upon the page of the book immediately following the title-page, and just below the statutory copyright notice:

"The price of this book at retail is one dollar net. No dealer is licensed to sell [\*\*4] it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

The Bobbs-Merrill Company." [\*158] (6) The defendants in the course of their business procured copies of said book before the commencement of this suit for the purpose of sale at retail. The defendants purchased 90 per cent. of said copies from dealers at wholesale at a reduction from said specified retail price of about 40 per cent., and 10 per cent. of said copies they purchased at retail, paying the full retail price therefor.

(7) Defendants at the time of their purchase of copies of said book knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and knew that this notice was printed in every copy of said book purchased by them.

(8) The wholesale dealers, from whom defendants purchased copies of said book, obtained the same either directly from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that said book was a copyright book, and were familiar with the terms of the notice printed [\*\*5] in each copy thereof, as described in paragraph 5 of this statement, and such knowledge was in all wholesale dealers through whom the books passed from the complainant to defendants. But said wholesale dealers were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers or to restrict their sales to retail dealers who would agree to observe said terms.

(9) The defendants have sold copies of said book at retail at the uniform price of 89 cents a copy, and are still selling, exposing for sale, and offering copies of said book at retail at said price of 89 cents per copy, without the consent of the complainant.

(10) That during the year 1900 a large number of publishers in the state of New York and throughout the states of the United States entered into an agreement for the purpose of maintaining the net retail price of copyrighted books published by any of them as designated by the publisher of each book, and to prevent the sale at retail of any such copyrighted books by any dealer at retail at less than said fixed net retail price. That pursuant to that agreement a membership corporation was formed under the laws of the state of [\*\*6] New York under the name of the "American Publishers' Association," which included among its members the complainant herein and a large majority of the publishers of all books, copyrighted or uncopyrighted, in the state of New York and throughout the United States.

(11) That immediately after the incorporation of said American Publishers' Association a resolution was adopted and its members entered into agreements with each other and with the American Publishers' Association, a copy of which is as follows:

Exhibit A.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be [\*159] published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) [\*\*7] and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than 10 per [\*\*8] cent. Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

"V. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VI. That after the expiration of a year from the publication of any such net copyrighted book dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VII. That when the publisher sells at retail a book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"VIII. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure [\*\*9] from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"IX. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"X. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations

respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XI. That the report, **[\*\*10]** when adopted by the board of directors, be submitted to the association and voted upon in accordance with the association's rules, article II, section 1."

(12) That thereafter a voluntary association, called the "American Booksellers' Association," was formed, which was intended to and did include a large majority, to wit, about 90 per cent., **[\*160]** both in number and extent of business, of all wholesale and retail book dealers throughout the state of New York and the United States. That the avowed purpose of this association was to co-operate with and assist the American Publishers' Association and its members in the maintenance of the so-called net price or restricted price system for the sale of books at retail, and to supply the American Publishers' Association with the names of booksellers who cut the prices of net price or restricted books at retail, and to refrain from selling such price-cutters, or any individuals, firms, or dealers believed to be price-cutters, any books of any kind, whether copyrighted or uncopiedrighted, at wholesale or at retail prices. That said American Booksellers' Association thereafter at its annual convention in June, 1901, adopted the following **[\*\*11]** resolution:

Exhibit B.

"Reform Resolution No. 1.

"Whereas, the American Publishers' Association has adopted a net price system and entered into an agreement for its maintainance, by which the members of said association will cut off the supply of all their books, net, copyrighted, or otherwise, to any dealer who fails to maintain the net price of any or all books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include fiction under the net price system as repidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the books of any publisher who declines to support the net price system.

**[\*\*12]** "(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear, upon the presentment of any three members of this association, that a member has purchased, put in stock, or offered for sale the books of the publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any books at less than the net **[\*\*13]** or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain [\*161] the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] vote for the adoption of Reform Resolution No. 1 as above stated.

"[Signed]

Name

"Address "

(13) That thereafter and in pursuance of said agreements neither of said associations nor any of the members thereof, including the complainant, would sell or supply, or sanction the sale or supply, of any books at any price to any dealer in the state of New York, or elsewhere in the United States, whether a member [\*\*14] of said associations or not, and whether said books were copyrighted or not, or were published by any of the members of the said American Publishers' Association or not, who did not maintain the arbitrary net retail price on copyrighted books published by the members of the American Publishers' Association, or would resell or was believed to resell such copyrighted books to any dealers who thereafter sold the same at less than the arbitrary price named by the publisher and maintained pursuant to the rules and agreements of the two associations and their members.

(14) That on or about the 8th day of January, 1902, the plan, resolutions, or agreements of the American Publishers' Association were amended by the addition thereto of the article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said association, and a change in article 4 relating to discounts to be allowed to libraries, and in article 6, and the omission of article 11 of the original plan. A copy of said resolutions, with the said amended articles indicated by italics, is marked "Exhibit C." Thereafter, on the 27th day of May, 1902, the said [\*\*15] plan, resolutions, or agreements were further amended by the addition to article 4 thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which said resolutions as so amended is marked "Exhibit D." That thereafter, and on the 15th day of January, 1903, the said plan, resolutions, and agreements were amended by the addition to article 3 of a paragraph relating to the sale of protected books in combination with a periodical, and in article 12 a paragraph was added relating to an agreement to be entered into by all purchasers of books from the members of the Publishers' Association. A copy of said resolutions as amended is marked "Exhibit E." That thereafter, and on or about the 13th day of February, 1903, the said plan, resolutions, or agreements were again amended as to articles 1 and 4, so as to provide for the exclusion at the option of a publisher of certain copyrighted juvenile books from the class of so-called net publications, and the inclusion of such books in the class of copyrighted works of fiction not net. Article 5 was likewise amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolutions or [\*\*16] agreements as amended is marked "Exhibit F." That thereafter, on the 13th day of January, 1904, the said resolutions or agreements were amended as to articles 1 and 5, so as to apply to all juvenile [\*162] books, and article 4 thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolutions or agreements as so amended is marked "Exhibit G."

Exhibit C.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at a meeting held February 8, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at

which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all [\*\*17] school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. *That the members of the association agree that on all copyrighted works of fiction (not net) published by [\*\*18] them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.*

"V. *The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.*

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of [\*\*19] any copyrighted books issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable [\*163] person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the [\*\*20] cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local

associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

Exhibit D.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

"I. That the members of the American Publishers' Association agree that **[\*\*21]** all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter **[\*\*22]** provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either **[\*\*23]** free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

**[\*164]** "VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in [\*\*24] books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

#### Exhibit E.

"The American Publishers' [\*\*25] Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meeting held January 15, 1903.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price [\*\*26] of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected [\*165] books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The [\*\*27] conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given. When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, [\*\*28] and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the [\*\*29] formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

Exhibit F.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to March 4th, 1903.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, [\*\*30] and other matters were adopted at later meetings.

[\*166] "Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction (not juveniles), or any juveniles of the class that may be described as board books, flat picture books, or toy books.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books [\*\*31] for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net [\*\*32] books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction and juvenile board books, flat picture books, or toy books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, [\*\*33] dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and, when directed, shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

[\*167] "X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

[\*\*34] "XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important centre or section of the country. That the association pledge itself to

support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association.

"Dated March, 1903."

Exhibit G.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to January 14th, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American [\*\*35] Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and [\*\*36] to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of [\*\*37] fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

[\*168] "V. The only exceptions to the foregoing rules shall be in the cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discounts on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and [\*\*38] may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation [\*\*39] of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

(15) That thereafter, and during the month of February, 1904, in an action brought in the Supreme Court of the state of New York, it being a court of competent jurisdiction, wherein the defendants in this action were plaintiffs and the American Publishers' Association and the American Booksellers' Association and such of their respective members as were [\*\*40] within the jurisdiction of the said court were made parties defendant, the New York Court of Appeals, being the highest appellate court in the said state, rendered its decision that the combinations and agreements described in paragraphs 10, 11, 12, and 14 of this statement were unlawful and void, and contrary to the statute law and public policy of the state of New York, and more especially of the statute law of said state known as chapter 690, p. 1514, of the Laws of 1899, which said law, for the purposes of this statement, is made part of the record. The prevailing opinion of the court, to which reference is hereby made for the [\*169] true construction of said decision, reported [177 N.Y. 473, 69 N.E. 1107, 64 L.R.A. 701, 101 Am. St. Rep. 819](#), is as follows:

"Isidore Straus et al., Composing the Firm of R.H. Macy & Company, Respondents, v. American Publishers' Association et al., Appellants.

"Monopolies -- An Agreement Which in Effect Prevents the Sale of Uncopyrighted Books in the State is Illegal under the Anti-Monopoly Act (Laws 1899, c. 690). An agreement between publishers representing ninety-five per cent. of the books published in the United States, and ninety per [\*\*41] cent. of the business done in the book trade, that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers and jobbers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose

name would be given to them by the association as one who cut such prices; and that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such persons shall be that the name has been given to him by the association as one who cuts such net prices -- is an agreement which, while purporting to secure to the owner and publisher of copyrighted books the monopoly permitted by federal law, may, and as practically [\*\*42] construed by the parties does, operate in fact so as to prevent the sale of books of any kind or at any price to any dealer who resells, or is suspected of reselling, copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not. Such an agreement undertakes to interfere with the free pursuit in this state of a lawful business in which a monopoly is not secured by the federal statute, viz., that of dealing in books which are not protected by copyright. It is, therefore, in violation of chapter 690, p. 1514, of the Laws of 1899, enacted to prevent monopolies in articles or commodities of common use, and to prohibit restraint of trade and commerce.

" [\*Straus v. American Publishers' Ass'n, 85 App. Div. 446, 83 N.Y. Supp. 271\*](#), affirmed.

(Argued January 19, 1904; decided February 23, 1904.)

"Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 30, 1903, which reversed an interlocutory judgment of Special Term sustaining demurrer to the complaint.

"Stephen H. Olin and Thaddeus D. Kenneson, for appellants. John G. Carlisle and Edmond E. Wise, for respondents.

[\*\*43] "Parker, C.J. Chief Justice Marshall said long ago, in [\*Grant v. Raymond, 6 Pet. 217, 241, 8 L. Ed. 376\*](#): 'To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to Congress. \* \* \* It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield. It receives all which it has contracted to receive. The full benefit of the [\*\*44] discovery after its enjoyment by the discoverer for 14 years is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged.' That case and many [\*170] others were considered recently by the United States Supreme Court in *Bement v. National Harrow Co.*, 186 U.S. 70, [\*22 Sup. Ct. 747, 46 L. Ed. 1058\*](#), Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state, of which [\*Patterson v. Kentucky, 97 U.S. 501, 24 L. Ed. 1115\*](#), is an illustration, he says (186 U.S. 91, [\*22 Sup. Ct. 755, 46 L. Ed. 1058\*](#)): 'Notwithstanding these exceptions, [HN1](#)[] the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices [\*\*45] does not render them illegal.' That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the [\*Park & Sons Co. Case, 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578\*](#), upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government permits them to enjoy for the reasons stated by

Chief Justice Marshall (*supra*), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends **[\*\*46]** against the law of this state as much as if it related to bluestone (*Cummings v. Stone Co.*, 164 N.Y. 401, 58 N.E. 525, 52 L.R.A. 262, 79 Am. St. Rep. 655), or to envelopes (*Cohen v. Envelope Co.*, 166 N.Y. 292, 59 N.E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is, what may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association; and it appears from the complaint that the practical construction given to this agreement by those operating together under it is that, if a dealer is suspected of selling copyrighted books at less than the arbitrary net price, it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems **[\*\*47]** to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description. The fifteenth paragraph of the complaint alleges 'that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally, and contrary to the public policy and the statutes of the state of New York, \* \* \* combined and associated themselves together,' etc. The sixteenth paragraph refers to the method of organization, and the fact of the adoption of a resolution and an agreement to carry out their object, while the seventeenth states the nature of **[\*\*48]** the agreement as follows: 'That **[\*171]** as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word "copyrighted" is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices.' It will be seen that, while the leading object of this portion of the agreement apparently is to maintain the retail net price of copyrighted books, it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall **[\*\*49]** be required to govern his action and to prevent him from selling to such a person shall be that the name has been given to him by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

"But it is said that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business because of his refusal to abide by the rules of the association. It is, of course, of no consequence how this course of action may be described by those who invented it; for, if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way. The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states: 'That in pursuance **[\*\*50]** of said unlawful combination and agreement said American Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continue so to do; and plaintiffs say that in compliance with said agreement neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is

suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price.' Here, then, we have a practical construction of the agreement, one put upon it by the parties to it; and it is such [\*\*51] a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer 'who resells or is suspected of reselling copyrighted books at less than the arbitrary net price,' whether such dealer be a member of the association or not. The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means, inasmuch as the members represent 95 per cent. of the publishers and 90 per cent. of the business done in the book trade, that he may be practically driven out of the business if any one chooses to suspect [\*172] that a dealer to whom [\*\*52] he has sold books has resold them at less than the price fixed. The members of the association, therefore, have entered into an agreement which by its terms -- as we read it, and as they have construed it in their everyday working under it -- undertakes to interfere with the free pursuit in this state of a lawful business in which any member of the community has a right to engage, a business in which a monopoly is not secured by the federal statutes, namely, that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690, p. 1514, Laws 1899, which provides: 'Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation [\*\*53] is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.'

"The order should be affirmed, with costs.

"Haight, Martin, Vann, and Werner, JJ., concur with Parker, C.J. Gray and Barrett, JJ., read dissenting opinions.

"Order affirmed."

That the judgment upon this decision was duly adopted by the New York Supreme Court and entered on its records.

(16) That thereafter, and on or about the 13th day of March, 1904, the said resolutions or agreements were amended as to article 3 so as to cover copyrighted books only, and so as to provide for the placing of the seller's name on the cut-off list of the association only under certain changed conditions. A copy of such resolutions as amended, with the words stricken out by said amendment indicated by brackets, and the words thereby added in italics, are hereto annexed and marked "Exhibit H."

Exhibit H.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to April 1st, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901.

[\*\*54] "Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3, 4, 5, 9, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that [such net] copyrighted books [and all others of their books] shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their **[\*\*55]** *copyrighted books except at retail* [further] to no one who [known to them to] cuts such **[\*173]** net prices [or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided]. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. It is further agreed by the members of the association that they will not themselves offer, nor sell their *copyrighted books* to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to **[\*\*56]** the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations dealers shall not be held to the above restrictions, **[\*\*57]** and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come **[\*\*58]** to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

[\*174] That thereafter the American Booksellers' Association passed a so-called Reform Resolution No. 2 in April, 1904, which said resolution is as follows:

Exhibit I.

"Reform Resolution No. 2.

"Whereas, the American Publishers' Association [\*\*59] has adopted a net price system, and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their copyrighted books to any dealer who fails to maintain the net price of any or all copyrighted books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include copyrighted fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the copyrighted books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all [\*\*60] members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear upon the presentment of any three members of this association that a member has purchased, put in stock, or offered for sale the copyrighted books of a publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any copyrighted books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any copyrighted books at less than the net or usual retail price to any dealer who shall have been [\*\*61] denounced by the Publishers' Association for cutting the price of net copyrighted books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their copyrighted books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net copyrighted books so long as they are reasonably in demand, provided such discount is allowed by the

publishers to the dealers as will yield them a living profit; and they shall maintain the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] hereby vote to rescind Reform Resolution No. 1 and to adopt Reform Resolution No. 2.

[Signed]

Name

"Address

"Dated March 10, 1904."

(17) That since May, 1901, the date that the first resolutions and agreements of the American Publishers' Association and the American Booksellers' Association and their respective members went into effect, and until April, 1904, a large majority of all the publishers, in numbers and extent of business, including the complainant [\*\*62] herein, [\*175] and a large majority of all the booksellers throughout the United States, consisting of about 90 per cent. both in numbers and in extent of business, have obeyed the rules and regulations of the two associations as from time to time amended. They and each of them refused to sell or sanction the sale of any books of any kind, whether copyrighted or uncopyrighted, whether published by any member of the American Publishers' Association or not, to any dealer throughout the United States who did not maintain at retail the net or restricted price at which each copyrighted book was published under the net price or restricted price system, nor would they sell or sanction the sale of any books of any kind to any one who was known or believed to sell such net or restricted copyrighted books at retail at less than the net or restricted price, nor would they sell or sanction the sale of any books of any kind to any one who sold books of any kind to a price-cutter on copyrighted books, or who was known or believed to supply a price-cutter with any books of any kind; and when any dealer or person sold any net price books or restricted price books at less than the net or restricted [\*63] price, or any jobber or wholesaler supplied a price-cutter with any books of any kind, or was known or believed to so supply him, the two associations circulated and published notices warning all persons in the trade, whether members of either of such associations or not, that the book supply of such persons had been cut off pursuant to the rules of the two associations.

(18) That since April, 1904, any dealer who does not maintain the net or restricted price at retail of any copyrighted book published by any member of the Publishers' Association under the net price or restricted price system cannot purchase any copyrighted books of any kind from any of the members of either of the associations at less than the retail price, whether such copyrighted book is published by any of the members of the associations or not, and whether such copyrighted book was published under the net price system or not, or prior thereto.

(19) That the defendants were placed on the cut-off list in May, 1901, because they refused to maintain the net retail price of \$1.40 on the copyrighted book "Tarry Thou Till I Come," published by Funk & Wagnalls, but uniformly sold the same at retail at \$1.24; and since [\*\*64] said time their name has been circulated monthly upon the list of dealers whose supplies have been cut off under the rules of the two associations, and against whom the trade at large was warned as price-cutters and as coming under the rules of the two associations as dealers to whom books should not be sold, and, furthermore, that books should not be sold to any one who in turn was known or believed to resell the same to these defendants. That since March, 1904, the rules have been amended and relaxed as above set forth, so as to permit dealings with the defendants in uncopyrighted books only. That as to all copyrighted books of any and all kinds the members of said associations are not permitted under the rules to sell to the defendants, nor to sell to any one who resells or is believed to resell to the defendants; and the cut-off lists or blacklists have been published against these defendants and [\*176] against such other dealers as have been cut off from their supply of books, copyrighted or otherwise, without any interruption or intermission from the time they were first included in the list of dealers whose supplies were cut off until the present time, without any change [\*\*65] in the method employed prior to the passage of the last amendment, which eliminated uncopyrighted books from the rules.

(20) That such combination and agreement as hereinbefore described are now in force, and that it is intended by the members of the two associations and the two associations to continue them in force.

(21) That the complainant was, since May, 1901, a member of the American Publishers' Association, and a party to all the agreements of said association hereinbefore set forth, and obeyed and lived up to all the rules and regulations of the American Publishers' Association hereinbefore set forth, and published all its books, including "The Castaway," in accordance with the rules and regulations of the association above set forth.

(22) That the members of the said two associations, including the complainant herein, do now, and at all the times herein mentioned have, resided and carried on their business of selling books in many different states, and, in the conduct of their respective business as publishers and wholesale and retail dealers in books, the members of the said two associations, including the complainant, were and now are engaged in the business of purchasing **[\*\*66]** books, copyrighted and uncopyrighted, from each other and from other persons, in many states other than the states in which the purchasers resided, or now reside, and do business; and all such books were and have been transported, in compliance with the contract of purchase, from the state where such books were purchased to the purchaser, and delivered to the purchaser in the state where he resided, or now resides in and conducts his business, and members of both of such associations, including the complainant herein, also sell and have sold books to many persons who are not members of the said associations, in states other than the ones in which the sellers reside and conduct their business, and all such books were and have been transported, in compliance with the contract of purchase, from one state to another, and then delivered to the purchaser, and all the rules, regulations, and agreements made by the said two associations and its members, including the complainant, as hereinbefore set forth, were intended to be applied and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books throughout all the states of the United States, **[\*\*67]** whether such publishers and dealers were or were not members of either of such associations, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

(23) That the members of the said two associations, including the complainant herein, have heretofore produced, distributed, and sold, and still produce, distribute, and sell, the majority of all books purchased and dealt in throughout the state of New York and all other states and territories of the United States.

**[\*177]** From these facts, which are conceded, it appears that the original purpose of the combination and agreement of the association of publishers, including the complainant, was (1) to maintain the net retail price of all copyrighted books published by the members of such association, or any of them, at such price per book as might be fixed by the publisher of that book, and (2) to prevent the sale at retail of any one or more of such copyrighted books by any dealer in books at retail at a less price per copy than that so fixed. (See finding 10.) Thereupon the persons, firms, and corporations in the combination, including the complainant, **[\*\*68]** formed a corporation under the name "American Publishers' Association." This corporation included a large majority of all the publishers of all books, both copyrighted and uncopyrighted, in the United States. This corporation, immediately on its organization, adopted the resolution (Exhibit A), and it and its members entered into an agreement with each other, and combined together to do the acts and things, and refrain from doing the acts and things, mentioned in such resolution (Exhibit A). That subdivision or paragraph III thereof was illegal and in restraint of interstate commerce is perfectly plain. (See finding 22.) In fact, the effect of the decision of the Court of Appeals of the state of New York, quoted in the findings (finding 15), is so to declare. By paragraph or subdivision X of such resolution the combination to keep up the price of books and limit and restrain interstate commerce was to be further extended. Thereupon the American Booksellers' Association was formed. (See finding 12.) That the object and purpose as there set forth was illegal cannot be doubted. We now have the combination extended to at least 90 per cent. of the booksellers of the United States, **[\*\*69]** and including, not only 90 per cent. of all booksellers, but 90 per cent. of all publishers of books. The combination as existing under those resolutions, etc., is not confined to publishers and sellers of copyright books, but includes the publishers and sellers of all books. The declared object and purpose of this combination is (1) to fix the retail price of books; (2) to maintain such retail price; (3) to refuse to furnish or sell any books to any dealer in books who does not maintain such prices -- that is, who sells a book at less than the fixed price; (4) to compel all publishers and dealers in books, in practical effect at least, to come into the combination and enforce and maintain these prices, or be blacklisted and driven from the business; (5) to drive out of the business of general publishing and bookselling all who refuse or neglect to maintain these prices. The freedom of the owner of a book -- any book, except those specially excepted -- duly purchased and paid for to sell the same, soiled or injured, or read and no longer desired, was thus attempted to be destroyed. The right of a retail

bookseller to sell to the purchaser of 50 books for his library at a less price [\*\*70] than to the purchaser of one book must not be exercised under the pain and penalty of having his supply of books cut off and of being driven from the business and financially ruined. (See Exhibit B, finding 12.) As to what was done in restraint of interstate commerce, see finding 13.

[\*178] An attempt was then made by the American Publishers' Association to eliminate the vicious provision of the written agreements and resolutions adopted by the combination by the substitution of article or subdivision III of Exhibit H. (See finding 16.) This must be read with the words included in brackets left out. The American Booksellers' Association followed, with the adoption of Exhibit I, or "Reform Resolution No. 2." In finding 17 is set out what was done up to April, 1904. What has been done by the combination since April, 1904, is set out in finding 18. As appears from finding 19, the defendants were put on the so-called cut-off list, or blacklist, in May, 1901, when the unmodified agreement or combination was being enforced. Its offense was in refusing to maintain the retail price of a copyrighted book, however. Defendants' name has not been taken from the list at any time. [\*\*71] It is found and conceded that the complainant is living up to and enforcing the agreements, rules, and regulations aforesaid, as modified, of course, and has published and is publishing all its books, including "The Castaway," because thereof, and in accordance and compliance therewith. It follows, necessarily, from the facts recited from 1 to 23, inclusive, and is found as a further fact, that the notice in "The Castaway," on the page following the fly leaf, viz.: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company" -- is an act done by the complainant, acting in combination with the said American Publishers' Association and the American Booksellers' Association, and the members thereof, in execution of the said combination and agreement, and for the purpose of enforcing same, and because of the said combination and agreement as evidenced by the acts of, and the resolutions and rules adopted and made by, such associations, and agreed to and being executed by the members of said association, including this complainant. It [\*\*72] also follows and is found as a fact that such notice was put in such books, and that its enforcement as an alleged license agreement is attempted, by means of this action, not because the complainant reserved or intended to reserve to itself any interest in said books containing such printed notices, nor because it merely licensed or intended to license the purchasers thereof, who purchased same in the first instance from the complainant, to use or sell such books in a certain way, or on certain terms and conditions, or at certain prices, but as an attempt by complainant, as a member of said American Publishers' Association, to enforce as against this defendant the rules of such associations and combination fixing prices, in an effort to maintain them. It is part of a scheme, and the right of the complainant to maintain this action depends on the validity of that scheme or combination. Is such notice in such books sufficiently explicit in its terms to constitute a license agreement or contract, or any restriction on or modification of the absolute title thereto in the defendant? It does not purport to reserve to the complainant any interest in the book, or any right to control it, [\*\*73] or the action of its owner in his use and disposition of it, except by possible inference.

[\*179] In Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co. et al., 77 Fed. 288, 25 C.C.A. 267, 35 L.R.A. 728, the owner of a patent for fastening buttons to shoes with metallic fasteners made and sold the machines with this notice on a metal plate, so conspicuously fastened thereto that all must see it, and so securely fastened as to constitute substantially an integral part of the machine, viz.:

"Condition of Sale. This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

Here is a plain, unequivocal statement, one that cannot be misconstrued or misunderstood, that there is a condition attached to the sale, viz., that the machine is to be used with fasteners of a certain make only, and that a use with other fasteners will be such a violation of the agreement as to defeat the title or right given. This was seen by the purchaser, and he took the machine on that condition, and by so doing agreed to the condition and became bound thereby. [\*\*74] He became a mere licensee. He acquired the right to use that machine in a certain way only.

In Cortelyou and Another and Neostyle Company v. Charles Eneu Johnson & Co. (recently decided by this court) 138 Fed. 110, the patented rotary neostyle was sold with this notice on a metal plate firmly and conspicuously attached thereto, viz.:

"License Agreement. This machine is sold by the Neostyle Company and purchased by the user with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented), made by the Neostyle Company New York City."

When the purchaser took this machine he assented to this condition and became bound by it, and became a licensee. He is told that he is licensed to use the machine in a certain way and with certain supplies only. Had he been licensed to sell only -- that is, made an agent to sell -- and empowered to sell at a certain fixed price only, it is unquestionably true that, had he violated the agreement by selling at a lower, or even a higher, price, he could have been enjoined. Having the sole power to vend his patented articles, he would undoubtedly have the right to fix the price at which they [\*\*75] should be sold, and stop sales made by his agents and licensees in violation of the authority conferred. This is now settled as to a patent right. *Bement v. National Harrow Co.*, 186 U.S. 70, 88, 92, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058. In the opinion in that case (pages 92-93, 186 U.S., page 755, 22 Sup. Ct. 46 L. Ed. 1058), we find the following:

"The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U.S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addystone Pipe, etc., Company v. United States, 175 U.S. 211, 20 Sup. Ct. 96, 44 L. I<sup>\*\*761</sup> Ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions, imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. \* \* \* The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In *Victor Talking Machine et al. v. The Fair*, 123 Fed. 424, 61 C.C.A. 58, the syllabus reads:

**HN2** [↑] "The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an [\*\*77] ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer, who buys from a jobber with knowledge of such reservation and resells in violation of it, is an infringer of the patent."

And in the opinion, after stating that the grant of a patent by its terms covers three separate or separable fields, the learned judge giving the opinion says:

"The field of sale is as much within the monopoly as the others, and so it has been decided. *Bement v. National Harrow Co.*, 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. And in Edison Phonograph Co. v. Kaufmann (C.C.) 105 Fed. 960, and Same v. Pike (C.C.) 116 Fed. 863, the holdings were that a patentee may reserve to himself, as an ungranted part of his monopoly of sale, the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

*In the Victor Talking Machine Case, supra*, the notice affixed to the machine read:

"Notice. This machine, which is registered in our books No. , is licensed by us for sale and use [\*\*78] only when sold to the public at a price not less than \$ . No license is granted to use this machine when sold at a less price. \* \* \* A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation."

"Victor Talking Machine Co."

In the Edison Phonograph Company Cases, cited (see *supra*) by *Judge Baker in the Victor Talking Machine Case, supra*, there was a restrictive contract, and this was referred to in the following language by a notice on the box containing the instrument when sold, viz.:

"Notice to Dealers. This record is sold subject to restrictions as to the persons to whom and the prices at which it may be sold. Any violation of such restrictions makes the seller or user an infringer of the Edison patents."

A reference to the case in [116 Fed. 863](#), will show that the restriction was very clear and explicit. The notice in "The Castaway" does not suggest a restriction upon the title to the book, or that the person or persons taking the book for sale are obtaining anything short of an absolute title, and no one would suppose that the [\*181] publisher of the book would attempt or assume to fix the price at which [\*\*79] dealers should sell after obtaining absolute title to the book from such publisher. The words, "No dealer is licensed to sell it at a less price," are notice that licensees, not absolute owners, are so restricted. The words, "and a sale at a less price will be treated as an infringement of the copyright," clearly do not even tend to make such a sale by an absolute owner of such books an infringement of the copyright.

It is a close question whether a copyright may be infringed by selling in violation of express and explicit restrictions placed on the dealer, expressly made an agent or licensee only, as to the mode of sale or the price at which same is to be sold. Act March 3, 1891, c. 565, 26 Stat. 1106 [U.S. Comp. St. 1901, p. 3406], entitled "An act to amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights," amends section 4952 so as to read:

"The author \* \* \* or proprietor of any book \* \* \* shall, upon complying with the provisions of this chapter have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Section 7 of that act (26 Stat. 1109 [U.S. Comp. St. [\[\\*\\*80\]](#) 1901, p. 3413]) amends section 4964 of the Revised Statutes so as to read as follows:

"Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

This section declares what acts constitute a violation of the copyright of a book. It declares that, to constitute a violation of the copyright, the offender must have, within the term limited -- that is, the life of the copyright -- and without the consent of the proprietor thereof, first obtained in writing and executed in the presence of two or more witnesses, printed or published [\[\\*\\*81\]](#) or imported, contrary to the provisions of the act, such copyrighted book, or contrary to the provisions of the act, within such time and without such consent, must have sold or exposed to sale a copy of such copyrighted book, known to have been illegally printed. In substance this section declares that it is an infringement of a copyright to print or publish the copyrighted book without the consent of the proprietor, given in writing, signed in the presence of two witnesses, or to import a copy of such book without such consent, or knowingly to sell or expose for sale a copy or copies of such copyrighted book when unlawfully printed or imported. From this it would appear that an infringement by the sale of a copyrighted book consists in the selling or exposing for sale of a copy of such book that has been unlawfully printed or imported. If this be the law, it is not an [\[\\*182\]](#) infringement of a copyright to sell or expose for sale a copy or copies of such book, when the same was lawfully printed or lawfully imported. The result would be that it is not an infringement of the copyright of a book to sell a copy or copies thereof lawfully printed, as in this case, in violation [\[\\*\\*82\]](#) of a mere condition imposed upon a dealer by the publisher, by which such dealer agrees not to sell below a certain price; the title to the book having been vested in such dealer by the publisher thereof, or even in cases where the absolute title had not passed to the

dealer. If the publisher of the book, being the proprietor of the copyright, parts with the title to such book, either a single copy or any number of copies, and receives his pay therefor, he has voluntarily parted with all control over that or those particular books. The owner of those books is neither a licensee nor an agent. He has the absolute property therein, and the absolute ownership of an article of personal property carries with it the right to give away or sell for such consideration as the owner sees fit to impose, prescribe, or demand, so long as he violates no law. This view of the copyright laws of the United States, as amended by the act of March 3, 1891, seems to be taken by Macgillivray in his work on the Law of Copyright, p. 287, c. 4, § 2. He there says:

"Prohibited Acts and Remedies. HN3[] It is an infringement, subject to the remedies stated below, to do any of the following acts in respect of [\*\*83] a copyrighted work: In the case of books, without the consent of the proprietor, in writing, signed in the presence of two witnesses (1) to print or publish; (2) to dramatize or translate; (3) to import; (4) knowingly to sell or expose for sale copies unlawfully made or imported."

We find no suggestion that it is an infringement of the copyright of a book for the owner of the book to sell copies at a price which violates a valid contract between the publisher of the book and the dealer, and which was made at the time such dealer became the owner.

In Harrison v. Maynard, Merrill & Co., 26 U.S. App. 99, 61 Fed. 689, 10 C.C.A. 17, the complainants, publishers of books and the owners of a copyrighted book, sent a quantity of the printed and unbound sheets of such book to the bindery of one Alexander for binding, and such sheets were to be stored until complainants should order bound copies. Sometimes they bound copies in advance. A fire occurred in the bindery, and both complainants and Alexander supposed the commercial value as books of all such bound or unbound sheets of such book in such bindery was destroyed. On examination complainants' agent so reported. Thereupon Alexander, [\*\*84] without objection from complainants, sold the entire debris to one Fitzgerald, who, without moving it, sold same to some dealers in old paper. Alexander imposed no restriction or condition when he sold. Fitzgerald, who had become the ownwr of the debris, including the printed sheets and bound volumes, put this condition and restriction in the bill of sale:

"It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else."

[\*183] Harrison, a dealer in books, visited the place and purchased of these dealers in old paper some of the volumes of the copyrighted book not destroyed, and put them on the market. He had no notice of the restriction or condition put in the bill of sale given by Fitzgerald. Complainants, owners of the copyright, brought suit to enjoin such sale by Harrison. On these facts the court (Wallace, Lacombe, and Shipman, Circuit Judges) held that, so long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner [\*\*85] in which and upon the persons to whom the copies are to be sold. They also held that if the agents of the owner of the copyright, intrusted with the possession of such books, violates his instructions and fraudulently sells to a person who has knowledge of the restrictions, such sale by the agent constitutes a fraud upon the owner of the copyright, and that such fraud constitutes an infringement of the copyright, with which the owner has never parted, and that such fraud -- meaning, of course, such sales -- can be restrained by virtue of the statutes applicable thereto. The court states that this right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he may have parted with the possession of the book. The court also holds that the right to restrain the sale of a particular copy of the book by virtue of such statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. If this is true of one particular book, it is also [\*\*86] true of a large number of copies. The court also says, in substance, that the new purchaser cannot reprint the copy, but that, the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation, attaches to it. The court further says:

HN4[] "If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is

guilty under the copyright statutes of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment."

The court cites in support of these statements *Clemens v. Estes, 22 Fed. 899*. If this be a correct statement of the law, and this court does not doubt that it is, we recur to the simple proposition whether or not the complainant in the case now under consideration, the Bobbs-Merrill Company, retained any title in the books in question by printing on the page following the title-page the statement: "Copyright 1904. The Bobbs-Merrill Company. May." And thereunder the statement:

"The price of this book at retail is one [\*\*87] dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

The Bobbs-Merrill Company."

The defendants in this case purchased 90 per cent. of its copies of this book from dealers at wholesale at a reduction of 40 per cent. from said mentioned retail price. The other 10 per cent. of their [\*184] copies they purchased at retail, paying the full retail price therefor. The defendants knew of the statement printed in said books above quoted, and knew that it was printed in each copy of the book. The wholesale dealers from whom the defendants purchased their copies obtained such copies either from complainants direct or from other wholesale dealers at a discount from the above-mentioned retail price. Such wholesale dealers knew that the book was copyrighted, and were familiar with the said statement printed in each copy thereof. The books that came to the defendants prior to reaching them did not pass through the hands of any person or persons who were ignorant of the said notice printed therein. It is expressly found, however, and conceded, that these wholesale dealers from whom the defendants [\*88] here obtained their copies were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers, or to restrict their sales of copies of such book to retail dealers who would agree to observe the said notice.

As has been stated, the notice contains no suggestion that the title of the purchaser to the book is in any way limited. The notice is that the price of the book at retail is one dollar net; and, if the words "no dealer" are to be construed as referring solely to retail dealers, then the notice is that the Bobbs-Merrill Company has not licensed any retail dealer to sell the book at retail for less than one dollar per copy. The fair meaning of this is that, in cases where the Bobbs-Merrill Company has granted a license to some retail dealer or dealers to sell the book, such licensee or licensees are limited and restricted in his or their authority; but the notice is not a suggestion or an intimation to any person that those who buy and pay for the book in the open market, or even of the Bobbs-Merrill Company, without entering into an express license agreement different from that suggested by this notice, are bound or obligated in any [\*\*89] way to demand one dollar per copy for such book. It well may be that the Bobbs-Merrill Company has licensed or will license certain dealers to sell this book, and when it grants a license it has the right to impose conditions on its licensees; but this notice does not state or suggest that every purchaser of one of these books containing this notice becomes a licensee with a limited title, or, in fact, no title, to the book. A person cannot be both licensee and absolute owner.

Again, it is contended that the words "the price of this book" refer to the particular copy containing the notice, and that the words "no dealer is licensed to sell it" refer to the particular copy containing the notice. It is further contended that the court is bound to give this construction to this language, and that therefore the defendants, having knowledge of the notice, assented to the proposition and in effect entered into a contract or agreement with the Bobbs-Merrill Company whereby they became its agents to sell the copies at one dollar per volume, and no less, or its licensee with power to sell such books, for which it had paid the wholesale dealer the price demanded, at one dollar per copy only. [\*\*90] This court refuses to give that construction to this notice. This court declines to hold [\*185] that the words in such notice "this book" and "it" refer to the particular copy of the book in which the notice is found. The language of the notice is a general statement, referring to the book known as "The Castaway" generally, and not to any particular copy or copies thereof, and, at best, is but a notice that licensees of the publishers are only at liberty to sell such book at one dollar per copy. The notice forms no part of a contract between the purchaser from the publisher and such publisher, nor does it limit or restrict the title of the purchaser. And this court will say here that it would be lending itself to the perpetration of a fraud upon the public should it hold

differently. If the Bobbs-Merrill Company, in putting its books upon the market, desires to say to wholesalers and to retailers that it is not selling the entire title to the copies put upon the market, let it say so in plain and unambiguous terms. Let it say in its notice that the purchaser of copies of the book from either the publisher or any wholesale or retail dealer is obtaining but a limited or qualified [\*\*91] title in the copies purchased, or that in purchasing one or more copies such purchaser becomes but a mere licensee of the publisher, without title to the copies, and with power to dispose of the same only on receiving a specified sum of money. The Circuit Court of Appeals, in *Harrison v. Maynard*, Merrill & Co., supra, also quotes with approval the language of [\*Judge Hammond in Henry Bill Publishing Co. v. Smythe \(C.C.\) 27 Fed. 914-925\*](#), viz.:

**HN5** "The owner of the copyright may not be able to transfer the entire property in one of his copies and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property -- copyrighted articles, like any other [\*\*92] -- is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other -- swallows it up, so to speak -- and the two cannot coexist in any owner of the copy, except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated, so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy."

In [\*Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219, 55 L.R.A. 631\*](#), decided October 17, 1901, without dissent, the court, speaking of copyrights, said:

**HN6** "The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred [\*\*93] an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. [\*Harrison v. Maynard, 61 Fed. 689\*](#), 10 C.C.A. 17. See, also, [\*Clemens v. Estes \(C.C.\) 22 Fed. 899\*](#); [\*Meyer v. Estes, 164 Mass. 457, 1\\*186 41 N.E. 683, 32 L.R.A. 283\*](#); [\*Waterman Co. v. Waterman, 27 App. Div. 133, 50 N.Y. Supp. 131\*](#)."

The same doctrine is plainly expressed in [\*Keeler v. Standard Folding Bed Company, 157 U.S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848\*](#). In that case it was held that one who purchases patented articles of manufacture from one authorized to sell them at the place where sold becomes possessed of an absolute property in such articles, unrestricted in time or place. In that case the complainants were the assignees for the state of Massachusetts of certain letters patent granted to one Welch. This assignment as matter of course gave to the complainants the rights of the patentee in and for the state of Massachusetts, viz., the sole right to make, use, and sell the patented article in that state. The Welch Folding Bed Company owned the patent rights for the state of Michigan, and it of course had the same right to [\*\*94] make, use, and vend the patented article in that state. The defendants purchased a car load of the patented articles from the Welch Folding Bed Company at Grand Rapids in the state of Michigan. It proposed to sell these articles in the state of Massachusetts, and thereafter did sell some of such articles in the state of Massachusetts, and was engaged in selling the remainder in that state at the city of Boston when the bill of complaint was filed. The Supreme Court held that the defendants, having purchased the patented articles in Michigan from the assignee of the patent for the territory included within the boundaries of the state of Michigan, had the right to sell them anywhere within the United States, including the state of Massachusetts, notwithstanding the fact that all the patent rights for the state of Massachusetts had been assigned to another person, to wit, to the complainants. The decision is based upon the proposition that where the patentee, not having parted with his rights granted by the patent, makes and vends a patented article, the purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or [\*\*95] dispose of the same in any part of the United States. The court says:

"It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights."

The court approves the language of [\*Mr. Justice Clifford in Good-year v. Beverly Rubber Co., 1 Cliff. 348-354\*](#), Fed. Cas. No. 5,557, wherein he states, in substance, that, the patentee having manufactured the article and sold it for a satisfactory compensation, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to or impressed upon it by the law under which the patent was granted. The court further says:

"If, as is often the case, the patentee has divided the territory of the United States into 20 or more specified parts, must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country [\*187] [\*96] to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made in such a case between the right to use and the right to sell?"

The court then cites with approval several cases, and especially the language of [\*Mr. Justice Clifford in Mitchell v. Hawley, 16 Wall. 544, 546, 547, 21 L. Ed. 322\*](#), as follows:

"Patentees acquire by their letters patent the exclusive right to make and use their patented inventions, and to vend to others to be used, for the period of time specified in the patent; but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or authorized another to construct, sell, and deliver it, or to construct, use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the [\*97] patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

At page 666, 16 Wall., 21 L. Ed. 322, the court calls attention to the case of [\*Wilson v. Rousseau, 4 How. 646, 11 L. Ed. 1141\*](#), and says that it was there held that:

"As between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale; and in respect [\*98] of the time of enjoyment, by those decisions the right of the purchaser, his assigns, or legal representatives is clearly established to be entirely free from any further claim of the patentee or any assignee."

The court then says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In the case now before this court it appears that the publisher of the book "The Castaway" printed and sold these copies. It put them upon the market. It received its price therefor, and reserved no right to demand any further compensation. The defendants purchased in the open market and paid the price demanded. It is conceded that

the wholesalers of whom the defendants purchased were under [\*\*99] no contract or obligation to impose any condition upon the defendants, and they did not. There is no privity of contract between the defendants and the complainants. There is no suggestion [\*188] in the notice that the retail dealer who buys the copies of the book in the open market enters into any contractual relation with the publishers. It is not stated that the copy of the book is sold on condition that the purchaser will abide by and enforce the price arrangement. The notice is assertive in its terms. It is a dictum. It says that the price of the book at retail is one dollar net. The plain meaning of this language is that if the signer of the notice sells a copy of the book, or the book in question, containing the notice, at retail, the price is one dollar. The notice also asserts that the Bobbs-Merrill Company has not licensed any retail dealer to sell at a less price. It does not say or suggest that the Bobbs-Merrill Company has not sold millions of copies of the book for the trade, parting with the title absolutely and unconditionally. This court is aware that the Keeler Case, cited above, is a patent, and not a copyright case; but the principle is the same.

[\*\*100] In a supplemental brief filed by the counsel for the complainant, he states that he does not consider the notice published in the book as in the nature of a license. He says:

"In my opinion, the putting of the book upon the market and selling it by the owner of the copyright constitutes the license; and this notice published in the book is a limitation and qualification of that license. If the book is put out without any notice, the license is unqualified, and the sale is absolute; but my contention is that the owner of the copyright has the authority to restrict the license, and, being published in this way, the restriction attaches to the property, and is a charge and limitation upon the rights of all parties purchasing the book for resale."

This is a claim that the owner of a copyright for a book, who prints the book and sells it for a consideration, gives to the purchaser a license, and does not sell and convey a piece of personal property absolutely. The contention here is that any notice printed in a book and brought to the attention of the purchaser is a restriction of that license to that extent, and may be enforced, and that a violation of the obligation imposed by [\*\*101] the notice is an infringement of the copyright which may be restrained by the federal courts. This doctrine, it seems to this court, is contrary to the adjudicated cases. I do not think this contention can be sustained upon principle. Clearly it is opposed to public policy. The purchaser of an article not patented may duplicate it if he can. The purchaser of an article made under a patent right may not duplicate it, but he may use the article purchased and sell the same as his own in any way or for any price he sees fit. The purchaser of a book not copyrighted may duplicate it -- make copies or a reprint. The purchaser of a copyrighted book may not make or print or publish a copy, as this would be an infringement of the copyright; but this restriction in no way interferes with the absolute ownership of the particular copy of the book. The owner of an article made under a patent right or of a book printed under a copyright is in no sense a licensee of the patentee or of the owner of the copyright.

"License," with reference to real estate, is a permission or authority to do a particular act or a series of acts on the land of another without possessing any estate therein. So, [\*\*102] with reference [\*189] to personal property, "license" implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word "easement" always implies an interest in the land. See Words & Phrases, vol. 5, tit. "License."

#### What is the Present Combination and Its Object, or Purpose?

1. The American Publishers' Association has adopted a net price system for all copyright books published or controlled by any member or members of the association and made an agreement to maintain it. By this agreement the members thereof are to cut off all supply of their copyrighted books to any dealer who fails to maintain the net price of such books as fixed by such association, or, what is the same thing, by its members. In short, this combination fixes the price of copyrighted books published by its members, and the price at which such books are to be sold, both at wholesale and at retail, and agrees not to furnish or sell any of these books to any dealer who fails to maintain such price; that is, demand and exact from the purchaser the price so fixed.
2. Another association, the American Booksellers' [\*\*103] Association, assents to this, agrees to co-operate and be bound by such system and arrangement and to aid and assist in carrying it into effect, and to this end agrees not to buy, or keep in stock, or offer for sale, the copyrighted book of any publisher who refuses to join the combination

and enforce this price system and demand and exact of the customer this price fixed by the combination. Two-thirds of the members of this association govern. If any member fails to live up to the agreement, etc., he may be expelled, and he is not to have books, and all members are "restrained" from supplying books, etc. (See subdivisions 4 and 5 of Exhibit I.) The objects are: (1) To compel the would-be owners and readers of copyrighted books to purchase their books of the members of this combination, made up of two combinations embracing at least 90 per cent. of all publishers and dealers in copyrighted books, at an arbitrary price fixed by the combination, regardless of the actual value of the book as determined by a demand therefor established in a free and open market or the condition of the books. (2) To compel all publishers of and dealers in copyrighted books to come into the combination, **[\*\*104]** submit to and be controlled by it, and sell books at prices fixed by it, regardless of the value of the books, etc., or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books. In short, such as refuse to come in are to be crippled, or perhaps ruined, in their business. As the combination extends throughout the United States by the very terms of the agreement, interstate commerce is necessarily restrained. A judgment for the complainants in this action will restrain interstate commerce.

If this suit is one to restrain the infringement of a copyright, granted to the complainant and now owned by it, by the doing of any act that constitutes infringement of that right, and defendant has infringed, it is entirely immaterial that the combination **[\*190]** described exists, or that complainant is a member thereof, or that its objects are those described. It is no defense to such a trespass upon the complainant's rights that it has violated and is violating the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3200]), or some statute of the state of New York. In **[\*\*105]** [General Electric Co. v. Wise, 119 Fed. 922-924](#), this court so held, citing cases. This court there said:

"It is difficult to understand how or why a violation of the Sherman **antitrust law** by this complainant, if there has been such a violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating some statute. However that may be, the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. [Soda Fountain Co. v. Green \(C.C.\) 69 Fed. 333; Columbia Wire Co. v. Freeman Wire Co. \(C.C.\) 71 Fed. 302; Bement v. Harrow Co., 186 U.S. 70, 88-91, 22 Sup. Ct. 747, 46 L. Ed. 1058. Harrow Co. v. Quick \(C.C.\) 67 Fed 131](#), cannot be accepted as authority on this question."

See, also, [Strait v. National Harrow Co. \(C.C.\) 51 Fed. 819.](#)

But if the complainant has turned over to the combination the fixing of prices, **[\*\*106]** and has entered into the combination described, and becomes a party to the agreement for the purposes described, and is now, through this suit, attempting, as this court holds it is, to enforce such combination agreement in whole or in part, and such agreement is unlawful, because in violation of the act referred to, then this action cannot be maintained. The complainant confessedly is a party to the combination and the agreement, and cannot, if it be illegal, have a standing in a court of equity to enforce any part of it, directly or indirectly. When a complainant comes into court, asking equity, it must come with clean hands, so far as the transaction involved is concerned. If a party, person, or corporation, in attempting to violate the rights of the public and the rights of those persons who will not join in the attempted violation of law, suffers some injury to his property or property rights, which are being used by his consent by those who are thus violating the law, in perpetrating such violation, at the hands of one who is lawfully resisting such attempted injury, he or it cannot, while continuing the illegal acts, have an injunction to enjoin the resisting acts resulting **[\*\*107]** in such injury. Each owner of the copyright of a book has a monopoly of that particular book. Copyrights, like patents, are assignable, and hence a person or a corporation may lawfully become the owner of any number of copyrights or of all the copyrights of books issued by the United States, and it is immaterial that the purpose is to monopolize the whole business of publishing and selling copyrighted books. In such case such person or corporation would hold and control all the monopolies for such copyrights of books, and he or it could print and sell, or print and not sell, or refuse to print at all, or refuse to allow others to print or publish. Should he or it print or publish one or more copies of these books, such person or corporation could appoint agents

to sell and prescribe and limit their powers. He or it could [\*191] license one or more persons to sell, and prescribe the terms and conditions of such sale, and limit the price at which same should be sold. Assume that such person or corporation has fixed the price at whcih such book shall be sold at retail by such agents and licensees, and may restrain a disposition of such books in violation of the conditions, [\*\*108] we have no combination or conspiracy. One man cannot combine or conspire. It takes two or more to make a combination or a conspiracy. So an agreement by all holders of copyrights to assign same to one person or corporation is but a sale of their own, and they may take pay in cash, horses, scrap iron, or licenses to sell the copyrighted book, provided they actually sell their copyrights. If the agreement be a mere pretense, however, a mere cover for a combination to violate some statute, then such agreement to sell their copyrights would be void, and the whole combination would be illegal and void. So one person may purchase and own all the hay, oats, or potatoes existing in the country. If he becomes such owner, he may fix the price at which he will sell. Here there is no conspiracy or illegal combination. But if the several owners of such produce combine, and agree that they will fix prices, interfere with and limit interstate commerce, drive all other dealers and owners of similar property who will not join them in their purposes out of business, and deprive them, if possible, of their right to purchase and ship produce from state to state as a part of interstate commerce, [\*\*109] we undoubtedly have an illegal combination, and no member of such a conspiracy can enforce in a court of equity any contract or agreement made in execution, in whole or part, of such a conspiracy. It is evident that one may do, in fixing and enforcing prices, and in exacting tribute from the people and restraining interstate commerce, what two or more cannot do in pursuance of an agreement or combination. A corporation, on becoming the owner of several patents or of several copyrights, may do all acts under each that the person to whom such rights were originally granted might have done. Having become the owner, it is entitled to the benefits and privileges of the monopolies granted. But all this affords no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of his particular patent, or the several owners of distinct copyrights, each having a monopoly of his particular copyright, may combine and conspire as to their patented articles, or as to their copyrights or books published under and protected thereby, to restrain interstate commerce in articles made or produced thereunder. A right or privilege to form such a combination [\*\*110] or conspiracy is not embraced or included within the monopoly granted. The monopoly of one patentee cannot be extended and made more of a monopoly by that of another. The grant of an exclusive right to make and vend a certain machine does not include a license to combine and conspire with another having a like exclusive right to restrain trade and commerce between the states in those articles, if made and put on the market, or to conspire not to put them on the market. The right to elect not to make or sell is necessarily included. The right to combine [\*192] and conspire is not. In any event the so-called Sherman law forbids any and all combinations in restraint of such commerce.

In the case of copyrighted books it is evident that, if the publisher of one or two should demand and exact of the purchaser at retail a grossly unreasonable price, he would sell but few, if any, copies. Others would supply the market, for readers would forego that book, or those books, and find reading matter elsewhere. But when all publishers of and dealers in copyrighted books -- and nearly all new books are now copyrighted -- combine to exact a fixed, arbitrary price, etc., the readers of [\*\*111] books become powerless, if they would read at all, not because of the monopoly granted or sanctioned by the government in granting the copyright, but because of the new monopoly (the conspiracy of monopolists), created by the agreement and combination of these monopolists -- one that is forbidden and denounced by Act July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Section 1 of that act reads:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several states, or with foreign nations, is hereby declared to be illegal."

It is not necessary that the effect necessarily be to restrain trade or commerce. It is sufficient if the combination may have that effect. It seems to this court impossible to hold that this section of the act does not apply to a combination of patentees to restrain trade and commerce in patented articles made under their patents as much as to such a combination made by dealers in other articles of commerce.

In 1 Page on Contracts, p. 698, § 445, after a statement regarding [\*\*112] the law as to "Monopoly Contracts concerning Patents," it is said:

"But if the owners of distinct patents combine to prevent competition in business, and to control the price of the patented article, such combinations and all contracts for such purposes are as invalid as if the articles were not patented."

The following cases are cited to sustain the statement: [National Harrow Co. v. Hench, 83 Fed. 36](#), 27 C.C.A. 349, 55 U.S. App. 53, 39 L.R.A. 299; [National Harrow Co. v. Quick \(C.C.\) 67 Fed. 130](#); [Vulcan Powder Co. v. Powder Co., 96 Cal. 510, 30 Pac. 1113, 31 Am. St. Rep. 242](#); [Gamewell, etc., Co. v. Crane, 160 Mass. 50, 35 N.E. 99, 22 L.R.A. 673, 39 Am. St. Rep. 458](#).

In 1 State and Federal Control of Persons and Property (Tiedeman) 412-413, it is said:

"But the mere fact that the subject-matter of the monopolistic combination may be patent rights, covering machines employed in the same art or industry, will not protect the combination from the penal provisions of the antitrust laws. If a corporation or association is formed among manufacturers and patentees of certain articles of kindred character, in order to control the trade and prices of such articles, the combination is [\*\*113] nevertheless illegal, although the exclusive manufacture of the goods is guaranteed by letters patent from the United States government."

At the time of that writing (1900) the author was not aware of the decision in *Bement v. National Harrow Co.*, 186 U.S. 70, [22 I<sup>1</sup>931 Sup. Ct. 747, 46 L. Ed. 1058](#), which modifies some of the cases cited by him, but not in respect to the general doctrine stated.

In [Bement v. Harrow Co., supra](#), the court, at page 94, 186 U.S., page 756, [22 Sup. Ct. \(46 L. Ed. 1058\)](#), plainly intimates that the several owners of several patents may not combine to restrain commerce in their patented articles. It is unnecessary to cite many cases. If *Montague & Co. v. Lowry*, 193 U.S. [38, 24 Sup. Ct. 307, 48 L. Ed. 608](#), and [Northern Securities Company v. United States, 193 U.S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679](#), are to be respected as law and followed in cases where there is no hue and cry against railroads, this combination is illegal as in restraint of interstate commerce. If anything can be found in the prevailing opinion in [John D. Park & Sons Co. v. Wholesale Druggists' Association et al., 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578](#), supporting [\*\*114] the contention of the complainant here, it is sufficient to say that this court does not agree with the prevailing opinion or decision in that case, but does agree with the dissenting opinions of Martin, J., and Cullen, C.J., with whom Vann, J., concurred.

The defendants have not infringed and are not threatening to infringe complainant's copyright, nor have they violated any contract. The complainant is seeking to enforce against defendants an unlawful combination agreement, to which such defendants are not parties, and by which they have not consented to be bound to prevent defendants selling books of which they are the absolute owners. The same result on a similar state of facts as to the effect of such notice was reached by the court in [Bobbs-Merrill Co. v. Snellenburg, 131 Fed. 530](#).

The defendants are entitled to a decree dismissing the complaint, with costs.

## In re Goode

Court of Common Pleas of Hamilton County, Ohio

October 24, 1905, Decided

No Number in Original

**Reporter**

16 Ohio Dec. 404 \*; 1905 Ohio Misc. LEXIS 146 \*\*; 3 Ohio L. Rep. 401

CORA DOW GOODE, IN RE.

**Prior History:** [\*\*1] APPLICATION for writ of habeas corpus.

**Disposition:** Writ granted, and petitioner released.

### **Core Terms**

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refuse to answer, habeas corpus, notary, trade secret, Druggists, alleges, dealers, jail, article of merchandise, anti trust law, blacklist, consumer, supplied, damages, matters, bought, commit, courts, cease

### **LexisNexis® Headnotes**

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Governments > Local Governments > Employees & Officials

#### [HN1](#) [down arrow] Local Governments, Employees & Officials

A notary has no power to determine whether a question which a witness has refused to answer is relevant or competent. His only recourse is to commit the witness to jail, leaving to a court of competent jurisdiction the determination of the question of relevancy upon application for release by habeas corpus.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

#### [HN2](#) [down arrow] Public Enforcement, State Civil Actions

The Antitrust Law of Ohio, Lan. R. L. 7586, prohibits the creation or carrying out of restrictions in trade or commerce to prevent competition in the sale or purchase of merchandise, to fix at any standard or figure any article

of merchandise intended for sale in this state, whereby its price to the public or consumer shall be in any manner controlled or established, or to make or carry out any agreement of any kind or description by which they shall bind themselves not to sell any article of merchandise, below a common standard figure, or by which they shall in any manner establish the price of any article between themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN3** [down arrow] **Private Actions, Costs & Attorney Fees**

Section 11 of the **Antitrust Law** of Ohio provides that in addition to the criminal and civil penalties herein provided, any person who shall be injured in his business by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor and recover twofold the damages sustained and the costs of the suit.

## **Headnotes/Summary**

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### **Headnotes**

#### **EVIDENCE--HABEAS CORPUS--WITNESSES.**

##### **1. WITNENSS NEED NOT ANSWER IRRELEVANT OR PRIVILEGED QUESTION BEFORE NOTARY.**

At the hearing of a writ of habeas corpus, testimony may be introduced by the petitioner showing that the question asked by the notary was either irrelevant or privileged, the latter under the Ohio rule not being competent to pass thereon

##### **2. WITNESS NEED NOT ANSWER QUESTION OPERATING TO CONFER UNFAIR BUSINESS ADVANTAGE ON ADVERSE PARTY.**

If it appear that the answer to a question propounded to a witness would injure the plaintiff by affording the defendants an opportunity to commit certain acts forbidden by the Valentine **Antitrust Law**, technical rules of evidence will be disregarded and the witness not required to answer.

**Counsel:** J. S. Graydon and Smith Hickenlooper, for petitioner:

Testimony in habeas corpus proceedings. Church, *Habeas Corpus* (2 ed.) Secs. 170, 178 et seq.; Hurd, *Habeas Corpus* (2 ed.) 301, 302.

Relevancy. Jennings, *Ex parte, 60 Ohio St. 319 [54 N.E. 262]*; 71 Am. St. Rep. 720]; *Robbins v. Railway, 180 Mass. 51 [61 N.E. 265]*; *Storm v. United States, 94 U.S. 76 [24 L. Ed. 42]*; *Gorham Mfg. Co. v. Dry-Goods Co. 92 F. 774*.

Privileged trade secrets. 3 Wigmore, Evidence 2212; Krieger, *Ex parte, 7 Mo. App. 367*; Jennings, *Ex parte, 60 Ohio St. 319 [54 N.E. 262]*; 71 Am. St. Rep. 720]; *Jenkins v. Putman, 106 N.Y. 272 [12 N.E. 613]*; *Gorham Mfg. Co. v. Dry-Goods Co. 92 F. 774*; Badische Anilin & Soda Fabrik v. Levinstein, L. R. 24 Ch. Div. 156; Moore v. Craven, L. R. 7 Ch. App. 94; Saccharin Corporation v. Chemicals & Drugs Co. 2 Ch. Div. 557; *Tetlow v. Savournin, 15 Phila. 170*; *Moxie Nerve-Food Co. v. Beach, 35 F. 465*; *Dobson v. Graham, 49 F. 17*.

F. H. Freericks and R. B. Smith, contra:

Legality of the commitment. Church, *Habeas Corpus Sec. 169*; Miller, *In re*, 11 Dec. 69 (8 N. P. 142); Jennings, *Ex parte*, 60 Ohio St. 319 [54 N.E. 262]; 71 Am. St. Rep. 720].

Relevancy and privilege. Jennings, *Ex parte*, 60 Ohio St. 319 [54 N.E. 262], 71 Am. St. Rep. 720]; Wigmore, Evidence Secs. 2210, 2212; *Commonwealth v. Pratt*, 126 Mass. 462; *People v. Freshour*, 55 Cal. 375; *Coburn v. Odell*, 30 N.H. 540; *State v. Fay*, 43 Iowa 651; *State v. Nichols*, 29 Minn. 357 [13 N.W. 153]; *Samuel v. People*, 164 Ill. 379 [45 N.E. 728]; *Pollock v. Pollock*, 1 Ohio Cir. Dec. 410 (2 R. 143); *Chambers v. Frazier*, 29 Ohio St. 362; *Bush v. Critchfield*, 5 Ohio 109; Eddy, Combinations Sec. 1010, par. 2; Buss v. Horrocks, 1 Ohio Dec. Rep. 376 (8 Jo. 419); *Meader v. Root*, 5 Ohio Cir. Dec. 61 (11 R. 81); *Conner v. Mackey*, 20 Tex. 747; *Blackburn v. Morton*, 18 Ark. 384; *Glenn v. Brush*, 3 Colo. 26; *Packard v. Hill*, 7 Cow. 489; *Odivene v. Hills*, 1 Wend. 18; Rauh, *In re*, 65 Ohio St. 128 [61 N.E. 701].

**Judges:** SPIEGEL, J.

**Opinion by:** SPIEGEL

## Opinion

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### [\*405] SPIEGEL, J.

This is an application for a writ of habeas corpus for Mrs. Cora Dow Goode, retail druggist of this city, for restoration to liberty, she having been theoretically committed to jail by a notary for refusal to answer a question, the nature of which will [\*\*3] be found further on.

Before determining the merit of the question involved, it will be necessary to consider the question raised at the hearing of the writ, whether testimony can be introduced during such hearing. Counsel for respondent claims this cannot be done in the present case, there being only a question of law for determination. The record shows that, before the notary, the petitioner was asked of whom she bought certain goods, which she refused to answer, claiming her privilege upon the ground that the question was irrelevant and in the nature of a trade secret. The notary, thereupon, committed her to jail for refusal to answer. Upon the hearing before me, I permitted the petitioner to testify and introduce testimony. Whether the question asked contained a trade secret, was a matter of fact, which required elucidation. In that course I was justified both by general practice and the law of Ohio (see Church, *Habeas Corpus Secs. 178 and 192*, and Hurd, *Habeas Corpus* 302). In Ohio the law is stated by me in *Miller, Ex parte*, 11 Dec. 69 (*8 Ohio N.P. 142*), syllabus 2:

**HN1** [↑] "A notary has no power to determine whether a question which a witness has refused to answer is [\*\*4] relevant or competent. His only recourse is to commit the witness to jail, leaving to a court of competent jurisdiction the determination of the question of relevancy upon application for release by habeas corpus."

This being the rule, the court, in furtherance of justice, was compelled to hear testimony, the question being, not whether the notary was right in his ruling, but whether the prisoner was entitled to her liberty.

This brings me to the consideration of the question, whether the petitioner was right in her refusal to answer the question. The petition in this case is filed under **HN2** [↑] the *antitrust law* of Ohio (Lan. R. L. 7586; B. 4427-1, et seq.), prohibiting the creation or carrying out of restrictions in trade or commerce; to prevent competition in the sale or purchase of merchandise; to fix at any standard or figure any article of merchandise intended for sale in this state, whereby its price to the public or consumer shall be in any manner controlled or established; to make or carry out any agreement of any kind or description by which they [\*406] shall bind themselves not to sell any article of merchandise, etc., below a common standard figure, or by which they [\*\*5] shall in any manner establish the price of any article between themselves and others, so as directly or indirectly to preclude a free and unrestricted

competition among themselves, or any purchasers or consumers in the sale or transportation of any such article. The petitioner alleges in her petition that, by reason of her refusal to join said unlawful combination (meaning the Ohio Valley Druggists' Association) or to maintain the prices fixed by the defendants (meaning the National Association of Wholesale Druggists, the Peruna Drug Manufacturing Company and the other defendants named), they have refused to sell commodities to her, and have induced others to refuse to sell to her, under threats of being cut off from supplies if they sell to her. In the hearing of the writ of habeas corpus she introduced testimony that dealers who had sold her were placed under the ban of these different combinations, who refused to sell to them unless they ceased selling to the petitioner. She further testified that if she revealed the names of those dealers who had supplied her with goods they would be placed on the black list, and her source of supply would entirely cease. She, therefore, claims **[\*\*6]** the right to refuse to answer this question as being both irrelevant and in the nature of a trade secret.

Petitioner files her suit under Sec. 11 of the antitrust, better known as the Valentine law, which **HN3** provides that in addition to the criminal and civil penalties herein provided, any person who shall be injured in his business by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor and recover twofold the damages sustained and the costs of the suit. She claims to have sustained damages, and the names of the parties from whom she bought goods, possibly at higher prices, may well become relevant, giving defendants the right to examination. But there is a wider inquiry involved. Would not an order compelling petitioner to answer this question destroy the very object which the **antitrust law** seeks to accomplish? She alleges in her petition, and submitted evidence in her examination, that a disclosure of these dealers would place them on the black list and deprive her of the opportunity of obtaining any of these goods.

It is the duty of the courts where the state has made criminal certain **[\*\*7]** rules of action in economic matters, to see that the purpose of these laws is carried out, and not nullify their very purpose by the enforcement of a technical rule of evidence. Whether the allegations of the petitioner are based on facts is a matter for the investigation of the trial court; but prior to that time, the court certainly ought not compel her to disclose matters which, while hardly trade secrets, would nevertheless **[\*407]** tend to injure her in her business and give the defendants the very opportunity to commit the acts which the state has made criminal. In saying this, I am not passing on the merits of the case, but I am using that wide discretion, which must always be vested in courts, to see that full and complete justice shall be done.

The writ is granted, and the petitioner ordered released.

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## OPINION ON REHEARING

Supreme Court of Kansas

January, 1906, Decided

No. 13,737.

**Reporter**

73 Kan. 343 \*; 84 P. 737 \*\*; 1906 Kan. LEXIS 257 \*\*\*

OPINION ON REHEARING.

**Disposition:** [\*\*\*1] Judgment reversed.

### Core Terms

mortgage, void, promise, commerce, cattle, illegality, provisions, commodity, selling, cases, livestock, transportation, merchandise, purchaser, partial, courts, carry out, combinations, indebtedness, buying

### LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN1](#) [down arrow] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Section 1 of the act of 1897, Kan. Gen. Stat. § 7864 (1901) makes unlawful any combination to create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state, and whether or not any other provisions of this act should be construed as having that purpose, the portion quoted is intended to reach among other evils the very one denounced by the statute of 1891, for an agreement between persons engaged in buying and selling live stock for others that a minimum commission for their services shall be maintained is of necessity a restriction in commerce and in the full and free pursuit of a lawful business.

Governments > Legislation > Expiration, Repeal & Suspension

#### [HN2](#) [down arrow] Legislation, Expiration, Repeal & Suspension

The Act of 1897 leaves no field for the operation of the statute of 1891, and therefore becomes a substitute for it and effects its repeal by implication.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN3** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Section 1 of the Laws of 1897 reads: A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes: First: to create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state. Second: to increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance. Third: to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce. Fourth: to fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN4** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

1897 Kan. Sess. Laws 265, § 1 reads in part: A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes: to make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void. 1897 Kan. Sess. Laws 265, § 1; Kan. Gen. Stat. § 7864 (1901).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN5** Public Enforcement, State Civil Actions

Parts of Kan. Gen. Stat. §§ 7868-7870 (1901) read: § 5: Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act, within this

73 Kan. 343, \*343 LEXIS 84 P. 737, \*\*737 LEXIS 906 Kan. LEXIS 257, \*\*\*1

state, are hereby denied the right, and are hereby prohibited from doing any business within this state. Section 6: Each and every person, company or corporation, their officers, agents, representatives or consignees, who, either directly or indirectly, violate any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned not less than thirty days nor more than six months. 1897 Kan. Sess. Laws 265; Kan. Gen. Stat. §§ 7868-7870 (1901).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

#### **HN6** **Public Enforcement, State Civil Actions**

Parts of Kan. Gen. Stat. 1901, §§ 7868-7870 read: § 7: Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of Kansas, and when any civil action shall be commenced in any court of this state, it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act. 1897 Kan. Sess. Laws 265; Kan. Gen. Stat. §§ 7868-7870 (1901).

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

#### **HN7** **Defenses, Demurrers & Objections, Affirmative Defenses**

The provisions of 1897 Kan. Sess. Laws 265, §7, Kan. Gen. Stat. § 7870 (1901), provide that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to, and growing out of, transactions prohibited by the act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN8** **Public Enforcement, State Civil Actions**

Kan. Gen. Stat. § 7870 (1901) forbids a member of a trust to do any business in the state, that is to say, as properly interpreted, to do any business in promotion of, or in pursuance of, the purposes of the trust.

Contracts Law > Defenses > Illegal Bargains

#### **HN9** **Defenses, Illegal Bargains**

If any part of a single consideration or either of two separate considerations of a contract is illegal the entire contract is void, although where two promises, one of which is illegal, are made upon a lawful consideration, the promise which is unobjectionable is ordinarily held to be enforceable.

73 Kan. 343, \*343L<sup>A</sup>84 P. 737, \*\*737L<sup>A</sup>906 Kan. LEXIS 257, \*\*\*1

Contracts Law > Defenses > Illegal Bargains

Contracts Law > ... > Discharge & Payment > Defenses > Illegalities

#### **HN10**[ **Defenses, Illegal Bargains**

Where one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction, and the contract itself is void. According to the great weight of authority, this doctrine is applicable where a note or series of notes is given for a consideration a specific and ascertained amount of which is illegal.

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

Contracts Law > Defenses > Illegal Bargains

Contracts Law > ... > Discharge & Payment > Defenses > Illegalities

#### **HN11**[ **Defenses, Failure of Consideration**

If one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable. Whilst a partial want or failure of consideration avoids a bill or note only pro tanto, illegality in respect to a part of the consideration avoids it in toto.

Contracts Law > Defenses > Illegal Bargains

#### **HN12**[ **Defenses, Illegal Bargains**

If any part of the entire consideration for a promise, or any part of an entire promise, is illegal, whether by statute or at common law, the whole contract is void. Indeed, the courts go far in refusing to found any rights upon wrongdoing.

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

Contracts Law > Defenses > Illegal Bargains

Contracts Law > ... > Discharge & Payment > Defenses > General Overview

Contracts Law > ... > Discharge & Payment > Defenses > Illegalities

#### **HN13**[ **Defenses, Failure of Consideration**

When the defense is founded on illegality of consideration it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity: that a partial illegality vitiates the bill or note in toto, while the partial want or failure of consideration only vitiates it pro tanto. And a mortgage to secure a bill or note of which

the consideration is in part illegal is also wholly void. If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent, though not upon the bill or note.

Contracts Law > ... > Methods of Perfection > Financing Statements > General Overview

Contracts Law > Defenses > Illegal Bargains

Contracts Law > Types of Commercial Transactions > Secured Transactions > General Overview

Contracts Law > ... > Secured Transactions > Security Agreements > General Overview

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview

#### **HN14** [blue icon] Methods of Perfection, Financing Statements

Where a chattel mortgage is made to secure, in part, a valid debt, and, in part, money advanced upon an illegal contract, the chattel mortgage may be enforced to the extent of the valid debt, although void as to the residue.

Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements

Criminal Law & Procedure > ... > Fraud > False Pretenses > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

#### **HN15** [blue icon] False Pretenses, Elements

In order to sustain a prosecution for obtaining property by false pretenses the pretenses must be shown to have been false. It is not enough even that the defendant believed them to be false; there can be no conviction unless they were false in fact. The allegation in an information that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage.

## **Syllabus**

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SYLLABUS BY THE COURT.

1. STATUTORY CONSTRUCTION -- *Statute Prohibiting Combinations--Repeal by Implication*. Chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), prohibiting combinations to prevent competition among persons engaged in buying and selling live stock, is superseded by the general antitrust law of 1897 (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874), and is no longer in force.
2. MONOPOLIES--*Dealing in Live Stock--Violation of Antitrust Law*. An association of persons and corporations engaged in the business of buying and selling live stock, and practically controlling that business at the place of operation, which has a by-law forbidding its members to buy or sell live stock for others without charging a commission therefor of at least fifty cents a head, is a combination to carry out restrictions in the full and free pursuit of a lawful business, and in virtue of that fact is a trust within the terms of chapter 265 of the Laws of 1897.

3. CONTRACTS--Commission--Void Because Made in Violation of Law. The charging of a commission for services in the purchase of live stock for another, by a member of such a [\*\*\*2] trust, in pursuance of the by-law referred to, is an act made a misdemeanor by that statute, and a contract to pay a commission exacted under such circumstances is void because made in violation of law.

4. CONTRACTS--Illegal Consideration--Case Disapproved. A note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. The language of the second paragraph of the syllabus in *Rathbone v. Boyd*, 30 Kan. 485, 2 P. 664, and of the corresponding portion of the opinion, is disapproved.

5. CONTRACTS--Consideration in Part Unlawful. Where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both of the notes and the mortgage are wholly void.

6. CRIMINAL LAW--Obtaining Money by False Pretenses--Defense. In a prosecution under an information charging the obtaining of money by false pretenses through selling as clear cattle that were in fact mortgaged, it is competent for the defendant to show in defense that the mortgage relied upon by the state, although fair on [\*\*\*3] its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute.

**Judges:** MASON, J. All the Justices concurring.

**Opinion by:** MASON

## Opinion

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[\*\*737] [\*344] The opinion of the court was delivered by

MASON, J.: Charles L. Wilson was prosecuted and convicted upon a charge of obtaining money by false pretenses by selling cattle which he represented to be clear of encumbrance when in fact they were covered by a mortgage. At the trial, for the purpose of establishing that the mortgage in question was void, and therefore in law no mortgage at all, he offered to prove that the mortgagee was a member of the Kansas City Livestock Exchange, that this exchange was an unlawful combination under the provisions of various statutes of Kansas known as the antitrust laws, and that the mortgage was given in pursuance of the unlawful purposes of such combination, and was therefore, by the very terms of these acts, illegal and unenforceable. The trial court rejected all evidence bearing upon this matter, and at the original hearing of the defendant's appeal the most serious question presented was whether this ruling was erroneous. Three statutes were invoked [\*\*\*4] by the defendant in this connection, namely: Chapter 257 of the Laws of 1889 (Gen. Stat. 1901, §§ 2430-2438), which forbids divers enumerated agreements in restraint of trade; chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), which relates specifically to combinations of persons engaged in buying or selling live stock; and chapter 265 of the Laws of 1897 (Gen. Stat. 1901, §§ 7864-7874), which denominates associations for various purposes as [\*345] trusts, makes them unlawful, and provides direct and indirect penalties for the doing by their members of the prohibited acts.

This court upon first consideration was of the opinion that the statutes of 1891 and 1897 should be construed together. Under such construction it was held that the validity of the mortgage must be tested by the provisions of the act of 1891, because of their more specific reference to transactions of the character of that involved, and that as so tested it was not void. This view involved deciding in the negative a question which in the course of the discussion had been suggested by the state, but had not been fully argued upon either side, namely, whether the statute of 1897 was intended to [\*\*\*5] cover the whole subject-matter of the act of 1891, and therefore to supersede it entirely. By reason of a very serious doubt of the correctness of the first impression of the court in this respect a rehearing was granted, and upon further consideration in the light of a full presentation of the matter the unanimous conclusion is reached that the later enactment was designed as a complete substitute for the earlier one.

The legislation of 1891 was entitled "An act prohibiting combinations to prevent competition among persons engaged in buying or selling live stock," etc. It forbade any agreement among such persons having the purpose or effect to prevent competition in the business of selling live stock for others, or to fix a minimum commission for such services. The act of 1897 makes no specific reference to agreements concerning commissions for the purchase or sale of live stock, and in the opinion announcing the decision of the case in this court it was said that the mere general expressions of the later act did not evince a purpose to replace the more definite provisions of the earlier one. However, HN1[<sup>1</sup>] the first subdivision of section 1 of the act of 1897 (Gen. Stat. 1901, § 7864) [\*\*\*6] makes unlawful [\*\*738] any combination "to create or carry out restrictions in trade or [\*346] commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state," and our final conclusion is that, whether or not any other provisions of this act should be construed as having that purpose, the portion quoted was intended to reach among other evils the very one denounced by the statute of 1891, for an agreement between persons engaged in buying and selling live stock for others that a minimum commission for their services shall be maintained is of necessity a restriction in commerce and in the full and free pursuit of a lawful business. Upon this ground we hold that HN2[<sup>1</sup>] the law of 1897 leaves no field for the operation of that of 1891, and therefore becomes a substitute for it and effects its repeal by implication.

This view is supported by two additional considerations: The act of 1897 presents a plan of handling the whole subject of trusts, and it is difficult to fit into it the provisions of the act of 1891 without marring its completeness and recognizing distinctions between essentially [\*\*\*7] similar matters, such as we cannot believe the legislature intended; and, while there is no repealing clause in the law of 1897, section 11 (Gen. Stat. 1901, § 7874) provides that the act of which it is a part shall not be construed to affect any action pending under any earlier law. This saving clause, which expressly retains the vitality of the former statutes so far as concerns proceedings already begun under them, fairly implies that they are to have no further force, but are to be regarded as repealed except to the extent indicated.

The view that the law of 1897 is complete in itself, and does not require to be interpreted in connection with that of 1891, reopens the entire question whether the defendant should have been permitted to give in evidence the circumstances under which the mortgage referred to was made. He offered, among other things, to prove that it was given to a member of the Kansas City Live-stock Exchange; that this exchange was an [\*347] association of persons engaged in buying and selling live stock for others, and practically controlling that business at Kansas City; that a by-law of such association forbade its members to charge a less commission for [\*\*\*8] such services than fifty cents a head; that a part of the consideration of the two notes to secure which the mortgage was given was a charge of \$ 201 for the services of the mortgagee in purchasing for the mortgagor the 402 head of cattle covered by the mortgage; that this commission was fixed and exacted in pursuance of the by-law already mentioned. Would these facts, if proved, render the mortgage void? It follows from what has already been said that they would show that the Kansas City Live-stock Exchange was a trust within the terms of the statute of 1897. HN3[<sup>1</sup>] Section 1 of that statute reads:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"First, To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

"Second, To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

"Third, To prevent competition in the [\*\*\*9] manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"Fourth, To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

**HN4**[] "Fifth, To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree [\*348] in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall [\*\*\*10] agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

"And any such combinations are hereby declared to be against public policy, unlawful and void." (Laws 1897, ch. 265, § 1; Gen. Stat. 1901, § 7864.)

It is needless to determine in this connection the effect of any of the subdivisions of the section except the first, for that is sufficient for the present purpose. The business of buying and selling cattle is one permitted by the laws of this state. An agreement among the members of an association which practically controls this business at a great commercial center that they will make no purchases or sales for others without charging as a commission for their services at least fifty cents for each head of cattle handled obviously creates a restriction in the full and free pursuit of that business. It also seemingly creates a restriction in commerce, although *Hopkins v. United States, 171 U.S. 578, 19 S. Ct. 40, 43 L. Ed. 290*, and *Anderson v. United States, 171 U.S. 604, 19 S. Ct. 50, 43 L. Ed. 300*, are [\*\*\*11] cited as holding against this. These cases, however, merely [\*\*739] decide that agreements such as that referred to are not in direct restraint of interstate commerce, as such.

Was the mortgage void if it was made to a member of a trust under the circumstances claimed by the defendant? The question is rendered one of great importance by reason of the possible far-reaching consequences of an affirmative answer. It, together with related questions, has been argued at length, not only by counsel for the parties to this action but also by [\*349] attorneys appearing as *amici curiae*, presumably in behalf of clients whose interests may be affected by the conclusion reached. Since the motion for a rehearing was granted requests for extensions of time for presentation of the matter have been repeatedly granted, in order that the fullest opportunity for discussion might be given. **HN5**[] The parts of the statute especially relied upon by the defendant in this connection read:

"SEC. 5. Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act, within this state, are hereby denied [\*\*\*12] the right, and are hereby prohibited from doing any business within this state. . . .

"SEC. 6. Each and every person, company or corporation, their officers, agents, representatives or consignees, who, either directly or indirectly, violate any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned not less than thirty days nor more than six months. . . .

**HN6**[] "SEC. 7. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state, and when any civil action shall be commenced in any court of this state, it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction [\*\*\*13] in violation of this act." (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7868-7870.)

They who contend that the mortgage in question would be valid notwithstanding this statute, although executed under the circumstances stated by the defendant, rely upon the cases of *Barton v. Mulvane, 59 Kan. 313, 52 P. 883*, *Ice Co. v. Wylie, 65 Kan. 104, 68 P. 1086*, and *The State v. Jack, 69 Kan. 387, 76 P. 911*. [\*350] These cases, however, proceed upon the theory that a wrong-doer is not to be deprived of his right to maintain an action in court merely because he has violated the law in some matter having no relation to the subject of the litigation. This

principle forbids the enforcement of the literal terms of the section last quoted, but leaves an abundant field for their operation as reasonably construed. As was said in the case last cited:

**HN7**[<sup>14</sup>] "The provisions of section 7 (Gen. Stat. 1901, § 7870) that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, as held in *Barton v. Mulvane*, 59 Kan. 313, 52 P. 883, [\*\*\*14] under a very similar provision of the antitrust act of 1889 (Laws 1889, ch. 257), contemplates only civil actions relating to, and growing out of, transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted, the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry." (Page 399.)

The contention here made is that the mortgage was void, not because it was given to one who was a member of an unlawful combination, but because a part of its consideration--the charge made for commission--was itself illegal. This is not an instance of an attempt to fasten a disability to sue upon an individual because of his violation of the law in some independent or collateral matter; the objection goes to the contract itself. **HN8**[<sup>15</sup>] The statute forbids a member of a trust to do any business in the state--that is to say, as properly interpreted, to do any business in promotion of, or in pursuance of, the purposes of the trust. Assuming the facts to be [\*\*\*15] as alleged by the defendant, the mortgagee, a member of the trust, bought these cattle for him, and in pursuance of the obnoxious by-law made him a charge of fifty cents a head for such service. This was an illegal act, and the contract to pay such [\*351] commission was a contract to pay a sum exacted in defiance of the law. The contract for this payment was, therefore, a contract in violation of the statute, by the very terms of which such contracts are made not merely non-enforceable, but absolutely void. (9 Cyc. 475.)

A part of the consideration of the mortgage was therefore illegal, if the facts were as the defendant attempted to show. Would this render the mortgage itself void? The generally accepted rule is that **HN9**[<sup>16</sup>] if any part of a single consideration or either of two separate considerations of a contract is illegal the entire contract is void, although where two promises, one of which is illegal, are made upon a lawful consideration, the promise which is unobjectionable is ordinarily held to be enforceable. (See 9 Cyc. 564-566, where the cases bearing upon the matter are collected and classified by states.) It is true that there are cases arising upon contracts based in [\*\*\*16] part upon a legal, and in part upon an illegal, consideration where the courts [\*740] have permitted an enforcement to the extent of the good consideration. But for the most part such cases purport to follow the general rule as above stated, but reach a result at variance therewith by failing to distinguish between a consideration which is merely insufficient to support a promise and one which is actually against the law or contrary to good morals. Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration and permit a *pro tanto* recovery. But **HN10**[<sup>17</sup>] where one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction, and the contract itself is void. According to the great weight of authority, and as we think also according to the better reason, this doctrine [\*352] is applicable where a note or series of notes is given [\*\*\*17] for a consideration a specific and ascertained amount of which is illegal--for example, for an indebtedness composed of various items, some lawful and some unlawful. A typical and often-cited case is that of *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664, where an action was brought upon a note given in settlement of an account which included various separate charges made for intoxicating liquor sold in violation of law. In the opinion it was said:

"The concurrent doctrine of the text-books on the law of contracts is that **HN11**[<sup>18</sup>] if one of two considerations of a promise be *void* merely, the other will support the promise; but that if one of two considerations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; [\*\*\*18] because the *whole consideration* is the basis of the *whole promise*.

The parts are inseparable. [Citing text-writers.] Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said with much force that, where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. . . . The suit was upon a promissory note alone--upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of [\*353] the provisions of a highly penal statute. The contract evidenced [\*\*\*19] by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

"With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note, for, being utterly void, it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: 'It is but a reasonable punishment for including with his just due that which he had no right to take.'" (Pages 435, 437.)

So in the case of [Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699:](#)

"The doctrine of the common law, as it is laid down in the text-books, and supported by numerous adjudications, [\*\*\*20] is that [HN12](#) if any part of the entire consideration for a promise, or any part of an entire promise, is illegal, whether by statute or at common law, the whole contract is void. Indeed, the courts go far in refusing to found any rights upon wrong-doing.' [Citing authorities.] . . . There has not, perhaps, been more frequent application of the doctrine than to promissory notes, or other evidences of debt, taken in settlement of accounts for goods, wares, or merchandise, items of which were for goods sold on Sunday, or for spirituous liquors sold in violation of law. The accounts may have contained items having no connection with the illegal sales; items for goods not sold on Sunday, or items for the sales of goods not prohibited. When all are blended, and a promissory note is taken for the whole, the note is entire and indivisible, and upon it there can be no recovery. . . . The complaint declares on eight several promissory notes, and the uncontested fact is that these notes were given in settlement of an account for goods and merchandise [\*354] sold by the plaintiffs to the defendant. And there was evidence tending to show that some of the sales were made on Sunday, and some [\*\*\*21] were of ginseng cordial, an intoxicating drink, in violation of a law prevailing in the locality of the sale, rendering such sale an indictable [\*\*741] offense. If there were items of the account closed by the notes not tainted with illegality--unconnected with the illegal sale--the plaintiffs could have maintained an action on the original contracts of sale, though the notes had been taken. The notes, if tainted with illegality, are utterly void; incapable of discharging the just indebtedness of the defendant." (Page 670.)

To the same effect are: [Hanauer v. Doane, 79 U.S. 342, 20 L. Ed. 439;](#) [Douthart v. Congdon, 197 Ill. 349, 64 N.E. 348;](#) [Bick v. Seal, 45 Mo. App. 475;](#) [Cotten v. McKenzie, 57 Miss. 418;](#) [Carleton v. Woods, 28 N.H. 290;](#) [Snyder v. Willey, 33 Mich. 483;](#) [Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592.](#) This application of the doctrine is almost universally upheld by the text-writers. For instance, in volume 1 of Daniel on Negotiable Instruments, fifth edition, section 204, the author says:

[HN13](#) "When the defense is founded on illegality of consideration [\*\*\*22] it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity--that a partial illegality vitiates the bill or note *in toto*, while the partial want or failure of consideration only vitiates it *pro tanto*. And a mortgage to secure a bill or note of which the consideration is in part illegal is also wholly void. The reason of the distinction is based mainly upon the ground of public policy, the court not undertaking to unravel a web of fraud for the benefit of

the party who has woven it. If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent, though not upon the bill or note."

(See, also, 1 Parsons, Cont., 9th ed., 456; Chitty, Cont., 10th Am. ed., 730; Jones, Chat. Mort., 4th ed., § 350; Pollock's Prin. of Cont., 1st Am. ed., 318; Anson, Cont., 2d Am. ed., 252; 1 Edwards, Bills, Notes & Neg. [\*355] Inst., 3d ed., § 471; Bishop, Cont. § 74; 2 Beach, Modern Law of Cont. § 1422; Benj. Prin. of Cont. 27; Comyn, Cont., 3d Am. ed., 20; Metcalf, Cont. 247; MacLaren, Bills, Notes & Cheques, 2d ed., 185; Story, Prom. Notes, [\*\*\*23] 5th ed., § 190; Wood's Byles, Bills & Notes, 146; 1 Story, Cont., 5th ed., § 583; 1 Page, Cont. 777; Lawson, Cont., 2d ed., § 335; 2 Addison, Cont., 8th ed., with American notes, 1169, note; Clark, Cont. 471; 4 A. & E. Encycl. of L. 192; 17 A. & E. Encycl. of L. 308.)

The second paragraph of the syllabus in [Rathbone v. Boyd, 30 Kan. 485, 2 P. 664](#), seemingly does not accord with the general rule already stated. It reads:

[HN14](#) [↑] "Where a chattel mortgage is made to secure, in part, a valid debt, and, in part, money advanced upon an illegal contract, the chattel mortgage may be enforced to the extent of the valid debt, although void as to the residue."

This portion of the syllabus and the corresponding part of the opinion may not have been essential to the determination of the case, but whether this be so or not we cannot accept the view there expressed as controlling upon the matter now under consideration, for the reason that it was announced without discussion and seemingly without examination of the consequences attached by the courts to a partial illegality of consideration, as distinguished from mere insufficiency. In a later case, [Fleming v. Greene, 48 Kan. 646, 30 P. 11](#), [\*\*\*24] while the precise point was not directly involved, the court quoted with approval a statement of the general doctrine taken from [Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664](#), which is included in the quotation already made from that case. (See, also, [Gerlach v. Skinner, 34 Kan. 86, 8 P. 257, 55 Am. Rep. 240](#); [Stansfield v. Kunz, 62 Kan. 797, 64 P. 614](#).)

There are cases holding that where a mortgage is given to secure two separate debts, one only of which is unlawful, the mortgage may be enforced to the extent of the valid indebtedness. In [Shaw v. Carpenter, 1\\*3561 54 Vt. 155, 41 Am. Rep. 837](#), although the court professed to approve and follow [Carleton v. Woods, 28 N.H. 290](#), a mortgage given to secure several notes a part of the consideration of which was illegal was permitted to be enforced to the extent of the valid consideration, upon the theory that equity was thereby done. In a dissenting opinion these cases were reviewed, and it was pointed out that even if a mortgage securing two notes, one good and one unlawful, may have vitality as to the valid note, yet where the notes themselves are [\*\*\*25] void because tainted with an illegal consideration the mortgage can have no efficacy whatever. The distinction is obviously sound, and even though the correctness of the conclusion in [Rathbone v. Boyd, 30 Kan. 485, 2 P. 664](#), were conceded it would not give force to the mortgage in the present case, for the two notes secured by it are equally affected by the illegality of consideration, and if the notes are void the mortgage is necessarily so.

The supreme court of Indiana, in [Hynds v. Hays, 25 Ind. 31](#), repudiated the generally accepted doctrine in an opinion which presents a plausible and complete argument in favor of the position taken, based upon the view that a note given for two distinct considerations is to be treated as a severable contract. We cannot, however, regard it as affording sufficient ground for departing from a rule so reasonable in itself and so firmly entrenched in the authorities.

The case of [Carradine v. Wilson, 61 Miss. 573](#), is one which supports the validity of the mortgage, but upon a different theory. It was there held that where two notes were given for a consideration a part of which was illegal, each note [\*\*\*26] being for a greater amount than the illegal portion of the consideration, and a mortgage was given securing both notes, the unlawful consideration could be referred to one of the notes, rendering it void, but thereby purging the other note of the illegality and leaving [\*\*742] the mortgage as a valid security for the second note. The facts of the present case are substantially [\*357] the same. The illegal consideration was but \$ 201. Two notes were given, respectively for \$ 6000 and \$ 7366.80. We cannot agree, however, that there is any doctrine of

law or reason that would justify considering the commission charge as having entered as an entirety into one note and none of it as having been incorporated in the other. There was in fact but one transaction. The Mississippi court bases its view largely upon *Zundt v. Roberts*, 5 S. & R. (Pa.) 139, and *Warren v. Chapman, 105 Mass. 87*. The former case is at variance with the prevailing view, and has done much to promote such conflict as there is in the decisions. The latter holds that where one owes two debts, one legal and one illegal, and gives his creditor a note for an amount less than the valid part of his [\*\*\*27] obligation, with no express direction as to its application, the law will apply it to the good and not to the bad account, and treat it as supported by a valid consideration. This is an entirely reasonable proposition, but it has no tendency to support the conclusion reached in *Carradine v. Wilson, 61 Miss. 573*. It results from what has been said that the view of this court is that upon the facts as the defendant sought to develop them the mortgage given by him was void.

Some attack has been made upon the constitutionality of the antitrust statute of 1897, but we think the questions so suggested are set at rest by the decisions of this court and of the federal supreme court. ( *The State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903*; *Smiley v. Kansas, 196 U.S. 447, 25 S. Ct. 289, 49 L. Ed. 546*.)

Was it competent for the defendant to show that the mortgage was in fact void for the reason suggested, although the invalidity did not appear on the face of the instrument? The notes were non-negotiable, so that the question is not affected by any considerations of the possible rights of an innocent purchaser. There was evidence that the [\*\*\*28] complaining witness, who bought the cattle from the defendant, was required to pay the [\*358] mortgage, not being advised of any fault in its origin. There is an obvious incongruity under the circumstances in permitting the defendant to escape punishment by showing that his representations that the cattle were clear were in fact true because the mortgage upon them was void under the *antitrust law*, although fair and legal on its face. The wrong and fraud practiced upon the complainant are not mitigated by the existence of this concealed defense to the mortgage. Yet the criminal law can only be administered in accordance with fixed and unyielding rules. And no principle of criminal law is better settled than that *HN15*[↑] in order to sustain a prosecution for obtaining property by false pretenses the pretenses must be shown to have been false. It is not enough even that the defendant believed them to be false; there can be no conviction unless they were false in fact. (19 Cyc. 394.) The allegation in an information that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof [\*\*\*29] of the existence of a valid mortgage. ( *Satchell v. The State, 1 Tex. Ct. App. 438*; *State v. Asher, 50 Ark. 427, 8 S.W. 177*; *State v. Garris, 98 N.C. 733, 4 S.E. 633*; *Keller v. The State, 51 Ind. 111*.) If, for instance, the mortgage had been paid, there is no doubt that the establishment of this fact would require an acquittal, although the notes and mortgage were outstanding, uncanceled and unreleased, and although the purchaser might have been inconvenienced thereby.

The information in this case charged in set terms that the mortgage in question constituted a valid lien on the cattle. But even in the absence of an express averment of its validity the mortgage referred to must have been understood to be a valid and not a void one. It is possible that if this defense had been anticipated a good information might have been framed by charging the defendant with selling cattle under the representation that he had signed no instrument purporting [\*359] to encumber them by which a colorable claim of lien upon them might be asserted, whereas in truth he had executed what appeared to be a good mortgage upon them, which [\*\*\*30] fact caused them to be less valuable to the purchaser than they would otherwise have been, and that by reason of this apparent lien the purchaser, not being advised of any defect in the mortgage, was required to pay the amount or lose the cattle. Under such allegations a conviction might perhaps have been sustained irrespective of the legal sufficiency of the mortgage.

The judgment of conviction is reversed, and a new trial ordered.

All the Justices concurring.

## State v. Wilson

Supreme Court of Kansas

January, 1906, Decided ; April 8, 1905, Filed

No. 13,737.

**Reporter**

73 Kan. 334 \*; 80 P. 639 \*\*; 1906 Kan. LEXIS 256 \*\*\*

THE STATE OF KANSAS v. CHARLES L. WILSON.

**Prior History:** [\*\*\*1] Appeal from Shawnee district court; Z. T. HAZEN, judge. First opinion filed April 8, 1905. Affirmed. Rehearing granted June 10, 1905. Second opinion filed April 7, 1906. Reversed.

### **Core Terms**

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mortgage, cattle, buying, provisions, selling, livestock, commerce

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Defenses > Illegal Bargains

#### **HN1[] Public Enforcement, State Civil Actions**

There are provisions of 1897 Kan. Sess. Laws ch. 265, Kan. Gen. Stat. §§ 7864-7874 (1901), that purport to make the fact that a business is an unlawful combination alone a complete bar to the enforcement of a contract made in Kansas by one of its members. Such provisions must be interpreted, however, as applying only to contracts made pursuant to the illegal combination, and in furtherance of its unlawful purposes.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN2[] Public Enforcement, State Civil Actions**

1897 Kan. Sess. Laws ch. 265, Kan. Gen. Stat. §§ 7864-7874 (1901), being penal, requires a strict rather than a free construction. Moreover, its interpretation is affected by another consideration. The Act of 1897 is so similar in many respects to 1889 Kan. Sess. Laws ch. 257, Kan. Gen. Stat. §§ 2430-2438 (1901), as to give plausibility to the suggestion that it was intended to cover the whole of the subject-matter of the earlier statute and entirely to supersede it. On the other hand, 1891 Kan. Sess. Laws ch. 158, Kan. Gen. Stat. §§ 2439-2441 (1901), is so specific in its terms, and there is such a lack of any apparent attempt to accomplish its precise purpose by the later

enactment, that there is little room for a contention that it has been repealed by implication, and it is still in force. This being decided, 1897 Kan. Sess. Laws ch. 265, Kan. Gen. Stat. §§ 2439-2441 (1901), since they relate to the same general subject, must be construed together, as though parts of the same enactment. In this situation, it is to the specific statute, and not to the general one, that a court must look for an expression of the intent of the legislature with regard to the matter of regulating the business of buying and selling cattle upon commission.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Defenses > Illegal Bargains

### **HN3** **Public Enforcement, State Civil Actions**

Upon a cursory inspection 1891 Kan. Sess. Laws ch. 158, Kan. Gen. Stat. §§ 2439-2441 (1901), may seem abundantly sufficient to stamp as illegal any agreement for the control of the commission to be charged for services either in buying or selling live stock. A careful reading, however, discloses that while the persons against whom it is directed are described as those engaged in the business of buying or selling live stock upon commission, the agreements declared to be illegal are in every instance those relating to the establishment of fixed or minimum charges for services in the sale, but not in the purchase, of live stock for others.

## **Syllabus**

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SYLLABUS BY THE COURT.

1. STATUTORY CONSTRUCTION--*Statute Prohibiting Combinations Not Repealed by Subsequent Enactment*. Chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), prohibiting combinations to prevent competition among persons engaged in buying or selling live stock, is not superseded by the general antitrust law of 1897 (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874), but is still in force. (See *post*, p. 343.)
2. CONTRACTS--*Commissions for Buying and Selling Live Stock--Legislative Restrictions*. The intention of the legislature as to restrictions to be placed upon agreements among persons engaged in buying and selling live stock for others for the control of the commissions to be charged must be determined from the act of 1891, above cited, having specific relation thereto, and not from the general antitrust act of 1897 or from that of 1889 (Laws 1889, ch. 257; Gen. Stat. 1901, §§ 2430-2438).
3. MONOPOLIES--*Dealing in Live Stock--Statute Construed*. [\*\*\*2] The act of 1891 above cited forbids agreements to maintain minimum rates of commission for services in the sale of live stock for others, but contains no such prohibition as to agreements concerning charges to be made for services in purchasing live stock.
4. MONOPOLIES--*Mortgage Given to Secure Purchase-money and Commissions--Validity*. Where a member of an association having for one of its purposes the maintenance of a minimum rate of charges for services in buying or selling live stock for others purchases cattle for another, and in pursuance of a bylaw of such association charges a commission for such services at the rate of fifty cents per head, which is included in the amount of a note and mortgage given to such member of such association by the purchaser in payment for such cattle, such mortgage is not on account thereof rendered void by the provisions of any of the statutes above cited.
5. CRIMINAL LAW--*Obtaining Money by False Pretenses--Information*. In a prosecution for obtaining money by false pretenses by selling property encumbered by a mortgage under the representation that it is clear, it is not essential that the information should show whether the [\*\*\*3] mortgagee, described as "the A. J. Gillespie Commission Company," is a corporation or a partnership.

6. CRIMINAL LAW--*Same*. In such prosecution an allegation of the information that at the time of the sale the property was encumbered by a mortgage sufficiently charges that the mortgage was unpaid.

7. CRIMINAL LAW--*Allegations and Proof--Variance*. In such a prosecution the proof of a mortgage given for \$ 13,366.80, the amount stated in the information being \$ 13,336.80, is not a fatal variance.

8. CRIMINAL LAW--*Same*. In such a prosecution the allegation of the information that the mortgage had been by the mortgagee as signed to, and was owned by, a bank and one Louis Hax is sufficiently sustained by proof that the mortgagee had sold the two notes secured by the mortgage, under a blank indorsement, to a buyer who in turn without further writing sold and delivered them to the bank, and that the bank then sold one of them to Hax.

9. CRIMINAL LAW--*Draft--Defendant's Title as Trustee Not Conclusively Shown*. In such a prosecution the fact that the draft charged to have been fraudulently obtained by the defendant was made payable to him "for the use of" [\*\*\*4] the person alleged to have been defrauded does not conclusively show that the defendant acquired title to it only as a trustee, but is open to the explanation that the words quoted were intended as a mere memorandum to indicate upon whose account the payment was made.

**Counsel:** C. C. Coleman, attorney-general, Otis E. Hungate, county attorney, and Aaron P. Jetmore, for The State; Frank Hagerman, and Botsford, Deatherage & Young, as amici curiae.

Eugene Hagan, A. F. Williams, A. E. Crane, and Hayden & Hayden, for appellant; D. R. Hite, of counsel.

**Judges:** MASON, J. All Justices concurring.

**Opinion by:** MASON

## Opinion

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[\*\*640] [\*335] The opinion of the court was delivered by

MASON, J.: Charles L. Wilson appeals from a conviction upon a charge of fraudulently obtaining property by false pretenses. The evidence of the state [\*336] tended to show that in October, 1898, Wilson and one George Maris purchased a herd of 402 steers, in payment for which they executed two notes to the A. J. Gillespie Commission Company for the aggregate amount of \$ 13,366.80, secured by a mortgage upon the cattle; that in the following December they sold 397 of these steers to the Elk Grove Land and Cattle Company, [\*\*\*5] under the representation that they were clear of all encumbrance, obtaining in payment a check for \$ 500 and a draft for \$ 10,547; and that the buyer was compelled to lose the cattle or pay the mortgage.

A large number of assignments of error have been made and argued, but the one most urgently presented is based upon a contention of the defendant that the cattle were in fact unencumbered because the mortgage executed by himself and Maris was rendered incapable of enforcement by various provisions of the Kansas statutes known generically as the antitrust laws. This question was raised in the trial court by an offer on the part of the defendant to prove that the A. J. Gillespie Commission Company was a member of a voluntary association known as the Kansas City Live-stock Exchange, composed of persons and corporations engaged in the business of buying and selling live stock for themselves and for others, organized for unlawful purposes, among which was that of fixing and maintaining a minimum charge for commissions for their services in buying and selling cattle for others, such minimum charge being established by a by-law at fifty cents per head; that the cattle here involved were [\*\*\*6] purchased by the Gillespie company for the defendant and Maris, a commission being charged in pursuance of the by-law referred to, amounting to \$ 201, which was included in the sum for which the notes and mortgage were given. The offer was made in greater detail than here shown, and included a tender of a copy of the articles of association, rules and by-laws of the live-stock exchange. It was rejected by the court, and the controversy [\*337] so far as this matter is concerned turns upon the correctness of that ruling.

Defendant in support of his contention invokes three statutes, enacted in different years--chapter 257 of the Laws of 1889 (Gen. Stat. 1901, §§ 2430-2438), chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), and chapter 265 of the Laws of 1897 (Gen. Stat. 1901, §§ 7864-7874). The first of these forbids certain contracts in restraint of trade. The second is narrow in its scope, and applies only to persons or corporations engaged in buying or selling live stock, who are prohibited by it from entering into any agreement to control the amount to be charged as compensation for services in making sales of live stock for others. The third is very sweeping [\*\*\*7] in its provisions. It defines and denounces five kinds of combinations, which it denominates trusts. The definitions are couched in general terms, but cover almost every conceivable device by which freedom of commerce might be hampered, competition restricted, or the price of commodities controlled. All acts done in pursuance of any of the arrangements interdicted by these various statutes are made misdemeanors. The act of 1897 also contains these provisions:

"Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof that . . . the cause of action grows out of any business transaction in violation of this act." (Gen. Stat. 1901, § 7870.)

The argument in behalf of the defendant is that, assuming the truth of the rejected evidence, the Kansas City Live-stock Exchange was an unlawful combination under each of these statutes; that in charging the defendant \$ 201 as a commission for services in [\*\*641] buying 402 head of cattle for him the Gillespie company acted [\*\*\*8] under and in pursuance of the unlawful bond which [\*338] united the members of the exchange, and thereby was guilty of a public offense; that the mortgage was unenforceable both because \$ 201 of its consideration was on this account illegal and because it was made in violation of the provisions of the statute of 1897, or grew out of a business transaction in violation of that statute.

It may be assumed for the purposes of the case that the live-stock exchange was a trust within the meaning of the law of 1897 by reason of a number of its rules other than those relating to the regulation of commission charges. [HN1](#)[ There are provisions of that law which purport to make such fact alone a complete bar to the enforcement of a contract made in this state by one of its members. Such provisions must be interpreted, however, as applying only to contracts made pursuant to the illegal combination, and in furtherance of its unlawful purposes. ( [Barton v. Mulvane](#), 59 Kan. 313, 52 P. 883; [The State v. Jack](#), 69 Kan. 387, 76 P. 911.) Whether this mortgage was a contract of that character is the pertinent inquiry in this connection. The mere fact that the Gillespie [\*\*\*9] company was a member of a trust when it bought these cattle for Wilson, paid for them, and took his notes and mortgage for the amount, did not taint the transaction with illegality. The feature of the proceeding of which complaint is made, and which causes the doubt of its validity, is the charge of a commission for services in making such purchase at the rate of fifty cents a head--the minimum rate fixed by & unlawful association. This being true, the mortgage was void only in case an agreement to maintain a minimum rate for such services is held to be one of those forbidden by statute.

There are general expressions in the law of 1897 which, if given a liberal construction, might be held to prohibit such an agreement; for instance, those directed against combinations intended "to create or carry out restrictions in trade or commerce, or aids to commerce," or "to carry out restrictions in the full and [\*339] free pursuit of any business," or "to increase or reduce the price of merchandise, produce, or commodities," or "to prevent competition in the . . . sale or purchase of merchandise, produce, or commodities, or to prevent competition in aid to commerce," or "to fix any standard [\*\*\*10] or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state." (Gen. Stat. 1901, § 7864.) [HN2](#)[ The statute being penal, however, requires a strict rather than a free construction. Moreover, its interpretation is affected by another consideration. The act of 1897 is so similar in many respects to that of 1889 as to give plausibility to the suggestion that it was intended to cover the whole of the subject-matter of the earlier statute and entirely to supersede it. ( [The State v. Smiley](#), 65 Kan. 240, 69 P. 199.) On the other hand, the act of 1891 is so specific in its terms, and there is such a lack of any apparent attempt to accomplish its precise purpose by the later enactment, that there is little room for a contention that it has been repealed by implication, and we regard it as still in force. This being decided, the two acts, since they relate to

the same general subject, must be construed together, as though parts of the same enactment. ( [Wren & Clawson v. Comm'r's of Nemaha Co., 24 Kan. 301.](#)) The precise scope [\*\*\*11] of the earlier one is indicated by its title, which is "An act prohibiting combinations to prevent competition among persons engaged in buying or selling live stock," etc. In the later enactment there is no reference to this subject by any terms more definite than those already quoted. In this situation, it is to the specific statute, and not to the general one, that we must look for an expression of the intent of the legislature with regard to the matter of regulating the business of buying and selling cattle upon commission, and the prohibition against the transaction complained of by defendant must be found, if at all, in the statute of [\*340] 1891, and not in that of 1897. ( [Long v. Culp, 14 Kan. 412.](#))

**HN3** Upon a cursory inspection the act of 1891 may seem abundantly sufficient to stamp as illegal any agreement for the control of the commission to be charged for services either in buying or selling live stock. A careful reading, however, discloses that while the persons against whom it is directed are described as those engaged in the business of *buying or selling* live stock upon commission, the agreements declared to be illegal are in every instance those [\*\*\*12] relating to the establishment of fixed or minimum charges for services in the *sale*, but not in the *purchase*, of live stock for others. This cannot be deemed the result of a mere error, clerical or otherwise, for the expression occurs no less than four times. Why the legislature should have made a distinction between agreements relating to commissions for selling and those relating to commissions for buying is not a matter of inquiry here; that it has done so admits of no doubt. We cannot insert in the law an inhibition against the establishment of minimum charges for services in buying cattle, nor can we ignore the effect of the omission of the legislature so to do. As the commission charged to the defendant by the Gillespie company was for the purchase of cattle for him, not for their sale, it was not under the ban of the statute and did not invalidate the mortgage. If the law of 1889 is to be considered still in force the application of its general provisions to the matter here involved must be denied, upon the reasoning already employed with regard to the act of 1897. It results from these conclusions [\*\*642] that the trial court committed no error in rejecting the evidence [\*\*\*13] under consideration.

The matter of defense just discussed was advanced under singular circumstances. There is no pretense that the defendant informed the Elk Grove company, or that it was otherwise notified, of any claim that the mortgage was void because based upon an unlawful [\*341] consideration, either before the cattle were sold or in time to have enabled the company to raise the question against the holder of the mortgage when the cattle were demanded under it. Selling property under the representation that the title is clear when in fact there is in existence a mortgage against it which is valid except for some latent defect unknown to the purchaser, and in virtue of which the property is successfully replevied from him, may be an offense in law, as it assuredly is in morals. But we have assumed that it was necessary for the state in order to convict in this case to prove the existence of a valid mortgage.

The defendant challenged the sufficiency of the information on the ground that it did not show whether the A. J. Gillespie Commission Company was a corporation or a partnership. Such an omission in laying the ownership of the stolen property in a prosecution for larceny [\*\*\*14] would be fatal. ( [The State v. Suppe, 60 Kan. 566, 57 P. 106.](#)) The same degree of particularity is not required, however, in the description of the mortgagee in a case of this kind.

Another objection made was that the information did not state that the mortgage was unpaid. It did allege that at the time of the sale to the Elk Grove company the cattle were encumbered by the mortgage, and this was equivalent to an allegation that the mortgage at that time remained unsatisfied. ( [Keyes v. The People, 197 Ill. 638, 64 N.E. 730.](#))

The information described the mortgage given by the defendant and Maris to the Gillespie company as one securing an indebtedness of \$ 13,336.80. The proof showed that the mortgage debt was \$ 13,366.80. This is claimed to be a fatal variance. It would not be profitable to review the great number of authorities cited in support of this contention. Whether or not it is possible to distinguish this case from those relied upon by the defendant, it is not necessary to do so. Notwithstanding anything that may have been said to the contrary by courts of eminent respectability, it is so [\*342] manifest that the defendant could not [\*\*\*15] by the most remote possibility have been misled by the inaccurate statement of the amount for which the mortgage was given that we have no hesitancy in holding that there is nothing substantial in the objection made.

The information alleged that the mortgage had been by the mortgagee assigned and transferred to, and was then owned by, the Central Savings Bank, of St. Joseph, Mo., and Louis Hax. The evidence was that the mortgagee sold the notes under a blank indorsement, that the buyer sold them to the St. Joseph bank, delivering them without further writing, and that the bank sold one of the notes to Louis Hax, retaining the other. This is also complained of as a variance. Granting that for some purposes the description of the notes as having been assigned to, and as being owned by, the bank and Hax was inapt, this is likewise a matter by which no prejudice could result to the defendant and for which it would be folly to set aside the conviction.

The draft which the defendant (jointly with Maris) was charged with having fraudulently obtained was issued by a bank cashier to the order of John Wilson & Co., and by the payees indorsed to "Maris & Wilson, for the use of Elk Grove Land [\*\*\*16] and Cattle Company." It is urged that because of this restrictive indorsement Maris and Wilson acquired no beneficial title to the draft, but took it only in trust for the Elk Grove company. This might be deemed the effect of the indorsement in the absence of any explanation, but the evidence warrants the conclusion that it was intended to mean simply that the draft, although transferred by John Wilson & Co. direct to Maris and Wilson, was delivered to them on account of the Elk Grove company.

Other assignments of error have been argued with regard to the admission of evidence, the giving and refusing of instructions, and the denying of the motion for a new trial. It is not thought that they require [\*343] separate statement or discussion. They have all been examined, and we reach the conclusion that the record is free from material error. The judgment is therefore affirmed.

All the Justices concurring.

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## **State v. Missouri, K. & T. R. Co.**

Supreme Court of Texas

February 26, 1906, Decided

No. 1491

### **Reporter**

99 Tex. 516 \*; 91 S.W. 214 \*\*; 1906 Tex. LEXIS 125 \*\*\*

State of Texas v. Missouri, Kansas & Texas Railway Company and American Express Company

**Prior History:** [\*\*\*1] Questions certified from the Court of Civil Appeals for the Third District, in an appeal from Travis County.

## **Core Terms**

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transportation, railway company, Railroad, commodities, rates, combinations, facilities, parties, railroad company, carry out, skill, preparation, carriers, lines, transportation costs, merchandise, Antitrust, contracts, questions, carrying, commerce, pursuit, railway, restrictions, demurrer, products, binding, lessen, terms, deem

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN1[] Regulated Industries, Transportation**

The Antitrust Act of 1903 provides in part that a trust is a combination of capital, skill, or acts by two or more persons, firms, or corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of Texas; To prevent or lessen competition in the transportation of merchandise, produce, or commodities; To fix or maintain any standard or figure whereby the cost of transportation shall be in any manner affected, controlled, or established.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN2[] Regulated Industries, Transportation**

The Antitrust Act of 1903 provides in part that a trust is a combination of capital, skill, or acts by two or more persons, firms, or corporations or associations of persons, or either two or more of them for either, any, or all of the

99 Tex. 516, \*516L<sup>A</sup> S.W. 214, \*\*214L<sup>A</sup>906 Tex. LEXIS 125, \*\*\*1

following purposes: To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of the transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others.

[Antitrust & Trade Law > Regulated Industries > Transportation > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

#### **HN3** **Regulated Industries, Transportation**

The Antitrust Act of 1903 provides in part that a trust is a combination of capital, skill, or acts by two or more persons, firms, or corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: To preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs](#)

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation](#)

#### **HN4** **Railroads & Rail Transportation, Rates & Tariffs**

Tex. Rev. Civ. Stat. Ann. art. 4540 provides that every railroad company operating a railroad within Texas shall furnish reasonable and equal facilities and accommodations, and upon reasonable and equal rates, to all corporations and persons engaged in the express business, for the transportation of themselves, agents, servants, merchandise, and other property; for the use of their cars, depots, buildings, and grounds; and for exchanges at points of junction with other roads.

[Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview](#)

[Governments > Police Powers](#)

#### **HN5** **Congressional Duties & Powers, Contracts Clause**

The state may, in the exercise of its police power, prohibit the continuance in the future of those things already in existence which are so injurious to the rights and interests of its citizens generally as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. The same power which may upon sufficient occasion, destroy other property of the citizen to secure the general welfare, may, to the same end,

destroy the binding obligation of contracts. The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere.

## **Headnotes/Summary**

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### **Headnotes**

#### **Antitrust Law -- Railway -- Express Company.**

Railroads being required by statute (Rev. Stat., art. 4540) to furnish to all express companies equal facilities for doing business over their lines, any combination of their capital, skill or acts by a railway with one express company which would limit or narrow the scope to be given to the business of others over such line would be a violation of the trust law of 1903.

#### **Antitrust Law -- Contract -- Exclusive Rights.**

A contract between a railway and express company by which the former bound itself merely not to contract with other express companies to do business on its road might not prevent it from furnishing them facilities for doing such business without contracting to do so; but where the rights granted are spoken of by the contract as "exclusive facilities," and are only to be awarded by the railway when compelled by legislative or judicial proceedings, and in that event the contracting express company is to have credit for the sums paid by other companies on the amount due from it under its contract, [\*\*\*2] the obstacles interposed to the admission of other companies to do business, evidence the intention to make the rights of the contracting company exclusive, and to create and carry out a restriction on others in the free pursuit of the business.

#### **Antitrust Law.**

While the mere purpose without the combination does not constitute the offense, the formation of such purpose and the agreement upon a contract by which it is to be carried out, in which contract the capital, skill or acts of both are to be used, completes the offense.

#### **Antitrust Law -- Contracts Prior to Enactment.**

Whenever, after the Act begins to operate, a combination for the prohibited purposes is found to exist, it falls within the terms of the law. The fact that it was formed by contract made before the law was passed is immaterial, if it was in active existence thereafter.

#### **Antitrust Law -- Retroactive Law -- Police Power -- Impairing Contract.**

The constitutional prohibition against impairing the obligation of a contract does not apply to a legitimate exercise of the police power by the state in prohibiting the continuance of things already in existence which are so injurious to [\*\*\*3] the rights and interests of citizens generally as to justify the exercise of such power, though their continuance may be provided for by contracts previously made.

#### **Antitrust Law -- Unlawful Contract.**

Whatever limitations there may be to the exercise of the police power to impair existing contracts, they do not apply to a contract already prohibited by a statute existing when it was made, e. g., the application of the antitrust law of 1903 to a contract for exclusive rights to an express company made unlawful by article 4540 of the Revised Statutes.

#### **Trusts -- Control of Rates by Commission.**

The fact that the regulation of the rates of both railways and express companies is placed under the control of the Railroad Commission does not exempt them from penalties for forming combinations made unlawful by the antitrust law.

### Pleading.

The allegation that the parties to a contract constituting an unlawful combination under a law passed after it was entered into, continued to treat it as valid and executed and carried it out after the law went into effect, was sufficient, as against a general demurrer, to charge them with acts violating the law.

**Counsel:** [\*\*\*4] *R. V. Davidson*, Attorney-General, and *Warren W. Moore*, District Attorney (*Lackey & Lewright* and *Allen & Hart*, of Counsel), for appellant. -- The allegations in the petition showed a violation of the Antitrust Act of 1903. Bill of Rights, sec. 26; Constitution of the State of Texas, secs. 1, 2 and 5, art. 10, and secs. 3 and 5 of art. 12; Rev. Stat., art. 4540; arts. 15, 16 and 17, Criminal Code; *Brenham v. Brenham Water Company*, 67 Texas, 561; *Gulf, C. & S. F. Ry. Co. v. The State*, 72 Texas, 404; *Coal Co. v. Lawson*, 89 Texas, 394; *Waters-Pierce Oil Co. v. The State*, 19 Texas Civil Appeals, 1; *Wells-Fargo Express Comany v. Williams*, 71 S. W. Rep., 314; *Thompson v. San Antonio & A. P. Ry. Co.*, 32 S. W. Rep., 427; *United States v. Trans-Missouri Freight Association*, 166 U.S., 290; *United States v. Joint Traffic Association*, 171 U.S., 505; *Diamond Glue Company v. United States Glue Company*, 187 U.S., 611; *Pearsall v. Great Northern R. R. Co.*, 161 U.S., 646; *Louisville & N. R. R. Co. v. Kentucky*, 161 U.S. Rep., 677; *Doyle v. Continental Ins. Co.*, 94 U.S., 535.

*Baker, Botts, Parker & Garwood* and *Alexander & Thompson*, for appellee, American Express Co.

*T. S. [\*\*\*5] Miller, Fiset & McClendon* and *Clarence H. Miller*, for appellee, Mo., K. & T. Ry. Co. -- The antitrust Acts in question were intended to prohibit combination generally, which restrain trade, or suppress competition, but not those contracts within the purview of the Railroad Commission law. The Commission under that law has exclusive power and is charged with the exclusive duty to protect the public against unjust or excessive rates on the part of railway and express companies, and hence the contract in question is not within the meaning of the antitrust laws. *Thorpe v. Adams*, L. R., 6 C. P., 135; *Moore v. Bell*, 95 Texas, 157; Rev. Stat., arts. 4561-4584; *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal., 549; *State v. Shippers Compress Co.*, 95 Texas, 603.

The contract in question was entered into before the Antitrust Act of 1903 and plaintiff's petition does not allege that the exclusive feature of the contract was carried out in such a way after that Act became effective, as to violate the terms of the Act. We submit that the allegations are insufficient to show a violation of the law, if it applied to the contract in question. See also *United States v. Dietrich*, 126 [\*\*\*6] Fed. Rep., 671; *Oregon Co. v. Windsor*, 20 Wal., 64; *Erie Ry. Co. v. Union L. Co.*, 6 Vroom, 244; *Stephen v. Southern P. Co.*, 109 Cal., 95; 9 Cyc., 575-6; *Brewster v. Kitchell*, 1 Salk, 198. The petition should allege an intentional violation of the law. *State v. Compress Co.*, 95 Texas, 607; 6 A. & E. Enc. of Law, 2d ed., 840, and note, and 864 and note.

The contract in question was not a violation of either the Antitrust Acts of 1899 or of 1903, because the express company was not a competitor of the railway company, and the railway company in giving the express company the exclusive privilege of transporting express matter over its lines merely operated a part of its own business through an instrumentality which it had the right to select. *Northern Securities Case*, 193 U.S., 197; *Welch v. Phelps & B. Windmill Co.* 89 Texas 655; *Gates v. Hooper*, 90 Texas, 565; *Lewis v. Weatherford*, etc., Ry. Co., 36 Texas Civ. App., 48; *Express Co. Cases*, 117 U.S., 1; *Wiggins Ferry Co. v. Chicago & A. Railway Co.*, 27 S. W. Rep., 570; *Donovan v. Pennsylvania Co.*, 120 Fed. Rep., 215; *Barney v. Oyster Bay & H. Steamship Co.*, 67 N. Y., 301; *Kates v. Atlanta B. & C. Co.*, 16 Am. & Eng. Ry. Cases (N. S.), [\*\*\*7] 140; *Pullman Palace Car Cases*, 139 U.S., 89; *Welch v. Phelps & B. Windmill Co.*, 89 Texas 655; *Anderson v. Rowland*, 44 S. W. Rep., 912; *Atchison T. & S. F. Ry. Co. v. Denver & N. O. R. R.*, 110 U.S., 667.

The contract in question is not a "combination" as defined in the Act of 1903, and the petition therefore fails to state a violation of the terms of that Act.

99 Tex. 516, \*516 A. 91 S.W. 214, \*\*214 A. 906 Tex. LEXIS 125, \*\*\*7

In Addyston Pipe Co. case, 85 Fed. Rep., 271, the rule is stated to be "where the main and controlling purpose of the contract is a lawful purpose and the restriction of competition is merely collateral or incidental to the main purpose, such incidental and contingent restraint of trade is not within the purpose of the statute."

In United States v. E. C. Knight, 156 U.S., 1, it was decided that "the fact that trade or commerce might be indirectly affected, was not enough to entitle complainant to a decree." To same effect is United States v. Traffic Association, 171 U.S., 505.

In the express cases, [117 U.S., page 1](#), and the Pullman Palace car cases, 139 U.S., 89, the Federal Supreme Court holds that the contract between the railroad company and an express company or a sleeping car company, whereby the latter acquire exclusive [\*\*\*8] rights on the lines of railroads is not monopolistic in its character nor opposed to public policy. These utterances by the highest federal court fully establish the proposition that the contract in question looked at from the most extreme standpoint, was only a partial restriction in competition, and was not unreasonable at common law or contrary to public policy. If it was not so at common law then it was not so, if our argument holds good, under the language of the Antitrust Act of 1903. United States v. Freight Association, 166 U.S., 341; Hopkins v. United States, 171 U.S., 578; United States v. Workman's A. Council, 26 L.R. A., 158; Addyston P. & S. Co. v. United States, 175 U.S., 211, and 95 Texas, 603; Addyston Pipe Co. case, 85 Fed. Rep., 271; 175 U.S., 211.

We think the case is distinguishable from the cases heretofore held to violate the [antitrust law](#), and within the doctrine announced in Gates v. Hooper, 90 Texas, 563. Vanderweghe v. American Brewing Co., 61 S. W. Rep., 526. See also White Dental Co. v. Hertzberg, 51 S. W. Rep., 355.

The contract in question is not an unreasonable restriction in trade or upon competition and is not illegal because the Antitrust [\*\*\*9] Act of 1903 applies only to unreasonable restraints in trade and substantial restrictions in competition.

If the Antitrust Act of 1903 prohibits reasonable restrictions in trade and competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, then it is void because it deprives the prohibited persons from exercising the constitutional right of making contracts. Dobbins v. City of Los Angeles, 195 U.S. Rep., 223; Lawton v. Steele, 152 U.S., 133; Express cases, 117 U.S., 1; Pullman cases, 139 U.S., 89.

If the Act of 1903 prohibits reasonable restrictions upon trade and competition, then the statute takes away the appellees' liberty and property without due process of law, and it is an impairment of rights protected by the [fourteenth amendment to the Federal Constitution](#).

The contract in question appears from the plaintiff's petition to have been entered into before the passage of the Antitrust Act of 1903, and that Act is an ex post facto law and a law impairing the obligations of the contract within the meaning of the United States Constitution as regards their contract. Express cases, 117 U.S., 1; Pullman cases, 139 U.S., [\*\*\*10] 89.

The Antitrust Act of 1903, the violation of which is complained of, is contrary to the [fourteenth amendment to the Federal Constitution](#) and denies the appellees the equal protection of the law, because in the 17th section of the Act, it provides that nothing in the act shall be construed to destroy any rights of the state to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in the state for acts committed before the Act takes effect, but does not provide for the recovery of penalties either against an individual or a foreign corporation for acts committed before the Act takes effect. Connolly v. Union Pipe Line Co., 184 U.S., 540.

**Judges:** Williams, Associate Justice.

**Opinion by:** WILLIAMS

## **Opinion**

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[\*519] [\*\*215] This case is submitted upon the following certificate from the Court of Civil Appeals for the Third District:

"This is a case now pending in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, wherein the State of Texas in the District Court of Travis County sought to recover from the appellees penalties for an alleged breach and violation of the Antitrust Acts of 1899 and 1903. [\*\*\*11] A general demurrer in the court below was sustained to the petition, and the case dismissed, from which judgment the state of Texas has appealed. The petition is as follows:

"First. That the state of Texas is the plaintiff herein and is represented by Warren W. Moore, her district attorney in and for the Twenty-sixth Judicial District of Texas, and acting under the authority and by the direction of the attorney-general of the state of Texas. That said district attorney applied to the Railroad Commission of Texas for permission and direction to bring this suit, but such permission and direction were declined by said Railroad Commission of Texas, because they had no jurisdiction in the matter and had nothing to do with the case. The defendants are the Missouri, Kansas & Texas Railway Company, of Texas, a railroad company incorporated under the laws of the state of [\*520] Texas, and the American Express Company, a joint stock company organized under the laws of the state of New York, doing business in Texas and having about fifteen hundred stockholders or members of said stock company residing in various parts of the country, whose names and residences are unknown to the [\*\*\*12] plaintiff.

"Second. That on the days and dates hereinafter mentioned, the defendant, Missouri, Kansas & Texas Railway Company of Texas, was engaged in operating a railroad from Denison to Galveston with various branches and feeders, and was a common carrier for hire in the state of Texas, being the owner of and in control of a railroad as above set out. That the defendant, the American Express Company, along with three other express companies, the Pacific Express Company, the Wells-Fargo Express Company and the United States Express Company, were each and all engaged in the express business in the state of Texas, and were carrying on such business as common carriers for hire over the various lines of railway within the state of Texas, and were in active competition with each other in such express business; that they, the said express companies, competed actively with each other in the rates charged, the promptness of service rendered for a given rate, the facilities afforded shippers and the public generally in dealing with them, in the courtesy of employes, and in the nature and character of the services rendered, and in many other ways were competing and did compete and could [\*\*\*13] compete with each other in the state of Texas."

The certificate here sets out the allegations of the petition as to a contract made between the parties defendant January 31, 1900, and as to that contract and the acts done under it, being in violation of the Antitrust Act of 1899, which allegations are omitted for reasons hereinafter stated. The petition then proceeds to allege the making of a second contract as follows:

"Seventh. Plaintiff says that heretofore, to wit: On the 23d day of September, A. D. 1902, the defendant, the Missouri, Kansas & Texas Railway Company of Texas, entered into a contract and agreement with the defendant, American Express Company, a joint stock association doing business in the state of Texas, whereby it was agreed by and between said railway company and said express company among other things as follows:

"(a) That the railway company agreed to transport all the express matter of the express company to and from all stations upon its lines of railroad and branches which were then owned and operated by it and which might thereafter be owned and operated by it during the life of said contract.

"(b) The railway company further agreed that 'none [\*\*\*14] of its employes for himself, or for the railway company, shall be allowed during the continuance of this agreement to transmit money, valuable packages, goods or merchandise of any kind whatsoever, except regular passengers' baggage and supplies for the railway company's eating houses upon the passenger trains of the said railway company, except that the railway company reserves the right to transport dogs in its passenger trains when accompanied by the owner, and also to transport corpses.'

"(c) It was further agreed that the railway company would not [\*521] contract with any party or parties to do an express business over said road, or any portion thereof, during the existence of the agreement.

"(d) It was further agreed that if the railway company constructed, leased, operated or acquired other lines during the life of the agreement, the express company should have the same exclusive facilities over all such lines insofar as the railway company could legally grant such facilities, 'it being understood that if the railway company by its trackage arrangement with other railway companies which it may deem best to make hereafter, or if it compelled by legislation [\*\*216] [\*\*\*15] or judicial proceedings to grant to any other express or transportation company facilities for carrying on an express business on its lines, or any part of the same, the revenue derived from the facilities so afforded such other express or transportation company shall be credited to the express company in its payment provided for under the terms of the agreement,' and it was further agreed that the compensation to such other transportation company or companies should not be less than the compensation provided for by the contract to be paid to the express company for the same service.

"(e) It was further agreed that the express company would transport, free of charge, over its lines, matters of any kind, property of the railway company, when such shipments did not exceed twenty pounds in weight, between any points reached by said express company and would charge on shipments exceeding twenty pounds in weight of the property of the railway company to and from any points reached by the express company off of the line of the railway company and the Missouri, Kansas & Texas Railway Company (of Kansas) 75 percent of its regular tariff on such shipments, and it was provided that the above [\*\*\*16] should apply to the business of the Southwestern Development Company, 'being an associated company of the railway company.'

"(f) The express company further agreed that it would not issue any local rates per hundred pounds between points on the railway company's lines 'which shall be less than one and one-half times the railway company's freight rate per hundred pounds on the same commodity between the same points,' unless consent to the contrary had been obtained from the traffic manager of the railway company, but it was provided that the express company shall be permitted to make such rates between competitive points as will enable it to compete successfully with other express companies operating on other lines of railway, the express company agreeing to notify the railway company of any reduction of rates made on account of competition, when such competitive rates are reduced to one and one-half times the freight rates of such commodity, the express company agrees that no further reduction shall be made in such competitive rates without the consent of the railway company.

"(g) It was agreed that the sum of \$ 7,732.12 shall be paid by said express company quarterly to said railway [\*\*17] company and that if 50 percent of the gross receipts of such company from traffic on the lines thereof should be in excess of that sum that such 50 percent should be paid.

"(h) It was further agreed by and between said parties that said [\*522] contract should become effective and be in force from and after the 1st day of February, 1903, and should continue in force for a period of ten years."

The petition then charges violations of the Act of 1899 in the making and carrying out of this contract up to March 31, 1903, when the Act of that year became a law, and proceeds:

"Ninth. Plaintiff says that after the 31st day of March, 1903, and up to and including the trial of this case, the defendant railway company and defendant express company, aforesaid, continued to treat said contract, last aforesaid, that is to say, the contract entered into on the 23d day of September, 1902, as a valid and binding contract between said parties, and executed and carried out said contract.

"Tenth. That by the execution and carrying out of the contract last aforesaid, after the 31st day of March, 1903, said defendant railway company and said express company each became and was a trust, and [\*\*\*18] each entered into a combination of capital, skill and acts by and with persons, firms, corporations and associations of persons, to wit: each defendant with the other for the following purposes:

"1. To create and carry out restrictions in trade and aids to commerce and in preparation of products for market and transportation and to create and carry out restrictions in the free pursuit of a business authorized and permitted by the laws of this state and said combination tended to carry out and create such restrictions.

"2. To prevent and lessen competition in the transportation of merchandise, products and commodities, and to prevent and lessen competition in aids to commerce and in the preparation of products for market and transportation.

"3. To fix and maintain a standard or figure whereby the price of articles or commodities of merchandise, products and commerce and the cost of transportation should be affected, controlled and established.

"4. To make, enter into, maintain, execute and carry out a contract, obligation or agreement by which the parties thereto bound themselves not to transport any article or commodity below a common standard or figure, and by which they [\*\*\*19] agreed to keep the price of such article, or charge for transportation at a fixed or graded figure and by which they might affect and maintain the price or cost of transportation and to preclude free and unrestricted competition among themselves in the transportation of articles or commodities of transportation and by which they agreed to pool, combine and unite an interest which they had in connection with a charge for transportation.

"Eleventh. Plaintiff further says that by the contract and agreement aforesaid and the execution and carrying out of the same after said 31st day of March, 1900, said railway company and said express company entered into and carried out an agreement:

"1. Creating and tending to create and carry out restrictions in trade and commerce and [\*\*217] aids to commerce and in transportation and in the free pursuit of business authorized and permitted by the laws of this state, and

"2. Fixing, maintaining and increasing the price of merchandise produce [\*523] and commodities and the preparation of products for market and transportation, and

"3. Preventing and lessening competition in the transportation of merchandise, produce and commodities [\*\*\*20] and preventing and lessening competition in aids to commerce and in transportation, and

"4. Fixing and maintaining a standard and figure whereby the price and cost of transportation is affected, controlled and established, and

"5. By which the said parties, bind and have bound themselves not to transport articles and commodities, and by which they agree to keep the price of charges for transportation at a fixed and graded figure, and by which they affect and maintain the price and cost of transportation and the cost of transportation between them and themselves and others, and to preclude a free and unrestricted competition among themselves and others in the transportation of articles and commodities and the business of transportation, and by which they agree to pool, combine and unite their interest in connection with the charge for the transportation of express matter, whereby such charge is affected.

"And plaintiff says that by the execution of the contract aforesaid and the carrying out of same after the 31st day of March, A. D. 1903, said defendant railway company and said defendant express company each formed a trust and a monopoly and a conspiracy in restraint of trade [\*\*\*21] and thereby violated the laws of the state of Texas, and especially the Act of March 31, 1903, and thereby each became liable to plaintiff for the penalties denounced and provided by said statute, to wit: the sum of fifty dollars per day for each day from and including the 1st day of April, 1903, to and including the date of the trial of this case, an aggregate of \$ 20,000 and for the sum of \$ 20,000 plaintiff now asks judgment against said defendant railway company, and for the sum of \$ 20,000, plaintiff asks judgment against said express company.

"Twelfth. That during the month of September, 1903, the Railroad Commission of Texas promulgated a general tariff of rates and classifications of freights and all express matter to be hauled by the express companies doing business in the state of Texas, such rates and classifications to govern in the transportation by said express companies of all express matter wholly within the state; that the defendant, the American Express Company, together with the other express companies doing business in the state of Texas, applied for and obtained from the United States Circuit Court an injunction against the Railroad Commission of Texas, restraining [\*\*\*22] them from promulgating or enforcing such rates and classifications; that such tariff was a general tariff and covered every sort of express matter; that said defendant express company and said other express companies claim in their bill upon

which they obtained such injunction that the Railroad Commission is without authority of law to fix and regulate charges to be made by them; that they also claim that they had no right on various grounds to enforce such rates and classifications, and said suit has been pending since September, 1903, and is now pending and can not be tried or finally disposed of by the court until January, 1905.

"And plaintiff prays for judgment severally against said defendants for the sums hereinbefore prayed to be adjudged against them respectively, [\*524] and it prays for judgment for costs and for such other relief as it may be entitled to.

"In view of the fact that we are reliably informed that there are thirty or more cases pending in the court below of practically the same nature as this case, and that are dependent upon a decision hereof; and in view of the public interest involved in the question, so that an early and final decision may be reached, [\*\*\*23] we have concluded to certify the questions raised by the plaintiff's petition to your honorable court. However, there is one question pointed out in appellee's brief as supporting the ruling of the trial court which we have agreed upon. It is insisted by appellees that the trial court correctly sustained the demurrer, because the attorney-general in an action to recover penalties for a breach of the antitrust statutes in question, so far as they affect railway and express companies, could not maintain the same without permission or consent of the Railroad Commission of Texas. The petition does contain an averment that the Railroad Commission did not give its consent to the bringing and filing of this suit, but it affirmatively appears upon the face of the petition that it was instituted under the consent and direction of the attorney-general. Without comment or stating the reasons that have influenced us in the ruling, we deem it only sufficient to say that we are of the opinion that the attorney-general could maintain the action without the consent or permission of the Railroad Commission.

"It will be observed that the petition specifically points out and calls the court's attention [\*\*\*24] to the grounds relied upon as showing and indicating wherein the contract as described in the petition comes within the condemnation of the Antitrust Acts of 1899 and 1903. Such being the case, we deem it unnecessary to make the questions propounded more specific than to merely ask the court whether the plaintiff's petition states a cause of action, and whether the trial court erred in sustaining the general demurrer. Therefore we propound to the Supreme Court the following question:

"Was the contract in question, as it is alleged [\*\*218] and described in plaintiff's petition, in violation of either the Antitrust Act of 1899 or of 1903, in any of the respects specifically insisted upon by the plaintiff in the petition?"

Those allegations based upon the two contracts intended to show violations of the Act of 1899 are omitted for the sake of brevity, because it was conceded at the argument that the petition did not show that Act had been violated. It may be stated, however, that the terms of the first contract alleged were in substance the same as those of the second. In view of the admission made by counsel for the state, which is regarded as proper, we deem it unnecessary [\*\*\*25] to discuss the questions put with reference to the Act of 1899, but content ourselves with answering that no violation of that Act is shown.

**HN1**[] The Act of 1903, so far as we need to consider its provisions, is as follows: "That a trust is a combination of capital, skill or acts by two or more persons, firms or corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

[\*525] "1. . . To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.

"3. To prevent or lessen competition in the . . . transportation . . . of merchandise, produce or commodities.

"4. To fix or maintain any standard or figure whereby the . . . cost of transportation . . . shall be in any manner affected, controlled or established.

**HN2**[] "5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard

or figure, or by [\*\*\*26] which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of the transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, HN3[<sup>A</sup>] to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected."

To answer the questions certified it is necessary only to bring to bear upon the contract alleged the first subdivision of the statute [\*\*\*27] and inquire whether or not the contract shows a combination of capital, skill or acts to create or carry out a restriction in the free pursuit of a business authorized or permitted by law, and in determining this we may further restrict the inquiry to the effect intended by the parties upon the businesses of other express companies. Whether or not a restriction in the pursuit of those businesses was contemplated must be determined by ascertaining their lawful scope in respect of the right of such companies to pursue them upon the railroads of the state. In 1885 it was decided by the Supreme Court of the United States that "railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled," and that "railroad companies are not obliged either by the common law or by usage to do more as express carriers than to provide the public at large with reasonable express accommodations; and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains." [\*\*\*28] Express Company Cases, 117 U.S., 1. This may be regarded as the rule of law existing in this state until 1887 when was enacted a statute now forming article 4540 of the Revised Statutes, which was evidently passed in order to remedy what the legislature, agreeing with the views expressed [\*526] by the judges who dissented in the Express Company Cases, regarded as a defect in the existing law. It reads as follows:

HN4[<sup>A</sup>] "Art. 4540. Every railroad company operating a railroad within this state shall furnish reasonable and equal facilities and accommodations, and upon reasonable and equal rates, to all corporations and persons engaged in the express business, for the transportation of themselves, agents, servants, merchandise and other property, and for the use of their cars, depots, buildings and grounds, and for exchanges at points of junction with other roads."

Unquestionably this authorized and permitted express companies to pursue their businesses on all the railways controlled by state legislation, with "equal and reasonable facilities and accommodations, and upon equal and reasonable rates." Thus the scope of this business, as "authorized or permitted" by law, is defined, [\*\*\*29] and any combination of the kind denounced by the antitrust statute, the carrying out of which would limit or narrow such scope, is necessarily one to create or carry out a restriction in the free pursuit of the business. This proposition can not be made plainer by any amount of elaboration. Ft. Worth & D. C. Ry. Co. v. The State, ante p. 34; 12 Texas Ct. Rep., 1002-3.

The contract in question shows by its own terms, that its purpose was to secure to the [\*\*219] express companies, as far as it was in the power of the parties to do so, the exclusive right to do an express business upon the railroad, and to exclude other express companies from the enjoyment of like rights. It is true that by clause (c) the railroad company only bound itself not to *contract* with others to do an express business on its road, and, if this were all, it might be urged that all of the equal and reasonable facilities, accommodations and rates exacted by the law might be accorded without express contract; but the purpose to grant an exclusive right to the express company is made too plain for argument by the succeeding clause. Clause (d) expressly calls the rights granted "exclusive facilities" [\*\*\*30] and plainly evinces the understanding that they shall not be given to any one else unless such action be compelled by legislation or judicial proceedings, and that, should this be done, the express company shall have credit for the sums paid by other companies. This clause shows plainly the intention that the only express business to be conducted on this road should be that of the contracting express company, and that that company should receive the benefit of the earnings of the railroad company from the business of any other express companies

which it might be compelled to admit to its lines, which stipulation is made, presumably, in return for sufficient consideration moving from the express company to the railroad company. The obstacle such an agreement interposes to the admission of other companies to the facilities given to them by the statute is easily understood, seeing that every other express company is to be charged for the facilities to be enjoyed by it the same price that the favored company is to pay as the consideration for everything the railroad company agrees to do for it, including the undertaking, in effect, to exact such prices from all other companies for the [\*\*\*31] benefit of this one. We conclude that there was the purpose to create and carry out a restriction in [\*527] the free pursuit of a business, and next inquire whether or not there was a combination of capital, skill or acts to accomplish that purpose.

The capital, the skill and the acts of the railroad company were employed in conducting its business of a common carrier, which included the transportation of the servants of the express company and the express matter controlled by it. The capital, the skill and the acts of the express company were employed in conducting, as a common carrier, the express business upon the railroad. The two businesses, although the same instrumentalities are, to an extent, used by the two companies in forwarding each, may be kept distinct and there is not necessarily a combination of any character in the mere fact that they are thus carried on. But when the two companies unite in the purpose defined and frame their contract with a view to its accomplishment, all that is promised on one side being the consideration for all that is promised on the other, the combination of their capital, their skill and their acts for the common purpose is complete. [\*\*\*32] The capital, skill and acts of each being employed in its business, when they agree upon the unlawful purpose and to so direct their businesses as to effect that purpose, they necessarily combine to that extent the capital, skill and acts by which such businesses are sustained. While the mere purpose without the combination, does not constitute the offense, the formation of the purpose and the agreement upon a contract by which it is to be carried out, in the execution of which contract the capital, skill or acts of both are to be used, does complete the offense. All of the power for mischief inherent in the union of two or more for the accomplishment of a purpose injurious to others is thus exerted, and this is the consideration that led the Legislature to prohibit such combinations for purposes which are not made unlawful when entertained by one.

The contract through which this combination was formed was made before the Act of 1903 was passed and the question whether or not there has been a violation of that Act must be determined by inquiring whether or not it applies to such combinations formed before, but carried out after, it took effect. The language in which the offense [\*\*\*33] is defined and described requires an affirmative answer. A trust is defined as a combination for certain purposes. Whenever, after the Act begins to operate, such a combination is found to exist it falls within the terms employed. All such combinations are declared by section 4 to be illegal and are prohibited. This language makes their existence a violation of the Act and other sections impose penalties upon parties causing such violation. The fact that a combination may have been formed before the statute took effect is immaterial if it is in active existence thereafter. The statute has no retroactive or ex post facto operation, and applies only to offenses occurring after its enactment; the offense does not consist in the formation and existence of the combination before the law went into operation, but in the persistence of the parties in it after it has become unlawful. This the terms of the Act make reasonably clear when they define the existence of certain elements to constitute a trust, and provide that one of the elements may be the purpose "to carry out" restrictions and the like, and make the penalties provided (section 11), apply for each day the offense is "continued." [\*\*\*34] That such is the correct [\*528] interpretation of such statutes is held by the Supreme Court of the United States in *United States v. Trans-Missouri Freight Association*, 166 U.S., 342. But it is said that this interpretation of the statute would render it unconstitutional as [\*\*220] impairing the obligation of a valid contract. The answer is that [HN5](#)↑ the state may, in the exercise of its police power, prohibit the continuance in the future of those things already in existence which are so injurious to the rights and interests of its citizens generally as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. The same power which may upon sufficient occasion, destroy other property of the citizen to secure the general welfare, may, to the same end, destroy the binding obligation of contracts. The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere, and therefore the mere objection that an exercise of that power impairs the obligation of a contract does not reach the true question, which is whether or not [\*\*\*35] the attempted exercise is within the scope of the power exercised. It is unnecessary in this case to go into any extended examination of the question as to the extent of this power. If we had before us a contract which was originally lawful and reasonable in itself and which, although falling within the literal language of the statute, could

not justly be regarded as so injurious to the state or its citizens as to afford reasonable grounds for its destruction, a different question would be presented. It is true that there are limitations upon the power of the Legislature to either strike down contracts already made, or unreasonably and arbitrarily to restrict the liberty of citizens in contracting in future, but there is no occasion for applying them here. This contract was, as we have seen, made in the face of a statute then existing, and was not a reasonable, and can hardly be said to have been a lawful one; and it is wholly unnecessary to pursue an inquiry which might arise with reference to contracts of a different character.

The argument is advanced that because of the existence of the laws creating the Railroad Commission and investing it with power to regulate the rates [\*\*\*36] to be charged by railroad and express companies, combinations between them do not fall within the reason and purpose of the statute which we are considering and which was passed subsequently to those just referred to. The Act of 1903 expressly deals with combinations affecting transportation, competition therein, and the cost thereof, and it is improbable that the Legislature intended to omit from its operation the two most prominent kinds of carriers engaged in transportation, combinations between whom would have greater effect on the things intended to be protected than the combinations of any other persons. Extensive powers are given to the Railroad Commission by which unjust practices among such carriers may be prevented or curtailed, and it is doubtless true also, that there was no purpose, in enacting laws to suppress trusts, to interfere with the regulation by it of matters placed under its control. But it is certainly not unreasonable to suppose that the Legislature may have thought that further checks might be necessary or useful by way of penalties prescribed for combinations calculated to impede the carriers' full performance of their duties [\*529] and to defeat [\*\*\*37] the laws enacted to define and enforce those duties. The language of the statute undoubtedly embraces railroads and express companies and no rule of construction would authorize the courts to take them out of its operation.

A contention like this was advanced by the railroad companies, in *United States v. Traffic Ass'n, supra*, and *United States v. Joint Traffic Ass'n*, 171 U.S., 505, based on the Federal Antitrust Act and the Interstate Commerce Act, with much greater reason in the provisions of those statutes than can be found in the terms of ours, but was held to be unfounded.

Finally, it is claimed, that the petition fails to show a violation of the Act of 1903 in that it does not allege that the features of the contract, constituting the unlawful combination, were carried out after the law went into effect. The natural meaning, or the reasonable intendment, at least, of the allegation that, after the law was passed, the defendants "continued to treat said contract . . . as a valid and binding contract between said parties, and executed and carried out said contract" is that the whole contract was so treated. This was sufficient at least to meet a general demurrer.

While [\*\*\*38] we have discussed the case upon the application of the first subdivision of the statute, the reasons we have stated lead obviously to the conclusion that there was also a combination for the purpose mentioned in the third subdivision. Questions much more far-reaching would arise under the fourth and fifth subdivisions, when applied to clauses (d), (f) and (g) of the contract, upon a discussion of which we find it unnecessary to enter. To do so would require a consideration of how far a railroad company in adjusting its business to that of an express company, to be carried on upon its road may regulate the terms upon which it is to be done so as to protect itself and its own business, whether or not stipulations made for that purpose are reasonable and, if so, valid, although coming within the general language of the subdivisions of the statute referred to, whether or not such questions could be determined from a mere inspection of the contract or would require for their decision the statement in the petition charging violations of the law of other facts upon which the legality of the things charged might depend, and probably other matters that need not be stated. These in most part [\*\*\*39] have not been argued and as a decision of them is not essential to an answer to the questions asked by the Court [\*\*221] of Civil Appeals, we deem it inadvisable to go further than we have done.

We answer that the petition showed a violation, in the particulars stated, of the Act of 1903, and that the court erred in sustaining a general demurrer.

## Norton v. W. H. Thomas & Sons Co.

Supreme Court of Texas

March 19, 1906, Decided

No. 1526

**Reporter**

99 Tex. 578 \*; 91 S.W. 780 \*\*; 1906 Tex. LEXIS 140 \*\*\*

H. N. Norton v. W. H. Thomas & Sons Company

**Prior History:** [\*\*\*1] Question certified from the Court of Civil Appeals for the First District, in an appeal from Galveston County.

## **Core Terms**

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barrels, quantity, whisky, pool, buy, provisions, void, president of the corporation, anti trust law, no application, uncollectible, accomplished, decisions, purposes, sections, parties, selling, Courts, induce, liquor, brand, ship

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### **HN1** **Regulated Practices, Price Fixing & Restraints of Trade**

1899 Tex. Acts 286, § 1 applies to agreements, etc., (1) to regulate or fix the price of any article, etc.; or (2) to maintain said price when so regulated or fixed; or (3) to fix or limit the amount or quantity of any article, etc.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

### **HN2** **Regulated Practices, Monopolies & Monopolization**

1899 Tex. Acts 286, § 2 defines a "monopoly" as a "union or combination," etc., "of capital, credit," etc., whereby any of the purposes mentioned in the act is accomplished or sought to be accomplished, etc.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

### **HN3** **Monopolies & Monopolization, Conspiracy to Monopolize**

1899 Tex. Acts 286, § 6 makes it unlawful for persons engaged in buying or selling articles, etc., to enter into any pool, trust, agreement, etc., to control or limit the trade in such article, etc., or to limit competition in such trade by

refusing to buy from or to sell to any other person or corporation any such article, etc., for the reason that such other person or corporation is not a member of or party to such pool, trust, agreement, etc.

## Headnotes/Summary

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### Headnotes

#### Antitrust Law.

An agreement on a contract for sale of merchandise (whisky) that the vendor would not sell any liquor of that age and brand in either of three cities where the vendee was engaged in business till the latter had closed out his purchase was not prohibited by the antitrust law of 1899 (Acts of 1899, p. 246).

#### Antitrust Law -- Limiting Amount.

The prohibition in section 1 of the antitrust law of 1899, of agreements "to fix or limit the amount or quantity of any article" embraces limitations on the amount or quantity in existence, not on that to be sold in or supplied to any particular community or territory.

#### Antitrust Law -- Limiting Sales.

Section 6 of the Antitrust Law of 1899, prohibits agreements limiting trade, competition, etc., to members of the pool, trust, etc., and does not cover agreements not to sell within specified limits.

#### Antitrust Law -- Cases Overruled.

The rulings of the Courts of Civil Appeals in *Troy Buggy Works v. Fife & Miller*, 74 S. W. Rep., 956, and *Simmons & Co. v. Terry*, 79 S. W. [\*\*\*2] Rep., 1103, disapproved.

**Counsel:** *R. H. and Alice S. Tiernan*, for appellant. -- The undisputed evidence shows that the plaintiff, through its president, gave Norton the exclusive sale of the whisky, for the payment of which the notes herein sued on were given, in the towns of Beaumont, Houston and Galveston, Texas. This agreement was made in Galveston, Texas. This agreement being in contravention of the anti-trust statutes of Texas, rendered the said contract null and void; hence the notes are null and void, and they can not be recovered on by the plaintiff. *Troy Buggy Works v. Fife & Miller*, 74 S. W. Rep., 956; Antitrust Statutes of Texas, Laws of 26th Leg., p. 346, chap. 146; *Fuqua v. Pabst Brewing Co.*, 38 S. W., 30, 31; Act of Congress, August 8, 1890.

A contract whereby a retail merchant agreed to handle a manufacturer's or wholesaler's gloves exclusively, except so far as he should buy inferior or cheaper gloves from others, and by which the wholesaler or manufacturer agreed not to sell to any other merchant in the retailer's city, so that the latter should have the exclusive sale and control of the retail business in certain lines of gloves in that city, was in violation [\*\*\*3] of the antitrust law of 1899, laws of 26th Leg., p. 246, making void any agreement to limit trade in any article or limit competition, and neither party could sustain any claim against the other on the contract. *Francis Simmons & Co. v. Terry*, 79 S. W. Rep., 1103, citing *Troy Buggy Co. v. Fife & Miller*, 74 S. W. Rep., 956; *Columbia Carriage Co. v. Hatch*, 47 S. W. Rep., 288; *Pasteur Vaccine Co. v. Burkey*, 54 S. W. Rep., 804; *Texas Brewing Co. v. Templeman*, 90 Texas, 277; *Fuqua v. Pabst Brewing Co.*, 90 Texas, 298.

*E. P. Gailey*, for appellees. -- An agreement made in Galveston, by appellee, with Norton, a wholesale dealer in whisky, not to sell the same brand of whisky to any other dealer in the towns of Houston, Beaumont and Galveston, is not in contravention of the antitrust statutes of Texas. Antitrust Statutes of Texas, Act of 1899, Laws of 26th Leg., p. 246, chap. 146; *Gates v. Hooper*, 90 Texas, 563; *Vandeweghe v. American Brewing Co.*, 61 S. W., 526.

**Judges:** Williams, Associate Justice.

**Opinion by:** WILLIAMS

## Opinion

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[\*579] [\*\*780] Certified question from the Court of Civil Appeals for the First District, as follows:

"The record on this appeal shows that in 1902 W. H. Thomas [\*\*\*4] & Sons Company, incorporated under the laws of Kentucky, entered into a contract with H. N. Norton, resident of Galveston, Texas, whereby it agreed to sell to Norton fifty barrels of whisky of a named brand and age at a stipulated price per gallon. Under the agreement the corporation was to ship one hundred barrels from Germany to Galveston, the first fifty above named to be a credit sale, and Norton to have the option to take the second fifty barrels at the same price for cash. In pursuance of this agreement, the whisky was shipped to Galveston, and Norton took and finally paid for the first fifty barrels, according to the contract.

"The president of the corporation being in Galveston, sought to induce him to take the other [\*\*781] fifty barrels, but Norton declined to exercise his option, giving business reasons. Thereupon the president of the corporation offered the whisky on a credit, the debt to be evidenced by Norton's notes. As a further inducement, the company agreed that it would not sell in Galveston, Beaumont or Houston (three points in which Norton was engaged in the liquor business) any liquor of that brand and age until Norton had closed out his purchase.

[\*\*\*5] "Norton accepted the proposition, the remaining fifty barrels were [\*580] delivered to him, and his notes for the purchase money duly executed and delivered to the corporation.

"Norton having defaulted on the last two notes for \$ 559.94 each, the corporation brought this suit to enforce their payment, and recovered judgment in the court below, and the cause is before this court on the appeal of Norton.

"One of his defenses in the court below was that the contract of sale was within the provisions of the antitrust law of 1899, and therefore void, and the question has arisen for our decision.

"In view of the holding in *Troy Buggy Works v. Fife & Miller*, 74 S. W., 956, the soundness of which we doubt, we respectfully certify for your decision: Was the contract void and the notes uncollectible by reason of the 'antitrust law' of 1899?"

Section 1 of the act [HN1](#) [↑] referred to in the question (Acts 1899, p. 246) applies to agreements, etc., (1) "to regulate or fix the price of any article," etc.; or (2) "to maintain said price when so regulated or fixed"; or (3) "to fix or limit the amount or quantity of any article," etc.

Section 2 [HN2](#) [↑] defines a "monopoly" as a "union or combination," [\*\*\*6] etc., "of capital, credit," etc., whereby any of the purposes mentioned in the act is accomplished or sought to be accomplished, etc.

Section 3 and 4 define other offenses, but their provisions are so clearly foreign to this case that they need not be stated.

Section 6 [HN3](#) [↑] makes it unlawful for persons engaged in buying or selling articles, etc., to enter into any pool, trust, agreement, etc., "to control or limit the trade in such article," etc., "or to limit competition in such trade by refusing to buy from or to sell to any other person or corporation any such article," etc., "for the reason that such other person or corporation is not a member of or party to such pool, trust, agreement," etc. The section has further provisions against threats, boycotts, etc., which plainly have no application here.

The contract stated in the certificate does not in our opinion fall within any of the provisions of the act stated. It belongs to a class which are usually treated as contracts in restraint of or imposing restrictions upon trade or competition, and which have been dealt with by other statutes, such as that of 1889, 1895 and 1903. All of the

decisions cited in support of the defense, [\*\*\*7] except two, were based upon the other statutes. In the excepted cases (Troy Buggy Works v. Fife & Miller, 74 S. W., 956, and Francis T. Simmons & Co. v. Terry, 79 S. W., 1103) by the Courts of Civil Appeals for the Fourth and Fifth Districts, the courts seem to have followed the former decisions, without noticing the difference between the statutes upon which they were founded and the Act of 1899.

We think it quite clear that the terms of the statute last referred to do not embrace this case. The contract does not attempt to fix or regulate the price of the whisky, nor to fix or limit the amount or quantity thereof. It must be borne in mind that the provision of the statute against limitations on the amount or quantity of an article does not refer to the amount to be sold in or supplied to any particular community or territory, but to the amount or quantity in existence; that is, to [\*581] what is generally called the supply, or output. The contract imposes no limitation such as the statute, when thus understood, prohibits.

The sixth section might apply to the case but for the requirement that the pool, agreement, etc., to limit trade, or competition therein, by a refusal [\*\*\*8] to sell to others besides the parties to the arrangement, must be for the reason that such others are not parties to it. By this it is made clear that the offense denounced does not consist simply of an agreement between two that one of them will not sell to others, but of an association which seeks to limit trade, or competition in trade, in some article, by confining the buying and selling thereof to the members of such pool, trust, agreement, etc., and by refusing to sell to, or buy from, others, for the reason that they have not become such members.

Since it is thus shown that none of the other sections apply to the case, it follows that the second has no application, because it refers only to unions, combinations, etc., for the purposes defined in the other sections. We therefore answer that the contract was not void, and the notes were not uncollectible by force of the Act of 1899.

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## **State ex rel. Taylor v. Ross**

Court of Common Pleas of Ashtabula County, Ohio

May 5, 1906, Decided

No Number in Original

**Reporter**

16 Ohio Dec. 704 \*; 1906 Ohio Misc. LEXIS 59 \*\*; 4 Ohio N.P. (n.s.) 377

STATE EX REL. TAYLOR, PROS. ATTY. v. ALBERT ROSS ET AL.

**Prior History:** [\*\*1] DEMURRER to indictment.

**Disposition:** Demurrers overruled.

### **Core Terms**

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commerce, commodity, words, convenience, terms, combinations, restrictions, indictment, fire insurance, carry out, merchandise, occupation, inserted, transportation, provisions, demurrsers, counts, subdivision, transacting, contracts, lawmakers, embraces, includes, insurance company, anti trust law, purposes, affords, barter

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN1** [down arrow] **Public Enforcement, State Civil Actions**

See Ohio Rev. Stat. § 4427-1.

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN2** [down arrow] **Antitrust & Trade Law, Regulated Industries**

Wherever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

16 Ohio Dec. 704, \*704L 1906 Ohio Misc. LEXIS 59, \*\*1

### **HN3** [down] **Antitrust & Trade Law, Regulated Industries**

The word "trade" embraces within its meaning commercial traffic, and it also has a limited and restricted significance, which applies to mechanical pursuits; but, in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions, and those that pertain to liberal arts and the pursuit of agriculture.

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

### **HN4** [down] **Antitrust & Trade Law, Regulated Industries**

The business of an insurance agent is included in the term "trade."

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

### **HN5** [down] **Antitrust & Trade Law, Regulated Industries**

In the general sense a commodity is something of convenience, advantage, benefit, or profit; and in a special sense a commodity is something produced for use as an article of trade or commerce. The privilege of transmitting or receiving, by will or descent, property on the death of the owner is a commodity within the meaning of this word in the constitution of Massachusetts.

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

### **HN6** [down] **Antitrust & Trade Law, Regulated Industries**

The primary meaning of the word commodity according to the lexicographers, is convenience, and its secondary meaning is that which affords convenience or advantage, especially in commerce, including everything which is bought and sold.

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

### **HN7** [down] **Antitrust & Trade Law, Regulated Industries**

Commodity is a general term and includes the privilege and convenience of transacting a particular business.

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN8\*\*](#) [L] Antitrust & Trade Law, Regulated Industries

Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

Antitrust & Trade Law > Regulated Industries > General Overview

## [\*\*HN9\*\*](#) [L] Antitrust & Trade Law, Regulated Industries

From the recognized and well settled definitions and meanings of the words "trade," "commodity" and "commerce" as given by lexicographers as established by courts and sanctioned and approved by long and general usage, it follows that these words could properly have been used in a sense broad enough to include fire insurance, by the legislature, in Ohio Rev. Stat. § 4427-1, and that the words are susceptible of such definition as will include and cover fire insurance.

Governments > Legislation > Interpretation

## [\*\*HN10\*\*](#) [L] Legislation, Interpretation

The intention of the lawmakers may be collected from the cause, or necessity of the act. Every statute should be construed with a reference to its object, and the will of the lawmakers is best promoted by such a construction as secures that object, and excludes every other. It being the duty of courts to give such a construction to statutes as will suppress the mischief, and advance the remedy. In giving a construction to any statute, the court must consider its policy, and give it such an interpretation, as may appear best calculated to advance its object by effecting the design of the legislature. It is a rule of interpretation universally accepted, that in giving a construction to a statute the court will consider its policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. It is equally well settled that where the legislature has employed explicit and unambiguous terms to express its purpose and object, the ordinary meaning of such terms is to be adopted.

Governments > Legislation > Enactment

Governments > Legislation > Interpretation

## [\*\*HN11\*\*](#) [L] Legislation, Enactment

It is a fundamental rule of construction, that the language of a statute is to be interpreted according to the sense in which the terms are employed and the plain intention of the legislature. The great object of the rules and maxims of interpretation has been to discover the true intention of the law. Regard must be had to the real object of the law, and the effect and substance of the subject-matter, and not barely to the nicety of form or circumstance. The reason, intent, and spirit of a law, therefore, must often prevail over the literal import of the terms employed. While, on the one hand, the judiciary should be careful not to make its office of expounding statutes a cloak for the exercise of legislative power, on the other hand it is equally bound not to stick in the mere letter of a law, but rather to seek for its reason and spirit in the mischief that required a remedy and the general scope of the legislation designed to effect it. In construing statutes so as to give them the legislative intent, interpretation may expand their

meaning beyond the literal significance of the words. In each case regard must be had to the subject and the circumstances, as well as to the words used.

Governments > Legislation > Interpretation

**HN12**[] **Legislation, Interpretation**

The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the lawmaking body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted. But the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. When the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or although the construction be, indeed, contrary to the latter.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

Governments > Legislation > Types of Statutes

**HN13**[] **Legislation, Interpretation**

The rule requiring the strict construction of a penal statute, as against the prisoner, is not violated by giving every word of the statute its full meaning, unless restrained by the context. It is not intended, however, to ignore the rule which requires penal statutes, as against the prisoner, to be construed strictly, and in his favor, liberally. But it does prevent a construction, as against him, so strict, or, in his favor, so liberal, as to defeat the obvious intention of the legislature. A statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons plainly within the terms of the statute.

Governments > Legislation > Interpretation

**HN14**[] **Legislation, Interpretation**

It is not to be presumed that favoritism was intended.

Governments > Legislation > Enactment

**HN15**[] **Legislation, Enactment**

See *Ohio Const. art. II, § 16.*

Governments > Legislation > Interpretation

**HN16** [  ] **Legislation, Interpretation**

The title is one of the indices pointing, feebly it may be, to the legislative intent. The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the legislature; the court may therefore consider it as explanatory of the object of the law. In trying to determine what the object of the words of a statute are, the court is authorized to look at its title.

Antitrust & Trade Law > Regulated Industries > General Overview

Insurance Law > Industry Practices > General Overview

**HN17** [  ] **Antitrust & Trade Law, Regulated Industries**

Insurance is a commodity. Commodity is defined to be that which affords advantage or profit.

Antitrust & Trade Law > Regulated Industries > General Overview

Insurance Law > Industry Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN18** [  ] **Antitrust & Trade Law, Regulated Industries**

No good reason has been given that will hold insurance exceptional and accord to it a support that is denied to every other branch of industry. Business and law regard insurance as a commodity in the market, to be purchased as any other property, or beneficial interest.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

**HN19** [  ] **Legislation, Interpretation**

When the legislature of one state adopts legislation from another state, which has been construed by a court of last resort in that state, there is a presumption (not conclusive however), that it does so with the construction that has been so given it.

Governments > Legislation > Interpretation

**HN20** [  ] **Legislation, Interpretation**

It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided.

Governments > Legislation > Interpretation

## [\*\*HN21\*\*](#) [blue] Legislation, Interpretation

It is a general presumption that every word in a statute was inserted for some purpose.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

## [\*\*HN22\*\*](#) [blue] Legislation, Interpretation

The rule ejusdem generis is that when general words follow an enumeration of particular cases, such general words are held to apply to cases of the same kind as those which are expressly mentioned. It is generally held to be the law that this rule does not apply when the particular precedent words exhaust a whole genus; in which case the general term is held to refer to a larger class.

Antitrust & Trade Law > Regulated Industries > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN23\*\*](#) [blue] Antitrust & Trade Law, Regulated Industries

The word "commerce," is a generic word, the name of a whole class, and "all classes of business" must be used in a more comprehensive sense.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Governments > Legislation > Effect & Operation > General Overview

Constitutional Law > State Constitutional Operation

## [\*\*HN24\*\*](#) [blue] Bill of Rights, Fundamental Rights

It is held by the Supreme Court of Ohio, that it is essential to validity of an act undertaking to regulate the business that it shall in its requirements, operate equally; and that, the Ohio bill of rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and [Ohio Const. art. II, § 26](#) requires that all laws of a general nature shall have a uniform operation throughout the state.

## **Headnotes/Summary**

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### **Headnotes**

**MONOPOLIES--VALENTINE ANTITRUST LAW--INSURANCE.****VALENTINE ANTITRUST LAW APPLIES TO INSURANCE BUSINESS.**

The provisions of the Valentine antitrust law (Rev. Stat. 4427-1; Lan. 7586 *et seq.*) clearly comprehend the business of fire insurance within their purview; hence an indictment that the defendants did unlawfully conspire, combine and agree together to restrict "the trade, business and commerce of insuring property," and to increase and fix the premiums therefor, and prevent competition in such business, sets forth facts sufficient to constitute a crime under the laws of this state.

**Counsel:** C. L. Taylor and H. E. Starkey, for plaintiff.

T. E. Hoyt, A. M. Cox and H. B. Arnold, for defendant.

**Judges:** ROBERTS, J. Roberts and Metcalf, JJ.

**Opinion by:** ROBERTS

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**Opinion****[\*704] ROBERTS, J.**

The grand jury returned an indictment against Albert Ross and twenty-eight others, the first count of which charges that they, "on the thirtieth day of December, in the year of our Lord nineteen hundred and three, with force and arms, in said county of Ashtabula and state of Ohio, unlawfully did conspire, combine, confederate, and agree together, to create and carry out restrictions in the trade, business, and commerce of insuring property against loss and damage by fire, lightning, and tornado; and to increase the price of such insurance and to prevent competition in the making, sale, and purchase of such insurance; and to fix the price, premium, and rate of such insurance at a standard, and figure whereby its price to the public, and to the consumer shall be established, and controlled; and to make, enter into, execute, and carry out contracts, obligations, and agreements to keep the price of such insurance at a graduated figure, to not [\*2] sell or dispose of such insurance below a common standard, and fixed value, to establish and settle the price of such insurance between themselves and between themselves and others so as to preclude a free and unrestricted competition among themselves in the sale thereof, and to pool, combine, and unite their interests in the sale of such insurance so as to affect the price thereof," and they \* \* \* "then and there, unlawfully acted with, were members of, and aided in carrying out the purposes of an unlawful trust and combination known as Ashtabula County Underwriters' Association, then and there being and existing for each and all of the aforesaid purposes and which said trust and combination did then and there unlawfully effect and accomplish each and all of the aforesaid purposes, [\*705] contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio."

The second and third counts differ from the first count only in alleging different dates.

To this indictment the defendants, Albert Ross and Isaac Hewitt, have demurred severally, and all other defendants jointly. The demurrers are alike and allege the following reasons:

[\*\*3] "First: The facts stated and alleged in the said first, second and third counts in said indictment do not constitute, in either of said counts, an offense punishable by the laws of the state of Ohio.

Second: That the facts stated and alleged in the said first, second and third counts in said indictment, are not sufficient in either of said counts, to constitute an offense or crime under the laws of the state of Ohio.

Third: The facts stated and alleged in said first, second and third counts in said indictment do not constitute in either of said counts, an offense punishable under Chapter 19 A, entitled 'trusts' of the Revised Statutes of Ohio.

Fourth: The intent is not alleged in either the first, second or third counts of said indictment and proof of such intent is necessary to make out the offense charged."

This indictment was intended to be based upon the Stewart-Valentine antitrust law, so-called, and is found in 93 O. L. 143 (Rev. Stat. 4427-1; Lan. 7586).

The law, so far as pertinent in this consideration, reads as follows:

**HN1** [↑] "AN ACT

"To define trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, [\*\*4] or persons connected with them, and to promote free competition in commerce and all classes of business in the state.

"Section 1. Be it enacted by the general assembly of the state of Ohio, that a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any [\*706] article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or [\*\*5] any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

The questions involved in the consideration of these demurrs have been learnedly and exhaustively argued by counsel for the state and for the defendants, both orally and by briefs submitted, even to the extent of going beyond the legal propositions before the [\*\*6] court and embracing a discussion concerning the business of fire insurance generally, its purposes, its methods and its profits, which makes it proper to remark that in a consideration of these demurrs the court has nothing to do with the guilt or innocence of the defendants, with the manner of doing business by insurance companies, or agents, their designs or acts, or with the facts whatever they may be, embraced in the transactions alleged in the indictments.

The demurrs admit the truth of the allegations of the indictment, and considering them true, say that they do not constitute an offense under or punishable by, the laws of Ohio, and that they do not constitute an offense under the provisions of the Stewart-Valentine law.

In other words, and briefly stated, the issue is whether the business of insurance is included in, or provided for, in said law. If it is not, the demurrs should be sustained.

It will be observed that specific kinds of business are not enumerated in the law, and it is claimed by the state that insurance is included in "trade," "commerce" and "commodity," mentioned in the law.

The problem to be solved is whether these terms, or any of them, by proper **[\*\*7]** definition and by rightful construction of the law, include insurance.

**[\*707]** Recourse to the definitions of lexicographers and of courts becomes necessary. Webster defines trade as follows:

1. The act or business of exchanging commodities by barter, the business of buying or selling for money.
2. The business which a person has learned and which he carries on for procuring subsistence or for profit, occupation, especially mechanical employment.
3. Business pursued, occupation, employment.

The definitions found in the Standard and Century Dictionaries are substantially the same.

Bouvier says:

Trade. In exemption laws, it is usually confined to the occupation of a mechanic, but in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft or business.

Anderson's Law Dictionary says: "Trade, generally, equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment or business carried on for profit, gain or livelihood, not in the liberal arts or learned professions."

"The word 'trade' includes not only the business of exchanging commodities by barter, but the business of buying and selling **[\*\*8]** for money, or commerce and traffic generally."

[May v. Sloan, 101 U.S. 231 \[25 L. Ed. 797\].](#)

Story, J., said in [The Nymph, 1 Sumn. 516 \[18 F. Cas. 506\] HN2](#)  "Wherever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."

In this broader sense the word is used in [The Eliza, 2 Gall. 4 \[8 F. Cas. 455\]; United States v. Brig Eliza, 11 U.S. \(7 Cranch\) 113 \[3 L. Ed. 286\].](#)

The business of a telegraph company was held to be a trade in 3 Exch. Div. 108.

In [Betz v. Maier, 12 Tex. Civ. App. 219 \[33 S.W. 710\]](#), it is said, [HN3](#)  "The word 'trade' embraces within its meaning commercial traffic, and it also has a limited and restricted significance, which applies to mechanical pursuits; but, in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions, and those that pertain to liberal arts and the pursuit of agriculture."

In this case it was held that [HN4](#)  the business of an **[\*\*9]** insurance agent was included in the term "trade."

The word or term "commodity" is defined by Webster as,

1. Convenience; accommodation; profit; advantage; interest.
2. That which affords ease, convenience or advantage, especially **[\*708]** in commerce, including everything that is bought and sold, goods, wares, merchandise.

In the Century Dictionary:

1. Accommodation; convenience; suitableness.
2. Profit; advantage; interest.
3. That which is useful, anything that is useful, convenient or serviceable.

The definition in the Standard Dictionary is substantially the same.

Anderson's Law Dictionary, in addition to the definitions given, says that, "Commodity is a general term and includes the privilege and convenience of transacting a particular business."

8 Cyc. page 338.

"Commodity. In its primary and most comprehensive sense, accommodation; advantage; benefit; commerce [convenience]; commodiousness; convenience; gain; interest; privilege profit; the privilege and convenience of transacting a particular business. In its secondary and commercial sense, that which affords advantage or profit; that which affords convenience or advantage, especially in commerce, including [\*\*10] everything movable which is bought and sold; and article of trade or commerce, a movable article of value, something that is bought and sold; any movable and tangible thing that is ordinarily produced or used as the subject of barter or sale; anything movable that is subject of trade or acquisition; articles of trade or commerce; goods, wares, and merchandise of any kind; property; something produced for use, and an article of trade or commerce."

**HN5** [↑] "In the general sense a commodity is something of convenience, advantage, benefit, or profit; and in a special sense a commodity is something produced for use as an article of trade or commerce \* \* \*. The privilege of transmitting or receiving, by will or descent, property on the death of the owner is a 'commodity' within the meaning of this word in the constitution of Massachusetts." *Minot v. Winthrop*, 162 Mass. 113 [38 N.E. 512]; 26 L. R. A. 259].

"Commodity is a general term and includes the privilege and convenience of transacting a particular business." *Commonwealth v. Bank*, 123 Mass. 493.

**HN6** [↑] "The primary meaning of the word commodity according to the lexicographers, is convenience, [\*\*11] and its secondary meaning is that which affords convenience or advantage, especially in commerce, including everything which is bought and sold."

*McKeon v. Wolf*, 77 Ill. App. 325.

"If regarded as meaning goods and wares only, there would be much difficulty in the case, but if it signifies 'convenience, privilege, profit, and gains,' as uniformly held by the state court, then all difficulty vanishes, and the case is clear."

[\*709] *Hamilton Mfg. Co. v. Massachusetts*, 73 U.S. (6 Wall.) 632 [18 L. Ed. 904].

**HN7** [↑] "Commodity is a general term and includes the privilege and convenience of transacting a particular business."

*Portland Bank v. Apthorp*, 12 Mass. 252, 256.

Commerce is defined by Webster as being "The exchange of merchandise on a large scale between different places or communities."

Anderson's Law Dictionary quotes from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 [6 L. Ed. 23], as follows:

"In its simplest signification an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities and enter into commerce. [\*\*12] "

"A term of the widest import comprehending intercourse for the purpose of trade in any and all its forms."

It was said by Marshall, C. J., in [Gibbons v. Ogden, supra, HN8](#) "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In this case it was held that commerce included navigation.

In [Leloup v. Mobile, 127 U.S. 640 \[8 S. Ct. 1380; 32 L. Ed. 311\]](#), it is held that communication by telegraph is commerce.

In Black's Law Dictionary, it is said to the effect that commerce includes the various agreements which have for their object, facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit.

[HN9](#) From the recognized and well settled definitions and meanings of the words "trade," "commodity" and "commerce" as given by lexicographers as established by courts and sanctioned and approved by long and general usage, it follows that these words could properly have been used in a sense broad enough to include [\\*\\*13](#) fire insurance, by the legislature, in the law under consideration, and that the words are susceptible of such definition as will include and cover fire insurance.

The question now for determination is whether these words were used by the legislature in such broad and general sense, under such circumstances, and with such other language in the act, as requires or justifies a construction of the act, giving to these words a meaning which includes fire insurance.

Rules should now be considered for the construing of the statute and to determine what should be considered in so doing.

[HN10](#) "The intention of the lawmakers may be collected from the cause, or necessity of the act \* \* \*.

"Every statute should be construed with a reference to its object, [\\*\\*710](#) and the will of the lawmakers is best promoted by such a construction as secures that object, and excludes every other \* \* \*.

"It being the duty of courts to give such a construction to statutes as will suppress the mischief, and advance the remedy." [Burgett v. Burgett, 1 Ohio 469, 482 \[13 Am. Dec. 634\]](#).

"In giving a construction to any statute, the court must consider its policy, and give it such an interpretation, [\\*\\*14](#) as may appear best calculated to advance its object by effecting the design of the legislature. The great object of the statute in question, is clearly expressed in the title prefixed to it." [Wilber v. Paine, 1 Ohio 251](#).

"It is a rule of interpretation universally accepted, that in giving a construction to a statute the court will consider its policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature \* \* \*. It is equally well settled that where the legislature has employed explicit and unambiguous terms to express its purpose and object, the ordinary meaning of such terms is to be adopted." [Davis v. Justice, 31 Ohio St. 359, 367 \[27 Am. Rep. 514\]](#).

[HN11](#) "It is a fundamental rule of construction, that the language of a statute is to be interpreted according to the sense in which the terms are employed and the plain intention of the legislature. The great object of the rules and maxims of interpretation has been to discover the true intention of the law \* \* \*. Regard must be had to the real object of the law, and the effect and substance [\\*\\*15](#) of the subject-matter, and not barely to the nicety of form or circumstance. The reason, intent, and spirit of a law, therefore, must often prevail over the literal import of the terms employed." [Slater v. Cave, 3 Ohio St. 80, 82](#).

"While, on the one hand, the judiciary should be careful not to make its office of expounding statutes a cloak for the exercise of legislative power, on the other hand it is equally bound not to stick in the mere letter of a law, but rather to seek for its reason and spirit in the mischief that required a remedy and the general scope of the legislation designed to effect it." [Tracy v. Card, 2 Ohio St. 431](#).

"In construing statutes so as to give them the legislative intent, interpretation may expand their meaning beyond the literal significance of the words. In each case regard must be had to the subject and the circumstances, as well as to the words used." [Cincinnati Gas Light & Coke Co. v. Avondale, 43 Ohio St. 257, 267 \[1 N.E. 527\].](#)

**HN12**[] "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the lawmaking body which enacted it. **\*\*16** And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, **[\*711]** or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.

"But the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation." [Slingluff v. Weaver, 66 Ohio St. 621 \[64 N.E. 574\].](#)

"When the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceptible, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or although the construction be, indeed, contrary to the latter." [Logan Nat. Gas & Fuel Co. v. Chillicothe, 65 Ohio St. 186, 206 \[62 N.E. 122.\]](#) **\*\*17**

Rules applying directly to criminal cases will now be cited. In [Woodworth v. State, 26 Ohio St. 196, 198,](#) which was a case from this county, the Supreme Court said: **HN13**[] "The rule requiring the strict construction of a penal statute, as against the prisoner, is not violated by giving every word of the statute its full meaning, unless restrained by the context \* \* \*.

"It is not intended, however, to ignore the rule which requires penal statutes, as against the prisoner, to be construed strictly, and in his favor, liberally. But it does prevent a construction, as against him, so strict, or, in his favor, so liberal, as to defeat the obvious intention of the legislature."

Again in [Barker v. State, 69 Ohio St. 68, 74 \[68 N.E. 575\],](#) it is said: "We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons **\*\*18** plainly within the terms of the statute."

The meaning of the words of the statute being doubtful and its provisions subject to ambiguity, it becomes a duty, under the authorities cited, to consider "the history of the legislation," "the cause or necessity of the act," "the object and will of the lawmakers," and what "appears best calculated to advance its object."

This act was passed April 19, 1898, at a time when the great industrial and commercial interests of the county were being concentrated and united under single control; when syndicates and trusts were being formed to control, not only production, but transportation; **[\*712]** when competition was being stifled, and the result of individual effort was failure.

The necessities of life were passing under the control of monopolies and the condition of the masses was becoming subject to the power of combined wealth.

Widespread apprehension existed in the mind of the people, as to the result of these conditions, and the efforts of well meaning legislators were being directed to the remedy of evil conditions, and the protection of the people.

National legislation had resulted in the Sherman law, and various states had enacted **\*\*19** antitrust laws; the object of all which was to protect the people from unjust monopoly, and to promote free competition.

Insurance had become and was generally recognized as a necessity. As pertinently remarked by counsel for the defendants, "Its great growth has been within the last half century."

The home of the poor man and the business investments of the rich are not safe without it. Business would not prosper except for its protection. Credit, perhaps the greatest factor of the various enterprises of civilized life, is dependent upon it.

It has become and is universally recognized as a necessity of life, progress and prosperity.

From the nature of insurance, its business is transacted by comparatively few companies of great wealth, and thus its becoming a trust, as defined by the statute, was of comparatively easy accomplishment, and the danger to be apprehended correspondingly great.

Considering the "history of legislation" and the "necessity of the act," it seems incredible that the legislature in adopting this law should have considered and intended only to include and provide against restrictions in trade or commerce, and the control of the price or production of commodities **[\*\*20]** in the narrow and restricted sense of articles of trade and barter of goods, wares and merchandise.

Is it reasonable that the legislature intended to prevent monopoly in practically all classes of business except fire insurance? Did it intend to give to that business a special privilege and immunity?

**HN14**  It is not to be presumed that favoritism was intended.

The title of the act, which is declaratory of its object, says that it is "to promote free competition in commerce and all classes of business in the state."

That fire insurance is a business will not be seriously contended.

To what extent may the title of the act be considered for a construction of the act?

Section 16, Art. 2 of the constitution of the state of Ohio provides that **HN15**  "No bill shall contain more than one subject, which shall be clearly expressed in its title."

**[\*713] HN16**  "It (the title) is one of the indices pointing, feebly it may be, to the legislative intent." [State v. Pugh, 43 Ohio St. 98 \[1 N.E. 439\]](#). It follows that to the full extent that we may rely upon the title of this act to determine its meaning, it must be said that it was intended to and does include insurance.

"The title **[\*\*21]** is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the legislature; we may therefore consider it as explanatory of the object of the law." [Burgett v. Burgett, 1 Ohio 469-480 \[13 Am. Dec. 634\]](#).

"In trying to determine what the object of the words of a statute are, we are authorized to look at its title." [Bronson v. Oberlin, 41 Ohio St. 476, 483 \[52 Am. Rep. 90\]](#).

It was held by the Supreme Court of Mississippi, in [American Fire Ins. Co. v. State, 75 Miss. 24 \[22 So. 99\]](#), that a statute providing against combinations "of business" in those words, included fire insurance.

It is said, *Pinkney, In re, 47 Kan. 89 [27 P. 179]*:

"The question presented is, does the word 'trade,' used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of **[\*\*22]** the word in connection with that of 'products,' in the title qualifies the meaning of 'trade,' and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it; but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit \* \* \*. The broader signification given to the word by most of the lexicographers would fairly embrace and

cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title."

In *State v. Phipps, 50 Kan. 609 [31 P. 1097]*; 18 L. R. A. 657; 34 Am. St. Rep. 152], it was again held that insurance comes within the purview of "trade."

The statute of Iowa provided against combinations "to regulate or fix the price of oil, **[\*\*23]** lumber, coal, flour, provisions or any other commodity or article whatever," and the supreme court of Iowa in *Beechley v. Mulville, 102 Iowa 602 [70 N.W. 107]*; 63 Am. St. Rep. 479], **[\*714]** held "that insurance companies and a compact to charge uniform rates" was included in "any other commodity." The court said: "It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive legislature since the act passed, and no one has thought that the act referred to such companies. However that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever. HN17<sup>↑</sup> Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the **[\*\*24]** word as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right."

In the case of *Metzger v. Adams*, 28 Ins. L. Jo. 176 (Ind.), it is said: HN18<sup>↑</sup> "No good reason has been given that will hold insurance exceptional and accord to it a support that is denied to every other branch of industry. Business and law regard insurance as a commodity in the market, to be purchased as any other property, or beneficial interest."

Revised Statutes 6969 (Lan. 10660) and *Doll v. State, 45 Ohio St. 445, 446 [15 N.E. 293]*, construing that section, speak of purchasing fire insurance.

In *Paul v. Virginia, 75 U.S. (8 Wall.) 168 [19 L. Ed. 357]*, **[\*\*25]** the restricted definition of commerce was applied to insurance and insurance contracts were said not to be commodities to be shipped from one state to another.

This decision was followed in several others in the same court, but the subject under consideration was interstate commerce and insurance has been frequently held not subject thereto.

It may be proper to remark that this rule was laid down many years ago and insurance occupies a much more important position than then, and there has been much recent discussion to the effect that insurance should now be subject to interstate commerce.

**[\*715]** In 1889 the state of Texas enacted what was perhaps the first **antitrust law** of the states.

In 1893 the supreme court of Texas in *Queen Ins. Co. v. State, 86 Tex. 250 [24 S.W. 397]*; 22 L. R. A. 483], held that the law did not apply to insurance.

In 1895 the legislature of Texas enacted a second **antitrust law** broadening its terms apparently for the purpose of including therein the subject of insurance.

The argument of counsel for the defendants is largely an effort to show that the legislature of Ohio at the time of the passage of the law under consideration **[\*\*26]** had before it the original Texas law, the decision of the Texas court and the amended Texas law, and that a comparison of the three laws indicates that our legislature followed the original Texas law. That by a rule of construction recognized in Ohio, HN19<sup>↑</sup> when the legislature of our state

adopts legislation from another state, which has been construed by a court of last resort in that state, there is a presumption (not conclusive however), that it does so with the construction that has been so given it.

Taking into consideration the evils productive of the law, the purpose of suppressing the mischief and of advancing the remedy, in connection with the suggestion that the legislature had its attention directly called to the subject of insurance, by considering the first Texas law from which it was omitted, the Texas decision so holding and the second law so drafted as to include insurance, it seems to be extremely improbable that the Ohio legislature should have purposely followed a statute which excluded insurance and which had been found deficient as shown by subsequent legislation in the pioneer state of antitrust laws.

With due deference to the careful analysis and comparison of these **[\*\*27]** laws by counsel for the defendants, in arguing that original Texas law was followed, it is not thought that the comparison warrants this conclusion.

The original Texas law in section one, subdivision first read as follows: "To create or carry out restrictions in trade."

This was amended so as to include insurance, and to read, "To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and fee pursuit of any business authorized or permitted by the laws of the state."

It was held in *Queen Ins. Co. v. State, supra*, "That the words in the first subdivision of section one, of the act, 'to create or carry out restrictions in trade,' were intended only as a general expression of the purpose of the law."

This is the subdivision changed to include insurance and in our statute the words, "all classes of business" were inserted in the title as expressive of the purpose of the law.

**[\*716]** In the Ohio statute, subdivision one, of section one, is constituted a separate offense, as held in *State v. Gage, 72 Ohio St. 210, 73 N.E. 1078*.

This suggests the thought that our legislature intended **[\*\*28]** to include insurance, and the words bringing it in, as found in the Texas act, being where the court said was expressive of the purpose of the law, prompted their insertion in a corresponding place in the Ohio law, viz., the title.

It is said in the Texas decision. "It is true that while trusts are defined in the first section, nowhere either in that or any other section are they expressly declared unlawful \* \* \*. There is no express declaration that trusts are unlawful--the acts which are declared to constitute a trust are not expressly made punishable, nor is any act expressly declared to be a violation of the provisions of the statute."

That the Ohio law had before it the Texas decision and intended to remedy the defect suggested and not to follow the original act is apparent from the insertion in the Ohio law, in section one, subdivision five, the following provision: "Every such trust as defined herein is declared to be unlawful, against public policy and void."

Subdivision first, section one, Texas act of 1889, reads, "To create or carry out restrictions in trade." In the Texas act of 1895, to these words "or commerce" is added, and they are also found in section one, subdivision **[\*\*29]** one of the Ohio law, thus indicating that the second Texas law was followed.

It is said in *Bloom v. Richards, 2 Ohio St. 387, 402, HN20* "It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided."

The insertion of the words "or commerce" after "trade" means something and if "trade" be used in the narrow sense, then "commerce" should be accorded a more general definition, more in consonance with the meaning urged by counsel for the state.

While it can readily be believed that the legislature had before it both Texas acts, and that it drew for material from both, it is not apparent from comparison, that the Ohio law was taken from the original Texas law, with the intention of excluding insurance.

It is urged by counsel for the defendants that Rev. Stat. 3659 (Lan. 5872), the anticompetitive law, having been amended since the enacting of the Stewart-Valentine law, which is said not to include associations of agents, and not having had inserted therein provision such as is contended for in the Stewart-Valentine law, is reason to support the claim [\*\*30] that the legislature did not intend to include insurance. With as much reason it may be said that the legislature understanding that insurance was in the Stewart-Valentine law, did not therefore perceive any reason for inserting it in the anticompetitive law, when amended.

[\*717] The decision in *Queen Ins. Co. v. State, supra*, was largely based upon the provisions of the penal code of Texas which have no application in this state. It being provided in the penal code that no person shall be punished for an act which is not made a penal offense, and the fact has been heretofore mentioned that the original Texas act did not expressly declare trusts to be unlawful. That code also provides for a strict construction of penal laws

Further, the Texas decision held that under the terms of the original act providing against restraints of trade, many contracts and conditions of business would be punishable which are proper and necessary in the affairs of life; that no distinction is made between what is reasonable and proper and what is unreasonable and improper, which considerations seem to have largely influenced the court.

In *State v. Gage, 72 Ohio St. 210, 73 N.E. 1078*, [\*\*31] it was urged that the Stewart-Valentine law was void because its terms do not except from its prohibitions, contracts, acts and transactions which are protected by the constitution; but the court held that the case offered no opportunity for the application of a rule that when an act contains an indivisible prohibition, whose terms include contracts which the legislature is powerless to prohibit, the courts cannot save the act by restricting the natural and obvious meaning of its terms.

Thus it will be observed that the Supreme Court of Ohio and the supreme court of Texas construe this antitrust legislation along widely diverging lines.

*Runck v. Cloud, 11 Ohio Dec. 444 (8 Ohio N.P. 436)*, is cited as authority that insurance is not to be considered in the act and the court in that case so held.

In so deciding, the court assumes that the statute is "a literal copy" of the Texas act, which counsel for defendants do not claim it to be, and then the court proceeds to adopt the argument of the Texas court.

If it be not true that our statute was borrowed from the Texas act of 1889, then the foundation on which the case of *Runck v. Cloud, supra*, rests is destroyed.

[\*\*32] In this decision it is said, "Our legislature, very evidently then to avoid this ambiguity in our statute added on the word 'commerce,' to trade, as a synonym or equivalent and not by way of contrast."

This is a plain violation of the rule of construction laid down in *Bloom v. Richards, 2 Ohio St. 387, 402*, that, [HN21](#) [↑] "It is a general presumption that every word in a statute was inserted for some purpose."

This discussion further argues that all classes of business should be construed to mean all classes of business devoted to commerce, otherwise it is said if it is given a larger signification "embracing everything about which a person can be employed" it will include classes of [\*718] unions and combinations recognized to be lawful, devoted to working men.

*State v. Gage, supra*, held that lawful business can be excluded from the act and it still remain constitutional and operative. The decision seems to have been framed to avoid a danger said by our Supreme Court not to exist.

The effort of the court to restrict the meaning of "all classes of business" to the same class as commerce, by an application of [HN22](#) [↑] the rule *eiusdem generis*, that when general [\*\*33] words follow an enumeration of particular cases, such general words are held to apply to cases of the same kind as those which are expressly mentioned, is not warranted. It is generally held to be the law, that this rule does not apply when the particular preceding words exhaust a whole genus; in which case the general term is held to refer to a larger class.

McKeon v. Wolf, 77 Ill. App. 325; 23 Am. & Eng. Enc. of Law (1 ed.) 442; Sutherland, Stat. Constr. Secs. 278-279; Woodworth v. State, 26 Ohio St. 196.

**HN23** [+] The word "commerce," is a generic word, the name of a whole class, and under the rule of the Illinois court and other authorities, "all classes of business" must be used in a more comprehensive sense.

**HN24** [+] It is held by the Supreme Court of Ohio, that "it is essential to validity of an act undertaking to regulate the business that it shall in its requirements, operate equally;" and that, "Our bill of rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and Sec. 26 of Art. 2 of the constitution [\*\*34] requires that all laws of a general nature shall have a uniform operation throughout the state." State v. Gardner, 58 Ohio St. 599 /51 N.E. 136; 41 L. R. A. 689; 65 Am. St. Rep. 785].

The Stewart-Valentine law, having been held valid in State v. Gage, supra, and if the terms "trade," "commerce" and "commodity," properly defined, include insurance, then insurance must be held to be within the statute.

The Iowa case of Beechley v. Mulville, supra, which held that insurance is a commodity, is cited with evident approval by the Supreme Court of the United States in *Carroll v. Greenwich Ins. Co.* decided November 27, 1905. In a concurring opinion by Justice Harlan in that case, he said: "The business of fire insurance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the state to forbid combinations and agreements among fire insurance companies doing business within its limits, in reference to rates, agents, commissions and the manner of doing their business."

[\*719] The fourth ground [\*\*35] of the demurrer that intent is not alleged in the indictment, has not been argued, and it is understood that nothing is now claimed for it.

The issues presented by the demurrs have been considered in conjunction with Judge Metcalfe, who concurs in the conclusions herein made, and in the finding that the demurrs should be overruled.

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## **State v. Hygeia Ice Co.**

Court of Common Pleas of Lucas County, Ohio

August 3, 1906, Decided

No Number in Original

**Reporter**

16 Ohio Dec. 735 \*; 1906 Ohio Misc. LEXIS 62 \*\*; 4 Ohio N.P. (n.s.) 361

STATE OF OHIO v. HYGEIA ICE CO. ET AL.

**Disposition:** [\*\*1] Motions overruled.

### **Core Terms**

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sentence, guilty plea, classification, trial judge, confession, leniency, parties, motions, rights, imprisonment, withdraw, prosecuting attorney, embarrassing, artificial, promise

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN1** [down arrow] **Public Enforcement, State Civil Actions**

See Ohio Rev. Stat. § 4427-12.

Constitutional Law > State Constitutional Operation

**HN2** [down arrow] **Constitutional Law, State Constitutional Operation**

Ohio Const. art. 2, § 26 provides that all laws, of a general nature shall have a uniform operation throughout the state.

Constitutional Law > Equal Protection > General Overview

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

**HN3** [down arrow] **Constitutional Law, Equal Protection**

A law operates uniformly when it has uniform operation upon all of a particular class, if the classification made is a reasonable one.

Constitutional Law > Equal Protection > General Overview

Governments > Legislation > Effect & Operation > General Overview

#### **HN4** Constitutional Law, Equal Protection

When a law operates uniformly on all natural persons within the state, it operates uniformly.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

#### **HN5** Case or Controversy, Constitutionality of Legislation

Unless it manifestly contravenes the constitution, the judicial department is not warranted in declaring it void.

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Evidence > ... > Exemptions > Confessions > General Overview

#### **HN6** Crimes Against Persons, Coercion & Harassment

The judge is to determine how the confession was produced by looking at the circumstances; among which are the strength or weakness of the prisoner's intellect, his knowledge or ignorance. If satisfied, however, that the confession was produced by the representations or threats, the court cannot receive it in evidence, the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to have believed, but what did he believe. It does not follow that the same rule safeguarding the prisoner's rights which applies to an extrajudicial confession should be employed in the case of a confession in court; in fact, the rule is otherwise.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > Not Guilty

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

#### **HN7** Entry of Pleas, Changes & Withdrawals

The rule is universal that a person who has been indicted and who has pleaded not guilty, may, by leave of the court, on the advice of counsel or of his own motion, withdraw that plea and enter a plea of guilty; but it has long been held that where a defendant has pleaded guilty and sentence has been passed upon him, he cannot retract his plea and plead not guilty.

Criminal Law & Procedure > Postconviction Proceedings > Arrest of Judgment

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

## **HN8** Postconviction Proceedings, Arrest of Judgment

In most courts, where leave to substitute not guilty is asked in a reasonable time, it is granted pretty nearly as of course. Even where, after a defendant has pleaded guilty, has moved an arrest of judgment and his motion has been overruled, the court, if justice requires, will allow a substitute of not guilty for guilty, but it is too late after sentence.

## **Headnotes/Summary**

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### **Headnotes**

#### **CRIMINAL LAW--CONSTITUTIONAL LAW.**

##### **1. VALENTINE ANTITRUST LAW--IMPRISONMENT CLAUSE NOT UNCONSTITUTIONAL.**

Revised Statutes 4427-4 (Lan. 7589), the "imprisonment clause" of the Valentine antitrust law, does not manifestly contravene the constitution in that its operation is not uniform as to all persons, both natural and artificial, and is not, therefore, unconstitutional.

##### **2. DEFENDANTS SENTENCED UNDER PLEAS OF GUILTY MAY NOT WITHDRAW PLEAS AND CHANGE TO PLEAS OF NOT GUILTY--NOT CONFESSIONS.**

Defendants who have pleaded guilty to indictments against them and have been sentenced under such pleas may not be allowed to withdraw such pleas of guilty and substitute pleas of not guilty on the ground that they have been misled into making such pleas by expectation of leniency in the sentence to be imposed, however that expectation may have been aroused. Such plea of guilty, after sentence, may not be considered as an involuntary confession made under an apprehension or hope of reward.

##### **3. PARDONING POWER NECESSARY TO RELIEVE AGAINST SEVERITY OF SENTENCE.**

Within the limitations of the statute prescribing punishment the law vests the trial court with discretion in imposing sentence which cannot be reviewed for severity. The only relief is to be found in the pardoning power.

##### **4. CONFESSION IN OPEN COURT NOT WITHIN RULE AS TO SAFEGUARDING RIGHTS OF PRISONER IN EXTRAJUDICIAL CONFESSIONS.**

The rule safeguarding the rights of a prisoner, which applies to extrajudicial confessions, should not necessarily be applied to a confession made in court; and were this not true, it would not follow that it should be applied where intelligent business men under the advice of counsel, have speculated for weeks as to the best thing to do, have consulted with the prosecutor, and after turning the matter over in every possible light, conclude to plead guilty and throw themselves on the mercy of the court.

**Counsel:** L. W. Wachenheimer, Pros. Atty., Ralph Emery, Asst. Pros. Atty., and H. W. Seney, for plaintiff.

King & Tracy, Brown & Geddes, Schmettau & Williams, Smith & Beckwith and Hamilton & Kirby, for defendants.

**Judges:** BABCOCK, J.

**Opinion by:** BABCOCK

## **Opinion**

**[\*735] BABCOCK, J.**

The three motions of the several defendants have been heard and will be disposed of together as heard. The vital questions are the same in each. It is true that in Joseph Miller's case a trial and conviction had already taken place and motions for new trial and in arrest of judgment had been filed, while in the cases of Reuben C. Lemmon and Roland A. Beard, defendants, trials had not taken place, but they were before the court, awaiting trial and had pleaded not guilty to the charge preferred. On June 11 these defendants pleaded guilty. Later defendant, Miller, withdrew his motions and awaited sentence. His motion is for the vacation of the sentence pronounced upon him, with application for reinstatement of the motions as before the withdrawal, while Lemon and [\*736] Beard's motion is for the vacation of the sentences with application for leave to withdraw the pleas of guilty and enter [\*\*2] in their stead pleas of not guilty. The grounds for vacating the sentences are so nearly alike that the court can properly make its findings of law and fact on all three motions at the same time.

The movers in all of the motions contend for four propositions:

1. That Rev. Stat. 4427-4 (Lan. 7589) is unconstitutional so far as the imprisonment clause is concerned.
2. That the court promised leniency to defendants, if they would plead guilty, and therefore misled them to their prejudice.
3. That the court, by words and conduct, misled them into pleading guilty, to the like prejudice of their rights as defendants in the case.
4. That said defendants were wrongfully induced, and, in violation of their rights, were led to withdraw their pleas of not guilty and plead guilty through hope and expectation of leniency excited in their minds by counsel who were laboring under misapprehension and mistake as to leniency of sentence about to be pronounced.

While this grouping is not in the language of the motions, it does cover the grounds contended for.

The first question, in the order named, is that of the power to imprison for violation of the subsection styled the imprisonment or penalty [\*\*3] clause of the so-called Valentine antitrust law. Revised Statutes 4427-12 (Lan. 7597) reads:

**HN1** [↑] "The word 'person' or 'persons,' whenever used in this act shall be deemed to include corporations," etc.

It is contended that this act, providing for fine and imprisonment of natural and artificial persons, is invalid as being in violation of Sec. 26, Art. 2 of the constitution, **HN2** [↑] which provides that "all laws, of a general nature shall have a uniform operation throughout the state." It is contended that since corporations cannot be imprisoned, natural persons are discriminated against by this imprisonment clause. It is further contended that, if a classification may be made, this act is not saved, for the reason that the legislature has not made any classification.

The court is of opinion that the first contention is without force, for the reason that, were it otherwise, no criminal act could stand which omitted corporations from its provisions. This seems true for an entire exemption of artificial persons would be as grievous as a partial exemption--in fact, would be a wider departure from uniformity

**HN3** [↑] A law operates uniformly when it has uniform operation upon all of a particular class, [\*\*4] if the classification made is a reasonable one.

It is contended that the legislature has not attempted any classification, and therefore the statute cannot be saved on the classification theory. The court does not concede the proposition that classification between natural and artificial persons is necessary to meet this constitutional [\*737] provision; but for the argument's sake, assumes the contention of counsel to be correct and is seeking to determine whether classification in fact has not been made. If the court apprehends the claim of counsel, it is that there has been a classification made of natural

persons on one hand and artificial persons on the other. The complaint is of this classification, yet the fact of classification is denied. But it is said classification involves a purpose to classify, which is obvious upon the face of the statute, and this plainly shows classification was not in mind; for it is contended that the legislature would not have laid a more grievous burden on individuals than on corporations, which are known to be the class against which the corrective force of this statute is aimed. It appears to the court that this is begging the question; that [\*\*5] it is speculative and fanciful; and, finally, that there is nothing in even-handed justice calling for any different penalty upon artificial than upon natural persons. At least the court feels it is not justified in saying that the legislature may not have taken this brief manner of classifying by expressing it all in one section of the statute, leaving it to the very nature of the two different kinds of persons to suggest the classification. I am further inclined to believe that [HN4](#)[<sup>1</sup>] when a law operates uniformly on all natural persons within the state, it operates uniformly.

At a time when the constitutional question is pending in the circuit court and when that question is not plainer than it is in this case, it would be manifestly rash for the court, on this motion, with the consequences involved, to hazard the opinion that this solemn enactment of the legislature is invalid, and when, as said in [Western Union Tel. Co. v. Mayer, 28 Ohio St. 521, 540, HN5](#)[<sup>1</sup>] "Unless it manifestly contravenes the constitution, the judicial department is not warranted in declaring it void."

The second ground for setting aside the sentences is withdrawn from consideration by the movers, [\*\*6] who say they do not claim any promise expressly made by the trial judge and have never intended to be so understood.

The third ground is the claim that the court, by what it said and did, misled the defendants into withdrawing pleas of not guilty and entering pleas of guilty to the prejudice of their rights. This does not involve the question of express promise, but of indiscretion or that which amounts to an implied promise of the court resulting in an injury to the defendants and which fairness and justice require should be repaired by putting the parties back in the position they were in before. The question is this: Did the trial judge do or say anything to mislead these defendants to their prejudice? If he did, the sentences should be set aside. Before taking up in detail the history of what took place leading up to the sentences, I wish to say that I have been struck with the unusual care taken to avoid embarrassing complications. The parties [\*738] handled each other at arm's length. The defendant's counsel were unusually delicate in observing the ethics of the profession, in avoiding any attempt to either influence the trial judge or solicit favor at his hands.

In May, [\*\*7] they sought to bring about a conference with the court through the prosecuting attorney. This is not unusual. The prosecuting attorney is necessarily in close relationship with the trial judge. He declined to take any part in this, and told the parties to speak for themselves. They first concluded to do this, but, on second thought abandoned it.

On June 6, the Miller case had reached that stage in which the state had substantially made whatever case it had. It seems that a contract signed by these parties, who constitute the Toledo Ice & Coal Company and the Hygeia Ice Company, had been introduced in evidence, and which, unexplained, was very damaging to the defense. It was consequently liable to be embarrassing to these other defendants when their cases were put on trial. From what the trial judge said at the time of sentence, as to the powers of the court to accomplish in this class of cases the real ends of justice, it would seem that he conceived the idea, that the defendant, Miller, was in danger of embarrassing himself and possibly of swearing falsely if he took the witness stand and denied the combination, and that, if there was a combination, it was in the interest of public [\*\*8] justice that it be broken up and restitution made of such money as had been extorted from the customers. He realized the delicacy of the position. He must not assume but what Miller had a good defense; neither must he assume that there was any combination, notwithstanding what appeared in the state's proof; he must not do anything that would injure the defendant in the conduct of his case, and at so critical a juncture; yet it apparently seemed to him that he might be of service to public justice and subserve the interests of all parties if the defendants could see their way, in case they were guilty, to obey the law and make some reparation for the wrong. If he safeguarded all these rights, it was proper that this idea should be conveyed to Miller's counsel, Alexander Smith. But it must not be done so as to invade his rights, and the presumption of innocence with which the accused stood clothed.

The trial judge is uncertain which motive was strongest with him, leading him to do what he did. He says that he had no clear idea as to what could or ought to be done to accomplish the ends of justice; he only wanted Mr. Smith to think about it and left it to his good judgment to act in [\*\*9] such way as was consistent with the discharge of his duties. He therefore said to him: "I want to get an idea to you, but I don't want you to commit yourself--you needn't say a word. It might be well, however, to think along these lines;" and when the prosecuting attorney said to Mr. Smith, "What do you think about [\*739] Miller's guilt?" the court immediately stopped him--as it might wear the complexion of something inquisitorial--and said, "Mr. Smith is not here to be asked any questions, to make any statements or admissions." The court was simply attempting to show some way of safety to Mr. Smith, if his client was guilty and in danger, and he left it to him to do as he wished without exposing his hand to anyone.

I think that much that Mr. Smith claims in his affidavit, was, in substance, said. It is admitted that it was in the mind of the trial judge, and he might, with entire propriety, have expressed it, and it seems to have been along the line of his thought. He thinks, however, he did not say anything further than this: "Mr. Smith, this inquiry has been running through my mind as I have heard the case tried. These men have been indicted by the grand jury and I have listened [\*\*10] to the state's side of the case, and, of course, I don't know anything about what your proof will be. It might completely answer the case of the state--it may not answer it at all. It will have to be a pretty strong case, in my judgment, to answer the case that the state has made. The inquiry has been running through my mind, if this combination was formed as testified to by the witnesses on the part of the state--the inquiry has been running through my mind, why don't they abandon the whole thing, restore conditions; and I have simply called you in to make this inquiry; you can answer it or not, or you can answer it later or not as you wish; but I have thought of whether it might be practicable to bring about this result and I want to say to you that even if it were practicable, I do not wish the inquiry to indicate any line of action that I might take with reference to the cases even if it were done."

Smith then said he wished to talk with his associates before he said anything,--and that he might talk with the prosecuting attorney. It was properly suggested that it should be kept secret; and the reason is plain, for if the jury got the idea that there was some talk of surrender [\*\*11] on the part of the defendant, it would be most damaging to his defense. The situation was called to the attention of counsel by way of admonition; it was proper, and evidenced an appreciation on the part of the trial judge of the delicacy which the administration of justice demands at his hands. Mr. Smith thinks and makes affidavit, that the judge went so far as to suggest that none of the indicted parties could or should be allowed to testify; that if they did not testify they would probably be found guilty, and that if they did testify and the jury convicted, there might be a disagreeable necessity for a further inquiry--hinting at an investigation of perjury by the defendant.

I have this to say: that a judge who would so impose upon a defendant or his counsel, should resign his office. But it is so unreasonable, and is shown by the context to be so far from the truth, that the court refrains from saying that it is wilfully false by the consciousness [\*740] that Mr. Smith at the time was in that position of uncertainty as to what was best to do, that his mind was in no condition to receive what the court said on the subject of the strength of the state's case, without distorting [\*\*12] it and mixing his own impressions with what was said. He feared that his client was in danger of conviction; was analyzing in his mind whether he could safely put Miller upon the stand, and when the trial judge called his attention to the fact that the state had made a pretty strong case, he received the impression that it was unwise to put his client on the stand and he has confused that with saying that the court admonished him that he must not put him on the stand.

It is unreasonable to conclude that a court would guard him against saying anything that might be embarrassing, would stop the prosecuting attorney from even asking him an opinion about the merits of the case, and at the same time prejudge the matter and tell him that his client must not exercise his constitutional right of testifying in his own defense. I believe that Mr. Smith has confused his fears and what he thought he better not do with the words of the judge. I prefer this to thinking that he has intentionally sworn false; but that it is false, in words and in spirit, is clearly shown. The judge even took the pains to say that, if he acted in any manner upon the suggestions made, he must not consider it as indicating [\*\*13] anything the court would do by way of punishment. Smith, of course, communicated this to Brown, who immediately saw that it could lead only to unconditional surrender. Brown knew that he must not attempt to bargain with the court; neither did he have the disposition or wish to do so, for he had before that observed the ethics of the profession to such an extent as to abandon a purpose to even see the judge.

The trial judge in suggesting this idea to Smith's mind, did that which made it entirely proper for Brown to go and see him and it was entirely proper that he should seek to find out what he could, as to the consequences, if they pleaded guilty. I am inclined to say that if he had not done so he would have been remiss in the discharge of his duty to his clients. I think that Brown saw that it was liable to involve restitution to the customers from whom money had been extorted. He naturally wished to yield as little as possible and get as much in return as possible in the way of leniency. He knew that this suggestion came from the judge and not from the prosecutor. He therefore, sought to rebuke the suggestion of undoing the wrong by whipping the judge over the prosecutor's shoulders; **[\*\*14]** so he said: "Why, Wachenheimer can't fix prices; if he attempts that, we will have him indicted for violation of the law." And he went on to say that the men were justified in all they had done; that there had been an increase of expenditures and that nobody had done anything that was wrong, and that they would show the whole thing to be lawful when they got to the trial. The judge saw that the attitude of counsel was such that what he had suggested **[\*741]** was not liable to be accepted kindly, and that anything further was liable to lead into embarrassment, and he immediately admonished Mr. Brown that he need not say anything further, and said to him: "There isn't any occasion for talking about this matter any further," and left the room.

Mr. Smith went forward with his defense; and later, very properly, sought to open further conversation along the same line that had been suggested to him by the court at the noon recess. The court's short interview with Mr. Brown had determined and closed the entire incident, and he said to Smith, "I do not care to discuss this thing any further at all; you may dismiss the whole matter and consider it as if nothing had been said about it."

**[\*\*15]** This is the entire matter complained of. The conduct of every one in the case indicates that it was considered entirely abandoned. Even the associate counsel of Mr. Brown, who went with the parties into court and withdrew the pleas of not guilty and pleaded guilty, says that before the sentence was pronounced he speculated with the prosecutor as to what the court would probably do, in which he suggested that he did not believe the court would impose a workhouse sentence, but that the prosecutor said he wasn't so sure of that. This is strong, almost conclusive, that there was nothing held out and that the defense did not think there was anything held out in the way of favor to be received; otherwise this conversation is unintelligible.

In a word, the situation was this: The defendants had learned that the court's idea was that, if the defendants were guilty, it would be wise to stop the contest and do the proper thing by way of restoration. They, therefore, within forty-eight hours before entering the plea of guilty, made a deduction of two dollars a ton to home consumers, threw themselves upon the mercy of the court and hoped for some leniency. They were not surprised by anything **[\*\*16]** the court did unfairly; they were surprised at the court's severity. It was not that he had done some wrong, but that he had enforced the law with vigor and apparently with the intention to cut up root and branch the unlawful combination. They were chagrined that they had wrongly anticipated the outcome. They should not have attacked the court as they did. I wish, however, to say in this connection, that the counsel who were called in this emergency, have acted in a manner entirely commendable insofar as the court can observe, and that in filing the charge made in the motion they might properly feel that they needed to characterize the conduct as a promise, lest otherwise, it might be held that the grounds upon which they were claiming that the sentences should be set aside were not sufficient. I prefer to believe, and do believe, that it was filed under a belief that it was a proper thing for them to say and do, under the information they had, but I add that this information was entirely without foundation.

This principle is contended for, that it makes no difference who **[\*742]** excited the hope or expectation of leniency in the minds of the prisoners, if the court shall find **[\*\*17]** that they did have that expectation and were thereby led to withdraw their plea of not guilty and enter a plea of guilty. It is based upon the familiar doctrine that an extrajudicial confession will not be received in evidence in a criminal case, unless it is voluntarily made; and counsel contend, with a good deal of show of plausibility, that if a partial confession of guilt, induced by hope or fear excited in the mind of the prisoner by anyone, is not to be considered as voluntary, then the confession in open court, induced by hope of leniency excited in the mind of the prisoner by anyone, ought to be equally protected. In case of an extrajudicial confession thus brought about, the ruling is, that it shall not be received in evidence. The contention is that the same principle ought to obtain and the pleas of guilty which have been entered ought to be withdrawn. The rule as to extrajudicial confessions is exhaustively treated in [Spears v. State, 2 Ohio St. 583](#), wherein the court says:

**HN6** [↑] "The judge is to determine how the confession was produced by looking at the circumstances; among which are the strength or weakness of the prisoner's intellect, his knowledge or [\*\*18] ignorance

"If satisfied, however, that the confession was produced by the representations or threats, the court cannot receive it in evidence, \* \* \* the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to have believed, but what did he believe."

It does not follow that the same rule safeguarding the prisoner's rights which applies to an extrajudicial confession should be employed in the case of a confession in court; in fact, the rule is otherwise. But, if it did apply, what would the court say in this case, under the rule which says that the court should look to the circumstances, the strength or weakness of the prisoner's intellect, his knowledge or ignorance? When one is suddenly accused of crime, taken into custody, threatened with the opening of prison doors, the heralding of the offense in all ears, the blasting of reputation, the court properly says: "In such instances the strongest mind is liable to be unhinged." Justice requires that a party thus circumstanced should be safeguarded, for he will catch at anything which looks like hope. Human nature is such that many times persons have been persuaded to plead guilty to things they were [\*\*19] innocent of, for the apparent temporary rescue of themselves. Here intelligent, shrewd business men, flanked by good lawyers, speculated for weeks as to what was the best thing to do; sought interviews with the prosecutor in season and out of season; went over the whole matter time and again, turned it over in every possible light and finally concluded to plead guilty and throw themselves upon the mercy of the court. It would be a strange doctrine if the rule safeguarding their rights should be that of one suddenly overwhelmed and in fright at the arrest and charge of crime.

[\*743] **HN7** [↑] The rule is universal, that a person who has been indicted and who has pleaded not guilty, may, by leave of the court, on the advice of counsel or of his own motion, withdraw that plea and enter a plea of guilty; but it has long been held that where a defendant has pleaded guilty and sentence has been passed upon him, he cannot retract his plea and plead not guilty. The English case announcing that a prisoner will not be permitted thus to do, is *Regina v. Tell*, 9 Car. & P. 346. The same doctrine is announced in [State v. Buck, 59 Iowa 382 \(13 N.W. 342\)](#); [Mastronada \[\\*\\*20\] v. State, 60 Miss. 86](#). I call attention to the statement of the law as made by eminent text writers in criminal law. 1 Bishop, New Crim. Proced. Sec. 789:

**HN8** [↑] "In most of our courts, where leave to substitute not guilty is asked in a reasonable time, it is granted pretty nearly as of course. Even where, after a defendant has pleaded guilty, has moved an arrest of judgment and his motion has been overruled, the court, if justice requires, will allow a substitute of not guilty for guilty, but it is too late after sentence." To the same effect is Wharton, Crim. Pl. & Pr. Sec. 441.

It would be to trifl[e] with courts of justice to permit parties to speculate on what the sentence will be, and when it is not satisfactory to say, "What I did was not voluntary, because I expected leniency, which I failed to receive."

Concerning the severity of this sentence and its wisdom, I have nothing to suggest. First, because it is not within my province; second, because it would be discourteous to the judge who pronounced it. With its suspension or modification I have nothing to do.

It is therefore adjudged that each and every of the three motions be overruled.



## **State v. Crystal Ice Mfg. & Cold Storage Co.**

Court of Common Pleas of Franklin County, Ohio

November 30, 1906, Decided

No Number in Original

**Reporter**

17 Ohio Dec. 640 \*; 1906 Ohio Misc. LEXIS 155 \*\*; 5 Ohio N.P. (n.s.) 149

STATE OF OHIO v. CRYSTAL ICE MFG. & COLD STORAGE CO.

**Prior History:** [\*\*1] MOTIONS to quash indictment.

**Disposition:** Objections and the motions overruled.

### **Core Terms**

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indictment, conspiracy, indefinite, purposes, carrying, grand jury, objected, formation, combine, unknown, jurors, exact

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN1** [down arrow] **Inchoate Crimes, Conspiracy**

Time is not of the essence of the offense of conspiracy against trade unless by virtue of Lan. 7586 (B. 4427-4), which makes each day's violation of the provisions of the statute a separate offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Weight & Sufficiency

#### **HN2** [down arrow] **Inchoate Crimes, Conspiracy**

It is competent, as a matter of evidence, to show that at certain times, previous to the time when it is alleged certain individuals entered into an illegal combination, these individuals had met together for the purpose of inducing each other to enter into it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN3** Regulated Practices, Price Fixing & Restraints of Trade

The gist of the offense of conspiracy against trade is not the particular act done under the conspiracy but the formation of the conspiracy. The offense under the statute is the unlawful combination of skill and acts for this purpose. The particular means to be employed to accomplish the unlawful purposes may not have been agreed upon and are not in my opinion essential to the statement of an offense under the statute. The gist of the offense is the formation of a combination for such purpose. It is the purpose which is made unlawful and the means used to that end are immaterial and may be one thing at one date, and another at another and still be but the carrying out of a single unlawful purpose of combination.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN4** Regulated Practices, Price Fixing & Restraints of Trade

The carrying out of the purposes of an illegal combination is made a separate offense under the statute from conspiring to do so.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN5** Inchoate Crimes, Conspiracy

At common law, no overt act was essential to the offense of conspiracy.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN6** Inchoate Crimes, Conspiracy

The offense of conspiracy may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into a crime, although no act be done in pursuance of it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN7** Regulated Practices, Price Fixing & Restraints of Trade

By the terms of statute the formation of a trust or conspiracy against trade is made penal, although its purposes are not carried out. This is plain from the language of the statute. A combination whose purpose is to do the things forbidden in the future is denounced by the statute. It is made an offense to enter such a combination, to make or enter into, or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they shall combine or have combined themselves. The carrying out of the unlawful purposes stated in the statute is made a separate offense by the terms of Lan. 7589 (B. 4427-4).

## Headnotes/Summary

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### Headnotes

#### **CONSPIRACY--INDICTMENT--MONOPOLIES.**

##### **1. SUFFICIENCY OF ALLEGATION OF DATE OF FORMATION IN INDICTMENT AGAINST A TRUST.**

It is not essential to an indictment for forming a combination in restraint of trade, under the Valentine antitrust law, that it should state the exact date, with certainty, upon which the combination was effected, and such an indictment is not bad for indefiniteness or uncertainty when it charges the defendants with having met on or about February 1, 1905, and at divers times between that date and June, 1906, met for the purpose of forming such a combination.

##### **2. FORMATION OF TRUST AS A SEPARATE OFFENSE.**

It is not an essential to the offense of forming a monopoly that the conspiracy should include the particular means to be used to attain the end sought, and an indictment alleging that one of the purposes of an alleged monopoly was increasing the price of ice, is not indefinite in that it does not state how this is to be done.

##### **3. EFFECT OF DESCRIBING ACCUSED AS DEFENDANT.**

The fact that the persons named in an indictment are afterwards described as defendants does not vitiate the indictment, as being indefinite and uncertain.

##### **4. WHAT IS UNLAWFUL COMBINATION.**

Under the antitrust law, Lan. 7586 *et seq.* (B. 4427-1 *et seq.*), it is an offense to form a combination for any of the purposes specified in the above statutes, independent of any overt act.

**Counsel:** K. T. Webber, prosecuting attorney, for plaintiff.

Booth, Keating & Peters, for defendants.

**Judges:** BIGGER, J.

**Opinion by:** BIGGER

## Opinion

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[\*640] **BIGGER, J.**

Motions to quash the indictment have been filed by the several defendants. It is objected that the indictment is so indefinite and uncertain as that the exact nature and cause of the accusation against the defendants is not apparent and does not appear from the indictment; and that it is so indefinite on account of the surplusage contained therein, that the defendants are not advised of the exact nature of the accusation made against them.

The indictment contains but one count. It charges that the defendants, naming them, and describing them as defendants, on or about February 1, 1905, and at divers other times between the said February 1, 1905, and June 1, 1906, the particular date being to the grand jury unknown, did meet and come together at the said county of Franklin, [\*641] in the state of Ohio, for the purpose and with the intent of inducing each and all of said defendants to engage in and take part in the conspiracy against trade hereinafter [\*\*2] set forth; that on or about February 1,

1906, the particular date to the grand jury unknown, the said defendants, at the said county of Franklin, in the state of Ohio, unlawfully did combine their skill and acts for the purposes following, to wit: To increase the price of a certain commodity, to wit, ice, to the purchasers and to the customers in the city of Columbus, and in said Franklin county, to prevent competition in the sale of a certain commodity, to wit, ice, among themselves and others, in the city of Columbus, and in said county of Franklin, to fix at a certain common standard figure, the price of a certain commodity, to wit, ice, to the purchasers and consumers thereof, whereby the price of said commodity, to wit, ice, should be established in the city of Columbus and in said county of Franklin, and be controlled by said combination, and the indictment concludes as follows:

"And so the jurors of the grand jury aforesaid, upon their oaths as aforesaid, do say that the defendants, and each of them, at the county of Franklin aforesaid, on or about the first day of February, 1906, the particular date being to the grand jury unknown as aforesaid, by so unlawfully combining their [\*\*3] skill and acts as aforesaid, for the purposes aforesaid, did engage in and take part in a conspiracy against trade, contrary to the statute in such cases made and provided and against the peace and dignity of the state of Ohio."

This conclusion of the grand jury adds nothing to the statement of facts contained in the indictment, but is only the conclusion of the grand jury from the matters found and stated by the grand jurors in the indictment, and may therefore be disregarded, upon the consideration of the question of the sufficiency of the matters stated in the indictment as constituting an offense under the statute.

Is this indictment so indefinite and uncertain as that it does not advise the defendants clearly of the offense charged against them, or does it contain so much surplusage as to obscure the real charge? The charge is, that these various persons natural and artificial, on or about February 1, 1906, did combine their skill and acts for the specific purpose named in the indictment and which are declared by the statute to constitute a trust and to be a conspiracy against trade. **HN1**[<sup>1</sup>] Time is not of the essence of this offense unless by virtue of Lan. 7586 (B. 4427-4), which [\*\*4] makes each day's violation of the provisions of the statute a separate offense.

It is stated in this indictment that upon a particular day, the exact date not being known to the grand jurors, but about February 1, 1906, this combination was entered into. It is certainly not essential to such [\*642] an indictment that the grand jurors must be able to state the exact date with certainty upon which this combination was effected. They state the exact date is to them unknown. Neither do I see how the indictment is indefinite because it is stated that the persons named did meet upon certain other dates for the purpose of inducing each and all of them to engage in the conspiracy described in the indictment. It would certainly not make an indictment for murder in the first degree indefinite or uncertain, if it were to allege that the defendant had deliberated upon the commission of the crime upon certain days preceding its commission. It is sufficient to state that it was deliberated upon, and it would not have the effect to render it indefinite if it were averred that the defendant had deliberated at divers times previous to the commission of the crime. It is objected that this indictment [\*\*5] charges that they met for this purpose up to June 1, 1906, or for a period of four months after it is alleged the illegal combination was formed. It is certainly manifest that persons could not meet together to induce each other to do something after they had done it. Upon trial such evidence would not be competent. But it is only surplusage and cannot make the charge indefinite. **HN2**[<sup>1</sup>] It would certainly be competent, as a matter of evidence, to show that at certain times, previous to the time when it is alleged they entered into this combination, these individuals had met together for the purpose of inducing each other to enter into it.

It would not be conclusive evidence, doubtless, that such combination was entered into, but it would certainly be competent evidence, tending to show it, as disclosing a disposition and desire to do so, which with other evidence, might be sufficient to warrant a jury in finding that it was entered into. I am unable to see how any indefiniteness can arise by reason of this averment.

It is said it is indefinite because, while it charges that one of the purposes of the combination was to increase the price of ice, it does not state how this was to be done, [\*\*6] but it is not essential, as I view it, to the statement of an offense, that the conspiracy should have included the particular means to be used to that end. That may have been left for future determination. But if the purpose of the combination was to do this, it is made unlawful without regard to the particular means to be employed. The same may be said as to the charge that one of the purposes

was to prevent competition. The particular means to that end may not have been determined upon but a combination for that purpose is made unlawful. But it is objected that the indictment is indefinite because it charges that the purpose was to prevent competition between themselves and others, without naming the others. Here again it would not be essential in my judgment to the statement of an offense to charge the names of the other persons, for, *non constat*, but that the others, who might be competitors, were unknown even to those charged with [\*643] being members of the conspiracy. The term is in my opinion, sufficiently comprehensive in itself to include all others engaged in the same business.

**HN3**[] The gist of this offense is not the particular act done under the conspiracy, but the [\*\*7] formation of the conspiracy, and I think it is sufficiently descriptive in its purposes to advise the defendants of what they are to meet. The offense under the statute is the unlawful combination of skill and acts for this purpose. The particular means to be employed to accomplish the unlawful purposes may not have been agreed upon and are not in my opinion essential to the statement of an offense under the statute. The gist of the offense is the formation of a combination for such purpose. It is the purpose which is made unlawful and the means used to that end are immaterial and may be one thing at one date, and another at another and still be but the carrying out of a single unlawful purpose of combination.

It is also objected that the persons named in the indictment are described as defendants. It is probably true that the term is not technically correct, but does it result in any indefiniteness? After the persons are named in the indictment, their names are followed by this statement "each and all defendants herein," and they are afterwards referred to as "said defendants." I do not see how any indefiniteness results from this. The said defendants, after they are described as [\*\*8] each and all defendants, certainly include all that are named and so described.

It is further objected that the indictment is bad for duplicity. I think this indictment does not charge more than one offense. The offense charged here is the formation of a trust and not its continuance, and it is alleged to have been formed upon a date not known exactly to the grand jurors, but stated to have been about February 1, 1906. This offense is unlike the indictment recently held to be bad upon motion and demurrer, which in a second count alleged, with a continuendo, the carrying out of the illegal purposes by the combination. I did state it as my opinion, in deciding these motions and demurrers, that this would probably not render an indictment subject to the charge of duplicity. Whether that opinion be correct or not, I think this indictment is not open to that objection, as it does not state the carrying out of the illegal purposes of the combination, between certain dates or its continuance for any length of time, but only the single offense of the formation of an illegal combination upon a date, stated to be about February 1. **HN4**[] The carrying out of the purposes of such an illegal combination [\*\*9] is made a separate offense under the statute, but this indictment does not charge that the conspiracy was carried out. It is said that there is no statement of any overt act on the part of the defendants in the carrying out of the illegal purposes of the combination. In my judgment this statute [\*644] makes it an offense to form such a combination for the purposes stated, independent of any overt acts. **HN5**[] At common law, no overt act was essential to the offense of conspiracy.

As was said by Lyon, Judge, in the case of *State v. Crowley, 41 Wis. 271, 277 [22 Am. Rep. 719]*:

**HN6**[] "The offense of conspiracy, in one respect, is doubtless peculiar. It may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into a crime, although no act be done in pursuance of it."

**HN7**[] By the terms of this statute the formation of a trust or conspiracy against trade is made penal, although its purposes are not carried out. This is plain from the language of the statute. A combination, whose purpose is [\*\*10] to do the things forbidden in the future, is denounced by the statute. It is made an offense to enter such a combination, to make or enter into, or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall combine or have combined themselves, not to sell, etc. The carrying out of the unlawful purposes stated in the statute is made a separate offense by the terms of Lan. 7589 (B. 4427-4).

17 Ohio Dec. 640, \*644A 1906 Ohio Misc. LEXIS 155, \*\*10

It is objected that the capacity in which the defendants are charged with taking part, is not stated. It is true that Lan. 7589 (B. 4427-4) makes it an offense to carry out the purposes of such illegal combination, whether the person so doing acts as principal, manager, director, agent, servant or employer, or in any other capacity; but I do not think this would make it necessary to state in an indictment in what capacity he acted; if he was personally charged with offending against the statute, and it should appear that he acted in either of these capacities, he would be liable to the penalties of the statute.

This provision of Lan. 7589 (B. 4427-4), it is also to be observed, relates only to the carrying out of the purpose of the combination, **[\*\*11]** and these defendants are not charged with carrying out of the purpose of the combination.

The objections which are pointed out to this indictment do not seem to me to be valid objections and the motions are overruled.

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## **John D. Park & Sons Co. v. Hartman**

Circuit Court of Appeals, Sixth Circuit

March 14, 1907

No. 1,581

**Reporter**

153 F. 2d \*; 1907 U.S. App. LEXIS 4375 \*\*; 5 Ohio L. Rep. 5

JOHN D. PARK & SONS CO. v. HARTMAN

**Prior History:** [\*\*1] Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

### **Core Terms**

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contracts, patent, articles, covenants, medicines, monopoly, manufacturer, restraint of trade, prices, formula, retailers, sales, cases, secret process, trade secret, preparations, restraining, wholesale, dealers, selling, restricting, patentee, rights, vendee, secret formula, purchaser, orator's, secret, buy, common-law

### **LexisNexis® Headnotes**

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Patent Law > Ownership > Conveyances > General Overview

#### **HN1** **Ownership, Conveyances**

Articles made under patents may be the subject of contracts by which their use and price in sub-sales may be controlled by the patentee, and such contracts, if otherwise valid, are not against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Ownership > Conveyances > General Overview

Patent Law > Remedies > Damages > General Overview

#### **HN2** **Conveyances, Licenses**

The patent grants an exclusive right to use, to make, and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using, or selling. To the extent that he restricts either one of these separable rights, the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer. When a patentee imposes such restrictions, it may likewise constitute a contract between the patentee and his direct vendee or licensee. In such case, the patentee has a double remedy--an action in tort for infringement, or an action for the breach of the contract.

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments](#)

[Patent Law > Infringement Actions > Exclusive Rights > General Overview](#)

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses](#)

[Patent Law > Infringement Actions > General Overview](#)

[Patent Law > Infringement Actions > Infringing Acts > General Overview](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

[Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses](#)

[Patent Law > Remedies > Damages > General Overview](#)

[Patent Law > Remedies > Equitable Relief > Injunctions](#)

### **HN3** **Ownership & Transfer of Rights, Assignments**

Whether a remedy is sought for the violation of restrictions placed by a patentee, upon either the use or sale of an article made under the patent, is in tort or in contract, the rules of the common law in respect of monopolies and restraints of trade have no application, because the very object of the patent law is to give to the patentee an exclusive monopoly in using, making, and selling the device which embodies the invention, and this exclusive right he may exercise by contracts under which he reserves to himself so much of his exclusive right as he does not elect to sell or assign or license. Thus, contracts restraining subsequent sales or use of a patented article which would contravene the common-law rules against monopolies and restraints of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent.

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments](#)

[Patent Law > Ownership > Patents as Property](#)

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

[Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses](#)

### **HN4** **Ownership & Transfer of Rights, Assignments**

Any conditions which are not in their very nature illegal with regard to patentable property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

#### **HN5** **Conveyances, Assignments**

The owner of a patented article can charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

#### **HN6** **Ownership & Transfer of Rights, Assignments**

26 Stat. 209 (1901) does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the licensee or assignee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor.

Patent Law > ... > Utility Patents > Process Patents > General Overview

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

#### **HN7** **Utility Patents, Process Patents**

One who makes or vends an article which is made by a secret process or private formula cannot appeal to the protection of any statute creating a monopoly in his product. He has no special property in either a trade secret or a private formula. The process or the formula is valuable only so long as he keeps it secret. The public is free to discover it if it can by fair and honest means, and, when discovered, anyone has the right to use it.

Patent Law > ... > Utility Patents > Process Patents > General Overview

#### **HN8** **Utility Patents, Process Patents**

If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by a chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Ownership > Patents as Property

### **HN9** [blue downward arrow] **Ownership & Transfer of Rights, Assignments**

In the case of a patent the monopoly endures for the whole term of the patent. It gives the patentee the right to control the use of his invention during the entire period, and he may rightfully protect by contract his power to regulate all manufacture, sale, or use of things embodying his invention. It is this continuity of the right granted to the patentee which distinguishes it from the right to manufacture, sell, or use unpatented articles.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Civil Procedure > Discovery & Disclosure > General Overview

Trade Secrets Law > Civil Actions > Discovery

Patent Law > Ownership > Patents as Property

Patent Law > ... > Utility Patents > Process Patents > General Overview

### **HN10** [blue downward arrow] **Ownership & Transfer of Rights, Assignments**

If a man shall make a new invention or make a new discovery and it is useful, he may obtain a patent and thus secure a reward. But even then he must pursue the prescribed course in order to obtain it. He may keep his secret if he can. But, if he puts upon the market things embodying it, he forever loses his right to acquire a monopoly in it. But it does not follow that because the owner of a secret formula cannot protect himself against discovery of his secret by fair means that he cannot protect himself against a betrayal of his secret by one who has received it through confidential relations. So also will the owner of a secret process or formula be protected against a breach of contract, when the secret is communicated in confidence and under restrictions as to its use.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Patent Law > ... > Utility Patents > Process Patents > General Overview

### **HN11** [blue downward arrow] **Types of Contracts, Covenants**

Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is sold.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

153 F. 2d, \*24L907 U.S. App. LEXIS 4375, \*\*1

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Trade Secrets Law > Federal Versus State Law > Governmental Agencies

Contracts Law > Defenses > Illegal Bargains

Patent Law > ... > Utility Patents > Process Patents > General Overview

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trade Secrets Law > Protection of Secrecy > General Overview

#### **HN12** [blue icon] Intellectual Property, Ownership & Transfer of Rights

The most satisfactory ground upon which covenants, restraining the use to be made of a trade secret, may be said not to contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy, he has necessarily a monopoly in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected whether the process or formula is used by A or B or by both, for there can be no restraint of trade in respect of a method or formula which is known only to the discoverer and those to whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public loses no right by respecting a restricted disclosure.

Civil Procedure > Discovery & Disclosure > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Trade Secrets Law > Civil Actions > Discovery

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Patents as Property

#### **HN13** [blue icon] Civil Procedure, Discovery & Disclosure

The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, grants to him a monopoly of his invention, including the making, selling, and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > ... > Utility Patents > Process Patents > General Overview

#### **HN14** [blue icon] Trade Secrets & Unfair Competition, Trade Secrets

A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and one is free not only to use the process or formula if discovered by skill and

investigation without breach of trust, but to make and sell the thing or preparation as made by the process or formula of the original discoverer, if that be the truth.

Contracts Law > Personal Property > Rights of Possessors

Patent Law > Ownership > Conveyances > General Overview

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

Real Property Law > Estates > Future Interests > General Overview

#### **HN15** [blue icon] Personal Property, Rights of Possessors

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. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved are generally held void.

Estate, Gift & Trust Law > Estate Interests > Invalid Restraints & Rule Against Perpetuities

Real Property Law > Estates > Present Estates > Leasehold & Real Estates

#### **HN16** [blue icon] Estate Interests, Invalid Restraints & Rule Against Perpetuities

If a man be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Real Property Law > Encumbrances > Restrictive Covenants > Covenants Running With Land

Contracts Law > Defenses > Illegal Bargains

Estate, Gift & Trust Law > Estate Interests > Invalid Restraints & Rule Against Perpetuities

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

#### **HN17** [blue icon] Types of Contracts, Covenants

It is a general rule of the common law that a contract restricting the use or controlling sub-sales cannot be annexed to a chattel so as to follow the article and obligate the sub-purchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Defenses > Illegal Bargains

## [HN18](#) [↑] Types of Contracts, Covenants

No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

## [HN19](#) [↑] Regulated Practices, Trade Practices & Unfair Competition

If agreements and combinations to prevent competition are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character.

**Counsel:** Alton B. Parker, William J. Shroder, and Henry T. Tay, for appellant.

Frank F. Reed, Edward S. Rogers, and Frederick W. Hinkle, for appellee.

**Opinion by:** LURTON

## Opinion

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[\*26] Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The system of contracts by means of which the complainant proposes to retain control of all sales and resales of its goods is not unique. It was first applied to commodities made under patents or productions covered by copyright. According to one of the averments of the bill, the same system of contracts has been generally adopted by the wholesale and retail druggists of the United States. But this, we take it, means no more than it has been adopted as a plan for maintaining prices and controlling sales of proprietary medicines, a business which amounts to more than \$60,000,000 annually. That the same plan has been extended to sales in respect to other commodities, not coming under the peculiar claims advanced for "patent" medicines, we may take notice. [\*27] The question, in its shortest form, is whether the exemption from common-law rules against monopoly and restraints of trade, and the provisions of the federal anti-trust act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent or productions covered by a copyright, extend also to articles made under a secret process or medicine compounded under a private formula. The fundamental position of counsel for the complainant is that in principle there is no distinction between the monopoly secured to a patent or copyright and the monopoly of a trade secret, and they advance and defend the claim that articles made [\*27] under patents, copyrights, and trade secrets may lawfully be contracted for and sold under any conditions and limitations with respect to price and subsales which the vendor chooses to impose, and that "contracts relating to any such articles are not within the restraint of trade rules." If this contention is sound, the contracts under which the complainant conducts his business are legal, and no question remains but a consideration of the matter of the relief equity may give against one not a party [\*28] to such contracts under the facts of this case.

[HN1](#) [↑] That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled. [Heaton-Peninsular Button Co. v. Eureka Specialty Co., 77 Fed. 288](#), 25 C.C.A. 267, 35 L.R.A. 728; [Dickerson v. Tinling, 84 Fed. 192](#), 28 C.C.A. 139; [Edison Phonograph Co. v. Kaufmann](#)

(C.C.) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (C.C.) 116 Fed. 863; *Rupp et al. v. Elliott*, 131 Fed. 730, 65 C.C.A. 544; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 428, 61 C.C.A. 58; Bement v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. **HN2**<sup>↑</sup> The patent grants an exclusive right to use, to make, and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using, or selling. To the extent that he restricts either one of these **[\*\*4]** separable rights, the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer. This is the ground upon which the cases stand which uphold restrictions upon either use or sale of a patented article where infringement is alleged. But, when a patentee imposes such restrictions, they may likewise constitute a contract between the patentee and his direct vendee or licensee. In such case the patentee would have a double remedy -- an action in tort for infringement, or an action for the breach of the contract. The double remedy in such circumstances is noticed in *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C.C.A. 267, 35 L.R.A. 728, and in *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C.C.A. 58. In Bement v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the action was one for breach of a contract by which the patentee had suffered his invention to be used on condition that the articles embodying it should not be sold below a certain price. In *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C.C.A. 594, the bill was not **[\*\*5]** to restrain infringement, but to enjoin sales by a vendee who was a jobber and who by direct contract had purchased phonographs made under the patent, agreeing to sell only at a named price and only to retailers who signed an agreement regulating retail sales. **HN3**<sup>↑</sup> Whether a remedy is sought for the violation of restrictions placed by a patentee, upon either the use or the sale of an article made under the patent, is in tort or in contract, the rules of the common law in respect of monopolies and restraints of trade have no application, because the very object of **[\*28]** the patent law is to give to the patentee an exclusive monopoly in using, making, and selling the device which embodies the invention, and this exclusive right he may exercise by contracts under which he reserves to himself so much of his exclusive right as he does not elect to sell or assign or license. It follows therefore that contracts restraining subsequent sales or use of a patented article which would contravene the common-law rules against monopolies and restraints of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent. Bement v. National Harrow Co., 186 **[\*\*6]** U.S. 70, 91, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Edison Phonograph Co. v. Kaufmann* (C.C.) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (C.C.) 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C.C.A. 58. In the Bement Case, cited above, the action was at law to recover liquidated damages for the breach of a contract in respect of the price at which articles made under a patent should be sold. The court, among other things, said:

"The very object of these laws is monopoly, and the rule is, with very few exceptions, that **HN4**<sup>↑</sup> any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

In regard to the provision in respect to price the court said:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, **[\*\*7]** but that was only recognizing the nature of the property in, and providing for its value as far as possible. This the parties were legally entitled to do. **HN5**<sup>↑</sup> The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It was urged in the same case that the stipulations restricting the price at which sales might be made was in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U.S. Comp. St. 1901, p. 3200]), upon the subject of trusts and restraints of interstate trade, but the court held that the act did not apply to contracts in relation to patented articles, saying:

**HN6**<sup>↑</sup> "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the licensee or assignee of a patent by the owner thereof,

restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by [\*\*8] its framers."

In *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C.C.A. 594, the same reasoning was followed and the validity of an agreement restraining prices held to be a valid contract, because it related to a patented article. There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one subject are not altogether controlling as to the other. See *Bobbs-Merrill Co. v. I<sup>\*29</sup> Straus (C.C.A.) 147 Fed. 15, 23*. Nevertheless, the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply. *Murphy v. Christian Press Ass'n*, 38 App. Div. 426, 56 N.Y. Supp. 597. But **HN7**[<sup>↑</sup>] one who makes or vends an article which is made by a secret process or private formula cannot appeal to the protection of any statute creating a monopoly in his product. He has no special property in either [\*\*9] a trade secret or a private formula. The process or the formula is valuable only so long as he keeps it secret. The public is free to discover it if it can by fair and honest means, and, when discovered, anyone has the right to use it. *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068, 6 L.R.A. 839, 21 Am. St. Rep. 442; *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12, 16 Am. St Rep. 740; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Vulcan Detinning Co. v. American Contracting Co.*, 58 Atl. 290, 67 N.J. Eq. 243. In *Chadwick v. Covell*, Justice Holmes, speaking of the character of the title one has to a secret formula, said:

"Dr. Spencer had no exclusive right to the use of his formulas. His only right was to prevent anyone from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. *Peabody v. Norfolk*, 98 Mass. 452, 458, 96 Am. Dec. 664; *Morison v. Moat*, 9 Hare, 241, 263; *Williams v. Williams*, 3 Meriv. 157. The defendant got his knowledge honestly, and therefore has a right to make and sell the medicines. Having the right to make and sell the medicines, [\*\*10] the defendant has the right to signify to the public that the medicines are made according to the formulas used by Dr. Spencer."

In *Tabor v. Hoffman*, cited above, the New York court said:

**HN8**[<sup>↑</sup>] "If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by a chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts."

**HN9**[<sup>↑</sup>] But in the case of a patent the monopoly endures for the whole term of the patent. It gives the patentee the right to control the use of his invention during the entire period, and he may rightfully protect by contract his power to regulate all manufacture, sale, or use of things embodying his invention. It is this continuity of the right granted to the patentee which distinguishes it from the right to manufacture, sell, or use unpatented articles. **HN10**[<sup>↑</sup>] If a man shall make a new invention or make a new discovery and it is useful, he may obtain a patent and thus secure a reward. But even [\*\*11] then he must pursue the prescribed course in order to obtain it. He may keep his secret if he can. But, if he puts upon the market things embodying it, he forever loses his right to acquire a monopoly in it; i.e., to obtain a patent, either for manufacture, sale, or use. But it does not follow that because the owner of a secret formula cannot protect himself against discovery of his secret by fair means that he cannot protect himself against a betrayal of his secret by one who has received it through [\*30] confidential relations. *Jarvis v. Knapp*, 121 Fed. 34, 58 C.C.A. 1; *Harrison v. Glucose Co.*, 116 Fed. 304, 311, 53 C.C.A. 484, 58 L.R.A. 915; *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12, 16 Am. St. Rep. 740; *Morison v. Moat*, 9 Hare, 241; *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068, 6 L.R.A. 839, 21 Am. St. Rep. 442. So also will the owner of a secret process or formula be protected against a breach of contract, when the secret is communicated in confidence and under restrictions as to its use. *Fowle v. Park*, 131 U.S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

In *Fowle v. Park*, the owner of the formula sold the right to make the remedy and sell it under its trade-name at a restricted [\*\*12] price within a given territory. The court enjoined the breach of this agreement. The conclusion of

the learned Chief Justice who wrote the opinion of the court seems to rest, not upon any notion that contracts touching the sale of a secret formula or trade secret were outside the rules of the common law in regard to restraints of trade, but rather upon the theory that such contracts were governed by the principle against restraints, but valid because the covenants were made in connection with the sale of a business and not larger than necessary to protect the reserved rights of the assignor to carry on the same business. In *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U.S. [24](#), 53, [11 Sup. Ct. 478](#), [35 L. Ed. 55](#), Justice Gray seems to have rested the legality of such covenants upon the peculiar nature of the property which is the subject of the sale, saying:

**HN11** [↑] "Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is sold."

**HN12** [↑] The most [\*\*13] satisfactory ground upon which covenants restraining the use to be made of a trade secret may be said to not contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy he has necessarily a monopoly in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected whether the process or formula is used by A. or B. or by both, for there can be no restraint of trade in respect of a method or formula which is known only to the discoverer and those to whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public lose no right by respecting a restricted disclosure, for no freedom of traffic has been stifled. The language of Justice Holmes in *Board of Trade v. Christie*, [198 U.S. 236](#), [25 Sup. Ct. 637](#), [49 L. Ed. 1031](#), in respect of contracts limiting the right of those who receive the market quotations to a special use, is equally applicable to trade secrets in general. The learned justice said:

"But, so far as these contracts limit the communication [\*\*14] of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

In *Ammunition Co. v. Nordenfeldt*, L.R. 1 Ch. Div. 630, 1894, Lord Justice Bowen said that the sale of a trade secret was not within [\*31] the mischief of restraint of trade, because, "unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

The basis of the common-law protection accorded to an author is the same. His legal rights grow out of the peculiar nature of the property. His composition is properly regarded as his absolute property. He need not disclose it. But the unrestricted offer of a single copy to the public operates as a disclosure or publication, and his exclusive right to make other copies is gone. But he may in confidence exhibit his work under restrictions, and this, like the confidential disclosure of a trade secret, will not amount to a dedication to the public, and he will be protected against a violation of the conditions imposed. The whole subject of the common-law [\*\*15] rights of an author is so fully and carefully discussed by Judge Townsend in *Werckmeister v. American Lithographic Co.*, [134 Fed. 321](#), 69 C.C.A. 553, 68 L.R.A. 591, and in *Bobbs-Merrill Co. v. Straus (C.C.A.)* [147 Fed. 15](#), that it would be a work of supererogation to again go over the subject. The cases relating to the distribution of news and information rest also upon the peculiar kind of property rights involved. So long as one who by his own industry has gathered together news or information, and does not disclose it, he cannot be compelled to make publication. The matter is his own in as true a sense as a trade secret or private formula, or the composition of an author. In such circumstances it is not illegal to protect the news gatherer against the piratical use of his news and prevent a public disclosure by one who has placed himself under obligation to respect a restricted use. In such case public disclosure is destructive of its value as property. *Board of Trade v. Christie*, [186 U.S. 236](#), [250](#), [25 Sup. Ct. 637](#), [49 L. Ed. 1031](#); *Jewelers' Mercantile Agy. v. Jewelers' Pub. Co.*, [84 Hun. 12](#), [32 N.Y. Supp. 41](#); *Id.*, [155 N.Y. 251](#), [49 N.E. 872](#), [41 L.R.A. 846](#), [63 Am. St. Rep. 666](#); [\*\*16] *National Tel. News Co. v. Western Union Tel. Co.*, [119 Fed. 294](#), 56 C.C.A. 198; *Exchange Tel. Co. v. Gregory*, etc., Co., 1 Q.B. Div. 147 (1896); *F.W. Dodge, etc., Co. v. Construction Co.*, [183 Mass. 62](#), [66 N.E. 204](#), [60 L.R.A. 810](#), [97 Am. St. Rep. 412](#). In the Board of Trade Case, cited above, Justice Holmes, speaking of the protection granted to the business of distributing stock quotations, said:

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing it, to itself. \* \* \* The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public."

The trading stamp and railroad ticket cases, such as [Sperry & Hutchinson Co. v. Mechanics' Clothing Co. \(C.C.\) 135 Fed. 833](#), and [Nashville, etc., Ry. Co. v. McConnell \(C.C.\) 82 Fed. 65](#), likewise rest upon the peculiar character of the property rights involved. Neither concern the buying and selling of articles of general commerce, and both relate to things [\*\*17] in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic. But it does not follow that because a secret process [\*32] or formula for a medicine or beverage will be protected against betrayal by employes or those to whom it has been communicated in confidence under a contract for a restricted use that a system of contracts for the control of all sales and subsales of the device, medicine, or beverage when once made will be outside of the rules in restraint of trade simply because the product of such secret process or formula. We have here to deal not with contracts which relate to the secret formula itself, or the right to use a trade-name or dress, as in Fowle v. Park, 131 U.S. 88, [9 Sup. Ct. 658, 33 L. Ed. 67](#), but with the preparation when made by the owners of the process. The preparation when ready for the market and the formula are two separate and distinct things and may have distinct ownerships. Contracts in respect of a restricted use of the formula are not within the rule against restraint because of the character of the property right in such a secret. There can be no unrestricted use, before [\*\*18] discovery by fair means, to which the owner does not consent, and then only at the expense of the destruction of its commercial value as a secret; but this is not the case with contracts which affect only traffic in the manufactured product of the secret formula. Freedom of traffic in that is consistent with its value and does not involve exposure of the formula.

Neither is there any such analogy between an article made under a patent and an article made under a secret formula as to require like exemptions from the rules which relate to articles made under neither. It is well at this point to notice that the exemption from the rule against restraint has never been extended to contracts in respect of articles made under a patent which have once passed beyond the domain of the patent by an original sale without restriction. The only reason which has ever been given for holding that a contract restricting the field of using, selling, or making of an article made under a patent is that the patent statute has granted an exclusive monopoly which cannot be cut down by the rule against restraint for that would be to grant a monopoly by law and then proceed to take it away by law.

But, [\*\*19] if the owner of a secret process or a private formula does not or cannot bring himself under the protection of the patent statute by securing a patent upon his discovery, he cannot claim the advantage of the statute. [HN13](#)<sup>↑</sup> The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, has granted to him a monopoly of his invention, including the making, selling, and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law. [HN14](#)<sup>↑</sup> A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and, as we have already seen, one is free not only to use the process or formula if discovered by skill and investigation without breach of trust, but to make and sell the thing or preparation as made [\*33] by the process [\*\*20] or formula of the original discoverer, if that be the truth. [Chadwick v. Covell, 151 Mass. 190, 23 N.E. 1068, 6 L.R.A. 839, 21 Am. St. Rep. 442](#). To say that the owner of this secret need not make the medicine, nor sell it when made, unless it suits his convenience, is true. But the same thing may be said of the man who grows potatoes. He need not grow them, and need not sell them when grown. But, if something be conceded in favor of an article which no one can produce except the owner of the formula over one which any one can produce, what shall it be? There is no statute creating a lawful monopoly such as seems to take articles made thereunder without the rule against illegal restraint. Neither will the commercial value of the manufactured product vanish if subjected to the principles which apply to things not so made. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself apply to the product of the formula.

Without assenting to the claim that the making and selling of the preparation is a "publication" in the technical sense of that term, we are nevertheless unable to discover any legal or economic [\*\*21] reason which justly exempts such articles when made from all of the rules of the common law which forbid unreasonable restraints in trade and from the anti-trust act of Congress in so far as trade in the prepared medicine is the subject of interstate commerce. Judge Cochran, who heard this case below, after considering the differences between a secret process and the article made, said:

"What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by the purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers and thus putting them on the market. Equally so the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but purchased or obtained otherwise from the manufacturer, may refrain from selling them to purchasers and thus [\*\*22] putting them on the market. Suppose the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into in reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that the complainant's medicine has been made under a secret process has no effect whatever upon the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property".

Although Judge Cochran concluded that the complainant's preparations were no more exempt from the common-law rules against restraints of trade by reason of the fact that they had been prepared under secret formulas than if that had not been the case, he reached the ultimate conclusion that any vendor of an article might make similar contracts to those in suit, [\*\*23] and that the control which was thereby secured over subsequent sales was not an unreasonable restraint [\*34] of trade. Most of the cases which he cites in support of his conclusion are in conflict with the grounds upon which he rests his decision, and, indeed, the learned counsel for the Hartman Company have not assented to so much of Judge Cochran's opinion as holds that a trade secret remedy stands in no better plight than it would if the preparation had been disclosed upon the label. And so it has come about that the cases which have directly involved the Hartman system of contracts, and which are relied upon by counsel to sustain their legality, all stand upon the assumption that an article made under a secret formula may be the subject of contracts maintaining prices and controlling subsequent sales to as full an extent as an article made under a patent or a production secured by a copyright. The cases directly in point are all nisi prius decisions, except [Jayne v. Loder, 149 Fed. 21](#), decided by the Circuit Court of Appeals, Third Circuit, and are all quite recent. They include three cases in which the Dr. Miles Medical Company was the plaintiff, namely, [Dr. Miles Medical \[\\*\\*24\] Company v. Goldthwaite \(C.C.\) 133 Fed. 794](#). The force of this case is weakened because the decree was not resisted. The next is [Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838](#), decided by the same judge who decided the Goldthwaite Case. The next is [Dr. Miles Medical Co. v. Platt \(C.C.\) 142 Fed. 606](#). This was followed by [Wells & Richardson v. Abraham \(C.C.\) 146 Fed. 190](#), in which the legality of the contracts was not denied, thus lessening the value of the opinion as an authority. The ground upon which the two contested cases cited above was rested was the identity between the rights of a patentee and the owner of a mere trade secret or private formula with respect to the product or manufactured article. Thus, in Dr. Miles Medical Co. v. Jaynes, cited above, Judge Colt said:

"The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this they do not rely so much upon the common-law rule as upon the federal statute (26 Stat. 209). The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure [\*\*25] or lawful discovery, the complainant has an exclusive property in these trade secrets and has the exclusive right to make and use and vend the articles made thereunder. The exclusive right of property in a trade secret is of necessity a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making them. It may sell them, or refrain from

selling them: It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning articles made under trade secrets, the same as similar contracts concerning articles made under a patent or copyright, are outside the rule of restraint of trade whether at common law or under the federal statute. [Hartman v. Park \(C.C.\) 145 Fed. 358](#); [Dr. Miles Medical Co. v. Platt \(C.C.\) 142 Fed. 606](#); [Wells & Richardson Co. v. Abraham \(C.C.\) 146 Fed. 190](#); [Dr. Miles Medical Co. v. Goldthwaite \(C.C.\) 133 Fed. 794](#); Bement v. National Harrow Co., 186 U.S. 70, [22 Sup. Ct. 747, 46 L. Ed. 1058](#); [Board of Trade v. Christie, 198 U.S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031](#); [Garst v. Harris, 177 Mass. 72, 74, 58 \[\\*\\*261 N.E. 174\]](#); Fowle v. Park, 131 U.S. 88, 97, [9 Sup. Ct. 658, 33 L. Ed. 67](#); [Park & Sons Co. v. National Wholesale Druggists' Association, 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578](#); [Standard Fireproofing Company v. St. Louis Company, 177 Mo. 559, 76 S.W. 1008](#); [Victor Company v. The Fair, 123 Fed. 424, 61 C.C.A. 58](#); [Heaton-Peninsula Company v. Eureka Company \(C.C.\) 77 Fed. 288](#), 25 C.C.A. 267, 35 L.R.A. 728; [\*35] [Central Shade Company v. Cushman, 143 Mass. 353, 9 N.E. 629](#); [Good v. Daland, 121 N.Y. 1, 24 N.E. 15.](#)"

In [Dr. Miles Medical Co. v. Platt \(C.C.\) 142 Fed. 606, 610](#), Judge Kohlsaat says:

"These suits are brought for an infringement or violation of the property right of the complainants in the secret process owned or controlled by them. The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the Victor Talking Machine Case, cited above, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required [\*\*27] to give reasons or deal fairly with purchasers. Why is it material, then, in a suit to prevent infringement of complainants' rights in their secret processes, to inquire whether complainants have entered into a combination or conspiracy to control the very thing they are lawfully entitled to control?"

Jayne v. Loder, cited above, was decided by the Third Circuit Court of Appeals. It was an action under the seventh section of the antitrust act against a combination of three distinct national associations, one that of the wholesale druggists, another that of the retail druggists, and the Association of Manufacturers of Proprietary Medicines. The object of the combination was to exclude every dealer from trading in proprietary medicines at all who would not consent to sell to members of the combine only and at prices named by it. Arguedo Judge Archbald did say that an individual proprietor might enforce his own terms in respect to his own goods. But this was not involved. The combination was in the teeth of the law whether an individual proprietor could or could not enforce such a system as that there involved.

If we are right in our conclusion that the manufactured product [\*\*28] of a trade secret or private formula is not immune from the common-law rules forbidding monopolies and unreasonable restraints in trade, the cases above referred to must be disapproved, at least in so far as they are grounded upon the cases which deal with articles made under patents or copyrights. In addition to the cases cited above, counsel for the appellees cite and rely upon [Park v. National Wholesale Druggists' Ass'n, 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578](#). That case involved the validity of a method of doing business and a system of contracts between manufacturers of proprietary medicines and wholesale druggists dealing in such medicines for the purpose of suppressing competition in prices. The opinion does not support the validity of such a system of contracts with reference to medicines not protected by any patent, for the decision is bottomed upon the assumption that the "proprietary medicines," the subject of the contracts then involved, were made under patents. Judge Haight, who delivered the opinion of the court, said:

"The matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trade-marks, [\*\*29] copyrights, or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as 'proprietary goods,' and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price and adopt such plan for the sale thereof as he, in his judgment, may determine."

[\*36] To the objection that the contracts were in restraint of trade, he said:

"Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified."

The principle upon which Park & Sons Co. v. National Wholesale Druggists' Association was decided is emphasized [\*\*30] in the subsequent case of [Straus v. American Publishers' Assn, 177 N.Y. 473, 477, 69 N.E. 1107, 64 L.R.A. 701, 101 Am. St. Rep. 819](#), where was involved the validity of an agreement between publishers of copyrighted books to regulate the price at which retail dealers should sell such books. If the agreement had stopped there, the New York court thought the agreement valid and not in unlawful restraint of trade under the principles announced in Bement v. National Harrow Company, 186 U.S. 70, [22 Sup. Ct. 747, 46 L. Ed. 1058](#), an opinion to which we have heretofore referred, which involved contracts for controlling prices of articles made under patents. After referring to the Bement Case Judge Parker, who had written a concurring opinion in the previous case, after setting out the reasoning of Justice Peckham in the Bement Case, said:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the [Park & Sons Co. Case, 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578](#), upon [\*\*31] which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out."

The dissenting opinion of Judge Martin, in case of [Park & Sons Company, 175 N.Y. 1, 67 N.E. 136, 62 L.R.A. 632, 96 Am. St. Rep. 578](#), also proceeds upon the assumption that the subject-matter of the agreement concerned medicines made under patents. See page 42 of 175 N.Y., on page 140, of 67 N.E. (62 L.R.A. 632, 96 Am. St. Rep. 578). The vice which the New York court found in the Straus Case was, not that the agreement obliged publishers not to sell copyrighted books to dealers who would not maintain the retail price dictated by the publishers, but that they also refused to sell uncopyrighted books to all such dealers as did not maintain prices on copyrighted books. This the court found under the facts of the case would operate practically to exclude all persons from the business of selling uncopyrighted books who would not become parties to the agreement to maintain the price of copyrighted books, and tended [\*\*32] to create a monopoly of sale of books not copyrighted. Touching this, the court said:

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection [\*\*37] which the Federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (supra), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone [[Union Bluestone Co. Case, 164 N.Y. 401, 58 N.E. 525, 52 L.R.A. 262, 79 Am. St. Rep. 655](#)] or envelopes [[Berlin & Jones Envelope Co. Case, 166 N.Y. 292, 59 M.E. 906](#)], and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is: What may be done under the agreement? Reference to the complaint makes it clear that the association [\*\*33] has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association."

That decision puts the New York court squarely in opposition to agreements, combinations, and "systems of contracts" between a manufacturer of unpatented or uncopyrighted articles and his vendees which tend to an unreasonable restraint of trade or to create a monopoly, and makes plain the ground upon which such contracts had been maintained in the Park & Sons Co. Case. That the "proprietary medicines," called more than once "patent medicines," were not in fact patented, is of no significance, if true, for the court assumed they were, and it does not appear from anything in any of the opinions that the fact assumed was not true. That opinion, by its own language, as well as by the pointed reference to the principle upon which it rested in the later opinion of the same court, has

no application when, as here, the subject of the contracts in question is unpatented and uncopied articles. The cases of Elliman & Sons v. Carrington & Son, L.R. 1901, 2 Ch. Div. 275, and *Garst v. Harris, 177 Mass. 72, 58 N.E. 174*, are also cited as supporting the legality of such a series of agreements as that under which complainant conducts his business. Both cases involved contracts of sale of article, presumably made under secret formulas, though no stress is laid upon the fact in the Elliman Case. Each was a suit directly between the vendor and his vendee. Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law. Neither case holds that a buyer from such a vendee, even with notice, would not get title or come under the obligation of the contract between the original parties. The most that can be made of the decisions is that, having regard to the subject-matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore **[\*\*35]** not within the mischief of the rule against restraints. The Elliman Case was decided by a single judge.

*Walsh v. Dwight (Sup.) 58 N.Y. Supp. 91*, another case relied upon to support the decree, was an action by a maker and dealer in salsaratus and soda, alleged to be an article in common use, against another maker who sold another brand which he called "Dwight's **[\*38]** Cow Brand Salsaratus and Soda," for damages to him through a course of business by which his brand of the same article lost much demand. The defendant did this, first, by extensive advertising; second, by giving to all dealers a rebate who would agree to sell its article at a minimum price named and to charge a like price for every other brand. The price thus fixed was, as averred, an extravagant price and operated to enlarge the demand for the defendant's advertised brand and diminish that for the plaintiff's. The court found no illegal restraint of trade, as there was "nothing to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone willing to buy." The substance of the decision is well stated in the syllabus as follows:

"An agreement by a **[\*\*36]** manufacturer with his customers to give them a rebate if they should refuse to sell his article, or other similar articles, at less than a certain price, is not in restraint of trade."

The fact that "Peruna" is a trade-name, that it is put on the market in a distinctive trade dress, has no bearing upon the question. The defendants are not charged with infringing the trade-mark or trade dress. The medicine they bought was the medicine put up by the complainant, and the defendants have neither sold nor offered to sell a preparation of their own for and as the preparation of the complainant. A trade-mark, or a trade-name, or trade dress, have no other effect than to prevent one from "palming" off his goods for those of another. *Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219, 55 L.R.A. 631*; *Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118*. The averments of the bill as to the complainant's trade-name and trade dress are irrelevant, for no exemption from the principles of the common law is secured by either. *Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219, 55 L.R.A. 631*; *Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118*. The transactions described in the bill plainly constitute sales of complainant's medicines and the general title passes to every such purchaser and subpurchaser. *Garst v. Hall & Lyon Co., 179 Mass. 588, 590, 61 N.E. 219, 55 L.R.A. 631*. To call such a purchaser an "agent" is to juggle with words. "Sale" is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales which pass the general property in chattels, as well as the possession, and provide for no reverter.

Neither is the suit based upon any breach of contract by the defendants. Confessedly, they have made no contract with complainants, and have definitely refused to conform to complainant's methods of doing business. That they have bought "Peruna" on the market from sellers who had it for sale is true. That the bill avers that they bought without being licensed to buy is true. That they bought from vendors who knew this fact and who thereby breached their agreement not to sell **[\*\*38]** to dealers who had not been certified to them as licensed buyers who had entered into an agreement with the complainant restricting resales is also averred. That Park & Sons Company knew **[\*39]** complainant's plan of business, and that in selling to them every such vendor thereby breached his

agreement, is also charged, and, for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. [Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219, 55 L.R.A. 631](#). A prime objection to the enforceability of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.[HN15](#)

[\*\*39] 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. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void."If [HN16](#) a man," says Lord Coke, in Coke on Littleton, § 360, "be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man." [HN17](#) It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with [\*\*40] or attach itself to a mere chattel. Spencer's Case, 3 Resolution, 5 Coke, 16; Wald's Pollock on Contracts (3d Ed.) 278; Splidt v. Bowles, 10 East, 279, 282; [Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. Rep. 220](#); [Prater v. Campbell, 110 Ky. 23, 60 S.W. 918](#); [Appollinaris Co. v. Scherer \(C.C.\) 27 Fed. 18, 21](#); Garst v. Hall & Lyon Co., [179 Mass. 588, 691, 61 N.E. 219, 55 L.R.A. 631](#); Taddy Co. v. Sterions Co., 73 Law Journal, 1904, Ch. Div. p. 191; De Mattos v. Gibson, 4 De J. & Jones, 276, 282. Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights. They also cite [New York Bank Note Co. v. Hamilton Bank Note Co., 180 N.Y. 280, 294-295, 73 N.E. 48](#), De Mattox v. Gibson, 4 De J. & Jones, 276, and [Whitwell v. Tobacco Co., 125 Fed. 454](#), 60 C.C.A. 290, 64 L.R.A. 689. The New York Bank Note Company Case concerned the legality of a contract for [\*\*41] the sale of "Kidder [\*40] Printing Presses" with attachments enabling them to do a certain class of work. There were patents upon certain parts of the press, but none upon the attachments. It was contended that a covenant which restricted the sales of the press with the attachments was void as in restraint of trade. The fourth syllabus is in these words:

"The fact that the contract restricted the sale of presses except to the printing company, and that a separate consideration was paid for the covenant of restriction, does not render the contract so unreasonable in its restraint of trade that it is void for that reason, where the adoption of the press to the special use was the work of both parties and the covenant not to sell other presses for similar work accompanied the manufacture and sale of a press, and constituted an integral part of the thing sold."

The ground is better shown by the following extract from the opinion itself:

"So far as the machine was the subject of patent its use was lawfully a monopoly, and therefore no contract relating to it could be condemned as creating a monopoly. But, whatever may have been the case as to the patentable character of the [\*\*42] machine, we think the fact that its adaption to the special use was the joint work of both parties, and that the covenant not to sell other presses for similar work accompanied the manufacture and sale of a machine, rendered that covenant reasonable as constituting an integral part of the value of the thing sold."

See [Tode v. Gross, 127 N.Y. 480, 28 N.E. 469, 13 L.R.A. 652, 24 Am. St. Rep. 475](#). It is manifest that the case is not in point. De Mattox v. Gibson is still less an authority.

Under a bill for specific performance of a charter party the question arose as to whether a mortgagee of the chartered vessel should be allowed to foreclose and thereby intercept a voyage which the vessel was under

contract to make when the mortgage was given, of which contract the mortgagee had notice. It was in respect of such facts that Justice Bruce used the language which is supposed to support the notion that a covenant may attach to chattels which pass by delivery from hand to hand and bring any one who buys with notice under the restrictions against a resale at less than a dictated price. But even in that case it was said that the mortgagee who took his mortgage with notice incurred no [\*\*43] liability in respect to the charter party, and was only obliged to desist from doing anything which would prevent performance. *Whitwell v. Tobacco Co.* involved nothing more than whether a tobacco manufacturer might sell his goods at one price to those who would agree to buy only from him and at a higher price to those who would not.

The conclusion we reach upon all the foregoing considerations is that the complainant cannot obtain the active interposition of a court of equity against one who is under no contract relation to him, unless the covenants which he has imposed upon his vendee and subvendees are only such reasonable and partial restraints, for his own protection, as may be legally exacted by one who sells a business or property. This court in *United States v. Addyston Pipe Co. et al.*, 85 Fed. 271, 281, 29 C.C.A. 141, 46 L.R.A. 122 et seq., speaking by Judge Taft, laid down as an indispensable condition that "no [HN18](#) conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary [\*41] to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect [\*\*44] him from the dangers of an unjust use of those fruits by the other party." Covenants in partial restraint, and ancillary to a principal contract, which had generally been upheld, the learned judge divided into five principal classes. The fourth of these classes he defined as covenants "by the buyer of property not to use the same in competition with the business retained by the seller." As typical cases under this class, he cited *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C.C.A. 634, and *Hitchcock v. Anthony*, 83 Fed. 779, 28 C.C.A. 80, both being decisions by this court. *Navigation Co. v. Winsor*, 20 Wall. (U.S.) 64, 22 L. Ed. 315; *Dunlop v. Gregory*, 10 N.Y. 241, 61 Am. Dec. 746; *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335, 1 Am. St. Rep. 816. The court below located the contracts here involved as coming under the fourth class, being covenants ancillary to the sale of the medicines put up by the complainant, which he concluded were not unreasonable for the protection of the retained business of the covenantee. Assuming that these contracts operate only as a partial and not a general restraint, a question which we do not concede, and that they are properly to be [\*\*45] considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. 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. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of [\*\*46] the prices and sales of the line of preparations made by complainant. 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. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In *Continental Wall Paper Co. v. Voight & Sons Co. (C.C.A.)* 148 Fed. 939, where was involved a combination in restraint of trade, and, where each wholesaler and retailer in the business had executed separate but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing [\*42] prices. This was rested upon the holding that the several agreements constituted one whole. See, also, observations of Judge Taft in *United States v. Addyston Pipe Co.*, 85 Fed. 275, 29 C.C.A. 141, 46 L.R.A. 122, and [\*\*47] of Justice Peckham in *Montague v. Lowry*, 193 U.S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

The plain effect of the "system of contracts," the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between

jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. **[\*\*48]** If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied and then should say, "I will sell only to those who will resell only to those I shall license to buy and only at the price I dictate," could any voice be raised to say that the covenants, which every dealer should sign in order to prevent exclusion from trade in such articles, would be upheld by the courts and a remedy by injunction granted to restrain **[\*\*49]** breaches? But it is said that a distinction exists between contracts which relate to articles which any one can make and sell and those which are made under a secret process, and that covenants in respect to the former might affect the public interest, while the public would not be affected by like covenants relating to the latter class of subjects. But, unless we are willing to say that that fact places such products wholly outside of the mischief incident to restraints of trade and upon a plane of equality in that respect with that occupied by things made under the statutory monopoly of a patent, the fact can be of no weight except as it may be a factor in determining whether the covenants exacted of jobbers and retailers, alike regulating subsequent sales and selecting subsequent buyers, are **[\*43]** no more than necessary to afford a fair protection to the business of the complainant and not so large as to interfere with the interests of the public. There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: "What is a reasonable restraint with reference to a particular case?" This was the test applied in Horner **[\*\*50]** v. Graves, 7 Bing. 735, and in Nordenfeldt v. Maxim Nordenfeldt Co., 1894, App. Cases, 535, 567, and also approved by this court in the Addyston Pipe Co. Case, 85 Fed. 271, 282, 29 C.C.A. 141, 46 L.R.A. 122. A general system of contracts, such as that which the complainant seeks to enforce and which 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.

Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to any one who will buy "necessary," to use Judge Taft's phrase, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party"? In what way are covenants which compel retailers to maintain **[\*\*51]** prices, to quote Chief Justice Tindal, "such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public"? Horner v. Graves, 7 Bing. 735. The learned trial judge found it difficult to answer these questions. He says in his opinion (145 Fed. 358):

"That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it for them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised of such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst its vendees and subvendees and enable him to maintain his prices for his medicine."

The averments of the bill are very general. Thus it is averred that:

"Some time since the class of stores known as 'department stores' and 'cut rate stores' have inaugurated a system of obtaining [\*\*52] from cut rate wholesale and jobbing druggists and elsewhere, and offering for sale your orator's medicines, remedies, and preparations at retail prices lower than the prices fixed by your orator and stamped upon the cartons and packages. Said system is known as the 'cut rate' or 'cut price' system and resulted in much confusion, trouble, and damage to your orator's business, and has injuriously affected the reputation and depleted the sale of your orator's remedies, medicines, and preparations. Thereupon, and in order to protect its trade, custom, and business, and the manufacture and sale of his remedies, medicines, and preparations, your orator has established and put in force the following methods and system of governing, regulating, and controlling the sale and marketing of your orator's said medicines, remedies, and preparations."

Then, after setting out the system of contracts, which is now sought to be enforced, it is said:

[\*44] "The entire purpose and object of the said system of contracts, serial numbers, lists, and cards being to prevent the cutting of prices and the demoralization of trade, both wholesale and retail in your orator's medicines and remedies, and [\*\*53] the injury and damage resulting to your orator's aforesaid trade and business in the manufacture and sale of said remedies and medicines, as aforesaid, which said system and method your orator charges both in its form and purposes, and the prices therein fixed are reasonable, regular and proper, and which, if observed, will accomplish the aforesaid purposes and greatly benefit your orator in his aforesaid business by increasing the sales of and demands for his remedies, medicines, and preparations."

"These allegations," said the court below, "must be taken as true," and upon these he held that the complainants were advantaged by the covenants and injured if not so restrained. In this conclusion we cannot concur. Prima facie the contracts are plainly in restraint of trade. It was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business. Unless he could do this, he could not ask equitable relief under such covenants. This the bill does not do, unless the court is to be content with general averments that the competition methods called derisively the "cut rate" or "cut [\*\*54] price" system had "demoralized," "confused," "troubled," and "damaged" the complainant's business. So, also, it is averred that the "system" had and will accomplish the suppression of the competition plan "and greatly benefit your orator in his business by increasing the sales of and demand for his remedies." Doubtless the "system" rigidly enforced will put an end to the "demoralization," the "trouble," and "confusion" incident to competition. But such an averment as this can be of no legal consequence, for it is no more than to say that a noncompetitive system of conducting trade and traffic in the line of articles made by complainant is of more advantage than the ordinary competitive system. That the suppression of even unreasonable competition will sanctify an agreement or combination to restrain trade will not be claimed. The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation. A partial restraint of competition may be upheld when one sells a business or other property, provided it is no greater than necessary to enable the vendor to realize [\*\*55] the value of his good will or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. But here the only competition which the contracts in question tend to suppress is competition between those who buy his goods to sell again. How the suppression of competition between his vendees and subvendees is to secure to him the enjoyment of the legitimate fruits of his contracts of sale, to which the restrictive covenants are supposed to be ancillary, or to protect him against an unjust competition, is not clear, and the bill states no facts from which we can determine whether these covenants are necessary and reasonable. The general averment that under the "cut rate" plan of doing business, demoralization and damage resulted, while under the "contract system" enlarged sales and increased emoluments have and will follow, does not answer the question as to why such covenants are necessary to protect complainant against [\*45] consequences which may fairly require protection. Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion [\*\*56] that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to

any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against **[\*\*57]** his retained business. No instance has been called to our attention where the main purpose and principle, if not only result, is to protect buyers against the competition of each other. If such a principle shall find lodgment in the law, it must be upon economic reasons which are in conflict with those which now prevail. The single direct effect of the "system of contracts" is to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way. Each obtains a price enhanced by the "system" over the "cut rate" or "cut price" method which had before prevailed, and which it was the object of the new plan to abolish. It may be that sales went on as before; but at a higher price to the consumer than would otherwise have been paid. In [Addyston Pipe Co. v. United States, 175 U.S. 211, 244, 20 Sup. Ct. 96, 44 L.Ed. 136](#), it was said:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts **[\*\*58]** to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

It is no answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined. In [People v. Sheldon, 139 N.Y. 251, 264, 34 N.E. 785, 789, 23 L.R.A. 221, 36 Am. St. Rep. 690](#), it was said:

**[\*46] [HN19](#)** **[↑]** "If agreements and combinations to prevent competition are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon an actual proof of public prejudice or injury, it would be very difficult in any case to establish **[\*\*59]** the invalidity although the moral evidence might be very convincing."

This principle was very strongly approved by this court in the Addyston Pipe Case, so frequently referred to, and many other cases cited in its support. It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the Addyston Pipe Case with a strength to which we can add nothing.

Our **[\*\*60]** conclusion is that complainant's system of contracts is not enforceable. The injunction must be discharged.

The case will be remanded, with directions to proceed as may be consistent with this opinion.

## R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.

Circuit Court, W.D. Virginia

March 20, 1907

No Number in Original

**Reporter**

151 F. 819 \*; 1907 U.S. App. LEXIS 4990 \*\*

R. J. REYNOLDS TOBACCO CO. v. ALLEN BROS. TOBACCO CO.

### **Core Terms**

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tag, tobacco, brand, color, trade-mark, label, advertising, manufacture, peculiar, plug tobacco, purchaser, letters, red, copies, style, words, appearing, deceive, unfair, good will, designated, fraudulent, consumer, plugs, customer, bottle, boxes, conveyance, packages, dealers

### **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Trademark Law > Conveyances > Assignments

Contracts Law > Contract Conditions & Provisions > General Overview

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Patent Law > Ownership > Conveyances > General Overview

#### **HN1** [down arrow] **Conveyances, Assignments**

A clause in a conveyance of property which includes good will, trade-marks, trade-secrets, and letters patent, is perfectly valid, and not in restraint of trade at all, and clearly a clause of that character does not so directly affect interstate trade or commerce as to be within the statute, even if it were in restraint of trade.

Trademark Law > Trademark Cancellation & Establishment > General Overview

Trademark Law > Conveyances > General Overview

#### **HN2** [down arrow] **Trademark Law, Trademark Cancellation & Establishment**

Where a device or mark is in part arbitrary and, to that extent, would have no natural or necessary significance in that connection with the article manufactured, apart from its use in that connection, yet, by such use of the plaintiffs' in connection with their manufacture and sale of these articles, it has become well known to the trade, and has

come to be taken by dealers as a peculiar designation by which the plaintiffs' goods are distinguished in the market, it is therefore, both in its character and use, when taken together, a lawful trade-mark.

[Business & Corporate Compliance > ... > Sales of Goods > Performance > Insurable Interest & Identification](#)

[Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress](#)

[Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview](#)

[Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview](#)

[Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview](#)

[Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > General Overview](#)

### **HN3** **Performance, Insurable Interest & Identification**

The general rule of law is that, if a manufacturer has applied a peculiar and distinctive label to designate his goods, and has so used it that his goods are identified by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to lead to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods.

[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[Trademark Law > Special Marks > Trade Names > General Overview](#)

[Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview](#)

### **HN4** **Regulated Practices, Trade Practices & Unfair Competition**

When an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of.

[Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud](#)

[Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage](#)

[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview](#)

[Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview](#)

151 F. 819, \*819 U.S. App. LEXIS 4990, \*\*4990

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Conveyances > Valid Transfers

#### **HN5** Bad Faith, Fraud & Nonuse, Fraud

An ownership and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. Where a company has no property in the words or in the means by which this fraud is committed, but it owns the good will -- the custom -- which the false and fraudulent use of these words and names injures and destroys, its proprietary interest in that good will is ample to warrant the court in enjoining its destruction by the fraud. Suits for infringements of trade-marks rests on the ownership of the trade-marks. Suits for unfair competition in trade are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom -- the good will -- of a business, and that the good will is injured, or is about to be injured, by the palming off of the goods of another as his.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

#### **HN6** Consumer Protection, Likelihood of Confusion

No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation of himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

#### **HN7** Consumer Protection, Likelihood of Confusion

Rivals manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of

agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

## **HN8** Contracts, Sales of Goods

The intention on the part of an alleged infringer to induce purchasers through the use of simulated trade-mark or dress, to buy his goods under the belief that they are another, furnishes no ground for relief, unless the similarity between the two trade-marks is of character to convey a false impression to the public mind, and to mislead and deceive the ordinary purchaser.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

## **HN9** Consumer Protection, Deceptive & Unfair Trade Practices

The public, as well as individuals, is entitled to protection from those, who by unfair means and methods seek to palm off an article which is not what it is represented to be.

**Counsel:** **[\*\*1]** Frank F. Reed, for complainant.

Caskie & Coleman, for defendant.

**Opinion by:** PRITCHARD

## **Opinion**

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**[\*820]** PRITCHARD, Circuit Judge. This suit was instituted in March, 1906, and seeks to enjoin the defendant from unfair and fraudulent competition. Both the complainant and defendant are engaged in the business of manufacturing smoking and chewing tobacco, the complainant at Winston-Salem, N.C., and the defendant at Lynchburg, Va. Complainant is a corporation created under the laws of New Jersey, and the defendant is a Virginia corporation. The sum or value in controversy exceeds \$2,000, exclusive of cost and interest. In 1880 Richard J. Reynolds, then a manufacturer of plug tobacco, originated a formula or recipe, selected the name "Schnapps" as the trade-mark or trade-name for the product, and placed his article upon the market under that style. R. J. Reynolds was succeeded in business in 1888 by R.J. Reynolds & Co., a copartnership, composed of R. J. Reynolds, William N. Reynolds, and Henry Roan. In 1890 the copartnership was converted into the R. J. Reynolds Tobacco Company of North Carolina, and this company, in 1899, sold out to, and was succeeded by, the R.J. Reynolds Tobacco **[\*\*2]** Company of New Jersey, the complainant. The copartnership and corporations in each instance acquired the plant, assets, property, good will, trade-names, trade-marks, trade-dress, recipes, and trade-rights of the predecessor, announced succession, preserved the Schnapps formula as a trade-secret, and

continued the manufacture of the brand at the same place, and in substantially the same way under the general conduct and supervision of the originator of both the business and [\*821] brand. Prior to 1894, Schnapps had been marketed with the tag in various designs. In that year a new and theretofore unused style of tag was gotten up, and from that date employed for the tag, consisting of a narrow tin rhomboid, exhibiting a dark brown or black background with the word "Schnapps" imprinted thereon in red back-slanting letters. Two or three such tags, one for each cut, are placed upon each plug, and are the only badges or marks of origin or identification attached to the tobacco and accompanying it, usually seen by the consumer. The plugs with the tags attached are packed in the usual way in boxes or caddies which bear the name and address of the maker, and an enlarged reproduction [\*\*3] of the tag upon the sides and ends. In retail stores, where the tobacco is sold to users, the caddies are usually unheaded and placed in show cases or rear shelves where but little of the letter press thereon is visible, but where the general appearance of the tag can be seen; and from such caddies the retailer passes out the plugs or cuts to the buyer. The market for this brand embraces the Southern states. The brand has been, especially since 1894, extensively advertised by signs, hangers, posters, and circulars, which usually have reproduced on an enlarged scale the peculiar identifying tag. About \$1,000,000 have been expended in advertising the brand of tobacco called "Schnapps." The sales have reached 11,500,000 pounds annually. The consumers are largely colored and white people unable to read. The tag is thoroughly associated with and in the minds of users, and identifies the product of complainant, directly or indirectly, by signifying the thing desired. Beginning in 1902, after defendant's infringement started, indented letters were used for the Schnapps tag, and to some extent advertised as identifying the genuine product. Six years after Schnapps was well established [\*\*4] and known, and the peculiar features of the tag associated and identified with, and relied upon as a badge of origin, defendant, a rival plug tobacco manufacturer, with knowledge of the facts relative to Schnapps came upon the market with a new brand styled "Traveller," and employed a tag of same dimension, shape, and color, and the word "Traveller" inscribed thereon in red back-slanting letters. The plugs of tobacco are identical in shape, size, color, and weight with complainant's; have the tag affixed in the same places and numbers, and are packed in boxes and caddies of the same sizes. The shapes, sizes, and colors of plugs, number of cuts, and places of tags, method of packing, and sizes and shapes of boxes, are common to the trade. Traveller tobacco is inferior in quality, is sold to the trade for a less price than the brand of complainant known and designated as "Schnapps," and sold to the consumer for the same prices, and is not advertised to any extent. It is exposed for sale and sold in the same way and to the same class of consumers, and in the same markets as Schnapps.

It is insisted by the complainant that the defendants' salesmen are requested to suggest to retail [\*\*5] dealers that the "Traveller" brand can be substituted for "Schnapps" with greater profit; and this has been done, and is being done. It is also insisted that it is shown by the testimony that the defendants at the suggestion of a customer by the name of Tom Morton, of Tennessee, adopted the size, color of tag, etc., and color of letterpress to enable such substitution and passing off of the [\*822] Traveller brand of tobacco; that the defendants' salesmen had deliberately and methodically represented to retail dealers that by similarity of the label "Traveller" brand could be palmed off on buyers as "Schnapps"; that the imitation is calculated and does deceive buyers; that the defendants have been repeatedly and cautiously warned, but have refused, to desist their conduct; that although the imitation tag has been on the market for four or five years, it is only within the last 18 months that it has been actively urged or pushed and that it was not until after the institution of this suit that the fraudulent inception of Traveller was ascertained by complainant. The injunction sought is to stay the use in the manufacture, packing, and distributing of plug tobacco, containing a [\*\*6] tag identical or like that of complainant, or the tag used by defendants of the same style or color, style, color, or arrangement of letterpress, calculated to enable or of enabling the plug tobacco of the defendants to be substituted and passed off, and sold as the plug tobacco of complainant. It is not claimed that the Traveller brand is an infringement of the Schnapps brand as a trade-mark or trade-name. This is a suit to enjoin unfair and fraudulent competition in trade. It is insisted by counsel for defendants that there is a want of title to the Schnapps brand and tag, because of a stipulation in the conveyance from the R.J. Reynolds Tobacco Company of North Carolina to the complainant, the R.J. Reynolds Tobacco Company of New Jersey, upon the ground that the contract in question contains a clause in restraint of interstate commerce or trade, and therefore void.

The amended bill of complaint shows the inception of the business in 1880 by Richard J. Reynolds, its transfer in 1888 to R.J. Reynolds & Co.; the succession in 1890, of the R.J. Reynolds Tobacco Company of North Carolina,

and the acquisition of the business by the R.J. Reynolds Tobacco Company of New Jersey in 1899. [\*\*7] These averments, which are practically unchallenged by the answer, save that the legality or the validity of the conveyance from the North Carolina Company to the New Jersey Company is denied as violative of the anti-trust act, are amply sustained by the conveyances, of which copies are annexed to the affidavit of Richard J. Reynolds as exhibits 1 to 11, inclusive. Exhibit 1, Copartnership articles, dated January 2, 1888, between Richard J. Reynolds, W. N. Reynolds, and Henry Roan; the former retaining the ownership of all brands. Exhibit 2. Articles of incorporation of R.J. Reynolds Tobacco Company of North Carolina, dated February 11, 1890, showing R. J. Reynolds, W. N. Reynolds, and Henry Roan, taking all the shares of stock. Exhibit 3. Deed from R. J. Reynolds to R.J. Reynolds Tobacco Company of North Carolina, conveying the factory, fixtures, furniture, and brands. Exhibit 5. Articles of incorporation of R.J. Reynolds Tobacco Company of New Jersey dated April 3, 1899. Exhibit 6. Resolution of stockholders of R.J. Reynolds Tobacco Company of North Carolina, authorizing the directors to sell and convey as of March 21, 1899, the good will, business, trade-marks, brands, patents, [\*\*8] trade-secrets, processes, formulas, bills and accounts receivable, real estate, factory, plant machinery, and all assets and property of the North Carolina Company to the R.J. Reynolds Tobacco Company of New Jersey. Exhibit 7. Resolutions [\*823] of board of directors of North Carolina Company April 10, 1899, authorizing such transfer. Exhibits 8 and 9. Deeds of factory from R. J. Reynolds and North Carolina Company to New Jersey Company, dated January 30, and April 11, 1899. Exhibit 10. General conveyance April 11, 1899, from R.J. Reynolds Tobacco Company of North Carolina and its stockholders, to R.J. Reynolds Tobacco Company of New Jersey, conveying the tobacco manufacturing business of vendor as a going concern with all good will, personal property, chattels, trade-marks, trade-names, brands, labels, copyrights, trade-secrets, etc., and all property effects, assets, and estate of vendor. Among the registered brands scheduled as "Schnapps." Exhibit 11. Separate transfer, dated April 11, 1899, of registered trade-marks and brands, enumerating Schnapps as registered April 22, 1884. The defendant seeks to show that the complainant is not the legal owner of the Schnapps tag, [\*\*9] and, in support of this contention, it is insisted that the conveyance from the North Carolina Company to the New Jersey Company is violative of the anti-trust act.

In order to sustain the proposition contended for by defendants, it must first appear that the contract is in restraint of trade, and it must also appear that it is in restraint of interstate commerce or trade. It has been repeatedly held that HN1[<sup>A</sup>] a clause of this description in a conveyance of property which includes good will, trade-marks, trade-secrets, and letters patent, is perfectly valid, and not in restraint of trade at all, and clearly a clause of this character does not so directly affect interstate trade or commerce as to be within the statute, even if it were in restraint of trade. The questions thus sought to be raised do not apply in a suit of this character. While the court is of opinion that the evidence amply shows that the contract entered into between the R.J. Reynolds Tobacco Company of North Carolina and the R.J. Reynolds Tobacco Company of New Jersey in 1899, is not in violation of the anti-trust act, at the same time, it is admitted that the complainant is in the possession of the trade-mark "Schnapps," [\*\*10] and the label, and that it has been in possession of the same for a long time under color of title and right. It necessarily follows that it is in the rightful possession of the same. It is a well-settled principle that, as against a trespasser, possession of the premises is sufficient.

The tag which is asked to be protected having been adopted in 1894, while the trade-mark Schnapps was owned by the R.J. Reynolds Tobacco Company of North Carolina, and it appearing that all of the business and assets have been transferred to complainant, this would be sufficient without a specific assignment of the trade-mark to give complainant a perfect title to all rights pertaining to the tag. Pillsbury v. Pillsbury-Washburn F. Mills Co., 64 Fed. 841, 12 C.C.A. 432; Prince Co. v. Prince Co., 57 Fed. 938, 6 C.C.A. 647; Kidd v. Johnson, 100 U.S. 617, 25 L. Ed. 769; Hoxie v. Chaney, 143 Mass. 592, 10 N.E. 713, 58 Am. Rep. 149. The evidence shows that Schnapps tag has been constantly used and employed since April, 1899, by complainant and such use was long prior to the adoption of the Traveller tag. It thus appearing that the North Carolina Company has ceased to use the Schnapps tag, under these [\*\*11] circumstances the complainant acquired title to the same independent of any conveyance that may have [\*824] been made to it by the North Carolina Company. Baking Powder Co. v. Raymond (C.C.) 70 Fed. 376, two cases.

The court will now consider the question whether the adoption of the Schnapps tag in shape, size, and color of same were in combination new, peculiar, and distinctive.

The verified bill of complaint on page 6, among other things, alleges:

"In the year 1894, while the said R.J. Reynolds Tobacco Company of North Carolina was the owner and proprietor of said business, and was engaged in the manufacture, exploitation, and sale of plug tobacco under said secret formula and recipe at said plant and place, and employing the said trade-mark and trade-name thereon, said R.J. Reynolds Tobacco Company of North Carolina did devise, and thereforth use and employ, in connection with said trade-mark and trade-name, Schnapp, a new, peculiar, original, and theretofore unused tag exhibiting a new, peculiar, original and theretofore unused form and combination of color, shape, and size, and color, and style of letterpress, wherein the word 'Schnapp' was printed in red back-slanting [\*\*12] letters upon a very dark or black tin tag of rhomboidal form. Said form of letterpress, and color of type, and color and form of tag were new, original, striking, and distinctive, and not theretofore used or employed upon or in connection with plug tobacco."

R. J. Reynolds syas in his affidavit:

"When, in 1894, the Schnapp tag was changed and the present style adopted, this style, so far, as I then knew, or now know, was absolutely new and original. I had been selling, manufacturing and dealing in plug tobacco at that time for a period of over 20 years, and was well posted as to the style of tags employed. Prior to that time, I never saw or heard of a tag of this description; that is, an elongated lozenge or parallelogram, with slanting ends, dark background, and the name of the brand in red letters inscribed thereon. This tag was devised for the express purpose of identifying and distinguishing the manufacture of the R.J. Reynolds Tobacco Company, and from the beginning was extensively advertised for that very purpose."

W. V. Birchfield, after stating that he has known the Schnapps brand for 12 or 14 years, says:

"The tag in its present form was adopted in 1894. When [\*\*13] I first became acquainted with the brand, it was new and distinctive, and I cannot remember of ever having seen anything like it on plug tobacco."

Tom Morton, who has been in the tobacco business in the South since 1889, and is familiar with brands, says:

"When I first saw the Schnapps tag, it was to me new, peculiar, and distinctive in shape and colors, and was, so far as I know, new and peculiar to the R.J. Reynolds Tobacco Company."

W. Z. Stultz says:

"I am well acquainted with the Schnapps brand, and knew it prior to 1894, when the present form of label was adopted. So far as I know, the combination of shape of label, color of label, and color and slant of letters, was new and original."

George P. Cornell, Jr., says:

"I have known Schnapps brand since about 1894. In 1894 a new tag of the present form was adopted. Prior to that time I never saw a similar tag."

R. U. Falkner says:

"That the present form of Schnapps, when adopted in 1894, was new and original, and affiant had never seen anything like it before."

[\*825] W.T. Brown, of Brown Bros. Company, is familiar with plug tobacco brands and has known Schnapps since its appearance on the market, and knew [\*\*14] of the new tag adopted in 1894, and says:

"That at the time of the adoption and placing upon the market of the present Schnapps tag, its design and combination of shape, color, and color of letters a distinctively original and new tag."

Geo. T. Brown, president of Brown & Williamson Tobacco Company, of Winston-Salem, N.C., who has been manufacturing and selling plug tobacco in Southern states for 12 years, and who has known the brand Schnapps since put on the market says:

"The tag adopted in 1894, was in design and combination of shape, color, and color of letters, new and original."

E. M. Bohannon, of Winston-Salem, has been a manufacturer and seller of plug tobacco in the South for 18 years and has known Schnapps from its origin, gives the same evidence as to the newness and originality of the Schnapps tags. W. A. Whitaker, of Winston-Salem, who has made and sold plug tobacco for 25 years, says the same thing. So do J. P. Taylor, a member of the firm of Taylor Bros., manufacturers, and C.D. Ogden, of Ogden Hill & Co., both of Winston-Salem, after an experience as a manufacturer of plug tobacco of 25 years' duration. The peculiar and distinctive tag for Schnapps has been [\*\*15] extensively advertised and used, and is now thoroughly associated with and identifies the R.J. Reynolds Tobacco Company's product. Bill of complaint (page 96) affidavit of Richard J. Reynolds, and exhibits thereto. The evidence shows that over 783,676,524 tags have been used upon the plugs sold since 1894. This advertisement and association of the peculiar and distinctive tag as a badge of identification is stated in the bill of complaint, and abundantly sustained by the proof.

R. J. Reynolds says:

"It is safe to say that since the adoption of the new form of Schnapps tag in 1894, the R.J. Reynolds Tobacco Company of North Carolina and the R.J. Reynolds Tobacco Company of New Jersey, has expended the sum of \$1,000,000 in advertising Schnapps tobacco, of which sum the advertising matter which reproduced the Schnapps tag. During the same period 83,773,776 pounds of Schnapps, bearing 783,676,524 tags, have been sold."

The exhibits of advertising matter reproducing the 1894 Schnapps tag are exhibit 13, May 6, 1901, 50,000 copies; Exhibit 14, May 15, 1901, 25,000 copies; Exhibit 15, August 17, 1901, 50,000 copies; Exhibit 16, March 20, 1902, 100,000 copies; Exhibit 17, store signs, [\*\*16] showing caddies and tag; April 19, 1902, 50,000; October 8, 1902, 50,000; Exhibit 18, April 11, 1902, 20,000 copies; Exhibit 19, July 19, 1902, 50,000 copies; October 16, 1902, 50,000; February 2, 1903, 100,000; April 6, 1903, 50,000; Exhibit 20, June 20, 1903, 50,000 copies; August 19, 1903, 50,000 copies; Exhibit 21, November 14, 1903, 42,000 copies; Exhibit 22, April 20, 1904, 100,000 copies; Exhibit 23, February 16, 1904, 100,000 copies; Exhibit 24, January 30, 1904, 500,000 copies; Exhibit 25, April 30, 1904, 100,000 copies; Exhibit 26, before 1900; Exhibit 27, before 1900; Exhibit 28, issued 1901; Exhibit 29, prior to 1900; Exhibit 30, issued in 1898 or 1899; [\*826] Exhibit 31, issued several years since; Exhibit 32, 1895 or 1896; Exhibit 33, issued in 1901. These signs and hangers were distributed all over the South. In 1899, Exhibit 34, showing Schnapps tag on cover was extensively distributed. In March, 1903, Exhibit 35, a pamphlet, showing tag reproduction was issued to the extent of 1,000,000 copies. Keeping in mind the enormous sales, and that all of the mass of advertisement was of a permanent character, and hung up in public places, and that the prominent and [\*\*17] striking features were in most instances of advertising, and in all instances of sales, the tag itself, it necessarily follows that the tag, original, individual, and peculiar, became closely associated with the product in the minds of buyers.

W. V. Birchfield says that the tag from its adoption has served to identify the tobacco, and adds:

"From the earliest date of my experience, the people identified the product by the peculiar shape and style of this tag. I know there are thousands of people in my territory who chew Schnapps, and identify it by the shape and color of the tag without being able to read the word Schnapps."

Tom Morton, after stating that he has noticed throughout the South for a great number of years the advertisements reproducing the tag, says:

"Beyond question this peculiar tag is thoroughly identified with and identifies and designates the tobacco of the Reynolds Company, and the people rely on the shape, color, and arrangement and the general appearance of the tag as identifying that tobacco, as well as the word 'Schnapps' itself. This is particularly true of many of the consumers of plug tobacco. Of these a great many are ignorant people who cannot [\*\*18] read, and who depend upon not the printed name, but simply the general appearance of the tag as identifying the tobacco asked for."

W. Z. Stultz says:

"I know that this label in its general appearance is thoroughly identified with the Schnapps brand of tobacco, and is relied upon by purchasers as identifying the thing that they want."

Geo. P. Cornell, Jr., says:

"I know that the people rely on the general appearance of this tag as identifying the goods."

In order to properly determine the merits of this controversy, it is well to understand what it takes to constitute unfair and fraudulent competition in trade. The complainant seeks to enjoin the defendant from the use of a tobacco tag known and designated as "Traveller," which it alleges has been used by the defendant in an unfair and fraudulent manner in the manufacture and sale of plug tobacco. The title of complainant to the Schnapps tag is clearly established, as will appear by the statement of facts in this cause. It appears from the evidence that Geo. T. Brown, Wm. T. Brown, F. M. Bohannan, W. O. Whitaker, J. B. Taylor, and C. D. Ogburn, rival manufacturers, and not all interested in the result of this suit, without [\*\*19] exception, state that, owing to the extensive reproduction of the tag in advertising Schnapps brand and tag it had become generally understood on the part of the public as well as dealers that the Schnapps brand was and is associated and identified as the product of the R.J. Reynolds Tobacco Company. [\*827] The extensive advertising of this particular brand, and the familiarity with the tag on the part of the public, and the further fact that complainant's goods are known and identified thereby, will be presumed in law from the undisputed facts shown by the testimony as to extensive advertising, long use, and extensive sale.

The New England Awl Co. v. Marlborough Awl Co., 168 Mass. 154, 46 N.E. 386, 60 Am. St. Rep. 377, was a suit for the protection of a bronze colored box. The court, among other things ruled:

"The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in [\*\*20] its favor. McAndrew v. Bassett, 4 De Gex. J. & S. 380."

It appearing that the Schnapps style of label is identified with complainant's product and that it has a trade or secondary meaning, it will in equity be protected from imitation. The theory upon which the ruling in cases like this is based is that where one adopts a means of advertising, new and peculiar, and has extensively advertised and used the same for a considerable period of time that he thereby becomes the owner of the good will and particular trade in which he is engaged and no one can legally by fraud or falsehood deprive him of the proprietary interest thus acquired, and it being made to appear to the satisfaction of the court that the right thus acquired is being interfered with by trick, artifice, fraud, or falsehood by those who come in competition with him in the sale of his product, a court of equity will by injunction prevent such interference upon the ground that it constitutes unfair and fraudulent competition in trade. The following cases clearly establish the principle that if a manufacturer has adopted a new, peculiar and distinctive label, for the purpose of designating his goods, and the evidence [\*\*21] shows that he has used it -- his goods being identified by it -- a court of equity will restrain another party from adopting and using a similar label arranged so as to mislead purchasers who exercise ordinary care in the purchase of such articles.

In Morrison v. Case, 9 Blatchf. 548, Fed. Cas. No. 9,845, in speaking of the name and figure of a star employed in connection with shirts, it was said:

**HN2** [↑] "Though this device or mark is in part arbitrary and, to that extent, would have no natural or necessary significance in that connection with the article manufactured, apart from its use in that connection, yet, by such use of the plaintiffs' in connection with their manufacture and sale of these articles, it has become well known to the trade, and has come to be taken by dealers as a peculiar designation by which the plaintiffs' goods are distinguished in the market. It is therefore, both in its character and use, when taken together, a lawful trade-mark. It has long been employed by the plaintiffs, and well understood, by dealers and the public, as designating such articles of their manufacture."

In [Anheuser-Busch Brewing Ass'n v. Clarke \(C.C.\) 26 Fed. 410](#), it was said in reference [\*\*22] to a red diagonal band or label used upon a bottle of beer:

**HN3** "The general rule of law applicable to this case is that, if a manufacturer has applied a peculiar and distinctive label to designate his goods, and has [\*828] so used it that his goods are identified by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to lead to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods. [McLean v. Fleming, 96 U.S. 245, 24 L. Ed. 828](#). The complainant's affidavits show that the complainant was the first to use for bottled beer a label with a diagonal red band, with the name of the kind of beer appearing in white letters on the red band, and that he had been habitually using this label for two years. The label is very noticeable and distinctive; one by reason of the diagonal red band. The result of the effect upon the eye from seeing a number of bottles is that it is a beer labeled with a diagonal red band, and the more frequently one sees it the more this one effect is deepened. It does appear altogether probable that a consumer who has [\*\*23] been accustomed to getting bottles labeled with complainant's label would more and more rely on the diagonal red band as its distinctive mark, and would be likely to accept the respondent's beer with his diagonal label on it as supplying what he was in the habit of getting. There is nothing in the differences in the labels calculated to counteract this; and, I think, it is a strong case of a similarity likely to deceive."

In [Hires Co. v. Consumers Co., 100 Fed. 809](#), 41 C.C.A. 71, where the defendant had first adopted, advertised, and used for root beer a certain form of bottle, it was said:

"It was proven that the complainant's root beer was principally known to and recognized by consumers from the peculiar form of bottle. It was this distinguishing feature which caught the eye, and abided prominently in the memory. Indeed, the court below declared in its opinion that the changes made by the defendant in its label tended to deceive, 'when taken in connection with the shape of the bottle,' thus clearly recognizing the fact that the form of the bottle employed was an effective factor in the deception practiced."

In case of [Elgin National Watch Co. v. Illinois Watch Co., 179 U.S. 1\\*\\*24 665, 21 Sup. Ct. 270, 45 L. Ed. 365](#), where the controversy was over the word "Elgin" as a trade-mark, it was held incapable of protection as a trade-mark, but the court declared:

"But **HN4** when an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. [Lawrence Manufacturing Co. v. Tennessee Mfg. Co., 138 U.S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997](#); [Coats v. Merrick Thread Co., 149 U.S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847](#); [Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.](#)"

In [Walter Baker & Co. v. Puritan Pure Food Co. \(C.C.\) 139 Fed. 680](#), it is said:

"Evidence has been introduced to show that complainant has constantly used its trade-mark or emblem since about [\*\*25] 1875, and at enormous expense has thus advertised its product in the leading newspapers and periodicals published throughout the United States and Canada. As a natural result thereof, complainant's appropriation, not only attracted the attention of the public generally, but was the means of identification of its chocolates and cocoa by the consumer. That such chocolate and cocoa is frequently purchased and designated by the buyers as 'the cocoa with the picture of the woman or girl,' or 'the chocolate with the picture of the lady,' is abundantly established by the evidence. Hence, it cannot be successfully controverted that complainant's chocolate and cocoa, irrespective of the words 'Walter Baker & Co.' printed upon [\*829] the labels, became and were distinctly known and identified by its trade-mark. The full enjoyment of such reputation and means of identification by complainant is unmistakably entitled to protection. The fact that its product is also known or identified by the name of 'Baker,' or 'Walter Baker's Chocolate or Cocoa,' is not material. The purchaser is entitled

to receive the commodity which he desires and intends to buy, although other persons may know [\*\*26] it by different marks of identification or accessories."

In the case of *Johnson v. Seabury & Johnson (N.J. Ch.)* 61 Atl. 5, it is said:

"Every case of this class must be dealt with according to the facts in each, having in mind the rights of the public as well as those of the parties. In the case under consideration the complainant, by conspicuous and continued use of, and by extensively advertising its goods under, the red cross symbol, so impressed the public that it came to rely upon the red cross as indicating complainant's goods, and to look upon the red cross symbol as an indicia of origin; and from this grew the habit of the consumer, when desiring complainant's goods, to call for 'Red Cross Cotton,' as in a similar manner was supplied the word 'Angostura' in *Seigert v. Finlater*, 7 Ch. Div. 801, so that, by the act of the public these words became the usual designation of the article, which the court will protect. *Levy v. Waitt, 61 Fed. 1008, 1011*, 10 C.C.A. 227, 25 L.R.A. 190."

The Schnapps brand is not claimed by complainant to be a trade-mark, nevertheless complainant is entitled to protection against any imitative device or style of dress which enables the substitution [\*\*27] of another's product.

In the case of *Shaver v. Heller & Merz Co., 108 Fed. 825*, 48 C.C.A. 48, 65 L.R.A. 878 (Circuit Court of Appeals, Eighth Circuit), Judge Sanborn, who delivered the opinion of the court, in discussing this proposition, among other things, said:

"Another proposition of counsel for the appellants is that the appellee has, and can have, no proprietary interest in the word 'American,' or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. *HN5* But an ownership, and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds; but he owns the field, and the crop it is producing, an these facts are sufficient to warrant any court in granting him summary relief by injunction against the threatened injury. The appellants scatter throughout the land for the purpose of deceiving the public and diverting to themselves the trade, [\*\*28] custom, and the good will of the appellee, words and names which convey false statements that the goods they are selling were made by the Heller & Merz Company. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will -- the custom -- which the false and fraudulent use of these words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the court in enjoining its destruction by the fraud. The contention of counsel for the appellants here is a confusion of the basis of two classes of suits -- those for infringements of trade-marks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trade-marks. Suits of the latter class are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is [\*\*29] entitled to the custom -- the good will -- of a business, and that this good will is injured, or is about to be injured, by the [\*830] palming off of the goods of another as his. *Lee v. Haley*, 5 Ch. App. 155; *Flour Mills Co. v. Eagle, 86 Fed. 608*, 30 C.C.A. 386, 41 L.R.A. 162; *Coats v. Thread Co., 149 U.S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847*; *Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118*."

In *Reddaway v. Banham*, 13 R.P.C. 218, a suit was instituted for the purpose of securing protection for the words "Camel Hair" which were used as the name of belting which constituted about 60 per cent. of camel hair. The evidence in that case showed that the words "camel hair" had by long use by the complainant acquired a secondary meaning and to signify his goods. The court, in discussing this proposition, said:

"I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used, to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood because in its primary sense [\*\*30] it may be true."

And, in discussing the doctrine of unfair competition in trade, the court said:

"I have often endeavored what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it), that is, that HN6<sup>↑</sup> no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation of himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer."

In the case of Coats v. Thread Co., 149 U.S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, it is said:

"There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe that he is buying those of the plaintiffs. HN7<sup>↑</sup> Rivals manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, **[\*\*31]** in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

Counsel for defendant cite the case of Coats v. Thread Co., 149 U.S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, in support of their contention, but a careful reading of the same shows that, instead of sustaining the views urged by the defendant, it rather tends to support the theory upon which this suit was instituted. Counsel for defendant also rely upon the case of Centaur Co. v. Marshall, 97 Fed. 791, 38 C.C.A. 419, the court said:

HN8<sup>↑</sup> "The intention on the part of an alleged infringer to induce purchasers through the use of simulated trade-mark or dress, to buy his goods under the belief that they are another, furnishes no ground for relief, unless the similarity between the two trade-marks is of character to convey a false impression to the public mind, \* \* \* and to mislead and deceive the ordinary purchaser."

In that case it was held that, while there were elements in both labels that were common, yet **[\*\*32]** inasmuch as there were many distinguishing **[\*831]** elements, and each manufacturer put its name on the labels, so that any one who desired to look and see could do so, that was sufficient. Relief was denied. It necessarily follows from the quotation in the case, *supra*, if the labels had been without distinguishing features save the name employed, a different conclusion would have been reached by the court. In the case at bar the defendant adopted and used a simulated trade-mark or dress which was calculated to convey a false impression to the public mind, "and to mislead and deceive an ordinary purchaser."

Again, in the case of Heide v. Wallace & Co. (C.C.) 129 Fed. 649, and *Id.*, 135 Fed. 346, 68 C.C.A. 16, relied upon by counsel for defendants. In the former case, it is said:

"This device stamping or embossing the monogram has been employed for the purpose of marking their goods by others in the same trade, including the defendants, fully as long, if not longer, than the complainant."

The language used by the court in the above paragraph is sufficient to distinguish that case from the one at bar. The evidence in that case clearly shows that the device employed in marking **[\*\*33]** the goods by others than the complainant had been in use by them as long, if not longer, than the complainant. Complainant was, therefore, met at the threshold of the proceeding with an insuperable barrier which he could never overcome in a suit of this character.

Again, referring to the diamond form and lettering, the court said:

"Furthermore, except as these so-called pastilles are sold in bulk, neither the form nor the lettering is brought to the attention of purchasers until after they have bought them; and while both, no doubt, even so, might aid in an intended deception, it has to be initially induced and practically accomplished by the outside of the package, as addressed to the eye of the customer, which is thus controlling."

This is sufficient to differentiate that case from the one at bar.

In the case now under consideration, the tag on the plug of tobacco may be seen when the purchase is made, and before the purchaser asks for the article. The court, in continuing the discussion, among other things, said:

"The case, in this view, is brought down to the use by the defendants of the words 'Liquorice Pastilles,' and the manner they have taken to dress their packages."

[\*\*34] From this quotation, it appears that the words "Liquorice Pastilles" are descriptive and in common use, and hence no right exclusive or otherwise obtainable therein; and the court, in conclusion, said:

"In the face of this demonstration, it cannot be successfully contended that the term 'Liquorice Pastille,' which has been in such long and familiar use, is distinctive of the plaintiff's manufacture."

The court also said:

"It is only when he adds his name and trade-mark that we have anything that is, and these the defendants in no way imitate. Neither do they the style or coloring with which he dresses out his package. This is in mixed red and blue, set off in gilt, with the diamond trade-mark prominently displayed; while the defendant's package is predominantly yellow, with an entirely different style of lettering in red, shaded with white on a black background, with their name written below."

[\*832] These statements taken from the opinion in that case fully differentiate it from the case at bar, leaving the proposition upon which plaintiff relies for relief in this instance, not only unaffected, but to a certain extent sustained, thereby; the theory in that case being [\*\*35] that the shape and size of the boxes were common to the trade, and not susceptible of a monopoly. It was also held that the boxes not being the same in coloring and marking, it was not likely that a customer of ordinary intelligence would be misled or deceived thereby.

In the opinion of the Court of Appeals, where this case was heard, the court, among other things, said:

"There is nothing whatever to suggest an attempt to catch the unwary purchaser and inveigle him into taking the one when he was seeking the other, nor could the most careless be deceived, except he was in reality unconcerned as to which he got."

The inference to be drawn from the opinion in that case is that, if the colors of the boxes labeled by defendant had been similar to those of complainant, the complainant would have been entitled to relief. The use of distinctive colors, together with the arrangement upon the exterior of the boxes, and the use of the respective manufacturers' names, were deemed insufficient by the court to justify the relief sought, upon the theory that the name "Pastille," and size of the packages were old and known to the trade, and the use of the same was a right that was common [\*\*36] to all persons engaged in the mercantile business. How different are the facts in the case at bar. Here, we have a tag which has been adopted and used by the complainant consisting of a peculiar background, the use of the word "Schnapps" on slanting letters, and the tag being rhomboid in shape. This tag, as stated, has been extensively advertised throughout the country, and, as a result of which, has become identified with the particular grade of tobacco sold by complainant, and has been used by the public to such an extent that such brand has established a reputation by virtue of the means thus employed to identify and advertise the same. The evidence shows conclusively that the R.J. Reynolds Tobacco Company conceived the idea of placing upon the market a certain grade of tobacco stamped with the word "Schnapps" as a means of identifying and advertising the same. It appears that about \$1,000,000 have been expended by this company in advertising this particular product; as a result of which, it has become well known and identified as a particular brand of chewing tobacco.

While the elements taken as a whole constitute entirely new and distinct features unknown to the trade prior [\*\*37] to the adoption of this particular brand, at the same time, the different elements thus combined, when considered separate and distinct the one from the other, do not constitute an element new and unknown to the trade. Therefore, it is the result of the combination, letterpress, background, color, size and form of tag which give to the label of complainant features that are separate, new, and distinctive and which were unknown to the trade at the

time of its adoption. The principle invoked by complainant is well defined, and is governed by a long line of decisions intended to secure fair and impartial dealings, among those who may seek to place their goods, wares, and merchandise on the market.

[\*833] The evidence of Tom Morton, reading at Memphis, Tenn., is, that while he was engaged in selling the product of the defendant that the brand of Traveller was adopted solely with the view of enabling the defendant to find a ready market for this kind of tobacco which the defendant at that time was exceedingly anxious to introduce as a new brand of tobacco. The testimony of this witness shows that it was agreed that a tag should be used of the same size, color of background, type, [\*\*38] and peculiar slant of letters as that of Schnapps brand, the only difference being that the word "Traveller" instead of "Schnapps" was to be used on the new brand.

The question involved in this controversy, not only affected the rights of the parties, but the public also. [HNG↑](#) The public, as well as individuals, is entitled to protection from those, who by unfair means and methods seek to palm off an article which is not what it is represented to be. The evidence shows conclusively that the brand known as "Traveller" is an inferior grade of tobacco, sold at wholesale, at a much less price per pound than the Schnapps brand. The adoption of the Traveller brand enabled the defendant to secure an undue advantage over the Schnapps brand in that it was enabled to offer to unscrupulous dealers a cheaper grade of tobacco which was to all appearances of the same grade as Schnapps, labeled with a tag so similar thereto as to deceive the public into purchasing the same, believing it to be the genuine Schnapps brand of tobacco. The cheapness of the grade, and the similarity of the brand both as to shape, size, and lettering, made it possible for the defendant by these means to engage in unfair [\*\*39] and fraudulent competition by which it could ultimately drive its competitor out of the market. The adoption of this peculiar device by the defendant enabled it to offer a persuasive argument to the retail dealer by pointing out to him the fact that here was a brand of tobacco; the plug of which was of the exact shape, size, and color, as that of the Schnapps brand, and that the brand thereon similar in shape, size, color of background, and lettering, and which could be placed upon the market at a cheaper price than the Schnapps brand, and in this way supplanting the Schnapps brand by selling what appeared to be the same tobacco at a much cheaper price.

It is insisted by complainant that most of this brand of tobacco was consumed in communities where ignorant white and colored persons, who, being unable to read, relied solely on the general appearance of the brand and size of the plug; but the court is of opinion that this is really not the true test, and does not deem it necessary if such were so, to make the application in this instance, in view of the fact that the similarity of the brands are such that the Traveller brand is calculated to deceive any one of ordinary intelligence [\*\*40] who might desire to purchase the Schnapps brand. By placing plugs of the Schnapps and Traveller brands of tobacco along side each other in a storeroom with such light as stores usually have, at a distance of six or eight feet (the distance usually intervening between the place where tobacco is placed on the shelves, and the position occupied by customers), and without a magnifying glass, it would be a physical impossibility for an expert reader to distinguish the one from the other.

[\*834] We know by observation that the average purchaser of tobacco rarely ever takes time to examine the brand on tobacco before removing the same. The rush incident to the great amount of business that is now being transacted throughout the country renders it quite impossible for the average man to take time to closely scrutinize the brands which may be attached to a particular piece of tobacco which he may purchase. Therefore, the public has come to rely mainly upon the well-established brands for almost every article purchased, and is entitled to receive the same free from deception and fraud. Common honesty, public policy, and every consideration of fair dealing, demand that the public should [\*\*41] be protected in this respect. This peculiar brand of tobacco, having been so thoroughly advertised by all manner of devices, through the public press, bill posters, and cards, has become so thoroughly identified as the product of the R.J. Reynolds Tobacco Company that one who desires to purchase this particular product relies exclusively on the first impression he gains when looking at a caddy of plug tobacco, and does not stop to critically examine the same in order to ascertain whether or not a fraud is being practiced upon him.

That the means employed by the defendant are such as to mislead those who may desire to purchase the Schnapps brand of tobacco cannot be doubted; and it being further shown that the public has been misled by the

means thus employed, and inasmuch as it appears from the evidence that the Traveller brand was adopted with the intent of entering into unfair and fraudulent competition with the complainant, the relief demanded will be granted.

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## **State v. Ice Delivery Co.**

Court of Common Pleas of Hamilton County, Ohio

March 23, 1907, Decided

No Number in Original

**Reporter**

17 Ohio Dec. 515 \*; 1907 Ohio Misc. LEXIS 142 \*\*; 5 Ohio N.P. (n.s.) 89

STATE OF OHIO v. ICE DELIVERY CO. ET AL.

**Disposition:** [\*\*1] Demurrer overruled.

### **Core Terms**

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indictment, purposes, duplicity, conspiracy, overt act, venue, demurrer, cases, charging, offenses, motion to quash, single count, charged offense, carrying, pursuance, supplies, averred, clauses, distinct offense, adulteration, combinations, intoxicated, grounds, no allegation, carry out, constitutes, belonging, knowingly, liquors, trusts

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

Criminal Law & Procedure > ... > Procedures > Return of Indictments > Motions to Quash

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

#### **HN1[ Grand Juries, Investigative Authority]**

Under Ohio Rev. Stat. 7249 (Lan. 11003), a motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### **HN2[ US Department of Justice Actions, Criminal Actions]**

17 Ohio Dec. 515, \*515L 907 Ohio Misc. LEXIS 142, \*\*1

A trust is a combination of (1) capital, (2) skill or (3) acts by two or more (a) persons, (b) firms, (c) partnerships, (d) corporations, (e) or associations of persons, or of any two or more of them for either, any or all of the following purposes: 1. to create or carry out restrictions in trade or commerce; 2. to limit or reduce the production, or increase, or reduce the price of merchandise or any commodity; 3. to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity; 4. to fix at any standard or figure any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state, whereby its price to the public or consumer shall in any manner be controlled or established.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > Sentencing > Fines

#### **HN3** **US Department of Justice Actions, Criminal Actions**

Any violation of either or all of the provisions of the Valentine-Stewart **Antitrust Law** shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than \$ 50 nor more than \$ 5,000, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

#### **HN4** **US Department of Justice Actions, Criminal Actions**

In any indictment for any offense named in the Valentine-Stewart **antitrust law**, it is sufficient to state the purpose or effects of the trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

#### **HN5** **US Department of Justice Actions, Criminal Actions**

In prosecutions under the Valentine-Stewart **antitrust law**, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

## [\*\*HN6\*\*](#) [blue downward arrow] **Defenses, Demurrs & Objections, Defects of Form**

A demurrer searches the whole record.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

Criminal Law & Procedure > ... > Defective Joinder & Severance > Duplicity > General Overview

## [\*\*HN7\*\*](#) [blue downward arrow] **Alcohol Related Offenses, Distribution & Sale**

Under the act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio, a count in an indictment charging that the defendant unlawfully, etc., sold intoxicating liquors to one being then and there intoxicated and in the habit of getting intoxicated, defendant knowing, etc., is not bad for duplicity.

Criminal Law & Procedure > ... > Crimes Against Persons > Robbery > General Overview

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > General Overview

Criminal Law & Procedure > ... > Defective Joinder & Severance > Duplicity > General Overview

## [\*\*HN8\*\*](#) [blue downward arrow] **Crimes Against Persons, Robbery**

A count in an indictment in which the defendant is charged with robbery and with murder while in the commission of the robbery, and in which it is alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge and a shovel, is not bad for duplicity; the state cannot be required to elect upon a trial on such count, and evidence of the robbery and the use of each of the implements in producing death is admissible.

Criminal Law & Procedure > ... > Defective Joinder & Severance > Duplicity > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## [\*\*HN9\*\*](#) [blue downward arrow] **Defective Joinder & Severance, Duplicity**

When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute, if they are not repugnant; and proof of any one of them will sustain the indictment.

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > General Overview

Criminal Law & Procedure > ... > Defective Joinder & Severance > Duplicity > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## [\*\*HN10\*\*](#) [blue downward arrow] **Entry of Pleas, Types of Pleas**

A statute often makes punishable the doing of one thing, or another, sometimes specifying a considerable number of things. Then by proper and ordinary construction a person who, in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

#### [HN11](#) [blue download icon] **US Department of Justice Actions, Criminal Actions**

The Valentine-Stewart [antitrust law](#) § 5, 93 Ohio Laws 144, provides that it shall be unnecessary in any indictment brought under this act to give the name or description of the trust or combination or to state how, when or where, it was created.

Criminal Law & Procedure > ... > Domestic Offenses > Nonpayment of Child Support > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Venue

#### [HN12](#) [blue download icon] **Domestic Offenses, Nonpayment of Child Support**

One who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, venue must be laid as in the county of the offense. An offense is committed in that county in which the acts constituting the same are done. This statute defines and prescribes but a single offense; that of nonsupport of a parent; and it is the act of the child in failing to support that constitutes the offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

#### [HN13](#) [blue download icon] **Inchoate Crimes, Conspiracy**

In cases of conspiracy, while overt acts may be averred and proven they are not required to be, as a rule. Especially is that true where the conspiracy is made an offense as in this case by a statute which sets forth all the essential elements of the offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### [HN14](#) [blue download icon] **Conspiracy, Elements**

The crime of conspiracy consists in the unlawful combination and not in what is done toward carrying out such combination, and the crime is completed when the conspiracy is entered into although no act done in pursuance thereof is committed.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### [HN15](#) [blue icon] **Inchoate Crimes, Conspiracy**

A conspiracy to do an unlawful act is a separate and distinct offense from that of the act itself, and is to be governed in its prosecution by the provisions relating to conspiracies and not those relating to the specific offense. Indeed, it is not necessary that the overt act be the completed purpose intended to be accomplished by the combination, and it may be done outside the jurisdiction of the court in which the conspiracy is prosecuted.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

### [HN16](#) [blue icon] **Accusatory Instruments, Indictments**

Where the statute is silent as to the defendant's intent and knowledge, the indictment need not allege, or the government's evidence show, that he knew the fact; his being misled concerning it is matter for him to set up in the defense and prove.

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

### [HN17](#) [blue icon] **Criminal Law & Procedure, Defenses**

An indictment should aver with certainty the nature of the offense charged so that defendant may have opportunity to prepare his defense and to be entitled to the claim of former jeopardy in case of conviction.

## **Headnotes/Summary**

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### **Headnotes**

#### **MONOPOLIES--INDICTMENTS AND INFORMATIONS.**

##### **1. JOINDER OF OFFENSES IN ONE COURT OF INDICTMENT.**

An indictment which charges in one count the commission of several offenses of the same general character, committed at the same time and forming part of the same transaction, is not bad for duplicity.

##### **2. CHARGING ONE OFFENSE IN SEVERAL WAYS.**

An indictment which charges in a single count conjunctively several different ways of committing an offense described in the statute disjunctively, is not bad for duplicity.

##### **3. STATING VENUE IN INDICTMENT AGAINST MONOPOLIES.**

In an indictment under the Valentine antitrust act against individuals, firms, partnerships, corporations or associations, or any two or more of them, it is not necessary to aver that the trust or illegal combination exists or does business in the county in which the indictment is formed.

#### 4. WHAT CONSTITUTES AN OFFENSE UNDER VALENTINE ANTITRUST LAW.

No overt act need be charged in the indictment against the persons, firms, partnerships, corporations or associations mentioned in Sec. 1 of the Valentine act. The mere membership in the illegal combination or trust is sufficient to constitute an offense under said act and in such case the venue of the indictment is the county where such members of said combination reside or exist, without reference to where the trust itself as an entity exists or does business.

#### 5. SUFFICIENCY AND REQUISITES OF INDICTMENT AGAINST AGENTS OR EMPLOYEES OF A MONOPOLY.

Laning 7589 (B. 4427-4) distinguishes between two classes of persons who may become liable under the act, viz: First, "any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission," and, second, "any person who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof." In an indictment charging any person in the first of said classes with a violation of the act, knowledge need not be averred nor proven, but knowledge must be averred and proven in an indictment against any member of the second class.

**Counsel:** H. M. Rulison, F. Morris, L. B. Sawyer and C. O. Rose, for plaintiff:

Indictment bad for duplicity denied. [Hale v. State, 58 Ohio St. 676, 679 \[51 N.E. 154\].](#)

No overt act is necessary to be charged, as the crime of conspiracy is complete with the combination. Limber v. State, 28 O. C. C. 761.

Miller Outcalt, Oscar Stoehr, Harmon, Colston, Goldsmith & Hoadly, Paxton & Warrington, Thomas Darby, A. G. Turnipseed and H. L. Gordon, for defendants.

**Judges:** BROMWELL, J.

**Opinion by:** BROMWELL

#### Opinion

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##### [\*516] BROMWELL, J.

The grand jury of Hamilton county returned an indictment against the Ice Delivery Company and the other defendants herein, charging that said defendants--

"On the fifteenth day of June, in the year 1906, with force and arms, at the county of Hamilton aforesaid, were active members of, acted with and in pursuance of, and aided and assisted in carrying out the purposes of an association of persons, firms, partnerships and corporations, the said association being organized for the following purposes, to wit:

"First. To create and carry out restrictions in trade and commerce in ice.

"Second. To increase the price of a certain commodity, to wit, [\*2] ice.

"Third. To prevent competition in the manufacturing, making, purchase and sale of a certain commodity, to wit, ice.

"Fourth. To fix at a certain standard and figure, whereby the price of ice, an article of merchandise intended for sale, barter, use and consumption in the state of Ohio, to the public and consumer was controlled, then and there, by

said association, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

To this indictment the defendants have filed a motion to quash on the following grounds, viz.:

"That there are defects upon the face of the record in this, to wit:

"First. Said indictment contains a charge of more than one offense.

"Second. The indictment contains no allegation as to where the alleged association existed.

"Third. The indictment contains no allegation in the first three clauses of purposes named, of any intention to restrict trade, increase the price of, or prevent competition in ice in the state of Ohio.

"Fourth. The indictment fails to show or set forth the manner in which the price of ice was fixed, or controlled.

"Fifth. The indictment contains no allegation of knowledge [\*\*3] of the purposes of the association on the part of the defendants, or that any of the defendants performed any act in violation of said section.

"Sixth. Other defects apparent upon the record."

**HN1**[] Under Rev. Stat. 7249 (Lan. 11003), "A motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged."

It is sometimes difficult to distinguish between proper grounds for a motion to quash and those for a demurrer; but, although the state suggests that some of the grounds alleged in this case might more properly be urged by demurrer than by motion to quash we shall, for the [\*517] purposes of this case, consider all of the reasons set forth in the motion we are considering as being appropriate to that motion and will pass upon them in the order in which they are presented.

#### 1. As to duplicity in the indictment.

The defendant claims that "Said indictment contains a charge of more than one offense, and that it sets out, in one count, the violation of each of the subdivisions of the first section of the so-called Valentine antitrust act," and that by [\*\*4] reason thereof, it must be defective for duplicity.

To support this contention defendant cites the case of [State v. Gage, 72 Ohio St. 210 \[73 N.E. 1078\]](#), and particularly, the language of the court in that case as found on page 229.

This was a suit brought under the so-called Valentine-Stewart antitrust law, 93 O. L. 143, (Lan. 7586 to 7597; B. 4427-1 to 4427-12), being the same act under which the indictment is brought in this case.

The following are the sections of said act involved in the present proceeding:

Laning 7586 (B. 4427-1). **HN2**[] "A trust is a combination of [1] capital, [2] skill or [3] acts by two or more [a] persons, [b] firms, [c] partnerships, [d] corporations [e] or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure \* \* \* any article or commodity [\*\*5] of merchandise, produce or commerce intended for sale, barter, use or consumption in this state," whereby--i. e., by the standard or figure fixed--its price to the public or consumer shall in any manner be controlled or established.

**HN3**[] Laning 7589 (B. 4427-4). "Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty (\$ 50) dollars nor more than five thousand (\$ 5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense."

**HN4**[] Laning 7590 (B. 4427-5). "In any indictment for any offense named in this act, it is sufficient to state the purpose [\*\*6] or effects of the [\*518] trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."

**HN5**[] Laning 7591 (B. 4427-6). "In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such."

Laning 7594 (B. 4427-9). "That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state."

The indictment against Gage, in [State v. Gage, supra](#), page 211, charged that he,

"Said Perley W. Gage, late of said county of Delaware, was an active member of, acted with and in pursuance of, aided and assisted [\*\*7] in carrying out the purposes of the Delaware Coal Exchange, an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal, and to directly preclude a free and unrestricted competition among the members of said association, purchasers and consumers in the sale and transportation of coal, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

The defendant demurred to the indictment on the grounds:

First. "That the facts charged do not constitute an offense against the laws of Ohio.

Second. "That the statute under which the indictment was presented is unconstitutional and void."

The demurrer was overruled, plea of guilty entered, sentence of fine and motion of arrest of judgment, which was overruled.

The court decided that the act was constitutional and that the indictment was sufficient to charge the offense.

The question of duplicity was not raised either by motion or demurrer, although the indictment shows that the defendant was charged with being a member of an association \* \* \* organized for the purpose of "preventing [\*\*8] competition in the sale of coal"--which charge relates to the third paragraph of Sec. 1 of the act--and also "to maintain a uniform and graduated figure for the sale of coal" which relates to the fifth paragraph, and also "to directly preclude a free and unrestricted [\*519] competition among the members, etc., which relates also to the fifth paragraph.

According to the theory of the defense in this case the indictment in [State v. Gage, supra](#), was defective because three separate and distinct offenses were charged in one count, one made so by paragraph 3 of the act and the other two by paragraph 5.

But it is a familiar rule of pleading that [HN6](#) [↑] a demurrer "searches the whole record;" and, as the Supreme Court had this indictment before it on demurrer, it was its duty to, and no doubt it did, examine the indictment for other defects than those alleged especially as ground for demurrer; the fact that the court made no such criticism upon the indictment in that case would seem to be conclusive against the claim of duplicity charged in the present case which resembles the Gage indictment and differs from it only in setting forth four of the methods and purposes of the combination [\\*\\*9](#) instead of three as in that case.

But we do not have to rely on that case alone in reaching this conclusion. The following citations from Ohio cases seem to make clear the rule as to duplicity in a single count in an indictment.

In the case of [Foster v. State, 1 Ohio Cir. Dec. 261 \(1 Ohio C.C. 467\)](#), three persons were indicted for three several acts, each of which was a violation of law. But the court held that, as but a single general offense was charged, and the three defendants might have been found guilty either as principals or as aiders and abettors, of each of the offenses, the indictment was not bad for duplicity.

In the case of [Blair v. State, 3 Ohio Cir. Dec. 242 \(5 Ohio C.C. 496\)](#), the indictment charged defendant with an assault with intent to rob, an attempt to perpetrate a robbery, and with murder, all in one count. A demurrer was filed charging duplicity. The court said, page 245:

"So that, conceding for the sake of argument, that, omitting the alleged independent charge of assault with intent to rob, the indictment sufficiently charges an 'attempt to perpetrate a robbery,' how is plaintiff in error injured by two averments [\\*\\*10](#) of the same attempt, or two averments of some of the facts amounting to such attempt to rob?

"Not all indictments charging two offenses in one and the same count are bad. [Breese v. State, 12 Ohio St. 146.](#)"

In the case of [State v. Bauer, 1 Ohio Dec. 199 \(1 Ohio N.P. 103\)](#), tried before Judge Evans of this court, two of the counsel for defendants in the present case represented opposite sides. The charge was soliciting a bribe. The language of the indictment was in the conjunctive, *i. e.*, "with respect to his action, vote, opinion, and judgment," while the language of the statute under which it was drawn was in the disjunctive, *i. e.*, "with respect to his action, vote, opinion or judgment."

A motion to quash for duplicity was overruled, the court citing [\\*520 Watson v. State, 39 Ohio St. 123; State v. Conner, 30 Ohio St. 405; Mackey v. State, 3 Ohio St. 362.](#)

In the case of [Mackey v. State, supra](#), the third syllabus reads as follows:

"An allegation of uttering a 'false, forged, and counterfeited bank note,' is not bad for repugnancy."

Here, according to contention [\\*\\*11](#) of defendants in this case (and as claimed in the case cited), are three distinct offenses, viz.: uttering a false note, uttering a forged note, and uttering a counterfeit note. It is true that the statement of this case does not inform us whether these three offenses were charged in a single count or in several; but the natural inference from the manner in which they are grouped in the syllabus would be, that they were in a single count. The court did not pass upon the question of duplicity but did upon the question of repugnancy as above.

In the case of [Breese v. State, 12 Ohio St. 146 \[80 Am. Dec. 340\]](#), there was but one count which contained a charge of burglary and also a charge of larceny. Demurrer filed for duplicity because the "indictment contains but one count charging two distinct crimes--burglary, a penitentiary offense and larceny, punishable only by fine and imprisonment in the county jail."

17 Ohio Dec. 515, \*520L 1907 Ohio Misc. LEXIS 142, \*\*11

The court, while stating the general rule to be, that two distinct crimes or offenses cannot properly be shown in the same count of an indictment, also stated that this rule was by no means of universal application and that one of the exceptions, as well established [\*\*12] as the rule itself, is, that a burglary and larceny, committed at the same time, may be thus united. The court thinks that the clause, "committed at the same time," taken in connection with the fact that the two offenses while distinct crimes, grew out of, and formed parts of, the same transaction, is the key to this decision.

In the case of [State v. Hennessey, 23 Ohio St. 339 \[13 Am. Rep. 253\]](#), the syllabus is:

"Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment and the taking thereof charged as one offense."

The indictment was for larceny. The second count charged the stealing of certain articles belonging to one person, and also the stealing of certain other articles belonging to another person, the values being separately stated. The court held as above.

In the case of [State v. Conner, 30 Ohio St. 405](#), the first syllabus is as follows:

**HN7** [↑] "Under the act 'to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio' [52 O. L. 153] (2 S. & C. 1431) [\*\*13] [4 Curwen 2669; see Rev. Stat. 6940 (Lan. 10589) *et seq.*], [\*521] a count in an indictment charging that the defendant unlawfully, etc., sold intoxicating liquors to one 'being then and there intoxicated and in the habit of getting intoxicated,' defendant knowing, etc., is not bad for duplicity."

This was an indictment in which it was claimed that in the third count two distinct offenses were charged, viz. That of selling to a person intoxicated and that of selling to a person in the habit of getting intoxicated, and that it was bad for duplicity. The court said, page 406:

"The offense is but a single one. There is but one sale of liquor, and but one person to whom it was sold. The fact that such person represents two characters, under the statute, does not make the offense double. \* \* \* It is universally laid down, that where the offense is thus marked by the disjunctive 'or,'" [in the statute defining it], "the indictment may well charge by substituting 'and.'

"Bishop, Statutory Crimes Sec. 383, speaking of the alternative crimes, says: 'If an indictment is to be drawn on a statute in alternative clauses, the pleader, as a general rule, \* \* \* may elect to charge no [\*\*14] more than constitutes an offense within one clause, or he may proceed upon two clauses, or three, or all, as he deems best, and all in a single count, employing the conjunctive 'and,' when the statute has the disjunctive 'or.'"

In the case of [Jackson v. State, 39 Ohio St. 37](#), the first syllabus is as follows:

**HN8** [↑] "A count in an indictment in which the defendant is charged with robbery and with murder while in the commission of the robbery, and in which it is alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge and a shovel, is not bad for duplicity; the state cannot be required to elect upon a trial on such count, and evidence of the robbery and the use of each of the implements in producing death is admissible."

In the case of [Watson v. State, 39 Ohio St. 123](#), the second clause of the syllabus is as follows:

"A single count in such indictment, which charged that B was a member of the house, and also a member of a standing committee of such house to which the bill was referred, and that the offer or promise was made to influence his vote therefor in the house, and his vote for a favorable report [\*\*15] thereon in the committee, is not bad for duplicity. The charge thus made constitutes but one offense under the statute."

In the case of [Hale v. State, 58 Ohio St. 676 \[51 N.E. 154\]](#), the first two clauses of the syllabus are as follows:

17 Ohio Dec. 515, \*521 [907 Ohio Misc. LEXIS 142, \*\*15

"1. When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant.

[\*522] "2. An indictment drawn under the act 'to regulate the practice of medicine in the state of Ohio' (92 O. L. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee prescribed, directed, and recommended for the use of a person named, a drug medicine, and agency, put up in a paper box on which he wrote directions to which he signed his name and appended thereto the letters 'M. D.,' is not bad for duplicity."

It was contended in this case (page 679) that as the indictment, in the same count, charged that the accused prescribed a medicine for the use of a person named, and appended the letters "M. D." to [\*\*16] his name subscribed to directions written on the package for the use of the medicine, two distinct offenses were charged and the indictment therefore bad for duplicity. The court said, page 679:

"It appears to be a well-settled rule of criminal pleading that, [HN9](#) [↑] when an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute, if they are not repugnant; and proof of any one of them will sustain the indictment. This rule is more fully stated in Bishop, New Criminal Procedure Sec. 436, as follows:

[HN10](#) [↑] "A statute often makes punishable the doing of one thing, or another, sometimes specifying a considerable number of things. Then by proper and ordinary construction a person who, in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where [\*\*17] the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them."

The court further said, page 680:

"Nor is this indictment open to the objection of duplicity because it charges that the defendant prescribed, directed and recommended the remedy, and describes the latter as a drug, medicine and agency for the treatment, cure and relief of a wound, fracture and bodily injury, although the statute is in the alternative, and makes it an offense to do either of the things mentioned; for they are not repugnant, and all of them may occur in the same transaction, constituting but one offense. Upon this principle it was held that where a statute made it a crime to use instruments, or administer drugs, to produce an abortion, an indictment drawn on it, was not double which charged that both of those means were employed by the defendant in the commission of the offense. [Commonwealth v. Brown, 80 Mass. 419](#). And under a statute which prohibited the unlicensed sale of rum, brandy, whiskey [\*523] or gin it was held proper to charge, in a single count, the sale of all these various kinds of liquors. [Rawson v. State, 19 Conn. 292](#). Numerous cases are found in the books in which indictments so drawn on alternative statutes, have been sustained. Bishop, Statutory Crimes Sec. 244, 383; Bishop, New Criminal Procedure Sec. 586."

In the case of [Smith v. State, 59 Ohio St. 350 \[52 N.E. 826\]](#), the first syllabus is as follows:

"An indictment which charges that the accused on a specified day received and concealed different chattels which had been stolen from different owners, is not bad for duplicity."

The first sentence of the fourth syllabus draws a distinction between offenses growing out of the same transaction at the same time, referred to in the first clause of the syllabus, and different offenses at different times growing out of different transactions. It reads as follows:

"Receiving or concealing different articles of property at different times and on separate occasions, constitutes distinct offenses and cannot be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place."

17 Ohio Dec. 515, \*523L<sup>A</sup>907 Ohio Misc. LEXIS 142, \*\*18

In the case of the [State v. Inskeep, 49 Ohio St. 228 \[34 N.E. 720\]](#), the defendant was **[\*\*19]** indicted for making an assault and also for striking and wounding. The trial court sustained a motion to quash on the ground that it contained but one count and two separate and distinct offenses. This was reversed by the Supreme Court, which held that,

"The indictment is not bad for duplicity and is in proper form."

In the case of [Gordon v. State, 46 Ohio St. 607 \[23 N.E. 63\]](#); 6 L. R. A. 749], the court, on page 626, said:

"No matters, however multifarious, will operate to make a declaration or information double, provided, that all taken together, constitute but one connected charge, or one transaction.' A man may, accordingly, be indicted for the battery of two or more persons in the same count; or for a libel upon two or more persons, when the publication is one single act; or for selling liquor to two or more persons without rendering the count bad for duplicity."

The indictment in this case charged that defendant unlawfully sold intoxicating liquors, other than cider, \* \* \* to be used as a beverage, to divers persons whose names to the jurors were unknown \* \* \*, following almost exactly the language of the statute defining the offense. **[\*\*20]** Defendant claimed that it was bad for duplicity in charging several different offenses in a single count. The court ruled otherwise as above.

See also [State v. Sparks, 1 Ohio Dec. 275 \(31 Week. L. Bull. 84\)](#).

The language of the Supreme Court in [State v. Gage, supra](#), page 230, cited by defendant, must be taken in connection with the subject it was then passing upon. The claim had been made that the entire act **[\*524]** was indivisible and was to be construed as a whole; that certain sections of it, viz., Secs. 4, 5, 6 and 7, were unconstitutional and if that were true the entire act was tainted and of no validity. It was in connection with these sections and this claim of unconstitutionality that the court said:

"The case, therefore, offers no opportunity for the application of the principle \* \* \* that where an act contains an indivisible proposition whose terms include contracts which the legislature is powerless to prohibit the courts cannot save the act by restricting the natural and obvious meaning of its terms."

That the court in this case would go beyond the two grounds urged by the plaintiff in error and search the indictment for any other defect **[\*\*21]** is sustained by the case of [Reed v. State, 15 Ohio 217, 222](#), where Judge Wood says:

"For, while in civil cases we are not astute in searching for errors not expressly raised on the record, but consider our duty as discharged when we dispose of the case made by those who represent the parties in interest, in criminal prosecutions a different rule prevails. The court, then, in the administration of criminal justice, are, at least, *quasi* counsel for the accused; and, in revising the proceedings of an inferior tribunal, will overlook no substantial defect in the record, though not expressly assigned, any more than permit on trial an improper conviction to be obtained by false issues presented through the forms of pleading, and by the unskillfulness of counsel."

I have gone thus fully into the question of duplicity, not because it seems to be directly involved in the case under consideration but because of the stress laid upon it by counsel for defendant in support of the motion. The indictment and the statute being read in the light of the foregoing decisions would seem beyond a doubt to set up but one offense charged in the indictment, viz.: That defendants **[\*\*22]** "were active members of, acted with and in pursuance of, and aided and assisted in carrying out the purposes of an association, etc."

The court therefore finds the claim of defendant that the indictment is bad for duplicity is not well taken.

2. The second reason urged by defendant as a ground to quash is that "The indictment contains no allegation as to where the alleged association existed."

In considering this alleged defect in the indictment it seems sufficient to call attention to the fact that the *locus* of the association or combination is not prescribed, fixed by or in any manner referred to in the statute itself, and so far as

anything appears in the law, it is entirely immaterial where the trust or combination itself exists, whether in Ohio or outside of Ohio.

**HN11**[] Section 5 of the act (93 O. L. 144), provides that it shall be unnecessary in any indictment brought under this act to give the name [\*525] or description of the trust or combination or to state how, when or where, it was created. It does not, in so many words, say that it shall be unnecessary to set out where such trust or combination is located and doing business at the time charged in the indictment, [\*\*23] but as this is a collateral fact and not the gist of the offense charged, is it not reasonable to presume that the word "description" as used in the act is sufficiently explicit and broad enough to cover as a part of the description the place where the trust or combination exists? In support of this inference we again call attention to the Gage case, in which the indictment was similar to the one under consideration in that it contained no averment as to the place where the trust or combination of which the defendant was a member existed or did business, and again we may well assume that in searching the record for errors in that case the Supreme Court would have detected this omission if it were error as claimed.

It must be remembered that this indictment is not against the trust or combination as an entity; if it were, the venue of such indictment would probably be the county where said trust or combination carried on its business or committed some overt act in violation of the law and this venue would have to appear in the indictment. But the offense charged in the indictment before us is against the individual members of the combination and not against the combination itself and [\*\*24] the individual members are not charged with overt acts unless, indeed, the language that they "aided and assisted in carrying out the purposes" of said combination constituted an overt act.

But even with such an assumption this language might be construed as redundant and there would still be enough left in the indictment properly to charge an offense against the law.

The act does not require the charging of any overt act. The mere passive condition of being members of the trust or combination is all that is required and the venue of this indictment is the place where these defendants individually, and not as a trust or combination taken as a whole, were existing or residing at the time they were active members of said combination; or acted with said combination or aided or assisted in carrying out its purposes, and this venue is plainly charged in the indictment to be Hamilton county, Ohio.

If it should appear on the trial of this cause that any one or more of the defendants were not residing or existing in Hamilton county, Ohio, at the time of the alleged offense such fact might be pleaded as a defense for such nonresidence; but that is a matter that cannot be set up in a motion [\*\*25] to quash, which goes only to defects apparent upon the record and no such defect as to the venue of any of the defendants appears in the indictment but, on the contrary, is expressly averred.

In the case of State v. Dangler, 74 Ohio St. 49, 77 N.E. 271, where the offense charged was the failure of a child to support his parent and where the [\*526] evidence showed that the former resided in one county and the latter in a different county and also showed that the defendant had not been present in the county of the parent during the time laid in the indictment, the court found that the venue of the indictment was that of the child and not that of the parent. Here was no overt act but only a passive offense of failing to perform the duty of giving support. The court said, page 51:

"Generally speaking, it is a fundamental rule of criminal procedure that **HN12**[] one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, *venue* must be laid as in the county of the offense. \* \* \* An offense is committed in that county in which the acts constituting [\*\*26] the same are done. \* \* \* This statute defines and prescribes but a single offense; that of nonsupport of a parent; and it is the act of the child in failing to support \* \* \* that constitutes the offense."

We agree with counsel for defendants that the legislature of Ohio "has no extraterritorial jurisdiction" and that the offense must be laid in the indictment as having been committed in Ohio and, generally, in the county where the offense was committed. But this statement of the law of venue has no application in this case for the reasons already given. We do not agree with them in the inference that the act under consideration "could relate only to

combinations organized and existing within the state of Ohio." Section 5 of the act expressly dispenses with the necessity of stating how, when or where such trust or combination is created.

Granting that the title of the act casts light upon the intention of the legislature in framing the law, we still cannot agree with the defendants that the title in this case limits the provisions of the act to membership in Ohio trusts or combinations. The title is in the following words:

"An act to define trusts and to provide for criminal penalties [\*\*27] and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state."

While we recognize, under the opinion of the Supreme Court, in the case of *Burgett v. Burgett, 1 Ohio 469 [13 Am. Dec. 634]*, and *State v. Pugh, 43 Ohio St. 98, 113 [1 N.E. 439]*, the rule that the title may be read, as explanatory of any doubtful matter in the act itself, it does not seem to us that there is anything doubtful in the meaning of the act which requires explanation or that there is any inconsistency between the language of the title and the purposes of the act.

Sutherland, Stat. Constr. Sec. 339, says:

"But the title cannot enlarge or confer powers, control the plain words of the act, or extend the purview to objects mentioned in the [\*527] title but not in the act. Where the text of the statute is plain and unambiguous, the title cannot have the effect to modify it."

The last clause of this title states one of the purposes of the act to be, "to promote free competition in commerce and all classes of business in the [\*\*28] state," and this is the only clause in the title which limits the scope of any of the purposes of the act to the state of Ohio. It does not set forth that this act is to define trusts created or existing in Ohio; it does not limit its penalties and punishments to Ohio corporations or associations, for Sec. 3 of the act contains a special provision against foreign corporations and associations violating its provisions.

If there were any doubt whatever upon the applicability of the act to foreign corporations, trusts or combinations, Sec. 12, defining the meaning of the word "persons," wherever it appears in the act, says that it shall include "corporations, partnerships and associations existing under or authorized by the state of Ohio, or any other state, or any foreign country." Substituting these last words in place of the word "person" or "persons" where they occur in the act, makes it evident that the contention of defendant upon the point raised in its second objection to the indictment is not well taken.

3. The third claim advanced by defendant is, that

"The indictment contains no allegation in the first three clauses of purposes named, of any intention to restrict trade, [\*\*29] increase the price of, or prevent competition in ice in the state of Ohio."

If we are correct in our interpretation of the legislative intent, there is in the act no limitation upon the first three purposes set forth in Sec. 1 (93 O. L. 143), to Ohio trusts and combinations. Such combinations as have the purpose to do the things set forth in these three sections are declared to be trusts under our law, no matter whether the purposes are to be carried out in Ohio or outside of this state. The allegation or averment in the indictment that the illegal combination is formed to do these things in Ohio is dispensed with by the statute itself in Secs. 4, 5 and 12.

The fourth clause of the first section "fixing at a standard or figure, etc.,," closes with the clause "in this state." This clause would undoubtedly require that the averment in the indictment which recites this fourth clause as one of the purposes of the trust or combination should set out that the purposes contained in said clause were to be carried out in the state of Ohio and that averment is found in the indictment in this case. This last statement is made applicable to a case where the purpose is that contained in the fourth [\*\*30] clause alone.

But the indictment in this case goes further than that and places the venue of these purposes in Hamilton county, Ohio, the semicolon at the end of each of the first three sections being only an abbreviated form of the word "and" and all of the causes being connected up into one continuous sentence by that means.

[\*528] It may well be construed that it was the intention of the legislature to have this clause "in this state" apply to the first three purposes as well as the fourth, it being omitted only in order to avoid tautology.

Incidentally we might say that even if this objection made by defendant to the first three clauses in the indictment as not alleging venue were tenable, which we do not think to be the case for the reasons given above, yet they might be rejected as surplusage and, the fourth clause being free from this infirmity, if it is one, would save the indictment from being quashed.

Recurring again to the Gage case, we call attention to the fact that the indictment in that case and this are identical in omitting the clauses fixing venue which defendants claim should have been contained in the present indictment and again assuming that the Supreme [\*\*31] Court in the Gage case found no objection, we must conclude that the claim of defendants upon this point is not well taken.

4. The next contention of defendants is, that

"The indictment fails to show or set forth the manner in which the price of ice was fixed or controlled."

It might be sufficient to say that the price of ice was not fixed nor controlled by the defendants in this case, whatever may have been done by the trust or combination to which they are alleged to belong. In the view which we have already expressed as to the proper construction of this act, there are but three elements necessary to constitute the offense charged in the indictment, viz.:

First. Was there an ice trust, as defined by the act?

Second. Were defendants members of that trust?

Third. Were defendants, at the time of the alleged offense, residents of or existing in Hamilton county, Ohio?

Whether the trust did or did not carry out any, a part or all of the purposes referred to, or the manner in which it carried any or all of them out by overt acts is entirely immaterial. The fact that the indictment does not aver the particular manner in which the trust controlled the price of ice or the means by [\*\*32] which it proposed to do so does not, in view of the language of Sec. 5 (93 O. L. 144), viz.: "In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination," make it defective.

If we construe the law correctly, it is not necessary for the trust to do any overt act beyond the organization of the conspiracy or combination, nor for the individual members of the trust to do anything more than to be a member of it. Of course, overt acts may be done by both; but for the purposes of this case no overt act needed to be alleged to make out the offense.

Again we refer to State v. Gage, supra, in support of our belief that this objection to the indictment is not well founded.

5. The next claim of defendants is that

[\*529] "The indictment contains no allegation of knowledge of the purposes of the association on the part of the defendants or that any of the defendants performed any act in violation of said section."

This objection raises the question of knowledge and overt acts. As to overt acts, we may repeat what we have previously called attention to--that the gist of the offense charged in this indictment [\*\*33] is the conspiracy. It is well settled that HN13 in cases of conspiracy, while overt acts may be averred and proven they are not required to be, as a rule. Especially is that true where the conspiracy is made an offense as in this case by a statute which sets forth all the essential elements of the offense.

In the case of [Needles v. Bishop, 14 Ohio Dec. 445](#), which was a suit under the Valentine act, the second and third clauses of the syllabus are as follows:

"A common-law unlawful combination tending to create a monopoly and restrain trade, contrary to public policy, is pleaded in a petition which avers that defendants are the only persons in the particular city engaged as jobbers furnishing plumbers' supplies; that defendants have combined and conspired together by uniting their capital, labor and skill for the purposes of limiting the production of such supplies, and increasing the purchase price thereof to persons not members of the association; that defendants have agreed neither to sell below a certain schedule of prices, sell to any person not a member of the association, nor sell supplies to be used in any building or structure not being plumbed or furnished [\*\*34] with plumbing supplies by some member of the association; that they have agreed not to compete with each other in furnishing supplies, or in plumbing buildings; that they will not sell supplies to any person unless some member of the association is employed to furnish the labor to install the plumbing supplies in the building for which they are furnished; and that such combination is formed to enhance the price of supplies without regard to their cost. Plaintiff is entitled, under such petition, to recover whatever damages he has sustained as a direct result of such unlawful combination."

"Evil intent or actual injury to the public need not be shown to render trade combinations void as against public policy. The test of illegality is their tendency to endanger the public, whether or not their necessary consequence is to control prices, limit production and suppress competition in a manner to restrain trade, and create a monopoly."

In 2 McClain, Crim. Law Sec. 966, we find the following:

[HN14](#) [+] "The crime" [conspiracy] "consists in the unlawful combination and not in what is done toward carrying out such combination, and the crime is completed when the conspiracy is entered into although [\*\*35] no act done in pursuance thereof is committed"--citing in footnote a large number of cases.

[\*530] Also from the same section we cite the following:

[HN15](#) [+] "A conspiracy to do an unlawful act is a separate and distinct offense from that of the act itself, and is to be governed in its prosecution by the provisions relating to conspiracies and not those relating to the specific offense. \* \* \* Indeed, it is not necessary that the overt act be the completed purpose intended to be accomplished by the combination, and it may be done outside the jurisdiction of the court in which the conspiracy is prosecuted."

Section 972, same work, might have been cited in connection with the previous discussion upon the subject of venue, but is here inserted as reflecting upon the general rule governing conspiracies.

"Section 972. The venue of the offense is either where the conspiracy is formed or where the overt act thereunder is done. \* \* \* It seems also that the offense is punishable where the conspiracy is entered into, although it contemplates the doing of a wrongful act elsewhere." Citing *Wolf, In re*, 27 F. 606, and [Bloomer v. State, 48 Md. 521.](#)

Section 977, [\*\*36] of the same work says:

"From what has already been said in regard to an overt act, it is plain that it is not necessary to charge anything that is done in pursuance of the conspiracy except where, by statute an overt act is required. If the indictment alleges substantially the facts necessary to show a conspiracy, no act done or injury suffered in consequence thereof need be charged."

There is but one place in the entire act under consideration where the *scienter* or knowledge of the unlawful act is required and that is in Sec. 4. This section groups offenders against the act into two classes. The first commit the offense by doing certain acts whether knowingly or not, and the second class must have the guilty knowledge before they can be considered as violating the law. Let us separate these groups so as to discover whether the defendants, if guilty as charged, are described in either group and if so in which one.

The language which describes the first group is as follows:

"Any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission."

This refers to the constituents or members who form the component parts of the combination **[\*\*37]** and furnish the capital, skill or acts referred to in the first section. The very fact of their engaging in the conspiracy creates a presumption of knowledge of the purposes for which it was formed and dispenses with the averment or proof of knowledge. We doubt, however, whether actual ignorance of such purposes could be proven as a defense upon the trial of the charge.

The second group is described as follows:

"Any person \* \* \* who shall, as principal, manager, director, **[\*531]** agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof."

In this group the knowledge of the wrongful act is material, is set out in the statute and must be averred in the indictment. The persons described in this second group are the active factors or servants, speaking broadly, of the combination, who put into operation the machinery of the trust to carry out its purposes, as distinguished from the more passive persons described in the first group who, while members of the trust, have no active connection with the management **[\*\*38]** of its business.

Counsel for the defendants argue that the word "knowingly" in this section relates back and attaches to the first group as well as the second. If that were the intent, its natural position in the statute would be in the third line instead of the sixth and the section would read, "Any person who knowingly may become engaged, etc."

This would be the grammatical and rhetorical location of the word "knowingly" if the intent of the legislature had been as suggested by defendants, and the fact that it is thus detached would seem to be conclusive that it was to refer to the second group only.

The indictment in the present case, by its averment, puts the defendants in the first group where knowledge is not made a material or essential part of the offense and, as it would not require proof, so it need not be averred in the indictment.

The right of the legislature to pass laws making acts criminal, regardless of the knowledge or intent of the persons who may be accused of committing them, is well recognized. While there has been an extended discussion as to whether, when the act itself which describes the offense does not make knowledge a requisite part thereof, it must, **[\*\*39]** nevertheless, be averred in the indictment and be proven on the trial, it is quite certain that in certain classes of offenses the act may dispense with knowledge as one of its essential elements. This is particularly the case with acts under the police power; acts for the preservation of health; to prevent food adulteration and defining offenses against public policy.

The cases cited by counsel for defendants, in which knowledge was required to be averred in the indictment, all involved as a necessary ingredient of the crime, from its very nature, a knowledge of the unlawful character of the act done and an intent, nevertheless, to carry it out. Thus the case of Drake v. State, 19 Ohio St. 211, was a forgery case; the cases of Fouts v. State, 8 Ohio St. 98; Jones v. State, 51 Ohio St. 331 [38 N.E. 79]; Kain v. State, 8 Ohio St. 306; Hagan v. State, 10 Ohio St. 459, were all murder cases; the case of Mann v. State, 47 Ohio St. 556 [26 N.E. 226]; 11 L. R. A. 656], decided that **[\*532]** "punishable by law" was not sufficient in describing the **[\*\*40]** offense of administering poison to two colts, etc. The law, Rev. Stat. 6851 (Lan. 10459), made malice, (which implies knowledge and intent) as an essential to the crime described in said act. All the cases cited involved offenses in which malice or wicked intent and knowledge were necessarily essential elements.

But, as above stated, there are other classes of offenses which relate to the health, public policy, and similar subjects which have been created by the legislature in which the element of knowledge has been dispensed with and for the commission of which the accused will be held responsible, although he may, at the time of the offense, have been entirely ignorant that he was violating the law.

A collection of these cases, under the food adulteration and similar statutes, is found elaborately discussed in the case of *State v. Fromer, 6 Ohio Dec. 374 (7 Ohio N.P. 172)*; also in the case of *Altschul v. State, 4 Ohio Cir. Dec. 402, 405 (8 Ohio C.C. 214)*, in the course of which reference is made to the following citation from Bishop, Statutory Crimes Sec. 1022:

**HN16** [+] "Where the statute is silent as to the defendant's intent and knowledge, the [\*\*41] indictment need not allege, or the government's evidence show, that he knew the fact; his being misled concerning it is matter for him to set up in the defense and prove."

In the case of *State v. Kelly, 54 Ohio St. 166 [43 N.E. 163]*, which involved the sale of an adulterated food product, the statute did not make knowledge of the adulteration an element in this crime. The second syllabus of the decision is as follows:

"2. In a prosecution under said act it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale."

The court, on page 179, of this case, said:

"If this statute had imposed upon the state the burden of proving the purpose of the vendor in selling an article of food or his knowledge of its adulteration, it would thereby have defeated its declared purpose. Since it is the duty of courts to so construe doubtful statutes as to give effect to the purpose of the legislature, they cannot in case of a statute whose provisions are unambiguous and whose validity is clear, defeat its purpose by construction.

"The correct view of statutes of this general nature is stated by the supreme court of Massachusetts [\*\*42] in *Commonwealth v. Murphy, 165 Mass. 66 [42 N.E. 504]*; 30 L. R. A. 734; 52 Am. St. Rep. 496]. 'Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out [\*533] whether his contemplated act is prohibited, and of refraining from it if it is.'"

See also the case of *Mitchell v. State, 11 Ohio Cir. Dec. 446 (21 Ohio C.C. 24)*, where a very full discussion of the subject is given.

One of the latest decided cases on this point is that of *Studer v. State, 19 Ohio Cir. Dec. 33*, where the offense charged was procuration. The court decided that in the indictment charging the offense, where the girl solicited was less than eighteen years of age it was not necessary to aver that the defendant had knowledge of her age. This case was afterwards affirmed [\*\*43] without report by the Supreme Court.

See also the second syllabus in the case of *Bissman v. State, 6 Ohio Cir. Dec. 712 (9 Ohio C.C. 714)*, a food adulteration case.

The case of the *State v. Ross, 16 Ohio Dec. 704*, was a prosecution under the Valentine act for conspiracy involving restrictions on furnishing fire insurance. In this case the same claim was made on demurrer that because the intent was not averred in the first two counts of the indictment and that such intent was necessary to make out the offense, the indictment was bad. This contention was abandoned, however, before the court passed upon the case.

The case of *State v. Bridge Co. 18 Ohio Cir. Dec. 147*, was a quo warranto proceeding to oust the defendants for violation of this same Valentine act. The first two paragraphs of the syllabus relate to the venue and decide that suit may be brought in any county where any one or more of the defendant corporations forming the trust is situated or has a place of business, or may be brought in any county where the trust itself does business as a separate entity.

Once more, and finally, we call attention to the fact [\*\*44] that upon this question of knowledge and overt act State v. Gage, supra, is on all fours with the present as to the form of the indictment and must be conclusive upon this point for the reasons heretofore stated.

While we recognize the well-established principle that HN17[] an indictment should aver with certainty the nature of the offense charged so that defendant may have opportunity to prepare his defense and to be entitled to the claim of former jeopardy in case of conviction, we also desire to call attention to the fact that the certainty which is required in the indictment is only certainty to a common intent. Carper v. State, 27 Ohio St. 572; Roberts v. State, 32 Ohio St. 171, 172.

We are of the opinion that the indictment in this case sets forth with sufficient certainty the offense charged as to protect the defendants.

In conclusion, having carefully and as thoroughly as is possible in the limited time at our disposal examined the various grounds urged by defendants for quashing the indictment and the authorities cited in support of their contention and finding the same not well taken, especially in view of the rule that a motion [\*\*45] to quash should not be [\*534] granted except upon the most convincing proof that it has good reasons to support it, the court overrules the motion to quash the indictment.

Unless counsel wish to advance cause for demurrer in addition to those which have been considered in connection with the motion to quash, counsel may, as a matter of form, if they so desire, file their demurrer upon the same grounds and the court will, without further argument, overrule said demurrer.

After the giving of this decision all of the defendants except three pleaded guilty and were fined \$ 100 each: two of the cases were nollied and the remaining one remains undisposed of.

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## Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.

Circuit Court of Appeals, Seventh Circuit

April 16, 1907

No. 1,336

**Reporter**

154 F. 358 \*; 1907 U.S. App. LEXIS 4536 \*\*

RUBBER TIRE WHEEL CO. v. MILWAUKEE RUBBER WORKS CO.

**Prior History:** [\*\*1] In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

### **Core Terms**

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patent, monopoly, parties, tires, contracts, prices, patentee, manufacturers, commerce, royalties, conclusions of law, infringement, articles, percent, invention, license

### **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Constitutional Law > Supremacy Clause > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Governments > Police Powers

#### **HN1[ Conveyances, Assignments**

A state cannot subtract from the right conferred upon a patentee and his assigns by the federal laws. For the protection of the physical or moral health of its citizens a state may restrain the use of the corporeal thing or article brought into existence by the application of the patented discovery.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Patents as Property

#### **HN2[ Infringement Actions, Exclusive Rights**

Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using, or vending the thing patented, without your permission.

[Criminal Law & Procedure > ... > Arson > Simple Arson > General Overview](#)

[Patent Law > ... > Defenses > Inequitable Conduct > General Overview](#)

[Patent Law > Infringement Actions > Exclusive Rights > General Overview](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

### **[HN3](#) Arson, Simple Arson**

The monopoly is of the invention, the mental concept as distinguished from the materials that are brought together to give it a body. Use of the materials, as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson.

[Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties](#)

### **[HN4](#) Commerce Clause, Interstate Commerce**

Congress made illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, and subjected to liability to fine or imprisonment every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. Congress, having created the patent law, has the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1901), contains no reference to the patent law.

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

## [\*\*HN5\*\*](#) Intellectual Property, Ownership & Transfer of Rights

Each statute, the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1901) and the patent laws was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN6\*\*](#) Antitrust & Trade Law, Sherman Act

The true test of violation of the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1901), is whether the people are injured, whether they are deprived of something to which they have a right.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

## [\*\*HN7\*\*](#) Ownership & Transfer of Rights, Assignments

The only grant to the patentee is the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers.

**Counsel:** A. L. Humes and Edwin E. Jackson, Jr., for plaintiff in error.

Charles Quarles, for defendant in error.

**Opinion by:** BAKER

## **Opinion**

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[\*359] Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error began this action to recover royalties on account of defendant's use, under a license system set forth in the complaint, of patent No. 554,675, issued February 18, 1896, to Grant, plaintiff's assignor, for an improvement in rubber-tired wheels. The license system was embodied in three papers, Exhibits A, B, and C. That they "were all executed at one and the same time and were intended to constitute and did constitute one agreement" is not open to question, for such is the explicit admission in defendant's answer. The covenants of defendant must therefore be taken as having been made in consideration of plaintiff's grant. The license system, briefly, was this: Plaintiff authorized 18 companies, of which defendant was one, to make, use, and sell tires under the patent for 1 year; each company's share of the trade was fixed at a certain proportion of the whole, [\*\*2] defendant's at 2 per cent.; two qualities of tires were to be made; the minimum selling price of the first quality was established at 65 cents a pound, of the second quality at 55 cents a pound; each company agreed to pay plaintiff monthly 4 per cent. of its sales, and, if in any month its sales proved to be larger than its proportional share of the

total sales for that month, to pay plaintiff an additional royalty of 20 per cent. of the amount over its quota; plaintiff agreed to employ a commission of five persons to supervise the transactions of all the parties, and to turn over to the commission all royalties in excess of 2 per cent.; from the moneys so put into their hands the commission, after deducting their expenses and compensation for services in supervising and auditing, were to pay monthly to any company that had sold less than its quota of the preceding month's total business a sum equal to 20 per cent. of such deficiency; the commission then were to accumulate \$50,000, and to distribute any sums in excess monthly among the companies according to their quotas of the trade, and at the expiration of the arrangement to distribute all funds then on hand; and it was agreed in **[\*\*3]** paragraph 10 "that the commission shall have power upon the written consent of a **[\*360]** majority of the parties in interest hereto, to purchase tires from any or all of the parties hereto at the prices hereinbefore provided and to dispose of such tires to the trade at such prices as said commission shall deem to the interest of all the parties hereto, and in making such purchases the commission is hereby authorized to use any money in its possession." The complaint proceeded to charge that defendant under this arrangement had made and sold certain amounts of the patented tires on which it had failed and refused to pay the stipulated royalties.

The defenses were that the arrangement was in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. 209, c. 647, § 1 [U.S. Comp. St. 1901, p. 3200]), and of section 1791j of the Wisconsin Statutes of 1898, which prohibits Wisconsin corporations (defendant was one) from entering into any arrangement or contract intended to restrain competition in the supply or price of any commodity constituting a subject of commerce within the state. As reasons why defendant's promise to pay was unenforceable in the face of those statutes, **[\*\*4]** the answer averred that the letters patent "were and were believed by all the parties to said agreement to be invalid and void, and had been so adjudged by the United States Circuit Court of Appeals for the Sixth Circuit, and that the Supreme Court of the United States had refused to review such decision; that said patent was resorted to in said contracts merely as a pretext to enable said contracting parties to evade the laws; and that said contracts were not and were not intended to be license contracts under letters patent, but were intended to establish and bring about the illegal trade combination herein mentioned; that the aforesaid purpose was carried out by the said agreement, and by reason thereof the price of the articles of commerce mentioned in plaintiff's complaint was raised beyond the former price thereof and beyond the natural and legitimate price thereof; and that the amount of said articles manufactured by the said parties was, by reason of said combination and monopoly, restricted."

A jury having been duly waived, the court heard the evidence, entered findings of fact and conclusions of law, and thereupon rendered judgment for defendant.

The court found that **[\*\*5]** plaintiff was the owner of the patent; that the patent was valid; that prior to the execution of the contracts in suit the patent had been sustained by the Circuit Court for the Southern District of New York, 91 Fed. 978, by the Circuit Court for the Southern District of Ohio (unreported), by the Circuit Court for the Northern District of Georgia, 116 Fed. 629, and by the Court of Appeals for the Republic of France, and had been declared invalid by the Circuit Court of Appeals for the Sixth Circuit, 116 Fed. 363, 53 C.C.A. 583, and the Supreme Court had declined to take the case on certiorari, 187 U.S. 641; that after the last-named decision was rendered, and down to the execution of the contracts in suit, the manufacturers of tires disregarded the patent, paid no royalties, and cut the prices of the respective qualities to 50 and 40 cents a pound; that all of the parties to the contracts in suit entered into the arrangement in good faith, believing that the patent was valid and that the adverse decision was erroneous; that all of the manufacturers that had been infringing, **[\*361]** except two small concerns, came into the pool; that the provision in paragraph 10 was never in any **[\*\*6]** manner acted upon or executed; that defendant made and sold tires under the contracts, and failed to pay plaintiff certain specified sums which were due if the promise to pay was enforceable; that after the expiration of the arrangement prices went back to former rates.

As conclusions of law the court stated (1) that the patent was and is valid; (2) that the decision of the Court of Appeals for the Sixth Circuit is controlling only between the parties to that case and their privies; (3) that as a practical result, however, the effect of that decision is to denude the patent of the attributes of a monopoly in that circuit; (4) that the provisions of the contracts respecting the payment of royalties are separate from the provisions of paragraph 10, and are not thereby rendered illegal or void; (5) that the contracts authorized the creation of a fund for crushing competition in interstate commerce throughout the whole country, not only in Grant tires but in all other

rubber tires; (6) that the contracts make an illegal combination under the laws of the United States, and are illegal and void.

The assignments of error go to the third, fifth, and sixth conclusions of law.

The Wisconsin [\*\*7] statute is eliminated not only because it is not involved in any assignment of error, but also because HN1[<sup>↑</sup>] a state cannot subtract from the right conferred upon a patentee and his assigns by the federal laws. Columbia Wire Co. v. Freeman Wire Co. (C.C.) 71 Fed. 302; U.S. Consolidated Seeded Raisin Co. v. Griffin & Skelly Co., 126 Fed. 364, 61 C.C.A. 334. For the protection of the physical or moral health of its citizens a state may restrain the use of "the corporeal thing or article brought into existence by the application of the patented discovery" ( Patterson v. Kentucky, 97 U.S. 501, 24 L. Ed. 1115), but such a laying on of hands does not touch the monopoly of the federal grant. Nothing in this record questions the innocence of rubber tires.

Apart from any support that may be afforded by the third and fifth conclusions, is the sixth conclusion sound? Does the Sherman law shield the defendant from its promise to pay?

HN2[<sup>↑</sup>] Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the [\*\*8] promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using, or vending the thing patented, without your permission. Bloomer v. McQuewan, 14 How. 539, 548, 14 L. Ed. 532; United States v. American Bell Telephone Co., 167 U.S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144; Bement v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Good v. Daland, 121 N.Y. 1, 24 N.E. 15; Fuller v. Berger, I\*362I 120 Fed. 274, 56 C.C.A. 588, 65 L.R.A. 381; Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C.C.A. 58; Rupp-Wittgenfeld Co. v. Elliott, 131 Fed. 730, 65 C.C.A. 544. Congress put no limitations, excepting time, upon the monopoly. Courts can create none without legislating. HN3[<sup>↑</sup>] The monopoly is of the invention, the mental concept as distinguished from the [\*\*9] materials that are brought together to give it a body. Use of the materials, as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson. Does the requirement that the licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article violate the Sherman law? We cannot dispose of the question on the authority of Bement v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058 (see United States Consolidated Seeded Raisin Co. v. Griffin & Skelly Co., 126 Fed. 364, 61 C.C.A. 334), for according to our reading the question was expressly excepted from the decision; and so, aided by the declarations of general principles in that and other cases, we must formulate our own answer.

Under its constitutional right to regulate interstate commerce [\*\*10] HN4[<sup>↑</sup>] Congress made illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," and subjected to liability to fine or imprisonment "every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law.

HN5[<sup>↑</sup>] Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subjects of monopoly; [\*\*11] instrumentalities of commerce between which the people are

entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. [HN6](#)<sup>↑</sup> The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. [\*Northern Securities Co. v. United States, 193 U.S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.\*](#)

Grant produced a new integer in the useful arts. See [\*Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. \(C.C.A., Second \[\\*363\] Circuit, February 1, 1907\) 151 Fed. 237.\*](#) Plaintiff, as his successor in interest, is the owner of a valid patent. That stands as an unquestionable fact on this writ of error. [HN7](#)<sup>↑</sup> The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker [\[\\*12\]](#) of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

True that "it is as important to the public that competition should not be repressed by worthless patents as that the patentee of a really valuable invention should be protected in his monopoly." [\*Pope Mfg. Co. v. Gormully, 144 U.S. 224, 234, 12 Sup. Ct. 632, 36 L. Ed. 414.\*](#) But worthless patents and other supposititious cases are not on review.

What is stated as the third conclusion of law does not affect the result. The case in the Court of Appeals for the Sixth Circuit was not a proceeding in rem. The defendant in that particular suit has a decree on which, if he were again sued for infringement of the Grant patent, he could base a plea of res adjudicata. [\[\\*13\]](#) That plea would be as good in the other circuits as in the Sixth. No other member of the public could plead that decree in any circuit. The right conclusion of law from the facts found is that, so far as the parties to the contract in suit are concerned, the patent is valid throughout the United States, and is enforceable against every one who is not able to shield himself behind an erroneous decree. If any inference of fact (or prophecy) was to be drawn from the facts found, it should have been that the Court of Appeals for the Sixth Circuit will not exempt other members of the public from the monopoly of the Grant patent. That infringers may be more contumacious in one locality than in another does not change the rights of the parties before the court. If defendant, or any other of those who entered the pool, had been before the court below in an infringement suit, the validity of the patent and defendant's use thereof without license would have compelled a decree enjoining the sale of the patented articles in Michigan, Ohio, Kentucky and Tennessee and requiring an accounting of sales already made. Consequently there was full warrant for the parties to the contract in suit [\[\\*14\]](#) to agree to pay for the use of the patent throughout the United States.

None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right. Both before and after the period covered by the contract the market was demoralized, prices were cut, and the owner [\[\\*364\]](#) of the patent was getting nothing except by the slow and expensive process of litigation; but the public was not entitled to profit by competition among infringers. The internal agreements relating to royalties, proportioning the business, supervision, and penalties, did not affect or concern the public at all. Equally innocuous, in our view, was the matter stated as the fifth conclusion of law. First, the public was not injured, because the finding of fact is that the provision was never acted upon in any way. Second, if a defense had been predicated on the presence of that provision in the contract, it would have been unavailing, because that provision is separable from the royalty and other valid parts of the contract. And, third, the owner of the patent had [\[\\*15\]](#) the right, either alone or through licensees, to accumulate funds with which to push the Grant tire on the market, and in so doing to undersell the makers of other tires and infringing makers of the Grant tires. It is not for a defendant's sake that courts listen to the defense that he ought not to pay because his promise was under an arrangement to injure the public. The public is not injured by an arrangement to compete with adversaries for the public's patronage.

The evidence has not been brought up. No assignment of error questions the fullness and accuracy of the finding of facts. No cross-assignment has been made. The amount due, with interest to the date of entering the judgment hereby directed, can be computed.

The judgment is therefore reversed with the direction to enter judgment in plaintiff's favor.

**Concur by:** GROSSCUP

## **Concur**

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GROSSCUP, Circuit Judge (concurring). I concur in the foregoing judgment; but am not prepared to hold that patented articles are never, under any circumstances, articles of trade or commerce among the several states, within the meaning of the Sherman Act; and do not think that that premise is essential to the conclusion arrived at.

The patentee, **[\*\*16]** in this case, in good faith believed the patent valid, as did also all the parties entering into the contracts. Whatever, therefore, their effect may have actually been, the contracts were not intended to affect prices, except as the parties believed they had the right, because of the patent, to fix and maintain prices.

Now were the patentee the manufacturer, he would unquestionably have had the right to fix and maintain his own prices; and were the other parties to the contract manufacturers for the patentee, at a given figure for such manufacture, the patentee's right to fix and maintain the selling price would still remain; nor could this be questioned were he to make the manufacturers his selling agents also. How, then, does the contract under review make a case in which the patentee, through his manufacturer, is not entitled to fix and maintain prices -- how is the arrangement, in effect, different in any way of restraining trade or competition, from the arrangement just supposed, in which the patentee unquestionably has that right?

True, in the case under review, the manufacturers, as to the public, are not competitors; but neither would they be in the cases supposed; in **[\*\*17]** both cases the public suffering nothing, except what the patentee had the right to exact; for so long, at least, as the patentee is not **[\*365]** exacting, as the value of his invention, an unreasonable sum (and his action in that respect is not here questioned) it is within his own right to say whether the price exacted should be retained by himself, or shall be distributed among the people manufacturing for him. The contracts, therefore, in the case before us, having been made in good faith, and not as a mere subterfuge, I can see in them nothing that the Sherman Act was intended to prevent.

## **State v. Bovee**

Court of Common Pleas of Lorain County, Ohio

June 8, 1907, Decided

No Number in Original

**Reporter**

17 Ohio Dec. 663 \*; 1907 Ohio Misc. LEXIS 157 \*\*; 6 Ohio N.P. (n.s.) 337

STATE OF OHIO v. M. O. BOVEE ET AL.

**Subsequent History:** [\*\*1] For prior contra holding, see State v. Ross, 16 Dec. 704.

**Prior History:** DEMURRERS to indictment.

**Disposition:** Demurrs sustained and the defendants discharged.

## **Core Terms**

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commodity, combinations, transportation, commerce, tangible, insurance business, merchandise, words, movable, barter, broad sense, restrictions, terms, fire insurance, enact a law, common law, consumption, consumed, intend

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

### [HN1](#) **Public Enforcement, State Civil Actions**

See Ohio Rev. Stat. § 7586 et seq.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

### [HN2](#) **Claim, Contract & Practice Issues, Policy Interpretation**

The issuing of a policy of insurance is not a transaction of commerce, but is a simple contract of indemnity against loss.

Civil Procedure > Appeals > Case Transfers

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

### [HN3](#) **Appeals, Case Transfers**

Insurance contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > ... > Business Insurance > Marine & Inland Marine Insurance > General Overview

Insurance Law > ... > Marine & Inland Marine Insurance > Coverage > Perils of the Sea

#### **HN4** **Claim, Contract & Practice Issues, Policy Interpretation**

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea.

Governments > Courts > Common Law

Governments > Legislation > Interpretation

#### **HN5** **Courts, Common Law**

In Ohio an act is not criminal unless made so by statute, and the statute should describe the act which is forbidden with reasonable certainty, and where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it.

Governments > Legislation > Interpretation

#### **HN6** **Legislation, Interpretation**

A criminal statute must be strictly but fairly construed, and any reasonable doubt that there may be should be resolved in favor of the defendants.

Governments > Legislation > Interpretation

#### **HN7** **Legislation, Interpretation**

In construing a statute the court has a right to consider the history of the legislation, the cause or necessity for it, its object and what appears best calculated to advance the same, for the purpose of determining what the intent of the legislature was in enacting the law.

Governments > Legislation > Interpretation

#### **HN8** **Legislation, Interpretation**

When a statute is taken principally from the statute of another state and prior to its adoption had received a construction in that state, it is reasonable to suppose that the legislature in adopting this provision did so in view of the construction which had been put upon it and with the intention that it should receive the same construction in Ohio.

Governments > Legislation > Interpretation

### **HN9** **Legislation, Interpretation**

General words following particular and specific words must, ordinarily, be confined to things of the same kind as those specified.

Governments > Legislation > Interpretation

### **HN10** **Legislation, Interpretation**

Before an act can be held to be criminal in Ohio it must clearly appear that the legislature intended to make that act criminal. It must be borne in mind that there are no common-law offenses in Ohio. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio unless such act or omission is specifically enjoined or prohibited by the statute laws of the state.

## **Headnotes/Summary**

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### **Headnotes**

#### **CRIMINAL LAW--INSURANCE--MONOPOLIES--STATUTES.**

##### **1. COMBINATIONS OF INSURANCE AGENTS NOT VIOLATION OF ANTITRUST LAW.**

The business of soliciting and selling fire, lightning or tornado insurance is not commerce; contracts of insurance are not commodities, and the insurance business is not a trade so as to come within the meaning of these terms as used in the Valentine antitrust law, Lan. 7586 (B. 4427-1) *et seq.*

##### **2. CONSTRUCTION OF CRIMINAL STATUTES.**

In Ohio an act is not criminal unless made so by statute, and the statute should describe the act which is forbidden with reasonable certainty, and where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it.

##### **3. EFFECT OF CONSTRUCTIONS OF COURTS OF FOREIGN STATE ON LAWS ADOPTED FROM THAT STATE.**

When the Ohio legislature adopts the law of another state it does so intending that it shall receive the same construction by the Ohio courts that had been put upon it, up to the time of its enactment in Ohio, by the courts of the state from which it is adopted.

**Counsel:** F. M. Stevens, prosecuting attorney, for plaintiff.

Stroup & Fauver and Thompson, Glitch & Cinniger, for defendants.

**Judges:** WASHBURN, J.

**Opinion by:** WASHBURN

## Opinion

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### [\*663] WASHBURN, J.

At the April term, 1907, of the court of common pleas of Lorain county, Ohio, twenty-three individuals and one corporation were jointly indicted under Lan. 7586 (B. 4427-1) *et seq.*, known as the Valentine antitrust law, for combination in restraint of trade.

The indictment contains four counts, each charging the offense in identical language, but on different dates, the charge being that the defendants--

"Unlawfully did conspire, combine, confederate, agree and associate themselves together to create and carry out restrictions in the trade, business and commerce of insuring property against loss and damage by fire, lightning and tornado, and to increase the price, premium and rate of such insurance and to prevent competition in the making, sale and purchase of such insurance and to fix the price, premium and rate of such insurance at a standard and [\*2] figure, whereby its price to the public and to the consumer shall be established and controlled, [\*664] in that the price, premium and rate of such insurance shall be maintained as fixed, and to make, enter into, execute and carry out contracts, obligations and agreements to keep and maintain the price of such insurance at a graduated figure, to not sell or dispose of such insurance below a common standard and fixed value, to establish and settle the price of such insurance between themselves and between themselves and others, so as to preclude a free and unrestricted competition among themselves in the sale thereof, and to pool, combine and unite their interests in the sale of such insurance so as to affect the price thereof; and that they" (naming the defendants) "then and there unlawfully acted with, were members of, aided and assisted in carrying out the purposes of, said unlawful trust and combination, the exact name of which is to the grand jurors unknown, then and there being and existing for each and all of the aforesaid unlawful purposes and which said trust and combination did then and there unlawfully bring about, effect and accomplish each and all of the aforesaid [\*3] purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio."

To this indictment the defendants have each, with one exception, interposed a demurrer, upon several grounds, the principal ground being that the facts stated do not constitute an offense punishable by the laws of the state of Ohio.

The principal question presented by the demurrs is, whether or not the business of fire insurance is included in the terms "trade," "commerce" or "commodity" as the same are used in the Valentine law. The object of that law, as stated in its title, is "To promote free competition in commerce and all classes of business in the state." Section 1 declares that:

**HN1** [+] "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase [\*4] of merchandise, produce or any commodity.

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport [\*665] any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any article or commodity, or by which they shall agree to pool, combine or directly or indirectly [\*\*5] unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Without stopping to quote the definitions of the word "commodity" as given by lexicographers, it is sufficient to say that the word as commonly used and understood means something movable and tangible. It is true that the word "commodity" in its broad sense is said to mean "convenience, accommodation, profit, benefit, advantage, interest, commodiousness," but its use in that sense has become obsolete. In that sense it cannot be said to be a thing that can be produced, used or transported, and the act in question, as shown by reference to the terms used in Subds. 2, 3, 4 and 5 of Sec. 1, refers to things that can be "produced," "manufactured," "made," "transported," "sold," "used" or "consumed;" hence I think that the word "commodity" was used in this act in its ordinary and well-understood commercial sense of something that is produced or used and is the subject of barter or sale, something movable and tangible. In the opinion [\*\*6] of the case cited hereafter, [Paul v. Virginia, 75 U.S. 168 \[19 L. Ed. 357\]](#), it is said that contracts of insurance are not commodities. I will later refer to an Iowa case which decides that insurance is a commodity.

The word "commerce," as ordinarily used, has to do with the sale or transportation of commodities or tangible and movable things, but it is a term of wide import, and it includes communications and intercourse for the purpose of trade in any and all its forms, and yet the Supreme Court of the United States, by repeated decisions, has held that-

**HN2** [↑] "The issuing of a policy of insurance is not a transaction of commerce--but is a simple contract of indemnity against loss." [Paul v. Virginia, supra.](#)

Mr. Justice Field, in deciding this case, uses this language:

**HN3** [↑] "These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded [\*666] from one state to another, and then put up for sale. They are like other personal contracts between parties [\*\*7] which are completed by their signature and the transfer of the consideration."

In 1895 the Supreme Court of the United States reiterated this doctrine in the following language:

**HN4** [↑] "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" [Hooper v. California, 155 U.S. 648, 655 \[15 S. Ct. 207, 210; 39 L. Ed. 297\]](#).

And the same court again, as late as 1900, specifically decided that "The business of life insurance is not commerce." [New York Life Ins. Co. v. Cravens, 178 U.S. 389 \[20 S. Ct. 962; 44 L. Ed. 1116\]](#).

So far as I know, no court has decided to the contrary, and I therefore hold that the word "commerce," as used in the act in question, does not include the business of fire insurance.

The word "trade" is ordinarily understood as meaning one's occupation or employment, or else the business of buying and selling. In the latter sense it is of no wider import [\*\*8] than "commerce" or "traffic," for "trade," in the sense of "exchanging commodities by barter, the business of buying or selling for money," has to do with movable and tangible things.

In the exemption laws of certain states the word "trade" is used in the broad sense of occupation or employment, and in the state of Texas, where the law exempted from attachment and execution all tools, apparatus and books belonging to "any trade or profession," the words "any trade or profession" were construed to include all employment and to include the business of an insurance agent so as to entitle him to the exemption therein provided for. Betz v. Maier, 12 Tex. Civ. App. 219 [33 S.W. 710].

In its broadest sense the word "trade" applies not only to skilled handicraft, but to any business that a man regularly engages in for a livelihood. If this broad meaning was intended, then the law applies to practically all business affairs, not only to the production, consumption, use, sale and transportation of tangible things, but to all cases where any occupation or employment is engaged in for the purpose of profit or gain, or a livelihood, except the learned professions. In this [\*\*9] broad sense it would include the occupation of the mechanic, the laborer, the agent, clerk or servant and all those who are employed for hire, except the lawyer, doctor, minister and those engaged in the liberal arts.

If that is the sense in which the word "trade" is used in this act, then it is made a criminal offense for two men to agree with each other not to work for less than two dollars per day. That construction would [\*667] render illegal all that class of unions and combinations of working men and tradesmen which are unqualifiedly recognized to be lawful and which have been encouraged and protected by the state. That men can combine for the purpose of regulating their wages by proper means, is now the settled law of the land; and such a combination was held not to be made criminal by a law very similar to our antitrust law. Hunt v. Co-operative Club, 140 Mich. 538 [104 N.W. 40].

Before giving to the Ohio statute a construction which will render criminal all combinations of laboring men, the court should be satisfied that such was the intention of the legislature.

It has been suggested that this statute applies only to such combinations as were [\*\*10] illegal at common law, and that such construction would exclude labor combinations and include insurance combinations, but that construction would render the law very indefinite and uncertain, for many combinations are legal at common law, and but few people know what combinations are legal and what are illegal at common law. In fact, few attorneys without research and study know just what combinations are upheld and enforced and what are illegal and unenforceable under the common law. HN5↑ In Ohio an act is not criminal unless made so by statute, and the statute should describe the act which is forbidden with reasonable certainty, and where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it.

It will be noticed that the word "trade" is used just twice in Sec. 1 of the act hereinbefore quoted,--in Subd. 1, where "restrictions in trade" are spoken of, and in Subd. 5, where reference is made to "any commodity or any article of trade, use, merchandise, commerce or consumption." It is apparent that as used in Subd. 5 the word "trade" has reference to something movable and tangible.

Throughout the act terms are used [\*\*11] which clearly indicate that the legislature had in mind concrete things which could be produced, transported, used or consumed. The language of Subd. 4 is: "any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state." To say that this language describes such an intangible thing as a contract of indemnity by which one person insures the property of another against loss by fire, is certainly to disregard the ordinary meaning of words.

That the terms "merchandise, product, or any commodity" were not intended to include intangible things, is shown by the fact that the legislature took particular pains to mention "transportation" among the list of things which might be the subject of a trust, thus evidently not intending to include such an intangible thing as transportation within the definition of such tangible things as "article" or "commodity."

[\*668] The transportation of an article is as much trade as is the insurance of an article, and as combinations for the purpose of preventing competition in the transportation of an article are specifically prohibited in Subd. 3 of Sec. 1, it is evident that the legislature did [\*\*12] not intend to include transportation in the word "trade" as used in Subd. 1, or the words "merchandise" or "commodity" as used in Subd. 2, or the words "merchandise, product, or any commodity" as used in Subd. 3, thus showing that the word "trade," as used in Subd. 1, was not used in its broadest sense, but rather in the sense of barter and sale.

If the term "restrictions in trade," as used in the first subdivision, is given its broadest and most comprehensive meaning, it includes all that is thereafter described in Subds. 2, 3, 4 and 5, and much that is not included in said subdivisions; hence, if it had been used in this broad sense, there was no need for the specific restrictions contained in Subds. 2, 3, 4 and 5--they were included and covered in Subd. 1. Indeed, it seems quite apparent that Subd. 1 is explained by Subds. 2, 3, 4 and 5, and that "trade" as there used has reference to the business of selling or exchanging some tangible substance or commodity for money; at least, it does not clearly appear that it was used in its broadest and most comprehensive sense.

This is [HN6](#) a criminal statute and must be strictly (*State v. Meyers, 56 Ohio St. 340, 350 [47 N.E. 138]*) [\*\*13] but fairly (*Barker v. State, 69 Ohio St. 68 [68 N.E. 575]*) construed, and any reasonable doubt that there may be should be resolved in favor of the defendants. [HN7](#) In construing a statute the court has a right to consider the history of the legislation, the cause or necessity for it, its object and what appears best calculated to advance the same, for the purpose of determining what the intent of the legislature was in enacting the law. The history of the law in question shows that the necessity for it grew out of the fact that there had been great combinations of corporations and capitalists for the purpose of controlling the price of tangible things--articles of prime necessity--or the charges for the transportation of the same, and that the state of Texas long before the Ohio law was passed had enacted a law very similar to what is now the Ohio law; in fact, the Ohio law is almost a literal copy of the Texas law, and before the Ohio law was passed the supreme court of Texas had decided that the legislature did not intend, in the use of the terms "restrictions in trade," "commerce" and "commodity," to include the business of fire insurance. [Queen Ins. Co. v. \[\\*\\*14\] State, 86 Tex. 250 \[24 S.W. 397\]](#); 22 L. R. A. 483]. Then the legislature of Texas amended the law so as to include the business of insurance, and thereafter the legislature of Ohio enacted the law in question, following, except as to title, practically the original Texas statute, and specifically omitting the provision in the amended Texas statute which brought the business of insurance within the terms [\*669] of the statute. The title to the Texas statute states that the law was passed "to promote free competition in the state of Texas," while the Ohio statute recites that it is an act "to promote free competition in commerce and all classes of business in the state."

But for this difference in the title of the Ohio statute the conclusion that the legislature of Ohio intended to enact a law which did not include insurance, is irresistible, and, considering the kind and character of the combinations which brought about the necessity for the legislation, I cannot give to the change in the title of the Ohio act a force and effect which would overcome the intention not to include the business of insurance in the act which is shown by the deliberate [\*\*15] omission from the body of the law of the provision in reference to insurance.

The title of the act is proper to be considered in determining the intention of the legislature in enacting the law, but it cannot be given controlling force in a criminal statute so as to give words of the law itself a meaning repugnant to that which, but for the title, is apparent from a consideration and fair construction of the law itself. [Bennett v. Lewis, 7 Ohio 80, 86; Seeley v. Thomas, 31 Ohio St. 301, 306](#); Sutherland, Statutory Construction Sec. 339.

The statute of Ohio is, as I have said, practically identical with the first Texas act, and the rule is, that where our legislature adopts the law of another state it does so intending that it shall receive the same construction by the Ohio courts that had been put upon it, up to the time of its enactment in Ohio, by the courts of the state from which it is adopted.

[HN8](#) "When a statute is taken principally from the statute of another state and prior to its adoption had received a construction in that state, it is reasonable to suppose that the legislature in adopting this provision did so in view of the construction [\*\*16] which had been put upon it and with the intention that it should receive the same

17 Ohio Dec. 663, \*669L<sup>A</sup> 1907 Ohio Misc. LEXIS 157, \*\*16

construction here." *Favorite v. Booher*, 17 Ohio St. 548; see also *Ives v. McNicoll*, 59 Ohio St. 402 [53 N.E. 60; 43 L. R. A. 772; 69 Am. St. Rep. 780], and *Gale v. Priddy*, 66 Ohio St. 400 [64 N.E. 437].

Having in mind that this is a criminal statute, a careful reading and consideration of the whole act leads me to the conclusion that the words in question were used in their ordinary and commonly-understood meaning and not in their obsolete or unusual meaning, and that the legislature intended the act to apply to tangible things, their manufacture, making, production, transportation, sale or purchase, and that it did not intend the law to apply to insurance. *Runck v. Cloud*, 8 Ohio N.P. 436, 11 Ohio Dec. 444.

I have not overlooked a case reported in *State v. Phipps*, 50 Kan. 609 [31 P. 1097; 18 L. R. A. 657; 34 Am. St. Rep. 152], but that merely holds that where insurance was specifically mentioned in the [\*670] body of the law it indicated [\*\*17] a legislative intention to use the word "trade" in the title of the act in a sense broad enough to include the business of insurance. Neither does the case reported in *State v. Insurance Co.* 152 Mo. 1 [52 S.W. 595; 45 L. R. A. 363], apply to the case at bar, because the law in that case especially mentioned and prohibited combinations of those engaged in the insurance business.

Counsel insist that this court should follow the supreme court of Iowa, where it is held that the word "commodity" in a somewhat similar statute included the business of fire insurance. That statute prohibited combinations "to regulate or fix the price of oil, lumber, coal, flour, provisions, or any other commodity or article whatever," and the supreme court of Iowa held that the business of fire insurance was included in the term "any other commodity or article whatever;" but in so deciding the court violated a well-settled rule of construction, which is, *HN9*[<sup>↑</sup>] "General words following particular and specific words must, ordinarily, be confined to things of the same kind as those specified." *Shultz v. Cambridge*, 38 Ohio St. 659.

Here the words "oil, lumber, [\*\*18] coal, flour and provisions" all refer to tangible and movable things, and the word "commodity," while including all of them, embraced many other things of the same general kind, and under the above rule the word "commodity" applied only to things like oil, lumber, etc., which were tangible and movable. In spite of that, the court gave to the word "commodity" an obsolete and unusual meaning and held that it included the business of insurance, because "there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law." The court recognized the fact that the business of insurance was not clearly within the provisions of the law, but seemingly held that it ought to be, and therefore was included. I do not regard the case as authority, for in Ohio "a statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute." *State v. Meyers, supra*.

There may be good reasons why combinations by insurance agents for the purpose of increasing rates of insurance should be prohibited, but [\*\*19] that will not justify a court in holding that such combinations are prohibited by a law which prohibits combinations with reference to articles which may be produced, transported and used and which are the subject of barter and sale.

If it is thought wise to extend the provisions of the *antitrust law* of Ohio so as to include the business of insurance, labor unions and everything about which a person may be engaged, the legislature can very easily use language which will clearly express that intention, but [\*671] it is sufficient for the determination of this case to say that such intention does not clearly appear from a consideration of the present law.

*HN10*[<sup>↑</sup>] Before an act can be held to be criminal in Ohio it must clearly appear that the legislature intended to make that act criminal. "It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio unless such act or omission is specifically enjoined or prohibited by the statute laws of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret [\*\*20] that our criminal code has not the expansiveness of the common law." *Smith v. State*, 12 Ohio St. 466, 469 [80 Am. Dec. 355].

The demurrers will, therefore, be sustained and the defendants discharged.

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End of Document

## Waters-Pierce Oil Co. v. State

Court of Civil Appeals of Texas

December 11, 1907, Decided

No. 4212.

**Reporter**

48 Tex. Civ. App. 162 \*; 106 S.W. 918 \*\*; 1907 Tex. App. LEXIS 203 \*\*\*

The Waters-Pierce Oil Company v. State of Texas.

**Prior History:** [\*\*\*1] Appeal from the District Court of Travis County. Tried below before the Hon. V. L. Brooks.

**Disposition:** Affirmed.

### **Core Terms**

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oil, anti-trust, violations, preponderance of evidence, do business, prescribed, forfeitures, dollars, tended, merchandise, alleged violation, civil action, prosecutions, forfeited, convicted, recovered, Refining, alleges, lessen, pecuniary, monopoly, indictment, petroleum, pleadings, suits, authorized agent, two year, declarations, provisions, imported

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Overbreadth

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN1[ Antitrust & Trade Law, Sherman Act**

The Sherman Anti-trust Law enacted by the United States Congress is not more definite and specific than the Texas anti-trust Acts of May 25, 1899, and March 31, 1903, and that law has stood the test against similar objections in the United States Supreme Court.

Criminal Law & Procedure > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

#### **HN2[ Defenses, Statute of Limitations**

See Tex. Crim. Stat. art. 219.

Governments > Legislation > Types of Statutes

**HN3**  **Legislation, Types of Statutes**

Offenses which are punishable by pecuniary fine only are misdemeanors.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN4**  **Public Enforcement, State Civil Actions**

Sections 2, 3, 4, and 6 of the Texas Act of May 25, 1899, declare that all persons, firms, corporations or associations of persons who violate those sections shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in the act.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN5**  **US Department of Justice Actions, Criminal Actions**

Section 11 of the Texas Act of May 25, 1899, states that all who do the things therein condemned shall be adjudged a monopoly and be subject to all the pains and penalties provided in the act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

**HN6**  **Public Enforcement, State Civil Actions**

Section 7 of the Texas Act of May 25, 1899, provides for the forfeiture of the charter of any domestic corporation and permit to do business granted to any foreign corporation for violations of the statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN7**  **Public Enforcement, State Civil Actions**

Section 5 of the Texas Act of May 25, 1899, reads as follows: Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of the act shall forfeit not less than \$ 200 nor more than \$ 5000 for every offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

Legal Ethics > Prosecutorial Conduct

#### **HN8** [blue icon] **Public Enforcement, State Civil Actions**

Under § 9 of the Texas Act of May 25, 1899, it shall be the duty of the attorney general and the prosecuting attorney of each district or county, respectively, to enforce the provisions of the act. The attorney general and the prosecuting attorney shall institute and conduct all suits begun in the district courts, and upon appeal the attorney general shall prosecute said suits in the courts of civil appeals and the state supreme court.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Governments > State & Territorial Governments > Employees & Officials

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

#### **HN9** [blue icon] **Accusatory Instruments, Indictments**

Section 11 of the anti-trust Act of March 31, 1903, reads as follows: Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of the act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of \$ 50, which may be recovered in the name of the state in any county where the offense is committed or where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general, or the district or county attorney, under the direction of the attorney general, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the state in proceedings under the act shall be over and above the fees allowed him under the general fee bill.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Legislatures

#### **HN10** [blue icon] **Public Enforcement, State Civil Actions**

It is the intention of the state legislature in enacting the Texas anti-trust Acts of May 25, 1899, and March 31, 1903 to create a cause of action in behalf of the state for the pecuniary penalties therein prescribed, to be recovered in a civil suit.

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > General Overview

48 Tex. Civ. App. 162, \*162LÁ06 S.W. 918, \*\*918LÁ907 Tex. App. LEXIS 203, \*\*\*1

Governments > Legislation > Statutory Remedies & Rights

**HN11[] State & Territorial Governments, Claims By & Against**

An action of debt will lie for the recovery of statutory penalties.

Governments > Legislation > Statutory Remedies & Rights

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > State & Territorial Governments > Claims By & Against

**HN12[] Legislation, Statutory Remedies & Rights**

The state may bring an action for debt for the recovery of statutory penalties.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

**HN13[] Public Enforcement, State Civil Actions**

If it is conceded that criminal prosecutions are barred within two years, it does not follow that the penalties which might have been recovered by such prosecutions can not, when authorized, be recovered in a civil action. The state penal code and code of criminal procedure deal exclusively with criminal cases, and that portion of the latter which deals with the subject of limitation only purports to fix the time within which criminal actions may be commenced. Tex. Crim. Stat. art. 219 merely forbids prosecutions by indictment or information after two years from the commission of the offense.

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Interpretation

**HN14[] Legislation, Statute of Limitations**

In prescribing a limitation for criminal proceedings, the legislature has in mind cases criminal, both in substance and form, and has no intention of affecting any right the state might assert in a civil action.

Governments > State & Territorial Governments > Claims By & Against

48 Tex. Civ. App. 162, \*162LÁ06 S.W. 918, \*\*918LÁ907 Tex. App. LEXIS 203, \*\*\*1

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > Legislation > Statute of Limitations > Time Limitations

## **HN15**[ **State & Territorial Governments, Claims By & Against**

A civil statute of limitation does not apply to the state unless so expressly provided.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Expiration, Repeal & Suspension

## **HN16**[ **Public Enforcement, State Civil Actions**

The proviso in the Texas Act of March 31, 1903, stated that nothing in the act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this Act took effect. This proviso preserved whatever rights the State had under the Texas anti-trust statute of May 25, 1899, including the right to enforce the penalties prescribed by that Act.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Governments > Legislation > Interpretation

Civil Procedure > Judgments > Relief From Judgments > General Overview

## **HN17**[ **Relief From Judgments, Motions for New Trials**

In construing written laws, courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention.

## **Headnotes/Summary**

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### **Headnotes**

#### **Receiver -- Appeal.**

One who has appealed from an order appointing a receiver and obtained a review of the proceedings with reference thereto is not entitled to raise the same questions again on appeal from the final judgment in the cause.

#### **Unlawful Combination -- Ownership of Corporate Stock -- Charge.**

The prohibition in the Act of March 31, 1903 (anti-trust law) against a combination of capital etc., of corporations for preventing or lessening competition by the acquisition by one corporation of the stock of another does not render

the corporation whose stock is so acquired liable to the penalties therein denounced except on its participation in the unlawful act. But see charge held (Key, J. dissenting) not to have the effect of imposing such liability.

#### **Unlawful Combination -- Harmless Error.**

Where one penalty is imposed by a verdict and judgment establishing the violations of several provisions of the anti-trust law of 1903, error in the submission of the issues arising on the alleged commission of one of the prohibited acts is not ground for reversal if the issue as to the other unlawful act was properly submitted and the recovery thereon sustained.

#### **Constitutional Law -- Anti-trust Laws.**

The constitutionality and validity of the Acts of May 25, 1899, and March 31, 1903 (the anti-trust laws) sustained.

#### **Anti-trust Law -- Limitation -- Civil and Criminal Actions.**

The Acts of May 25, 1899, and March 31, 1903 (the anti-trust laws) vest in the State a civil right of action for the pecuniary penalties prescribed for violations of the provisions of those statutes, to be prosecuted in the district courts and governed by the rule that limitation does not run against the State, and not affected by articles 218 and 219 requiring indictments or informations for felonies to be prosecuted within three years from the commission of the offense and indictments or informations for misdemeanors within two years.

#### **Anti-trust Law -- Suit by State.**

If an exception to the rule that limitation does not run against the State should be recognized in cases merely for actions for debt, not for the preservation of public rights, still its suits for penalties under the anti-trust laws is to preserve public rights and promote public policy, and would not fall within such exception, and neither the two years nor the four years limitation of civil actions would apply.

#### **Constitutional Law -- Labor Organization -- Discrimination.**

The Act of May 27, 1899, protecting working men in the right of organization, does not authorize anything to be done by trades unions which was prohibited by the Act of May 25, 1899 (anti-trust law) and creates no such discrimination as would under the latter act be unconstitutional.

#### **Penalties Under Repealed Law -- Saving Clause.**

The repeal by the Act of March 31, 1903, of the Act of May 25, 1899, reducing the amount of the penalties (anti-trust laws) but with a proviso saving the right of the State to penalties and forfeitures already incurred did not prevent action by it for such penalties under the repealed law.

#### **Penalties Under Repealed Law.**

The substitution by the Act of March 31, 1903, of a lower penalty for violating its prohibitions than was imposed for similar violations by the Act of May 25, 1899, saving the State's right to recover penalties for things done before the latter Act took effect left the original and not the reduced penalties in force as to such prior offenses.

#### **Penalties Under Repealed Law -- Statutory Construction -- Punctuation.**

The location of a comma in a proviso saving the "rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this Act took effect," did not justify the construction that the right to penalties against domestic corporations only was preserved, no reason existing for such discrimination.

**Excessive Fines and Forfeitures.**

The Acts of May 25, 1899, and of March 31, 1903 (the anti-trust laws) are not unconstitutional as imposing excessive fines and forfeitures (State v. Laredo Ice Co., 96 Texas, 467); nor was the imposition of penalties aggregating \$ 1,623,900 excessive when its magnitude was due to defendant's repeated and long continued violations of the law, covering a period of six years.

**Anti-trust Law -- Recovery Sustained.**

Evidence considered and held to show a violation of the anti-trust laws of Texas by an agreement between defendant and another foreign corporation, the object of which was to create a monopoly and control the price of petroleum oil in the State and acts done in the State in pursuance of such agreement.

**Counsel:** Clark & Bolinger, Cochran & Penn, D. W. Odell, and N. A. Stedman (J. D. Johnson and N. S. Priest, of counsel), for appellant.

The anti-trust Act of May 25, 1899, was repealed by the anti-trust Act of March 31, 1903. [Section 35, article 3, Constitution of Texas](#); Anti-trust law of May 25, 1899, General Laws of Texas, Twenty-sixth Legislature, p. 246; Anti-trust law of March 31, 1903, General Laws of Texas, Twenty-eighth Legislature, p. 119; Constitution of the United States, and section 1 of the Fourteenth Amendment thereto.

No right was reserved to the State by said Act of March 31, 1903, to recover penalties against foreign corporations for violations of said Act of May 25, 1899, or any other law upon said subject. Act May 25, 1899, *supra*; Act March 31, 1903, *supra*; *Collins v. Warren*, 63 Texas, 315; *Roberts v. Yarboro*, 41 Texas, 452; 26 Am. & Eng. Enc. of Law, p. 680; *United States v. Dickson*, 15 Peters, 165.

This suit, though civil in form, is a prosecution against the defendant to recover penalties for an offense, the plaintiff's cause of action is criminal in **[\*\*\*2]** its character, and the bar of limitation of two years prescribed by article 219 of the Code of Criminal Procedure precludes a recovery by the plaintiff of any penalties against the defendant under such anti-trust Act of May 25, 1899. Article 219, Code Criminal Procedure; *Missouri, K. & T. Ry. Co. v. State*, 100 Texas, 420; *Queen Insurance Co. v. State*, 86 Texas, 250; *Stocksbury v. Swan*, 85 Texas, 563; *Clepper v. State*, 4 Texas, 242; 1 Bishop's Criminal Law, sec. 32; 22 Cyc., p. 186; *Wisconsin v. Pelican Insurance Co.*, 127 U.S., 265; *Boyd v. United States*, 116 U.S., 616; *United States v. Shapleigh*, 54 Fed. Rep., 126; *Lees v. United States*, 150 U.S., 480; *Commonwealth v. Equitable Life Ass. Soc.*, 38 S. W. Rep., 491; *Wood on Limitation*, sec. 16; *Ex parte Lange*, 18 Wallace, 163; *Bristol v. Washington County*, 177 U.S., 147.

It appears from the face of the plaintiff's petition that the plaintiff's cause of action, if any it ever had, to recover penalties under the anti-trust Act of May 25, 1899, accrued more than two years before the institution of this suit and therefore if the plaintiff's cause of action is not to be regarded as criminal in its nature, and not governed by article 219 **[\*\*\*3]** of the Code of Criminal Procedure, such cause of action must be treated as civil in its character, and having accrued more than two years before the institution of this suit, it is barred by the statute of limitation of two years, as prescribed in article 3354 of the Revised Civil Statutes of Texas. Revised Civil Statutes, art. 3354; *Buswell on Limitation*, sec. 97; *Stockwell v. United States*, 13 Wallace, 531; *Davidson v. Missouri Pacific Ry. Co.*, 3 Willson's Cases, p. 216; *Rockwell v. Ohio*, 11 Ohio, 130; *State v. Moore*, 19 Tenn. (Meigs), 476.

Plaintiff's cause of action, if not regarded as criminal in its nature, is civil in its character, so much thereof as accrued prior to the 22d day of September, 1902, is barred by the statute of limitation of four years as prescribed in article 3358 of the Revised Civil Statutes of Texas. Revised Civil Statutes, art. 3358; *Boswell v. Robinson*, 33 N. J. Law, 273, and also same as above.

Any violator of said Act is guilty of a felony, and as to such violator the period of limitation for the commission of the felony is three years as prescribed by article 218 of the Code of Criminal Procedure of the State of Texas, and therefore a person **[\*\*\*4]** prosecuted by an action, civil in form, for the recovery of the penalty of \$ 50 per day for violating said Act is, if no other period of limitation is available to him, entitled to the protection of the statute of limitation of three years prescribed by said article 218 of the Code of Criminal Procedure by analogy. *Pomeroy's Equity Jurisprudence*, 419; *Roller v. Holly*, 176 U.S., 398.

Section 2 of the anti-trust Act of May 25, 1899, does not sufficiently designate an offense against the laws within the requirement of article 3 of the general provisions of the Penal Code of the State of Texas, which declares that no person shall be punished for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written law of this State; nor within the requirement of article 6 of the general provisions of the Penal Code of the State of Texas, which prescribes that whenever it appears that a provision of the penal law was indefinitely framed or of such doubtful construction that it can not be understood, either from the language in which it is expressed or from some other written law of the State, such penal law shall be regarded as wholly inoperative; [\*\*\*5] nor within the requirement of article 9 of the general provisions of the Penal Code of the State of Texas, which prescribes that no person shall be punished for an offense not made penal by the plain import of the words of the law.

Section 6 of the anti-trust Act of May 25, 1899, does not sufficiently define an offense within the requirement of article 3 of the general provisions of the Penal Code of the State of Texas, which declares that no person shall be punished for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written law of this State; nor does it sufficiently define an offense within the requirement of article 6 of the general provisions of the Penal Code of the State of Texas; nor does it sufficiently define an offense within the requirement of article 9 of the general provisions of the Penal Code of the State of Texas. Queen Ins. Co. v. State, 86 Texas, 250; Missouri, K. & T. Ry. Co. of Texas v. State, 100 Texas, 420; Louisville & N. Ry. Co. v. Commonwealth, 35 S. W. Rep., 129; Tozer v. United States, 52 Fed. Rep., 917; Louisville & N. Ry. Co. v. R. R. Commission of Tenn., 19 Fed. Rep., 679.

The Acts in question [\*\*\*6] denied to defendant the benefit of that part of the [Fourteenth Amendment to the Constitution of the United States](#) which provides that no State shall deprive any person of property without due process of law. Missouri, K. & T. Ry. Co. v. State, 100 Texas, 420; Louisville & N. Ry. Co. v. Commonwealth, 35 S. W. Rep., 129; Chicago, B. & Q. Ry. Co. v. Chicago, 166 U.S., 226; Hagar v. Reclamation Dist., 111 U.S., 701; Bank of Columbia v. Okely, 4 Wheaton, 235; State v. Loomis, 115 Missouri, 307; People v. Gillson, 109 New York, 389.

The verdict of the jury in assessing penalties against the defendant at the sum of \$ 1,549,500 for alleged violations of law, for each of the days between May 31, 1900, and March 31, 1903, was so grossly and shockingly excessive as to show passion and prejudice on the part of the jury against the defendant. [Constitution of Texas, art. 1, sec. 13](#); Penal Code, art. 2; Acts of 1903, p. 119; State v. Laredo Ice Co., 96 Texas, 467; Cooley's Constitutional Limitations, 401.

The action of the court in overruling appellant's motion for a new trial, and its refusal to set aside the verdict of the jury, and in entering judgment upon the verdict against appellant, [\*\*\*7] results in depriving appellant of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. Cotting v. Kansas City Stock Yards Co., 183 U.S., 101; Gates v. Hooper, 90 Texas, 563; State v. Shippers Comp. Co., 95 Texas, 603; Railway Co. v. State, 87 S. W. Rep., 336.

The court erred in overruling defendant's general exception to the motion or application of the State for the appointment of a receiver. (Tr., p. 655); Revised Statutes, arts. 1177, 1181, 1191 and 1337; Hall v. Jackson, 3 Texas, 305; Nye v. Gribble, 70 Texas, 458; May v. Taylor, 22 Texas, 348; Mann v. Falcon, 25 Texas, 276; Bledsoe v. Wills, 22 Texas, 650; McConkey v. Henderson, 24 Texas, 212; Ex parte Lange, 18 Wallace, 175; Townes' Pleading, pages 18 to 20; Bailey on Jurisdiction, sec. 23; Pomeroy Eq. Remedies, sec. 118. That a proceeding after judgment must be brought as a new suit: Munds v. Cassidey, 98 N. C., 558; Thayer v. Hart, 24 Fed. Rep., 558.

Robert V. Davidson, Attorney-General; Jewel P. Lightfoot, Assistant; John W. Brady, County Attorney; Gregory & Batts and Allen & Hart, for appellee.

The anti-trust Act of March 31, [\*\*\*8] 1903, expressly preserves all the rights of the State to recover penalties, to forfeit charters and prohibit foreign corporations from doing business in the State, and the cause of action asserted in this cause is not affected by the repeal of the Act of 1899. Anti-trust law, May 25, 1899, General Laws of Texas, Twenty-sixth Legislature, p. 246, and amendment, General Laws of Texas, Twenty-sixth Legislature, p. 310; Anti-trust law of March 31, 1903, General Laws of Texas, Twenty-eighth Legislature, p. 119, sec. 17; Penal Code, arts. 15, 16, 17, 18, 19 and 20; Snyder v. Compton, 87 Texas, 374.

This being a civil suit to recover statutory penalties, limitation does not run against the State. Acts Twenty-sixth Legislature, General Laws of 1899, pp. 246 and 310; Acts Twenty-eighth Legislature, General Laws, p. 119; Brown v. Sneed, 77 Texas, 471; Mellinger v. Houston, 68 Texas, 37; Governor v. Albright, 21 Texas, 753; Davidson v. Missouri Pacific Ry. Co., 3 Texas App. Civ., 217; State v. Waters-Pierce Oil Company, 67 S. W. Rep., 1057; Stockwell v. United States, 13 Wallace, 531; In re Rosey, Federal Cases, 12,066; United States v. Colt, Federal Cases, 14,839; United States v. Lyman, [\*\*\*9] Federal Cases, 15,647; United States v. Bougher, Federal Cases, 14,627; United States v. C. B. Church, Federal Cases, 14,762; Thompson v. Bassett, 5 Indiana, 535.

The Acts of 1899 and 1903, being valid acts, the court did not err in overruling the several special exceptions. State v. Laredo Ice Co., 96 Texas, 461; State v. Shippers' Compress Co., 95 Texas, 603; National Cotton Oil Co. v. The State, 6 Texas Court Rep., 510; 197 U.S., 115; State v. Missouri, K. & T. Ry. Co., 91 S. W. Rep., 214.

The anti-trust law of 1903 did not ameliorate the penalty provided for violations of the Act of 1899. Wall v. State, 18 Texas, 682; Martin v. State, 24 Texas, 61; Am. & Eng. Ency. of Law, vol. 28, sec. (c), p. 738.

The verdict of the jury was amply warranted by the evidence, was not excessive and showed neither bias nor prejudice on the part of the jury against the defendant. Texas anti-trust Act of 1899; State v. Laredo Ice Company, 96 Texas, 467; Martin v. Johnston, 33 S. W. Rep., 306; 13 Am. and Eng. Ency. of Law (2d ed.), 60; Southern Express Company v. Walker, 92 Va., 66; 15 Century Digest, secs. 3304-3309; State v. Rodman, 58 Minn., 402; 27 Am. and Eng. Ency. of Law, 779.

The [\*\*\*10] judgment did not deprive defendant of its property without due process of law in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States; in that the court proceeded under a valid law of the State of Texas in accordance with the law, passed in the lawful exercise of the police power of the State. Waters-Pierce Oil Co. v. Texas, 177 U.S., 28; Waters-Pierce Oil Co. v. State, 44 S. W. Rep., 936; National Cotton Oil Co. v. State, 197 U.S., 115; Smiley v. Kansas, 196 U.S., 447.

**Judges:** KEY, Associate Justice.

**Opinion by:** KEY

## Opinion

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[\*167] [\*\*919] KEY, Associate Justice. -- This case involves alleged violations of the anti-trust laws of this State, and as the charge of the able judge who tried the case sufficiently states the nature of the suit as it was submitted to the jury, and correctly defines the provisions of the anti-trust statutes applicable to the case, and states the issues that were decided by the jury, it is deemed proper to set out the charge in full, which is as follows:

"Gentlemen of the jury: In this case the State of Texas, as plaintiff, has sued the Waters-Pierce Oil Company, a private corporation chartered under the laws of the State [\*\*\*11] of Missouri, and doing business in Texas by virtue of a permit issued to it by the State of Texas on May 31, 1900, as defendant, to cancel said permit and to recover penalties for violations of the anti-trust laws of [\*168] Texas, which the State alleges the defendant has committed on each and every day from May 31, 1900, to April 29, 1907.

"The State alleges that on or about January 1, 1870, John D. Rockefeller, John D. Archbold, H. H. Rogers, Henry M. Flagler, and a number of other persons conceived the scheme of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States, including the State of Texas, and that said persons to that end and for that purpose entered into a conspiracy among themselves and with other individuals and corporations, including the defendant corporation, which conspiracy the State alleges continued in force and effect from the date of its formation until the date of the filing of the State's second amended petition in this case, and the State further alleges that in pursuance of said alleged conspiracy the defendant has done various acts and entered into various agreements [\*\*\*12] which constitute violations of the anti-trust laws of Texas.

"The State further alleges that the defendant's predecessor, the Waters-Pierce Oil Company, incorporated in 1878, on or about the 5th day of October, 1894, entered into a contract with the Eagle Refining Company, A. W. Clem and certain other individuals named in its petition, by the terms of which defendant acquired the property of said Eagle Refining Company, situated in the city of Dallas, Texas, and the right to operate its business under the name of the said Eagle Refining Company. It further alleges that the defendant did, subsequent to May 31, 1900, operate said Eagle Refining Company and maintain the plant thereof at Dallas, as an apparently competing concern for various purposes prohibited by the anti-trust laws.

"The State further alleges that in the year 1896, the defendant's said predecessor bought out the business of the Texas Oil and Gasoline Company and of one Roy Campbell, who were at that time doing business in the city of San Antonio, Texas, and elsewhere, and entered into contracts and agreements with the said Texas Oil and Gasoline Company and Roy Campbell, whereby said Texas Oil and Gasoline Company [\*\*\*13] was thereafter to be operated under said name by defendant as an apparently competing concern with defendant at San Antonio, in the sale of the products of petroleum. It further alleges that said Texas Oil and Gasoline Company was operated by defendant as a concern apparently competing with it at San Antonio subsequent to May 31, 1900, for various purposes in violation of the anti-trust laws of the State. For full particulars of the State's allegations you are referred to its second amended original petition.

"The defendant denies all and singular the allegations of the State, and in addition to various other special defenses, pleads specially that, if it has entered into any of the agreements or committed any of the acts alleged by the State, none of same constitute violations of the anti-trust laws of Texas, because said agreements were made and said acts done (if at all) solely with reference to subjects of interstate commerce. For full particulars of defendant's allegations, you are referred to its third amended original answer.

[\*169] "As the law of the case you are instructed as follows, viz.:

"I. -- The burden of proof rests upon the State to establish the affirmative [\*\*\*14] of the issues which will hereafter be submitted in this charge for your consideration by a preponderance of the evidence, and you will find in favor of the defendant on each issue so submitted for your consideration, except such issue or issues, if any, as you find that the State has established by a preponderance of the evidence, and you will return a general [\*\*920] verdict for the defendant, unless you find that the State has established by a preponderance of the evidence some combination or combinations of facts which will entitle it to recover under the law as it is given you in charge by the court.

"II. -- The statute known as the anti-trust law of 1899 was in force on May 31, 1900, and thereafter remained continuously in force until March 31, 1903.

"For the purposes of this charge you are instructed that this Act made it unlawful for any corporation transacting or conducting any kind of business in this State to enter into, or become a party to, any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise or to control or limit in Texas the trade in any article of manufacture [\*\*\*15] or merchandise.

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this State to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed, or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

"The statute known as the anti-trust law of 1903, became effective on March 31, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill or acts, by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes, [\*\*\*16] viz.:

"1. -- To create or which may tend to create or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State.

"2. -- To fix, maintain or increase the price of merchandise in Texas.

"3. -- To prevent or lessen competition in Texas in the sale of merchandise.

"4. -- To abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof.

"Said statute of 1903 further defines a monopoly to be a combination **[\*170]** or consolidation of two or more corporations when effected in any of the following methods, viz.:

"1. -- When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create, a trust as above defined.

"2. -- When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect **[\*\*\*17]** or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"III. -- Oil, all other products of petroleum, and goods, wares or merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the State of Texas and caused to be transported to its agents or others within the State, are the subjects of interstate commerce when they enter this State, and so remain until such commodities are removed from the original tanks, vessels or other packages in which they are imported into the State and become mixed with the common mass of property of similar character in this State. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, pool or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce can be considered by you as violating any **antitrust law** of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased **[\*\*\*18]** by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside the State and transported into the State and removed from the original packages or vessels in which it was brought into the State and mingled with other property of similar character in the State, is the subject of interstate commerce, but on the contrary is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this State.

"IV. -- A corporation such as defendant can only act through its agents and servants, but such a corporation is not liable for all of the acts of its agents or servants. It is liable, however, for the acts done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents, if any, which have been knowingly acquiesced in or ratified by the governing body of said corporation.

"V. -- Much evidence has been introduced before you relating to **[\*\*\*19]** the doings and agreements of the agents of corporations other than defendant, and to the doings and agreements of defendant's predecessor's agents prior to June 1, 1900, and to the doings and agreements of defendant's agents, and the agents of other corporations, **[\*171]** outside the State **[\*\*921]** of Texas, and to the doings and agreements of individuals both prior and subsequent to June 1, 1900, and both outside and within the State of Texas. None of this evidence is competent or can be considered by you against the defendant, except within the limitations and for the purposes hereinafter stated, viz.:

"If you find from a preponderance of the other evidence in the case, independent of all declarations or statements made by any person or persons, except their evidence given while testifying by deposition or personally as witnesses on the trial of this case, that on June 1, 1900, there was formed or existed an agreement between the

governing officers of defendant and the governing officers of any of the other corporations alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, or between the governing officers [\*\*\*20] of defendant and any of the individuals alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, then you may consider for what, if anything, you think it worth, such acts or declarations of all the parties to said agreement, if any, and such acts and declarations of their authorized agents, if any, as were done or made, as the case may be, during the existence of said agreement, if any, and in furtherance of its execution, for the purpose of determining the character of said agreement, and whether or not it contemplated a violation by defendant of the anti-trust laws of Texas.

"You may further consider for what, if anything, you think it worth as tending to show or explain the course of defendant's dealing in Texas, said evidence, if any, of what it did through its duly appointed and authorized agents, if any, outside the State.

"None of said evidence can be considered by you against the defendant for any other purpose whatsoever, and none of it can be so considered by you against the defendant for said purposes, except such of it, if any, as you think proper to be considered when tested by the rules above stated relating [\*\*\*21] to its competency.

"VI. -- No agreement made by the defendant outside the State of Texas, to violate the anti-trust laws of Texas, if any such there were, can be made the basis for forfeiting its permit to do business in Texas, or for imposing penalties upon it, unless such agreement was executed or attempted to be executed in Texas by the duly authorized agents of defendant; but inasmuch as the undisputed evidence in the case shows that the defendant has continuously maintained its agents in this State and prosecuted its business therein since May 31, 1900, you will be authorized to convict it of violating the anti-trust laws of Texas, if you find from a preponderance of the evidence in favor of the State on the issues submitted for your consideration in paragraphs VII, VIII, IX, X or XI of this charge.

"VII. -- If you find from a preponderance of the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from [\*172] petroleum, and if you further find from a preponderance [\*\*\*22] of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, and if you further find from a preponderance of the evidence that the oil with reference to which said agreement or understanding, if any, was so made and carried out, was the subject of local as distinguished from interstate commerce, you will return a verdict for the State and say by your verdict, we, the jury, find for the State on the issues submitted for our consideration in paragraph seven of the court's charge. You are instructed in this connection that if you find in favor of the State on the issue above submitted for your consideration in this paragraph of the charge, each day embraced between May 31, 1900, and March 31, 1903, during which the defendant remained a party to the agreement or understanding herein mentioned, if there were any such agreement or understanding, and if it remained a party to same on any of said days, would constitute a separate and distinct [\*\*\*23] violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant was on June 1, 1900, or on some date subsequent thereto and prior to March 31, 1903, through the action of its duly appointed and authorized agents, a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined from petroleum, and if you do not further find from a preponderance of the evidence that the oil with reference to which defendant entered into said agreement or understanding, if any such there were, was the subject of local, as distinguished from interstate, commerce, you will say by your verdict, we, the jury, find for the defendant on the issues submitted for our consideration in paragraph seven of the court's charge.

"VIII. -- If you find from a preponderance of the evidence that on June 1, 1900, or on any date subsequent thereto and prior to March 31, 1903, the defendant acting through its duly appointed and authorized agents, had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey, whereby the price in [\*\*\*24] Texas of oil refined from petroleum, other than oil which was the subject of

interstate as distinguished from local commerce, was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed [\*\*922] or regulated (or whereby the trade in such oil in Texas was sought to be controlled or limited), you will return a verdict for the State and say by your verdict, we, the jury, find for the State on the issues submitted for our consideration in paragraph eight of the court's charge. In this connection you are instructed that if the defendant became a party to a pool of the character mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, if there were any such days, would [\*173] constitute a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that on June 1, 1900, or that on some date subsequent thereto and prior to March 31, 1903, the defendant acting through its duly appointed and authorized agents had brought about or permitted a combination or union of its capital with the capital of the [\*\*\*25] Standard Oil Company of New Jersey, and if you do not further find from a preponderance of the evidence that by said combination or union, if such there were, the price in Texas of oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, was sought to be fixed or regulated, or that thereby the price in Texas of such oil was reasonably calculated to be fixed or regulated, or that thereby the trade in such oil in Texas was sought to be controlled or limited, you will say by your verdict, we, the jury, find for the defendant on the issues submitted for our consideration in paragraph eight of the court's charge.

"IX. -- If you find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in this State of the business of selling oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, [\*\*\*26] or to fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were on March 31, 1903, or any date subsequent thereto and prior to April 29, 1907, you will return a verdict for the State and say by your verdict, we, the jury, find for the State on the issues submitted for our consideration in paragraph nine of the court's charge. In this connection you are instructed that if the defendant became a party to a trust of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to and acted under such trust, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey, for the purpose of creating in Texas, or which tended to create or carry out in Texas restrictions in the free [\*\*\*27] pursuit in this State of the business of selling said character and kind of oil, or to fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas, in the sale of such oil, and that the defendant remained or was a party to, and acted under, such combination, if such there were subsequent to March 30, 1903, and prior to April 30, 1907, you will say by your verdict, we, the jury, find for the defendant on the issues submitted for our consideration in paragraph nine of the court's charge.

[\*174] "X. -- If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers, under such circumstances, that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph [\*\*\*28] of this charge, or to fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the State and say by your verdict, we, the jury, find for the State on the issues submitted for our consideration in paragraph ten of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, and that they were brought under such common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to [\*\*\*29] create or carry out restrictions in the sale in Texas of such oil, or fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will say by your verdict, we, [\*\*923] the jury, find for the defendant on the issues submitted for our consideration in paragraph ten of the court's charge.

"XI. -- If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a [\*\*\*30] verdict for the State and say by your verdict, we, the jury, find for the State on the issues submitted for our consideration in paragraph eleven of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph [\*175] of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and if you do not further find from a preponderance of the evidence that said stock was acquired and combination effected, if it were at all, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of said character and kind of oil, or that the effect of said combination, if such there were, [\*\*\*31] tended to affect or lessen the competition in the sale in Texas of said oil, you will say by your verdict, we, the jury, find in defendant's favor on the issues submitted for our consideration in paragraph eleven of the court's charge.

"XII. -- The evidence introduced before you does not show with sufficient definiteness that the defendant has, since May 31, 1900, acted under or persisted in the performance of either the contract with Clem and the Eagle Refining Company and others, or the contract with Roy Campbell and the Texas Oil and Gasoline Company, in such a manner as to violate the anti-trust laws of 1899 or 1903. You are, therefore, instructed to find in defendant's favor on the issues pleaded by the State with reference to said contracts.

"XIII. -- Evidence has been introduced before you tending to show that the defendant has given rebates and discounts in the course of its dealings; evidence has also been introduced before you tending to show that defendant has made contracts and entered into understandings other than those which have been submitted for your consideration in paragraphs seven to eleven, inclusive, of this charge. Evidence has also been introduced before [\*\*\*32] you tending to show the general course of dealings of defendant in Texas and elsewhere, including some of its business methods in meeting competition. You are instructed that none of this evidence shows or tends to show any violation of the anti-trust laws of Texas, unless it tends in some degree to establish some one or more of the issues submitted for your consideration in the last above mentioned paragraphs of this charge; and you are therefore instructed to acquit the defendant and return a general verdict for it, notwithstanding any and all of said evidence, unless you find in favor of the State on the issues submitted for your consideration in some one or more of said paragraphs of the charge.

"XIV. -- If you convict the defendant under the foregoing instructions of any violation or violations of the anti-trust law of 1899, you will specify in your verdict the date or days for which it is convicted of having violated said law, and will further specify in your verdict that for said violation or violations, if any you find, that its permit to do business in Texas shall be forfeited, and the amount of money which shall be adjudged against it as penalties [\*176] for said

violations, [\*\*\*33] if any. In fixing the penalties, if any, which you assess against the defendant for any violations of which you may convict it, of the anti-trust law of 1899, you will fix same at not less than two hundred dollars, or more than five hundred dollars per day for each day you find it has so violated the law. If you convict the defendant of any violations of the anti-trust law of 1903, you will specify in your verdict the date or days for which it is so convicted and further specify therein that as a result of said conviction, its permit to do business in Texas shall be forfeited, and the sum of money that shall be adjudged against it as a penalty for such violation, fixing said sum at fifty dollars per day for each and every day that you convict it of having violated said law.

"XV. -- In order to aid you in preparing your verdict in proper form, when you have reached same, the following forms of verdicts are submitted for your consideration:

"1. -- If you find in favor of the State on all of the issues submitted to you and for the entire time for which penalties are claimed by the State against the defendant in its petition, you will say: 'We, the jury, find for the plaintiff against [\*\*\*34] the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for the penalties at \_\_ Dollars; and we find for the plaintiff against the defendant on each of the issues submitted for each of the days [\*\*924] between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days, and fix the penalties at Seventy-four Thousand Four Hundred Dollars. We further find that the permit of the defendant to do business in the State of Texas should be canceled. We find for the defendant upon all the issues made by the pleadings and not submitted in the charge of the court.'

"2. -- If you find in favor of the State on some of the issues submitted for your consideration, relating to the alleged violation of the anti-trust law of 1899, and in favor of the State with reference to some of the alleged violations of the anti-trust law of 1903, you may use the following form of verdict:

"We, the jury, find in favor of the State on the issues submitted for our consideration in the following paragraphs of the court's charge ----.

"We further find that the defendant violated the anti-trust laws of Texas [\*\*\*35] on the following days embraced between May 31, 1900, and March 31, 1903 ----.

"We further find that on account of said violations, the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of \_\_ Dollars. We further find that the defendant violated the anti-trust laws of 1903, on the following days embraced between the 30th day of March, 1903, and the 29th day of April, 1907 ----.

"We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of \_\_ Dollars. On all other issues raised by the pleadings, we find in favor of the defendant.

[\*177] "3. -- If you find in favor of the State with reference to some or all of the alleged violations of the anti-trust law of 1899, submitted for your consideration, and if you find in favor of the defendant on other of said alleged violations, and if you find in favor of the defendant on the issue of all of the alleged violations of the antitrust law of 1903, you may use the following form of verdict:

"We, the jury find in favor of [\*\*\*36] the State on the issues submitted for our consideration in the following paragraph of the court's charge \_\_\_. We further find that the defendant has violated the antitrust laws of Texas on each of the following days embraced between May 31, 1900, and March 31, 1903 ----; we further find that because of said violations the permit of the defendant to do business in Texas should be forfeited and penalties should be imposed upon it in the amount of \_\_ Dollars. We further find in defendant's favor on all alleged violations of the anti-trust laws of 1903, and on all other issues made by the pleadings.

"If you find in defendant's favor on all issues submitted for your consideration relating to its alleged violation of the anti-trust laws of 1899, but find in favor of the State on all or some of the issues relating to defendant's alleged violation of the anti-trust law of 1903, you may use the following form of verdict: "We, the jury, find in defendant's favor on all issues submitted for our consideration relating to its alleged violation of the anti-trust laws of 1899, but

find in favor of the State under the following paragraphs of the court's charge: \_\_, for alleged [\*\*\*37] violations of the anti-trust laws of 1903. We further find that the defendant has violated said anti-trust laws on each of the following days embraced between March 30, 1903, and April 29, 1907, \_\_. We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the sum of \_\_ Dollars.

"5. -- If you desire to return a general verdict for defendant you may use the following form of verdict: We, the jury, find for the defendant.

"XVI. -- You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony; but you are bound to take the law as it is given you in charge by the court, and to be governed thereby in arriving at your verdict."

All requested instructions were refused. The verdict of the jury reads as follows:

"We the jury, find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties 1,549,500.00 dollars.

"And we find for the plaintiff against the defendant on each [\*\*\*38] of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days, and fix the penalties at seventy-four thousand four hundred dollars.

[\*178] "We further find that the permit of the defendant to do business in the State of Texas should be canceled.

"We find for the defendant upon all issues made by the pleadings and not submitted in the charge of the court."

The court rendered judgment for the State in accordance with the verdict for \$ 1,623,900, and a cancellation of the defendant's permit to do business in this State. The defendant has appealed and presents the case in this Court on one hundred and twenty-nine assignments of error.

There is evidence in the record which supports the findings of the jury, and we find the facts to be as found by the verdict.

*Opinion.* -- 1. -- Assisted by elaborate briefs and arguments submitted by able counsel on both sides, this court has given to this important case earnest and careful consideration. The volume of business on our docket and the great number of questions presented preclude extended [\*\*925] consideration in this opinion of many of the questions raised [\*\*\*39] in appellant's brief. We therefore announce, in general terms, our conclusion to the effect that it is not shown that error was committed in overruling appellant's application for a change of venue, in various rulings upon exceptions to pleadings, and as to admissibility of testimony.

A majority of the court also hold that no positive error has been assigned upon the charge of the court. The writer of this opinion is of a different view concerning the 11th section of the charge, and concurs with counsel for appellant in their contention that it was calculated to mislead the jury into the belief that they could find against the defendant upon the issue therein submitted, regardless of whether it had any knowledge of, participated with, or aided or abetted the Standard Oil Company in the wrongful conduct therein referred to. The provision of the anti-trust statute of March 31, 1903, upon which the charge in question was evidently founded, seems to be addressed, in the main, against the corporation which acquires stock or other property of another corporation with the intention of using it for the purpose specified in the statute, and it can not properly be construed to include the corporation [\*\*\*40] whose stock or property has been acquired, and subject it to the penalties prescribed by the statute, unless that corporation is, in some manner, responsible for the unlawful acts of the acquiring corporation.

These are my individual views, and the other members of the court do not concur in the construction placed by me upon the charge. However, we are all agreed that if the charge in question be erroneous, it affords no ground for reversal, because the jury found that appellant had violated other provisions of the anti-trust Act of 1903, and awarded only one penalty for each day's violation. Having found for the State on these other issues, if the verdict

had been in appellant's favor on the issue submitted by the charge under consideration, the judgment should have been the same; and therefore if that section of the charge was erroneous, such error is now harmless and immaterial.

In reference to the assignments of error complaining of the order [\*179] of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute a separate appeal from that order, and this court, in considering that appeal, has decided against appellant. It [\*\*\*41] is not entitled to have the order appointing a receiver reviewed by this court twice or in two distinct proceedings.

2. -- The constitutionality and validity of the anti-trust Acts of May 25, 1899, and March 31, 1903, have been vigorously assailed in numerous respects. We overrule these objections and hold that these statutes authorize and sustain this suit. (*State v. Laredo Ice Company*, 96 Tex. 461; *Waters-Pierce Oil Co. v. The State*, 44 S.W. 936.)

The contention that these statutes are too indefinite and uncertain in the particulars involved in this case is not regarded as tenable. [HN1](#)[<sup>1</sup>] The Sherman Anti-trust Law enacted by Congress is not more definite and specific than these statutes, and that law has stood the test against similar objections in the Supreme Court of the United States. (*United States v. Knight Company*, 156 U.S. 1; *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290; *United States v. Joint Traffic Ass'n*, 171 U.S. 505; *Hopkins v. United States*, 171 U.S. 578; *Anderson v. United States*, 171 U.S. 604; *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211; *Montague & Co. v. Lowry*, 193 U.S. 38; *Northern Securities Company v. United States*, 193 U.S. 197.)

3. -- [\*\*\*42] This suit was instituted on September 22, 1906, and the defendant interposed a special exception to the petition insofar as it sought to recover penalties for alleged violation of the anti-trust laws of this State prior to the 22d day of September, 1904, for the reason that it appeared from the face of the plaintiff's petition that the right to recover such penalties accrued more than two years before the suit was filed; and was therefore barred by the statute of limitation of two years, as prescribed in article 219 of the Code of Criminal Procedure of this State. That exception was overruled, and the court refused to give the jury a special instruction, requested by appellant, announcing and applying the same proposition of law. These rulings of the trial court are assigned as error, and present one of the most important questions in the case. Chapter 1 of title 4 of the Code of Criminal Procedure is headed thus: "The time within which criminal actions may be commenced:" Article 219 reads as follows: [HN2](#)[<sup>1</sup>] "For all misdemeanors an indictment or information may be presented within two years from the commission of the offense and not after-ward."

By the Penal Code [HN3](#)[<sup>1</sup>] offenses which are punishable [\*\*\*43] by pecuniary fine only are designated misdemeanors; and appellant's contention seems to be that the things condemned by the Act of May 25, 1899, upon which this suit in part is based, constitute misdemeanors; and that, although civil in form, the suit is criminal in nature and barred by article 219 of the Code of Criminal Procedure. It is also contended that the pecuniary penalties imposed by the Act of March 31, 1903, constitute part of the punishment prescribed by that Act, and that the suit for the penalties accruing thereunder constitutes [\*180] a criminal case, and is barred by article 218 of the Code of Criminal Procedure, [\*\*926] which bars prosecutions for felonies.

[HN4](#)[<sup>1</sup>] The second, third, fourth and sixth sections of the Act of May 25, 1899, declare that all persons, firms, corporations or associations of persons who violate those sections "shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this Act." [HN5](#)[<sup>1</sup>] The 11th section states that all who do the things therein condemned shall be "adjudged a monopoly and be subject to all the pains and penalties provided in this Act." [HN6](#)[<sup>1</sup>] The seventh section provides for the forfeiture [\*\*\*44] of the charter of any domestic corporation and permit to do business granted to any foreign corporation for violations of the statute. [HN7](#)[<sup>1</sup>] The 5th section reads as follows: "Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this Act shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided."

The pertinent part of the 9th section is expressed in these words: [HN8](#) "It shall be the duty of the Attorney-General and the prosecuting attorney of each district or county, respectively, to enforce the provisions of this Act. The Attorney-General and the prosecuting attorney shall institute and conduct all [\*\*\*45] suits begun in the District Courts, and upon appeal the Attorney-General shall prosecute said suits in the Courts of Civil Appeals and Supreme Court."

The first section of the anti-trust Act of March 31, 1903, defines a trust. The second section defines a monopoly, and the third section prescribes what acts shall constitute a conspiracy in restraint of trade. The fourth section declares all trusts, monopolies and conspiracies in restraint of trade to be illegal. The 5th, 6th and 7th sections make provision for the forfeiture of charters of domestic corporations violating that Act, and the 8th section makes a similar provision in reference to the permit of foreign corporations to do business in this State. The 7th and 10th sections use the word "convicted," but the 7th relates to the subject of the forfeiture of charter rights, and the tenth to the subject of forfeiture of a foreign corporation's right to do business in the State, which shows that the Legislature did not have in mind a proceeding by indictment or criminal information. [HN9](#) The 11th section reads as follows:

"Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions [\*\*\*46] of this Act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General, or [**\*181**] the district or county attorney, under the direction of the Attorney-General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this Act shall be over and above the fees allowed him under the general fee bill."

The 13th section of that Act reads as follows: "And in addition to the penalties and forfeitures herein provided for, every person violating this Act may further be punished by imprisonment in the penitentiary not less than one nor more than ten years."

We agree with counsel for appellant that these statutes are penal. They were enacted for the purpose of suppressing and preventing certain things regarded by the Legislature as detrimental to the public interest. The penalties prescribed were intended as punishment, but it does not follow [\*\*\*47] that this is a criminal case within the purview of article 219 of the Code of Criminal Procedure. After a careful consideration of all their terms, we have reached the conclusion that [HN10](#) it was the intention of the Legislature in enacting the two statutes under consideration to create a cause of action in behalf of the State for the pecuniary penalties therein prescribed, to be recovered in a civil suit.

We reach this conclusion mainly from the language of the 5th section of the Act of 1899, and the 11th section of the Act of 1903. These sections declare that those who violate any of the provisions of those Acts shall forfeit and pay, in the one instance not less than \$ 200 nor more than \$ 5000, and in the other instance \$ 50, to be recovered in an action in the name of the State. It is true that in some places in these laws the procedure is designated "prosecutions," but in others they are spoken of as "actions" and "suits." In the 9th section of the Act of 1899, it is declared to be the duty of the Attorney-General and district and county attorneys "to institute and conduct all suits begun in the District Courts, and upon appeal the Attorney-General shall prosecute said suits [\*\*\*48] in the Courts of Civil Appeals and Supreme Court."

Section 5 of that Act, construed in connection with section 9, indicates with absolute certainty a legislative purpose to authorize civil suits for the recovery of the pecuniary penalties prescribed. The two sections together indicate that it was not intended that such penalties should be enforced by a criminal proceeding, because if that act creates a criminal offense [**\*\*927**] such offense would be a misdemeanor, of which the District Court would have no jurisdiction. The Constitution confers upon that court exclusive jurisdiction of suits by the State for forfeitures and penalties, and it must be presumed that in enacting that statute, the Legislature intended to provide for such suits as were authorized by that provision of the Constitution, and not to create criminal offenses of which the County Court alone would have original jurisdiction, otherwise the Legislature would not have used the language, "shall institute and conduct all suits begun in the District Courts."

It is true that both of these statutes contain some expressions common to criminal procedure, such as "offense," "guilty" and "convicted." The word "guilty," [\*\*\*49] however, is frequently used in civil cases, [\*182] as "guilty of fraud," "guilty of negligence." And the word "offense," as used in these statutes, has reference to violations of their provisions, and is not equivalent to the words "felony" or "misdemeanor." However, we do not hold that it is necessary to use either of the latter terms to create a criminal offense; nor, on the other hand, do we think that the words "offense," "guilty" and "convicted" necessarily determine that these are criminal statutes to be enforced exclusively by indictment or information. The word "suit" is very generally used to designate a civil case, and seldom if ever applied to criminal cases.

As these statutes do not, in terms, require a resort to criminal procedure for their enforcement, then, even if they do not direct any method of enforcement, we are of the opinion that the State had the right to proceed in a civil action for a recovery of the pecuniary penalties. In such cases it is a well established rule that HN11[<sup>1</sup>] an action of debt will lie for the recovery of statutory penalties. (5 Ency. Plead. & Prac. 907, and authorities there cited.) It has been so decided in this State in Davidson v. Missouri [\*\*\*50] Pacific Ry. Co., 3 Texas App. Civ. 173, where it was held that a suit to recover a statutory penalty was an action of debt, and barred by our statute of limitation, which requires actions for debt, where the indebtedness is not evidenced by a contract in writing, to be commenced within two years. That HN12[<sup>1</sup>] the State may also bring an action for debt for the recovery of statutory penalties seems to be equally well settled. It was so held by the Supreme Court of the United States in Stockwell v. United States, 13 Wall. 531. That was an action by the government to recover double the value of certain shingles, alleged to have been illegally imported into the United States. The Act of Congress upon which the suit was founded reads as follows: "That if any person or persons shall receive, conceal or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so received, concealed or purchased." In that case, among other things, the court said:

[\*\*\*51] "A verdict and judgment having been recovered against the defendants in the court below, the record has been removed into this court and four errors have been assigned.

"The first is that a civil action of debt will not lie, at the suit of the United States, to recover the forfeitures or penalties incurred under this Act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported, for it is conceded that by the act of importing, an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that when a statute gives a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this [\*183] position, and it is believed that none exists. It can not be that whether an action of debt is maintainable or not depends upon [\*\*\*52] the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty -- a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The Act of 1823 (3 Stat. at L., 781), fixes the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

"But all doubts respecting the matter are set at rest by the fourth section of the Act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed and accounted for in the manner prescribed by the Act of March 2, 1799 (1 Stat. at L., 627), entitled 'An Act [\*\*\*53] to regulate the collection of duties on Imports and Tonnage.' By referring to the 89th section of that Act, it will be seen that it directs all penalties accruing by any breach of the Act, to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector [\*\*928] within whose district a forfeiture shall

have been incurred, is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the Act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has been frequently ruled that debt will lie at the suit of the United States, to recover the penalties and forfeitures imposed by statutes. *United States v. Colt. Pet.* (C. C.), 145; [Jacob v. United States, 1 Brock. 520](#); [United States v. Bougner, 6 McLean 277](#); *Walsh v. United States*, 3 Wood. & M. 342; *United States v. Lyman*, 1 Mas. 482; [United States v. Allen, 4 Day 474](#). It is true that the statute of 1823 imposes [\*\*\*54] the forfeiture and liability to pay double the value of the goods received, concealed or purchased with knowledge that they had been illegally imported, 'on conviction thereof.' It may be, therefore, that an indictment or information might be sustained. But the question now is whether a civil action can be brought, and, in view of the provision that all penalties and forfeitures incurred by force of the Act shall 'be sued for and recovered,' as prescribed by the Act of 1799, we are of the opinion that debt is maintainable. The expression 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

As to the point made in reference to the penalties being indefinite under the Act of 1899, in addition to the case just cited, we refer to [Rockwell v. State, 11 Ohio 130](#), where the law fixed the penalty at not less than \$ 5 nor more than \$ 50, and the objection referred [\*184] to was overruled, and it was held that an action of debt would lie. Other courts have held that statutes somewhat similar to those under consideration confer upon the State a cause of action to be maintained in a civil suit. ([Burgh v. State, 108 Ind. 132](#); [Davis, Admr., \[\\*\\*\\*55\] v. State, 119 Ind. 555](#); [State v. Grove, 77 Wis. 448](#); [Territory of New Mexico v. Baca, 2 N.M. 183](#).) Interesting discussions of the terms "fines," "forfeitures" and "penalties" will also be found in [People v. Nedrow, 122 Ill. 363](#); [Gosselfink v. Campbell, 4 Iowa 296](#).

Our conclusion is that the statutes under consideration vest in the State a civil right of action for the pecuniary penalties prescribed for violations of the provisions of those statutes. This being true, and as our statute of limitations applicable to civil cases does not include and bar the State, we hold that limitation is not available as a defense in this case. We do not rest this ruling upon the ground that the statutes under consideration do not create criminal offenses. [HN13](#)<sup>↑</sup>] If it be conceded that they create such offenses, criminal prosecutions for which would be barred within two years, it does not follow that the penalties which might have been recovered by such prosecutions can not, when authorized, be recovered in a civil action. Our Penal Code and Code of Criminal Procedure deal exclusively with criminal cases, and that portion of the latter which deals with the subject of limitation only purports to fix the time [\*\*\*56] within which criminal actions may be commenced; and article 219, relied on by appellant, merely forbids prosecutions by indictment or information after two years from the commission of the offense.

It is argued on behalf of appellant that, even though a statute creating an offense may confer upon the State the right to maintain a civil action to recover a pecuniary penalty for violating the statute, still that right would be barred by article 219, which would bar the right to enforce the penalty by indictment or information. If article 219, or any other statute, declared that no right of action should exist or no sort of proceeding be instituted for the collection of a penalty after two years, appellant's contention would be correct; but that article is much narrower in its scope and merely prohibits prosecutions in the manner and by the means prescribed for the prosecution of criminal cases. It may be true that the same general result would be sought in the one case as in the other, viz.: recovery of the penalty, and if that were the only thing to be considered, there would be force in the argument that in prohibiting criminal prosecutions after a specified time the Legislature intended [\*\*\*57] thereby to prevent any other character of procedure which had for its purpose the accomplishment of the same general result. If the two proceedings, civil and criminal, were not so essentially different the contention urged might be sustained; but the statutes under consideration apply to natural persons as well as corporations, and as to such persons, civil and criminal proceedings are widely different. In a civil action against an individual to recover a penalty he is notified of the suit by delivering to him a citation. When the case is tried, if he loses, the only result is a personal judgment against him for a specified sum of money to be collected by execution and not otherwise. But if he is proceeded against criminally for the enforcement of a penalty he is arrested [\*185] and required to give bond or stay in jail until after the case is tried. Upon trial, if he is convicted, the judgment not only goes against him for the penalty, but unless he pays it, he is again incarcerated in jail. Thus it will be seen that in a criminal proceeding to enforce the penalty the

defendant would necessarily be subjected to the ignominy of an arrest by a public officer, and, upon contingencies [\*\*\*58] which often occur, would be incarcerated in jail. Now, when the Legislature prescribed a time which would prevent a prosecution fraught [\*\*929] with these serious consequences, does it necessarily follow that it intended to cut off any right the State might have to obtain a personal judgment for a pecuniary penalty, without resorting to a procedure that would bring about any such harsh results? We think not. [HN14](#)[] In prescribing limitation for criminal proceedings we believe the Legislature had in mind cases criminal, both in substance and form, and had no intention of affecting any right the State might assert in a civil action.

Chief Justice Marshall, in [\*Adams v. Woods, 2 Cranch 336\*](#), announced that if a law should merely declare that no indictment or information should be presented after a specified time, such law would be pleadable only in bar of indictments or informations, and would not bar a civil action for a recovery of the penalty prescribed for violating a statute.

An offense which is punishable by imprisonment in the penitentiary absolutely or in the alternative, is a felony; and as the anti-trust Act of 1903 fixes confinement in the penitentiary as an alternative punishment, [\*\*\*59] appellant pleaded article 218 of the Code of Criminal Procedure in bar of the State's right to recover part of the penalties sued for under that Act. Article 218 is framed like article 219, and would apply to a criminal prosecution based upon the Act of 1903 and bar such prosecution after three years. As we hold that it was the intention of the Legislature to confer upon the State the right to maintain a civil action for the pecuniary penalties therein prescribed, we hold that such right of action is not barred by article 218. In other words, while the penalties referred to were intended, in a certain sense, as punishment, they were not imposed as punishment to be inflicted through the onerous instrumentalities of a criminal prosecution.

Appellant also pleaded the statute of limitation of two and four years embodied in the Revised Statutes and applicable to civil cases. It is contended that the two years statute has application upon the theory that if the State's suit is an action of debt, and not instituted for the preservation of the public rights, revenues or property, then the State should not be exempt from limitation, but should be treated as any other litigant. It is the rule [\*\*\*60] of the common law of England that unless so expressly enacted, limitation does not run against the sovereign, and that is the rule in the American States. We are not prepared to place upon that rule the restriction urged, but if we should do so it would not be proper to apply it to this case. In seeking to recover the penalties here involved, the State is endeavoring to enforce statutes enacted for the protection of the public interest. One of the main objects of the suit is to protect and preserve public rights and promote a well established public policy.

[\*186] In view of what we have already said it is hardly necessary to add that we regard the four years statute of limitation as equally unavailing. In [\*Brown v. Sneed, 77 Tex. 471\*](#), which holds that [HN15](#)[] limitation does not apply to the State unless so expressly provided, the authorities are collated and reviewed. We also hold that no error was committed in refusing a charge to the effect that the State must prove its case beyond reasonable doubt. Being a civil case, the rule does not apply.

4. -- It is contended on behalf of appellant that the anti-trust Act of May 25, 1899, was rendered unconstitutional by the passage of another [\*\*\*61] statute at the same session of the Legislature entitled "An Act to protect workingmen in the right of organization and the purposes thereof," approved May 27, 1899, wherein it was provided that from and after its passage it should be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service in their respective pursuits and employments. By the third section it is declared that that Act shall not apply to combinations or associations of capital or capital and persons natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade, and that nothing therein contained shall be held to interfere with the terms and conditions of private contracts with regard to the time of service or other stipulations between employers and employees, and "that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, [\*\*\*62] conspiracies against trade, pools and monopolies." In view of these limitations placed upon that act, we are of the opinion that it was not the intention of the Legislature to authorize anything to be done that was prohibited by the Act of May 25, 1899. Hence, we hold that this statute engrafts no exemptions upon the anti-trust statute referred to.

5. -- The anti-trust statute of May 25, 1899, having been superseded and repealed by the Act of March 31, 1903, which diminished the pecuniary penalties, appellant sought to have the latter statute applied to the time before as well as after it went into effect. This was refused, and we think properly so, on account of [HN16](#)[<sup>1</sup>] this proviso in the latter Act: "provided nothing in this Act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this Act took effect." We are of opinion that this proviso preserved whatever rights the State had under the former law, including the right to enforce the penalties prescribed by that [\[\\*\\*930\]](#) Act. We are unable to concur [\[\\*\\*\\*63\]](#) in the proposition that it was merely intended to preserve the right to, but not the amount of, the penalties. Nor can we sanction the proposition that because of the location of a comma in the proviso quoted, it was the intention of the Legislature to protect and preserve the right of the State to recover penalties from domestic corporations and not preserve such right as against [\[\\*187\]](#) foreign corporations. No reason existing for making such a marked discrimination, we are not willing to hold that it was the intention of the Legislature to do so, merely because a comma was so used as to render that construction plausible. [HN17](#)[<sup>1</sup>] In construing written laws courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention.

6. -- It is claimed that the trial court should have granted appellant's motion for a new trial based upon the ground that the judgment imposes excessive fines, and operates as a deprivation of property without due process of law. It is also contended that the Act of 1899 should be declared void, because it authorizes excessive fines and forfeitures. That question has already been decided against appellant's [\[\\*\\*\\*64\]](#) contention in [State v. Laredo Ice Co., 96 Tex. 461](#). The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence, we have reached the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives.

7. -- In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged, the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this State. The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this State, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the State [\[\\*\\*\\*65\]](#) of Texas; and that, to a large extent, such object has been accomplished. Insofar as that agreement related to this State, appellant, acting by its agents, performed it within this State; and such performance within the limits of the State constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been made in this State. To a large extent the case rests upon circumstantial evidence; but we can not say that the jury were not warranted in the conclusions drawn from it. Hence, we hold that the verdict is supported by testimony, and no error was committed in overruling the motion for a new trial.

Upon the whole case our conclusion is that reversible error has not been shown, and therefore the judgment will be affirmed.

*Affirmed.*

Writ of error refused.

## **Dr. Miles Medical Co. v. John D. Park & Sons Co.**

Circuit Court of Appeals, Sixth Circuit

September 10, 1908

No. 1,797

**Reporter**

164 F. 803 \*; 1908 U.S. App. LEXIS 4678 \*\*; 9 Ohio L. Rep. 37

DR. MILES MEDICAL CO. v. JOHN D. PARK & SONS CO.

**Prior History:** [\*\*1] Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

### **Core Terms**

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proprietor, retail, consignee, Medicines, monopoly, wholesale, jobbers, retail price, dozen, contracts, formula, percent, consignment, articles, dealer, prices, proprietary, agrees, discount, invoice, parties, secret, advances, restrain, selling, patent, unsold, cases

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Copyright Law > Scope of Copyright Protection > Duration & Renewal > General Overview

#### **HN1** **Ownership & Transfer of Rights, Assignments**

A distinction exists between the extent of the protection granted by the patent and copyright statutes, and the copyright statute has been held not to create the right to impose, by notice, a limitation at which a book shall be sold at retail by future purchasers, with whom there is no privity of contract.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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#### **HN2** **Regulated Practices, Monopolies & Monopolization**

A trade secret or medical formula is a monopoly until discovered by fair means, and will be protected against abuse by one who learns it under a contract limiting its use or in the confidence of an employment.

**Counsel:** Frank F. Reed (Edward S. Rogers and Frederick W. Hinkle, on the brief), for appellant.

William J. Shroder, for appellee.

**Opinion by:** LURTON

## Opinion

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[\*804] Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. We see no substantial difference between the systems of contracts under which the Dr. Miles Medical Company is now conducting its business and that under which Dr. Hartman carried on his business as a manufacturer of Peruna, considered by this court at length in the case of *Jno. D. Park & Sons v. Hartman*, 153 Fed. 24, 82 C.C.A. 158, 12 L.R.A. (N.S.) 1135. That case is pending, undecided, in the Supreme Court. The complainant's very learned counsel was the counsel for Hartman in that case, and both systems of contracts are most probably the fruit of his acknowledged skill in respect to this class of business arrangements. No difference whatever is suggested between the system of contracts considered in that case and those here presented, except, it is claimed, that the agreement with jobbers and wholesale dealers here involved is one of bailment or agency [\*\*2] and not one of sale as in the Hartman Case. If this were admitted, it does not, in our judgment, operate to legalize the "system" of which that agreement is but one part. The effect of that contract with jobbers, whether it be regarded as one of sale or of agency, is to restrain jobbers from selling to any save retailers licensed by complainant, and to restrain retailers from selling for resale to any save those licensed to buy or to persons who buy for consumption only, and to none, by either jobber or retailer, except at a price imposed by the manufacturer. The confessed object of this plan or system is to obtain a price to the jobber and to the retailer unaffected by any competition between them. The scheme is one to enhance or maintain prices by eliminating all possibility of competing rates between either jobbers or retailers, and is quite as effectual in its results as if the contract with the jobber was plainly one of sale.

But we are not disposed to concede that the contracts with jobbers are contracts of bailment. There are too many features which seem inconsistent with a mere agency or commission agreement. All the responsibility of an owner seems cast upon the so-called [\*\*3] "consignee." He is not given the right to return goods unsold; that can be done only upon the cancellation of the contract and demand for return. The [\*805] retention of title for the security of the price would after all make the contract one of conditional sale, and the jobber would still be the general owner and responsible as such. Curiously enough, the actual payment of the price at which the consignment is billed is not to affect the title; it is still, under the contract, to remain with the so-called "consignor." Yet the heavy inducement of 5 per cent. upon a very close class of goods is held out to induce a payment in advance of sales. It is difficult to believe, whatever the technical relation of the parties under such an agreement, and whatever the belief each may have had as to his relation to the other, that such jobbers were not in fact and law the general owners of goods so "consigned," and engaged in selling for themselves and not as the mere agents, del credere or otherwise, of the complainant. The scheme seems to be an effort to disguise the wholesale dealers in the mask of agency upon the theory that in that character one link in the system for the suppression [\*\*4] of the "cut rate" business might be regarded as valid. Hardly any two contracts raising the question of sale or agency are so near alike as to make an opinion construing one an authority in another. It matters little what the parties call such agreements. Whether the result is a sale or an agency must depend upon the meaning and intent of the instrument as a whole. Looking at this agreement thus, we think the jobber must be regarded as the general owner and engaged in selling for himself and not as a mere agent of another. True, he must sell, if this system of doing business is valid and enforceable, as he obligates himself to do, but nevertheless he is selling for himself and upon his own account and risk. *Coweta Fertilizer Co. v. Brown* (decided at this term, and cases therein cited) 163 Fed. 162; *Ex parte White*, L.R. 1870, 6 Ch. App. Cases; *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 67 N.W. 174, 58 Am. St. Rep. 691; *Peoria Co. v.*

Lyons, 153 Ill. 427, 38 N.E. 661; Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 S.W. 3, 36 L.R.A. 285, 60 Am. St. Rep. 854.

This case must, after all, turn upon whether there is such identity of character between the statutory monopoly of articles made **[\*\*5]** under a valid patent or copyright and articles made according to some private formula as to exempt them from the principles which apply to contracts which tend to create a monopoly or restrain trade when the subject is an article not made under a patent or copyright or secret formula. HN1<sup>↑</sup> A distinction exists between the extent of the protection granted by the patent and copyright statutes, and the copyright statute has been held "not to create the right to impose, by notice, a limitation at which a book shall be sold at retail by future purchasers, with whom there is no privity of contract." Bobbs Merrill Co. v. Straus (decided by the Supreme Court, June 1, 1908) 210 U.S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. This distinction has been drawn since the decision of the cases we refer to, and since the decision of the Hartman Case above referred to. There are decisions by most respectable courts which hold that articles, such as proprietary medicines, are outside of all rules and statutes which forbid contracts in restraint of trade, because they are made under a secret formula. Some, if not most, of these decisions have been made in cases in which the Dr. Miles Medical Company has been **[\*\*6]** a party. They are cited and commented **[\*806]** upon by this court in the case of Jno. D. Park & Sons v. Hartman, 153 Fed. 24, 34, 82 C.C.A. 158, 12 L.R.A. (N.S.) 1135. They go upon the conceded fact that HN2<sup>↑</sup> a trade secret or medical formula is a monopoly until discovered by fair means, and will be protected against abuse by one who learns it under a contract limiting its use or in the confidence of an employment. They do not observe any distinction between the necessary monopoly of the secret itself and the unnecessary monopoly of the articles made according to the secret process and offered for sale and resale to the consuming public. Neither do those decisions recognize any distinction between the statutory monopoly accorded to articles protected by a patent or copyright and those made under such private formulas. The argument in support of this result is epitomized in all the cases referred to, but may be seen in full in the opinion of Colt, C.J., in the case styled "Dr. Miles Medical Co. v. Jaynes Drug Co." (C.C.) 149 Fed. 838. The same argument was presented by the counsel now representing the Dr. Miles Medical Company in the case decided by this court of Jno. D. Park & Sons**[\*\*7]** Co. v. Hartman, 153 Fed. 24, 82 C.C.A. 158, 12 L.R.A. (N.S.) 1135, and again presented with elaboration in the present case. In the case referred to, we reached with unanimity the conclusion that no legal, economic, or moral reason existed for regarding contracts in respect to the vast and ever-increasing commerce in proprietary medicines as either outside of the mischief intended to be remedied by the federal statute against monopolies or the rules of the common law, or within the statutory protection afforded by the patent and copyright statutes. Any other conclusion would be to sanction a monopoly in that class of goods vastly more far-reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it the inventor must put on record his invention. At the end of the term the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in their formula, they may not only **[\*\*8]** preserve it through all time, but continue to restrain prices and prevent competition in the sale of the product. It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article when it has once passed under the dominion of a buyer. A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world. Coke on Littleton, § 360. The mere fact that one article or class of articles is made under an unknown and private formula and another class is not is an undeniable fact which may serve for some purposes to differentiate them. But **[\*807]** that single fact does **[\*\*9]** not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade.

We need not repeat the argument by which we reached the conclusion that the system of contracts which Hartman sought to enforce through the injunctive power of a court of equity was obnoxious not only to the statute of Congress against restraints and monopolies in respect of interstate trade but inimical also to the reasonable restraints which at common law may be imposed as ancillary to a principal contract. All that we said in respect to

the Hartman system is applicable here. The case falls directly within the reasoning and decision of that case in respect to every aspect of the question, and the decree sustaining the demurrer interposed by the appellees must be affirmed.

"Consignment Contract. Wholesale. The Dr. Miles Medical Company.

"This agreement made by and between the Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereinafter referred to as the proprietor and hereinafter referred to as the consignee, witnesseth:

"That the said proprietor hereby appoints said consignee one of [\*\*10] its wholesale distributing agents, and agrees to consign to such consignee for sale for the account of said proprietor such goods of its manufacture as the proprietor may deem necessary, the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to consignee at the following prices:

"Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

"Medicines (if any) of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Freight on all orders, the invoice price of which amounts to \$100.00 or more, to be prepaid by the proprietor; otherwise, freight to be paid by consignee.

"Said consignee agrees to confine the sale of all goods and products of the said proprietor strictly to and to sell only to the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor, and to faithfully [\*\*11] and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation for all services, charges and disbursements a commission of ten per cent of the invoice value, and a further commission of five per cent on the net amount of each consignment, after deducting the said ten per cent commission, on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the proprietor as if no such advances had been made; provided that such advances shall be repaid to said consignee should the said proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said consignee guarantees the payment for all goods sold under this agreement and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall [\*\*12] not affect the title of any unsold goods which shall remain in the proprietor until actually sold, as herein provided.

"It is further agreed that the consignee shall furnish the proprietor from time to time upon demand full statements of the stock of goods of the proprietor on hand on any date specified and that a failure to furnish such statements within ten days from date of such demand shall be a sufficient cause for the cancellation of this agreement, and a demand for the return of the consigned goods.

[\*808] "It is further agreed that the proprietor will cause each retail package of its goods to be identified by a number and said consignee hereby agrees to furnish the said proprietor full reports upon proper cards or blanks furnished by said proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said proprietor at least semi-monthly, and at any other time on the request of said proprietor.

"It is understood and agreed between the parties hereto that the commissions [\*\*13] herein specified shall not be considered as earned by said consignee upon any goods of said proprietor which shall have been delivered to

dealers not authorized agents of said proprietor, as per list of such agents, or upon any goods whose disposition by said consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said consignee in making advance payments or monthly remittances on account they shall be charged back to said consignee and credited and paid to said proprietor. It is understood that violation or non-observance of any provision hereof by the consignee shall make this agreement terminable and all unsold goods returnable at the option of the proprietor.

"It is agreed that the goods of said proprietor shall be sold by said consignee only to the said retail or wholesale agents of said proprietor, as per list furnished, at not less than the following prices, to-wit:

[\*\*14] "Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

"Medicines (if any), of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Provided, that said consignee may allow a cash discount not exceeding one per cent, if paid within ten days from date of invoice, and that when sales at one time and at one invoice, amount to \$15.00 or more, the said consignee may allow three per cent trade discount, and if said purchase amounts to \$50.00 or more, five per cent trade discount, all without cost to the proprietor, and if such \$50.00 quantity shall be shipped direct to the retail purchaser from the laboratory of the said proprietor, on the order for the said wholesale distributing agent, freight will be prepaid by the proprietor, but not otherwise.

"This contract will take effect when the original, duly signed by the consignee, has been received and accepted by the Dr. Miles Medical Company, at Elkhart, Indiana.

"Done under our hands A.D., 1907.

(Fill in date on above line.)

"The Dr. Miles Medical Company.

"

"Wholesale dealer. Sign your name on above line. Original return [\*\*15] in enclosed envelope."

"Retail Agency Contract.

"The Dr. Miles Medical Company.

"This agreement between the Dr. Miles Medical Company of Elkhart, Indiana, and \_\_\_\_\_ of \_\_\_\_\_, Retailers named on above line, \_\_\_\_\_ Town, \_\_\_\_\_ State, hereinafter referred to as the retail agent, witnesseth:

"Appointed Agent.

"The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its proprietary medicines and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to-wit:

[\*809] "Wholesale Prices.

"Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

"Medicines, of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Quantity Discounts.

"Provided that when purchasers at one time and on one invoice amount to \$15.00 (or more), wholesale distributing agents are authorized to allow three per cent trade discount; if such purchase amounts to \$50.00 (or more) [\*\*16] five per cent trade discount will be allowed, and if such \$50.00 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account at such wholesale agent, freight will be prepaid, but not otherwise.

"Full Price.

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company.

"Violation.

"It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars (\$25.00) for each violation of any provision of this [\*\*17] agreement, it being otherwise impossible to fix the measure of damage.

"This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by the Dr. Miles Medical Company, at its office at Elkhart, Indiana.

"Done under our hands , A.D., 1907.

(Fill in date on above line.)

"The Dr. Miles Medical Company.

"

"Retail dealer, sign your name on above line in ink.

"To retail dealer:

"Paste printed label, giving name and address, that your name may be correctly listed.

"Duplicate. Keep for reference."

## *Redland Fruit Co. v. Sargent*

Court of Civil Appeals of Texas

October 15, 1908, Decided

No Number in Original

**Reporter**

51 Tex. Civ. App. 619 \*; 113 S.W. 330 \*\*; 1908 Tex. App. LEXIS 283 \*\*\*

Redland Fruit Company v. H. H. Sargent.

**Prior History:** [\*\*\*1] Appeal from the District Court of Harrison County. Tried below before Hon. W. C. Buford.

**Disposition:** Affirmed.

### **Core Terms**

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premises, passengers, railroad, railway company, anti-trust, pursuit, general demurrer

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Contracts Law > Defenses > Illegal Bargains

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

#### **HN1** [ **Defenses, Demurrsers & Objections, Demurrsers**

If a party's cause of action as stated in his petition shows that he is undertaking to recover damages for the breach of an illegal contract, then the objection may be made at any stage of the proceedings. The objection goes to the substance of the petition, and the error, if it exists, is fundamental.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN2** [ **Regulated Practices, Price Fixing & Restraints of Trade**

In 1903 Tex. Gen. Laws p. 119, a trust is defined as a combination of capital, skill or acts by two or more persons for either, any or all of the following purposes: (1) To create, or which may tend to create, or carry out restrictions in trade or commerce, or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this State.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### **HN3** **Regulated Practices, Price Fixing & Restraints of Trade**

The business competition which can not be restricted under 1903 Tex. Gen. Laws p. 119 is that which, under the laws of the State, a person is permitted or authorized to engage in. The privilege of selling goods upon the premises of another is not derived from the laws of the State, but from the consent of the owner.

## **Headnotes/Summary**

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### **Headnotes**

#### **Illegal Contract -- Fundamental Error.**

If the contract pleaded and sued on is illegal because prohibited by the laws of the State against trusts and monopolies, a recovery by plaintiff presents fundamental error, which may be availed of in any stage of the proceedings, and is not waived by defendant failing to call his demurrer to the attention of the court and have action thereon.

#### **Trusts -- Inducing Persons to Trade.**

An agreement by A. to endeavor to induce his employes to trade with B. is not obnoxious to the statute prohibiting trusts and monopolies (Act of March 31, 1903, Laws, 28th Leg., p. 119).

#### **Trusts and Monopolies -- Right to Sell Goods on Premises.**

The statute prohibiting contracts creating trusts or monopolies is violated only by a restriction of such business competition as a person has a right under the laws of the State to engage in; the right to sell goods on certain premises is derived from the owner thereof; and his contract giving it to one person only is not illegal.

#### **Trusts and Monopolies -- Cases Discussed.**

[Ft. Worth & D. C. Ry. Co. v. State, 99 Tex. 34](#); and [Lewis v. Weatherford, M. W. & N. W. Ry. Co., 36 Tex. Civ. App. 48](#), followed; [Texas & P. Coal Co. v. Lawson, 89 Tex. 394](#), distinguished.

#### **Pleading.**

A petition seeking damages for violation of a contract giving plaintiff the exclusive right to sell goods on defendant's premises considered and held sufficient.

#### **Statement of Facts.**

Questions concerning the sufficiency of evidence are not considered in the absence of a proper statement of facts, a copy instead of the original being sent up in disregard of the law. (Act of May 25, 1907, Laws 30th Leg., 1st Called Session, p. 509.)

**Counsel:** Jno. M. Scott, for appellant.

An objection that the contract sued on is void will be considered on general demurrer, though not specially pleaded. [Fuqua v. Pabst Brewing Co., 90 Tex. 301](#); [Texas and Pac. Coal Co. v. Lawson, 89 Tex. 394](#); [Texas Brewing Co. v. Templeton, 90 Tex. 277](#); [Missouri, K. & T. Ry. v. Chenault, 92 Tex. 504](#).

As applied to the facts in this case, a "trust" is a combination of capital, skill or acts by two or more persons, to create or carry out restriction in trade; to prevent or lessen competition in the sale or purchase of merchandise, produce or commodities, and any contract or agreement creating such combination is absolutely void, and not enforceable in law or equity. Ch. 94, sec. 1, p. 119, Acts of the Twenty-eighth Legislature, 1903; [Texas & Pac. Coal Co. v. Lawson, 89 Tex. 394](#), and authorities above cited.

No principle is more firmly established than that remote and speculative damages can not be recovered on account of a breach of contract, when that breach is unmixed with the elements of fraud. [Jones v. George, 56 Tex. 153](#); [Voorhees v. Fry, 1\\*\\*\\*21 52 S.W. 580](#); Missouri, K. & T. Ry. v. Wise, 3 Tex. Civ. App. 461-2; [Crouch v. Osborn, 23 S.W. 937-8](#); [Elmendorf v. Classen, 92 Tex. 477](#); Couch v. Parker, 1 Tex. Civ. App. 193; [Waco Tap Ry. v. Shirley, 45 Tex. 372](#); [Sabine, etc., Ry. Co. v. Joachimi, 58 Tex. 460](#).

A contract by two or more persons, firms or corporations combining their capital, skill or acts, to create or carry out restrictions in trade or to prevent or lessen competition in the sale or purchase of merchandise, produce or commodities, is a trust within the meaning of our statutes, and therefore void, and no action can be founded thereon. Ch. 94, sec. 1, p. 119, Acts of the Twenty-eighth Legislature, 1903; [Texas & Pac. Coal Co. v. Lawson, 89 Tex. 394](#); [Fuqua v. Pabst Brewing Co., 90 Tex. 301](#); [Texas Brewing Co. v. Templeton, 90 Tex. 277](#).

Scott & Lane, for appellee.

**Judges:** HODGES, Associate Justice.

**Opinion by:** HODGES

## **Opinion**

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[\*621] [\*\*330] HODGES, Associate Justice.--The appellee recovered a judgment in the court below against the appellant for damages on account of the alleged breach of a contract theretofore made and entered into between the parties. The allegations in the appellee Sargent's petition are substantially [\*\*\*3] as follows: That the appellee and one E. L. Harper, who was superintendent and manager for the appellant company, entered into the following written contract:

"The State of Texas, county of Harrison.

"September 4, 1905.

"This agreement made and entered into between E. L. Harper, superintendent of the Redlands Fruit Company, of the first part, and H. R. Sargent, of the second part, witnesseth: That the said E. L. Harper, superintendent, for and under instructions of said company, and in and for the consideration of five percent on all sales of goods made by the said H. R. Sargent, the second party, on the premises of the said company, does agree for the said H. R. Sargent to erect a store house on their premises, and to conduct a general merchandise business, and the company will endeavor to give the said H. R. Sargent their trade from the said plantation, and will give no other rights on the premises to other parties for the sale of merchandise. The said H. R. Sargent shall sell no whisky or other intoxicating drinks on the premises of said company. The said Sargent shall have the right to removal of said store house and the right to sell same. The said [\*\*331] company acquires [\*\*\*4] no claim or title to said store house building, and the said Sargent no rights on premises, only so far as terms of the agreement.

"E. L. Harper,

"Supt. Redlands Fruit Company.

"H. R. Sargent."

It is alleged that this contract was to last five years; that in pursuance thereof the appellee, plaintiff below, did erect a store house at an expense of \$ 750, and put therein a stock of goods which, it is claimed, was worth at the time of the alleged breach from \$ 700 to \$ 1,000; and that the reasonable profits which he would realize from the sale of those goods would have been \$ 4100 per year; that but for the contract aforesaid he would not have erected the house nor bought the stock of goods; that the appellant company broke the contract it had thus entered into by throwing the trade of the plantation to others and allowing others to erect a store house on its premises; that on account of the breach of the said contract by the appellant company the appellee's trade, and the profits therefrom, which, he says, would have amounted to \$ 5,000, left him. Appellee also alleges that this house was rendered valueless to him, except to the extent of what it would be worth in lumber, which was [\*\*\*5] estimated at \$ 50; that his goods deteriorated to the extent of \$ 750 on account of being left on his hands. He sues to recover the aggregate sum of \$ 6,450.

The defendant answered by a general demurrer, general denial and specially, that appellee breached the contract by selling intoxicating liquors on the premises, and in not paying over the five percent commissions provided for in the contract.

[\*622] The case was submitted to the court without a jury, and a judgment rendered in favor of the appellee for the sum of \$ 240. From that judgment this appeal is prosecuted.

There are five assignments of error in the record, two of which assail the refusal of the court to sustain the appellant's general demurrer. The remaining three attack the grounds upon which the court predicated its judgment in matters of facts.

The first question that presents itself for our consideration is, whether or not the contract, as pleaded by the appellee, is void by reason of being in conflict with the provisions of what is known as the anti-trust law of the State.

The first error assigned complains of the refusal of the court to sustain the general demurrer interposed by the appellant in the trial [\*\*\*6] below. It appears that the general demurrer was filed, but not called to the attention of the trial court, and was not passed on. The reason urged in the appellant's brief as grounds upon which the court should have sustained its general demurrer is that the contract sued upon and set out in the appellee's original petition shows upon its face that it is in violation of the law of this State prohibiting the formation of trusts and monopolies. [HN1](#) If the appellee's cause of action as stated shows that he is undertaking to recover damages for the breach of an illegal contract, then the objection may be made at any stage of the proceedings. The objection goes to the substance of the petition, and the error, if it exists, is fundamental. [Grant v. Whittlesey, 42 Tex. 320](#); [Norris v. Logan, 94 S.W. 123](#); [Schuster v. Frendenthal, 74 Tex. 53](#); [11 S.W. 1051](#); [Alamo Ins. Co. v. Davis, 45 S.W. 605](#); 6 Amer. & Eng. Ency. Plead & Prac., 380.

The question then is: Do the terms of the contract sued on violate the anti-trust statute? The provisions of the contract pointed out as being obnoxious to that statute are those by which Sargent is given the exclusive right to sell goods on the appellant's premises, [\*\*\*7] and by which appellant bound itself to endeavor to induce its employes to trade with Sargent. In the Acts of 1903, p. 119, [HN2](#) a trust is defined as "A combination of capital, skill or acts by two or more persons . . . for either, any or all of the following purposes: (1) To create, or which may tend to create, or carry out restrictions in trade or commerce, or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this State." An undertaking on the part of the appellant to endeavor to induce its employes to trade with the appellee could not be regarded as any violation of law, and the vice, if any, in the contract must be that portion which gives to the appellee the exclusive right to sell goods on the appellant's premises. If this is in violation of the anti-trust statute, then the assignment should be sustained, otherwise it should be overruled.

We do not think it was the purpose of the statute to prevent the making of exclusive contracts of any kind whatever. Such an inhibition would be productive of a greater evil than that which the law attempts [\*\*\*8] to remedy. [HN3](#) The business competition which can not be restricted is that which, under the "laws of the State, a person is permitted or authorized" to engage in. The privilege of selling goods upon the premises of another [\*623] is not

derived from the laws of the State, but from the consent of the owner. [Fort Worth & D. C. Ry. Co. v. State, 99 Tex. 34; Lewis v. Weatherford, M. W. & N. W. Ry. Co., 36 Tex. Civ. App. 48.](#) In the first case cited above a contract had been entered into between the railway company and the Pullman Company, by the terms of which the latter was given the exclusive right of furnishing the railway company sleeping cars on all of its lines for the term of fifteen years. In an opinion holding that this contract did not violate the anti-trust statute, the court said: "Waiving the fact that, at the time the law of 1903 was enacted, there was no other person or company engaged in the like business [\*\*332] in Texas, we come to the question: Did the railroad company have the lawful right to make a contract with the Pullman Company whereby it excluded all other companies for fifteen years from furnishing to the railroad company sleeping cars for the use on all [\*\*\*9] of its lines? That question suggests this: Did all sleeping-car companies have a right to demand of the railroad company to haul their coaches on its railroad? If yea, the contract restricted the free pursuit of a lawful business, and constitutes a trust under the Act of 1903; otherwise the law has not been violated by the agreement. . . . This contract in no way interfered with the rights of any other sleeping-car company, if any existed, to build or furnish its cars to other railroads. Neither the Pullman nor any other corporation or persons had a right to have sleeping cars attached to the passenger trains of the Ft. Worth & Denver City Railroad Company. Therefore, to exclude them did not restrict 'the free pursuit of any business authorized or permitted by law,' because such business was not authorized to be pursued on a railroad without the consent of the owner; and, since no such business right existed, it could not be restricted."

In that opinion the case of Lewis v. Ry. Co. is cited with approval. In the latter case an attack was made on the contract entered into between the railway company and one Green, by which the latter was given the exclusive right to go upon the train [\*\*\*10] of the railway company and solicit the transfer of baggage from passengers riding thereon. Lewis and his employes would purchase tickets, board the passenger train of the railway company, and also solicit such patronage from the railway passengers. The railway company sought to enjoin this conduct on the part of Lewis, and set up the fact that it had contracted with Green that he should have this exclusive privilege. This feature of the contract was assailed as being in violation of the anti-trust statute. The court held otherwise, and, in disposing of the question, used this language: "It is, we think, a sufficient answer to this contention that the rule or regulation of appellees by which Green was permitted to solicit the patronage of its passengers, to the exclusion of appellant, did not 'create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this State,' because the only restriction imposed is with respect to the transaction of appellant's business on appellee's passenger trains, which he is nowhere authorized or permitted by the law of this State to engage in. It is, therefore, not a restriction upon the free pursuit of his [\*\*\*11] lawful business. In the sense that the regulation prevents appellant from securing the patronage of appellant's passengers, it may be said to be a restriction upon its business. [\*624] But the least reflection will show that, if this construction of the law were to be adopted, a very large percent of the everyday contracts in the business world, such as those of leasing, of agency, of service, and the like, would be reprobated--a result never dreamed of by the legislators who enacted the statute. If appellee is to be denied the relief prayed for it must be upon other grounds than that asserted in this assignment."

Applying the principles approved in the decisions quoted above, we may ask: Were any restrictions created or carried out in the contract under consideration against the free pursuit of any business which the law gave others the right to engage in? Did others have the right under the law to demand of the appellant that they be permitted to sell goods upon its premises? The right to sell upon the premises of another is not given by law, but by consent of the owner. The latter has the right to say who shall or who shall not use his premises for any such purpose. The right [\*\*12] to give an exclusive contract for the purpose of any business is involved in every lease.

Our attention has been called to the case of the [Texas & P. Coal Co. v. Lawson, 89 Tex. 394.](#) The appellant urges with much earnestness that the language used in that case is decisive of this. We do not agree with that contention. While there is some language used in the opinion rendered by Justice Denman in the case referred to which tends to support the appellant's construction, yet the facts are different, and that language is not in harmony with the latter decisions of our Supreme Court which we have cited. If we have departed from the ruling of the court in the Lawson case we think our action is justified, not only by the latter expressions of the Supreme Court, but by sound reason as well. In the Lawson case the contract which was held to be in violation of the anti-trust statute was more far-reaching than the one here under consideration. Among other things, the coal company, the owner of the premises, bound itself not to engage in a business in competition with that carried on by Lawson. It thus, by agreement,

51 Tex. Civ. App. 619, \*6241<sup>13</sup> S.W. 330, \*\*3321<sup>1908</sup> Tex. App. LEXIS 283, \*\*\*12

deprived itself of a right given by law, and in so doing restricted competition [\*\*\*13] to that extent. In this case the contract is susceptible of no such construction.

The second assignment of error is overruled because we do not think the pleadings were subject to the objections urged. They were sufficient to constitute a cause of action, however defectively this may have been stated.

The remaining assignments of error involve issues of fact which can not be considered because of the absence of a statement of facts such as is now required by law. The transcript contains what purports to be a copy of the statement of facts. Under the law as it now exists, in all appeals from the District Court, the original statement of facts must be sent up with the record. Laws of 1907, [\*\*333] p. 509; Garrison v. Richards, 107 S.W. 861.

The judgment of the District Court is affirmed.

*Affirmed.*

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## Terr. v. Long Bell Lumber Co.

Supreme Court of Oklahoma

November, 1908, Decided ; December 21, 1908, Opinion Filed

No. 2099, 2100 and 2101, Okla T.

**Reporter**

1908 OK 263 \*; 22 Okla. 890 \*\*; 99 P. 911 \*\*\*; 1908 Okla. LEXIS 93 \*\*\*\*

TERRITORY v. LONG BELL LUMBER CO. et al. SAME v. OKLAHOMA MILL & ELEVATOR Co. et al. SAME v. HAINES et al.

**Prior History:** [\*\*\*\*1] Error from District Court, Kingfisher County; C. F. Irwin, Judge.

Actions by the Territory of Oklahoma against the Long Bell Lumber Company and others, and against the Oklahoma Mill & Elevator Company and others, and against A. T. Haines and others. Judgments for defendants, and the territory brings error. Reversed and remanded.

The above-entitled cases were all brought in the district court of Kingfisher county, Okla., in the month of October, 1906, by the county attorney of the county, the petitions being signed by him as such official and verified as provided by the statute. Omitting the formal parts, the first cause of action stated in the petition of the case where the Long Bell Lumber Company, the A. H. Showalter Lumber Company, and Butts Bros. Lumber Company are defendants reads as follows:

"That said defendants have been engaged in said business for several years last past, and all of said time they have federated together, and have, by express agreement with each other, either written or oral, controlled all the business of buying and selling lumber at said point in such a manner as to create a monopoly for the benefit of said corporations, and greatly to the [\*\*\*\*2] injury of the public and the people of the county of Kingfisher, and the territory of Oklahoma. That, by means of said confederation, combination, and monopoly, said defendants are enabled to and do keep other persons desiring to enter said business from doing so, and they not only fix the prices that said lumber shall be purchased at from the mills, but also arbitrarily fix the price for which said lumber shall be sold to the consumer and have for several years last past, do now, and will continue to, unless restrained by the court, completely shut out competition in the lumber business in said city of Kingfisher, and said defendants have for several years last past, and do now, and will continue to, if not restrained by the court, charge the public and the people of Kingfisher county, and the territory of Oklahoma, unjust, unreasonable, and exorbitant prices for lumber, and by reason of the monopoly of said defendants created by said defendants said public and the people of Kingfisher county and territory of Oklahoma cannot buy lumber elsewhere, but are compelled, by reason of said monopoly, to purchase their lumber from said defendants, and from no other person or corporations. [\*\*\*\*3] That each of the above-named defendants are apparently conducting a separate business under the respective names of their corporations, but in truth and in fact, by reason of the combination and monopoly created by said defendants, there is no competition in the sale of lumber in said city, nor will said defendants permit any one else to engage in the business of lumber dealers therein. That said defendants have conducted the aforesaid combination and monopoly for a good many years last past, to the great loss and injury of the public and to the people of the county of Kingfisher and territory of Oklahoma, and threaten to, and will continue to, violate the anti-trust law of the territory of Oklahoma and the United States, unless restrained by the courts. That for these impositions the public and the people of Kingfisher county and Oklahoma Territory have no speedy and adequate remedy at law."

The second cause of action sets forth substantially that the defendants have by agreement between themselves combined to suppress evidence which will enable the officers to enforce the antitrust law. The prayer is for an

injunction restraining the parties from carrying on and conducting the [\*\*\*\*4] business combination and monopoly, and from further combining and federating together for the purpose of defeating the operation of said law. The language used in the petitions filed in the second and third cases, and the averments of the same, are identical with the petition in the first case, except that in the second case grain was the commodity which was alleged the combination operated upon, and in the third case it was coal which had thus been brought within the control of the contract made between the parties.

The cases all took identically the same course in the lower court, in that temporary injunctions were obtained in each from the judge of the probate court, and on motion in the district court the same were dissolved and the petitions dismissed. From this action the territory of Oklahoma took each of said cases to the Supreme Court by proceedings in error where they were pending at the time Oklahoma and Indian Territory were erected into a state. They have now been consolidated, and are before this court for consideration by virtue of our succession to the territorial Supreme Court under the terms of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267) and the [\*\*\*\*5] Schedule to the Constitution (Bunn's Ed. §§ 449-493).

**Disposition:** Judgment reversed and remanded.

## Core Terms

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territory, provisions, nuisance, commodity, legislate, rights, combinations, petitions, fine, territorial legislature, public nuisance, authorities, monopoly, comfortable, anti-trust, interfere, proceeded, Organic, courts, lumber, act of congress, civil action, price fixing, natural gas, obstruction, enjoyment, fish, restraint of trade, attorney general, attorney's fees

## LexisNexis® Headnotes

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Governments > Local Governments > Finance

Real Property Law > ... > Remedies > Injunctions > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

### **HN1** Local Governments, Finance

Okla. Stat. Ann. § 4440 (1903) provides: An injunction may be granted in the name of the territory to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

## **HN2** [down arrow] **Monopolies & Monopolization, Conspiracy to Monopolize**

The Sherman Anti-Trust Act (act), 26 U.S.C.S. § 209(3), specifically applies to territories, and § 4 vests the several Circuit Courts of the United States with jurisdiction to prevent and restrain violations of the act, and making it the duty of the several district attorneys of the United States under the direction of the Attorney General to institute suits in equity for such purpose. The statute against unlawful restraints and monopolies, 26 U.S.C.S. § 209, does not authorize the bringing of injunction suits or suits in equity by any parties except the government.

Governments > State & Territorial Governments > Legislatures

## **HN3** [down arrow] **State & Territorial Governments, Legislatures**

Whenever Congress legislates upon any subject directly in relation to the government of the people of the territory, then it ceases to be a rightful subject of territorial legislation, and any law that the legislature of the territory has enacted or enacts upon the same subject which Congress has assumed to legislate upon, is inconsistent with such laws of the United States, and is, therefore, void.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Fines

## **HN4** [down arrow] **Conspiracy, Elements**

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories, and any state or states or the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

## **HN5** [down arrow] **Monopolies & Monopolization, Conspiracy to Monopolize**

The territorial act on conspiracy, in restraint of trade or commerce provides, in part: [Section 1](#). If any individual, firm, partnership or any association of persons whatsoever, shall create, enter into, become, a member of, or a party to, any pool, trust, agreement, combination or understanding with any other individual firm, partnership or association of persons whatsoever, to regulate or fix the price of, or prevent or restrict, the competition in the sale of provisions, feed, fuel, lumber, or other building materials, articles of merchandise or other commodity they shall be deemed guilty of (a) misdemeanor and upon conviction thereof shall be fined not less than \$ 50 nor more than \$ 500.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

[Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview](#)

[Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview](#)

#### [\*\*HN6\*\*](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

The territorial act on conspiracy, in restraint of trade or commerce provides, in part: Section 2. It shall not be lawful for any corporation organized under the laws of this territory, or organized under the laws of any other territory or state, and doing business in this territory, to enter into any combination, contract, trust, pool or agreement with any other corporation or corporations, or with any individual, firm, partnership or association of persons, whatsoever, for the purpose of regulating or fixing the price of, or preventing or restricting competition, in the sale of provisions, feed, fuel, lumber, or other building materials, articles of merchandise, or other commodity, including the fixing of the rate of interest. Any president, manager, director, agent, receiver or other officer of any such corporation, violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$ 50 nor more than \$ 500 for the first offense, and upon a second conviction shall be fined a sum equal to twice the amount of the first fine, and such corporation shall forfeit its corporate right and franchise, and its corporate existence, in this territory, shall thereupon cease and determine.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

#### [\*\*HN7\*\*](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

The territorial act on conspiracy, in restraint of trade or commerce provides, in part: Section 3. Any person purchasing provisions, feed, material, articles of merchandise, or any commodity from any individual, firm, partnership, or corporation, transacting business in violation of the provisions of this act, such person so purchasing shall not be liable for the price or payment of any such article or commodity and may plead this act, as a defense in any suit for price or payment. In any civil action brought under the provisions of this section, the court before whom such suit shall be pending may compel the plaintiff to testify, but if the plaintiff be a corporation then the court may compel any officer, agent, or employe of such corporation to attend, appear, and testify, or compel the production of any contract, or papers in evidence in such civil action: Provided, the evidence so obtained shall not be used in any criminal prosecution against the person so testifying except in a criminal prosecution for perjury committed in giving such testimony.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

[Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview](#)

#### [\*\*HN8\*\*](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

The territorial act on conspiracy, in restraint of trade or commerce provides, in part: Section 4. Any person who shall have purchased from any individual, firm, partnership or corporation, doing business in violation of the provisions of this act, any provisions, feed, fuel, lumber or other building material, articles of merchandise, or other commodity and paid for the same, may maintain a civil action to recover the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable attorney's fee to be fixed by the court, which attorney's fee shall be taxed and collected as part of the costs in such case. In any civil action brought under the provisions of this section, the court before whom such suit be pending may compel the defendant to testify, but if the defendant be a corporation, then the court may compel any officer, agent or employe of such corporation to attend, appear, and testify or compel the production of any contract or papers as evidence in such civil action: Provided, the evidence so obtained shall not be used in any criminal action against the person so testifying, except in a criminal prosecution for perjury committed in giving such testimony.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

#### [\*\*HN9\*\*](#) [blue download icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

The territorial act on conspiracy, in restraint of trade or commerce provides, in part: Section 5. It shall be the duty of the prosecuting attorneys in their respective counties, to enforce the foregoing provisions of this act, and any prosecuting attorney securing a conviction under provisions of this act, shall be entitled in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine received.

Governments > Legislation > Enactment

Governments > Federal Government > Property

Governments > State & Territorial Governments > Legislatures

#### [\*\*HN10\*\*](#) [blue download icon] **Legislation, Enactment**

Section 6 of the Organic Act, [26 U.S.C.S. § 84](#), provides as follows: That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value. Section 4 of the Organic Act places the legislative power and authority of the territory of Oklahoma in the governor and legislative assembly. Section 6 of the Organic Act not only confers the authority subject to the reserved power mentioned, but contains specific limitations imposed upon the exercise of the authority. Within the limitations noticed, the legislative power for local self-government is quite as extensive in a territory as in a state. The policy of the government is to give to it the fullest opportunity to govern itself and prepare for statehood.

Governments > Legislation > Expiration, Repeal & Suspension

#### [\*\*HN11\*\*](#) [blue download icon] **Legislation, Expiration, Repeal & Suspension**

Annulments of statutes by implication, like repeals by implication, are not favored by the courts. No statute of a territory will be declared void because it may indirectly or by a construction which is possible but not necessary be

repugnant to an act of Congress annulling legislation of the territory; but such a result must be direct and proximate in order to invalidate the statute.

Governments > State & Territorial Governments > Legislatures

### **HN12**[ **State & Territorial Governments, Legislatures**

The territorial legislature, being the representatives of the people of the territory, have the right to legislate for the people upon all subjects which are not in conflict with the Constitution of the United States, and do not in any way interfere with the supreme right of the United States government to direct and control the governmental affairs of the territory.

Governments > Police Powers

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Transportation Law > Water Transportation > Waterways

Real Property Law > Torts > Nuisance > General Overview

### **HN13**[ **Governments, Police Powers**

Oklahoma Statute tit. 56, § 1 (1903) provides as follows: A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or, Second. Offends decency; or, Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or, Fourth. In any way renders other persons insecure in life, or in the use of property. Section 2 reads as follows: A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Governments > Legislation > Statutory Remedies & Rights

### **HN14**[ **Monopolies & Monopolization, Conspiracy to Monopolize**

It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right, in the ordinary forms of property.

## **Headnotes/Summary**

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### **Headnotes**

**1. TERRITORIES--Status.** A territory, under the Constitution and laws of the United States, is an inchoate state--a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress, with a separate Legislature, under a territorial Governor, and other officers appointed by the President and Senate of the United States.

**2. SAME--"Legislative Power."** The legislative power of the territory of Oklahoma extended to all rightful subjects of legislation pertaining to local self-government when not inconsistent with the Constitution and laws of the United States, and when the exercise of such power did not in any way interfere with the supreme right of Congress to control its governmental affairs.

**3. SAME--Legislative Power--Anti-Trust Legislation.** Chapter 83, Wilson's Rev. & Ann. St. Okla. 1903, being an enactment of the legislative assembly of the territory of Oklahoma passed December 25, 1890, entitled "An act to prevent combinations in restraint of trade," is not in conflict or inconsistent with the Constitution or laws of the United States nor with an act on the same subject applicable to territories, enforceable by the federal authorities, passed by Congress July 2, 1890 (Act Cong. July 2, 1890, c. 637, 26 Stat. 209 [U.S. Comp. St, 1901, p, 3200]) and was a valid statute of the territory of Oklahoma.

**4. SAME.** The fact that a prosecution for a violation of the terms of such territorial statute would also be a violation of and punishable under the federal act in no wise affects its validity.

**5. MONOPOLIES -- Complaint -- Injunction -- "Public Nuisance."** Where it is alleged that certain parties in violation of such act of the territorial Legislature had entered into and become members of a pool, trust, agreement, combination, and understanding with each other to create a monopoly in the business of buying and selling lumber, coal, and grain, and that, acting thereunder, they were enabled to and were charging the public unjust, unreasonable, and exorbitant prices for such commodities, and preventing others from engaging in such business, such acts constitute a public, common nuisance, and the parties thereto may be restrained as provided for in section 4440, Wilson's Rev. & Ann. St. Okla. 1903, at the suit of the county attorney.

**Counsel:** Chas. J. West, Atty. Gen, George L. Bowman, Co. Atty., and Matthew John Kane, for the Territory.

F. L. Boynton, W. R. Cowley, and W. A. Ledbetter, for defendants in error.

**Judges:** DUNN, J. Williams, C. J., TURNER and HAYES, JJ., concur; KANE, J., being of counsel and not sitting.

**Opinion by:** DUNN

## Opinion

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[\*\*893] [\*\*\*913] DUNN, J. [\*P1] (after stating the facts as above). [HN1](#) Wilson's Rev. & Ann. St. Okla. 1903, § 4440, provides:

"An injunction may be granted in the name of the territory to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required."

[\*P2] It was under the authority conferred on the county attorney by this section of the statute that he acted in bringing these suits, beginning them upon petitions which he verified on his information [\*894] and belief, and securing injunctive relief in the name of the territory without bond. The position taken by him was that a monopoly or combination in restraint of trade [\*\*\*\*6] such as is delineated and set forth in the petitions was a public or common nuisance, and as such that courts of equity at the instance of the public prosecutor had power to suppress the same.

[\*P3] The consideration and determination of two propositions will in our judgment cover and dispose of all the controverted questions raised. These are: First, was the territorial anti-trust act a valid, existing law at the time of the institution of these suits; and, second, if so, did the violation of its terms as averted constitute and make the result of such acts a common and public nuisance?

[\*P4] Incidental to the first proposition, there is argued in the briefs of defendants in error the proposition that the territorial authorities were without jurisdiction or power to proceed under the terms of what is generally known as HN2<sup>↑</sup> the "Sherman Anti-Trust Act," passed by Congress on July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3201]), section 3 of which is made specifically applicable to territories, and section 4 thereof vesting the several Circuit Courts of the United States with jurisdiction to prevent and restrain violations of the act, and making it the duty of the [\*\*\*\*7] several district attorneys of the United States under the direction of the Attorney General to institute suits in equity for such purpose. This question has been squarely passed upon in the case of Greer, Mills & Co. v. Stoller (C. C.) 77 F. 1, wherein it was held that the statute against unlawful restraints and monopolies (Act July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3200]) does not authorize the bringing of injunction suits or suits in equity by any parties except the government. Blindell et al. v. Hagan et al. (C. C.) 54 F. 40; Beach on Monopolies and Industrial Trusts, § 226. So that this theory may be disposed of on these authorities, and the question then arises: Was the anti-trust act passed by the Legislature of the territory of Oklahoma on December 25, 1890, contained in [\*\*895] chapter 83, Wilson's Rev. & Ann. St. Okla. 1903 (sections 67396743), a valid existing law of the territory of Oklahoma at the time of the institution of these suits? It will be noted that the federal anti-trust act was passed on the 2d day of July, 1890, while the act of the territorial Legislature was passed about six months thereafter, and [\*\*\*\*8] plaintiffs in error contend that, Congress having legislated on the subject, its legislation was exclusive so far as the territorial Legislature was concerned, in that it could pass no act covering the same field which could stand concurrently with the federal legislation on the subject. The rule contended for is stated in the case of Allen v. Reed, 10 Okla. 105 at 105-111, 60 P. 782, 784, and is as follows:

HN3<sup>↑</sup> "Whenever Congress legislates upon any subject directly in relation to the government of the people of the territory, then it ceases to be a rightful subject of territorial legislation, and any law that the Legislature of the territory has enacted or enacts upon the same subject which Congress has assumed to legislate upon, is inconsistent with such laws of the United States, and is, therefore, void."

[\*P5] In order that the scope and purpose of the two acts brought to the attention of the court by reason of this controversy may be clearly before us, we quote that portion of the federal antitrust act relating to this subject, which is as follows:

HN4<sup>↑</sup> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory [\*\*\*\*9] of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories, and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[\*P6] HN5<sup>↑</sup> The territorial act on the same subject is as follows:

[\*\*896] "Sec. 1. If any individual, firm, partnership [\*\*\*914] or any association of persons whatsoever, shall create, enter into, become, a member of, or a party to, any pool, trust, agreement, combination or understanding with any other individual firm, partnership or association of persons whatsoever, to regulate or fix the price of, or prevent or restrict, the competition in the sale of provisions, feed, fuel, lumber, or other building [\*\*\*\*10] materials, articles of merchandise or other commodity (they) shall be deemed guilty of (a) misdemeanor and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars.

**HN6** "Sec. 2. It shall not be lawful for any corporation organized under the laws of this Territory, or organized under the laws of any other territory or state, and doing business in this Territory, to enter into any combination, contract, trust, pool or agreement with any other corporation or corporations, or with any individual, firm, partnership or association of persons, whatsoever, for the purpose of regulating or fixing the price of, or preventing or restricting competition, in the sale of provisions, feed, fuel, lumber, or other building materials, articles of merchandise, or other commodity, including the fixing of the rate of interest. (Any) president, manager, director, agent, receiver or other officer of any such corporation, violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars, for the first offense, and upon a second conviction shall be fined a sum [\*\*\*\*11] equal to twice the amount of the first fine, and such corporation shall forfeit its corporate right and franchise, and its corporate existence, in this Territory, shall thereupon cease and determine.

**HN7** "Sec. 3. Any person purchasing provisions, feed, material, articles of merchandise, or any commodity from any individual, firm, partnership, or corporation, transacting business in violation of the provisions of this act, such person so purchasing shall not be liable for the price or payment of any such article or commodity and may plead this act, as a defense in any suit for price or payment. In any civil action brought under the provisions of this section, the court before whom such suit shall be pending may compel the plaintiff to testify, but if the plaintiff be a corporation then the court may compel any officer, agent, or employe of such corporation to attend, appear, and testify, or compel the production of any contract, or papers in evidence in such civil action: Provided, the evidence so obtained shall not be used in any criminal [\*\*897] prosecution against the person so testifying except in a criminal prosecution for perjury committed in giving such testimony.

**HN8** "Sec. 4. [\*\*\*\*12] Any person who shall have purchased from any individual, firm, partnership or corporation, doing business in violation of the provisions of this act, any provisions, feed, fuel, lumber or other building material, articles of merchandise, or other commodity and paid for the same, may maintain a civil action to recover the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable attorney's fee to be fixed by the court, which attorney's fee shall be taxed and collected as part of the costs in such case. In any civil action brought under the provisions of this section, the court before whom such suit be pending may compel the defendant to testify, but if the defendant be a corporation, then the court may compel any officer, agent or employe of such corporation to attend, appear, and testify or compel the production of any contract or papers as evidence in such civil action: Provided, the evidence so obtained shall not be used in any criminal action against the person so testifying, except in a criminal prosecution for perjury committed in giving such testimony.

**HN9** "Sec. 5. It shall be the duty of the prosecuting attorneys [\*\*\*\*13] in their respective counties, to enforce the foregoing provisions of this act, and any prosecuting attorney securing a conviction under provisions of this act, shall be entitled in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine received."

[\*P7] The foregoing act of the territorial Legislature, while striking at the identical evil legislated against in the act of Congress, it will be seen contains numerous provisions not provided for under the former. Territories, being portions of the United States not yet created into states, and Congress having been given the power to dispose of and make all needful rules and regulations therein, have just such authority to legislate as is conferred upon them by Congress, limited as both are by the Constitution. Congress not only may abrogate the laws of any of the territories, but it may itself, if it chooses, legislate directly for the entire local government. It may make a valid act of the Legislature void, and [\*\*898] a void act valid. It has complete legislative authority over the people inhabiting the territories and all of the departments of the territorial government. It may restrict all [\*\*\*\*14] legislation for a territory to itself or it may portion it out to subordinate bodies; but, when these bodies act, they act by virtue of federal authority, and their legislation is federal legislation applicable solely to their local conditions. This authority in the territory of Oklahoma is contained and set out in **HN10** section 6 of the Organic Act (Act May 2, 1890, c. 182, 26 Stat. 84), as follows:

"That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the

soil; no tax shall be imposed on the property of the United States, nor shall the lands or other [\*\*\*915] property of nonresidents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value."

[\*P8] Section 4 of the Organic Act places the legislative power and authority of the territory of Oklahoma in the Governor and legislative [\*\*\*\*15] assembly. Section 6 of the Organic Act, *supra*, not only confers the authority subject to the reserved power mentioned, but contains specific limitations imposed upon the exercise of the authority. Within the limitations noticed, the legislative power for local self-government is quite as extensive in a territory as in a state. The policy of the government is to give to it the fullest opportunity to govern itself and prepare for statehood.

[\*P9] The Supreme Court of the United States in the case of [\*Clinton v. Englebrecht, 13 Wall. 434, 20 L. Ed. 659,\*](#) has specifically so held. The court said:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision [\*\*899] of national authority, and with certain fundamental principles established by Congress."

[\*P10] This in our judgment is a correct statement of the rule involved, and the determination of the extent to which Congress has granted the right to the territory of Oklahoma to legislate must be ascertained from a construction of the powers specifically [\*\*\*\*16] granted in section 6 of the Organic Act, *supra*, taken in connection with the manifest policy of the government in granting the power of legislation upon all rightful subjects of legislation as set forth above. If the act of the territorial Legislature passed for the purpose of making effective and enforceable by its own authorities, an act to prevent combinations in restraint of trade, was not in conflict and in no wise interfered with or affected the enforcement by the federal authorities of the act of Congress, then it occurs to us that there is no good reason for saying that the same was annulled and rendered nugatory as soon as enacted by such previous act. There is nothing in the federal act prescribing or prohibiting to the legislative authority of the territory the right to legislate upon this identical subject, nor is the same contained in any act of Congress to which our attention has been called. The right to legislate upon this subject and to have its act enforced by its own authorities was a valuable one to the people inhabiting the territory, and it ought not to be taken away by any strained or arbitrary construction.

[\*P11] Attention is particularly directed to the numerous [\*\*\*\*17] provisions making certain its enforcement which are not contained in the federal act, and which perhaps are not available to the prosecutors under it. It will be noted that the punishment prescribed by the federal act is simply a fine and imprisonment of the persons who make such contract, while under section 2 of the local statute a second conviction of any corporation violating its provisions brings upon its corporate life a sentence of death, and its existence in the territory terminates. Section 3 provides that any person purchasing from such illegal organization shall not be liable for the price or payment for any article or commodity so [\*\*900] purchased, and likewise contains a complete and effective provision for securing evidence of the offense. Section 4 provides that any person who shall have purchased from such organization and paid for the commodity is authorized to maintain an action to recover the full amount of damages sustained in addition to a reasonable attorney's fee. It likewise provides for the production of evidence to aid the court in the ascertainment of the facts. Section 5 makes it the duty of the prosecuting attorneys of the several counties to enforce [\*\*\*\*18] the act, and, in order to insure vigilance on their part, offers to each who secures a conviction a fifth of the fine. These additional provisions in no wise conflict with the federal act, and the same rule, that repeals by implication are not favored, pertains to the annulment of statutes in cases of this character. The United States Supreme Court in the case of [\*Cope v. Cope, 137 U.S. 682, 11 S. Ct. 222, 34 L. Ed. 832,\*](#) says:

**HN11** [↑] "Annulments of statutes by implication, like repeals by implication, are not favored by the courts. No statute of a territory will be declared void because it may indirectly or by a construction which is possible but not necessary be repugnant to an act of Congress annulling legislation of the territory; but such a result must be direct and proximate in order to invalidate the statute."

[\*P12] The act under which these proceedings were brought had at that time been on the statute books of the territory of Oklahoma for nearly 16 years. It was passed almost immediately after the approval of the federal act. This at least was a construction on the part of the territorial Legislature that it was necessary and essential, and that its terms were not repugnant [\*\*\*\*19] to the federal act. Furthermore, section 1850 of the Revised Statutes of the United States provides that "all laws passed by the legislative assembly and Governor of any territory (except certain territories not material here) shall be submitted to Congress, and, if disapproved, shall be null and of no effect." Section 3 of the Organic Act made it the specific duty of the Secretary of the territory of Oklahoma to transmit two copies of the laws of each legislative assembly [\*\*901] within 30 days after its adjournment to the presiding officers of the Senate and House of Representatives of the United States. This act doubtless in accordance [\*\*\*916] therewith was presented to Congress and the fact that it was not disapproved is again a legislative construction making in favor of its validity.

[\*P13] In the case of [\*Clinton v. Englebrecht, supra\*](#), speaking of the controverted act passed by the territory in that case, and of this provision of the federal statutes, Mr. Chief Justice Chase, who delivered the opinion of the court, said:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the [\*\*\*\*20] statute book for more than 12 years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the territory to transmit to that body copies of all laws on or before the 1st of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

[\*P14] In addition to the foregoing reasoning, which in our judgment tends to the conclusion that this was a valid act of the territorial Legislature when passed, a number of judges and courts have had occasion to pass upon the identical question which is here presented to us, and a rule substantially correct is, we believe, annunciated in an opinion prepared by Judge Irwin of the Supreme Court of the territory of Oklahoma in the case of [\*Territory ex rel. Ridings v. Neville et al., 10 Okla. 79, 60 P. 790\*](#). This opinion, although not receiving the sanction of the majority of the members of that court, in our judgment expresses the law upon this proposition. He said:

**HN12** [+] "The territorial Legislature, being the representatives of the people of the territory, have the right to [\*\*\*\*21] legislate for the people upon all subjects which are not in conflict with the Constitution of the United States, and do not in any way interfere with the supreme right of the United States government to direct and control the governmental affairs of the territory."

[\*P15] The foregoing in our judgment expresses the correct rule obtaining in reference to the power of the constituted legislative [\*\*902] body of a territory to legislate in reference to matters with which Congress has likewise dealt. In this conclusion we are supported by a number of authorities. Cooley's Constitutional Limitations (7th Ed.) p. 54, note 1; [\*State v. Norman, 16 Utah 457, 52 P. 986; Territory v. Guyott, 9 Mont. 46, 22 P. 134; Knudsen v. Hannberg et al., 8 Utah 203, 30 P. 749; In re Murphy, 5 Wyo. 297, 40 P. 398; Davis v. Beason, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637; Cope v. Cope, 137 U.S. 682, 11 S. Ct. 222, 34 L. Ed. 832.\*](#)

[\*P16] The law declared by the Supreme Court of Wyoming in the case of [\*In re Murphy, supra\*](#), is as follows:

"The fact that the Congress of the United States had enacted a [\*\*\*\*22] law defining and punishing the crime of bigamy in the territories and other places over which the United States have exclusive jurisdiction did not restrict or impair the right of the Legislature of the territory of Wyoming to define and provide a punishment for bigamy as an offense against the territorial sovereignty and its laws."

[\*P17] Such also is the holding of the Supreme Court of Utah in the case of [\*State v. Norman, supra\*](#):

"The acts of Congress defining 'adultery,' and prescribing punishment therefor, in the territories, as a crime against the United States, were not exclusive of territorial legislation on the same subject, and did not prevent the territorial Legislature from punishing by statute the same act as an offense against the territorial government and its laws."

[\*P18] To the same effect in a degree is the declaration of the Supreme Court of Montana in the case of [Territory v. Guyott, supra](#):

"We are aware of the broad distinction between the government of a state and territory, but 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. [\*\*\*\*23] ' Rev. St. U.S. § 1851. In [Hornbuckle v. Toombs, 18 Wall. 648, 21 L. Ed. 966](#), it is adjudged that, 'as a general thing, subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local Legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of [\*\*903] Congress to revise, alter, and revoke at its discretion.' The powers thus exercised by the territorial Legislatures are nearly as extensive as those exercised by any state Legislature."

[\*P19] Nor is it any argument against the validity of this act that a violator of it was liable to be prosecuted twice for the same offense. [In re Murphy, 5 Wyo. 297, 40 P. 398](#); [Harlan v. People, 1 Doug. \(Mich.\) 207](#); [Miners' Bank v. State of Iowa, 12 How. 1, 13 L. Ed. 867](#). The rule in this respect is properly declared by the Supreme Court of Montana in the case of [In re Murphy, supra](#), as follows:

"The contention that the law of the territory was not valid, because the same act was punishable as a crime under the laws of of [\*\*\*\*24] the United States, and therefore, if both were in force, the person committing the crime would be subject to punishment twice for the same offense, is not sound, as the federal government could punish it as a crime against it while at the same time it might be a crime punishable under the laws of the territory. In this respect there is no distinction between a state and a territory in their respective relations to the general government."

[\*P20] We therefore conclude that the anti-trust act of the Legislature of the territory of Oklahoma was not repugnant to or in conflict with the federal anti-trust act or any other constitutional or congressional limitation, and was a valid, existing statute of the territory of Oklahoma.

[\*P21] [\*\*\*917] This conclusion on our part brings us to by far the most serious question in the case; that is, whether or not the allegations contained in the petitions bring these defendants within the terms of the statute of the territory defining a public nuisance. [HN13](#)  [Section 1](#), c. 56, Wilson's Rev. & Ann. St. Okla. 1903, provides as follows:

"A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures [\*\*\*\*25] or endangers the comfort, repose, health, or safety of others; or, Second. Offends decency; or, Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or, Fourth. In any [\*\*904] way renders other persons insecure in life, or in the use of property."

[\*P22] Section 2 thereof reads as follows:

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."

[\*P23] The county attorney, as first noted, began these actions under section 4440, *supra*. It will be noted that under this statute the term "common nuisance" is used, while the statute defining a nuisance violating the general rights of the public is under section 2, *supra*, denominated a "public nuisance." The meaning of these two phrases as generally understood by the courts, and the elements entering therein, is illustrated by the statement of the general rule contained in volume 21, p. 683, American and English Encyclopaedia [\*\*\*\*26] of Law, as follows:

"A common or public nuisance is one that affects the people at large, and is a violation of a public right, either by a direct encroachment upon public property or by doing some act which tends to the common injury or by omitting to do, in the discharge of a legal duty, that which the common good requires. It does not necessarily mean one affecting the government or the whole community of the state. It is public if it affects the surrounding community generally, or the people of some local neighborhood, as, for instance, the inhabitants of a village. Nor is it

necessary that all persons in the community, or in fact that any individual whatever, should be actually annoyed or injured, but it is sufficient if there is a tendency to the annoyance of the public by an invasion of a right which all are entitled to exercise if they see fit."

[\*P24] It will be noted that the petitions allege that the defendants have become members of a pool, trust, agreement, combination, and understanding with each other to regulate and fix the price of lumber, coal, and grain and to prevent and restrict competition in the sale thereof, and that by virtue of being thus federated together, have [\*\*\*\*27] so controlled all the business of buying and selling such commodities in the town of Kingfisher as to create a monopoly for their benefit, and, by charging unjust, unreasonable, exorbitant [\*\*905] prices for these commodities, their acts have been and are greatly to the injury of the people of the county of Kingfisher and the territory of Oklahoma; that, by means of said confederation, combination, and monopoly, they are enabled to and do keep other persons desiring to enter said business from doing so, and arbitrarily fix the price which shall be paid for such commodities, and also the price at which they shall be sold to consumers, and that they have thereby completely excluded competition in these lines. Wood on Nuisance, § 51, says. "All monopolies were regarded as nuisances at common law"; and they have received the condemnation of Legislatures and courts from the earliest times. Forestalling and engrossing in the purchase of commodities in common use were at an early date condemned by the English Parliament, being made punishable by fine and imprisonment, and courts have uniformly denied to parties to contracts in restraint of trade their remedies and relief. Nearly all [\*\*\*\*28] of the states of the Union, as well as the federal government, have provisions either in their Constitutions or statutes making them illegal and bringing them under the ban of prosecution on the part of the state. Where corporations are shown to have been involved, they have been proceeded against by *quo warranto* (*People v. North River Sugar Refining Company*, 22 Abb. N.C. 164, [3 N.Y.S. 401](#); *State ex rel. Snyder v. Portland Natural Gas & Oil Company*, [153 Ind. 483, 53 N.E. 1089, 53 L.R.A. 413, 74 Am. St. Rep. 314](#); *State ex rel. v. Standard Oil Company*, [49 Ohio St. 137, 30 N.E. 279, 15 L.R.A. 145, 34 Am. St. Rep. 541](#); *National Cotton Oil Company v. Texas*, [197 U.S. 115, 25 S. Ct. 379, 49 L. Ed. 689](#)), or they have been prosecuted under the criminal provisions of the statute ([Smiley v. Kansas](#), [196 U.S. 447, 25 S. Ct. 289, 49 L. Ed. 546](#)), or the state has proceeded against them by injunction to prevent a continuation of their illegal practices ([Gulf, Colorado & Santa Fe Railway Company et al. v. State of Texas](#), [72 Tex. 404, 10 S.W. 81, 1 L.R.A. 849, 13 Am. St. Rep. 815](#)), or the parties [\*\*\*\*29] thereto have been indicted and prosecuted for conspiracy ([People v. Sheldon et al.](#), [139 N.Y. 251, 34 N.E. 785, 906 23 L.R.A. 221, 36 Am. St. Rep. 690](#); [People v. Duke](#), [19 Misc. 292, 44 N.Y.S. 336](#); *State ex rel. Durner v. Huegin*, [110 Wis. 189, 85 N.W. 1046, 62 L.R.A. 700](#); *State v Eastern Coal Company et al.* [*R. I.*] [70 A. 1](#).) The state of Connecticut proceeded by mandamus in one instance against a railway company compelling it to reinstate train service which it had ceased under contract made with a competing carrier. *State v. Hartford & New Haven Railroad Company*, [29 Conn. 538](#).

[\*P25] The foregoing cases exemplify some of the different remedies which [\*\*\*918] have heretofore been applied to relieve the public of the effect of unlawful combinations restrictive of free competition, and now we are called on to say whether or not combinations such as are delineated in the petitions herein may be proceeded against in yet an additional way, as for a nuisance; the question being: Do their acts produce such a condition as to bring them within the terms of our statute, to the end that their continuance [\*\*\*\*30] may be restrained at the instance of a county attorney on a petition supported by his oath or affirmation, upon information and belief and without a bond? The light in which they are held by the courts is manifest from expressions contained in all of the cases where they have been before them. A few of the list and which might easily be extended are as follows: *Butchers' Union Company v. Crescent City Company*, [111 U.S. 746, 4 S. Ct. 652, 28 L. Ed. 585](#); *Richardson v. Buhl*, [77 Mich. 632, 43 N.W. 1102, 6 L.R.A. 457](#); *Craft et al. v. McConoughy*, [79 Ill. 346, 22 Am. Rep. 171](#); *Morris Run Coal Company v. Barclay Coal Company*, [68 Pa. 173, 8 Am. Rep. 159](#); *Charles River Bridge Company v. Warren Bridge et al.*, [11 Pet. 420, 9 L. Ed. 773](#); *Tuscaloosa Ice Manufacturing Co. v. Williams*, [127 Ala. 110, 28 So. 669, 50 L.R.A. 175, 85 Am. St. Rep. 125](#).

[\*P26] Mr. Justice Field of the Supreme Court of the United States in his concurring opinion in the case of *Butchers' Union Company v. Crescent City Company, supra*, said:

"As in our intercourse with our fellow men certain principles of morality [\*\*\*\*31] are assumed to exist without which society would be [\*\*907] impossible, so certain inherent rights lie at the fountain of all action, and upon a

recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident' (that is, so plain that their truth is recognized upon their mere statement) 'that all men are endowed,' not by edicts of emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator with certain inalienable rights, (that is rights which cannot be bartered away, or given away, or taken away, except in punishment of crime), 'and that among these are life, liberty, and the pursuit of happiness, and to secure these' (not grant them, but secure them) 'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity [\*\*\*\*32] or develop their faculties, so as to give to them their highest enjoyment The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike, upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

[\*P27] Now the question presents itself: Do the allegations of these petitions bring the defendants within our statute, and constitute of their acts a public common nuisance? In other words, are their doings as set forth such as would annoy, injure, or endanger the comfort, repose, health, and safety, or in any way render at the same time an entire community or neighborhood, or any considerable number of persons, insecure in life or in the use of their property.

[\*P28] An act of the state Legislature of Indiana, (Acts 1893, p. 300, c. 36, § 1) provides: "That it shall be unlawful for any person, firm, [\*\*\*\*33] or corporation [\*\*908] having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

[\*P29] The penalty for a violation of this section was provided in the recovery of \$ 200 for each violation, and a further penalty of \$ 200 for each 10 days during which such violation should continue, to be recovered in a civil action in the name of the state, for the use of the county in which such well is located, with attorney's fees and costs of suit. In addition to this remedy, it was provided that persons in the vicinity were authorized to go upon the land where any such well is situated, close and pack the same, and were entitled to sue and recover the expenses thereof with attorney's fees and costs of suit. The Ohio Oil Company, it was alleged, [\*\*\*\*34] was violating this section of the statute, and the Attorney General of the state and the prosecuting attorney for the Madison circuit court brought suit praying an injunction to restrain it from wasting natural gas. The circuit court sustained a demurrer to the complaint for want of sufficient facts to constitute a cause of action. The plaintiff elected to abide the demurrer, refused to amend or plead further, and the court rendered judgment against the state, from which the state appealed, as did the territory in the case at bar. The complaint alleged that the defendant had "unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the state's supply of natural [\*\*\*919] gas has been greatly diminished, and the property of its citizens within the said gas territory, dependent upon the continued supply of natural gas for fuel as aforesaid, has been greatly damaged and decreased in value." The action brought on the part of the state was, as is the one at bar, to enjoin and restrain a nuisance. The statute of the state of Indiana on nuisances reads: [\*\*909] "Whatever [\*\*\*\*35] is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance, and the subject of an action. \* \* \* The nuisance may be enjoined or abated and damages recovered therefor."

[\*P30] On the consideration of the allegations set forth in the petition of the state, and the terms of the statute on nuisances, the court held in the case of State v. Ohio Oil Company, 150 Ind. 21, 49 N.E. 809, 47 L.R.A. 627, as follows:

"The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the state. The Supreme Court of Kansas in *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, said: 'Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance.' The demurrer to the complaint admits that the wells of the appellee are in this category. The Supreme Court of California in a suit by the Attorney General to enjoin the Truckee [\*\*\*\*36] Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely analogous to this action, the court used the following language, which we adopt:

"It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons," is a public nuisance. \* \* \* The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state ( *Ex parte Maier*, 103 Cal. 476, 37 P. 402, 42 Am. St. Rep. 129), as in England it was in the King, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and [\*\*\*\*37] every other state in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is [\*\*910] being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. *People ex rel. Ricks Water Company v. Elk River Mill & Lumber Company*, 107 Cal. 214, 40 P. 486, 48 Am. St. Rep. 121. \* \* \* The dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters and their preservation for the common enjoyment of its citizens is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. \* \* \* While the right of fishery upon his own land is exclusively in the riparian proprietor, [\*\*\*\*38] this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. \* \* \* The fact that acts of the character alleged are by the Penal Code made a misdemeanor, and punishable as such, does not make them less a nuisance, nor imply that the Legislature intended to make the criminal remedy exclusive of the civil. Nor is there anything in the objection that the Attorney General is not privileged to maintain the action upon his own information without the intervention of a private relator.' ( *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am. St. Rep. 183.)

"The same doctrine is laid down in *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Commonwealth v. Pittsburgh & C. R. Co.*, 24 Pa. 159, 62 Am. Dec. 372; *State ex rel. McCain v. Metschan*, 32 Ore. 372, 46 P. 791, 53 P. 1071, 41 L.R.A. 692."

[\*P31] It is true the foregoing case is not one wherein a monopoly is declared a nuisance, but it is one which recognizes [\*\*\*\*39] the principle which we regard as controlling in all cases where the question is involved as to whether or not certain things constitute a public nuisance. In that case it was not alleged that any citizen of the state at that particular time by reason of the act of the [\*\*911] defendant was being deprived of natural gas by virtue of the waste in which defendant was indulging, but merely that by virtue of the waste, they were invading the valuable public right of having that gas conserved, to the end that the people of the state in their communal capacity might not in the future be denied and deprived by virtue of such waste of the right to this common product. This waste, resulting in a diminution in the value of property, the court held interfered with the comfortable enjoyment of life [\*\*\*920] and property of the citizens of the state.

[\*P32] Now let us apply this principle to the facts as averted in the case at bar. The allegations in the petitions before us clearly show that lumber, fuel, and grain, three of the prime necessities of life, are in the community where these combinations are alleged to exist entirely monopolized and under the control of these defendants. The

right [\*\*\*\*40] of the citizens of that community to purchase or sell in an open and free market, shelter, warmth, or grain for food is by virtue of these combinations entirely denied by these defendants. This great and invaluable public right is not only invaded, but absolutely destroyed. The extent of the evil in the present case may be gathered when we consider that from lumber are constructed the houses and homes of nearly our entire population. The inclemencies of the season and the requirements of civilization require and compel men to purchase this commodity in order that they may survive. The same elements make it equally necessary to heat these houses and homes, and yet, under the aver-merits of these petitions, if true, two combinations of a small number of individuals have effectually gotten into their hands the power in this community to exact any price from the citizens thereof for these absolute necessities that they may choose, for in truth the citizens have no choice on the question as to whether they shall purchase or not, and if the law can afford them no relief, they have recourse to but two remedies: First, to yield; or, second, to move, and the extent of the detriment which they [\*\*\*\*41] may thus be wrongfully compelled to bear is measured only by which of these alternatives presents the least burden. In reference to [\*\*912] grain, which constitutes and makes up the greater portion of the food of the people, and of their domestic animals, a similar condition is alleged to exist, except that it is more far reaching in the evil effects. Here a combination, it is alleged, not only fixes the price which the producer who grows grain for a livelihood shall receive for it, limited only by the burden of taking it to another market, but within the same limitation it has arrogated to itself the right of fixing the price which those who require this necessity must pay for it. Under the operation of combinations of this character, competition which usually corrects inequalities in trade relations is stifled, and the people living there with their homes and establishments are by virtue of these circumstances compelled to patronize those who exploit them. Our population is made up of those who produce raw material, and who purchase goods from dealers. They each and all have a right under the laws of the land to a free and equal opportunity to conduct their daily business operations, [\*\*\*\*42] unhampered by restrictions imposed by unlawful combinations. They have a right to have the current of their business affairs unobstructed and the atmosphere of their daily transactions unpolluted by monopolistic organizations destroying that free and open market to which all are entitled. The benefit of a free and open market, unhampered by secret combinations with the power by virtue of such to arbitrarily fix prices which those who enter it shall receive and shall be required to pay, is one of the most valuable rights which organized government offers a citizen, and it is a right not only of material value to the individual member in his personal capacity, but it is a right which he is entitled to enjoy as a member of the community in which he lives in common with all of his other rights. Any invasion of this right in the manner indicated by these Suits is an invasion of a public right, one which all the citizens of a community should be permitted to enjoy by reason of being law-abiding members of such community and loyal citizens of the state.

[\*P33] That combinations such as are here proceeded against are invasions of this public right and of the interests of the public; and [\*\*913] [\*\*\*\*43] that such acts are so recognized is declared by numerous authorities. [People v. Milk Exchange, 145 N.Y. 267, 39 N.E. 1062, 27 L.R.A. 437, 45 Am. St. Rep. 609](#); [People ex rel. v. Chicago Gas Trust Company, 130 Ill. 268, 22 N.E. 798, 8 L.R.A. 497, 17 Am. St. Rep. 319](#); [Richardson v. Buhl, 77 Mich. 632, 43 N.W. 1102, 6 L.R.A. 457](#); [Nester et al. v. Continental Brewing Company et al., 161 Pa. 473, 29 A. 102, 24 L.R.A. 247, 41 Am. St. Rep. 894](#); [Tuscaloosa Ice Manufacturing Company v. Williams, 127 Ala. 110, 28 So. 669, 50 L.R.A. 175, 85 Am. St. Rep. 125](#); [Nashville, Chattanooga & St. Louis Railway Company v. McConnell \(C. C.\) 82 F. 65](#). This thought is well expressed by Judge Clark of the federal court for the middle district of Tennessee in the case of [Nashville, Chattanooga & St. Louis Railway Company v. McConnell, supra](#), wherein he said:

[HN14](#) [↑] "It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of [\*\*\*\*44] greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right, in the ordinary forms of property."

[\*P34] When we consider the terms of our statute, and find that the word "annoy" is by Webster defined as "to disturb or irritate, especially by continued or repeated acts," and that "insecure" means "not secure, not confident of safety or permanence, distrustful, suspicious; apprehensive of danger or loss," we are unable to come to any other conclusion than that the acts of these defendants as charged in the petitions constituted of their doings under our statute a public common nuisance, which annoyed, injured, and endangered [\*\*\*921] the comfort and safety of

others, and in many ways rendered at the same time the people residing in that community and neighborhood where they existed insecure in the use of their property.

**[\*P35] [\*\*914]** This holding on our part interferes in no particular whatever with any legitimate operation by the defendants of their different businesses. It simply prevents them from [\*\*\*\*45] doing the identical things against which they are entitled to and should be protected on the part of others, and which is denounced by the law as a crime. The business which they are conducting and the service given by them to the community in which they live are indispensable, and those so engaged and rendering such service should be protected in every way in all their legitimate operations. Hence the writ issued in this case should in no wise and in no particular interfere with these defendants in conducting their affairs in a lawful manner. Its extreme scope should go no further than to restrain them from maintaining a monopoly and acting under the contracts charged against them, and on the trial hereof no permanent writ should issue except upon the production on the part of the plaintiff of evidence of high and convincing character.

**[\*P36]** The record before us shows that the Oklahoma Elevators, one of the parties defendant in case No. 2,100, was not a party in the proceedings in error, that no service was made upon it, nor appearance made herein, and the judgment rendered will not run as against it. With this exception the judgment of the lower court is accordingly reversed, and the **[\*\*\*\*46]** cases are remanded to the district court of Kingfisher county, with instructions to require the defendants herein to answer, and to set the same down for such early determination and trial by that court as the public service and convenience will permit.

**[\*P37]** WILLIAMS, C. J., TURNER and HAYES, JJ., concur; KANE, J., being of counsel and not sitting.

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## State v. Brady

Court of Civil Appeals of Texas

November 25, 1908, Decided

No Number in Original

**Reporter**

114 S.W. 895 \*; 1908 Tex. App. LEXIS 743 \*\*

STATE v. BRADY, County Attorney.†

**Subsequent History:** [\*\*1] January 6, 1909, Rehearing Denied

Reversed by [State v. Brady, 102 Tex. 408, 118 S.W. 128, 1909 Tex. LEXIS 167 \(Tex., Apr. 14, 1909\)](#)

**Prior History:** Appeal from District Court, Williamson County; Chas. A. Wilcox, Judge.

Suit by the State against John W. Brady, County Attorney. Judgment for defendant, and plaintiff appeals. Affirmed.

## **Core Terms**

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anti-trust, percent, county attorney, suits, legal interest, violations, collected

**Counsel:** James R. Hamilton, Dist. Atty., and J. M. Patterson, for the State.

John W. Brady, Allen & Hart, Gregory & Batts, D. W. Doom, and D. H. Doom, for appellee.

**Judges:** FISHER, C. J.

**Opinion by:** FISHER

## **Opinion**

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[\*896] FISHER, C. J.

This suit was brought by appellant against appellee to recover from him the following sums of money: \$750, with legal interest from December 5, 1904; \$2,350, with legal interest from November 11, 1905; \$1,200, with legal interest from July 18, 1906; \$3,480, with legal interest from October 4, 1907; and \$1,750, with legal interest from November 8, 1907, upon the ground that appellee as county attorney represented appellant in as many anti-trust suits filed and prosecuted to final judgment for violations of the anti-trust law of 1899 (Laws 1899, p. 246, c. 146), after the passage and taking effect of the anti-trust law of 1903 (Laws 1903, p. 119, c. 94), and that appellee kept and retained as his fee or commission as county attorney 25 per cent. of the amount of each of the judgments so obtained [\*\*2] and collected by him, instead of commission allowed him by article 297 of the Revised Statutes of 1895, the appellant's contention being that the anti-trust law of 1903 repealed the provision of the anti-trust law of 1899, giving district and county attorneys 25 per cent. of the penalties recovered by them for the state, and that, after the antitrust law of 1903 took effect, district and county attorneys were only entitled to the commissions on

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† Writ of error granted by Supreme Court.

such recoveries as prescribed by article 297 of the Revised Statutes of 1895 — that is, 10 per cent. of the first \$1,000 of each judgment and 5 per cent. of each judgment over \$1,000. The appellee answered that the act of 1903 did not repeal the provision of the act of 1899 giving district and county attorneys 25 per cent. of the amount recovered in such suits, and also pleaded departmental construction of the act of 1903 in his favor by the Attorney General. The case was tried before the court upon an agreed statement of facts, and judgment rendered in appellee's favor.

The trial court filed the following conclusions of fact and law:

"(1) It is agreed that the facts alleged and set out in plaintiff's petition are true and correct, and shall be [\*\*3] taken as facts in the trial of this suit, especially as to the official acts of the said John W. Brady, the dates and amounts of the judgments recovered, and of the fees retained by the said Brady as county attorney under the antitrust laws of 1899 and 1903 of the state of Texas. However, it shall not be taken as admitted by the said Brady that the fee alleged in the motion to be the fee allowed by law is the fee allowed him by law. In this respect he only admits that he received as county attorney 25 per cent. of each respective judgment for penalties as alleged in plaintiff's motion, and claims that he was entitled to the same under the law.

"(2) It is agreed: That in all of the suits named in said motion, except that of J. M. Guffey Petroleum Company, and the facts as to that are correctly stated in defendant's answer, the said John W. Brady appeared and represented the state under the direction of the Attorney General of Texas.

"(3) That on March 31, 1903, C. K. Bell was Attorney General of Texas, and held that office until on or about January 2, 1905. That on July 14, 1904, the said John W. Brady as county attorney of Travis county, Tex., assisted by D. A. McFall and G. W. Allen, [\*\*4] attorneys, brought suit in the district court of Travis county, Tex., in behalf of and in the name of the state of Texas, against the J. M. Guffey Petroleum Company and the Beaumont Confederate Oil & Pipe Line Company for violations of chapter 146, p. 246, Gen. Laws Tex. 1899, and by agreement recovered a judgment in said suit for \$5,000. That said judgment was collected in full by said John W. Brady on or about December 5, 1904, and that said Brady retained \$1,250 as his official fee in said suit of the state of Texas against the J. M. Guffey Petroleum Company and the Beaumont Confederate Oil & Pipe Line Company. That out of said fees he paid under contract to the said two attorneys two-thirds thereof for their services therein. That the settlement which resulted in said judgment and collection was at the time approved by said C. K. Bell, Attorney General, as the construction of the anti-trust laws of 1899 and 1903, by which the said John W. Brady retained one-fourth of said judgment as his official fees therein.

"(3½) It is agreed: That in all the judgments rendered in the cases in which collections were made, and in which penalties were assessed for violations of the act of 1899, [\*\*5] such penalties were assessed for the [\*897] minimum penalty of \$200 per day for each day's violations as provided in said act of 1899, and collections made accordingly.

"(4) That the suit No. 21,046, State of Texas v. U. S. Fidelity & Guaranty Co. et al., was filed while C. K. Bell was Attorney General, but was settled a short time after R. V. Davidson qualified as Attorney General.

"(5) That all the suits named in plaintiff's motion, including those filed and settled under the administration of Attorney General Bell, as well as under the administration of Attorney General Davidson, were settled by agreed judgments, approved in terms and amounts by the Attorney General. That all of the fees retained by the said John W. Brady in said suits were retained by him in good faith, believing that he was entitled thereto under the law. That in so retaining said fees he relied upon and followed the construction given to the anti-trust laws of 1899 and 1903 by Attorneys General Bell and Davidson, viz., that the repeal of the act of 1899 by the act of 1903, with the saving clause in the latter act, had the effect of keeping alive the act of 1899 as to all acts committed before the act of 1903 took effect, [\*\*6] not only as to the penalties named in the former act, but also as to all its machinery and provisions for the enforcement of the same, including the compensation of 25 per cent. to county and district attorneys. That such construction is still adhered to by the Attorney General's department of this state.

"(6) That upon the faith of said construction by the Attorney General's department the said John W. Brady, with the knowledge and sanction of said department, employed attorneys and made contracts with them for contingent interest in said fees, based upon the construction that he was entitled to 25 per cent. of the recovery under the act of 1899, to assist him and the Attorney General in the prosecution of each of said suits. That said attorneys actively assisted in the work of preparing said cases for trial, and performed all legal services therein required of them by the said John W. Brady or by the Attorney General. That out of the fees received by him in said cases the said Brady has paid out to said attorneys and in expenses for procuring testimony and preparing the same for trial over two-thirds of the fees actually retained by him upon the faith of said construction.

"Conclusions **[\*\*7]** of law.

"(1) That the saving clause of the antitrust act of 1903, when taken in connection with the language and provisions of the anti-trust acts of 1899 and 1903, is susceptible of the construction given to it by two administrations of the Attorney General's department, as set out in the agreed statement of facts, viz., that such saving clause in the latter act had the effect of keeping alive the act of 1899 as to all violations of such act committed before the act of 1903 took effect, not only as to the penalties named in the former act, but also as to all its machinery and provisions for the enforcement of same, including the compensation of 25 per cent. to the county and district attorneys.

"(2) That, applying the well-established rules with reference to the departmental construction of statutes to the facts in this case, I conclude that the construction given said statutes by the Attorney General's department as above set out, and upon the faith of which the defendant acted, should be adhered to by the courts.

"Therefore I conclude that the defendant was entitled to the fees sought to be recovered in this case, and that the state should not recover in this action."

We agree with **[\*\*8]** the trial court in the conclusions and result reached.

We find no error in the record, and the judgment is affirmed.

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## **Bigelow v. Calumet & H. Min. Co.**

Circuit Court of Appeals, Sixth Circuit

February 18, 1909

No. 1,897; No. 1,898

**Reporter**

167 F. 721 \*; 1909 U.S. App. LEXIS 4375 \*\*

BIGELOW v. CALUMET & HECLA MINING CO. et al. (two cases)

**Prior History:** [\*\*1] Appeals from the Circuit Court of the United States for the Western District of Michigan.

### **Core Terms**

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commerce, stock, monopoly, manufacture, copper, interstate commerce, sugar, external, cases, refining, shares, mining company, capital stock, ownership, combinations, interstate, Northern, mining, Lake, state act, percent, anti-trust, stream, restraint of trade, Consolidated, suppression, approached, properties, refineries, contracts

### **LexisNexis® Headnotes**

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Business & Corporate Law > Foreign Corporations > General Overview

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > General Overview

Business & Corporate Law > Corporations > Corporate Formation > General Overview

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Business & Corporate Law > ... > Meetings & Voting > Voting Shares > General Overview

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

### **HN1[] Business & Corporate Law, Foreign Corporations**

The act of 1905, No. 105, Pub. Acts Mich. 1905, pp. 153, 154 provides that corporations organized under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, metals, or minerals may subscribe for, purchase, own or dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or

minerals. The latter act does not so seriously interfere with the contract between the company and its shareholders as to require the shareholders' acceptance as an amendment of the charter powers. The amendment, while allowing a wide expansion of the business operations of such companies, is not so fundamental as to be beyond the power of the Legislature under the constitutional reservation of the power to alter or amend the general constating act under which corporations may be organized in Michigan. Use of the power conferred by the amendment is evidence of acceptance, if acceptance be necessary. The right to vote stock so lawfully acquired is, of course, an incident to ownership. Comp. Laws Mich. § 7002.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[International Trade Law > General Overview](#)

## **[HN2](#)[] Antitrust & Trade Law, Sherman Act**

Under the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200), the validity of an alleged combination or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results.

[Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers](#)

[International Trade Law > Authority to Regulate > General Overview](#)

[Transportation Law > Intrastate Commerce](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations](#)

[Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview](#)

[International Law > Authority to Regulate > General Overview](#)

[International Law > Authority to Regulate > Anticompetitive Activities](#)

[International Trade Law > General Overview](#)

## **[HN3](#)[] Interstate Commerce, State Powers**

The power of Congress to legislate upon trade, aside from the territories and the District of Columbia, is derived from its power to regulate commerce among the states and with foreign nations. It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily, affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce, the latter being as exclusively within the regulating power of the state as is the former within the power of Congress.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

## **[HN4](#)[] Antitrust & Trade Law, Sherman Act**

There must be some direct and immediate effect upon interstate commerce in order to come within the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200).

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

**HN5**  **Antitrust & Trade Law, Sherman Act**

An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation would not be direct. The act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200) must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it.

Antitrust & Trade Law > Sherman Act > General Overview

**HN6**  **Antitrust & Trade Law, Sherman Act**

A mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200) to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is not such a special circumstance as to constitute the direct and immediate effect upon commerce among the states as to bring the agreement within the act.

Antitrust & Trade Law > Sherman Act > General Overview

**HN7**  **Antitrust & Trade Law, Sherman Act**

Unless a monopoly of manufacture in a single state of a product which goes into interstate commerce directly and immediately or necessarily interferes with or restrains that commerce, the monopoly does not come under the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200).

Antitrust & Trade Law > Sherman Act > General Overview

**HN8**  **Antitrust & Trade Law, Sherman Act**

If there is a presumption, in respect to a question of restraint or monopoly under the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200) that the power to determine the management of a competing corporation through ownership of a majority of shares constitutes a suppression of competition, the inquiry is whether such presumption is one of fact or law. If one of fact, as it evidently is, it is rebuttable. Purpose or motive is of no moment, provided the contract or agreement directly provided for the suppression of competition, or when such a result, as a matter, of law, must necessarily occur. But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some

evidence of an unlawful intent becomes essential, that a court may see that, if not stopped, a prohibited restraint is likely to be created.

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN9\*\*](#) [+] Antitrust & Trade Law, Sherman Act

The act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200) gives a proceeding against combinations in restraint of commerce among the states, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent -- for instance, the monopoly -- but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the complete result.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

#### [\*\*HN10\*\*](#) [+] Antitrust & Trade Law, Sherman Act

In the absence of any express terms of an agreement providing for acts directly affecting interstate commerce, antitrust complainants must by facts and circumstances show that the direct and necessary result of what has been done and threatened is to restrain interstate commerce. The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.

Contracts Law > Contract Interpretation > General Overview

#### [\*\*HN11\*\*](#) [+] Contracts Law, Contract Interpretation

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

**Counsel:** H. E. Boynton and A. C. Denison, for appellant.

Otto Kirchner and A. F. Ress, for appellees.

**Opinion by:** LURTON

## Opinion

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[\*722] Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge. These cases have been heard together upon the same transcript. The solution of the questions presented by one will substantially determine the other. The first and principal bill is that of Albert S. Bigelow against the Calumet & Hecla Mining Company and the Osceola Consolidated Mining Company. The

complainant, Bigelow, is a citizen of Boston, Mass. The defendants are copper mining companies created under the laws of the state of Michigan. The complainant is a large stockholder in and president of the Osceola Consolidated Mining Company. In his character as a stockholder of that company he has filed this bill to enjoin the Calumet & Hecla Company from voting shares of the capital stock of the Osceola Company owned by it, and also to enjoin it from voting certain proxies held in its interest, at the annual stockholders' meeting for the election of a board of directors [\*\*2] which was about to occur when the bill was filed.

The bill in the second case was filed by Mr. Bigelow in his character as a small holder of shares of the capital stock of the Calumet & Hecla Company, acquired since the starting of the first suit, for the purpose of questioning the legality of the purchase by that company of some 50,000 acres of additional copper-producing lands in Michigan, and also for the purpose of questioning the power of that company under its charter, as well as under the federal and state legislation against monopolies and illegal restraints of trade and commerce, and to enjoin that corporation from acquiring other mining lands or shares of stock in other mining companies and from exercising the power of voting upon any such shares already acquired.

[\*723] An injunction pendente lite was granted under the first bill. The grounds for this action are found in an opinion by [Judge Knappen, 155 Fed. 869](#). No injunction was applied for under the second bill. Upon a final hearing the bills in both cases were dismissed. Pending this appeal the injunction, which operated to preserve the status quo by preventing the election of directors pending this suit, was [\*\*3] continued.

The essential facts are these: Both companies are Michigan corporations engaged in mining and refining copper. The properties of the two companies are contiguous and situated in the copper district of the northern peninsula of Michigan. The Calumet & Hecla Company has bought outright 22,671 shares of the capital stock of the Osceola Company, and has obtained proxies, which are held in its interest, in part with options of purchase, in an amount sufficient with its holdings to make a majority of the 100,000 shares which constitute the total capital stock of the Osceola Company. There is no doubt but that the purpose of the acquisition was to enable the Calumet Company to elect a majority of the directors of the Osceola Company from the board of the Calumet Company. This was avowed in circular letters soliciting proxies from the shareholders of the former company. That such company was to continue its operations as an independent company is equally clear. No other course was possible, though one should eliminate the other so far as active competition might result from the control of a majority of the shares and the exercise of the power of selecting directors incident [\*\*4] to such stock control.

We need not consider the power at common law of such corporations to own and vote shares in similar corporations, for the reason that in Michigan the Legislature has not deemed such restrictions wise or desirable, for there have been a series of enactments relaxing the common-law rule. Comp. St. Mich. § 7012, Pub. Acts Mich. 1903, pp. 382, 383, No. 233, culminating in [HN1](#) the act of 1905, No. 105, Pub. Acts Mich. 1905, pp. 153, 154, which provides that corporations organized under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, metals, or minerals may "subscribe for, purchase, own or dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." That the latter act does not so seriously interfere with the contract between the company and its shareholders as to require the shareholders' acceptance as an amendment of the charter powers, we think clear. The amendment, while allowing a wide expansion of the business operations of such companies, is not so fundamental as to be [\*\*5] beyond the power of the Legislature under the constitutional reservation of the power to alter or amend the general constating act under which corporations may be organized in Michigan. [Attorney General v. Looker, 111 Mich. 498, 69 N.W. 929](#); [Looker v. Maynard, 179 U.S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; Louisville Trust Company v. Railroad Co., 75 Fed. 445, 448](#), 22 C.C.A. 378. Use of the [\*724] power conferred by the amendment is evidence of acceptance, if acceptance be necessary. [Miller v. Insurance Co., 92 Tenn. 167, 21 S.W. 39, 20 L.R.A. 765](#); [Cahill v. Kalamazoo Mutual Ins. Co., 2 Doug. \(Mich.\) 124, 43 Am. Dec. 457](#). The right to vote stock so lawfully acquired is, of course, an incident to ownership. Comp. Laws Mich. § 7002. [Rogers v. Railroad Co., 91 Fed. 299, 312](#), 33 C.C.A. 517; [Taylor v. Southern Pacific R.R. Co. \(C.C.\) 122 Fed. 147, 151](#). There is nothing, therefore, in the laws of Michigan which forbids the holding or voting of these shares owned, or those for which proxies are held in the interest of the Calumet Company, unless such ownership or voting shall result in an illegal monopoly or combination in restraint of

trade, either under the federal anti-trust act [\*\*6] or the Michigan anti-monopoly act of 1899, p. 409, No. 255, and the Public Acts of Michigan of 1905, p. 507, No. 329. In view of the very broad powers expressly conferred by the state of Michigan to such corporations to buy and hold shares in similar companies, it is very clear that, if the incidental voting powers and the ownership of the shares in question is not an illegal monopoly in restraint of trade, the question of the effect upon interstate commerce aside, it was not forbidden by the laws of Michigan. We shall therefore deal with the case in its aspect under the federal act forbidding restraints and monopolies.

Laying on one side, therefore, many interesting questions which have been discussed by counsel as going to the possibility of relief under these bills, we come to the application of the act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200). The relevant sections are the first and second. They are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make [\*\*7] any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

We shall assume at the outset that the authoritative decisions of the Supreme Court have so construed this anti-trust act as to give it a broader application than the prohibition of contracts and agreements in restraint of trade at the common law. It is not essential that the restraint shall be unreasonable within the well-understood definition of an unlawful restraint before the statute. HN2[<sup>↑</sup>] Under this act the validity of an alleged combination [\*\*8] or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results. We need only cite the latest utterance of that court upon the subject. Loewe v. Lawlor, 208 U.S. 274, 297, [\*725] 28 Sup. Ct. 201, 52 L. Ed. 488; Northern Securities Co. v. United States, 193 U.S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. But HN3[<sup>↑</sup>] the power of Congress to legislate upon the subject, aside from the territories and the District of Columbia, is derived from its power to regulate commerce among the states and with foreign nations. It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily, affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce, the latter being as exclusively within the regulating power of the state as is the former within the power of Congress. [\*\*9] In Hopkins v. United States, 171 U.S. 578, 594, 600, 19 Sup. Ct. 40, 45, 46, 43 L. Ed. 290, Mr. Justice Peckham emphasizes this obvious limitation when, speaking for the court, he said:

HN4[<sup>↑</sup>] "There must be some direct and immediate effect upon interstate commerce in order to come within the act."

The same discriminating justice then adds:

HN5[<sup>↑</sup>] "An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation would not be direct. \* \* \* The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it."

This limitation of the act to those contracts and combinations which directly and immediately or necessarily affect commerce among the states is recognized in a long series of opinions. Among them are: United States v. E.C.

Knight Co., 156 U.S. [1, 15 Sup. Ct.](#) 249, [39 L. Ed. 325](#); *Addystone Pipe Co. v. United States*, 175 U.S. 211, 242, [20 Sup. Ct.](#) 96, [44 L. Ed. 136](#); Montague [\[\\*\\*10\]](#) & Co. v. Lowry, 193 U.S. [38, 24 Sup. Ct.](#) 307, [48 L. Ed. 608](#); *Northern Securities Co. v. United States*, 193 U.S. 197, 331, [24 Sup. Ct.](#) 436, [48 L. Ed. 679](#); *Loewe v. Lawlor*, 208 U.S. 274, 297, [28 Sup. Ct.](#) 301, [52 L. Ed. 488](#). The Knight Case, in its last analysis, is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that [HN6](#)<sup>↑</sup> a mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the states as to bring the agreement within the act. Subsequent cases have been distinguished from it, but it has never [\[\\*726\]](#) been overruled. In *Addystone Pipe Co. v. United States*, 175 [\[\\*\\*11\]](#) U.S. 211, 240, [20 Sup. Ct.](#) 96, [107, 44 L. Ed. 136](#), it was said:

"The direct purpose of the combination in the Knight Case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which have been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the [commerce clause of the Constitution](#), were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportsations to other states of specific articles were proper subjects [\[\\*\\*12\]](#) for regulation because they did form part of such commerce."

Referring to the facts in the Addystone Case as taking it out of the Knight Case, the court said:

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants, by reason of this combination [\[\\*\\*13\]](#) and agreement, could only send their goods out of the state in which they were manufactured, for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

In *Loewe v. Lawlor*, 208 U.S. 297, [28 Sup. Ct.](#) 305, [52 L. Ed. 488](#), it was said of the combination involved in the Knight Case that "the purpose of the agreement was not to obstruct or restrain commerce. The object and intention determined its legality." *Swift & Co. v. United States*, 196 U.S. 375, [25 Sup. Ct.](#) 276, [49 L. Ed. 518](#), was a case of a combination between fresh meat dealers, dominating a large proportion of the trade in the United States, for the purpose of regulating prices, shipments, and freight rates to the exclusion of competition. The combination was, of course, invalid within the law. The court, in its opinion by Justice Holmes, in dealing with the effect of the combination as a restraint upon commerce among the states, said that restraint of that commerce was --

"a direct object; it is that for which the said several specific acts and courses of conduct [\[\\*\\*14\]](#) are done and adopted. Therefore the case is not like *United States v. Knight Co.*, where the subject-matter of the combination was manufactories within a state. However likely monopoly of commerce among the states in the article

manufactured was to follow from the agreement, it was not a [\*727] necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales."

The specific thing complained of in the case for decision is that one Michigan mining corporation has obtained by purchase or proxy a majority of the capital shares of another Michigan mining corporation, and purposes to exercise its voting power to place in the directory of the latter a majority of its own selection from its own board of officers. The specific relief sought is an injunction against the exercise of the voting power, and a decree compelling a disposition of the shares so held under purchase or proxy. What has the Calumet & Hecla Mining Company done or what does it threaten to do which is a violation of the anti-trust act of Congress? It has the legal right to purchase and vote [\*\*15] shares of stock in the Osceola Company under the laws of Michigan. This we have already considered. Of course, if such stock ownership and such stock control is enough to constitute a direct and immediate or necessary restraint upon trade and commerce between the states, the sanction of the state act goes for nothing. This much is settled by the Northern Securities Case, for a state cannot give to a corporation the lawful right to do anything which is a direct restraint of commerce between the states. How, then, does the exercise of the power of stock control by one mining or manufacturing corporation over another in the same state directly and immediately or necessarily operate as a restraint of commerce among the states? Confessedly the products of these two companies are in competition in the markets, and confessedly the greater part of the product of each will, sooner or later, enter into the stream of interstate commerce, for the chief demand for the product is outside the state of production. But that is not enough. There was all this and more in the Knight Case. If, indeed, such stock control results in a monopoly, it is only a monopoly in manufacture in the same state, [\*\*16] and we have again the conceded situation in the Knight Case. HNT<sup>↑</sup> Unless that monopoly of manufacture in a single state of a product which goes into interstate commerce directly and immediately or necessarily interferes with or restrains that commerce, the monopoly does not come under the act of Congress. But we are unable to conclude upon this record that mere stock control of such a company by another in the same state either directly or necessarily destroys competition there, or, if it did, that it results in any such monopoly as to directly or necessarily and immediately affect commerce among the states.

The Calumet & Hecla Mining Company does not own a majority, nor anything like a majority, of the stock of the Osceola Consolidated Mining Company. If it has the power to cast a majority of votes at a stockholders' meeting, it is because there are enough of the stockholders of the latter company willing to co-operate with it in the selection of a board. But it does not follow, if we assume for the purposes of this case that the evil is the same whether its power of election is due to a combination of shares owned [\*728] with proxies or by the ownership of a majority of all [\*\*17] the stock, that the ownership constitutes a legal control, or that competition is thereby ended. A board elected by the owner of such a majority would not in any legal sense be the control of such majority owner, nor from such ownership could the legal inference be drawn that the Calumet & Hecla Company dominated the management of the Osceola Company. The two companies would still remain separate corporations, each managed presumably in its own interest. Pullman Co. v. Missouri Pacific Co., 115 U.S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499; Porter v. Pittsburg Bessemer Steel Co., 120 U.S. 649, 670, 7 Sup. Ct. 1206, 30 L. Ed. 830; Richmond Construction Co. v. Richmond, 68 Fed. 105, 15 C.C.A. 289, 34 L. Ed. 625. But HN8<sup>↑</sup> if the presumption be, in respect to a question of restraint or monopoly under the act of Congress, that the power to determine the management of a competing corporation through ownership of a majority of shares constitutes a suppression of competition, we come to the inquiry as to whether such presumption is one of fact or law. If one of fact, as it evidently is, it is rebuttable. We quite agree that purpose or motive is of no moment, provided the contract or agreement [\*\*18] directly provided for the suppression of competition, or when such a result, as a matter, of law, must necessarily occur. United States v. Freight Ass'n, 166 U.S. 291, 17, Sup. Ct. 540, 41 L. Ed. 1007; Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 623, 53 C.C. 256. But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created. In Swift Co. v. United States, 196 U.S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said by Mr. Justice Holmes that:

**HNg** [↑] "The statute gives this proceeding against combinations in restraint of commerce among the states, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent -- for instance, the monopoly -- but require [\*\*19] further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55. But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the complete result."

The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interest of an economical management of both companies. In that case, it has done nothing directly affecting commerce among the states.

On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the [\*729] freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts.

The Calumet & Hecla Mining Company vigorously [\*\*20] deny any purpose to either bring about a monopoly, restrain competition, or diminish production, and assert that their only object was to extend their industrial life by the acquirement of an interest in the oreproducing lands of the Osceola Company and the more economical management of their own property by a friendly and mutually advantageous use of the facilities of the two companies. The two properties are in large part contiguous. In a very convincing opinion, the judge who heard the case below states the leading facts which made it desirable and economical that there should be, to a certain extent, a co-operation in future mining operations by the two companies, in order that certain poorer lodes underlying the conglomerate lode of the Calumet Company, which has been worked to a point where exhaustion is in sight, may be worked to the best advantage of both companies. We shall not go into the details. We refer and adopt the conclusion stated by Judge Knappen, who thus sums up the evidence relating to the motive or purpose actuating the Calumet & Hecla Mining Company:

"I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose [\*\*21] of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous."

But it is said that the stock control of the Osceola Company will result in a monopoly. If this be so, and it be only a monopoly in mining and refining copper brought about by the combination of two companies of the same state conducting their operations side by side, it is not enough, under the Knight Case, to bring the agreement within the act, even though the fact be that the product will in large part [\*\*22] pass ultimately into interstate commerce. In the Knight Case, the American Sugar Refining Company, if permitted to combine with the four independent refining companies at Philadelphia, would control 98 per cent. of all the sugar refining in the United States. Such a combination undoubtedly brought about a monopoly under the common law. But as it was only a monopoly in manufacture, it was held not to be a restraint of trade among the states, although the great bulk of the product was ultimately destined for commerce among the states, the effect upon such commerce being indirect. There is, in fact, no parallel between the facts of that case and this in respect to the probable results of the two combinations. In this case it is shown that the world's production of copper in [\*730] 1896 was approximately 1,600 million pounds, of which amount about 900 million pounds was produced in the United States. The production of the copper called "Lake Copper" -- that is, copper produced in the Lake Superior region -- was about 224 million pounds, or one-fourth of the entire product of the United States and one-eighth of the world's product. The Calumet & Hecla Company produced, of this [\*\*23] amount, about 95 million pounds, and the Osceola Company about 18

1/2 million pounds. So far from the "control" of the smaller company by the larger resulting in a monopoly, it is evident that the combined output would be less than one-half of the product of lake copper alone, or about one-ninth of the product of the United States and about one-fifteenth of the product of the world.

But the complainant has very seriously insisted that, in the determination of the question as to whether the stock control of the Osceola Company will result in a monopoly and an unlawful suppression of competition, every class or grade of copper should be eliminated except that particular class or grade made by the Calumet & Hecla Company and the Osceola Company and a few smaller producers, upon the contention that the product of these companies is a distinct commercial commodity, known in the market as "Best" or "Prime Lake Copper," as distinguished from Western or electrolytic copper. The great bulk of the copper of the world is treated electrically. The purpose is to free it from impurities, for the purer it is the greater its conductivity. Arsenic is an ordinary impurity, and the presence of **[\*\*24]** this in small quantities adds, or is supposed to add, to the tensile strength of the copper, for which reason copper having this slight admixture of arsenic is preferred by some makers of copper wire. Hence some manufacturers of wire specify in their purchases of copper "Best" or "Prime Lake Copper," meaning copper not so electrically treated as to entirely eliminate this arsenical impurity. But it is demonstrated that electrolytic copper is capable of being used for every purpose for which "Best Lake Copper" can be used, and that they actively compete with each other in the markets of the world, though, as a rule, the quotations for "Best Lake" are slightly higher than Western or electrolytic copper. There is no material intrinsic difference between the two kinds. The court below, upon a full review of the evidence, expert and nonexpert, reached the conclusion that neither "Lake Copper" nor "Best Lake Copper" is so far a distinct commodity as to justify an elimination of the electrolytic copper as a factor in a case like this. In this we entirely concur.

When all is said which the facts justify, the acquisition of the voting power of a majority of the capital shares of the Osceola **[\*\*25]** Consolidated Mining Company and its proposed exercise by the selection of a board, a majority of which to be composed of the members of the board of the Calumet & Hecla Company, is the main fact upon which the complainant must invoke the prohibition of the act of Congress. That fact is not enough. That the two companies are in a sense competitors, and that the product of their mines will ultimately go into interstate commerce, is far from making out a **[\*731]** case of direct or necessary and immediate interference with that kind of commerce. They do not show that even a monopoly of the product will ever probably ensue, to say nothing of the utter absence of any material evidence indicating that such a monopoly in the product of two contiguous mining companies would directly or necessarily affect commerce among the states. No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case differs from all of the cases appealed to by the learned counsel for appellants in this important particular. In the Addystone Pipe Case, the agreement specifically provided a scheme for the suppression of **[\*\*26]** competition between the parties in the matter of sales of iron pipe in a large number of states through a division of territory and sham bids, the parties agreeing to divide among each other a share in the profits made by the mill to which, by their concerted effort, the particular sale was directed. In Montague v. Lowry, 193 U.S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, was involved an express agreement between manufacturers of tiles and dealers within a given territory by which the plaintiffs were unable, not being members of the combination, to procure titles without paying a great advance over those who were members of the combination. In the case of Swift & Company v. United States, 196 U.S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the agreement involved a combination between packers and dealers in fresh meat throughout the United States for the express purpose of regulating prices, freights, and shipments and sales of live stock. Loewe v. Lawlor, 208 U.S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, involved a widespread combination among the union labor organizations to prevent the sale of hats anywhere within the United States made by a hat maker at Derby, Conn., until he should unionize his **[\*\*27]** shops. In Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 53 C.C.A. 256, there was an express agreement among 14 coal-mining companies engaged in interstate commerce for the purpose of fixing prices and regulating production and shipments. The cases of Continental Wall Paper Co. v. Voight, 148 Fed. 939, 78 C.C.A. 567, and John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C.C.A. 158, 12 L.R.A. (N.S.) 135, both being decided by this court, were cases which involved systems of contract between producers, wholesale and retail, carrying on business in every state of the Union, for the express purpose of maintaining prices and stifling competition, and were obviously cases which directly affected freedom of commerce among the states.

**HN10**[] In the absence of any such express terms of the agreement providing for acts directly affecting interstate commerce, complainants must by facts and circumstances show that the direct and necessary result of what has been done and threatened is to restrain interstate commerce. The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the **[[\*\*28]]** illegality of the contract assailed.

**[\*732]** In *Cincinnati, P.B.S. & P. Packet Co. v. Bay*, 200 U.S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the **antitrust law**, that **HN11**[] "a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

No unlawful object has been shown, and no such facts established, as to convince us that the necessary consequence of the combination complained of will result in any direct, immediate, or necessary restraint of interstate commerce.

Finally, the facts of the case do not bring the conduct of the Calumet & Hecla Mining Company under the condemnation of the Michigan statute against monopolies. The purchase of shares and the acquirement of the additional 50,000 acres of copper-producing lands has the sanction of the express law of Michigan, and, while the power to acquire shares or additional lands may be subject to the condition that such acquisition shall not result in monopoly or the unlawful suppression of competition, there are **[[\*\*29]]** no such results to be feared from the acts and conduct attributable to the Calumet & Hecla Mining Company as to bring it within the Michigan act.

The decree dismissing the bill and discharging the injunction must be affirmed.

**Concur by:** COCHRAN

## Concur

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COCHRAN, District Judge. I concur with Judge LURTON'S statement of fact and in the conclusion he has reached, but think best to state the particular ground upon which I have come to that conclusion. The principal ground upon which it is claimed that the decrees of the lower court should be reversed is that the transaction complained of was in violation of the national anti-trust act. It is urged also that it is in violation of the Michigan anti-trust act. The stress of the argument is upon the application of the national act, and I will proceed at once to address myself to the question as to whether it affects the legality of the transaction complained of.

Here, we must first inquire whether this question is an open one. Is or not a consideration thereof foreclosed by any decision of the Supreme Court? I think that it is, and that by the first decision made by that court under that act. I refer to the case of United States v. E.C. **[[\*\*30]]** Knight Company, 156 U.S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. It is practically conceded that this is so, if the authority of that case has not been overthrown or weakened by subsequent decisions. It is earnestly contended that it has been substantially overruled by later decisions of the Supreme Court. The decisions relied on are those in the cases of *Addystone Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Company v. United States*, 193 U.S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U.S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. It is claimed that the decision in the Addystone Pipe & Steel Company Case left not much, if any, force in it, and that in the Swift Case left nothing of it. But the decision **[\*733]** in the Northern Securities Company Case is claimed to be more in point than either of the others, as its facts fit more closely the facts of the Knight Case, and it is said that these suits were brought on the basis of the decision in that case. It is further claimed that the majority of the court in the case of *United States v. American [[\*\*31]] Tobacco Company (C.C.)* 164 Fed. 700, took the position that the Knight Case is no longer any proper foundation for the point decided in it. In answer to the possible suggestion that in no subsequent case has the Supreme Court expressed any doubt as to the correctness of the decision in that case, and that whenever it has referred thereto it has done so with seeming approval, it is said that the Supreme Court had in mind that the facts of the case were

different from what they really were, and that what it so approved was this supposititious case and not the real case. This is shown, it is claimed, by the consideration that the points actually decided in these later cases are in direct conflict with that really decided in the Knight Case.

I think that the majority of the court in the American Tobacco Company Case hardly went as far as claimed, but at least two of the three judges constituting that majority did question the correctness of the decision in that case, and did intimate that it was overthrown by the later decisions. Judge Lacombe said that it seemed to him that subsequent decisions of the Supreme Court had modified the opinion in that case, and Judge Coxe that it was [\*\*32] interesting to note that the Chief Justice, who wrote the opinion of the court therein, also wrote the unanimous opinion in Loewe v. Lawlor, that an examination of numerous decisions since that case leads to the conclusion that there has been constantly a tendency towards a broader and more liberal construction of the statute or wider scope therefor, and that the only distinction between that case and the Loewe-Lawlor Case is that in one the acts complained of related to the manufacture and sale of sugar and in the other to the manufacture and sale of hats. Both these judges seem to indicate a preference for the view taken by Justice Harlan in his dissenting opinion. I do not find that Judge Noyes, the other judge of the majority, questioned the authority of that decision to any extent. Judge Ward, who dissented, took the position that that decision had not been affected by any subsequent one and is still in full force. Counsel for appellant attacked that case in the lower court, the same as here, and possibly with some measure of success, as it seems to have been somewhat shy of basing the conclusion reached on the authority thereof.

The vital relation of the Knight Case to [\*\*33] this case, and the attack made upon it in the American Tobacco Company Case and here, calls for a somewhat extended consideration thereof. The propriety of so doing is helped out by the fact that this seems to be the first case that has arisen since then involving the exact question involved therein. I do not understand that the American Tobacco Company Case hinges upon that case, as this one does. Besides, a true conception of what was decided therein and the reasoning upon which it was based is essential to a correct determination of the effect thereon of the later cases which are claimed to have overthrown it.

[\*734] I may say at the outset that I think that that case not only fits this case, and has not been affected by the decision in any subsequent case, but that it was correctly decided; and, further, that it is not likely that it was incorrectly decided. The conclusion there reached represented not only the views of all the members of the Supreme Court except Justice Harlan, who dissented, and Justice Jackson, who did not sit therein because of illness, but of the Circuit Court of the Eastern District of Pennsylvania, where the case originated, and of the Circuit [\*\*34] Court of Appeals for the Third Circuit, where it was first carried on appeal. And though Mr. Justice Jackson did not sit in the case, the conclusion reached accorded with his views as expressed in the case of *In re Greene (C.C.) 52 Fed. 104*, a case of like character, and those courts, in deciding as they did, simply followed in the path which he had theretofore clearly marked out.

In considering this case, I would direct the attention singly to three separate and distinct matters. They are, first, the condition of things before the doing of the thing complained of therein; second, the thing done that was complained of; and, third, the thing sought to have done. The condition of things referred to was this: The American Sugar Refining Company, a New Jersey corporation, in New York, New Jersey, and several other places, was engaged in the business of refining sugar thereat and selling the sugar so refined. The business which it so did was 65 per cent. of the business of that kind done in the United States. The E.C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company, and the Delaware Sugar House, each of which was a Pennsylvania corporation and had [\*\*35] no connection with the others, owned like plants located at Philadelphia, and were engaged in the business of refining sugar at their respective refineries and selling the sugar so refined. The business done by all four was 33 per cent. of the whole. The business done by the five, therefore, constituted 98 per cent. thereof. The other 2 per cent. was done by a Massachusetts corporation, the Revere, whose plant was located at Boston. Each one of the five corporations was engaged in external commerce. They sold sugar for delivery in other states than where made and sold, and no doubt a great, if not the principal, part of the business done by them was so sold. The facts of the case will not allow this feature thereof to be minimized; and, as I view it, there is no occasion to minimize it.

Then, what was the thing done that was complained of? The American Company purchased the entire capital stock of the other four companies, and gave in exchange therefor shares of its own stock. It thus acquired control of 98 per cent. of the business of making and selling refined sugar in the United States. This control as to 65 per cent. was by virtue of its ownership of its own plant, and [\*\*36] as to 33 per cent. by virtue of its ownership of the entire capital stock of the other four companies, enabling it to choose the boards of directors thereof, who would have control of the operation of their plants respectively. And the acquisition of such stock was for the purpose of obtaining such control. This feature of the case, also, is not to be blinked.

[\*735] And finally, as to the thing sought to have done. It was simply an undoing of what had been done, and an injunction against attempting to do it again. It was held that the nation was not entitled to have this thing done. We are thus brought face to face with the reasoning upon which this conclusion was based. It was not that what had been done was not within the national act. The court went deeper than this. It was that the nation, through Congress, by the national act, had no right to attempt to prevent what had been done from being done, and hence had no right to complain of its being done. Of course, this being so, the presumption was that the nation, through Congress, had not by the national act attempted to prevent what had been done from being done, and hence that it was not within the act. But the [\*\*37] court concerned itself with the deeper question -- with what was fundamental, and not with what was accidental. And, if I may be permitted to suggest it, I think that the confusion that has arisen as to the correctness and effect of the decision in the Knight Case and the effect thereon of the later decisions is due to the fact that it has been overlooked that concern was there had, not with what the act meant, but with what the nation, through Congress, had power to enact.

How, then, was it made out that the nation had no right, through Congress, by that act, to prevent what had been done from being done, and hence had no right to complain of its being done. It was in this way. What had been done was not external commerce, nor did it relate to or affect directly such commerce, and hence did not come within the commercial provision of the national Constitution, which was the only provision thereof that could be claimed to authorize the nation, through Congress, to prevent what had been done from being done. So far as it was commerce at all or was related to or directly affected commerce, it was internal commerce, and the doing of it was solely within the state's jurisdiction. [\*\*38] Mr. Chief Justice Fuller emphasized the importance of respecting the boundary of each government's jurisdiction. It was "vital," he said, that "the delimitation between the two, however sometimes perplexing, should always be recognized and observed." And, further, he said that "acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

To complete the line of reasoning upon which the conclusion reached is based, it remains to indicate wherein what had been done was held not to be external commerce and not to relate thereto or affect it directly. It was essential both that it was not such commerce, and that it did not relate thereto or so affect it, in order that what had been done should have been beyond the national jurisdiction. The nation has jurisdiction of what relates to or affects directly external commerce as well as external commerce itself under the commercial provision. It is necessary to complete jurisdiction of such commerce. Jurisdiction of the thing itself would be of but little consequence [\*\*39] if jurisdiction did not also cover that which related thereto or affected [\*736] it directly. It is only of what is not external commerce and affects it only indirectly that it does not have jurisdiction. There was no room to claim that what had been done was itself external commerce. What had been done was simply the purchase by the one company of the entire capital stock of the other four, and the giving in exchange therefor shares of its own capital stock. If it be a fact that a sale of such stock for delivery in another state than that where the sale was made would have been external commerce, there was no such sale made. The most that can be claimed is that what had been done related to or affected directly such commerce. Did it do so?

Each corporation was a Pennsylvania corporation. The refineries and other property owned by each was internal. The operation of the refineries and manufacture of refined sugar thereat was internal. It was only when the corporations were engaged in selling the sugar so made that things took on an external hue, and then only in case sales for delivery outside of the state were made. Commerce has been likened to a stream, and sugar [\*\*40] produced at those refineries did not become a part of external commerce until placed in the stream of external

commerce, which would be when sold for delivery on the outside. Sales for delivery within the state were purely internal. Now, the purchase of the stock had no relation to and did not affect in any way the sugar that had been put into the stream of external commerce prior thereto. That was a matter of the past. Nor did it relate to or affect directly the sugar that might be placed therein thereafter. It depended entirely on whether thereafter the refineries were operated, and, if operated, on whether, if any of the sugar thereafter refined thereat were placed in said stream, such purchase would affect it at all. The mere fact that the intent and purpose was to place such sugar therein could not make such purchase relate to or affect directly external commerce. It may be said that it affected it, but only indirectly so. If it can be said that it affected it directly, then, whenever one, under any circumstances, intends and purposes to place property owned by him in the stream of external commerce, such commerce is affected directly, and he and that property pass within **[\*\*41]** the national jurisdiction. But this cannot be. As well said by Mr. Justice Lamar in the case of *Kidd v. Pearson*, 128 U.S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry."

In the Knight Case Mr. Chief Justice Fuller said:

"Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

The purchase of those stocks no more related to or affected directly external commerce than if the American Company, instead of purchasing **[\*737] **[\*\*42]**** them, had purchased from those corporations themselves their refineries and other property. Purchase of the capital stock was but an indirect way of acquiring the properties themselves. By the purchase, instead of acquiring the properties of the corporations, they acquired an interest in the corporations that owned them. If the properties of the corporations had been owned and operated, not by the corporations, but by trustees for the benefit of the stockholders, a purchase from the cestuis que trustent of their beneficial interests would have had no more relation to or affected no differently external commerce than a purchase from the trustees.

Such, then, is the line of reasoning by which the Supreme Court reached its conclusion in the Knight Case. I have put it in a different and somewhat amplified form in an effort to make it plain, but a reading of Mr. Chief Justice Fuller's opinion will show that I am justified in claiming that such is the reasoning on which that conclusion is based.

Before passing from the consideration of this case, it is to be noted that it was not involved therein whether if, after the purchase, those corporations had entered into an agreement amongst **[\*\*43]** themselves concerning the external commerce to be done by them, such an agreement would have related to and affected directly such commerce and been within the national jurisdiction. What was sought to have done was not the undoing of any such agreement, but the undoing of the purchase of the stock. Nor was it involved therein whether the nation, through its jurisdiction over commerce among the states and with foreign nations, could by appropriate legislation have excluded from such commercial stream any of the sugar that had been manufactured at the refineries of any of the five corporations. These two questions are entirely distinct from that which arose and was decided in that case. That question was whether the one corporation had the right, so far as the national act was concerned, to purchase the capital stock of the other four. It was held that it did, and it seems to me that there is no escape from that conclusion and the reasoning on which it is based.

We come, then, to the question whether this decision has been affected to any extent by the subsequent decisions of the Supreme Court. As heretofore stated, I do not think that it has; and I will now attempt to make **[\*\*44]** this position good. The extended consideration of the Knight Case renders unnecessary any like consideration of the cases, the decisions in which are claimed to have affected that in that case. A very general reference thereto will be sufficient to show that they have in no wise affected it. Take, for instance, the Addystone Pipe & Steel Company

and Swift Cases, which are somewhat alike in their essential characteristics. Each of these cases involved an agreement between several independent manufacturers or producers, the one of iron pipe and the other of meat, each of whom was engaged in interstate commerce, which agreement related to and directly affected that commerce so far as they were engaged in it in the way of restraining it, their independency being preserved except so far as affected by that agreement. It was held that the agreement [\*738] in each case was a combination within the national act, and its further execution was enjoined. In the Swift Case the agreement related to and affected some matters that may be said to have been purely internal as well as to the external commerce of the parties thereto, and the execution of the agreement in those particulars [\*\*45] was enjoined as well as in so far as it affected such commerce. The necessities of this case do not require a presentation of the line of reasoning by which Mr. Justice Holmes justifies this part of the decision. That portion thereof in no way concerns the Knight Case.

Then as to the case of Loewe v. Lawlor, sometimes referred to as the "Danbury Hat Case." That case involved the question whether a boycott on the part of the United Hatters and affiliated organizations of laborers against the external commerce of the manufacturers of those hats was a combination within the national act. It was held that it was and its continuation was enjoined.

Now, I fail to see how these three cases have any bearing whatever on the Knight Case. A decision that a combination that relates to and affects directly external commerce within the national act is certainly not antagonistic to one that decides that a transaction which does not relate thereto and affects it indirectly only is not within that act. Nor is a decision that an agreement between two or more corporations with reference to the external commerce done by them relates thereto and affects it directly antagonistic to one that decides [\*\*46] that a purchase by one competitor of the property by which he carries on such business does not relate to external commerce and affects it indirectly only. Of similar character to these three cases is that of Montague v. Lowry, 193 U.S. [38, 24 Sup. Ct. 307, 48 L. Ed. 608](#).

Finally, how is it as to the Northern Securities Company Case? It must be conceded that this case is more like the Knight Case than either of the others. The minority judges in that case, as represented by the dissenting opinion of Mr. Justice White, regarded that the Knight Case required a decision that the transaction there involved was not within the national act. Of course, if this position was correct, then the decision in that case does conflict with that in the Knight Case, and the latter case must be considered to have been overthrown by the former. The likeness between the two cases consists in the fact that in the later case, as in the earlier one, the validity of the purchase of the stock in a corporation was involved. But even here there was a difference. In the earlier case the purchasing corporation was engaged in the same business as that of the corporations whose stock it purchased, and those [\*\*47] corporations were competitors of it, whereas in the later case the purchasing corporation was not engaged in the same business as that of the competing corporations whose stock it purchased. It was engaged in no business except that of purchasing and holding that stock. But in this case, as in that, the effect of the purchase was to put the control of the competing corporations in one and the same hand. There was, therefore, nothing in this difference to cause a difference of decision. If one of the competing corporations in the Northern Securities Company Case had purchased the capital stock of the other, we would have thus far [\*739] exactly the same case as the Knight Case. And the purchase by the outside corporation of the capital stock of the two competing corporations was, in its legal significance, nowise different from a purchase by one of the two of the capital stock of the other.

But here the likeness between the two cases stops. In a striking particular they are different -- so different in this particular as to necessitate, in my judgment, a difference of decision. That particular was this: The property of each of the two competing corporations, to wit, the [\*\*48] Great Northern Railway Company and the Northern Pacific Railway Company, was interstate in its character, and the operation thereof was interstate. It follows that the purchase of the stock of the two corporations and combining them in one corporation was an interstate transaction. That transaction related to and affected directly interstate commerce. It did so as much as if the one corporation had purchased the property of the other. If that had been the nature of the transaction, it could not have been contended that it was not interstate in its character. How different this from what we have found to have been the case in the Knight Case. The properties of the four Pennsylvania corporations and their operation were not

interstate in their character. They were purely internal to the state of Pennsylvania, and likewise would have been their purchase by the New Jersey corporation. Nowise different was the purchase by it of the capital stock of these corporations. It follows that there was no room to claim in the Northern Securities Company Case that the transaction there involved was not within the national jurisdiction. The question raised was solely as to whether that transaction **[\*\*49]** was within the meaning of the national act. It is true that Mr. Justice White argued strenuously that it was not within that jurisdiction, but, with all due respect, I submit that he was in error here. The basis of his argument that the transaction attacked was not within the national jurisdiction was that the purchase by the Northern Securities Company of the capital stock of the two railway companies was not interstate commerce. That is undoubtedly true. But that circumstance was not sufficient to take the transaction out of such jurisdiction. If, though not itself interstate commerce, it related to and affected directly interstate commerce, then it was within that jurisdiction. That it did so is evident from the fact that it was a purchase of the stock of corporations whose property and the operation thereof was interstate. It was as much interstate as if one of the two competing corporations had purchased the capital stock or the property of the other.

I, therefore, conclude that, to no extent whatever, has the authority of the Knight Case been affected by any of the later decisions of the Supreme Court.

Before quitting this branch of the case, it may be proper to show **[\*\*50]** that the Knight Case fits this case, though, as heretofore stated, it is practically conceded that it does. The Calumet & Hecla Company has not acquired the entire capital stock of the Osceola Company. It has not acquired the ownership of a majority of that stock. It has acquired the ownership of a portion, and the right to vote another **[\*740]** portion, the two together being a majority thereof. The business here involved is that of mining instead of refining sugar. Otherwise there is no difference between that case and this. The property of the Osceola Company and its operation is internal to the state of Michigan, as that of the Pennsylvania corporations was to that state. The differences in detail referred to do not call for a difference of decision. The conclusion must be reached, then, that the transaction complained of herein is not within the national act. If the Calumet & Hecla Company had purchased the property of the Osceola, or if that property had been held by a trustee for the benefit of its stockholders and the Calumet & Hecla Company had purchased the beneficial interests of the cestuis que trustent, certainly the transaction would not in either case have **[\*\*51]** been within that act. No more can it be said that a purchase by it of the capital stock, or a majority thereof, or of a portion thereof and the right to vote another portion, the two together constituting a majority, is within it.

It seems to me that the existence of any difficulty in determining how this case ought to be decided, so far as this question is concerned, is due to the manner in which it is approached. If it is approached in an effort to reach a conclusion as to whether the transaction involved is within the meaning of the national act, it may be hard to dispose of it correctly. But if it is approached as the Knight Case was approached by the judges of the different courts who rendered opinions, holding that the transaction attacked therein was not within that act, which was in an effort to reach a conclusion as to whether it was within the national jurisdiction, and consequently whether it could properly have been put within that act, no room for doubt as to how it ought to be decided will be left.

As indicated at the start, it is also claimed that the transaction involved here is within the state act. The claim that it is so is based largely, if not altogether, **[\*\*52]** on the same line of reasoning upon which it is claimed to be within the national act. Indeed, on the one side, it seems to be claimed to be within the state act because it is within the national act, and, on the other hand, that is not within the state act because it is not within the national act. This, no doubt, is due to the fact that both sides of this case have approached it from the standpoint as to what is the true meaning of both acts, and not from the standpoint as to which jurisdiction -- national or state -- the transaction complained of is within. So approaching it, it was but natural to feel that the question whether that transaction was within the state act depended on whether it was within the national act. For the language of both acts is substantially similar, though that of the state act is somewhat more verbose. But approaching it from the proper standpoint, as I have claimed it to be, as soon as it is determined that the transaction in question is not within the national act, it is at once realized that it does not necessarily follow that because it is not within the one act it is not within the other. The transaction being within the state jurisdiction, and **[\*\*53]** not within the national, it may well be within the state act, though not within the national. The question, then, as to whether it is within the state act hangs

on whether [\*741] it is within the words thereof, construed in the light of the circumstance that the state had power to put it there.

So construing these words, how does the matter stand? The Calumet & Hecla Company and the Osceola Company were created and organized, and have ever since continued, to transact business under a general act of the state of Michigan providing for the incorporation of companies for mining, smelting, and manufacturing copper and other metals. By that act, any two or more corporations existing thereunder may consolidate. This court in the case of Marbury v. Kentucky Union Land Co., 62 Fed. 335, 10 C.C.A. 393, held that an act authorizing two corporations to consolidate, also authorizes one to purchase the capital stock of the other, on the principle that the greater includes the less. But this was not the only authority that the Calumet & Hecla Company had to purchase the stock of the Osceola. By an amendment to that general act, approved May 10, 1905 (Pub. Acts 1905, p. 153, No. 105), [\*\*54] a company organized thereunder was expressly authorized "to subscribe to, purchase, acquire and own" stock in any company organized thereunder. Neither the provision authorizing a consolidation or purchase of stock has ever been repealed or modified to any extent, unless it has been done by the anti-trust legislation. There are two anti-trust acts in Michigan, one approved June 23, 1899 (Pub. Acts 1899, p. 409, No. 255), and another, declared to be "supplementary to and declaratory of and in addition to" the earlier act, approved June 20, 1905 (Pub. Acts 1905, p. 507, No. 329). The original act was in existence at the time of the approval of said amendment of May 10, 1905, and the supplementary one was approved subsequent to its approval. The one is entitled "An act to prevent trusts, monopolies and combinations," etc., and the other "An act relative to agreements, contracts and combinations in restraint of trade or commerce." It is not necessary to quote from the body of either act. Each contains general language in the line of its title. There is no express reference to the legislation referred to as contained in said general act and the amendment thereto. It is not to be taken [\*\*55] that it impliedly has reference thereto. That legislation and those acts can be construed together, and I think that within well-recognized principles they ought to be so construed. So construing them, it is not to be held that what the one expressly authorizes is denied by the other.

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## **State ex rel. Hadley v. Std. Oil Co.**

Supreme Court of Missouri

March 9, 1909, Decided

No Number in Original

### **Reporter**

218 Mo. 1 \*; 116 S.W. 902 \*\*; 1909 Mo. LEXIS 316 \*\*\*

THE STATE ex inf. HADLEY, Attorney-General, v. STANDARD OIL COMPANY, of Indiana, WATERS-PIERCE OIL COMPANY and REPUBLIC OIL COMPANY, Corporations.

**Notice:** [EDITOR'S NOTE: PART 3 OF 4. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

**Disposition:** [\*\*\*1] Writ of ouster awarded.

## **Core Terms**

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oil company, oils, prices, manufacturer, products, restraint of trade, territory, combinations, petroleum, pool, stock, commodities, cases, competitors, charter, rebates, rights, independent company, refined, sales, conspiracy, customers, sections, franchises, confederation, dealer, common law, contracts, selling, quo warranto

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Constitutional Law > State Constitutional Operation

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

### **HN1[] Jurisdictional Sources, Constitutional Sources**

The [Constitution of Missouri, art. 6, § 3](#), gives the Supreme Court of Missouri power to issue the writ of quo warranto. It will issue against a corporation for the non-use or misuse of its corporate franchise, or for an infraction of its contract with the state by a violation of the anti-trust laws. And the jurisdiction of the court being conferred by the constitution, it is beyond the power of the legislature to take it away, and it will not be intended that a legislative enactment is designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

## **HN2** Corporations, Dissolution & Receivership

The charter of a private corporation will be forfeited, in proper proceedings by the state, for any willful or fraudulent misuse or abuse of its franchises which injures or menaces the interests or welfare of the state or the community in which it transacts business, whether the misuse or abuse consists in the exercise of a franchise or power not conferred upon the corporation by its charter, or in the violation of prohibitions in its charter, or in the violations of prohibitions in general laws to which it is subject, or in the violation of established principles based upon the ground of public policy.

Business & Corporate Law > Foreign Corporations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > State & Territorial Governments > Licenses

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

## **HN3** Business & Corporate Law, Foreign Corporations

Both articles 1 and 2 of Mo. Rev. Stat. Ch. 143 declare pools, trusts, agreements, combinations, confederations and conspiracies, formed and entered into by corporations for the accomplishment of the purposes therein specified, to be illegal. These statutes are a declaration of the policy of Missouri, the violation of which by a corporation is a violation of its pact, entered into with the state when it was chartered as a domestic company, or licensed to do business as a foreign company, which violations give the state the right to withdraw such charter rights or cancel such license privileges.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

## **HN4** Conspiracy, Elements

Conspiracies may be formed to do an unlawful act or to do a lawful act by unlawful means. The rule of pleading in such cases, even in criminal proceedings, is that: If the act which the conspirators combine to perform is unlawful, it is unnecessary to set out in the indictment the means to be employed in accomplishing it. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out such unlawful means.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Governments > Legislation > Types of Statutes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN5** US Department of Justice Actions, Criminal Actions

The anti-trust laws of Missouri are penal in their nature and should be strictly construed. When a proceeding partakes of the nature of a criminal prosecution and severe penalties are imposed, it is not sufficient to warrant a finding adverse to respondent oil companies that the court may entertain strong suspicions, or even strong probabilities, of their guilt. Yet, both the information and the facts should be given a reasonable and sensible construction, one which, on the one hand, will give effect to the material and well-stated charges in the information, and on the other such a construction and application of the facts as will elicit the truth and not mere suspicions and probabilities.

Governments > Legislation > Interpretation

#### **HN6** Legislation, Interpretation

All laws should receive a reasonable construction, and general terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will, therefore, be presumed that the legislature intends exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

#### **HN7** Corporations, Dissolution & Receivership

Where the State charges an abuse or a misuse of the corporate franchise, or acts of corporations contrary to the constitution and laws of Missouri, relator attorney general must prove the charges as laid in the information or enough of them to warrant the finding that the respondent oil companies are guilty. If the state has failed to do this, then nothing remains but to so pronounce.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN8** Public Enforcement, State Civil Actions

Stockholdings showing a community of interest, while in some cases innocuous, might in given cases be the very root from which the trust agreement grows.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Corporations > Corporate Finance > General Overview

#### **HN9** Public Enforcement, State Civil Actions

A corporation which owns a majority of the shares of the capital stock of another corporation controls it. The ownership of the stock of a corporation carries with it the control of the corporation. It is very true that the ownership of the stock does not carry with it the ownership by the stockholders of the property of the corporation. The property belongs to the corporation and is managed by the proper agents selected for that purpose.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

#### **HN10** [ ] **Public Enforcement, State Civil Actions**

Every corporation is a person, artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corporation, he is not himself the corporation. In such case, the man is one person, created by the Almighty, and the corporation is another person, created by the law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN11** [ ] **Public Enforcement, State Civil Actions**

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. If the validity of such an agreement were made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity. It is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

#### **HN12** [ ] **Public Enforcement, State Civil Actions**

The statute contemplates the existence of at least two or more corporations, individuals or partnerships, so as to agree or combine with each other to do the prohibited acts mentioned in the statute. In other words, it is intended to operate upon two or more corporations or individuals, who, so far as the public are concerned, indicate that they are pursuing an independent business, legitimate competitors, when, in fact, there is a secret agreement by which the very things condemned by the statute are accomplished. The public has rights which the law contemplates shall be respected. Neither corporations, individuals, nor partnerships are permitted to deceive or mislead the public by an apparent competition, when in fact none exists.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN13** [ ] **Public Enforcement, State Civil Actions**

In order to constitute a trust, there must be a combination of capital, skill, or acts by two or more. Combination means union or association. If there be no union or association by two or more of their capital, skill, or acts, there can be no combination and hence no trust.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [HN14](#) [blue document icon] Public Enforcement, State Civil Actions

If the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [HN15](#) [blue document icon] Public Enforcement, State Civil Actions

Any person who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any person or persons, to regulate or fix the price of any article of manufacture, merchandise, commodity, etc., or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, merchandise, commodity, etc., shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this article. Mo. Rev. Stat. Ch. 143, art. 1 and 2, § 8965.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

International Trade Law > Forfeitures & Penalties > General Overview

## [HN16](#) [blue document icon] Public Enforcement, State Civil Actions

All arrangements, contracts, agreements or combinations between two or more persons designated or made with a view to lessen, or which tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in Missouri, and all arrangements, combinations, contracts or agreements, whereby, or under the terms of which, it is proposed, stipulated, provided, agreed or understood that any person or persons doing business in this state, shall deal in, sell or offer for sale in this state any particular or specified article, product or commodity, and shall not during the continuance or existence of any such arrangement, combination, contract or agreement, deal in, sell or offer for sale any competing article, product or commodity, are hereby declared to be against public policy, unlawful and void; and any person or persons becoming a party to any such arrangement, contract, agreement or combination, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties provided for in this article. Mo. Rev. Stat. Ch. 143, art. 1 and 2, § 8966.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

## [HN17](#) [blue document icon] Public Enforcement, State Civil Actions

Any corporation created or organized by or under the laws of Missouri, which shall violate any of the provisions of this article, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in this state, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other state or country, which shall violate any of the provisions of the preceding sections of this article, shall thereby forfeit its right and privilege thereafter to do any business in this state. Mo. Rev. Stat. Ch. 143, art. 1 and 2, § 8971.

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

Governments > Courts > Clerks of Court

Insurance Law > ... > Company Representatives > Agents > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview

### **HN18** [ ] Forfeitures, Proceedings

Upon proper proof being made thereof in any court of competent jurisdiction in this state, its right and privilege to do business in this state shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this state has been, while acting as such agent, in the name, behalf or interest of such foreign corporation, violating any provision of the preceding sections of this article, shall be received as prima-facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, also to the Superintendent of the Insurance Department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation. Mo. Rev. Stat. Ch. 143, art. 1 and 2, § 8971.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Readjustments > General Overview

Business & Corporate Compliance > ... > Readjustments > Formation > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

### **HN19** [ ] Public Enforcement, State Civil Actions

Every pool, trust, agreement, combination, confederation, understanding, or conspiracy entered into, or created, or organized by any person or persons, to regulate, control or fix the price of any article or articles of manufacture, merchandise, commodity, etc., or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations, conspiracies or pools made, created, entered into or organized by any persons to fix the amount or limit the quantity of any article of manufacture, commodity, etc., are hereby declared illegal. If any two or more persons who are engaged in buying or selling any articles of commerce, merchandise, commodity, etc., shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade, by refusing to buy from or sell to any other person or persons any such article or thing aforesaid, for the reason that such person is not a member of or a party to such pool, trust, combination, confederation, association or understanding, shall be guilty of a violation of this article. Mo. Rev. Stat. Ch. 143, art. 1 and 2, § 8978.

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Constitutional Law > State Constitutional Operation

Civil Procedure > Remedies > Writs > General Overview

#### **HN20** [ ] **Common Law Writs, Quo Warranto**

The [Mo. Const. art. 6, § 3](#), in express terms, confers power upon the Supreme Court of Missouri to issue, hear, and determine writs of quo warranto.

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

#### **HN21** [ ] **Common Law Writs, Quo Warranto**

Whatever the origin of the writ of quo warranto, whether civil or criminal, it is certain now at the present time and for a long period anterior to this, it has been and is but a civil suit.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Constitutional Law > State Constitutional Operation

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

#### **HN22** [ ] **Appellate Jurisdiction, State Court Review**

The jurisdiction of the Supreme Court of Missouri in this regard being conferred by the constitution, it is beyond the power of the legislature to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

#### **HN23** [ ] **Corporations, Dissolution & Receivership**

The charter of a private corporation will be forfeited, in proper proceedings by the state, for any wilful or fraudulent misuse or abuse of its franchise which injures or menaces the interests or welfare of the state or of the community in which it transacts business, whether the misuse or abuse consists in the exercise of a franchise or power not conferred upon the corporation by its charter, or in the violations of prohibitions in its charter, or in violations of prohibitions in general laws to which it is subject, or in the violation of established principles based upon the ground of public policy. Where the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, it

thereby may be said to offend against the law of its creation, and consequently forfeits its right longer to exercise its franchises, and is subject to a judgment of ouster.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

#### **HN24** [ ] **Public Enforcement, State Civil Actions**

Corporations are recognized as creatures of the law and they certainly owe obedience thereto, and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or forbidden acts, the state unquestionably has the right, and it is its duty, to object, and it may interpose by information, and wrest from the offending corporations its franchises. If the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Civil Procedure > Remedies > Writs > General Overview

#### **HN25** [ ] **Corporations, Dissolution & Receivership**

A corporation may be proceeded against by quo warranto for a misuse or perversion of the franchises conferred upon it by the state, notwithstanding its officers and agents may at the same time be amenable to the criminal law for offense committed by them in the perversion of such franchises. If a corporation, through its servants and agents, may be guilty of such abuses of its franchises as will subject it to ouster by quo warranto, a court can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Civil Procedure > Remedies > Writs > General Overview

#### **HN26** [ ] **Corporations, Dissolution & Receivership**

A private corporation created by the legislature may lose its franchises by a misuse or nonuse of them; and they may be resumed by the government under a judicial judgment upon quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Business & Corporate Law > Corporations > Dissolution & Receivership > Involuntary Dissolution

Civil Procedure > Remedies > Writs > General Overview

### **HN27** [ ] Causes of Action & Remedies, Breach of Contract

The laws of the state authorize and direct the attorney-general to institute civil proceedings by information in the nature of quo warranto against any corporation to annul its charter and forfeit its franchises whenever it has by misuse, nonuse, or usurpation of power so conducts itself as to violate the laws of its being or the criminal laws of the state. If, upon trial, the corporation is found guilty, a decree of forfeiture must go, and the court has the power, in addition, to impose penalties for such violations of the laws as it may deem proper. This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea that there is an implied or tacit agreement on the part of every corporation, by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the state in the manner before suggested. In addition thereto the legislature has the unquestionable power and authority to declare the acts which will work a forfeiture of the charter shall also constitute a crime, and subject the corporation and its agents and servants to punishment under the criminal laws of the state.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

### **HN28** [ ] Legislation, Interpretation

All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. And, a statute must be construed with reference to the system of which it forms a part. And, statutes on cognate subjects may be referred to though not strictly in pari materia.

Governments > Legislation > Interpretation

### **HN29** [ ] Legislation, Interpretation

Where enactments separately made are read in pari materia, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject is governed by one spirit and policy, and is intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other even after some of them have expired or been repealed.

Governments > Legislation > Interpretation

### [HN30](#) [blue] Legislation, Interpretation

There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof. In construing any statute it is proper and often useful to consider the state of the law existing at its enactment as casting light on the intended scope of the change made by it.

Governments > Legislation > Interpretation

### [HN31](#) [blue] Legislation, Interpretation

A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the source from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute is adopted. Construction has ever been a potent agency in harmonizing the operation of statutes, with equity and justice.

Governments > Legislation > Interpretation

### [HN32](#) [blue] Legislation, Interpretation

Statutes are to be so construed as to make the law an uniform system, not a collection of divers and disjointed fragments. A statute must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble. The complete doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms.

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Governments > Courts > Common Law

Governments > Legislation > Interpretation

### [HN33](#) [blue] Corporations, Dissolution & Receivership

The mere fact that heavy losses may be sustained by respondent oil companies in consequence of an adjudication of ouster should not influence or deter the court from declaring the intention of the legislature as contained in Mo. Rev. Stat. Ch. 143, art. 1 and 2.

Governments > Courts > Common Law

Governments > Legislation > Types of Statutes

#### [\*\*HN34\*\*](#) [blue] Courts, Common Law

Remedial and salutary statutes, though in derogation of the common law, should be construed and enforced according to the plain intention of the legislature, although heavy damages were prescribed and penalties imposed for their violation.

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Governments > Legislation > Statutory Remedies & Rights

Military & Veterans Law > Military Justice > Jurisdiction > Assimilation

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Loyalty

Civil Procedure > Remedies > Writs > General Overview

Energy & Utilities Law > Utility Companies > Contracts for Service

#### [\*\*HN35\*\*](#) [blue] Common Law Writs, Quo Warranto

An information in the nature of quo warranto filed by relator attorney general is not of the character of a petition in an ordinary case either in law or equity; it is the official call of the law officer of the state on the corporation or individual to show by what authority it or he is assuming to exercise a particular franchise. The rules of pleading in such case are stated as follows: The office of an information in the nature of a quo warranto is not to tender an issue of fact, but simply to call upon respondent oil companies in general terms to show by what warrant or charter the privilege, franchise, or office is held or exercised. Where the state calls upon one to show cause by what authority he exercises a corporate franchise or public office, the allegation by the attorney general of intrusion or usurpation may be of the most general character, while the oil companies required to set forth particularly the grounds of his claim and the continued exercise of his right, except where by statute the pleadings are more nearly assimilated to those in other civil actions.

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > Remedies > Writs > General Overview

#### [\*\*HN36\*\*](#) [blue] Pleadings, Answers

When one is called upon by the state to show warrant or authority for the exercise of a franchise or office pertaining to the state, respondent oil companies must, by his plea, answer or return, disclaim all right to the franchise and deny its usurpation, or allege facts which, if true, will invest him with the legal title of pleading the charter or legislative grant of the franchise sought to be forfeited or seized, or by pleading directly and positively all the facts necessary to establish the title to the office which the oil companies called upon to justify; and in the absence of such an answer the state will be entitled to a judgment of ouster. There is no such plea as a general denial in a case of this kind.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

218 Mo. 1, \*16 S.W. 902, \*\*902 Mo. LEXIS 316, \*\*\*1

Civil Procedure > Remedies > Writs > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

### **HN37** **Public Enforcement, State Civil Actions**

If the act with which the conspirators combine to perform is unlawful, it is unnecessary to set out in the indictment the means employed in accomplishing it. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out such unlawful means.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Constitutional Law > Equal Protection > Nature & Scope of Protection

Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Business & Corporate Law > Corporations > Articles of Incorporation & Bylaws > General Overview

### **HN38** **Franchise Relationships, Franchise Agreements**

A corporation is a legal fiction -- a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the state, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises. An individual is a natural person, created by his Maker, and not by law, and, therefore, has no franchises to exercise or to forfeit, consequently the same punishment, if one so terms it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

Constitutional Law > Equal Protection > Nature & Scope of Protection

### **HN39** **Equal Protection, Nature & Scope of Protection**

It is not the object or purpose of that the equal protection provision of the constitution to prevent legislation which embraces within its provisions all persons or things which naturally and reasonably belong to the same class and similarly situated and where the statute must operate equally and uniformly upon all such persons or things of that class. The purpose of that provision is to prevent legislation which embraces within its provisions persons or things which affect only a portion of the persons or things which rationally belong to the same class and who are similarly situated.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

### **HN40** **Methods of Discovery, Inspection & Production Requests**

A corporation, being a creature of the state, has no constitutional right to refuse to produce its books and papers in court for examination in the trial of a proceeding by the state against it; nor can the officer in charge of the

corporation charged with a violation of the statutes plead the criminality of the corporation as a refusal to produce the books.

[Business & Corporate Law > Corporations > Corporate Formation > General Overview](#)

[Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview](#)

[Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview](#)

[Business & Corporate Law > Corporations > Dissolution & Receivership > Involuntary Dissolution](#)

#### **HN41** [+] **Corporations, Corporate Formation**

The legislature has no power or authority to prevent respondent oil companies from carrying on interstate trade, for the reason that power is vested in and rests with Congress; but it does possess the power to authorize the courts to forfeit the charters of all corporations organized and existing under the laws of Missouri for the usurpation of powers not granted to them, or for misuse or nonuse of those granted; and it is wholly immaterial whether those corporations are engaged in interstate commerce or not.

[Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers](#)

[Business & Corporate Law > Foreign Corporations > Qualifications](#)

[Governments > State & Territorial Governments > Licenses](#)

[Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview](#)

[Business & Corporate Law > Foreign Corporations > General Overview](#)

[Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview](#)

#### **HN42** [+] **Interstate Commerce, State Powers**

The legislature possesses the undoubted authority to revoke or forfeit the license issued to any foreign corporation authorizing it to do an interstate business in Missouri. The revocation of such a license in no manner interferes with interstate commerce. The authority to conduct such business is obtained under the acts of Congress and not by virtue of the laws of the state. A license from the state can neither confer nor take away the authority or right of a foreign corporation to carry on interstate commerce; and, that being true, a court is unable to see in what possible manner the forfeiture of such a license, that is, a license which only authorizes a foreign corporation to do an interstate business, can possibly offend against the [U.S. Const. art. I, § 8](#), which only applies to interstate commerce.

[Business & Corporate Law > Foreign Corporations > General Overview](#)

[Governments > State & Territorial Governments > Licenses](#)

[Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview](#)

[Business & Corporate Law > Corporations > Articles of Incorporation & Bylaws > General Overview](#)

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

#### [\*\*HN43\*\*](#) [L] Business & Corporate Law, Foreign Corporations

The *U.S. Const. art. I, § 10*, has no application to a license issued by the state to a foreign corporation to do business therein, for the reason that when it accepts the license, it impliedly, at least, agrees to transact such business under and in obedience to the laws of the state in the same manner as a domestic corporation should transact similar business, and that if it violates the laws of the state, then it would thereby forfeit its rights to such license, in the same manner that the domestic corporations would forfeit their charter rights by offending against the laws.

Governments > Police Powers

#### [\*\*HN44\*\*](#) [L] Governments, Police Powers

The police power of the state is an inherent power of sovereignty and cannot be contracted away.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Privileges & Immunities

Constitutional Law > Relations Among Governments > General Overview

Constitutional Law > Relations Among Governments > Privileges & Immunities

#### [\*\*HN45\*\*](#) [L] Public Enforcement, State Civil Actions

Two or more parties may enter into any lawful contract regarding any matter, and if that otherwise legal contract only incidentally limits trade or fixes prices, then that legal contract will not be held void on the ground that it incidentally operates in restraint of trade. But if the primary purpose of the contract is to limit and restrain trade, then the contract would be void at common law, and would not be protected by the privileges and immunities clause of the U.S. Const. amend. XIV, § 1, however slight that interference or restraint might be.

Constitutional Law > Privileges & Immunities

Governments > Police Powers

#### [\*\*HN46\*\*](#) [L] Constitutional Law, Privileges & Immunities

While the Fourteenth Amendment prevents illegal infringements upon the liberty of the citizen to contract, and deprive him of his property and impose restraints and burdens upon him without due process of law, yet that amendment has never been held to prevent the legislature from the exercise of the general police power of the state. This power extends to many subjects, which need not here be enumerated, which affect the general welfare and public interest within the purview of that power. In the absence of such power, the citizen would have the absolute authority to contract and the power to hold property as he might deem proper; but under that power the state may enact valid laws requiring each citizen to so conduct himself and so use his property as not to unnecessarily injure others. They are nothing more or less than the powers of government inherent in every sovereignty; that is to say, the power to govern men and things. Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such

regulations become necessary for the public good. The state can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity.

Contracts Law > ... > Perfections & Priorities > Perfection > General Overview

Governments > Local Governments > Police Power

Contracts Law > ... > Secured Transactions > Perfections & Priorities > General Overview

Governments > Police Powers

#### **HN47[] Perfections & Priorities, Perfection**

All property is held subject to the power of the state to regulate or control its use, to secure the general safety and the public welfare. Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare. By this general police power of the state, persons and property are subject to all kinds of restrictions and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which, no question ever was, or upon acknowledged general principles can be, made. The police power, so called, inheres in every sovereignty and is essential to the maintenance of public order and the preservation of mutual rights from disturbing conflicts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Police Powers

#### **HN48[] Public Enforcement, State Civil Actions**

The state in the exercise of power in the selection of remedies looking to the suppression of evils harmful to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation under a capricious exercise of the police power, but a useful regulation in the interest of the public welfare. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce which, when carried out, affect the interests of the public. This is certainly a just acknowledgment of the power, for there are few acts which individuals may engage in that are more harmful in their effects upon the interests of the people generally than trusts and combinations concerning the commodities useful to mankind. The rights of the individual must yield to the public wants, and his conduct and all property held by him is subject to the control of the state, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. While power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### **HN49[] Public Enforcement, State Civil Actions**

Legal regulations and restraints imposed upon the use of property and the authority to contract in reference thereto do not deprive the owner of his property or contract-rights without due process of law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Police Powers

#### **HN50** [ ] **Public Enforcement, State Civil Actions**

There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government to legislate is complete, so that, while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar rights of others. This principle underlies and runs through all governments and societies, and it is the corner stone of the police power of the state.

Governments > Legislation > Interpretation

#### **HN51** [ ] **Legislation, Interpretation**

Any strained or extreme construction placed upon a statute might lead to a holding that it was unconstitutional, but no statute should receive such a construction. Extreme cases can be readily suggested, but ordinarily such cases are not safe guides in the administration of the law. All laws should receive a sensible construction, and general terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will, therefore, be presumed that the legislature intends exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter.

Business & Corporate Law > Foreign Corporations > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Dissolution & Receivership > Termination & Winding Up > General Overview

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > Principal Office

#### **HN52** [ ] **Business & Corporate Law, Foreign Corporations**

Mo. Rev. Stat. § 1018 is as follows: The president or secretary of every domestic incorporated company in Missouri, when it shall dissolve, and the principal officer of every foreign corporation when it shall retire from business in this state, is hereby required to file with the Secretary of State an affidavit to that effect, and any failure to comply with the provisions of this section shall subject such company or the officers thereof to a penalty of from \$ 50 to \$ 500, to be collected as is provided for the collection of penalties and remuneration of prosecuting officers in Mo. Rev. Stat. § 1017 of this article.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Antitrust Issues > General Overview

#### **HN53** [ ] **Public Enforcement, State Civil Actions**

It may be admitted that under some circumstances corporations with no community of interest as holders of stock in each other, or even where the stock is not in the hands of a holding company as trustee, might be guilty of a violation of the anti-trust law. It might further be admitted that a trust or combination might be proved by the overt acts of the agents of respondent oil companies sufficiently distinctive and significant and of such long continuance as would tread back and tend to establish the obnoxious pact or trust agreement. Yet, experience has shown that stock holdings showing a community of interest, while in some cases innocuous, might in given cases be the very root from which the trust agreement grows.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN54** [+] **Public Enforcement, State Civil Actions**

In an investigation intended to lead up to the establishment of a fraudulent conspiracy between individuals, taking for illustration a fraudulent disposition of property, it could not be denied that kinship or close business intimacy would be relevant matter, for what it was worth, be that worth much or little, and we can perceive no good reason why this investigation may not commence at the very groundwork of these corporations, showing, if fact it be, a close relationship in stock holdings and in the personnel of officers and agents, the use of the same instrumentalities and methods, simultaneous in time and originating in the same radiating center -- a sort of prenatal, natal or else postnatal disposition to combine, as it were -- to be followed, of course, by sufficient proof indicating that the community of stock interest, if any, had been used as a foundation upon which to build the illegal structure denounced by the antitrust statute.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN55** [+] **Antitrust & Trade Law, Sherman Act**

The test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effects are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of inter-state commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It is not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of the business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Civil Procedure > Settlements > Settlement Agreements > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN56** [+] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

A stipulation by a vendee of any trade, business or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of

the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

#### **HN57** [ ] **Monopolies & Monopolization, Attempts to Monopolize**

An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases -- dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the Sherman Act, is, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, have a reasonable construction.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

#### **HN58** [ ] **Antitrust & Trade Law, Sherman Act**

The true construction of the first section of the Sherman Act is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of the commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the States.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

#### **HN59** [ ] **Monopolies & Monopolization, Attempts to Monopolize**

It is not -- it could not be -- the purpose or the effect of the second section of the Sherman Act to prohibit or punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce

to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, is not intended to be made, and is not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

### [HN60](#) [ ] Antitrust & Trade Law, Sherman Act

The phrase used in the Sherman Act, viz.: restraint of trade, is no new one. It has heretofore been used by courts applying the doctrines of common law in determining the validity of contracts. It is to be presumed that the lawmakers, when they choose this phrase, intend that it should have, when used in the statute, no other or different meaning from that which has always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used for the act is described as one to protect trade and commerce against unlawful restraints and monopolies; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. The restraint of trade which is obnoxious to the provisions of the first section must be of such kind as are, before the passage of the act, recognized as unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

### [HN61](#) [ ] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is devoted to a use in which the public has an interest; and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. It is a business device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, My goods are for sale, only to those who will buy from me exclusively, not to others.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

### [HN62](#) [ ] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Each manufacturer has the right to refuse to sell to anyone if he sees fit. If he chooses to make his goods, and sell them, he has the right to fix any price he chooses upon them. Not only so, but he has the right to select his own customers. He may agree to dispose of all his goods to one person, or he may be willing to supply the whole trade except one person; and whatever he chooses to do is a matter with which the law has no concern, because the goods are his, to be kept or sold, as he pleases. So he may not only fix his own price, but he may impose such terms as he sees fit, or can exact from his customers. These matters are absolutely within his own control. If each manufacturer is at liberty thus to control the sale of his goods, undoubtedly all may, if they see fit, agree together to enforce conditions which each one seeks to impose upon the dealing with the article which he makes. The action of each manufacturer in fixing prices and imposing conditions of sale is undoubtedly legal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

#### **HN63** [ ] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

The vendors are entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers, and the purchasers were entitled to such protection as is reasonably necessary for their benefit. Agreements which have for their object the realization of a fair price for the product manufactured and sold are not against public policy, even though in some respects they operate in restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Contracts Law > Defenses > Public Policy Violations

#### **HN64** [ ] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Agreements which have for their purpose the realization of a fair price for the product manufactured and sold do not contravene any rule of public policy, even though in some respects they operate in restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

#### **HN65** [ ] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Traders have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. It matters not that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons have a right to make, and those who are parties to the bargain must take it or leave it as a whole.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## HN66 Public Enforcement, State Civil Actions

To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rebates

## HN67 Public Enforcement, State Civil Actions

At common law, traders, manufacturers and common carriers have the right to give rebates to their patrons and customers in order to secure and retain their business. But the rebates were given in order to secure business and not for the purpose of stifling competition, or as a means by which to control, fix and maintain prices. It has not and cannot be seriously contended that the legislature does not possess the power to enact laws preventing all rebates being made the object of which is in restraint of trade or which tends to fix and maintain prices. If therefore rebates are used as a means in pursuance of a combine or agreement in restraint of trade, or for the purpose of fixing and maintaining prices, then such combination or agreement is prohibited by the statutes, and is, of course, void on that account.

## Headnotes/Summary

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### Headnotes

**1. JURISDICTION: Quo Warranto: Supreme Court.** The Constitution, in giving the Supreme Court power to issue, hear and determine "writs of *quo warranto*," included proceedings on information in the nature of a *quo warranto*, and thereby gave the said court jurisdiction to hear and determine such civil proceedings.

**2. JURISDICTION: Quo Warranto: Criminal Action: Combinations in Restraint of Trade.** The laws of the State authorize and direct the Attorney-General to institute civil proceedings in the Supreme Court by information in the nature of *quo warranto* against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, non-user or usurpation of powers, so conducted itself as to violate the laws of its being, the anti-trust statutes or the criminal laws of the State; and the Supreme Court has jurisdiction to hear and determine such civil proceedings, nor can the Supreme Court be ousted of its jurisdiction by the fact that the corporation's conduct is violative of the criminal laws of the State, nor can the corporation justify or defend upon any such plea. The court has no original jurisdiction over a proceeding that is essentially a criminal prosecution, but the proceeding upon information in the nature of a *quo warranto* to oust the company of its franchises for a violation of the anti-trust statutes, and to impose penalties on it if it is found guilty, is a civil one, and of that the Supreme Court has jurisdiction, and in determining it it is immaterial whether the corporation has also been guilty of a crime which would subject it to prosecution upon indictment before a court and jury.

**3. JURISDICTION: Quo Warranto: Criminal Action: Combinations in Restraint of Trade: Abuse of Franchise: Statutory Construction.** Articles 1 and 2 of chapter 143, Revised Statutes 1899, are to be read together, and as *in pari materia*, and section 8971 is to be treated prospectively and construed with section 8978, and when both articles and both sections are construed together, as one act, section 8978 is express authority for holding that corporations which enter into agreements to regulate prices or to control or limit trade are guilty of misuse, abuse and usurpation of power, notwithstanding that section fixes penalties and provides a mode of procedure for its violation. Those sections are not in derogation of the common law, but are intended to be in aid thereof, and remedial in their purpose; and although heavy losses may result to the corporation by a forfeiture of its charter and

the imposition of penalties, yet they should be construed and enforced according to the plain intention of the Legislature.

**4. COMBINATIONS IN RESTRAINT OF TRADE: Misjoinder of Parties: Several Corporations.** One corporation may be joined with another as defendants in a suit in the name of the State on information in the nature of a *quo warranto* to oust them of their franchises upon a charge of abuse or usurpation of corporate powers.

**5. COMBINATIONS IN RESTRAINT OF TRADE: Sufficiency of Information: To Maintain Prices.** An information which does not charge defendants with forming a combination to maintain prices, but only with combining to regulate, control and fix prices, is sufficient. While sections 8965 and 8966, Revised Statutes 1899, prohibit a combination to maintain prices, and do not prohibit combinations to fix, regulate and control prices, section 8978 does in express terms prohibit such combinations, and all these statutes should be construed together, as one act, and when that is done there is no room for niceties of meaning between "to maintain prices" and "to fix, regulate and control prices."

**6. COMBINATIONS IN RESTRAINT OF TRADE: Sufficiency of Information: General Allegations.** An information in *quo warranto* to oust a corporation which contains general allegations of the facts constituting the misuser, non-user or usurpation, is sufficient. The State is not required, as in an indictment in a criminal prosecution, to allege and prove in detail the facts constituting the mode and manner in which defendants have violated the law against combinations in restraint of trade or the usurpation of powers not granted by their charters.

**7. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Different Punishment.** The anti-trust statutes are not unconstitutional because they provide that an individual violating them may be punished by fine and imprisonment and a corporation by fine and forfeiture of its charter. There is no such difference in the punishments prescribed as renders them invalid.

**8. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Equal Protection of the Laws.** Nor are said statutes in conflict with the Fourteenth Amendment in denying to corporations the equal protection of the laws. That provision of the Constitution does not prevent legislation which embraces all persons or things that naturally belong to the same class and are similarly situated and upon whom it must operate equally and uniformly. If the statute affects all corporations violating it alike it does not deny to any the equal protection of the laws.

**9. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Equal Protection of the Laws: Discrimination Against Labor.** The anti-trust statutes do not deny to corporations the equal protection of the laws for that they embrace commodities only and do not include labor, which may also become the subject of a combination. That is no such discrimination against property as makes the statutes unconstitutional.

**10. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Due Process of Law: Production of Books: Or, Striking Out Pleadings.** Section 8984, Revised Statutes 1899, providing that when corporations, charged to be in a combination in restraint of trade, do not produce their books and papers ordered produced by the court, the court, upon motion, shall strike out their pleadings and render judgment of ouster against those in default, does not deny to them due process of law, and is not unconstitutional. It gives them a right to a hearing according to the law of the land, and is in keeping with similar statutes applicable to all litigants.

**11. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Production of Papers: Self-Incrimination.** The corporations that have violated anti-trust statutes are not entitled to a discharge in the ouster proceeding because they were compelled by the process of the court to produce books, documents and other testimony against themselves. The statute grants immunity from prosecution to all witnesses who testify in compliance with the order of the court. Nor does the Constitution interfere with the power of the court to compel the production of documentary evidence under a subpoena *duces tecum*.

**12. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Production of Papers: Self-Incrimination: Corporations.** An individual may lawfully refuse to answer incriminating questions unless protected

by an immunity statute, but there is a distinction between individuals and a corporation. A corporation is a creature of the State, which has a reserved right to investigate its contracts and find out whether it has misused its powers, and it has no constitutional right to refuse to produce its books and papers in court for an examination in the trial of a proceeding against it brought by the State; nor can an officer in charge of the corporation charged with a violation of the statute plead the criminality of the company as a refusal to produce its books.

**13. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Interstate Commerce.** The clause of the U.S. Constitution giving Congress power to regulate trade among the States, does not prohibit the State, through statutes forbidding pools, trusts and combinations in restraint of interstate trade and the decrees of its courts, from forfeiting the charter of a corporation organized under its laws, or from revoking the license to do business in this State of a corporation organized under the laws of another State, when such company violates those statutes. The State can forfeit the charter of a domestic corporation or revoke the license of a foreign corporation, for a misuser or non-user or abuse of the powers granted or an usurpation of powers not granted, whether the corporation is engaged in interstate or intrastate commerce.

**14. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Impairment of Contracts.** Nor are the anti-trust statutes void for that they violate the clause of the U.S. Constitution providing that no State shall enact any law that will impair the obligations of a contract. That law has no application to a license issued by the State to a foreign corporation to do business therein, for the reason that, when it accepted the license, it impliedly agreed to transact such business only as a domestic corporation might.

**15. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Impairment of Contracts: License Antedating Statute.** Nor are its legal rights affected by the fact that its license was issued before the anti-trust statutes were enacted, for these statutes are an exercise of the police powers of the State, and no State can contract away its police powers. The power to govern men and things is inherent in government, and the State always has the reserved right to compel all persons, whether natural or artificial, to so conduct themselves as not to injure others.

**16. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Unreasonable Restraint of Trade.** There is nothing in either the State or Federal Constitution that prevents the enactment of statutes prohibiting the making of all contracts in restraint of trade, whether reasonable or unreasonable. Anti-trust statutes are not unconstitutional because they prohibit the making of all contracts in restraint of trade, those that are reasonable, as well as those that are unreasonable and unjust; those of Missouri do that, but they in no manner denounce as illegal any trade contract which has a legitimate purpose for its object, and which only incidentally stifles trade.

**17. COMBINATIONS IN RESTRAINT OF TRADE: Constitutional Statutes: Unreasonable Restraint of Trade: Unrestrained Power to Contract.** There is no such thing in civilized society as an unrestrained power to contract. Every holder of property, however absolute and unqualified his title, holds it under the implied liability that his use of it shall not be injurious to others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Statutes prohibiting pools, trusts and combinations in restraint of trade are bottomed upon those police powers which are inherent rights of sovereignty; and legal regulations and restraints imposed upon the use of property and the right to contract in reference thereto do not deprive the owner of his property or contract-rights without due process of law.

**18. COMBINATIONS IN RESTRAINT OF TRADE: Abatement of Suit: Corporation: Withdrawal from State.** Under ordinary circumstances any defendant in a suit may abate the same as to him by voluntarily doing all the things which the pleadings in the cause pray the court to compel him to do; but the confession must be as broad as the charges and must not amount to a colorable dismissal. A judgment of ouster is only an incident to a suit brought by the State charging a foreign corporation licensed to do business in this State with entering into an unlawful pool, trust and combination with other corporations in restraint of trade and to fix and maintain prices on commodities handled by them, to the great damage of the people; and such foreign corporation cannot abate the suit as to it and avoid the penalty for an abuse of its franchise, by withdrawing from the State after the suit is instituted and filing an unaccepted withdrawal with the Secretary of State.

**19. COMBINATIONS IN RESTRAINT OF TRADE: Community of Interest: Stock Held by Trustee or Another Company: Control of Business: Evidence of Conspiracy.** Where the information does not charge that a trustee was appointed or a holding corporation was organized for the purpose of taking over the stock of the three respondent corporations, and does not charge that the holding company was vested with power to and did conduct and carry on the business of the three respondents, it will not be held that such placement of stock and business management constituted, as a matter of law, a trust and combine in restraint of trade within the meaning of the anti-trust statutes; but evidence that such trustee or holding company held or owned the stock of the three respondents and controlled their business is competent as tending to establish the charge of the information that the three respondents unlawfully and fraudulently entered into a conspiracy, combine and agreement in restraint of trade in violation of the anti-trust statutes.

**20. COMBINATIONS IN RESTRAINT OF TRADE: Division of Territory: Between Dealers.** The respondent Standard Oil Company of Indiana was a manufacturer of the products of petroleum, and also a large dealer, both at retail and at wholesale; and the respondent Waters-Pierce Oil Company was a dealer only. The two companies divided the State by a zigzag line running from the Mississippi River to Kansas and beyond, and agreed that the Indiana Company should sell oil only north of the line and the Waters-Pierce only south of it, and the Indiana Company bound itself to sell, as a refiner, exclusively to the Waters-Pierce in the territory south of the line and the Waters-Pierce bound itself to purchase exclusively from the Indiana Company, and that neither of said companies would sell to any other dealer except at retail prices. *Held*, that neither company is to be considered only as a manufacturer, but as dealers, and the agreement as to the division of territory and as to exclusive sales was in violation of the anti-trust statutes.

**21. COMBINATIONS IN RESTRAINT OF TRADE: Division of Territory: Breadth of Statutes: Articles of Necessity.** The anti-trust statutes of Missouri declare that all contracts in restraint of trade are null and void; and they make no distinction between articles of prime necessity and other articles.

**22. COMBINATIONS IN RESTRAINT OF TRADE: Rebates: Stifling Competition: Power of Legislature.** The Legislature possesses the power to enact laws to prevent the giving of rebates from the prices at which a commodity is sold by a dealer when the purpose of such rebates is to secure the trade of a competitor and to stifle competition and as a means by which to control, fix and maintain prices; and has done so in its anti-trust statutes, and the giving of rebates by a combination of dealers in the commodity, with that purpose as its object, is in restraint of trade, and the combination or pool is in violation of the statutes.

**23. COMBINATIONS IN RESTRAINT OF TRADE: Rebates: Stifling Competition: Purpose: How Shown.** The evidence shows that the three respondent oil companies, all parts of another parent company, through their agents, acquired information from railroad agents of the amount of oil sold in the various towns of the State by independent companies, and to whom, and by this means and a persistent system of espionage over the business of the independent companies they acquired perfect knowledge of their business, and then by a system of rebates from the prices at which they sold oils to the customers of the independent companies they acquired and held from eighty-five to ninety-eight per cent of the aggregate oil business of the State, and by the same means they fixed and maintained the prices at which all oils were sold in the State. *Held*, that the rebate system was maintained for the purpose of stifling competition and to fix prices, and tends to show there was a combination between respondents which is violative of the anti-trust statutes.

**24. COMBINATIONS IN RESTRAINT OF TRADE: Formed in Another State.** Where the unlawful pool, trust or combination in restraint of trade was formed in a foreign State or country, the parties to it, if they attempt to do business in this State in pursuance thereof, can be punished under the laws of this State. It is wholly immaterial where the unlawful conspiracy was entered into, or by what means it was formed, if it concerns commodities which as a matter of fact are sold in this State by the conspirators. They are in that case punishable in this State, whether the unlawful combination was formed here or elsewhere.

**By WOODSON, J., as to Compliance With Decree.**

**25. ORDER TO DISSOLVE COMBINATION: Proof: Resolution.** Where by the decree of the court all three respondents were found guilty of entering into a combination and pool to fix, control and maintain the prices of oil in this State, and the domestic respondent was fined fifty thousand dollars, and in addition its charter was forfeited, but this was suspended upon condition that it immediately cease all connections with the other respondents and all other companies in maintaining said combination and that it furnish the court with satisfactory evidence of its compliance with this judgment and of its intention to cease all connections with its co-respondents and all other companies and persons and on or before a date named file the proofs of its willingness to comply with the judgment, sufficient proof of its compliance with the judgment is not made by its payment of the fine and the filing of a resolution adopted by its board of directors declaring that it "does hereby accept the terms and conditions" of the judgment "and does hereby express its willingness to abide by the same." The purpose of the suit was to break up the trust and the combination between the respondents and the Standard Oil Company of New Jersey, which is not and could not be made a defendant, but which controls the business and policy of all of the respondents by its ownership of all the stock of the two respondent foreign corporations and a majority of the stock of the respondent domestic corporation; and that resolution does not show that the domestic corporation has dissolved its connection with this parent company, or that the pool and combination in restraint of trade of which it was found to be a party has been dissolved.

**26. ORDER TO DISSOLVE COMBINATION: Effect of Decree.** The decree forfeiting the charter of the domestic respondent took away its life and dissolved the relation between it and the parent company and its subsidiary corporations, the other respondents, and to permit the domestic respondent alone to do business in this State so long as a majority of its stock is owned by this parent company or so long as the parent company has the power to control and manage its business, is to fail to break up the "Oil Trust," and is to restore to the parent company the power to continue the unlawful trust and combination and to fix, control and maintain the prices of oils throughout the entire State; and the decree should be so modified as to permit the domestic respondent to show, within a time named, by indisputable proof, that all stock relations and business connections with it and the parent company and its subsidiary companies have been dissolved in good faith, and in default of such showing the writ of ouster should go.

**Judges:** WOODSON, J. Lamm, J., dissents as to certain portions of the decree as stated in a separate opinion; Graves, J., concurs in separate opinion.

**Opinion by:** WOODSON; GRAVES; LAMM

## Opinion

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The Republic Oil Company was placed in the State of Missouri without any authority anywhere in the State to make prices as against the other respondents. It was shown that at Kansas City prices on common oils at least sold by the Republic were made by the Standard Oil Company and communicated to the Republic agents by the Standard manager. Also, at St. Louis and in the Missouri division of the Waters-Pierce Oil Company, managers and agents of the Republic were instructed, some say, to follow the market which was fixed by the Waters-Pierce, and others say they were instructed to be governed in fixing prices by the Waters-Pierce prices. It is a fact that in Standard Oil territory Standard prices were the prices of the Republic and in Waters-Pierce territory the prices fixed [\*\*\*2] by that company were the prices of the Republic. It is not shown that either of the other respondents fixed the price of "palacine" or other high-grade oils of the Republic. These prices were furnished from Cleveland, and some discretion was given agents to vary prices in their competition with independents.

The Union Tank Line Company was a Standard Oil interest with its general office at 26 Broadway, New York City. It furnished tank cars for transporting [\*301] oils of Standard interests only. No independent company used these cars. Oils from all the northern and eastern refineries of the Standard, including the refineries in Kansas, were shipped to all the respondents in these cars. They were also used by the Consolidated Tank Line Company of Kentucky.

The evidence shows that the respondents had control of and sold from eighty-five to ninety-per cent of all the refined oils sold in Missouri during the time laid in the information, and that practically all of this large percentage [\*\*993] consisted of petroleum products obtained from, owned by and allied with the Standard Oil Company of New Jersey.

The evidence establishes the fact that it was finally admitted that during [\*\*\*3] the time laid in the information, the Waters-Pierce Oil Company would not sell oil in Standard territory nor would the Standard Oil Company sell in Waters-Pierce territory, and that orders sent to one company from merchants or jobbers doing business in the territory of the other were not filled by the company from which ordered, but were transmitted to the company in whose territory the customer lived, and were filled by that company.

It is now conceded that there was a dividing line in the State on one side of which the Waters-Pierce Oil Company distributed oil, and on the other side oil was distributed by the Standard Oil Company. Maps showing this division line were kept in the office of the Standard at Kansas City, in the office of the Waters-Pierce at St. Louis, and at 26 Broadway, the home of the Standard Oil interests. The line was first established and agreed on in 1878, between the Waters-Pierce Oil Company and Standard Oil Company of Ohio, and while the evidence does not disclose any special or express agreements made concerning it since yet it was accepted by the Consolidated Tank Line Company, the Standard Oil Company of Kentucky, the respondents, and is still faithfully [\*\*\*4] maintained. Joplin, [\*302] in southwest Missouri, is only about six or eight miles from Galena, in Kansas, yet the Standard (respondent), which sells in Kansas, will not sell at Joplin, or in Missouri, nor will the Waters-Pierce sell at Galena, in Kansas. However, when the Standard runs out of oil at Galena it sends over its tank wagons and fills them from the tanks of the Waters-Pierce Oil Company. Mr. Pierce says one reason he has not gone beyond the line is because he agreed not to do so.

During the time laid in the information, or from 1900 to the present time, the Standard Oil Company of New Jersey has regularly drawn the dividends on 2,750 shares of the capital stock of the Waters-Pierce Oil Company. Dividends on the whole amount of stock except, perhaps, four shares, were declared in the name of and paid to H. C. Pierce, the stock standing of record in his name, and he regularly paid out about two-thirds of the amount to the Seaboard National Bank, in New York City, or to some other representative of the Standard Oil Company of New Jersey.

Reference has already been made to the trade of Republic Oil Company in the high-class grades of petroleum products. Its agents [\*\*\*5] and managers were instructed to make such sales a special object. Sales in high-class goods were greatly increased, while in the beginning something like twenty-five or thirty per cent of its sales consisted of such grades of oils, later on the percentage of such sales reached from fifty to sixty per cent.

An important fact to be considered in arriving at a solution of this case is the ownership of capital stock of the respondents by the Standard Oil Company of New Jersey. Since the incorporation of the Republic Oil Company the New Jersey Company has owned all the stock of the Republic and Standard of Indiana, and sixty-eight and one-half per cent of the Waters-Pierce [\*303] Oil Company. Four shares of stock of the latter company have been held by individuals acting as officers.

When a change would be made and a new officer put in, the share of stock held by the retiring officer would be assigned, thus indicating that these shares were held for the purpose of officering the company. The significant fact is to be drawn from all the evidence that the Standard Oil Company of New Jersey and H. Clay Pierce were the only real stockholders in the respondent companies. By an original [\*\*\*6] agreement made in 1878 with Standard Oil Company of Ohio, and subsequently with trustees of Standard Oil Trust and Standard Oil Company of New Jersey, H. Clay Pierce was to have absolute control of Waters-Pierce Oil Company and its management and the fixing of its policies. Mr. Pierce claims that he exercised such control and management from 1878 to the spring of 1904, when the 2,747 shares of stock indorsed in blank by Pierce to the Standard of New Jersey were caused by the last named company to be assigned of record to M. M. Van-Buren, and are now held by him for that company.

A significant custom which prevailed among these respondents was what was called the "transfer" of men from one company to another. When the Republic Oil Company began business, its original incorporators were all Standard

Oil employees, two of them being clerks at 26 Broadway, New York City, and one being a clerk in the office of the Standard Oil Company of Indiana, at St. Joseph, Missouri. With the exception of the general manager, a number of field managers and quite a number of employees who had formerly been with Schofield, Shurmer & Teagle, who were retained by the Republic, its principal officers, accountants [\*\*\*7] and other employees were "transfers" from the Standard Oil Company.

Such transfers were also made from 26 Broadway to the Waters-Pierce Oil Company, at St. Louis, Oklahoma, Texas and other points. In most instances the [\*304] men transferred from Standard Oil Company to the Republic or Waters-Pierce were instructed to say nothing about the fact that they came from the Standard Oil Company.

Prior to 1900, it is conceded that auditors working under Wade Hampton, general auditor of the Standard Oil Company, with offices at 26 Broadway, regularly audited the books of the Waters-Pierce Oil Company, reported to Hampton and were on his pay-rolls. After 1900 he continued to send auditors to St. Louis to audit the Waters-Pierce Oil Company books, but they were placed on the pay-rolls of the latter company during the time [\*\*994] they were engaged, at a salary invariably fixed by Hampton. These auditors reported to Waters-Pierce Oil Company, but a copy of their report was sent to 26 Broadway. Hampton's auditors also audited the accounts of the Republic Oil Company at Cleveland, Ohio, in the same way. After the services of these auditors had ended with the Waters-Pierce or Republic [\*\*\*8] they at once became employees of Hampton.

Hampton says it was his understanding that Standard Oil Company should audit accounts of Waters-Pierce Oil Company. He personally audited the books of Standard Oil Company of Indiana, his men reporting to him and he paying them for their services. After 1900 a number of letters were written by Hampton to J. P. Gruett, secretary of Waters-Pierce Oil Company, introducing various auditors whom he sent to audit the books of that company and fixing the salaries of such auditors. The conduct of Hampton in keeping a strict supervision over the accounts of the Waters-Pierce Oil Company, both before and after 1900 (the date of the new incorporation) was simply the exercise of good business judgment on the part of the majority stockholders in that company. The Standard Oil Company of New Jersey had the right and power (both of which were exercised) to do these things.

[\*305] The Waters-Pierce Oil Company at all times made full reports regularly of its business transactions to 26 Broadway. Before 1900 these reports were sent to H. M. Tilford, at 26 Broadway. Tilford was an officer of the Standard Oil Company of New Jersey. After 1900 they were [\*\*\*9] sent to R. H. McNall, at 75 New street, New York City, being an entrance to 26 Broadway, he being designated the commercial agent of the Waters-Pierce Oil Company. These reports embraced, among other things, sales and deliveries of refined oils, deliveries of lubricating oils, etc., comparative sales, deliveries of specialty oils, deliveries of outside oils, deliveries of wax candles, etc., tank-wagon and milk-can deliveries, sales and deliveries of naphtha, etc., marine sales, total sales and net results, semi-annual statement showing costs of barrelling and marketing all kinds of oils and products of petroleum. This is the character of the reports made to 26 Broadway by Waters-Pierce Oil Company. A daily cash statement was sent. Also Consolidated Tank Line Company and Standard of Indiana made similar full reports to 26 Broadway. The daily cash statements sent by Waters-Pierce Oil Company were turned over to the comptroller of the Standard of New Jersey. While the reports were all, after 1900, addressed to McNall, they were distributed among the various officers at 26 Broadway and were passed on by a committee at that place, which has not been definitely identified, some calling it [\*\*\*10] a Domestic Trades Committee, some an Executive Committee, some an Association of Gentlemen or Experts, and some claiming it to be the directors of Standard Oil Company of New Jersey, who had their offices and held their meetings at that place. W. E. Bemis, an officer of Standard Oil Company, at 26 Broadway, in charge of the statistical department of Standard Oil interests, received reports from all Standard Oil interests.

[\*306] R. H. McNall, who was commercial agent of Waters-Pierce Oil Company after 1900, succeeding H. M. Tilford in that capacity upon the reincorporation of that company in 1900, had been prior thereto and was afterwards an assistant to Tilford. Tilford knew of the reports coming to McNall and saw them. Mr. Pierce says his company reported regularly to Standard Oil Company at 26 Broadway prior to 1900, and that the same reports were sent afterwards through McNall instead of mailing them directly to the heads of departments. He says that it was through McNall that the business of the Waters-Pierce Oil Company was transacted with Standard Oil interests at 26 Broadway. Mr. Pierce further said: "McNall was furnished anything and everything that he asked for as the [\*\*\*11]

representative of the Standard Oil Company and its various heads." Andrew M. Finlay, who was vice-president and general manager of Waters-Pierce Oil Company, says he was instructed by Mr. Pierce to send any reports to 26 Broadway called for by McNall. James A. Moffett, president of the Standard Oil Company of Indiana, says that company made full reports of all its business to 26 Broadway.

Now the Republic Oil Company, through its general officers, managers, agents and salesmen, posed and represented the company to be independent of Standard Oil Interests, and Waters-Pierce Oil Company. This position was taken wherever it sold the products of petroleum. Yet shortly after its incorporation the two refineries purchased in the deal with Schofield, Shurmer & Teagle, the one at Cleveland and the one at Scio, Ohio, were dismantled and discontinued and oils purchased from Standard Oil Company. Reports of all the business of the company were regularly made to 26 Broadway through Nichols, the president, at 75 New street, New York City. It occupied and sold identically in the same territory as the Standard Oil Company, except at points where it sold in Waters-Pierce [\*307] territory. Its \*\*\*12 principal officers and employees were from the Standard Oil Company and sent to it by that Company. Its stock books and certificates of stock were kept at 26 Broadway, and all its capital stock was owned by the Standard Oil Company of New Jersey. The general manager, W. C. Teagle, says it was an independent company and yet he assisted in making the sale of the property of Schofield, Shurmer & Teagle to the Standard Oil Company at 26 Broadway. This same Teagle, as general manager, in circulars sent out to field managers, denied that the Standard \*\*995 had bought out the firm of Schofield, Shurmer & Teagle.

Mr. C. L. Nichols, president of Republic Oil Company, and at the same time assistant to L. J. Drake, sales-agent of Standard Oil Company of Indiana, at 26 Broadway, says it was necessary to conduct and represent the Republic as an independent company in order to control the trade in high-class brands of oil formerly controlled by Schofield, Shurmer & Teagle. The independent companies made heavy assaults on the Republic from the beginning, because it was specially pushing a class of trade which created more competition with them. The cheaper oils were sold by the Republic, says \*\*\*13 Nichols, only as a necessity and as a means of selling high grades. Nichols regularly consulted Drake and others at 26 Broadway about Republic reports. A part of the president's salary was paid by Republic Oil Company and part by Standard Oil Company, and all reports to him came addressed to 75 New street. Nichols says that after this action was brought it was necessary to dispose of the Republic because it had served its purpose and kept and maintained "palacine." The publicity of its ownership by the Standard Oil interests destroyed its usefulness and purposes. "Palacine" is now being sold by the Standard of Indiana.

In Texas, Oklahoma and Arkansas the same conditions, so far as the relations between the Waters-Pierce [\*308] Oil Company and Standard Oil Company were concerned, existed as in Missouri.

L. H. Turrell, who was the first secretary of Republic Oil Company, was requested by L. J. Drake, then general manager of Standard Oil Company of Indiana, to go to New York and become an incorporator in a *sub rosa* corporation. At New York he found that Moffett, who was connected with both the Standard of New Jersey and of Indiana, was the principal negotiator for the purchase \*\*\*14 of the property of the firm of Schofield, Shurmer & Teagle, and he was told that the Standard Oil Company was making the purchase. He was also told that he had been agreed on as secretary, treasurer and a director. He was directed by Mr. Moffett to the office of Mr. Dodd, general counsel of Standard Oil interests, where he was asked to sign articles of incorporation by name F. A. Turrell, his correct name being L. H. Turrell. He was told that the mistake in name would make no difference and he signed by the initials "F. A." He was instructed by both Dodd and Moffett to use caution and not let it be known at Cleveland, where he went to work for the Republic, that he came from the Standard Oil Company. George B. Wilson, chief clerk of the Standard Oil Company of New York, became, as he expressed it, an accommodation president, and served for four months, when Nichols was elected. James R. Taylor, the other incorporator, was private secretary to H. M. Tilford. These three parties were the stockholders, officers and directors of the Republic Oil Company. They held meetings in the office of H. M. Tilford, director in the Standard Oil Company of New Jersey and a member of some committee \*\*\*15 at 26 Broadway. All their proceedings were directed and dictated by Tilford.

Between 1903 and 1905 letters were written by various heads of departments at 26 Broadway, New York City, to Waters-Pierce Oil Company and Republic Oil Company. Those to the Waters-Pierce were \*\*\*16 sent to McNall,

who signed them, and those to the Republic were signed by Nichols. These letters concerned all branches of oil business and called for various reports and numerous matters of information.

R. P. Tinsley, who, in 1904, became connected with the Waters-Pierce Oil Company at St. Louis, or was "transferred," had, prior to that time, been a general agent at 26 Broadway for all Standard Oil interests. Just what his exact duties were in that capacity has not been shown.

M. M. VanBuren, who holds 2,747 shares of the capital stock of Waters-Pierce Oil Company, is a son-in-law of John D. Archbold, vice-president of the Standard Oil Company of New Jersey. John D. Rockefeller is the president of that company.

H. M. Tilford, a director in the Standard Oil Company of New Jersey, and a director in Waters-Pierce Oil Company prior to 1900, says that McNall, the commercial agent of Waters-Pierce Oil Company [\*\*\*16] at 26 Broadway or 75 New street, was his assistant both before and after he became such commercial agent.

Quite a number of letters were introduced during the examination of Tilford which tend to throw light on the questions being considered, some of which are to the following effect: From McNall to J. P. Gruett, secretary of Waters-Pierce Oil Company, in 1903, giving the information that R. P. Tinsley had succeeded Walter Jennings as agent at 26 Broadway; from McNall to J. P. Gruett in 1903, relating to salaries of employees of Waters-Pierce Oil Company; from McNall to Gruett, in 1903, about Waters-Pierce Oil Company dividends, in which McNall states that he seldom sees the daily cash report sent to his office; from H. M. Tilford to J. P. Gruett, in 1903, relating to the transfer of oils; from McNall to S. Johnson, in charge of lubricating and specialty department of Waters-Pierce Oil Company at St. Louis, in 1904, fixing the price of wax; from H. M. Tilford to J. P. Gruett, in 1902, relating to [\*310] sales' reports; from H. M. Tilford to J. P. Gruett, in 1902, relating to banks where funds of Waters-Pierce Oil Company are deposited; from McNall to A. M. Finlay, then president [\*\*\*17] of Waters-Pierce Oil Company, that hereafter when letters were written him at 26 Broadway or 75 New street by Waters-Pierce Oil Company, to have a number of carbons made, without [\*\*996] date, signature or address, for distribution to other offices; letter from H. C. Arnold, accountant at 26 Broadway, to R. P. Tinsley, then with Waters-Pierce Oil Company, relating to services of Preston, sent to audit for Waters-Pierce.

Mr. Pierce says that all the various brands of oil sold by Waters-Pierce Oil Company, although different in names to those used by Standard of Indiana, were manufactured by Standard Oil Company for his company. He also says that after stock held by Standard Oil Company of New Jersey in Waters-Pierce Oil Company was transferred to M. M. VanBuren on the books of the company in the spring of 1904, the Standard Oil Company then began in various ways, by discharging old employees and substituting their own, to interfere with and take the management from him. This continued until 1905, when he induced the Standard Oil authorities to again put the management into his hands; and his son, Clay Arthur Pierce, was elected president. Says he got both J. P. Gruett and R. P. [\*\*\*18] Tinsley, the former had been secretary of Waters-Pierce Oil Company, and who was succeeded by Tinsley, from the Standard Oil Company. The Waters-Pierce Oil Company communicated with the various heads of departments at 26 Broadway through McNall, commercial agent. A list of all salaries of Waters-Pierce employees was sent to 26 Broadway once a year.

James A. Moffett, president of Standard Oil Company of Indiana, established his office as such president at 26 Broadway in 1901, about the time of the organization of the Republic Oil Company. He assisted in [\*311] the negotiations for the purchase of the property of Schofield, Shurmer & Teagle, and did caution L. H. Turrell not to talk too much when Turrell became secretary of the Republic Oil Company. He says that the Standard of Indiana sold almost exclusively to Standard Oil interests. He is also a director of the Standard Oil Company of New Jersey, and says that full reports come to 26 Broadway from the Standard of Indiana. He says unqualifiedly that the directors of Standard Oil Company of New Jersey control the companies in which it owns a majority of stock. In the State of Missouri the Standard of Indiana as a refiner and wholesaler [\*\*\*19] sells only to Standard interests. He also says that Col. Dodd, general counsel of Standard Oil interests, with offices at 26 Broadway, had charge of the incorporation of the Republic Oil Company. "Eupion" oil, the high-grade of Waters-Pierce Oil Company, and "Eocene," the high-grade of the Standard Oil Company of Indiana (both illuminating oils) were both manufactured

by the latter company. At all times the general offices of the Republic Oil Company were located at 26 Broadway. He always considered the Waters-Pierce Oil Company a Standard Oil interest.

C. L. Nichols, who became president of the Republic Oil Company in the fall of 1901, and is still president, says that during all that time he has occupied an office with L. J. Drake, sales-agent of the Standard Oil Company of Indiana, at 26 Broadway, as an assistant to Drake. As such, Drake had charge of certain territory, being the territory in which the Republic was doing business and carrying on a fierce competition with Mr. Drake's company. He says there was an association of gentlemen at 26 Broadway who would meet and discuss Standard Oil Interests in a general way. Nichols said he had consultations with Drake about reports he [\*\*\*20] received from Republic Oil Company. His selection as president of the Republic was a surprise [\*312] to him -- he was informed of his selection by J. R. Taylor, one of the stockholders.

The general officers of all the respondents either knew of their common ownership by the Standard Oil Company of New Jersey, or understood that they were Standard Oil interests and under the domination of the heads of departments at 26 Broadway. Most field managers and others occupying important positions and in direct touch with the trade and distribution of oils in the field had at least heard of the relationship of the respondents and surmised that they were all connected with Standard Oil interests.

All officers and employees who testified on the part of the respondents or either of them, say there was no agreement, or combination, or understanding between any or all of them to fix, maintain, or control prices of the products of petroleum, nor to control or limit the trade therein, nor to control, limit or prevent competition therein, in the State of Missouri. These denials are couched in general terms and go to all the charges contained in the information.

The Master made the following [\*\*\*21] rulings regarding the admission and rejection of testimony:

#### RULING UPON OBJECTIONS TO TESTIMONY.

[References are to pages of "Printed Record of the Testimony."]

On pages 307 and 312 the witness Hatfield was asked to state in a general way with reference to the similarity of the division of trade territory on the map that he saw at 26 Broadway and the one he afterwards saw at the Waters-Pierce Oil Company office in St. Louis. An objection to this question was sustained. It should have been overruled and the witness permitted to state if the two maps disclosed a similar division line of territory.

On page 1071 a ruling on the objection to the introduction of a certified copy of the charter of the Consolidated [\*313] Tank Line Company was reserved by the Commissioner. This objection is now overruled.

The objection to the testimony given by witness Wheelan in an answer to the second question on page 595 should have been sustained in so far as it attempted to elicit the relations between the [\*\*997] Republic Oil Company and Standard Oil Company, but the testimony was competent to the extent that it showed knowledge on the part of Cochran of such relations.

On page 1075 a [\*\*\*22] ruling on the objection to the introduction of a certified copy of the charter of the Standard Oil Company of Kentucky was reserved by the Commissioner. The objection is now overruled.

The objection to the tabulated statement set out on page 2730 should have been sustained. It was not properly shown to have been correct and authoritative. The same information is given in a proper way by the witness Webster.

The objection to the compilation of prices of the National Oil Company set out on pages 2763 to 2765 should have been sustained.

The objection to the compilation of prices of St. Louis Oil Company set out on pages 2772 to 2773 should have been sustained.

All proper exceptions to the foregoing rulings by the Commissioner are now allowed.

The respondents requested the Master to declare the law as follows:

"Each respondent separately asks the Commissioner to make as a separate finding of fact each division and subdivision of the statement submitted with the brief of the Republic Oil Company and Standard Oil Company of Indiana.

"Each respondent separately asks the Commissioner to give each of the following declarations of law:

"1. On the pleadings and proofs the findings must [\*\*\*23] be for the respondent.

[\*314] "2. The information does not state facts sufficient to constitute a cause of action or to entitle the State to any relief in this action.

"3. There is no jurisdiction in this proceeding to inquire into any question of any alleged violation of sections 8965, 8966 and 8978 of the Revised Statutes of Missouri.

"4. There is no jurisdiction in this proceeding to inquire into the question of any alleged violation of section 8978 of the Revised Statutes of Missouri of 1899.

"5. Each of sections 8965, 8966, 8967, 8968, 8971, 8972 and 8978 is unconstitutional and void for each of the reasons mentioned in the second amended answers of the Standard Oil Company of Indiana and the Republic Oil Company, filed February 11th, 1906.

"Each constitutional objection there made and presented is now separately made and presented the same as if separately written out as a separate declaration of law.

"6. This respondent was not a party to or part of any pool, trust, agreement, confederation, combination or understanding to regulate, fix or control the price to be paid by the retail dealers and others in the State of Missouri for naphtha, benzine, gasoline, kerosene, [\*\*\*24] lubricating oil or other products of petroleum offered for sale or sold in the State of Missouri.

"7. This respondent was not a party to or part of any pool, trust, agreement, confederation, combination or understanding to control or limit the trade in the products of petroleum in the State of Missouri.

"8. This respondent was not a party to or part of any pool, trust, agreement, confederation, combination or understanding to control, limit or prevent competition in the business of buying the products of petroleum in said State between themselves and others.

"9. This respondent was not a party to or part of any pool, trust, agreement, confederation, or understanding to deceive or mislead the public into the belief [\*315] that respondents were separate and distinct corporations, each pursuing an independent business as legitimate competitors in the purchase or sale of the products of petroleum.

"10. The information charges that the three respondents have wilfully and flagrantly abused, perverted and misused their rights, authority and franchise and assumed and usurped authorities and privileges not granted by the law of Missouri in that they between the \_\_ day of [\*\*\*25] \_\_, 1901, and March 29th, 1905, created, entered into and became members of a pool, trust, agreement, confederation, combination and understanding among themselves and each other:

"(a). To regulate, fix and control the price to be paid by the retail dealers and others in the State of Missouri for naphtha, benzine, gasoline, kerosene, lubricating oil and other products of petroleum offered for sale and sold in the State of Missouri;

"(b). To control and limit the trade in the products of petroleum in the State of Missouri;

"(c). To control, limit and prevent competition in such business of buying the products of petroleum in said State between themselves and others;

"(d). To deceive and mislead the public into the belief that respondents were separate and distinct corporations each pursuing an independent business as legitimate competitors in the purchase and sale of the products of petroleum.

"These, and these alone, constitute the issues of fact made by the pleadings.

"11. After making the charges mentioned in the last request, the information alleges as overt acts that by said pool, trust, agreement, confederation, combination and understanding respondents did certain [\*\*\*26] things. These, however, are not substantive acts and are not necessary parts of the pleadings. They could be wholly rejected as surplusage, or, at most, treated [\*316] as specific allegations of the specific acts constituting the general combination alleged.

"12. So far as concerns oil and oil products, section 8965 only prohibits combinations to regulate or fix prices and maintain them when so fixed or to fix or limit the amount or quantity thereof.

"13. So far as section 8966 attempts to prohibit combinations designated or made with a view to lessen or which tend to lessen free and full competition, it is limited to such combination whereby or under which [\*\*998] it is stipulated, provided, agreed or understood that any person, association of persons or corporation doing business in the State shall not deal in, sell or offer for sale in this State any particular or specified article, product or commodity and shall not during the continuance or existence of any such arrangement, combination or agreement deal in, sell or offer for sale in this State any competing article, product or commodity.

"14. So far as concerns any pool, trust, combination, confederation or understanding [\*\*\*27] to control or limit trade or competition in such trade, section 8978 only prohibits such pool, trust, combination, confederation or understanding by refusing to buy or sell to another for the reason that such other was not a member thereof.

"15. A plain remedy is provided for violation of section 8978 by the provisions found in sections 8979, 8980, 8981 and 8982, of the Revised Statutes of Missouri 1899, and for such a violation *quo warranto* will not lie.

"16. The fact that the majority of the stock of the three respondents was owned by the Standard Oil Company of New Jersey will not justify a finding of a violation of sections 8965, 8966, or 8978.

"17. An arrangement for a territorial division, if made or maintained as between the Waters-Pierce Oil Company and the Standard Oil Company of Indiana, was not a violation of section 8965, 8966 or 8978.

[\*317] "18. Unless there was a combination or agreement among two or more of the respondents to deceive and mislead the public into the belief that they were competing companies when they were not in fact, then there would be no finding against the Republic Oil Company simply because it may be that such company pretended to be [\*\*\*28] a competitor of the other respondents when it was not such in fact.

"19. The giving of rebates to purchasers of oil is not in violation of law."

The views taken by the Commissioner under the next sub-head which follows will answer all the propositions of law raised in the foregoing declarations.

The record fails to show whether these declarations of law were either given or refused, as asked.

The Master, however, made and returned the following:

FINAL CONCLUSIONS UPON THE LAW AND FACTS.

THE ISSUES.

It seems to be unnecessary to determine in this case whether the respondents have violated the common law of the State, or whether the common law in force in this State will sustain the charges in the information. The statutes, chapter one hundred and forty-three, Revised Statutes of 1899, are certainly broad enough to cover the facts and conditions shown to exist between these respondents. Therefore, the first task to perform will be to ascertain the issues by applying the allegations of the information to the statutes.

An analysis of the information setting forth the substantial allegations of a combination or trust formed between the respondents, together with certain overt [\*\*\*29] acts done in pursuance thereof, will be [\*318] given. The Commissioner finds that the information charges the respondents with the following violations of the various provisions of chapter 143, to which charges he will direct the evidence produced in this case.

It is charged that the respondents, between the -- day of \_\_, 1901, and 29th day of March, 1905, created, entered into and became members of a pool, trust, agreement, confederation, combination and understanding among themselves, and each other (following language in section 8965):

- (1). To regulate, fix and control the prices to be paid by retail dealers and others in the State of Missouri for the products of petroleum. [Sections 8965, 8978.]
- (2). To control and limit trade in the products of petroleum in the State of Missouri. [Section 8978.]
- (3). To control, limit and prevent competition in the business of buying and selling the products of petroleum in the State of Missouri, between themselves and others engaged in like business. [Section 8966, not the language of the statute.]

These three specifications, manifestly based on the statutes, constitute the alleged purposes for which the combination was [\*\*\*30] formed. Then the information proceeds and alleges that the respondents have, by said pool, trust, agreement, confederation, combination and understanding,

- (1). Fixed and maintained the prices of the products of petroleum sold and offered for sale by them in the State of Missouri. [Section 8978.]
  - (2). Have controlled and limited the trade in said products in this State. [Sections 8965, 8966.]
  - (3). Have prevented and destroyed competition in the purchase and sale of said products of petroleum in this State. [Sections 8965, 8966, 8978.]
- [\*319] (4). Have deceived and misled the public into the belief that respondents were separate and distinct corporations.

What follows seems to be specifications of overt acts committed in pursuance to the purposes of the combination charged to have been entered into and existing between the respondents. It is alleged that in pursuance of said pool, trust, agreement, confederation, combination and understanding, so entered into by said respondents as aforesaid, and for the accomplishment of the objects and purposes aforesaid,

- (1). The State of Missouri has been divided into two territories, in one of which the Standard Oil Company sells [\*\*\*31] and Waters-Pierce Oil Company does not; in the other the Waters-Pierce Oil Company sells and the Standard does not, and that the Republic Oil Company sells in the territory of each of the other respondents to a class of trade who do not or will not buy [\*\*999] of them.
- (2). The respondents appeared and represented themselves to be separate, independent and competing corporations, when they were not and when said secret combination existed between them, thereby deceiving and misleading the public into the belief that they are separate and distinct corporations.
- (3). The respondent, Standard Oil Company, as a refiner, sells the products of petroleum in Missouri only to itself and the other respondents.

(4). The respondents have controlled and supplied to the retail dealers and the general public in Missouri from eighty-five to ninety per cent of the products of petroleum sold in Missouri.

(5). They have controlled the prices of the petroleum, have prevented competition among themselves, have secured control of the oil business and the purchase and sale of oil, have limited the trade therein and driven out competition, and the public have been [\*320] deprived of free, full [\*\*\*32] and wholesome competition in the sale of the products of petroleum.

The language of the information, both in substance and words, embraces combinations formed to regulate, fix and control the prices to be paid by retail dealers and others in the State for the products of petroleum, and to control and limit the trade in such products as interdicted by section 8965 of article 1 and section 8978 of article 2, chapter 143, Revised Statutes 1899.

Also the language of the information is broad enough to embrace combinations formed for the purpose, or made with the view to lessen, or which tend to lessen, competition in the sale of petroleum, as prohibited by section 8966 of said chapter 143.

It is contended that a violation of section 8978 cannot be reached in this proceeding, because article 2, of which that section is a part, gives circuit courts jurisdiction and provides a special or additional remedy in those courts. The purpose of this article as provided in section 8982 is not to repeal any subsisting acts relating to combinations in restraint of trade, but to provide an additional remedy for the control and restraint of pools, trusts and conspiracies in restraint of trade and unlawful [\*\*\*33] combinations. The additional remedy provided is by injunction in courts which alone have jurisdiction in such cases, and is expressly made to reach, not only the provisions of article 2, but those of article 1 as well. [HN1](#)[] The Constitution of Missouri, section 3, article 6, gives the Supreme Court power to issue the writ of *quo warranto*. It must be conceded that it will issue against a corporation for the non-user or misuser of its corporate franchise, or for an infraction of its contract with the State by a violation of the anti-trust laws. As said by Judge Sherwood, in the case of *State ex inf. v. Equitable Loan and Investment Co., 142 Mo. 325* (l. c. 337): "And the jurisdiction of this court being conferred by the Constitution, it is beyond the power of the Legislature [\*321] to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board." Article 2 of chapter 143 does not confer or create a distinct and independent remedy, but simply an additional remedy to those created by article 1, and other remedies, which are conferred [\*\*\*34] by the Constitution, or are inherent in the courts. The general principles governing such proceedings as this are well expressed by Clark and Marshall in their work on Private Corporations, vol. 2, sec. 314b, in this language: "As a general rule, however, [HN2](#)[] the charter of a private corporation will be forfeited, in proper proceedings by the State, for any willful or fraudulent misuser or abuse of its franchises which injures or menaces the interests or welfare of the State or the community in which it transacts business, whether the misuser or abuse consists in the exercise of a franchise or power not conferred upon the corporation by its charter, or in the violation of prohibitions in its charter, or in the violations of prohibitions in general laws to which it is subject, or in the violation of established principles based upon the ground of public policy." [High on Extraordinary Legal Remedies, secs. 647, 648; *State ex rel v. Gas Company, 153 Ind. 483, 53 N.E. 1089; Terrett v. Taylor, 13 U.S. 43, 9 Cranch 43, 51, 3 L. Ed. 650; State ex inf. Hadley v. Jockey Club, 200 Mo. 34, 92 S.W. 185, 98 S.W. 539.*]

[HN3](#)[] Both articles 1 and 2 of chapter 143 declare pools, trusts, agreements, combinations, [\*\*\*35] confederations and conspiracies, formed and entered into by corporations for the accomplishment of the purposes therein specified, to be illegal. These statutes are a declaration of the policy of the State, the violation of which by a corporation is a violation of its pact, entered into with the State when it was chartered as a domestic company, or licensed to do business as a foreign company, which [\*322] violations give the State the right to withdraw such charter rights or cancel such license privileges.

Respondents maintain that inasmuch as chapter 143 denounces pools, combinations, etc., therein described as "conspiracies to defraud," the information should be tested by the rules of pleading relating to charging conspiracies, and that it is, therefore, insufficient and states no cause of action. This action, although it does partake of the nature of a criminal prosecution in that heavy penalties may be imposed, yet it is a civil action and the

rules of pleading in civil cases appertain. While the corporate rights of the respondents may be taken from them or fines or suspensions imposed, yet these are not regarded as punishments for the commission of crime, but as results [\*\*\*36] which may follow the failure of a corporation to live up to the implied contract between it and its [\*\*1000] creator, the State. The respondents are charged with forming and entering into a combination or conspiracy to do an unlawful act. [HN4](#)<sup>↑</sup> Conspiracies may be formed to do an unlawful act or to do a lawful act by unlawful means. The rule of pleading in such cases, even in criminal proceedings, is that: "If the act which the conspirators combined to perform is unlawful, it is unnecessary to set out in the indictment the means to be employed in accomplishing it. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out such unlawful means." [4 Ency. Pl. & Pr., pp. 713, 714, 716, 717; [Coal Co. v. People, 214 Ill. 421, 73 N.E. 770.](#)] Respondents say, "The information does not show how and by what manner the combination was formed. The overt acts pleaded do not sufficiently show these details. They show what was done under the combination, not how the combination was effected." This is a very general objection without specifying [\*\*\*37] the exact deficiencies of the information. Neither [\*323] in the printed nor oral arguments have any of the counsel for respondents pointed out what omitted matter or allegation would have supplied the defects. In view of the fact that the sufficiency of the information has not been brought to the attention of the court by proper plea, and that in this case reported in [194 Mo. 130](#), Judge Lamm said, "The information proceeds with due legal precision and particularity to inform this court of the scope and tenor of the trust scheme and of the specific methods claimed to have been employed therein, and thereby to rivet upon the people of this State, contrary to public policy and in the very teeth of express law, an alleged odious monopoly," the Commissioner might have passed this question without comment. It is very clear that the information is sufficient and it only remains to dispose of a few other questions of law in a brief way and then proceed to a consideration of the question of the guilt or innocence of the respondents under the facts proven.

It is urged that the provision of chapter 143, Revised Statutes 1899, are in conflict with the first section of the [fourteenth Amendment](#) [\*\*\*38] to the [Federal Constitution](#) and other constitutional provisions. So far as the Commissioner is concerned all these constitutional objections are disposed of by the following cases: State ex. inf. v. [Standard Oil Co., 194 Mo. 124, 91 S.W. 1062](#); State ex. inf. v. [Firemen's Fund Ins. Co., 152 Mo. 1, 52 S.W. 595](#); State ex. inf. v. [Armour Packing Co., 173 Mo. 356, 73 S.W. 645](#); State ex. inf. v. [Continental Tobacco Co., 177 Mo. 1, 75 S.W. 737](#); [Finck v. Granite Co., 187 Mo. 244, 86 S.W. 213](#).

[HN5](#)<sup>↑</sup> The anti-trust laws of the State are penal in their nature and should be strictly construed. [State ex. inf. v. [Insurance Co., 152 Mo. 1, 52 S.W. 595.](#)] As said by Judge Fox, "It must be remembered that this proceeding partakes of the nature of a criminal prosecution, severe penalties are imposed, hence it is not sufficient to warrant a finding adverse to respondents that we may entertain strong suspicions, or even strong probabilities, [\*324] of their guilt." [State ex. inf. v. [Tobacco Co., 177 Mo. 1, 75 S.W. 737.](#)] Yet, both the information and the facts should be given a reasonable and sensible construction, one which, on the one hand, will give effect to the material and well-stated [\*\*\*39] charges in the information, and on the other such a construction and application of the facts as will elicit the truth and not mere suspicions and probabilities. As said by Judge Lamm in this case, "We feel, at least, on solid ground on the proposition that statutes leveled against monopolies are buttressed upon the wisdom of the common law, and this court, constrained and enlightened by events of current history, is not required and does not deem itself invited to approach the interpretation of such statutes, with a hostile or sour disposition, or to drive a coach-and-six through them but, on the other hand, while sedulously protecting the rights and liberties of the individual from insidious approaches, under whatever artful guise, we should at the same time not lose sight of the rights of the community, and should endeavor to advance the beneficent purpose underlying such laws where it can be done without doing violence to constitutional provisions." [State ex. inf. v. Standard Oil Co., 194 I. c. 148.] In [Jacobson v. Massachusetts, 197 U.S. 11, 49 L. Ed. 643, 25 S. Ct. 358](#), it was said by the Supreme Court of the United States that [HN6](#)<sup>↑</sup> all laws should receive a reasonable construction, [\*\*\*40] and general terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter."

CONCLUSIONS UPON THE FACTS.

As, in this case, [HN7](#)[] where the State charges an abuse or a misuse of the corporate franchise, or acts of corporations contrary to the Constitution and laws of the [\[\\*325\]](#) State, the informant must prove the charges as laid in the information or enough of them to warrant the finding that the respondents are guilty. If the State has failed to do this, then nothing remains but to so pronounce. [[State ex rel. Walker v. Talbot, 123 Mo. 69, 71, 27 S.W. 366.](#)]

The charge is that the respondents, between the -- day of \_\_\_, 1901, and the 24th day of March, 1905, created, entered into and became members of a pool, trust, agreement, confederation, combination and understanding, among themselves, and each other, to do certain things heretofore set out. The terms pool, trust, agreement, confederation, combination and understanding, in [\[\\*\\*\\*41\]](#) the sense used in the information and according to modern adjudications, are practically synonymous. [United States v. Addyston Pipe & Steel Co., 54 U.S. App. I. c. 764; Cook on Trusts, p. 4.] They are also denounced by the statute as conspiracies.

The respondents during the time laid in the information were separate and distinct corporations or entities, one organized under the laws of New York, one under the laws of Indiana and the other under the laws of Missouri. In 1882 the Standard Oil Company of New Jersey was organized and about that time the Standard Oil Trust was formed. In 1899 the capital stock of the New Jersey Company was increased from three to one hundred and ten million dollars. In 1878 the first Waters-Pierce Oil Company was organized with a capital stock of one hundred thousand dollars. In 1882 its capital stock was increased to four hundred thousand dollars. About this time the Standard Oil Trust became the holder for the Standard interests of 2,750 of the four thousand shares of this company. In about 1890, when the Standard Oil Trust was dissolved, the Standard Oil Company of New Jersey became the owner of the 2,750 shares of Waters-Pierce stock formerly held [\[\\*\\*\\*42\]](#) by the trustees [\[\\*326\]](#) of the Standard Oil Trust and owned that number of shares up to May, 1900, when the Waters-Pierce Oil Company was again organized, the Standard of New Jersey continuing to own and control 2,750 shares of the four thousand shares of the new company. In 1889 the Standard Oil Company of Indiana was incorporated. Practically all of its stock from that time to the present was owned by the Standard of New Jersey. In 1901 the Republic Oil Company was incorporated and absolutely all its stock was owned then and continued to be owned ever since by the Standard Oil Company of New Jersey. The stock held by the New Jersey company in the respondent companies was held for it by individuals connected with Standard Oil interests at 26 Broadway. The management of the Waters-Pierce Oil Company by agreement was given to H. Clay Pierce, who was president or managing influence from 1878 to the spring of 1904, when the Standard Oil Company of New Jersey exercised its right and power as a majority stockholder and took the management from him for about a year. The business and affairs of the other two respondents were, at all times, absolutely managed and directed from 26 Broadway, [\[\\*\\*\\*43\]](#) New York City, where their principal offices were located. As to the managerial acts and directions emanating from 26 Broadway, more will be said later on. Thus it will be seen that a motive for a combination between the respondents existed in the common ownership of their capital stock. Of the total capital stock of the three respondents, amounting to one million seven hundred and fifty thousand dollars, the New Jersey Company owned a little more than one million five hundred thousand dollars thereof.

Counsel for respondent Waters-Pierce Oil Company, says there was no motive for any combination among the companies as to price. "If," says counsel, "the conclusion of combination is to be drawn [\[\\*327\]](#) from the fact that the Standard Oil Company of New Jersey owned a controlling interest in all these companies, that inference is positively repelled by the fact that Mr. Pierce and his interests, which actually controlled the operations of the Waters-Pierce Oil Company, would have enjoyed no benefits from any such combination." But is it not a fact that a combination of Pierce's interests with Standard Oil interests was of vast importance to him? It enabled the Waters-Pierce Oil Company [\[\\*\\*\\*44\]](#) to control the trade and prices in the products of petroleum in one-half of the State of Missouri, a good portion of Louisiana, all of Indian Territory, Oklahoma, Arkansas, Texas and the Republic of Mexico. Otherwise, Mr. Pierce's one-third interest in the Waters-Pierce Company might not have been able to withstand competition from Standard Oil interests.

In [State ex inf. v. Standard Oil Company, 194 Mo. 124, 91 S.W. 1062](#), Judge Lamm says: "Yet experience has shown that [HN8](#)[] stockholdings showing a community of interest, while in some cases innocuous, might in given cases be the very root from which the trust agreement grows."

In People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798, it is said: "The control of the four companies by the appellee -- an outside and independent corporation -- suppresses competition between them, and destroys their diversity of interest and all motive for competition." Again, Noyes on Intercorporate Relations, sec. 294, says: "HN9[<sup>↑</sup>] A corporation which owns a majority of the shares of the capital stock of another corporation controls it." In Railroad v. Commonwealth, 7 A. 368, this plain and pointed language is used: "It is too plain to bear argument [\*\*\*45] that the ownership of the stock of a corporation carries with it the control of the corporation." It is very true that the ownership of the stock does not carry with it the ownership by the stockholders of [\*328] the property of the corporation. The property belongs to the corporation and is managed by the proper agents selected for that purpose. [Humphreys v. McKissick, 140 U.S. 304, 35 L. Ed. 473, 11 S. Ct. 779.] That principle of law distinguishes this case from the case of State ex inf. v. Tobacco Co., 177 Mo. 1, 75 S.W. 737. There the Continental Tobacco Company purchased the tangible assets of a number of tobacco companies and converted them into the assets of the tobacco company and proceeded to transact business in its own name and with its own assets and not by means of a number of subsidiary companies, organized at different times, in different States and under different names, as in the case of [\*\*1002] the Standard Oil Company of New Jersey. "HN10[<sup>↑</sup>] Every corporation is a person -- artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, [\*\*\*46] are the corporation itself; and when a single individual composes a corporation, he is not himself the corporation. In such case, the man is one person, created by the Almighty, and the corporation is another person, created by the law." [Exchange Bank v. The Macon Construction Co., 97 Ga. 1, 25 S.E. 326.] The Standard Oil Company of New Jersey, through the individuals at 26 Broadway, who held for it a large majority of the stock of all the respondents, had control by virtue of such ownership and did control. Even if Mr. Pierce did vote the stock of the New Jersey Company, elect the directors of and control the Waters-Pierce Oil Company from May, 1900, to February, 1904, no more can be said than that he was acting as the agent of the majority stockholder. That the New Jersey company had the power of control and that Pierce's authority was merely permissive, or that of an agent whose agency was subject to revocation at any time, was demonstrated in 1904 when his agency was revoked without consultation [\*329] with him, and he was told by the general counsel of the company that the action was regular. The conclusion cannot be escaped that the common ownership of the stock of [\*\*\*47] respondents by an outside corporation is a strong circumstance tending to show them guilty of an agreement, combination or conspiracy to effect the objects stated in the information.

There was a division of territory between the Waters-Pierce Oil Company and the Standard Oil Company of Indiana, not only in Missouri, but the two companies did not sell the products of petroleum at the same place at any point in the United States. While it is true no formal agreement was produced showing a division of territory -- such was not necessary. The evidence shows clearly that an understanding was had, that divisions were made as far back as 1878, and faithfully kept by the two respondents to the present time. It is safe to say that except for the combination or understanding which has always existed between these companies, together with their common stock ownership, such agreement would have been annulled long ago. It will not do to say that one company sold oil in one part of the State and the other in another part, and that, therefore, there was no competition. The charge against them was that they did not compete. If these two companies had not combined their vast wealth, it is reasonable [\*\*\*48] to believe that both would have established and maintained stations at all important commercial points in the State. If there had not been a close business and common stock-ownership existing between them, orders received from the territory of the Waters-Pierce Oil Company to the Standard Oil Company would have been filled by the company receiving them. These orders were never transferred to other companies -- to independent or outside companies -- but they went from the one to the other of said respondents. Nor was the Waters-Pierce Oil Company a [\*330] marketer of the brands of oil of the Standard Oil Company of Indiana. It posed to the public as a marketer of its own special brands of oil, manufactured, it is true, for it by the Standard Oil Company and its allied interests. So far as the public knew the "Eocene" of the Standard and "Eupion" of the Waters-Pierce were entirely different oils, although as a matter of fact they may have been the same. If these two companies had been independent of each other, a division of trade alone might not be sufficient to convict them of a violation of the statute. But it is an important circumstance to be considered in this case in connection [\*\*\*49] with all the other facts proven, and especially in conjunction with the fact that for all practical purposes the three respondents were ruled and controlled from 26 Broadway, New York City, the center from which Standard Oil interests draw inspiration from one end of the United States to the other.

The reserved dominating power of control over the respondents was at 26 Broadway. To that place all the companies made full reports of their entire transactions. Prior to 1900, the Waters-Pierce Oil Company communicated with the various heads of departments of the Standard Oil Company of New Jersey at 26 Broadway, and gave any and all information called for. Matters of construction, salary lists and all questions concerning the expenditure of money by Waters-Pierce were passed on at that place. H. M. Tilford, a director in the Standard of New Jersey, was then the directing force of the Waters-Pierce Oil Company. After 1900 -- after the Waters-Pierce Oil Company was re-organized for the purpose of enabling the company to resume business in Texas -- one R. H. McNall, a Standard Oil employee, and who continued as such afterwards, was appointed as commercial agent of the Waters-Pierce Oil Company. [\*\*\*50] He continued in the office of H. M. Tilford. Letters, daily cash reports [\*331] and many other reports covering the entire business of the Waters-Pierce Oil Company, were mailed to him, and he in turn distributed them to the proper departments. The Standard Oil Company of Indiana had its central office, that of president, at 26 Broadway. He was also a director in the Standard of New Jersey. Reports of this company were sent to him and he distributed them to the various departments representing Standard Oil interests. The president of the Republic Oil Company also had his office at 26 Broadway. He was an employee of the Standard Oil Company at that place, part of his salary [\*\*1003] being paid by each company. He occupied an office with L. J. Drake, sales-agent of the Standard Oil Company of Indiana. He was assistant to Drake, and testified that they carried on an active competition between their companies. All communications to 26 Broadway from the Waters-Pierce Oil Company and Republic Oil Company were addressed to 75 New street. The evidence discloses a great many detailed communications, letters and business transactions between all the respondents and 26 Broadway. The [\*\*\*51] accounts of all the respondents were regularly audited by Wade Hampton, the general auditor of Standard Oil interests. Prior to 1900 these auditors were in the pay of Hampton and reported to him directly. After 1900, he sent the auditors out from his office, but, so far as the Waters-Pierce Company was concerned, they were directed by him to be placed on its pay-rolls, he fixing their salary, which was done, and reports made to the Waters-Pierce Company, a copy of which was sent to 26 Broadway.

The Republic Oil Company was organized for the purpose of taking over the assets of Schofield, Shurmer & Teagle. For a great many years this firm had been a thorn in the side of the Standard Oil Company. It was entirely independent of Standard Oil interests. It had built up large sales in the central and southwest portions of the country in high-grade illuminating [\*332] oils and gasoline. Its special brand, the one which had gained the widest reputation of any other brands of illuminating oil on the market as the best burning oil was "palacine," a Pennsylvania product. That it was a better and higher grade of oil than any manufactured or sold by Standard Oil interests is conceded. At [\*\*\*52] the same time all other independent companies procured their oils principally from Pennsylvania independent refineries, which fact enabled them to sell much oil in competition with the Standard and Waters-Pierce, because of its superior quality. Hence the purpose of the Standard Oil Company in buying the property, good will and brands of Schofield, Shurmer & Teagle. It was necessary to create an independent company which could handle and sell Pennsylvania products in competition with independent companies. That was the purpose of the Republic Oil Company, which fact was conceded by Mr. Nichols, its president. Since this case was begun the Republic, except in Missouri, has sold all its assets and brands of oil to the Standard Oil Company of Indiana, which is entirely owned by the Standard of New Jersey, which, in turn, owned entirely the Republic Oil Company. It amounts to a sale by the Standard Oil Company to itself. The sale was made, so Mr. Nichols says, because of the disclosures made in this case, its purpose had been served -- it had maintained the "palacine" brand. The Republic Oil Company, while it claimed to be independent and its managers and agents were directed to so represent [\*\*\*53] it, which they did, began a fierce contention for business between itself and the independent companies. It never sold to any extent the class of oils handled by the Waters-Pierce Oil Company and the Standard Oil Company. Such oils were handled by it as an incident to its main business, the sale of high-class oils, and were invariably sold at prices fixed by one or the other of the other respondents. While it was, so far as the public was concerned, an apparent [\*333] independent company and made a show of competition with the Waters-Pierce Oil Company in isolated instances, yet, as a matter of fact, it greatly aided the other respondents in maintaining the prices of common oils which constituted the great bulk of their sales. If the Republic Oil Company had been a real independent company it would not have dismantled the two refineries purchased at the time of the sale of Schofield, Shurmer & Teagle to the Standard Oil Company. One of these refineries was located at Cleveland and the other at Scio, Ohio, and had furnished to Schofield, Shurmer & Teagle a large amount of their common oils.

Another significant fact bearing on the question of a combination and understanding between [\*\*\*54] respondents was what was termed the "transfer" of employees from one company to the other. The employees of the Republic Oil Company, except the old employees of Schofield, Shurmer & Teagle retained, were practically all men transferred from Standard Oil interests. Some of the principal officers and many of the subordinate employees of the Waters-Pierce Oil Company came from the Standard Oil Company.

All the dividends of the stock of the Standard Oil Company of Indiana and Republic Oil Company, and the dividends on two-thirds of the stock of Waters-Pierce Oil Company, were paid into the treasury of the Standard Oil Company of New Jersey. The contention is made that Mr. Pierce derived no benefit from the dividends so paid, and as he was in control of the Waters-Pierce Oil Company that company should not be held responsible for this condition. Mr. Pierce as an individual might not have been responsible for this state of facts, yet the company, the corporate entity, through its controlling power, the majority stockholder, was undoubtedly responsible. And while the evidence does not show that Mr. Pierce participated in a division of the dividends paid to the Standard of New Jersey by [\*\*\*55] respondents, yet it does show that by reason of [\*334] such ownership of stock and understanding existing between respondents he was enabled to draw, according to his own statement, from six to seven hundred per cent per annum as dividends on 1,250 shares owned by him.

Another strong circumstance tending to show a combination between respondents for the purposes alleged in the information is the [\*\*1004] fact that both the Standard Oil Company of Indiana and Waters-Pierce Oil Company purchased all the products of petroleum and brands of oil sold by them from the Standard Oil Company and its allied interests. The Republic Oil Company for the first year and a half purchased its highgrade oils from independent companies and its common oils from the Standard Oil Company. After that time and up to the present it purchased practically all its oils of all grades, including "palacine," from the Standard Oil interests. These oils were shipped in the tank cars of the Union Tank Line Company (a Standard Oil company), and it is a significant fact that no independent company got oils shipped in these cars. While there is testimony to the effect that the Standard Oil Company, as a refiner [\*\*\*56] and wholesaler, would sell to any person who wanted to buy and pay their prices, yet the fact has been proven that it sold almost exclusively to companies allied and subsidiary to it.

Again the system in vogue throughout the territory of both the Standard Oil Company and Waters-Pierce Oil Company, since 1878, of espionage upon the shipments of outside or independent companies, and the efforts of their agents to head off and prevent such shipments being sold, tends to show an understanding between those respondents to monopolize the sale of products of petroleum.

The percentage of sales of refined oils by the respondents, amounting to at least ninety per cent of the whole amount of such oils sold in Missouri, was due to the power wielded by them, which, in turn, was [\*335] due to a combination of their vast strength and wealth.

Therefore, did the respondents form a combination as charged in the information? A few quotations from the law will be given. "[HN11](#)[ The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. . . . If the validity [\*\*\*57] of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity." [State ex inf. v. [Armour Packing Co., 173 Mo. 356, 73 S.W. 645.](#)] In the same case it is further said: "It is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." In the case of State ex inf. v. [Continental Tobacco Co., 177 Mo. 1, 75 S.W. 737,](#) Judge Fox uses language very pertinent to the facts of this case, as follows: "[HN12](#)[ The statute contemplates the existence of at least two or more corporations, individuals or partnerships, so as to agree or combine with each other to do the prohibited acts mentioned in the statute. In other words, it is intended to operate upon two or more corporations or individuals, who, so far as the public are concerned, indicate that they are pursuing an independent business, legitimate competitors, when, in fact, there is a secret agreement by which the very things condemned by the statute are accomplished. The public has rights which the law contemplates shall be [\*\*\*58] respected. Neither corporations, individuals, nor partnerships are permitted to deceive or mislead the public by an apparent competition, when in fact none exists." While it is true there was no competition between the respondents, Waters-Pierce Oil Company and Standard Oil Company, nor even apparent competition, yet they did pose to the public as separate and independent companies,

while each was striving to enrich a common treasury, and by [\*336] an indefinite agreement as to time divided trade territory and did not compete. Again Judge Fox says in the above-cited case, and quoting from the Supreme Court of Texas: "[HN13](#)" In order to constitute a trust, within the meaning of the statute, there must be a 'combination of capital, skill or acts by two or more.' 'Combination,' as here used, means union or association. If there be no union or association by two or more of their 'capital, skill or acts,' there can be no 'combination' and hence no 'trust.' The respondents constitute three separate and distinct corporate entities. That the capital stock of each was working to one common good, depositing their dividends in one common treasury, there is no question. The skill and acts of all [\*\*\*59] three were employed to one main mutual purpose, the creation of earnings for the benefit of the Standard Oil Company of New Jersey. The Supreme Court of Ohio, speaking of the Standard Oil Trust which formerly held a majority of the stock of Waters-Pierce Oil Company and was succeeded in such holding by the Standard Oil Company of New Jersey, said: "Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our State and void." [[State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279.](#)] In the case of [State ex rel. v. Gas Co., 153 Ind. 483, 53 N.E. 1089](#), the Supreme Court of Indiana said: "The authorities affirm, as a general rule, that, [HN14](#)" if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of [\*\*\*60] injury inflicted upon the public; it is sufficient to [\*337] know that the inevitable tendency of the act is injurious to the public."

[\*\*1005] The evidence shows that in the territory of the Waters-Pierce Oil Company it fixed, controlled and regulated prices. The Republic Oil Company, through its field agents and employees instructed by its officers to do so, followed the prices fixed by the Waters-Pierce. As shown before, no real competition between the Republic Oil Company and that company existed, although it posed as an independent company and competitor of the Waters-Pierce. Its mission as has been shown was to divert the independent companies into a fight on the sale of high-class goods and give the Waters-Pierce a freer field on the principal products it handles, the common class of goods. The independents, as intelligently explained by Mr. Wilhoit of Springfield, were powerless to undersell the Waters-Pierce Oil Company without taking chances of being driven entirely out of business. Anyway, the Waters-Pierce Oil Company dictated, maintained, regulated, fixed and controlled the prices to be paid by retail dealers in its territory. The same conditions existed in [\*\*\*61] the territory of the Standard Oil Company in Missouri. While the Republic Oil Company made some show of competition against the Waters-Pierce Oil Company, it made no such show as against the Standard, except, as in the other territory, it made the claim everywhere that it was independent of the other respondents, had no connection with them and was a competitor of them. Prices at which the Republic sold in Standard territory were invariably fixed at Kansas City by the Standard Oil Company. That the trade in the products of petroleum, that is, illuminating oils and gasoline, was controlled by the respondents is made clear by the evidence showing that they sold ninety per cent of such products sold in Missouri. This evidence justifies the statement of Mr. Wilhoit that his [\*338] experience, both as an employee of the Standard Oil Company and as an independent dealer, was that the Standard Oil Company or Waters-Pierce Oil Company would suffer the independent to control about ten percent of the business, but if he attempted to go beyond and control more trade, prices were so reduced that the independent could not long exist. That prices were maintained is evident from the fact that [\*\*\*62] during the last ten years they have tended upward, although large discoveries of oil fields have been made in States and territories bordering on Missouri. It is further clear from a consideration of all the evidence that a combination was formed between the respondents to control, limit and prevent competition in the business of buying and selling the products of petroleum in the State of Missouri.

Wherefore, after giving due and careful consideration to all the testimony, the Commissioner finds that the respondents, Standard Oil Company of Indiana, Waters-Pierce Oil Company and Republic Oil Company, on the 8th day of July, 1901, in the State of Missouri, created, entered into and became members of a pool, trust, agreement, confederation, combination and understanding among themselves and each other, which pool, trust, agreement, confederation, combination and understanding, created and entered into by respondents, as aforesaid, continued to exist and be maintained up to the date of filing the information in this case, and were created and entered into for the following purposes:

- (1). To regulate, fix and control the prices to be paid by retail dealers and others in the State of [\*\*\*63] Missouri for the products of petroleum;
- (2). To control and limit trade in the products of petroleum in the State of Missouri;
- (3). To control, limit and prevent competition in the business of buying and selling the products of [\*339] petroleum in the State of Missouri, between themselves and others engaged in like business.

That said respondents, Standard Oil Company of Indiana, Waters-Pierce Oil Company and Republic Oil Company, during the above specified time, under and by virtue of said pool, trust, agreement, confederation, combination and understanding, so created and entered into have

- (1). Fixed and maintained the prices of the refined products of petroleum, sold and offered for sale by them and others in the State of Missouri;
- (2). Controlled and limited the trade in said refined products of petroleum in the State of Missouri;

That in pursuance to said pool, trust, agreement, confederation, combination and understanding, so created and entered into by the respondents, they have controlled the prices of the refined products of petroleum, prevented competition among themselves, and among themselves and others therein, secured control of the principal part of the refined [\*\*\*64] products of petroleum in the State of Missouri and of the purchase and sale of such oils, limited the trade therein, have driven competition out of the State, thereby depriving the people of the State of free, full and wholesome competition in the sale of the refined products of petroleum, and have under and in pursuance of said pool, trust, agreement, confederation, combination and understanding, so created, entered into and maintained, deceived and misled the public into the belief that they were separate and distinct corporations pursuing an independent business.

All contrary to and in violation of the laws and public policy of the State of Missouri. Done this 24th day of May, 1907.

Upon the incoming of the report of the Master, the respondents Standard Oil Company and the Republic [\*340] Oil Company filed seventy-five exceptions there-to, and the Waters-Pierce Oil Company filed thirty additional ones.

It will serve no useful purpose to set out [\*\*1006] these exceptions in the statement of the case, for the reason that such of them as have been accentuated by discussion, in briefs of counsel, will be carefully considered under appropriate headings in the opinion.

#### OPINION.

##### [\*\*\*65] I.

As elsewhere stated, this is an original proceeding, instituted in this court by the Attorney-General, on information, in the nature of *quo warranto*, against the respondents, to forfeit their charters and revoke their licenses to transact business in this State.

The contention of the informant is, that respondents are guilty of violations of the anti-trust laws of the State, as found in the common law and statutes.

The latter are found in articles 1 and 2 of chapter 143, Revised Statutes 1899, and the provisions thereof in so far as they are material to this controversy are sections 8965, 8966, 8971 and 8978.

Omitting such portions of the sections as are inapplicable to the questions involved in this case, and using the word "person" where the words "individual," "partnership," "corporation" or "association of persons" occur in the statute, those provisions are as follows:

"[HN15](#)[] Section 8965. Any person . . . who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any . . . person or persons, to regulate or fix the price of any article of manufacture, merchandise, commodity, etc., or to maintain [\*\*\*66] said price when so regulated or fixed, or shall enter into, become a member of or a party to any [\*341] pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, merchandise, commodity, etc., shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this article.

"[HN16](#)[] Section 8966. All arrangements, contracts, agreements or combinations between two or more persons designated or made with a view to lessen, or which tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State, and all arrangements, combinations, contracts or agreements, whereby, or under the terms of which, it is proposed, stipulated, provided, agreed or understood that any person or persons doing business in this State, shall deal in, sell or offer for sale in this State any particular or specified article, product or commodity, and shall not during the continuance or existence of any such arrangement, combination, contract or agreement, deal in, sell or offer for sale any competing article, product or commodity, are hereby [\*\*\*67] declared to be against public policy, unlawful and void; and any person or persons becoming a party to any such arrangement, contract, agreement or combination, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties provided for in this article.

"[HN17](#)[] Section 8971. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of this article, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in this State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other State or country, which shall violate any of the provisions [\*342] of the preceding sections of this article, shall thereby forfeit its right and privilege thereafter to do any business in this State, and [HN18](#)[] upon proper proof being made thereof in any court of competent jurisdiction in this State, its right and privilege to do business in this State shall be declared forfeited; and in all proceedings [\*\*\*68] to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State has been, while acting as such agent, in the name, behalf or interest of such foreign corporation, violating any provision of the preceding sections of this article, shall be received as prima-facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, also to the Superintendent of the Insurance Department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation.

"[HN19](#)[] Section 8978. Every pool, trust, agreement, combination, confederation, understanding, or conspiracy entered into, or created, or organized by any . . . person or persons, to regulate, control or fix the price of any article or articles of manufacture, merchandise, commodity, etc., or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations, conspiracies or pools made, created, entered into or organized by any . . . persons to [\*\*\*69] fix the amount or limit the quantity of any article of manufacture, commodity, etc., are hereby declared illegal. If any two or more persons who are engaged in buying or selling any articles of commerce, merchandise, commodity, etc., shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article [\*1007] or thing; or to limit competition in such trade, by refusing [\*343] to buy from or sell to any other person or persons any such article or thing aforesaid, for the reason that such person is not a member of or a party to such pool, trust, combination, confederation, association or understanding, . . . shall be guilty of a violation of this article."

The gist of the complaint against the respondents is thus stated in the language of the Attorney-General, to-wit:

"That the respondents had, between the -- day of \_\_\_, 1901, and the 29th day of March, 1905, created, entered into and become members of a pool, trust, agreement, confederation, combination, arrangement and understanding among themselves for the following purposes:

"First: To regulate, fix and control the prices to be paid [\*\*\*70] by retail dealers and others in the State, of Missouri for the refined products of petroleum sold and offered for sale in this State.

"Second: To control and limit the trade in the refined products of petroleum in this State.

"Third: To control, limit and prevent competition in the business of buying and selling the refined products of petroleum in this State between themselves and others engaged in like business.

"Fourth: To deceive and mislead the public into the belief that said respondents were separate and distinct corporations, each pursuing an independent, business as legitimate competitors in the purchase and sale of the products of petroleum."

At the very threshold of this case, we are met with the contention of the respondents that this court has no jurisdiction of this cause by a proceeding in the nature of *quo warranto*.

They contend, first, that this is a criminal prosecution and that *quo warranto* cannot be used as a criminal procedure; and, second, that the statutes under which it is instituted provide the mode of procedure [\*344] and designate the forum in which it is to be conducted, which is exclusive of all other modes of procedure.

If the respondents [\*\*\*71] are correct in their contention that this is essentially a criminal prosecution within the meaning of the Constitution and criminal laws of the State, then there could be no escape from the conclusion that this court has no jurisdiction over the cause; and, if they are guilty of violating said statutes, then they are guilty of a crime; and should, first, be prosecuted upon an indictment or information, before a court and jury; and, if convicted, then, and not until then, could such a proceeding as this be maintained.

If respondents' major premise is correct, then, as before stated, this court is without jurisdiction over the cause.

In fact, we do not understand the Attorney-General to controvert that proposition; but, upon the other hand, he contends that this is not a criminal prosecution in any sense of the word, but is a civil proceeding on information in the nature of *quo warranto* to oust respondents from transacting business in this State, because of their alleged violation of the statutory and common law against combinations and trusts made in restraint of trade.

If this contention of the State is sound, then it cannot be successfully maintained that this court is without [\*\*\*72] jurisdiction in the premises, for the reason that [HN20](#) section 3 of article 6 of the Constitution of 1875, in express terms, confers power upon this court to issue, hear and determine writs of *quo warranto*.

This brings us to the point where we must determine whether or not this is a civil proceeding within the meaning of that section of the Constitution; if so, then, clearly, this court has jurisdiction of the cause; but, if not, then its jurisdiction should be denied.

[\*345] The question of the proper procedure in this case and the nature of the complaint charged against respondents in the information are so closely allied and related to each other that it will be necessary to consider the two propositions somewhat together.

It would be useless and would serve no good purpose to go into the learning and distinctions between a proceeding by *quo warranto* and a proceeding by information in the nature of *quo warranto*. The demarcation is well defined and has been long established. Resort, however, is rarely ever had to the former, while the latter has grown into almost universal use. Long before the organization of this State, the writ of *quo warranto* had become almost, [\*\*\*73] if not quite, obsolete; and when our Constitution was adopted, proceedings on information in the nature of *quo warranto* were well understood by the bench and bar; and the jurisdiction conferred by said constitutional provision has been construed to mean and include jurisdiction of an information in the nature of *quo warranto*. [[State ex rel. v. Stewart, 32 Mo. 379](#), [State ex rel. v. Vail, 53 Mo. 97](#).]

In the discussion of this question, in the case of *State ex inf. v. Equitable Loan & Inv. Co., 142 Mo. 325*, this court, speaking through that great jurist, Sherwood, J., said, I. c. 335-337:

"At common law, 'the old writ of *quo warranto* is a civil writ, at the suit of the crown; it is not a criminal prosecution. . . This was the true old way of inquiring of usurpations upon the crown, by holding fairs or markets, viz: by writs of *quo warranto*. Then informations in the nature of a *quo warranto* came into use and supplied their place.' These observations fell from Mr. Justice Wilmot in *Rex v. Marsden*, 3 Burr. 1817, in the year 1765. [See High, Ex. Leg. Rem., sec. 603.] In Blackstone, written in 1758, some seven years before the last-mentioned period, it [\*\*\*74] is asserted that the proceeding by *quo warranto* 'is [\*346] properly a criminal method of prosecution.' [Cooley's Black., book 5, ch. 17, p. 262.] [\*\*1008] But [HN21](#)[<sup>↑</sup>] whatever the origin of the writ, whether civil or criminal, it is certain now at the present time and for a long period anterior to this, it has been and is but a civil suit. There is a distinction, of course, to be taken, a distinction pointed out by [Scott, J., in State v. Ins. Co., 8 Mo. 330](#), between a writ of *quo warranto* and an information in the nature of a *quo warranto*, but while this is true, yet it is also true, even in Blackstone's time, the issuance of the writ itself, owing to its cumbersome length, had long fallen into disuse, which resulted in the modern substitutionary and more speedy method of the filing of *ex-officio* informations by the Attorney-General. [Cooley's Black., book 3, chap. 17, p. 262.]

"Our Constitution provides, in the third section of its sixth article, that this court 'shall have power to issue writs of *habeas corpus*, *quo warranto*, *certiorari* and other original remedial writs, and to hear and determine the same.' Inasmuch as the issuance of a writ of *quo warranto* [\*\*\*75] had not occurred in England for centuries; inasmuch as courts, lawers and text-writers had been accustomed for hundreds of years to use the expression '*writ of quo warranto*' as the legal equivalent and synonym of 'information in the nature of *quo warranto*', it will be presumed that the framers of our Constitution were not unmindful or ignorant of such a common form of expression and the meaning which it bore, and, therefore, when they used the words '*writ of quo warranto*' they intended thereby only to convey in abbreviated form the meaning that phrase had for so long a period and so continuously been employed to convey, to-wit, 'informations in the nature,' etc.

"Since writing the above it has been found that in other States possessing organic laws like our own, similar conclusions have been reached. [[State v. Railroad, 34 Wis. 197](#), and cases cited; [State v. Gleason, 1\\*347 12 Fla. 190](#), and cases cited; High's Ex. Leg. Rem., secs. 610, 611.]"

Continuing, in the discussion of the proposition as to whether or not an information in the nature of a *quo warranto* could be sustained against a corporation for misuse and abuse of its franchise by reason of its failure [\*\*\*76] to comply with a statute, when the Legislature had prescribed certain penalties to be imposed in other proceedings for such violation, he said:

"And [HN22](#)[<sup>↑</sup>] the jurisdiction of this court in this regard being conferred by the Constitution, it is beyond the power of the Legislature to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board. [[State ex rel. v. Allen, 5 Kan. 213](#); [State ex rel. v. Messmore, 14 Wis. 115](#); [Kane v. People ex rel., 4 Neb. 509](#); 19 Am. and Eng. Ency. Law, 664; [People ex rel. v. Bristol Co., 23 Wend. 222](#); [People v. Hillsdale Turnp. Co., 1b. 254](#); [State ex rel. v. Baker, 38 Wis. 71](#); High, Ex. Leg. Rem., sec. 615; 2 Spelling, Ex. Rlf., secs. 1772, 1873.] In consequence of this well-recognized principle, sections 7 and 8 of the Laws of 1895, pages 31 and 32 in relation to the duties of the supervisor of building and loan associations, to institute proceedings in the circuit court against a delinquent building and loan association, and that such proceeding shall be conducted by the Attorney-General, cannot abate [\*\*\*77] the jurisdiction conferred on this court by the Constitution nor deprive the Attorney-General of his common law and inherent powers to file *ex-officio* informations, as in the present instance."

The statutes under which the respondent in the case just mentioned was organized and doing business imposed upon it certain penalties for violating such statutes; and also provided that if any such company should violate the provisions of its charter [\*348] or laws of the State, the supervisor of building and loan associations "shall institute proceedings in the circuit court of the city or county in which such association has, or had, its principal office, to enjoin or restrain such association from the further prosecution of its business, either temporarily or perpetually, or for such injunction and dissolution of such association and the settling and winding up of its affairs, or for any and all of said remedies combined, as the supervisor may deem necessary." [R. S. 1899, secs. 1385, 1392, and 1393.]

It is thus seen that those sections of the statutes are just as full and explicit, in prescribing penalties, forfeitures and remedies for their violation and in designating the [\*\*\*78] court in which those penalties and forfeitures are to be imposed and adjudged, as are the anti-trust laws now under consideration. But, notwithstanding those ample statutory provisions, this court, in that case, held that an information in the nature of *quo warranto* would lie to oust the respondent therein of its charter rights for violating its charter powers. It was also held therein that this court derived its jurisdiction from the Constitution, and that even though the Legislature had attempted to deprive it of that jurisdiction, by express enactment, it could not have done so, for the reason that such a statute would be unconstitutional and void.

Mr. High, in his consideration of this subject, uses the following language: "A corporate franchise is a species of incorporeal hereditament, in the nature of a special privilege or immunity, proceeding from the sovereign power and subsisting in the hands of a body politic, owing its origin either to an express grant, or to prescription which presupposes a grant. It follows, therefore, that the sovereign power has the right at all times to inquire into the method of user of such franchise, or the title by which it is held, and to [\*\*\*79] declare a forfeiture for misuser [\*\*1009] or non-user, [\*349] if sufficient cause appears, or to render judgment of ouster if the parties assuming to exercise the franchise have no title thereto." [High, Ex. Leg. Rem., sec. 648.]

The same proposition is announced by Clark and Marshall in their work on Private Corporations, vol. 2, sec. 314b, in the following language: "As a general rule, however, HN23<sup>↑</sup> the charter of a private corporation will be forfeited, in proper proceedings by the State, for any wilful or fraudulent misuser or abuse of its franchise which injures or menaces the interests or welfare of the State or of the community in which it transacts business, whether the misuser or abuse consists in the exercise of a franchise or power not conferred upon the corporation by its charter, or in the violations of prohibitions in its charter, or in violations of prohibitions in general laws to which it is subject, or in the violation of established principles based upon the ground of public policy."

And in State ex rel. v. Gas Co., 153 Ind. 483, 53 N.E. 1089, I. c. 486, 487, and 489, the right of the State to a forfeiture on account of the participation in a combination in [\*\*\*80] restraint of trade, is announced in the following language:

"Where, however, the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, it thereby may be said to offend against the law of its creation, and consequently forfeits its right longer to exercise its franchises, and is subject to a judgment of ouster. . . .

"HN24<sup>↑</sup> Corporations are recognized as creatures of the law and they certainly owe obedience thereto, and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or forbidden acts, the State unquestionably has the right, and it is its duty, [\*350] to object, and it may interpose by information, and wrest from the offending corporations its franchises. [Beach, Pr. Corp., secs. 840 and 841; Cook on Stock and Corp. Law, sec. 635; People ex rel. v. Dashaway Assn., 84 Cal. 114, 24 P. 277.] . . .

"The authorities affirm, as a general rule, that, if the act complained of, by its results, will restrict or stifle competition, the law will [\*\*\*81] regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public. [Salt Co. v. Guthrie, 35 Ohio St. 666; Swan v. Chorpenning, 20 Cal. 182; State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279; Gibbs v. Smith, 115 Mass. 592; Richardson v. Buhl, 77 Mich. 632, 43 N.W. 1102; Pacific Co. v. Adler, 90 Cal. 110, 27 P. 36; Beach on Monop. and Ind. Trusts, sec. 82.]"

In the case of State ex inf. v. Delmar Jockey Club, 200 Mo. 34, 92 S.W. 185, 98 S.W. 539, this same question came before this court. In that case a forfeiture of the charter was asked by the Attorney-General, because the club had so conducted its affairs as to violate the criminal laws of the State against book-making and pool-selling. In that case, as in the case at bar, counsel for respondent contended that in view of the fact that the statutes prescribed penalties for their violation, that constituted the sole remedy for their redress, or that there must be a

conviction [\*\*\*82] under the statute for its violation before a judgment of forfeiture could be declared against the corporation. In the discussion of that case this court said, l. c. 50, 51 and 55:

"It is apparent that this decision is not an authority for the contention that a corporation is not subject to an action of *quo warranto* to oust it of the franchises conferred upon it for a misuse or perversion of them, or that a corporation is exempt from the consequences [\*351] of unlawful or wrongful acts committed by its agents in pursuance of the authority derived from its charter. The information charges that respondent, 'acting through its officers, agents, employees and representatives in charge of its business,' engaged in the acts of misuser charged against it in the information. It will thus be seen that the unlawful act charged is not against the officers, agents, employees and representatives of the corporation, but against the corporation itself. There can be no doubt that [HN25](#) [↑] a corporation may be proceeded against by *quo warranto* for a misuse or perversion of the franchises conferred upon it by the State, notwithstanding its officers and agents may at the same time be amenable to [\*\*\*83] the criminal law for offense committed by them in the perversion of such franchises. If a corporation, through its servants and agents, may be guilty of such abuses of its franchises as will subject it to ouster by *quo warranto*, we can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding. Nor are we prepared to give assent to the contention that the defendant corporation could not be held to answer for such wrongful acts until its agents, guilty of the criminal offense, be tried and convicted.

"It is argued by defendant that forfeiture will not lie for an illegal act committed by a corporation. It is true that not for every illegal act will the charter of a corporation be forfeited; but the charter of the defendant is a contract with the State that it will use the franchise therein granted; that it will not misuse or pervert those franchises, and that it will not engage in the doing or carrying on any business which is [\*\*1010] unlawful or immoral. . . .

"It is alleged in the information [\*\*\*84] and admitted by the demurrer that during the time indicated defendant [\*352] sold pools to and registered bets with minors, which was a violation of law, it having no authority to do so. To make and sell pools and book-bets to minors is expressly prohibited by statute, and any person doing so may be punished as for a misdemeanor. [Sec. 2193, R. S. 1899.] So that defendant was without authority from any source to sell pools to or register bets with minors, and in doing so it was exercising a power which it did not possess, the tendency of which was immoral and to encourage minors in dissipation and vicious habits. Defendant now contends that the portion of the petition which relates to such sales does not state violations of law, because it is not alleged that the respondent knew at the time that such persons were in fact minors. The statute is an absolute inhibition against selling pools or book-bets to minors, and it was entirely unnecessary that the petition should allege that such sales were made to minors, knowing such persons to be minors. It was the defendant's duty to know when sales were made that they were not made in violation of law."

So in the case of [Terrett \[\\*\\*\\*85\] v. Taylor, 9 Cranch 43, 3 L. Ed. 650](#), Mr. Justice Story said: "[HN26](#) [↑] A private corporation created by the Legislature may lose its franchises by a misuser or *nonuser* of them; and they may be resumed by the government under a judicial judgment upon *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."

To the same effect are: High on Ex. Leg. Rem., secs. 648 and 649; 2 Spelling on Injunctions and other Ex. Rem., secs. 1812 to 1815; People v. Dispensary Co., 7 Lans. (N.Y.) 304; Bank v. State, 1 Blackf. (Ind.) 267; 5 Thompson on Corps., pp. 6615-16; 10 Cyc. p. 1281; Angell and Ames on Corps., sec. 774.

It is thus seen that a corporation can so offend against the laws of the State as to justify the Attorney-General [\*353] in proceeding against it by information in the nature of *quo warranto* to forfeit its corporate franchise; and those offenses may be against the common law as well as against the statute laws of the State.

And it is wholly immaterial, and the corporation cannot justify or defend its conduct in that regard by a plea, that such conduct was a violation [\*\*\*86] of the criminal laws of the State, by which it and its officers and agents are rendered amenable to the penalties and punishments thereof.

In other words, [HN27](#)<sup>↑</sup> the laws of the State authorize and direct the Attorney-General to institute civil proceedings by information in the nature of *quo warranto* against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, nonuser or usurpation of power so conducted itself as to violate the laws of its being or the criminal laws of the State. If, upon trial, the corporation is found guilty, a decree of forfeiture must go, and the court has the power, in addition, to impose penalties for such violations of the laws as it may deem proper. This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea that there is an implied or tacit agreement on the part of every corporation, by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the State in the manner before [\\*\\*\\*87](#) suggested. [State ex inf. v. [Delmar Jockey Club, 200 Mo. 34, 92 S.W. 185, 98 S.W. 539.](#)]

In addition thereto the Legislature has the unquestionable power and authority to declare the acts which will work a forfeiture of the charter shall also constitute a crime, and subject the corporation and its agents and servants to punishment under the criminal laws of the State. [[Stockwell v. United States, 80 U.S. 531, 13 Wall. 531, 20 L. Ed. 491](#); [\[\\*354\] Waters-Pierce Oil Company v. State of Texas \(Texas Court of Civil Appeals\), 48 Tex. Civ. App. 162, 106 S.W. 918](#); State ex inf. v. [Delmar Jockey Club, 200 Mo. 34](#) to 55, [92 S.W. 185, 98 S.W. 539.](#)]

It must, therefore, follow from what has been said, that this is not a criminal prosecution as contended for by respondents; nor is the procedure provided for in section 8971, Revised Statutes 1899, the exclusive remedy available to the State to correct abuses and usurpation of powers by corporations doing business in this State.

We are, therefore, clearly of the opinion that this court has jurisdiction over the cause, and to hear and determine the same.

## II.

It is insisted by the informant that a violation of section 8978 by a corporation [\\*\\*\\*88](#) constitutes a misuse, abuse or usurpation of franchises, notwithstanding the fact that the law fixes penalties and provides a mode of procedure for such violation.

This proposition is closely related in some respects to the one disposed of in paragraph one of this opinion, and much of what was there said applies with equal force in support of the proposition now in hand, especially that portion holding a corporation will forfeit its franchises by a continuous violation of any of the laws of the State.

But, independent of that holding, it is also clear from reading articles 1 and 2 of chapter 143, Revised Statutes 1899, together, that it was the intention of the Legislature to have the franchises of all corporations declared forfeited if they should violate either or both of said articles.

This court, in the case of [Sales v. Barber Asphalt Paving Co., 166 Mo. 671, 66 S.W. 979](#) and 678, held, and quoted with approval the following language from Mr. Sutherland:

[\[\\*355\] "HN28](#)<sup>↑</sup> 'All consistent statutes relating to the same subject, and hence briefly called statutes *in pari materia*, are treated *prospectively* and [\[\\*\\*1011\]](#) construed together as though they constituted one act. [\[\\*\\*\\*89\]](#) This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day.' [Sutherland, Stat. Construct., sec. 283.]

"And 'A statute must be construed with reference to the system of which it forms a part. And statutes on cognate subjects may be referred to though not strictly *in pari materia*.' [Id., sec. 284.]

"Further on, the learned author discussing and discoursing upon the same subject, says: [HN29](#)<sup>↑</sup> 'Where enactments separately made are read *in pari materia*, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred

that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent [\*\*\*90] and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other even after some of them have expired or been repealed.' [Ib., sec. 288.]"

This same canon of construction was approved and adopted by this court, In Banc, in the case of [State ex rel. v. Patterson, 207 Mo. 129, 105 S.W. 1048](#), l. c. 143.

[\*356] In [Dowdy v. Wamble, 110 Mo. 280, 19 S.W. 489](#), it was said: "[HN30](#) There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof."

In [Gabriel v. Mullen, 111 Mo. 110, 19 S.W. 1099](#), it was said: "In construing any statute it is proper and often useful to consider the state of the law existing at its enactment as casting light on the intended scope of the change made by it."

In the case of [Humphries v. Davis, 100 Ind. 274](#), it was said by Elliott, J.: "[HN31](#) A statute is not to be construed as if it stood solitary and alone, complete [\*\*\*91] and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the source from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted [Citing authorities.] As it was said in, . . . 'Construction has ever been a potent agency in harmonizing the operation of statutes, with equity and justice.' [HN32](#) Statutes are to be so construed as to make the law an uniform system, not a collection of divers and disjointed fragments. When this principle of construction is adopted, 'an enactment of today had the benefit of judicial renderings extending back through centuries of past litigation.' [Bishop, Written Laws, sec. 242b.] 'A statute,' says the author just referred to, 'must be construed equally by itself and [\*\*\*92] by the rest of the law. The mind of the interpreter, if narrow, will stumble.' 'The complete doctrine, resulting from a bringing together of its parts, is, that [\*357] all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms.' [Bishop, Written Laws, secs. 113a, 86.]"

If we apply this rule of statutory construction to said articles one and two, then the legislative intent regarding this matter is made perfectly clear. Those two articles are two of the four articles which constitute chapter 143, Revised Statutes 1899, and the title is, "Pools, Trusts and Conspiracies," and the respective title of each article is as follows:

- I. "Pools, Trusts and Conspiracies."
- II. "Agreements to Regulate Prices and Limit Trade."
- III. "The Testimony in Proceedings Against Trusts, etc."
- IV. "Taking Testimony Before Institution of Proceedings."

All of these articles are germane to the title of said chapter 143, and each and [\*\*\*93] every word, line and section thereof are directed against the formation and maintenance of pools and trusts and providing a mode for their destruction.

Section 8965 is intended to prohibit combinations to regulate or fix prices and to maintain them when so fixed; while section 8966 prohibits combinations to lessen competition by dealing in one article under an agreement that no competing article shall be dealt in.

Section 8971 prescribes a mode by which corporations created or doing business in this State shall forfeit their charters and licenses to do business herein by violating any of the provisions thereof, and is substantially as follows:

[\*358] "Section 8971. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of this article, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being [\*\*1012] made thereof in any court of competent jurisdiction in this State, be by the court declared forfeited, void and of non-effect and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other State or country, [\*\*\*94] which shall violate any of the provisions of the preceding sections of this article, shall thereby forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in this State, its right and privilege to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State has been, while acting as such agent, and in the name, behalf or interest of such foreign corporation, violating any provision of the preceding sections of this article, shall be received as prima-facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, also to the Superintendent of the Insurance Department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation."

And section 8978 declares every pool, trust and agreement made and entered into to fix and maintain prices to be illegal, [\*\*\*95] and is substantially as follows:

"Section 8978. Every pool, trust, agreement, combination, confederation, understanding or conspiracy entered into, or created, or organized by any . . . person or persons to regulate, control or fix the price of any article or articles of manufacture, merchandise, [\*359] commodity, etc., or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations, conspiracies or pools made, created, entered into or organized by any . . . person to fix the amount or limit the quantity of any article of any kind whatsoever, or of any article of manufacture, commodity, etc., are hereby declared illegal. If any two or more persons who are engaged in buying or selling any articles of commerce, merchandise, commodity, etc., shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade, by refusing to buy from or sell to any other person or persons any such article or thing aforesaid, for the reason that such person or persons is not a member of or a party to such pool, [\*\*\*96] trust, combination, confederation, association or understanding, shall be guilty of a violation of this article."

If, according to the rule of construction hereinbefore quoted, section 8971 is to be "treated prospectively" and construed together with section 8978, "as one act," then we must read the former section into the latter, and by so doing we have express statutory authority for holding that respondents would be guilty of misuse, abuse and usurpation of power, by entering into agreements to regulate prices, control or limit trade, as denounced by section 8978.

This construction is in harmony with a long and unbroken line of decisions in this and other States. [[State ex rel. v. Patterson, supra.](#)]

The respondents contend that the statutes under consideration are highly penal, and should for that reason be strictly construed, and that the contention of the informant should not be concurred in by the court; and they cite many authorities in support of their contention. While it is true these sections of the statute provide for forfeitures of charters and the revocation [\*360] of licenses of corporations to do business in this State, yet they are not in derogation of [\*\*\*97] the common law, as the authorities heretofore cited firmly establish, but are intended to be in aid of and supplementary thereto, highly salutary and remedial in their purpose; and [HN33](#) the mere fact that heavy losses may be sustained by respondents in consequence of an adjudication of ouster should not influence or deter the court from declaring the intention of the Legislature as contained in those articles. [[State v. Williams, 8 Tex. 255](#); [In re Greene, 52 F. 104](#); [State ex inf. v. Standard Oil Co., 194 Mo. 124, 91 S.W. 1062](#); [Railroad v.](#)

Commonwealth, 35 So. 129; United States v. Freight Assn., 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S.W. 691; Northern Securities Co. v. United States, 193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436.]

This court and many others have held that HN34[<sup>1</sup>] remedial and salutary statutes, though in derogation of the common law, should be construed and enforced according to the plain intention of the Legislature, although heavy damages were prescribed and penalties imposed for their violation. [Yall v. Snow, 201 Mo. 511, 100 S.W. 1, and cases cited; Johnson v. Snow, 201 Mo. 450, 100 S.W. 5.]

And as said [\*\*\*98] by Graves, J., in the Delmar Jockey Club case, *supra*, l. c. 70: "These proceedings are no longer recognized as criminal proceedings and have not been so recognized since the early days of the common law, but we have continually imposed what are called 'fines,' a term no doubt coming down from the time when the proceeding was looked upon as a criminal proceeding. The implied contract with the State, when the charter was given respondent, was that it would exercise and use the granted rights; that it would use none other, or, stated otherwise, that it would not usurp other rights; that it would rightfully use the powers granted, and not misuse them. A willful failure of either of these covenants with the State will authorize [\*\*1013] a forfeiture, and why not a fine? We forfeit [\*361] for nonuser, and why? Because there has been failure to perform the obligations to the State; because there has been a violation of the contract with the State. Misuser is likewise a violation of the implied agreement with the State. So is usurpation. Each are but violations of the implied contract with the State, and for these violations we declare forfeitures. Why not fix penalties and punishments [\*\*\*99] in the one as in the other? The gist of each in *quo warranto* is the willful violation of the rights of the State under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punishments in *quo warranto* proceedings. The violation of a corporation's contract with the State by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under the statute and fixing punishment permitted by the statute. It is the only way the State has of preventing the abuse of the confidences it has reposed in these corporate creatures which are of its own making. This abuse may be by nonuser, misuser, or usurpation, but, in our judgment, the State has the same rights in each event, both as to the forfeiture and the fine." [Also see *State ex inf. v. Equitable Loan & Inv. Assn., 142 Mo. 325*; *State ex inf. v. Armour Packing Co., 173 Mo. 356, 73 S.W. 645*; *Waters-Pierce Oil Co. v. State of Texas (Texas Civ. App.), 48 Tex. Civ. App. 162, 106* [\*\*100] *S.W. 918*; *Stockwell v. United States, 80 U.S. 531, 13 Wall. 531, 20 L. Ed. 491.*]

The Texas case just cited was predicated upon statutory provisions very similar to the statutes of this State regarding pools, trusts and combines made in restraint of trade. There, a civil suit was instituted by the State against the Waters-Pierce Company, seeking to recover penalties prescribed for violating the statutes, and also praying for a forfeiture of the company's [\*362] license to do business in the State. The defendant there, as in this case, contended that the violation of the statute constituted a crime and that it should be prosecuted therefor under an indictment or information, and that a civil action would not lie against it in the first instance for such violation. The court did not sustain that contention, but, upon the other hand, expressly held that the action was a civil suit, and assessed the penalties at \$ 1,625,900, and rendered a judgment revoking defendant's license to do business in the State, as prayed.

We are, therefore, of the opinion that this is a civil suit and not a criminal proceeding, and that full force and effect should be given to the statutes and not emasculated [\*\*\*101] by technical constructions placed upon them by the courts.

### III.

Respondents contend that there is a misjoinder of parties defendant in this cause.

Their position is, that one corporation cannot be joined with another when charged in *quo warranto* proceedings with abuse or usurpation of corporate rights, for the reason that such a charge relates to the individual contract between it and the State.

That is no longer an open or debatable question in this State. It has been fully and firmly determined against respondents' contention in the following cases: State ex inf. v. [Firemen's Fund Ins. Co., 152 Mo. 1, 52 S.W. 595](#); State ex inf. v. [Armour Packing Co., 173 Mo. 356, 73 S.W. 645](#); State ex inf. v. [Continental Tobacco Co., 177 Mo. 1, 75 S.W. 737.](#)

#### IV.

The next contention of respondents is, that the information does not charge them with forming a combination to maintain prices of their commodities, but only charges them with combining to regulate, control and fix prices.

[\*363] If we correctly understand respondents, their position is, that there is a difference between a combination to *maintain* prices and a combination to *fix and control* prices. They seem to [\*\*\*102] concede the former is within the inhibition of the statute, and that such a combination would be unlawful, but deny that the latter is within its purview, and, therefore, such a combination is not prohibited by sections 8965 nor 8966.

While it is true neither of those sections prohibits combinations to fix, regulate or control prices, yet section 8978 does in express terms prohibit all such combinations and agreements; and, if we are correct in the conclusions reached in paragraph two of this opinion, wherein we held that all of these statutes must be construed together, as one act, then it is wholly immaterial whether the inhibition mentioned is contained in sections 8965, 8966 or in 8978. If contained in any one of the three, that would be sufficient; and if violated by the respondents, they would be subject to the forfeitures therein prescribed. This is so plainly the meaning of the statutes, it is not deemed necessary to review the number of authorities cited by opposing counsel in support of their respective positions.

The Legislature was dealing with a grave question of great importance, one that had challenged the minds of the ablest and best men of the country, both in and [\*\*\*103] out of legislative halls, and one which affected the prosperity and welfare of the entire people; and, if unrestrained, might have threatened the very foundations of our form of government. With that aspect of the question before the minds of the law-makers, it is not to be presumed, in the absence of express legislation to the contrary, that they intended to enact laws which mean and are susceptible of the refined and technical construction which has been placed upon them by the able and learned counsel for respondents. [\*\*1014] No fair-minded, unbiased man can read chapter 143 of Revised Statutes of 1899, without logically coming to [\*364] the conclusion that it was the intention of the Legislature to smite with a mail hand all corporations and individuals doing business in this State which persistently or knowingly violated any of the provisions thereof; and pointed out to the courts in no uncertain terms what to do in case they found any such corporation or persons offending against the law.

It is also contended by counsel for respondents that the allegations of the information of the existence of the combination complained of are not sufficient to constitute a cause [\*\*\*104] of action against them. If we correctly understand counsel, their contention is that the information in this case should be drawn with the same rules of strictness which are applicable to criminal indictments and informations. In other words, they contend that the information should state the facts which constitute the pool, trust or combination, and not make the charge in general terms.

It is the formation of and entering into the pool, trust or combination that constitutes the usurpation of corporate powers; and in such cases, according to the text-writers and adjudications, all that is necessary to be stated in the information is a general allegation of the facts constituting the misuser, non-user or usurpation.

When the State challenges the authority of a corporation to do certain things, it must either deny the charge, or, if it is exercising the authority complained of, then it must justify its conduct by showing that it possesses that power and authority under its charter; and the State is not required to allege and prove the facts in detail constituting the mode or manner in which it is violating the law and usurping powers not granted to it by its charter.

In the case of [\*\*\*105] State ex inf. v. Mo. Pac. Ry. Co., 206 Mo. l. c. 40, 103 S.W. 936, this court said:

"In overruling the demurrers in these cases the court does not decide any of the questions touching [\*365] the merits, which were discussed in the oral arguments. The only point decided is that these informations are sufficient

to require the defendant to answer the charges made by the Attorney-General against them, either by specifically denying the charge or stating the facts which in the opinion of the defendants justify them in doing what they are charged with doing.

"The pleadings in a proceeding of this nature are not governed by the rules of pleading stated in the Code of Civil Procedure; the only provision of the code that is extended to a proceeding in *quo warranto* is contained in section 675, Revised Statutes 1899, relating to amendments.

"[HN35](#)<sup>↑</sup> An information in the nature of *quo warranto* filed by the Attorney-General is not of the character of a petition in an ordinary case either in law or equity; it is the official call of the Law Officer of the State on the corporation or individual to show by what authority it or he is assuming to exercise a particular franchise. The rules [\*\*\*106] of pleading in such case are thus stated in 17 Ency. Pl. and Pr., 457-8: 'The office of an information in the nature of a *quo warranto* is not to tender an issue of fact, but simply to call upon the defendant in general terms to show by what warrant or charter the privilege, franchise, or office is held or exercised. Where the State calls upon one to show cause by what authority he exercises a corporate franchise or public office, the allegation by the Attorney-General of intrusion or usurpation may be of the most general character, while the defendant is required to set forth particularly the grounds of his claim and the continued exercise of his right, except where by statute the pleadings are more nearly assimilated to those in other civil actions.' In this State we have no such statute. The same author, at page 467, says: [HN36](#)<sup>↑</sup> 'When one is called upon by the State to show warrant or authority for the exercise of a franchise or office pertaining [\*366] to the State, the defendant must, by his plea, answer or return, disclaim all right to the franchise and deny its usurpation, or allege facts which, if true, will invest him with the legal title of pleading the charter or legislative [\*\*\*107] grant of the franchise sought to be forfeited or seized, or by pleading directly and positively all the facts necessary to establish the title to the office which the defendant is called upon to justify; and in the absence of such an answer the State will be entitled to a judgment of ouster.' There is no such plea as a general denial in a case of this kind.

"If these defendants are not doing what the Law Officer of the State, in a general way, charges them with doing, let them specifically deny the charge; if they are doing it or doing something like it and think they are justified in so doing, let them specifically state it in their answers.

"These demurrs go mainly on the idea that the informations are not sufficiently specific in detailing the facts which constitute the charge of usurpation; that idea is out of place in this kind of proceeding; the State calls on these corporations to answer, and the duty of pleading specifically the facts rests on them.

"In these cases the Attorney-General has (doubtless induced by a practice heretofore tolerated), made more statements of facts than necessary, but they are treated as surplusage." [2 Spelling on Extra Legal Rem., secs. 1851, [\*\*\*108] 1853, 1855; *People ex rel. v. Railroad*, 12 Mich. 389; 17 Ency. Pl. and Pr., pp. 457, 458; *Commonwealth v. Eastman*, 1 Cush. 189; *State v. Parker*, 43 N.H. 83; State ex inf. v. *Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185, 98 S.W. 539; *United States v. Gardner*, 42 F. 829; *Landringham* [\*\*1015] v. State, 49 Ind. 186; *Hazen v. Commonwealth*, 23 Pa. 355; *Cole v. People*, 84 Ill. 216.]

And especially is this rule applicable in this State when such proceedings are civil in their nature; and [\*367] which are not required to be stated with the same technical strictness with which crimes must be charged. [State ex inf. v. *Equitable Loan & Inv. Co.*, 142 Mo. 325; State ex inf. v. *Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185, 98 S.W. 539.] But waiving that point for the present and conceding that this proceeding is in the nature of a criminal prosecution, and that the pleader should be held to the same strict rules of pleading as is required in charging a criminal conspiracy, still we are of the opinion that the information states a good cause of action, for the reason that acts with which the respondents are charged are unlawful.

In such cases the rule is, that, "[HN37](#)<sup>↑</sup> If the act with [\*\*\*109] which the conspirators combine to perform is unlawful, it is unnecessary to set out in the indictment the means employed in accomplishing it. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out such unlawful means." [4 Ency. Pl. and Pr., pp. 713, 714, 716, 717; *Coal Co. v. People*, 214 Ill. 421, 73 N.E. 770.]

Besides this, there are no specific objections made to the sufficiency of the information; all of them are general in their character, and leave the court in the dark to conjecture as to what are the infirmities. But after a careful reading and re-reading the information, and testing its sufficiency by all known rules of pleading, we have been unable to detect any defect in any of its charging parts.

The sufficiency of the information was sustained when the case was here before, [194 Mo. 130](#), and we have no reasons to change our minds upon the question.

We are, therefore, of the opinion that the information states a good cause of action.

[\*368] V.

The constitutionality of the statutes upon which this proceeding [\*\*\*110] is predicated is challenged by counsel for respondents for several reasons, which will now receive consideration.

(a) Their position is that those sections are in violation of the first section of the [fourteenth Amendment to the Constitution of the United States](#), in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.

In one sense that may be true, but it is not true in a legal sense.

[HN38](#) [↑] A corporation is a legal fiction -- a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the State, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises. That the State has the power to enforce this agreement, or law of forfeiture, is not questioned by respondents, but they insist that it is a different and greater punishment than is imposed upon an individual for the commission of the same offense. In answer to that, it may be said that an [\*\*\*111] individual is a natural person, created by his Maker, and not by law, and, therefore, has no franchises to exercise or to forfeit, consequently the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

While it is true, to forfeit the charter of a corporation for usurpation of power is equivalent to taking its life, as it were; but we suppose it will not be seriously argued that, because the statute does not demand the life of the individual, as it does that of the corporation, [\*369] as a punishment for his violation of the law, the law should and must be declared unconstitutional and void upon that ground. And, upon the other hand, where a statute denounces certain acts, whether committed by individuals or corporations, or both, it should not be declared unconstitutional because it provides for imprisonment of the former and a fine, or forfeiture of the latter's charter, as punishments for their violation of the statute. But if the contention of counsel for respondents is sound, then any individual could form an unlawful combination in restraint of trade with any corporation, [\*\*\*112] and when proceeded against for such unlawful conduct either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same but different. And we might add that, if their position is tenable, then the Legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit, ergo there is no punishment the Legislature could provide, excepting a fine against each. Such a contention regarding the proposition here involved if followed to its logical conclusion would lead to an absurdity, and, at the same time, shows the unsoundness of respondents' contention.

Nor do said sections of the statute deny respondents' equal protection of the law within the meaning of the [fourteenth Amendment of the Federal Constitution](#).

[HN39](#) [↑] It is not the object or purpose of that provision of the Constitution to prevent legislation which embraces within its provisions all persons or things which naturally and reasonably belong to the same class and similarly situated and [\*\*\*113] where the statute must [\*370] operate equally and uniformly upon all such persons or things

of that class. [*Andrus v. Ins. Assn.*, 168 Mo. 151, 67 S.W. 582; *Waters-Pierce Oil Co. v. State of Texas*, 19 Tex. Civ. App. 1, 44 S.W. I\*\*1016] 936; *Railroad v. Mackey*, 127 U.S. 205; *Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357; *Railroad v. Mathews*, 165 U.S. 1; *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; *Railroad v. Ellis*, 165 U.S. 150.]

The purpose of that provision was to prevent legislation which embraces within its provisions persons or things which affect only a portion of the persons or things which rationally belong to the same class and who are similarly situated. [*Railroad v. Ellis*, 165 U.S. 150.]

Nor do we agree with respondents in their contention that those statutes are violative of that constitutional provision, in that they unjustly discriminate against property by embracing commodities only and not including labor, which, it is contended, may also become the subject of a pool or combination.

While it is true those statutes are limited in their scope and operation to persons and corporations dealing in commodities, [\*\*\*114] and do not include combinations of persons engaged in labor pursuits, yet it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same general or natural classification of rights, or things, and have never been so recognized by the common law, or by legislative enactments. They stand upon entirely different footings, and the laws pertaining to the one are entirely different from those pertaining to the other.

Labor has always been considered in the nature of an attribute to man, and partakes more or less of his individuality, and personal liberty, and is inseparable from his person. Labor and labor organizations are controlled and protected by laws enacted to operate largely upon the individuals personally, and not so much as upon the products of their labor, called commodities; [\*371] while, upon the other hand, commodities are nothing but property, and have no personal connection with the owner whatever.

Legislation affecting property and property rights will in no manner interfere with the personnel of the owner. But that is not true of laws regarding labor, for the reason that the moment you enact laws affecting [\*\*\*115] labor, that moment and by that law you affect the personnel of the laborer. I am not speaking of those laws which are enacted to secure the wages due for labor, but I am referring to the laws that are applicable to labor itself; such as those guaranteeing to the person the right to labor, the right to contract to labor, and the right to agree upon prices to be paid therefor, as well as those which prevent involuntary servitude, etc.

This classification of the laws regarding labor and property has always been recognized, by all nations, in all ages; and those laws which apply to the one have never been considered or looked upon as being special and class-legislation, because they do not embrace both.

Mr. Blackstone, in his masterly treatise upon the common law, starts out by classifying the laws into the rights of persons and the rights of things, and then he treats the laws applicable to each class separately. Our laws are in this day based upon that same classification, and this is the first time I have ever heard it contended that the laws enacted for the one class must embrace the other, otherwise the act would be unconstitutional and void.

Respondents have cited no authority [\*\*\*116] sustaining their contention, and we assume there is none.

In the very nature of things a law could not be enacted which would be equally applicable to persons and things without interfering with the personnel and liberty of the laborer.

The Legislature in enacting these anti-trust laws well knew of this natural classification of commodities [\*372] and labor, and enacted laws only embracing the former, which in no manner deprives their owners of any of their legal or personal rights, while if they had also embraced labor combinations, they would have entrenched upon the personal rights of the labor.

While the Legislature might have included labor combinations, yet it did not do so, and the reason, above stated, alone was a sufficient justification for the omission to include labor combinations in the act; to say nothing regarding

the general and natural classification of persons and things, which has always been recognized by the law-making powers.

There is nothing new that can be said upon this subject which would throw any additional light upon it. The authorities above cited are but a few of the many which support the conclusions above stated.

These sections of our statutes [\*\*\*117] embrace all persons and corporations who naturally belong to the same class, and they do not arbitrarily and capriciously, without reason, divide classes or distinguish between classes existing under similar conditions.

(b) The constitutionality of sections 8983 and 8984 is also vigorously assailed by counsel for respondents.

In pursuance of those sections, respondents were required by this court to produce certain books and papers belonging to and in their care and custody, before the Master, to be used as evidence in this proceeding; and the latter provides that if the officers or agents of the corporation do not appear to testify and do not produce the books and papers ordered produced by the court, or by the officer authorized to take the evidence, then it shall be the duty of the court, upon proper motion, to strike out the answer, motion, reply, demurrer or other pleadings of said corporations whose officers or agents are in default, and proceed to render judgment by default against said corporations.

[\*373] When the order was made upon said respondents to produce the books and papers, they then assailed the constitutionality of both of these sections of the statutes. [\*\*\*118] In a very clear and able opinion written by Lamm, J., this [\*\*1017] court ruled against the contentions of respondents as regards section 8983, and held it to be constitutional; but declined to pass upon the constitutionality of section 8984, because it was not properly before the court, because none of the respondents had disobeyed the order of the court. [State ex inf. v. Standard Oil Co., 194 Mo. 124 to 150, 91 S.W. 1062.] We have re-examined the questions there presented and which are renewed here. In so far as what is there said regarding section 8983, it is sufficient to say that we are perfectly satisfied with the reasoning and conclusions there reached; but the objections urged against section 8984 demand further consideration.

In pursuance to the order above mentioned, the respondents produced the books and papers designated therein, and they were introduced and used as evidence in the case. They now renew their objections to the validity of that section, and say it is violative of both the State and Federal Constitutions, in that they produced the books and papers under the threatened penalty of having a judgment of ouster rendered against them.

Counsel for respondents [\*\*\*119] have not pointed out or suggested in what manner, nor have we been able to see how, a threatened judgment of ouster could or did in any conceivable way deprive any of the respondents of their property without due process of law, either within or without the meaning of the State and Federal Constitutions. They were clearly served, and were in court, appeared and resisted the right and authority of the court to make the order. This was a "hearing," and due process of law within those constitutional provisions. And if, after such hearing, respondents had seen proper to disobey the order and thereby have [\*374] suffered judgment by default to have been rendered against them, that would have been their privilege and fault, and not the fault of the law; and, if upon the other hand, they should obey the order, as they did in this case, then the trial would proceed in due course to final judgment upon the merits, as was done here.

In each case they had a trial according to due process of law, which means according to the laws of the land. [Naylor v. Harrisonville, 207 Mo. 341, 105 S.W. 1074.]

Similar statutes to the one under consideration are in force in this State and apply to [\*\*\*120] all litigants, and they may thereby be compelled to testify as witnesses before the court or referee, and be required to produce books and papers in their charge or under their control relative to the issues involved, under penalty of having their pleadings stricken out and judgment rendered against them for disobeying any such order of the court. [R. S. 1899, secs. 709, 710, 737, 738, 739 and 740.]

These statutes were first enacted shortly after the organization of the State; and similar statutes exist in almost all the States of the Union, and our attention has not been called to any case which has held any such statute to be unconstitutional.

Independent of what we have here said, the reasons assigned by this court when this case was formerly here for holding section 8983 to be constitutional apply with equal force and logic to section 8984. If the former is valid and authorizes the court to make the order, then it must follow as a necessary corollary that the latter, which empowers the court to enforce its orders by striking out the pleadings, must also be valid. It would be a foolish thing to argue or hold that the court has the authority under the statutes to make the order [\*\*\*121] and then hold that the court has no authority thereunder to enforce the obedience of such order after it is made. [State ex inf. v. Standard Oil Co., [\[\\*375\]](#) 194 Mo. 124; State ex inf. v. Continental Tobacco Co., 177 Mo. 1, 75 S.W. 737.]

(c) Respondents' next insistence is, that because they were compelled by the process of the court to produce testimony against themselves, they must be discharged in this proceeding. This contention is untenable.

(1) Section 8989, Revised Statutes 1899, granted immunity to all the witnesses who were produced by respondents and who testified in compliance with the order of the court. No witness can avail himself of section 23 of article 2 of the Constitution of 1875, nor of the Fifth Amendment of the Constitution of the United States, as to giving oral testimony, because said statute grants him immunity from prosecution; nor can he set those constitutional provisions up against an order for the production of books and papers, as the same statute would equally grant him immunity in respect to matters provided thereby. [Hale v. Henkel, 201 U.S. 43 to 73, 50 L. Ed. 652, 26 S. Ct. 370.]

(2) Nor was it intended by section 11 of article I [\*\*\*122] of the Constitution, nor the Fourth Amendment of the Constitution of the United States, known as the search-and-seizure clauses, to interfere with the power of courts to compel the production upon trial of documentary evidence under a subpoena *duces tecum*. [Hale v. Henkel, *supra*, l. c. 73.]

(3) While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers.

There is a distinction between an individual and HN40[<sup>↑</sup>] a corporation; the latter, being a creature of the State, has no constitutional right to refuse to produce its books and papers in court for examination in the trial of a proceeding by the State against it; nor can the [\*376] officer in charge of the corporation charged with a violation of the statutes plead the criminality of [\*\*1018] the corporation as a refusal to produce the books. [Hale v. Henkel, *supra*, pp. 74 to 76.] The rule above announced has the sanction of the highest court in the land and was applied in a criminal prosecution, and [\*\*\*123] *a fortiori* should the same rule apply to a civil proceeding like the case at bar.

(d) It is also contended that these anti-trust statutes violate the provisions of section 8 of article I of the Constitution of the United States, which gives Congress the power to regulate commerce with foreign countries and among the several States and Indian tribes.

It was not the intention of the Legislature, by the enactment of those statutes, to interfere with interstate commerce, but the clear intention was to prevent the formation and maintenance of pools, trusts and combinations in restraint of interstate commerce.

HN41[<sup>↑</sup>] The Legislature has no power or authority to prevent respondents from carrying on interstate trade, for the reason that power is vested in and rests with Congress; but it does possess the power to authorize the courts to forfeit the charters of all corporations organized and existing under the laws of this State for the usurpation of powers not granted to them, or for misuser or nonuser of those granted; and it is wholly immaterial whether those corporations are engaged in interstate commerce or not.

HN42[<sup>↑</sup>] The Legislature also possesses the undoubted authority to revoke or forfeit [\*\*\*124] the license issued to any foreign corporation authorizing it to do an interstate business in this State. The revocation of such a license in

no manner interferes with interstate commerce. The authority to conduct such business is obtained under the acts of Congress and not by virtue of the laws of the State. A license from the State can neither confer nor take away the authority or right of [\*377] a foreign corporation to carry on interstate commerce; and, that being true, we are unable to see in what possible manner the forfeiture of such a license, that is, a license which only authorizes a foreign corporation to do an interstate business, can possibly offend against section 8 of article I of the Federal Constitution, which only applies to interstate commerce.

We are, therefore, of the opinion that this contention of respondents is not well founded.

(e) Nor are we able to concur with the learned counsel for respondents in their contention that sections 8965, 8966, 8967, 8971, 8972 and 8978, Revised Statutes 1899, are void for the reason that they violate section 10 of article I of the Constitution of the United States which provides that no State shall enact any law which [\*\*\*125] will impair the obligations of a contract.

Clearly [HN43](#)[<sup>1</sup>] that section of the Constitution has no application to a license issued by the State to a foreign corporation to do business herein, for the reason that when it accepted the license, it impliedly, at least, agreed to transact such business under and in obedience to the laws of this State in the same manner as a domestic corporation should transact similar business, and that if it violated the laws of the State, then it would thereby forfeit its rights to such license, in the same manner that the domestic corporations would forfeit their charter rights by offending against the laws. [[Orient Ins. Co. v. Daggs, 172 U.S. 557, 43 L. Ed. 552, 19 S. Ct. 281](#); [Hooper v. California, 155 U.S. 648, 39 L. Ed. 297, 15 S. Ct. 207](#).]

The mere fact that the licenses granted to the Indiana and Republic Companies were issued prior to the enactment of some or all of those sections does not change the legal aspect of the question, because the enactment of those statutes was but the exercise of the police power of the State, which cannot be contracted away or surrendered by legislation. As shown by the numerous authorities before cited, [HN44](#)[<sup>1</sup>] the police [\*\*\*126] power of the State is an inherent power of sovereignty and cannot [\*378] be contracted away. [[Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273](#).]

(f) It is finally contended by respondents that sections 8965, 8966, 8971 and 8978 are all unconstitutional and void because they contravene section 1 of the Fourteenth Amendment to the Constitution of the United States, in this, that they abridge the privileges and rights of respondents to make valid contracts with respect to their business and property.

In support of that contention learned counsel for respondents argue that under that section of the Federal Constitution they had the legal right to make contracts in reasonable restraint of trade, and that the sections of the statute mentioned prohibit the making of all contracts in restraint of trade, those that are reasonable as well as those that are unreasonable and unjust, consequently the statute must fail.

In answer to that contention it may be said that counsel do not correctly state the rule of law regarding such contracts. The universal rule is that [HN45](#)[<sup>1</sup>] two or more parties may enter into any lawful contract regarding any matter, and if that otherwise legal contract [\*\*\*127] only incidentally limits trade or fixes prices, then that legal contract will not be held void on the ground that it incidentally operated in restraint of trade. [[Shawnee Compress Co. v. Anderson, 209 U.S. 423, 434, 52 L. Ed. 865, 28 S. Ct. 572](#); Phillips v. Iola Cement Co., 61 C.C.A. 20; Whitwell v. Continental Tobacco Co., 60 C.C.A. 299.] But if the primary purpose of the contract was to limit and restrain trade, then the contract would be void at common law, and would not be protected by the constitutional provision mentioned, however slight that interference or restraint might have been.

But even if that was not the common law, yet there is nothing in either the State or Federal Constitution which prevents the enactment of a statute prohibiting the making of all contracts in restraint of trade [\*\*1019] whether reasonable or unreasonable. The Supreme Court of [\*379] the United States in discussing that question in the case of [Shawnee Compress Co. v. Anderson, 209 U.S. 423, 52 L. Ed. 865, 28 S. Ct. 572](#), used this language: "And it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the [\*\*\*128] common law." [Horner v. Graves, 7 Bing. C.P. 735; [Northern Securities Co. v. U. S.](#),

193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436; United States v. Addyston Pipe & Steel Co., 85 F. 271; State ex inf. v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S.W. 595.]

The same is true and may be said of the statutes under consideration. They prohibit the making of all contracts and combinations which have for their object and purpose the restraint of trade or the fixing and maintaining of prices; but those sections in no manner denounce as illegal any contract regarding trade which has for its object a legitimate purpose and which only incidentally stifles trade.

**HN46** [↑] While the Fourteenth Amendment prevents illegal infringements upon the liberty of the citizen to contract, and deprive him of his property and impose restraints and burdens upon him without due process of law, yet that amendment has never been held to prevent the Legislature from the exercise of the general police power of the State. This power extends to many subjects, which need not here be enumerated, which affect the general welfare and public interest within the purview of that power. In the absence of such power, the citizen would [\*\*\*129] have the absolute authority to contract and the power to hold property as he might deem proper; but under that power the State may enact valid laws requiring each citizen to so conduct himself and so use his property as not to unnecessarily injure others. And as said by the Supreme Court of the United States in the case of Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77, "This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.*" Chief Justice [\*380] Taney in discussing the scope of the police powers of the State, in the License Cases, 5 How. 504, said: "They are nothing more or less than the powers of government inherent in every sovereignty; . . . that is to say, . . . the power to govern men and things. Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good."

"The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity." [Railroad v. Beckwith, [\*\*\*130] 129 U.S. 26; State v. Moore, 104 N.C. 714, 10 S.E. 143.]

The Court of Appeals of New York, in the case of Bertholf v. O'Reilly, 74 N.Y. 509, said: "**HN47** [↑] All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public welfare. 'We think it is a settled principle,' says Chief Justice Shaw, in Com. v. Alger, 7 Cush. 84, 'growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare.' Judge Redfield, in a passage often cited with approval, speaking of the police power, says: 'By this general police power of the State, persons and property are subject to all kinds of restrictions and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the Legislature to do which, no question [\*\*\*131] ever was, or upon acknowledged general principles can be, made.' [Thorpe v. Railroad, 27 Vt. 140.] [\*381] The police power, so called, inheres in every sovereignty and is essential to the maintenance of public order and the preservation of mutual rights from disturbing conflicts."

And as said by the Supreme Court of Texas in the case of Waters-Pierce Oil Co. v. State of Texas, 19 Tex. Civ. App. 1, 44 S.W. 936 and 12, "**HN48** [↑] The State in the exercise of this power in the selection of remedies looking to the suppression of evils harmful to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation under a capricious exercise of the police power, but a useful regulation in the interest of the public welfare. [Cooley, Const. Lim. (6 Ed.), 707-720.] In enumerating the subjects which may be acted upon by the State in the exercise of its police power, Mr. Tiedeman, in his valuable work on Limitations of Police Powers, names combinations in restraint of trade, section 96; and as said in United States v. Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540, 'Manufacturing [\*\*\*132] or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce which, when carried out, affect the interests of the public.' This is certainly a just acknowledgment of the power, for there are few acts which individuals may engage in that are more harmful in their effects upon the interests of the people generally than trusts and

combinations concerning the commodities useful to mankind. The rights of the individual must yield to the public wants, and his conduct and all property [\*\*1020] held by him is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. 'As said in *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so [\*382] conduct himself, and so use his own property, as not unnecessarily to injure another.' [*Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273.]'

The statutes in question are bottomed upon those police [\*\*\*133] powers which are inherent rights of sovereignty; and in pursuance thereof the Legislature enacted them for the purpose of suppressing the many evils which had grown up under the widespread system of trusts and combinations extending over the entire country, including this State, and to the great injury and detriment of the people.

The necessity and wisdom of such statutes are vouched for by their enactment in almost every State in the Union, as well as by the Congress of the United States, and by the many decisions of the various courts throughout the country sustaining their constitutionality and giving force and efficacy thereto. Such statutes are enacted for the purpose of restraining the unbridled liberty of the citizen in his conduct and use of his property, and no such reasonable restraint imposed by statute has ever been held unconstitutional because it deprived the citizen of his life, liberty or property without due process of law; but, upon the other hand, the courts have uniformly held all such laws to be a wise, just and valid exercise of the police powers of the State.

In the case of *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273, the Supreme Court of the [\*\*\*134] United States went so far as to hold a statute of that State valid which deprived the citizen of all rights to manufacture and sell intoxicating liquors in the State. In that case this question was reviewed at great length and discussed with great learning and ability, and it was there held that the statute was a reasonable and a valid exercise of the police power of the State, and that absolute prohibition did not deprive him of his rights without due process of law.[HN49](#)[

[\*383] Legal regulations and restraints imposed upon the use of property and the authority to contract in reference thereto do not deprive the owner of his property or contract-rights without due process of law. [*Railroad v. Mathews*, 165 U.S. 1; *Railroad v. Humes*, 115 U.S. 512; *Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357; *Walston v. Nevin*, 128 U.S. 578, 32 L. Ed. 544, 9 S. Ct. 192; *Railroad v. Gibbes*, 142 U.S. 386; *State ex inf. v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595; *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033.]

It was contended in the case of *State ex inf. v. Firemen's Ins. Co.*, 152 Mo. 1, 52 S.W. 595, that the **antitrust law** was unconstitutional [\*\*\*135] because it prohibited "a reasonable adjustment and maintenance of rates of premium to be charged for insurance." The court, after discussing the purpose and object of such legislation, says, I. c. 46-7: "Such laws have not only been adjudged constitutional by the Supreme Court of the United States, but the principles they announce have been expressly sanctioned by the Supreme Courts of many other States." [Citing cases from most of the States of the Union.] In answer to the contention that such acts restrain the defendant's right of contract, the court said, I. c. 47: "[HN50](#)[ There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government to legislate is complete, so that, while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar rights of others. This principle underlies and runs through all governments and societies, and it is the corner stone of the police power of the State."

The constitutionality of our anti-trust laws was further recognized [\*\*\*136] in the Beef Trust case and was expressly affirmed in *State ex inf. v. Continental Tobacco Company*, 177 Mo. 1, 75 S.W. 737. [See also *State ex rel. v. [\*384] Brew. Co.*, 104 Tenn. 715; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S.W. 936.]

The construction of such statutes should be made in a liberal spirit. As is said by this court in the case of *State ex inf. v. Standard Oil Company*, 194 Mo. 124, 91 S.W. 1062: "We feel at least on solid ground on the proposition that

statutes leveled against monopolies are buttressed upon the wisdom of the common law, and this court, constrained and enlightened by events of current history, is not required and does not deem itself invited to approach the interpretation of such statutes with a hostile or sour predisposition to drive a coach-and-six through them, but, on the other hand, while sedulously protecting the rights and liberties of the individual from insidious approaches under whatever artful guise, we should at the same time not lose sight of the rights of the community and should endeavor to advance the beneficent purpose underlying such laws ( State ex inf. v. [Armour Packing Company, 173 Mo. 356, 73 S.W. 645](#)) where [\*\*\*137] it can be done without doing violence to constitutional provisions."

While there may be some provisions in said articles one and two of chapter 143, which, if considered alone, might lend color and plausibility to respondents' contention, that [\*\*1021] they prohibit the making of certain contracts which are proper; but when all the sections of those articles are read and construed together, then that objection to their validity fades away and there is not a vestige of color remaining upon which to base such a contention.

**HN51**[] Any strained or extreme construction placed upon a statute might lead to a holding that it was unconstitutional, but no statute should receive such a construction. As is said by the [Supreme Court of the United States in Jacobson v. Massachusetts, 197 U.S. 11, 49 L. Ed. 643, 25 S. Ct. 358](#), I. c. 38-9, in discussing a similar question: "Extreme cases can be readily suggested, but ordinarily such cases are not safe guides in the administration of [\*385] the law. . . . 'All laws should receive a sensible construction, and general terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will, therefore, [\*\*\*138] be presumed that the Legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter.'"

The conclusions above reached are supported by the following cases: [Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S.W. 691](#); [United States v. Joint Traffic Association, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25](#); [United States v. Freight Assn., 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540](#); State ex inf. v. [Armour Packing Co., 173 Mo. 356, 73 S.W. 645](#); [Finck v. Granite Co., 187 Mo. 244, 86 S.W. 213](#).

We are, therefore, of the opinion that none of the sections under consideration are vulnerable to any of the constitutional assaults made upon them.

## VI.

On June 11, 1907, after the time for taking testimony had expired, the Republic Oil Company presented for filing in the office of the Secretary of State, the following affidavit:

"Whereas heretofore, to-wit, on the 8th day of July, A. D. 1901, the Republic Oil Company, being a corporation organized and existing under the laws of the State of New York, did file in the office of the Secretary of State, of the State of Missouri, authenticated evidence [\*\*\*139] of its incorporation, and in all respects complied with the requirements of the law of said State governing foreign corporations, and designating an agent or representative in said State on whom service of process against said corporation could be made; and

"Whereas, the said Republic Oil Company has disposed of all of its property and business interests in said State and ceased doing business therein:

"Now, therefore, the said Republic Oil Company does hereby abolish any and all offices or places of [\*386] business it may have in said State and does hereby revoke and cancel the authority of its present agent, H. C. Cornforth, of Kansas City, in said State, and does hereby withdraw itself from the State of Missouri.

"In witness whereof the said Republic Oil Company does hereby, by its proper officers, cause its name to be signed and its corporate seal to be attached at the city of New York, State of New York, this 3d day of June, A. D. 1906.

"Republic Oil Company.

"By C. L. Nichols, President.

"(Corporate Seal.)

"Attest: Charles T. White, Asst. Secretary.

"*State of New York, County of New York, ss.*

On the 3d day of June, A. D. 1907, before me personally came C. [\*\*\*140] L. Nichols to me known, who being by me duly sworn did depose and say that he is the president of the Republic Oil Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that he signed his name to the same for said corporation, and that all of the statements contained in said instrument are true.

"A. T. Doremus,

"Notary Public, Richmond County.

"[L. S.] Certificate filed in New York County."

The Secretary of State refused to file said affidavit of withdrawal for the following reasons, stated by him:

"I, John E. Swanger, Secretary of State, do hereby certify that the original affidavit of withdrawal of the Republic Oil Company, of which the attached is a copy, was presented to me and left at my office by Frank Hagerman, the attorney of said company, upon June 11th, 1907, with the request that the same be filed in my office, and the only reason that the same was not then [\*387] actually filed was that I desired the advice of the Attorney-General as to whether in view of the pending litigation it should be permitted to be filed.

"Witness [\*\*\*141] my hand and seal this 22d day of July, 1907.

John E. Swanger,

"Secretary of State."

Said company contends that, under and by authority of section 1018, Revised Statutes 1899, upon offering to file the affidavit, it had the legal right to retire from doing business in the State. [HN52](#)[] Said section is as follows:

"The president or secretary of every domestic incorporated company in this State, when it shall dissolve, and the principal officer of every foreign corporation when it shall retire from business in this State, is hereby required to file with the Secretary of State an affidavit to that effect, and any failure to comply with the provisions of this section shall subject such company or the officers thereof to a penalty of from fifty to five hundred dollars, to be collected as is provided for the collection of penalties and remuneration of prosecuting officers in section 1017 of this article."

Counsel, therefore, contend that when they presented the affidavit to the Secretary of State for filing, that act was equivalent to filing it within the meaning of the statute, and that when so filed it retired from the State and ceased to do business herein, and has [\*\*1022] in all respects [\*\*\*142] voluntarily performed all the matters and things which the informant prays this court to compel it to do by its judgment and decree, which, it is insisted, disposes of the subject-matter of the suit in so far as it is concerned, and for that reason this proceeding as to it is at an end, and the cause should be dismissed as to it.

The informant vigorously resists this contention upon two grounds: first, because, he says, there is no proper evidence in the record which shows that company has voluntarily retired from the State; and, second, [\*388] because it is answerable to the court for offenses which are so closely interwoven with and forming a part of the compact or conspiracy charged in the information that it is not entitled to have the cause dismissed against it, but that the cause should proceed regularly to a final determination, and, at that time, a decree should be entered which will properly and justly dispose of the withdrawal question.

As to the first proposition, we have no hesitancy in saying that as an abstract legal proposition under ordinary circumstances any defendant in a suit may abate the same, by voluntarily doing all the things which the pleadings in the [\*\*\*143] cause pray the court to compel him to do; and this may be done on motion at any stage of the litigation, before or after trial, or before or after an appeal is granted.

This question came before the Supreme Court of Massachusetts in the case of [\*In re Franklin Telegraph Co., 119 Mass. 447\*](#), which was a proceeding to forfeit a charter because of an illegal lease of its telegraph line to another line. Prior to the trial the lease was canceled and the court dismissed the proceeding because "the only injury alleged as a sufficient reason for the dissolution has therefore ceased to exist by the abrogation of the lease."

In [\*State v. Centreville Bridge Co., 18 Ala. 678, 681\*](#), the State instituted proceedings to forfeit a franchise because of a non-compliance with the statute. Pending the litigation the Legislature passed an act authorizing an assignee of the company to comply with the statute, but providing "that nothing herein contained shall be so construed as to affect any suit or suits now pending in favor of or against said company." The court said: "Both plaintiff and defendant have united in vesting the subject-matter of the controversy in a third person; the suit must therefore end, [\*\*\*144] for further prosecution would be vain and fruitless. It is said to be a rule that a title to an office will [\*389] not be tried by *quo warranto*, when at the time of the trial the term of office is expired. [[\*State ex rel. v. Jacobs, 17 Ohio 143\*](#); Ang. & Ames. on Corp., 626.] . . . We think the proviso was intended to apply only to suits brought by the company against individuals, or by individuals against the company. It could not have been the design of the Legislature to give to Maberry a privilege for the mere purpose of taking it from him by a suit then pending, and without regard to any act of his."

In [\*Hurd v. Beck \(Kan.\), 88 Kan. 11, 45 P. 92\*](#), it was said: "If we had then decided, or should now decide, the case in favor of the plaintiff, it is evident he would obtain no substantial right thereby; and the time of this court ought not to be occupied by the consideration of abstract questions of law, however important and interesting they may be."

This rule of practice is not confined to this class of cases, but extends to and includes all kinds of litigation; and the court may make the order at any time, upon its own motion, as will appear from the following authorities: [\*\*\*145] [\*Groves v. Richmond, 53 Iowa 570, 5 N.W. 763\*](#); [\*Ditch v. Sennott, 116 Ill. 288, 5 N.E. 395\*](#); [\*Hoskins v. Lord Berkeley, 4 Term R. 402\*](#); [\*In Re Elsam, 3 Barn. & Cres. 597\*](#); [\*Block v. Barton, 27 La. Ann. 89\*](#); [\*York County v. Fewell, 21 S.C. 106\*](#); [\*State v. Brown, 1 Mo. App. 449\*](#); [\*State v. Railroad, 74 N.C. 287\*](#); [\*Kidd v. Morrison, Phil. Eq. \(N. C.\) 31\*](#); [\*Dakota County v. Glidden, 113 U.S. 222, 28 L. Ed. 981, 5 S. Ct. 428\*](#); [\*Faucher v. Grass, 60 Iowa 505, 15 N.W. 302\*](#); [\*San Mateo County v. Railroad, 116 U.S. 38\*](#); [\*Atkinson v. Tabor, 7 Colo. 195, 197, 3 P. 64\*](#); [\*Wood-Paper Co. v. Heft, 75 U.S. 333, 8 Wall. 333, 19 L. Ed. 379\*](#); [\*Cleveland v. Chamberlain, 66 U.S. 419, 1 Black 419, 17 L. Ed. 93\*](#).

We now approach the second proposition mentioned, and it is not so free of doubt, nor so easy of solution. In fact, the adjudications upon this question are very few and meager in so far as our attention has been called to them. But the case of [\*State ex rel. v. Philips, 97 Mo. 331\*](#), bears closer resemblance as to the [\*390] facts and law to the question now under consideration than any we have been able to find. In that case the relator brought a suit in the circuit court of Jackson county against William [\*\*\*146] Taylor and the Armour Brothers Banking Company, asking for judgment declaring null and void two taxbills issued by the city engineer of the City of Kansas against property owned by relator to Taylor in payment for the construction of a district sewer, and held by the banking company as collateral security. Relator claimed in his suit that the taxbills were invalid because the city had no authority under its charter to cause the sewer to be built, but that they were nevertheless an apparent lien against the property and a cloud upon its title. The circuit court dismissed the petition upon a hearing of the case, and relator appealed to the Kansas City Court of Appeals. Errors were assigned and joined in by the parties, and the case was duly submitted to the court for its decision, and was taken under advisement. While the case was in that position, the respondents, Taylor and the banking company, filed in court, against the objections of relator, their suggestions and motion, stating that they had caused the taxbills, [\*\*1023] regarding which complaint was made in the suit, to be cancelled by the engineer in his office and had deposited them, marked paid, with the clerk of the court [\*\*\*147] for the use of relator, and had paid all the costs which had arisen or might arise in the suit, and moving the court to abate and strike from the docket relator's appeal. Relator resisted the motion, and showed by affidavits that he had not paid the taxbills, and that he rejected and refused to accept the proffered satisfaction; that he was prosecuting the suit in

the interest of other property-owners against whose property similar bills had been issued, and who were contributing to the expenses of the suit, as well as in his own behalf, for the purpose of obtaining an adjudication upon the legality of the proceedings under which the sewer was built; [\*391] that the object of his suit was to have the bills cancelled as void *ab initio*, and that he was entitled to an adjudication upon that issue, and that the recent offer of satisfaction was not equivalent to such adjudication, and that he had, during the pendency of the suit, conveyed the property, and covenanted generally that the same was subject to no incumbrance whatever, and he demanded that the court proceed and decide the case. The court, however, sustained the motion, and dismissed the appeal.

The relator then applied [\*\*\*148] to this court for a writ of mandamus, by which it was sought to compel the Kansas City Court of Appeals to reinstate the cause and to proceed with the hearing thereof. After reviewing many of the authorities above cited in disposing of that case, this court, speaking through Sherwood, J., said: "None of them, however, are exactly parallel to the case under discussion. This is no colorable appeal, no moot case, no case which has been compromised or settled; but a case where an offer has been made to the plaintiff by parties defendant; an offer which does not go the whole length of the plaintiff's demand, but an offer which falls far short of that; an offer which virtually confesses that he is right in his contention, but which seeks to head him off, to preclude him from attaining all he demands. After great consideration of the subject, the conclusion has been reached that the offer made was insufficient, and did not, therefore, extinguish the plaintiff's ground of equitable relief. Nothing short of that will answer. *The plaintiff had the right to have the full measure of the relief he claimed, or else, by a solemn adjudication of the court, to know the why and the wherefore of the* [\*\*\*149] *refusal which denied him redress in full of his demand.* He had the right to make the demand he did, and it was out of the power of the defendants to prevent adjudication of the matters demanded, except by a confession as broad as that demanded. In that event, and that event only, [\*392] would the issues in the cause be dead. It would be making a precedent of most dangerous consequence to rule otherwise; in short, it would be sanctioning a *colorable dismissal.*"

The same argument is equally applicable to the contention of the Republic Oil Company. This is not a colorable proceeding against it, no moot case, no case which has been compromised or settled; but a case where an offer has been made to the informant by respondent, an offer which has been rejected; an offer which does not go the whole length of the informant's demand, but an offer which falls far short of that; an offer which virtually confesses that he is right in his contention, but which seeks to head him off, to preclude him from attaining all he demands. The informant charges the Republic Oil Company with entering into an unlawful pool, trust or combination with its co-respondents in restraint of trade and to [\*\*\*150] fix and maintain prices on commodities handled by them to the great damage and detriment of the public.

It is the formation of and entering into the pool, trust, or combination which constitute the usurpation and abuse of corporate power complained of, and which constitute the gist of this action, and the judgment of ouster is only the incident thereto; and the informant has the right to have the full measure of relief claimed, and the voluntary withdrawal of the respondent from the State does not determine the question of the existence of the pool, trust or combination it is charged with, nor satisfy the full demand of the informant. If it does, then all the other two respondents would have to do to get rid of this litigation would be to file similar affidavits with the Secretary of State, and move for a dismissal of the cause, and thereby prevent an adjudication of the questions involved, and, at the same time, escape the penalties of past sin, if guilty, and then, on the morrow, re-enter the State and continue the business as of yore in defiance of all law and good [\*393] morals. No, the issues of this proceeding are not settled, and it is out of the power of the Republic [\*\*\*151] Oil Company and beyond the power of all the respondents to prevent an adjudication of the matters demanded, except by a *confession as broad as are the charges contained in the information.* In that event, and in that event only, would the issues in the cause be dead. The State of Missouri and the entire people thereof are entitled to have the questions involved herein fully and finally settled. It would be making a precedent of most dangerous consequence to rule otherwise, and it would sanction not only a " *colorable dismissal*" but would afford an impenetrable retreat and perfect immunity for such corporations as might see fit to violate the laws of the State.

The prayer of the informant for a judgment of ouster against the Republic Oil Company is but one of the things asked for, but, since it has voluntarily offered to comply with that part of the [\*\*1024] complaint, that fact should be duly considered in entering the decree should the judgment of ouster go against the respondents.

For the reasons above stated, we are of the opinion that the Republic Oil Company is not entitled to have the cause abated or dismissed as to it.

VII.

This brings us to the consideration of [\*\*\*152] the main question involved in this proceeding, and that is, was there an unlawful combination or agreement existing between respondents in restraint of trade and in fixing and maintaining prices, as charged in the information? The State contends that such combination exists, while the respondents deny its existence. The Master found that issue for the State, and respondents except to that finding for various reasons.

The following facts are virtually undisputed:

The Standard Oil Company of New Jersey, which will hereafter be called the New Jersey Company, is [\*394] a corporation organized under the laws of New Jersey, with a capitalization of \$ 110,000,000.

The Waters-Pierce Oil Company is a corporation organized under the laws of this State, with a capitalization of \$ 400,000.

The Standard Oil Company of Indiana is a corporation organized under the laws of Indiana, capitalized at \$ 1,500,000.

The Republic Oil Company is a corporation organized under the laws of New York, with a capital of \$ 350,000.

The New Jersey Company owns practically all of the stock of the Indiana Company; sixty per cent of the stock of the Waters-Pierce Company, and all of the stock of the Republic [\*\*\*153] Company. The New Jersey Company also owns practically all of the stock of several other oil companies, organized under the laws of various States. Mr. H. Clay Pierce owns the remaining forty per cent of the stock of the Waters-Pierce Company.

Practically all the officers and directors of the Indiana Company and of the Republic Oil Company are either officers, directors or employees of the New Jersey Company; and a majority of those of the Waters-Pierce Company bear the same relation to the New Jersey Company.

The main office of the New Jersey Company is located at 26 Broadway, New York City; that of the Indiana Company is located at the same place; that of the Republic Company is located in Cleveland, Ohio; and that of the Waters-Pierce Company is in St. Louis.

The three latter companies kept books, papers and records at their main offices, showing full and complete transactions of each day's business, and each of them made full and complete reports of all of their business transactions to the New Jersey Company, even to the smallest detail. The business, books and accounts of each of those three companies are regularly inspected [\*395] and audited by an auditor of the New [\*\*\*154] Jersey Company twice a year.

These reports embraced, among other things, the sales and delivery of refined oils, deliveries of lubricating oils, comparative sales, deliveries of special oils, deliveries of outside oils, deliveries of wax candles, tank, wagon and milk-can deliveries, sales and delivery of naphtha, marine sales, total sales and net results, semi-annual statements showing costs of barreling and making all kinds of oils and products of petroleum.

A daily cash statement was sent. These cash statements were turned over to the comptroller of the Standard Oil Company of New Jersey.

All of said companies deal in petroleum and the various by-products thereof. The New Jersey and Indiana Companies are producers and refiners of oil and are manufacturers of the various by-products thereof. The Republic Company for a year or so after its organization was also a producer and refiner of petroleum and a manufacturer of various by-products thereof, but was not refining or manufacturing at the time this suit was instituted. The Waters-Pierce Company has never produced or refined oil in this country, but is doing so in the Republic of Mexico.

The Indiana Company owns and operates a [\*\*\*155] large refinery in Indiana and one at Kansas City, Missouri, and a third in the State of Kansas.

The Indiana, Waters-Pierce and Republic Companies are all vendors of refined oils and the by-products of petroleum. The two latter procure all of their supplies from the former.

There are several other oil companies doing business in this State, called "independent companies."

In 1878, by agreement between the Standard Oil Company and Waters-Pierce Company, there was the following division of territory made between them: Beginning at a point on the Mississippi river on the southern boundary of Lincoln county; thence in a [\*396] western direction along the southern boundaries of Lincoln, Pike, Ralls, Monroe and Randolph counties; thence in a southwest direction along the eastern boundaries of Howard, Cooper, Pettis, Benton, St. Clair and Barton counties; and thence west along the southern boundary of Barton county to the Kansas line.

Under that agreement the Indiana Company took the territory lying north of that dividing line, and Waters-Pierce took that lying south of it. The latter company was also given Arkansas, Indian Territory, Oklahoma, Texas, Louisiana and the Republic of [\*\*\*156] Mexico. This division of territory has been respected from the time it was made to the present, and neither the Waters-Pierce Company, upon the one hand, nor the New Jersey Company, upon the other hand, nor any of its subsidiary corporations, which include the Indiana Company, Standard Oil Company of Ohio, Consolidated Tank Line Company, Standard Oil Company of Kentucky, and the Standard Oil Company of Iowa, have ever invaded each other's territory in quest of trade, except as will now be stated.

The Republic Company was the successor of the Schofield, Shurmer & Teagle Oil Company [\*\*1025] of Cleveland, Ohio, which was one of the independent companies, and the most active competitor the Indiana and Waters-Pierce Company had in this State. It had its own refineries, and refined and sold high grades of oil in all parts of the State and throughout the Middle West generally. After the New Jersey Company acquired the Schofield, Shurmer & Teagle interests, it caused the Republic Company to be organized, which took over the assets and property of the former, and continued to refine oil for a short time, and sold it in the same territory its predecessor had done. Not long after the organization [\*\*\*157] of the Republic Company it ceased to refine oil, and its refineries were dismantled, and, after [\*397] that, it procured all of its oil and supplies from the Indiana Company and continued to sell oil in Missouri, as before, with this limitation -- it would compete vigorously for the trade of all of the independent companies but never competed for the trade of the Indiana company, nor for that of the Waters-Pierce Company, except upon three or four occasions, whereupon vigorous protests were entered by the Waters-Pierce Company to the New Jersey Company, which resulted in smothering out all competition between the Waters-Pierce and Republic companies. And it may not be out of place to here state that the latter company, from its organization up to the time of the institution of this suit, masqueraded under and sold oils as one of the independent companies, and thereby caused the public to believe that it was an independent company.

The Indiana Company sells in the territory lying north of the dividing line, and not south of it, while the Waters-Pierce Company sells south of that line, and not north of it. All orders for oil received by the Indiana Company to be delivered in the [\*\*\*158] Waters-Pierce Company's territory are turned over to the latter and by it filed; and all orders received by Waters-Pierce for oil to be delivered in the territory of the Indiana Company are turned over to the latter, and by it filled. Whenever through mistake or design the agents of either of those companies sell oils within the territory of the other, the transaction is turned over to that company and it reaps the benefits thereof.

Neither the Indiana Company nor the Waters-Pierce Company will sell to the independent companies except at retail prices; and both of them have waged a most relentless war against the independents by a system of espionage and rebates given upon sales of goods.

The oil for the Indiana Company, and all other subsidiary companies of the New Jersey Company, is transported through pipe lines and tank cars belonging [\*398] to the latter company; while the oil for the Waters-Pierce Company is transported in tank cars, about one-half of which are owned by it and the other half is owned by the New Jersey Company, which aggregate, if we correctly understand the record, about one hundred and thirty cars. But neither of the said companies will permit any of [\*\*\*159] the independent companies to transport oil through the pipe lines or in their tank cars.

The Indiana Company, Waters-Pierce Company and the Republic Company all sell the same oils and grades of oil under different names or brands; each company having its own names or brands for the oils sold by it.

Prices for the products of petroleum, especially refined oils, illuminating and gasoline, are fixed by the Waters-Pierce Company.

It sends out to the trade card quotations, giving tank, wagon and barrel prices. As a rule those prices are followed by all other oil companies, including the independent companies, doing business in this State. As long as the independent companies do not reduce prices or increase the aggregate amount of their sales above ten or fifteen per cent of the entire amount of the sales made in the State, there is no war made upon them regarding prices; but whenever any independent company reduces prices below those fixed by Waters-Pierce or whenever their aggregate sales exceed fifteen per cent of all sales made in the State, a vigorous warfare is waged against them, chiefly through the Republic Company, by means of an elaborate system of espionage in their business [\*\*\*160] and cutting prices or giving rebates until the independents are glad to throw up their hands and say "enough" and be contented to sell oil at the prices and in the quantities prescribed by the Waters-Pierce Company and acquiesced in by the Indiana and Republic Companies. And as a result of this method, the Waters-Pierce Company fixes the prices [\*399] for which all such oils are sold in the State, by all dealers, including the independent companies, and at the same time and by the same means it controls and monopolizes for itself and the Indiana and Republic Oil Companies from eighty-five to ninety-five per cent of the entire oil business of the State.

The large capital, the means of transportation and the capacious and convenient storage capacity, taken in connection with the almost perfect and far-reaching delivery systems owned, possessed and controlled by the Indiana, Republic and Waters-Pierce Companies, enable them to carry out the business methods above mentioned.

All of the dividends of the Indiana, Republic and Waters-Pierce Companies were paid either directly or indirectly into the treasury of the New Jersey Company, except, however, those which were paid on the forty-per [\*\*\*161] cent of the stock of the Waters-Pierce Company owned by Mr. Pierce -- those dividends were paid to Mr. Pierce, which were about seven hundred per cent per annum on the capitalization of \$ 400,000. This \$ 400,000, however, was not the entire assets of the Waters-Pierce Company. Its total assets amounted to about \$ 12,000,000, which sum if added to the estimated value of the "name and good will" [\*\*1026] of the concern, the total assets would be swollen to the sum of \$ 45,000,000.

The record seems to be silent as to the value of the assets of the New Jersey, Indiana and Republic Companies; nor does it disclose the amount of the annual dividends which have been paid by those companies.

It was a common and frequent occurrence that officers, directors and employees of the New Jersey Company and all its allied corporations, including the Waters-Pierce Company, were transferred from one of said companies to another, either by election or contract of employment.

Auditors working under Mr. Wade Hampton, general auditor of the New Jersey Company, regularly [\*400] audited the books and accounts of all these companies and reported results to him at 26 Broadway, New York City. The salaries [\*\*\*162] of these auditors were fixed by Mr. Hampton, and charged to the Waters-Pierce Company by him, when auditing for that company, which were paid by it, including all of their expenses. Mr. Pierce, however, testified that he had no knowledge of that fact, and that if he had known of it he would not have permitted it. This only

emphasizes the fact that the New Jersey Company exercised control over the Waters-Pierce Company without even consulting him.

Mr. H. M. Tilford, and succeeding him, Mr. R. H. McNall, was the commercial agent of the Waters-Pierce Company, in New York, and his office was in the same rooms with the New Jersey Company, and it was through him that the business of the former company was transacted with the latter.

Mr. C. L. Nichols, president of the Republic Company, was also assistant to Mr. L. J. Drake, sales-agent of the Indiana Company, both of whose offices were located at 26 Broadway, with the New Jersey Company. Mr. Nichols instructed all officers, agents and employees of the Republic Company to inform the trade that said company was an independent company and had no connection whatever with the New Jersey Company. This was done in order that it might sell oils [\*\*\*163] to all persons who would not deal with the New Jersey, Waters-Pierce or other Standard Oil Companies. The bringing of this suit exposed the relations existing between the New Jersey and Republic Company, which destroyed its usefulness and necessitated its going out of business.

The same relations and conditions existing in this State between the Waters-Pierce Company and the New Jersey Company and its subsidiary corporations also existed between them in Texas, Oklahoma and [\*401] Arkansas, with the exception that Waters-Pierce had those States as its exclusive territory.

The officers of all the respondents knew the stock of their respective companies was either owned or controlled by the New Jersey Company, as before stated.

We have thus stated the most salient facts of the case, as shown by the evidence and the Master's report, to be true. Those facts, with certain incidents thereto, taken in connection with certain inferences deduced therefrom, as shown by this report, constitute the reasons assigned by him for finding that the respondents are guilty of the combination and conspiracy charged against them in restraint of trade and in fixing and maintaining prices of commodities [\*\*\*164] handled by them.

The respondents make a most vigorous assault upon that finding of the Master, and insist that those facts, taken in connection with all the reasonable deductions that may be drawn from them, do not establish their guilt.

The position of the Master is, that he had the legal right to and did consider all the facts and circumstances shown by the evidence, and the relation they bore to each other, in connection with the reasonable inferences to be drawn therefrom, and, that, when so viewed and weighed, they pointed with an unerring finger to the guilt of the respondents. While, upon the other hand, counsel for respondents separate each factor of the alleged combination and trust, and each method of doing business in pursuance thereof, from each other. Then they proceed at great length to a consideration of the legality of each part and phase of the alleged combination and each of the different acts, agreements and things done in furtherance thereof, and, as found by the Master, for the purpose of showing the legality of all the transactions and methods employed by them in the conduct of their business.

[\*402] In pursuance of that line of defense, the respondents, [\*\*\*165] while conceding the New Jersey Company owns practically all of the stock of the Indiana and Republic Companies, and a majority of that of the Waters-Pierce Company, yet they advance the legal proposition that such ownership does not constitute an unlawful combination between them in restraint of trade, as charged in the information.

The position of counsel for informant upon that question is not entirely clear, yet they cite authorities which sustain the proposition, that where the stocks of several corporations engaged in the same line of business are placed in the hands of a trustee or in the possession of a holding company, with power and authority in the trustee or holding company to conduct and carry on the business of the several corporations, such placement of stocks and business management constitute, as a matter of law, a trust and combine in restraint of trade within the meaning of the statutes. *Finck v. Granite Co., 187 Mo. 244, 86 S.W. 213; State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279; Northern Securities Co. v. United States, 193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436.*

But in each of those cases the information was predicated upon those facts, [\*\*\*166] and when the evidence disclosed that those allegations [\*\*1027] were true, then those courts held as a matter of law that they constituted a

trust or combination within the meaning of the antitrust statutes. While in the case at bar the cause of action stated is that they, *the three companies*, have unlawfully and fraudulently entered into a conspiracy, combine or agreement in restraint of trade in violation of their corporate rights; and it is not alleged that a trustee was appointed or a holding corporation was organized for the purpose of taking over the stock of the respondent corporations, or that the stock and business management were turned over to such trustee or corporation for the purposes mentioned.

[\*403] Under that state of the pleadings, we are not inclined to lend our assent to the proposition that the ownership of the stock alone, by the New Jersey Company, is conclusive evidence of an unlawful combination between the three respondents, as charged in the information.

But, notwithstanding the last mentioned proposition, counsel for informant insists that such ownership is admissible in evidence as a fact or circumstance tending to show the existence of the [\*\*\*167] unlawful combination charged. That was one of the questions presented to this court for determination when the case was here on a former occasion; and in passing upon that question Lamm, J., speaking for the court, said: "[HN53](#)"<sup>↑</sup> It may be admitted that under some circumstances corporations with no community of interest as holders of stock in each other, or even where the stock was not in the hands of a holding company as trustee, might be guilty of a violation of our anti-trust law. It might further be admitted that a trust or combination might be proved by the overt acts of the agents of respondent corporations sufficiently distinctive and significant and of such long continuance as would tread back and tend to establish the obnoxious pact or trust agreement. [State ex inf. v. [Firemen's Fund Ins. Co., 152 Mo. 1, 52 S.W. 595](#), et seq.] Yet, experience has shown that stock holdings showing a community of interest, while in some cases innocuous, might in given cases be the very root from which the trust agreement grows. On principle, why may not this root be got at? [HN54](#)<sup>↑</sup> In an investigation intended to lead up to the establishment of a fraudulent conspiracy between individuals, taking for illustration [\*\*\*168] a fraudulent disposition of property, it could not be denied that kinship or close business intimacy would be relevant matter, for what it was worth, be that worth much or little, and we can perceive no good reason why this investigation may not [\*404] commence at the very groundwork of these corporations, showing, if fact it be, a close relationship in stock holdings and in the personnel of officers and agents, the use of the same instrumentalities and methods, simultaneous in time and originating in the same radiating center -- a sort of prenatal, natal or else postnatal disposition to combine, as it were -- to be followed, of course, by sufficient proof indicating that the community of stock interest, if any, had been used as a foundation upon which to build the illegal structure denounced by the statute." [State ex inf. v. [Standard Oil Co., 194 Mo. 124, 156, 91 S.W. 1062](#).] That was one of the main questions then presented to this court for determination, but since it has been so earnestly urged again upon our attention, we have re-examined it, and, after due consideration, we are unable to see any good reason for changing our views regarding the conclusions there reached.

[\*\*\*169] It is next insisted by respondents that the division of territory between the Indiana and Waters Pierce Company is not a combination in restraint of trade, and, therefore, is not illegal. Their contention is that this division of territory is not like the case where two independent mercantile companies divide a State for selling purposes, each agreeing not to sell in the other's territory. They differentiate the two cases by saying that the Indiana Company was a producer, as well as a vendor of oils, and that it had a perfect legal right to divide the State into two or more divisions, and to enter into a contract with a dealer in each of said divisions, and thereby bind itself to sell oil exclusively to each of said dealers in each of said divisions, and thereby bind each of said dealers to purchase oil exclusively from it. In other words, the Indiana Company contends that if it had confined itself to refining oil, and if by contract it had bound itself to sell exclusively to one purchaser in the northern [\*405] half of the State, and to another in the southern half, then there could have been no valid, legal objection urged against such contracts.

In the consideration of a [\*\*\*170] similar question, arising under the Anti-trust Acts of Congress, Sanborn, J., in the case of Phillips v. Iola Cement Co., 61 C.C.A. 19, used the following language:

"It is now settled by repeated decisions of the Supreme Court that [HN55](#)<sup>↑</sup> the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the States. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the States, while its main purpose and chief effects are to foster the trade and enhance the

business of those who make it, it does not constitute a restraint of inter-state commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or [\*\*1028] the usual devices to which they resort to promote the success of the business, to enhance their [\*\*\*171] trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the States. [[Hopkins v. U. S., 171 U.S. 578, 592, 19 S. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U.S. 604, 616, 19 S. Ct. 50, 43 L. Ed. 300; U.S. v. Joint Traffic Assn., 171 U.S. 505, 568, 19 S. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U.S. 211, 245, 20 S. Ct. 96, 44 L. Ed. 136; U.S. v. Freight Assn., 166 U.S. 290, 339, 340, 342, 17 S. Ct. 540, 41 L. Ed. 1007; U.S. v. Northern Securities Co. \(C. C.\), 120 F. 721, 725.](#)] The application of [\*406] this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the States. It left the manufacturers who were competing with the plaintiff for the [\*\*\*172] trade of the country free to select their customers, to fix their prices and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the State of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the States, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890. For a more extended consideration of the principles upon which this decision is based, for a citation, review and analysis of the authorities which sustain them and which compel the ultimate conclusion which we have reached in this case, reference is made to the opinion of this court in Whitwell v. Continental Tobacco Co. (which is filed herewith), [125 F. 454](#). A repetition of the citation and review of authorities, and of the more exhaustive discussion [\*\*\*173] of principles there indulged in, would be useless here, and it is omitted."

In [Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 20 Wall. 64, 22 L. Ed. 315, 318](#), the right of a territorial division was distinctly recognized, Mr. Justice Bradley saying: "In accordance with these principles, [\*407] it is well settled that [HN56](#) [↑] a stipulation by a vendee of any trade, business or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding." Again, he said: "Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one [\*\*\*174] of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding?"

In Whitwell v. Continental Tobacco Co., 60 C.C.A. 290, [125 F. 454, 459, 460-63](#), the facts were: "A manufacturer, a corporation, and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them." This was held not to be, within the meaning of the Sherman Act, an arrangement to lessen competition. Judge Sanborn said: "The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of [\*408] them, is indispensable to the very existence of competition. Strike down or stipulate [\*\*\*175] away that right, and competition is not only restricted, but destroyed. . . . In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such

contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is in their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can [\*\*1029] be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged [\*\*\*176] against them did not restrict competition between them and the independent manufacturers or dealers, who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers. The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi-public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms [\*409] upon which it would contract to sell them. Each of them had the right to determine with what person it would make its contracts of sale. [In *Re Greene (C. C.)*, 52 F. 104, 115; In *Re Grice (C. C.)*, 79 F. 627, 644; *Walsh v. Dwight (Sup.)*, 40 A.D. 513, 58 N.Y.S. 91, 93; *Brown v. Rounsvell*, 78 Ill. 589; *Com. v. Grinstead (Ky.)*, 111 Ky. 203, 63 S.W. 427; *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 17 S. Ct. 427, 41 L. Ed. 832]. There is nothing in the Act of July 2, 1890, [\*\*\*177] ch. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which deprived any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contract or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade. The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employee fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell [\*\*\*178] their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employee had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation [\*410] of this act for them to fix their prices too high for profitable investment by the plaintiff. The tobacco company and its employee sold its products to customers who refrain from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants and free to compete for sales to the customers of the tobacco company by offering them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or quasi-public service, to sell to all applicants who sought to buy, or to sell to all intending [\*\*\*179] purchasers at the same prices. They had the right to select their customers, to sell and refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills. It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated section 2 of the Anti-Trust Act, because it was an 'attempt to monopolize . . . part of the trade [\*\*\*180] or [\*411] commerce among the several states.' It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the Act of July 2, 1890, ch. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every

sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. [HN57](#)<sup>↑</sup>] An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases -- dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the States, and some single corporation [\\*\\*\\*181](#) or person must be permitted to receive and [\\*\\*1030](#) control it all in one huge monopoly. The purpose of the Act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared ([Hopkins v. U. S., I<sup>\\*412</sup> 171 U.S. 578, 600, 19 S. Ct. 40, 43 L. Ed. 290](#); [U.S. v. Joint Traffic Ass'n, 171 U.S. 505, 568, 19 S. Ct. 25, 43 L. Ed. 259](#)), have a reasonable construction. The purpose of the second section is the same as that of the first -- to prevent the restriction of competition -- and the two sections ought to receive similar interpretations. The Supreme Court has declared [\\*\\*\\*182](#) that [HN58](#)<sup>↑</sup>] the true construction of the first section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the States. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of the commerce among the States is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the States. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. [HN59](#)<sup>↑</sup>] It was not -- it could not have been -- the purpose or the effect of the second section of this law to prohibit or punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors [\\*\\*\\*183](#) of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the States, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its [\\*413](#) main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the States."

In Dueber Mfg. Co. v. Watch and Clock Co., 14 C.C.A. 14, [66 F. 637, 643, 645, 652](#), Judge Lacombe said: "[HN60](#)<sup>↑</sup>] The phrase used in the Act of 1890, viz: 'restraint of trade,' is no new one. It had heretofore been used by courts applying the doctrines of common law in determining the validity of contracts. It is to be presumed that the lawmakers, when they chose this phrase, intended [\\*\\*\\*184](#) that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used for the act is described as one 'to protect trade and commerce against unlawful restraints and monopolies;' and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. [[U.S. v. Palmer, 16 U.S. 610, 3 Wheat. 610, 4 L. Ed. 471](#)]. The 'restraint of trade' which is obnoxious to the provisions of the first section must be of such kind as was, before the passage of the act, recognized as unlawful. [[In re Greene, 52 F. 104](#); [U.S. v. Freight Ass'n, 58 F. 58](#), 7 C.C.A. 15.] It may be assumed that the total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity enter into a combination in the form of a partnership, and by ingenious advertising, or by the devices of business competition, or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent trade of one or more of their [\\*\\*\\*185](#) competitors therein. But no one, not even the plaintiff in error, contends that the statute forbids any such acts, although, if the words be taken with absolute [\\*414](#) literalness, the phrase 'restraint of trade' is broad enough to cover them . . . [HN61](#)<sup>↑</sup>] An individual manufacturer or trader may surely buy from or sell to whom he

pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is 'devoted to a use in which the public has an interest;' and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. [*Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U.S. 517, 12 S. Ct. 468, 36 L. Ed. 247.] It is a business device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by [\*\*\*186] the maker of any kind of merchandise, [\*\*1031] 'My goods are for sale, only to those who will buy from me exclusively, not to others.'"

Judge Wallace also said: "I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor." In *Vandeweghe v. Brewing Co. (Tex. Civ. App.)*, 61 S.W. 526, 527, it was said: "The only fact relied upon to show a trust is an agreement by the plaintiff not to sell beer to anyone else within a certain designated territory, contributory to the defendant's place of business. We think the case is distinguishable from the cases heretofore held to violate the anti-trust law, and within the doctrine announced in *Gates v. Hooper*, 90 Tex. 563, 39 S.W. 1079."

In *Park & Sons Co. v. Nat. Druggists Ass'n*, 54 A.D. 223, 66 N.Y.S. 615, it was said: "It [\*415] cannot be denied that HN62[<sup>↑</sup>] each manufacturer has the right to refuse to sell to anyone if he sees fit. If he chooses to make his goods, and sell them, he has the right [\*\*\*187] to fix any price he chooses upon them. Not only so, but he has the right to select his own customers. He may agree to dispose of all his goods to one person, or he may be willing to supply the whole trade except one person; and whatever he chooses to do is a matter with which the law has no concern, because the goods are his, to be kept or sold, as he pleases. So he may not only fix his own price, but he may impose such terms as he sees fit, or can exact from his customers. These matters are absolutely within his own control. If each manufacturer is at liberty thus to control the sale of his goods, undoubtedly all may, if they see fit, agree together to enforce conditions which each one seeks to impose upon the dealing with the article which he makes. The action of each manufacturer in fixing prices and imposing conditions of sale is undoubtedly legal."

In *Fowle v. Park*, 131 U.S. 88, 33 L. Ed. 67, 74, 9 S. Ct. 658, it was decided: "A contract, by which defendants, for a valuable consideration, agreed not to sell a certain medicinal preparation, within the territory which it was covenanted complainants should occupy exclusively, nor sell to others for sale there, nor promote such [\*\*\*188] sales, is valid."

Mr. Chief Justice Fuller said: "HN63[<sup>↑</sup>] The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers, and the purchasers were entitled to such protection as was reasonably necessary for their benefit."

In 1 Eddy on Combinations, section 224, it is said: "Agreements which have for their object the realization of a fair price for the product manufactured and sold are not against public policy, even though in some respects they operate in restraint of trade."

[\*416] This rule was applied to the *Anti-Trust Act of New York ( Cohen v. Envelope Co.*, 56 N.Y.S. 588, 589), in this language: "HN64[<sup>↑</sup>] Agreements which have for their purpose the realization of a fair price for the product manufactured and sold do not contravene any rule of public policy, even though in some respects they operate in restraint of trade."

So in *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant's Ch. 540, it was said: "I think a distinction would be found in the consideration that here the article, the price of which was to be regulated, was not to [\*\*\*189] be purchased in the market, but was actually to be produced by the parties themselves, and this product they could not be compelled to part with except on their own terms."

It will be observed by reading the foregoing cases, cited by respondents in support of their contention, that they refer to a manufacturer, and in each of said cases the manufacturer sold its merchandise to a dealer, and that manufacturer entered into a contract with that dealer, by which it bound itself to sell its goods and merchandise to him, and no one else within a designated territory, and by which the dealer also bound himself to purchase exclusively from that manufacturer during the lifetime of the contract. It is thus seen that the manufacturer and dealer only bound themselves to do that which they had a perfect legal right to do. The manufacturer had a perfect right to sell his wares to only one dealer in each town, if he saw proper to do so, or he could decline to sell to every one, in any or all of such towns, if he so chose; while, upon the other hand, the dealer also had a perfect legal right to purchase exclusively of the manufacturer, or the right to refuse to purchase from all manufacturers. It [\*\*\*190] must be conceded that both of those propositions are true; and that being so, then we are unable to see any valid or legal objection that can be logically presented against such a contract as above supposed. It in no [\*417] manner prevents other manufacturers from selling the same class of goods to other dealers in the same towns in competition with those sold under the supposed contract. There is nothing wrong legally or morally in such a contract and arrangements. No manufacturer, in the absence of express legislation to the contrary, should be required to place his own fabrics in competition with each other. The law is satisfied in that regard if the different manufacturers of goods are left in reasonable and fair competition with each other. It will also be observed by reading those cases, that there was no contract or agreement between different manufacturers by which they bound themselves not to sell their respective fabrics in the same towns or cities, and thereby prevent competition in the sale of their goods and wares.

But the contract involved in the case at bar, dividing the State [\*\*1032] into the north and south territory, and assigning the north half to the Indiana [\*\*\*191] Company and the south half to the Waters-Pierce Company, with an agreement that they were not to sell in each other's territory, presents quite a different proposition from that just considered.

In the case at bar, the Indiana Company was not only a manufacturer of the products of petroleum, but it was also a large dealer, as large if not larger than was the Waters-Pierce Company. Now, instead of eliminating the fact that the former was a dealer, as respondents contend we should and consider it only as a refiner of oils, we should consider it just as it is. It is both a refiner of and dealer in oils, both at retail and at wholesale; while the Waters-Pierce Company is a dealer and not a refiner. But when we consider the fact that both of those companies are dealers in oils, and that they have divided the State into two parts, with an agreement by which they bind themselves not to sell to the trade in each other's territory, [\*418] coupled with the further fact that the Indiana Company bound itself to sell as a refiner to the Waters-Pierce Company exclusively, in that territory, with the corresponding agreement on the part of the Waters-Pierce Company to purchase exclusively from [\*\*\*192] the former, presents quite a different question from that supposed by counsel for respondents, and from those considered by the courts in the cases before considered. And especially is this true when we consider the further fact that neither of said companies would sell to any other dealer except at retail prices.

In discussing a similar question which arose under the Sherman Act regarding restraint of interstate commerce, the Supreme Court of the United States in the case of Montague & Co. v. Lowry, 193 U.S. 38, 47, 48 L. Ed. 608, 24 S. Ct. 307, used this language: "It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States. United States v. E. C. Knight Company, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249, did not therefore cover it." This is a complete answer against the contention of counsel for respondents. To the same effect are the cases of Northern Securities Co. v. U. S., 193 U.S. 197, 329, 48 L. Ed. 679, 24 S. Ct. 436; Swift & Co. v. United States, 196 U.S. 375, 396, 49 L. Ed. 518, 25 S. Ct. 276; Loewe v. Lawlor, 208 U.S. 274, 52 L. Ed. 488, 28 S. Ct. [\*\*\*193] 301.

And in the consideration of this proposition we should not lose sight of the important position occupied by the Schofield, Shurmer & Teagle Oil Company in the oil market, and its sharp competition with respondents prior to the time it was acquired and taken over by the New Jersey Company, and the subordinate position it has occupied, and the almost total lack of competition that has existed between them since that time. These facts possess greater probative force tending to show a combination in restraint of trade when thus viewed than when considered separate and distinct from each other.

[\*419] The only cases cited by counsel for respondents which, in our judgment, support their contention are the following:

In the case of Wickens v. Evans, 3 Younge & Jervis 327, the court said: "This question, as it appears to me, is confined within a narrow compass; and, as we have all formed the same opinion, I shall state my views of it very shortly. The principles upon which the decisions upon subjects of this nature are founded have been accurately stated; and, indeed, have so frequently and so long been acted upon that they are now indisputable. A general, universal restraint [\*\*\*194] of trade, inasmuch as it affects the public property, and the interest of the community, is bad . . . . But it is submitted that there may be, upon a good consideration, a partial restraint of trade; and that an agreement for that purpose is sustainable and has been sustained. The legality of partial restraint of trade has been established in a variety of cases; and the general transactions of mankind furnish daily instances of its existence. Without resorting to the aid of black cotton lines in order to divide all England into districts, there is no man engaged in trade who does not, in effect, impose some restraint upon himself, in point of practice, by confining himself within a particular district and circumscribing his trade within certain bounds. It has been supposed that the public are interested in precluding the parties from entering into the agreements now in question; but I think it very doubtful whether the benefit of the public would be best consulted by these three persons continuing to travel over the whole country, or by each confining himself to the district marked out in the map. Let us see what is the case now presented. It appears, according to the recital in the [\*\*\*195] agreement, that these three persons, in carrying on their business of box-makers, had traveled into various parts of the country to vend their boxes and [\*420] trunks, and had sustained great loss and inconvenience by reason of exercising this trade in the same places. This is the mischief and evil recited in the agreement -- and what is the remedy they propose? Not a monopoly, except as between themselves, because every other man may come into their districts and vend his goods. All they propose is, that they shall not carry on rivalry, nor continue any longer to trade throughout the country. This, then, is only a partial restraint of trade. But it is said that, admitting that to be so, there is no consideration extrinsic of the agreement itself; and that agreement is illustrated by the cases of a master giving up his business to his apprentice or to his journeyman. It [\*\*\*1033] strikes me, however, that in the present case there is as good a consideration as in either of those alluded to. Each party here, before the agreement entered into, has a trade in all the districts and he agrees to retire and to relinquish that trade in two of those districts, in order to secure the [\*\*\*196] other in undisturbed possession. An objection is then made to that part of the agreement by which it is stipulated that, in case other persons shall begin to trade as boxmakers in any of the districts, the parties shall meet to devise means to promote their own views. What those means may be it is unnecessary to surmise, but we can not presume that they will be illegal; and, therefore, the stipulation does not affect the validity of the agreement."

In Hearn v. Griffin, 2 Chitty 407, the following colloquy took place between court and counsel:

"Abbott, for defendant, argued in support of a demurrer to a declaration which stated that plaintiff was the proprietor of the one coach and the defendant of another, and that an agreement was made between them that they should not run in opposition to each other, but should each charge the same price to passengers, and this stipulation, it was urged, was in restraint of that competition in trade which is so conducive [\*421] to the interest of the public, and was consequently void.

"Ellenborough, C. J.: How can you contend that it is in restraint of trade? They are left at liberty to charge what they like, though not more than each other, [\*\*\*197] and, by agreement, particular days and times for each to run in the week are fixed. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other.

"Abbott then observed that there was a stipulation not to be engaged in other coach concerns or in any other coach. The whole deed upon oyer was before the court, and the court will not support this contract. There is no consideration but the mutual restraint. There is no averment that they continued to run their coach. There was no partnership interest between the plaintiff and the defendant, and they were proprietors of different coaches, and the covenant was in restraint of the other coach, though the parties covenanting might cease to run."

"Bailey, J.: If one cease to run, is not the contract then at an end? And if you do not perform your part of the contract, you should show your excuse. A general restraint is bad."

"Ellenborough, C. J.: If this argument could be sustained, then a covenant in an indenture of partnership, that neither of the parties should be engaged in any other business with any other persons would not be good, because it might prevent the public from having the industry in another [\*\*\*198] business. Each contracting party here has one day to work his particular coach, nor is there any limitation as to the size of the coach; the defendant may have a long coach. This agreement does not preclude a third or more persons from starting in opposition to plaintiff and defendant."

Gale v. Reed, 8 East 80, was as follows:

[\*422] Defendant made a contract with plaintiffs, by the terms of which, among other things, he agreed to transfer his business of cord-making to plaintiff -- he further agreed not to engage in such business during his lifetime, except for the government, or any public board. The breach assigned is: "That after the making of the indenture the defendant carried on the business of a rope-maker, and made cordage for divers persons other than by virtue of any contract which the defendant had entered into after the making of the said indenture, to make cordage, i. e., for government, contrary to his covenant."

"Ellenborough, C. J.: It has been contended on the part of the defendant, that the covenant on which the breaches have been assigned is void, as being a contract made in particular restraint of trade, without adequate consideration to the party restrained [\*\*\*199] upon the authority of *Mitchell v. Reynolds*, 1 P. Wms. 181, and other cases . . . . Laying, therefore, this objection of form out of the case, it remains to be considered whether the covenant in question be void, upon the ground already mentioned, viz: as being a particular restraint of trade, without adequate consideration. And the object and intention of the parties to this indenture appears to have been to devolve upon and exclusively to appropriate to the Gales, the plaintiffs, all the beneficial private trade of the defendant in this business of rope-making; leaving him at liberty to make and execute on his own account such contracts for cordage as he had made or might enter into with the government or any of the public boards. The indenture uniformly contemplates this trade as a trade carried on upon credit only. The only compensation which the indenture provides for the defendant as the consideration for his restraint, and for the benefit to be derived for the plaintiffs in this respect, is a payment and allowance of two shillings on every hundred weight of cordge. . . .

[\*423] "Supposing the former part of this covenant to be, for the reason given, properly narrowed by [\*\*\*200] the terms of dealing to which it refers, it will hardly be contended that the more general words to be found in the latter part of the same covenant shall not be restrained and qualified by the same context. The words are 'and shall not nor will employ any other person or persons whomsoever to make any other cordage, or any part thereof, under any pretense whatsoever.' To construe them according to the strict letter would impose a restraint without compensation to the party restrained, and to the possible prejudice of the public. [\*\*1034] Whereas to construe them with reference to the immediately antecedent words of the covenant in question, and the true scope and object of the whole indenture, renders the sense uniform and consistent throughout, makes the compensation and restraint commensurate with each other, and obviates the possible inconvenience, both public and private, which might result from a different construction. And this mode of construction is agreeable to the received rules and maxims, as well as to the authorities of law; for as is said in *Plowd.* 18: 'The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, [\*\*\*201] then is the matter itself and the intent thereof also accomplished.' . . .

"Feeling ourselves therefore warranted, by these and other authorities of law, in narrowing, according to the intention of the deed, the general words of the restrictive covenant to those cases of restraint only in which the party restrained can have the stipulated benefit for his restraint, and the party in whose favor the restraint is created, shall choose to avail himself of the restraint imposed upon the other, the covenant in question will stand clear of the objection made to it, as being a particular restraint of trade without adequate consideration, and that objection being removed out of the way (as for [\*424] the reasons above stated we think it is), the plaintiff is entitled to judgment."

In *Central Shade-Roller Co. v. Cushman* (143 Mass. 353, 9 N.E. 629) 9 N.E. 629, it was held that where several parties, severally engaged in the business of manufacturing and selling balance shade-rollers, for the purpose of avoiding competition, organize themselves into a corporation, and severally enter into an agreement with the corporation, so organized, that all sales of the shade-roller shall be made [\*\*\*202] in the name of the corporation,

and at once reported to it; that, when either party shall establish an agency in any city for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place; and that the prices for rollers of the same grade, made by different parties, shall be the same, and shall be, according to a schedule contained in the contract, subject to changes which may be made by the corporation upon recommendation of three-fourths of the stockholders, the agreement is valid, and not void as in restraint of trade.

These two last cases seem to fully support the contention of respondents; but there are two reasons why they are not controlling authorities in the case at bar:

First. Because they arose at a time when the industrial, commercial and transportation institutions of the country were not numerous, comparatively small, with limited means and restricted trade. Under those conditions the effects of such combinations as those mentioned in those cases were so small and insignificant, the common law seemed to have ignored them, the rules of which were not near so stringent as are the provisions of our anti-trust [\*\*203] statutes. But the extraordinary growth of those institutions in modern times, with capitalizations and assets reaching up into the hundreds of millions of dollars, few in number, driving and consuming small competitors as the prairie fire consumed the dry grass, with business girdling the [\*425] globe and extending from pole to pole, presents a totally different trade condition in this country from that which existed then. Let three or four of those gigantic institutions enter into such combinations as those mentioned in those cases, regarding any line of commodities, and the effect would be instantly felt by the entire country, monopolies would spring up, production and distribution would be curtailed, commerce would be restrained, prices would go up, and living expenses would increase; while, upon the other hand, the smaller industrial institutions would decrease in numbers; laborers would be thrown out of employment; the smaller producer and dealer would be crushed by sheer force of capital; and stagnation and starvation would befall all who were so unfortunate as not to belong to the combinations. Under these changed conditions, in my judgment, even the common law rules against [\*\*204] restraint of trade are fully ample to abate and prohibit such combinations. Clearly those cases are not in harmony with the great mass of authority upon that subject in this country and in England.

Second. Because, conceding the common law was not ample to control such combination, yet our trust statutes were enacted for the purpose of aiding and supplementing the common law along those lines; but the common law rule as announced by those decisions is in direct conflict with our statutes upon that subject. It is perfectly apparent by reading those cases and then by reading our anti-trust statutes, that they are diametrically opposed to each other. Those cases sustain contracts made in restraint of trade, while the statutes declare all such contracts to be null and void. The Massachusetts case seems to have gone off on the ground that the shade-rollers were not articles of prime necessity; but our statutes make no distinctions as to the kind of goods affected by the trust agreement. But suppose it did, it cannot be contended [\*426] that the products of petroleum are not articles of prime necessity for the people.

We are, therefore, of the opinion that the Master properly considered [\*\*205] all of these facts in connection with all the other facts and circumstances disclosed by the evidence in the case.

It is next contended by counsel for respondents, that at common law they had the legal right to cut prices on sales of oils, or to give rebates from those prices, in order to secure the trade from their competitors. This contention calls for a review of the authorities [\*\*1035] upon that question.

Mogul Steamship Co. v. McGregor ( L. R. 21 Q. B. D. 544), affirmed in the Court of Appeals ( L. R. 23 Q. B. D. 598), and in the House of Lords (L. R. App. Cas. [1892] 25), is the leading case upon the subject. The facts as stated in the syllabus were: "The defendants, who were firms of ship-owners trading between China and Europe, with a view of obtaining for themselves a monopoly of the homeward tea-trade and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent on all freights paid by them."

Lord Coleridge, C. J. ( L. R. 21 Q. B. D. 544, 552, 553, 554), at *nisi prius*, said: [\*\*206] "The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a

profit from their trade. HN65<sup>↑</sup> They have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they think fit, [\*427] endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribing, I see no evidence; of inducing, in the [\*\*\*207] sense in which the word is used in the class of cases to which *Lumley v. Gye* (2 E. & B. 216), belongs, I see none either. One word in passing only on the contention that this combination of the defendants was unlawful because it was in restraint of trade. It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas on condition of their customers' dealing with them and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question . . . . It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an [\*\*\*208] advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make [\*428] the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference, in 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill-will to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought, and honestly, and, as it turns out, correctly thought, that for a time at least there would be an end of their gains."

In affirming this view ( L. R. 23 Q. B. D. 598, 614, 616, 620, 625) in the court of appeal, Bowen, L. J., said: "They have [\*\*\*209] done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. HN66<sup>↑</sup> To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, [\*429] and which is designed to attract business to his own shop, would be a strange and impossible counsel [\*\*\*210] of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in [\*\*1036] the present case is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight?' It is said that it ought to be normal rate of freight, such as is reasonably remunerative [\*\*\*211] to the ship owner. But over what period of time is the average of this reasonable

remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship owners or merchants were ever deemed to be by law bound to conform to some imaginary 'normal' standard of freights or prices, or that Law Courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' To attempt to limit English competition [\*430] in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo ut alienum non laedas.* If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of [\*\*\*212] law which compels him to use his property in a way that judges and juries may consider reasonable; see Chasemore v. Richards (7 H. L. C. 349). If there is no such fetter upon the use of property known to the English law, why should there be any such fetter upon trade? . . . In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my views is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I, myself, would deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness' or of 'normal' prices, or 'fair freights,' to which commercial adventurers, otherwise innocent, were bound to conform."

Fry, L. J. said: "The defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency; they only desired [\*\*\*213] to drive them away from particular ports, where the defendants conceived that the plaintiffs' presence interfered with their own gain. The damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves."

[\*431] In the House of Lords (L. R. App. Cas. (1892) 25, 40, 43, 48, 49, 50, 51, 54, 58-59), Lord Halsbury, L. C., said: "I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of the opinion that it is not."

Lord Watson said: "I cannot for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition [\*\*\*214] ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment . . . The only means by which they endeavored to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept."

Lord Bramwell said: "If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefore, but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L. J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts."

Lord Morris said: "It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the [\*432] trade, and the means he uses be lawful weapons. Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights [\*\*\*215] are the same in principle, being a bonus by the defendants to customers to [\*\*1037] come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships was 'the competition' entered on by the defendants with the plaintiffs. The fifth means used, viz., the dismissal of agents, might be questionable according to the circumstances; but in the present case, the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade. All the acts done, and the means used by the defendants were acts of competition for the

trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it . . . I cannot see why judges should be considered specially gifted with [\*\*\*216] prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called 'fair' intermediate between lawful and unlawful. The question of 'fairness' would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."

Lord Field said: "It is absolutely unnecessary to consider whether these grounds were morally or commercially [\*433] justifiable. They were not unlawful, and they were of a nature legitimately, if not necessarily, to be taken into account in carrying on the respondents' business with profit."

Lord Hannon said: "The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can. If then the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should, during a fixed period, [\*\*\*217] deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals."

In Lough v. Outerbridge (143 N.Y. 271, 38 N.E. 292, 296) it was said of the right to grant rebates when not prohibited by statute:

"The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly and permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, [\*\*\*218] which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business [\*434] which it does not appear was of sufficient magnitude to furnish employment for both lines."

In Walsh v. Dwight (40 A.D. 513, 58 N.Y.S. 91, 92, 93, 94), it was, as stated in the syllabus, decided: "An agreement by a manufacturer with his customers to give them a rebate if they should refuse to sell his article, or other similar articles, at less than a certain price, is not a restraint of trade."

Ingraham, J., said: "The defendants simply offered to parties purchasing their goods to make a reduction in the prices of goods sold, in consideration of the purchasers agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price than that at which they agreed to sell the defendants' goods. It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as [\*\*\*219] the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendees, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured products of the manufacturer. If a dealer in articles of this kind, for his own advantage agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business such an agreement is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone who is willing to buy. There is nothing to prevent an individual from selling any property that he has at any price which he can get for it . . . There is nothing in this contract that restrains or prevents [\*435] competition in the supply or the price of any [\*\*1038] article or commodity. The act is entitled, 'An Act to prevent monopolies in

articles of general necessity,' and it makes illegal [\*\*\*220] a contract or combination whereby competition in the State of New York in the supply or price of any article or commodity of common use may be restrained or prevented for the purpose of advancing prices. This act did not have the effect of preventing a manufacturer from fixing the price at which his articles should be sold, or from making an agreement with those persons who acted as the jobbers or retailers of his manufactured articles that they would deal exclusively in his merchandise, or would not sell the merchandise of other persons at a less price than that for which his product was sold. The act was evidently intended to prevent manufacturers or dealers in any article or commodity of common use from combining together to advance the price of such article or commodity, by which competition in the supply or price of the same would be restricted or regulated; but a contract by a single manufacturer as to the price at which his goods, when manufactured, should be sold by those selected by him for the purpose of sale or distribution, would not be a contract by which competition in the supply or price of the commodity would be restrained or prevented. All of the manufacturers could [\*\*\*221] compete with these defendants in the sale of these goods, or the making of a contract such as was made by the defendants. The contract in question simply gave to such of their customers as chose to make the agreement with them an advantage as to price for which the goods were purchased which those who refused to come to such an understanding did not share. That such an agreement is not illegal has been settled by a long line of authorities."

In In Re Greene, 52 F. 104, 116, 117, 118, Mr. Justice Jackson said: "Was the arrangement with the Boston purchasers, as to making them a rebate upon [\*436] the conditions stated, an attempt to monopolize any part of the trade and commerce among the States in distillery products? It is not alleged, nor is it to be inferred from anything that is set forth, that said purchasers bound themselves, or entered into any contractual obligations or understanding, to buy their distillery supplies exclusively from distributing agents of said Distilling & Cattle Feeding Company. They were left at perfect liberty to purchase when, where, or from whom they pleased. No contractual or other restraint was placed upon them. Upon certain conditions, which [\*\*\*222] it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said distilling company or its distributing agents. But, suppose it did, there was nothing in such an agreement unlawful or in contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an 'attempt to monopolize,' when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no 'attempt to monopolize any part of the trade or commerce among the States.' The rebate promised, upon condition of exclusive [\*\*\*223] purchases and not underselling the vendor's distributing agents, was a legitimate method of inducing trade; but the means thus employed in no way operated to prevent or restrain others from offering the same, or greater, inducements. [\*437] The condition as to not selling at lower prices than those of the distributing agents may have had a tendency to maintain prices, but that would not have been an attempt to monopolize trade. The inducements offered for the exclusive trade, and to sell at no lower prices than the price list of the distributing agents, was not prejudicial to the public. It was in no way contrary to public policy, or an unlawful restraint of trade, as will be seen from the authorities hereinafter referred to . . . The matter of the promised rebate upon the same conditions as set forth in the second count, which is charged to have been a contract in restraint of trade and commerce among the States, and between the State of Massachusetts and other states, does not constitute any offense against the United States, or in any way contravene the first section of the Act of July 2, 1890, because there was actually no contract which bound, or attempted to bind, the Massachusetts [\*\*\*224] purchasers of alcohol, as to where or from whom they could make further purchases during the period stated, nor as to the price or prices at which they should sell. They were simply offered an inducement in respect to those matters, which they were at perfect liberty to comply with or decline. They were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions as alleged in the fourth count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties prior thereto, or during the period intervening between the date of the promise and the full compliance with [\*\*1039] the conditions on which the rebate was to be paid. During that period there was between the parties no contract in restraint of trade. But

suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, [\*438] it could not be held to be a contract in restraint of trade. It is not deemed necessary to review the authorities upon [\*\*\*225] the subject of contracts in restraint of trade, nor would it be at all profitable."

In Re Corning, 51 F. 205, 211, involved the question, the Government contending that the granting of rebates was a violation of the Sherman Anti-Trust Act. Judge Ricks, in denying the contention, said: "Such dealers were offered the rebate as an inducement to purchase exclusively from the defendants, and to sell at the prices defendants fixed; but there is no contract averred by which the dealers obligated themselves to do so. In what respects, then, are these acts charged different from the customary efforts of manufacturers or dealers to increase the sale of their products and push their business by the many artifices of trade? There are no contracts averred, as between the defendants and their customers, which are in restraint of trade. Their acts are rather intended to increase their trade, but not by restraining the liberty of the customer to deal with others, if he wishes to, or can do so, with advantage to himself. If these acts are illegal and in restraint of trade, and if they constitute a monopoly under this act, it may well be denominated an act to restrain legitimate enterprise, and limit [\*\*\*226] and qualify the ownership in property. The acts charged are common and frequent to many branches of manufacture and trade, and if the defendants are guilty in the manner of making sales of their products as set forth in the indictment, the act is more sweeping in its provisions than ever contemplated by Congress, as manifestly appears from the debates in the Senate when the act was before it for consideration."

In Re Terrell, 51 F. 213, 215, was a like case. Judge Lacombe said: "The points of law arising upon this indictment were all carefully considered by Judge Ricks in his opinion (filed June 11, 1892, N. Dist. Ohio) on application for a removal in Re Corning, 51 F. 205. [\*439] In that opinion I entirely concur . . . During that period they bought such products only from certain named dealers in a limited number of States, and sold only at prices fixed by the defendants; but they did so only because they chose to -- because the offer of a rebate to purchasers who would thus conduct their business was an inducement operating upon their self interest. No obligation of any kind constrained them to do so during that entire period, certainly, no contract restrained them, [\*\*\*227] for there was no contract in existence. They were entirely free to buy from whom they pleased, and to sell at any price they chose. The statute does not prohibit the offering of special inducements to such purchasers as shall make all their purchases from a single concern, and shall sell only at the prices fixed by it, even though those inducements be so favorable as to accomplish their object."

In Ex Parte Benson & Co., 18 S.C. 38, 44 Am. Rep. 564, 567, 568, it was said: "Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern in contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and therefore not enforceable. To be void on such grounds it must run counter to some known principle of equity or contravene some well established doctrine of public policy forbidding it. We do not know that this contract was obnoxious to any of these objections; nor in the face of [\*\*\*228] the testimony of the experienced superintendent who gave it, can we say that it was unnecessary. The cotton which he brought to the head of his road at Anderson Court House was grown in the State of Georgia, at a distance from Anderson. The Savannah river, running between Anderson and Hartwell, was its [\*440] natural outlet to market, and, no doubt, afforded cheaper transportation. With these obstacles in the way, it required some inducement to be held out so as to bring this cotton to the Greenville road. And so long as the charges against others were not unreasonable, and in no way increased by the rebate offered to it, what ground is there for the courts to interfere? It is the province of the court to enforce contracts, not to destroy them."

In dealing with this subject it was, in Cowden v. Pacific C. S. S. Co., 94 Cal. 470, 29 P. 873, 874, 875, said: "The fundamental and statute law of the various States upon this subject appears to have been founded upon the principles embodied in the early acts of parliament pertaining to the conduct and control of railways as common carriers, rather than upon the common law of England. Indeed, we have been able to obtain but few direct [\*\*\*229] adjudications from English courts upon this question, owing to the fact that it would seem the business of inland common carriers in that country was not a matter of great concern until railroads were operated; and, immediately

subsequent to that great epoch in the world's progress, statutory enactments followed, entirely taking away from the courts the necessity of any further application of the common law [\*\*1040] rights and remedies. If the common law were as appellant here contends it to be, there would have been no necessity for parliament to have enacted these stringent 'equality clauses,' as they were termed. . . . During the progress of the argument in *Baxendale v. Railroad*, 4 C. B. (N. S.) 78, Justice Byles said: 'I know no common law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge."

What has been said is peculiarly applicable to a private business as distinguished from a public employment. Thus, in *Beale & Wyman on Railroad Rate Regulation*, section 1, it is said: "In private businesses, [\*\*441] one may sell or not, as one pleases, manufacture what qualities one chooses, demand any price that can [\*\*\*230] be got, and give any rebates that are advantageous. But in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations."

In *Whitwell v. Continental Tobacco Co.*, 60 C.C.A. 290, c [125 F. 454, 461](#), Judge Sanborn said: "The tobacco company and its employee were not required, like competitors engaged in public or quasi-public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others."

These authorities clearly sustain the proposition that, [HN67↑](#) at common law, traders, manufacturers and common carriers have the [\*\*\*231] right to give rebates to their patrons and customers in order to secure and retain their business. But it will be seen by reading those cases that the rebates were given in order to secure business and not for the purpose of stifling competition, or as a means by which to control, fix and maintain prices.

It has not and cannot be seriously contended that the Legislature does not possess the power to enact laws preventing all rebates being made the object of which is in restraint of trade or which tends to fix and maintain prices.

[\*442] If therefore rebates are used as a means in pursuance of a combine or agreement in restraint of trade, or for the purpose of fixing and maintaining prices, then such combination or agreement is prohibited by the statutes, and is, of course, void on that account. [State ex inf. v. [Armour Packing Co., 173 Mo. 356, 73 S.W. 645.](#)]

Respondents, however, contend that there is no evidence in this record which tends to show that the rebates were made for any such purposes. We are unable to lend our concurrence to that contention.

When we consider the system of espionage established and maintained by them, over the business of their competitors, [\*\*\*232] the independent oil companies, and by which they acquired perfect knowledge of their business; and then, as the evidence tends to show, by the means of rebates, prevented all of them from doing more than ten to fifteen per cent of the aggregate oil business of the State, and by the same means fixed and maintained the prices at which all oils were sold in the State -- not only by themselves but also by all of the independent companies -- then it is difficult to see how it can be logically contended that the rebate system maintained by respondents does not tend to prove the unlawful conspiracy and combination, in restraint of trade, complained of in the information.

We are of the opinion that the rebates made in the manner disclosed by the evidence in this case tends to show there was a combination or agreement existing between respondents, which is violative of the antitrust statutes of this State.

When we view this case as an entirety, we are unable to see how the Master could have honestly reached any other conclusion than that found in his report filed herein.

Let us take a birds-eye view of this case.

The Standard Oil interests of this country are represented by some eight [\*\*\*233] or ten subsidiary corporations, diffused throughout the States, and are matrixed [\*443] in, if I may so use that word, and operated from the Standard Oil Company of New Jersey, with a capitalization of \$ 110,000,000. These minor companies, including the respondents, are but parts of, and derive their power, character and business policies and directions from, that mother company.

The New Jersey Company either owns all or the majority of the stock of all of said minor companies. It elects their officers and directors, and formulates and outlines their business policies. The officers and directors thus chosen carry out those policies to the letter, with daily, monthly and annual reports of their stewardship. The office of the New Jersey Company is located at 26 Broadway, New York City; and each and all of these minor companies have a representative located in that same office who conduct all business transactions which take place between them and that company. That company also has located in the office mentioned representatives who inspect and audit the books and papers of all of said companies and otherwise assist and participate in the arrangement and control of their business. [\*\*\*234] In other words, the New Jersey Company keeps in touch with and is constantly informed of the business [\*\*1041] policies and transactions to the minutest detail.

The New Jersey Company, either through itself or through some one of its subsidiary companies, furnishes to all of said companies all the oils and the products of petroleum handled by them; and neither it nor they will sell any of such commodities to any other, or independent company, except in a few instances where they have offered to make such sales at retail prices.

The New Jersey Company also furnishes the pipe lines and tank cars through which and in which all of the oil handled by those companies is transported, from one point to another, with the exception of the Waters-Pierce Company; it owns and uses about one-half of the tank cars required to transport its oils, and the [\*444] New Jersey Company furnishes the remainder. The record also discloses the fact that none of these companies will transport or permit their cars to be used for the transportation of oils for any independent company.

This record also discloses the fact that there has never been any genuine competition for trade between any of these [\*\*\*235] companies, nor cutting of prices; while, upon the other hand, they have waged the most relentless war and competition against each and all of the independent companies. In order to drive out all competitors and to monopolize the entire trade, they inaugurated and carried on a perfect system of espionage, by which they acquired complete knowledge of their competitors' business, and followed almost every barrel of independent oil shipped over a railroad to the very door of the dealer, and there, by means of cutting prices, offering rebates, misrepresentation and deception, attempted to have the sale countermanded and to prevent him from purchasing independent oil in the future. In furtherance of that system the New Jersey Company purchased the Schofield, Shurmer & Teagle Oil Company, and had it reorganized under the name of the Republic Oil Company, whose chief office was to follow up the business of the independent companies, and under the guise of being an independent company and by means of rebates, fraud and deception, waged a most vigorous competition against them, in all districts where they competed with the other respondents, while the latter refused to compete for business against [\*\*\*236] each other, or to reduce prices to meet those made by the Republic Company, as a means of fighting the independents.

In other words, the Indiana Company and the Waters-Pierce Company maintained their territorial division of the State, and thereby indirectly agreed not to compete with each other for business herein, which was equivalent to entering into a contract in restraint [\*445] of trade, and thereby enabled them to fix and maintain prices at which they sold oils in this State. If the independents encroached upon the business of either, and reduced the aggregate amount of its sales, or reduced the price of oils, then the Republic Company was set upon the offending independents, and practically drove them out of business by selling their customers oils at reduced prices or by giving rebates.

While this vigorous competition was going on between the independents and the Republic Company, the Indiana Company and Waters-Pierce Company were living up to their understanding and agreement and pursuing their fixed business policies in the even tenor of their way, maintaining prices at which they sold oils, and declining to compete with each other for business. And when the Republic [\*\*\*237] Company had sufficiently chastised the

independents, and thereby curbed their desire and ambition to increase the volume of their business, by the reduction of price of oils or otherwise, it would then practically retire from the field of operation and eagerly await the next combat with the independents, if, perchance, any one of them was so timorous as to challenge the monopoly of those two companies by seeking any portion of their trade. The office and the important part played by the Republic Company in the scheme is made more apparent by the declaration of one of its officers, to the effect that this suit exposed the ownership of the company, and it had to go out of business, because it had served its purpose, and there was nothing left for it to do; meaning, of course, that the Standard interest could no longer deceive and impose upon the public by the means of that company. And as a necessary sequence to that condition, the Republic Company attempted to voluntarily retire from the State, and moved the Master to dismiss the cause as to it, which he refused to do, and it has renewed that motion here, which has [\*446] received consideration in another portion of this opinion.

[\*\*\*238] When the foregoing facts are viewed in the light of the common ownership of the stock of all the Standard Oil companies, it does not require a very great stretch of the imagination to see why such close and intimate business schemes and relations have existed so long and harmoniously among them.

The common interest running through all of those companies is responsible for their formation and business schemes and policies, and lead up to and induce the Standard interest, including the respondents, to divide the State in twain; to furnish oil and transportation for each other; to decline to sell to or transport oils for the independents; and to fight them with the Republic Company by a system of espionage and rebates. The direct and inevitable effect of those facts, which are not seriously disputed, was to create, by indirection, a pool, trust and combination in restraint of trade, and to fix and maintain prices at which respondents sold the products of petroleum in this State. There is no logical escape from the conclusion that it was the [\*\*1042] intention of respondents and of the other Standard Oil companies that those things agreed to among themselves should and would have [\*\*\*239] the effect of producing a trust and combination among them in restraint of trade and in violation of our anti-trust statutes.

It stands out admitted in bold relief that the Indiana and Waters-Pierce Companies are both engaged in the sale and delivery of the same kind and grades of oils; that they are not competitors for business, notwithstanding the fact that both are well equipped and amply able financially to vigorously compete therefor. This lack of competition between these two gigantic institutions is not due to the fact that they are destitute of competitive instincts, or indifference as to the expansion of their trade, because they abundantly show both of [\*447] those admirable qualities in their business contacts with the "independents"; but it is confessedly due to an agreement made and entered into between them, by which one sells in the north and the other in the south half of the State. If that agreement is not in restraint of trade and in violation of the letter and spirit of the anti-trust laws, then words have lost their meaning, contracts their potency, and the law its majesty. This combination confessedly was conceived in and born of the common interest of those [\*\*\*240] two companies, and for the very purpose of preventing competition between them, and to maintain prices and enhance the profits of each, which it has done beyond the fondest dreams of either. Their business has grown from almost nothing in 1878 to gigantic proportions. The Waters-Pierce Company has assets worth \$ 12,000,000, and the name and good will of the concern is valued at about \$ 35,000,000, and is paying dividends of six or seven hundred per cent upon a capitalization of \$ 400,000. It is clearly inferable from this record that the Indiana Company has fared equally as well if not better than has the Waters-Pierce Company.

Can it be supposed for a moment that such phenomenal results could have been accomplished by them if they had been engaged in open competition with each other? Certainly not. They knew that, and their object and purpose in entering into the combination was to monopolize the trade and maintain prices, which they did against all other competitors.

The Waters-Pierce Company fixed and maintained the prices not only for itself but also for the Republic Company and for all the independent dealers, and monopolized from eighty-five to ninety-five per cent of the volume [\*\*\*241] of the oil business within its territory; while the Indiana Company did a little better in the north half of the State. It sold in that territory from ninety to ninety-eight per cent of the oil consumed therein, and fixed the prices for all dealers.

[\*448] If the statutes were not intended to apply to this and similar combinations, then I would like to see a combination stated to which they do or could apply.

This combination is but one link in a chain of combinations, which include all of the Standard Oil interests, which control practically all of the crude oil of the country. That fact enabled it to fix the prices at which the Indiana and the Waters-Pierce Companies had to pay for refined oils; and upon those prices they based and fixed prices at which they and all others sold oils to the trade and consumers. Yet it is argued that they do not fix and maintain prices.

Not only that, but the record discloses the fact that within the last decade the production of crude oil has about doubled, caused by the discovery and development of new oil fields in Kansas, Texas, Oklahoma and Indian Territory; yet notwithstanding that fact, the price of refined oils has been upward during [\*\*\*242] that period, and the price of crude oils has fallen more than fifty per cent.

And this record conclusively shows that the respondents absolutely fix and maintain the prices at which refined oils sell in this State, and that they and their allies control and fix the prices at which all crude oils are sold.

Their purpose in forming the combination by those means, rather than by an express contract, was clearly to escape the provisions of the common law and the statutes of the State in which they operated or conducted business.

Every contract made by them; their business policies and its management; their treatment of others; and the mode and manner of acquiring and holding trade, are but the footprints leading from the office of the New Jersey Company, No. 26 Broadway, New York City, through the various subsidiary companies, to the very hearthstone of the smallest consumers, throughout the country, including this State; and every imprint [\*449] bears strong evidences of agreements and combines in restraint of trade.

No man can run faster than he makes tracks, and, in this case, as in all others, when carefully followed, the maker of them can be traced from his starting point [\*\*\*243] to his place of destination.

In the case at bar we have traced every step and carefully considered every act of each and all of those companies, from the time of their organization down to the close of the evidence of this case, and they all point to guilt, and are inconsistent with all theories of innocence.

But it is finally insisted by counsel for respondents that Mr. Pierce of the Waters-Pierce Company had complete charge and control of that company, and directed its business independent of all other Standard influences. In one sense that is true. He does manage and control its business within the scope and bounds of the policies marked out by the Standard Oil Company of New Jersey, but no further. He and his company are but two of the many agents of the New Jersey Company in carrying out its monopolistic [\*\*\*1043] schemes and combinations in restraint of trade throughout the entire country. When we lay aside the corporate guise of these companies, and view the interested parties, their objects and purposes, it is perfectly apparent that they have a common interest; all working in harmony to that end, and are not competing with each other in any sense of the word. Look at the [\*\*\*244] Waters-Pierce Company from any viewpoint you may, and it is clearly seen that it is just as much a party to the trust and combine as is the Indiana Company or the Republic Company. What the one does the other does; they work hand in glove with each other, and for their mutual protection and benefit, and all of them work in harmony with the policies and for the best interest of the New Jersey Company.

[\*450] In discussing a similar question this court said, in the case of *State ex inf. v. Armour Packing Co., 173 Mo. 356, 73 S.W. 645*: "It is quite too plain for doubt that persons or companies who are engaged in the same line of business, in the same place, do not . . . maintain an uniform selling price, etc . . . unless there has been an unlawful pool, trust or combination to fix and maintain prices. Such acts and circumstances and practices speak as loudly, as directly and as certainly, and tell as strong and conclusive a tale of wrongdoing in those regards as any witness could possibly testify to it or any resolution formally adopted by the directors or stockholders could prove it. Independent, therefore, of any admissions or statements of the managers of the coolers or [\*\*\*245] of the solicitors, which, however, were clearly admissible, the State has made out a case against the respondents under the facts and circumstances of the case . . . So long as the law puts the stamp of condemnation on all

218 Mo. 1, \*450LA 16 S.W. 902, \*\*1043LA 909 Mo. LEXIS 316, \*\*\*245

arrangements, agreements, pools, trusts and conspiracies to fix and maintain the price of articles of prime necessity, the courts have no option but to enforce the law."

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## **State v. General Fire Extinguisher Co.**

Court of Common Pleas of Summit County, Ohio

January, 1910, Decided

No Number in Original

**Reporter**

20 Ohio Dec. 240 \*; 1910 Ohio Misc. LEXIS 27 \*\*; 9 Ohio N.P. (n.s.) 438

STATE OF OHIO v. GENERAL FIRE EXTINGUISHER CO.

**Disposition:** [\*\*1] Motion overruled.

### **Core Terms**

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indicted, imprisonment, provisions, antitrust, artificial, courts, fine, natural person, mischief, cases, legislative intent, criminal law

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN1](#) [down arrow] **Public Enforcement, State Civil Actions**

See Ohio Rev. Stat. § 4427-4.

Governments > Legislation > Interpretation

#### [HN2](#) [down arrow] **Legislation, Interpretation**

Criminal statutes must be construed strictly. That strict construction, however, must not be arbitrary, artificial or so narrow that the plain and obvious intendment of a statute is destroyed or diverted. It must be a reasonable construction, having due regard to the plain, ordinary, and natural meaning and scope of the language employed in the act.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > Ultra Vires Doctrine

Criminal Law & Procedure > ... > Miscellaneous Offenses > Nuisances > General Overview

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

20 Ohio Dec. 240, \*240L 1910 Ohio Misc. LEXIS 27, \*\*1

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

### **HN3** Powers, Ultra Vires Doctrine

The later decisions, under English and American statutes, hold that a corporation is indictable and punishable if the plain and obvious provisions of a statute make it so. A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act-in other words, of crime as an individual man sustaining to the thing the like relations. Corporations can commit criminal nuisance the same as individuals. When the law casts upon any corporation an obligation of such a nature that the neglect of it will be indictable in an individual, the corporation neglecting it may be indicted. No every misfeasance which will be indictable in an individual is so in a corporation. It must be within, or not too far outside of, the corporate duty.

Governments > Legislation > Interpretation

### **HN4** Legislation, Interpretation

The fundamental rule of construction of all instruments is that the intention shall prevail, and for this purpose the whole of an instrument will be looked to. The real intention will always prevail over the literal use of terms. Legislative acts fall within the rule, and it has been well said that a thing, which is within the letter of a statute, is not within the statute unless it is within the intention of the lawmakers. A thing, which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter. And a thing, which is within the letter of the statute, is not within the statute unless it is within the intention of the makers, and such a construction ought to be put upon it as does not suffer it to be included.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

### **HN5** Public Enforcement, State Civil Actions

See Ohio Rev. Stat. § 4427-12.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

### **HN6** Public Enforcement, State Civil Actions

Ohio Rev. Stat. § 4427-12 must be read into every other section of the Valentine Antitrust Act of Ohio.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

### **HN7** [down] **Public Enforcement, State Civil Actions**

See Ohio Rev. Stat. § 4427-9.

Constitutional Law > Separation of Powers

Governments > Legislation > Interpretation

### **HN8** [down] **Constitutional Law, Separation of Powers**

It is not the province of judges and courts to defeat the obvious intention of a lawmaking body under the guise of judicial interpretation or construction; it is their business rather to give force and effect to the plain intent and provisions of a statute.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

### **HN9** [down] **Justiciability, Standing**

It is unusual for a complaint to be entered upon the ground of discrimination, when the discrimination is in favor of a complainant, and the rule is generally well settled that the complainant must leave such a grievance to a person actually aggrieved.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Constitutional Law > Substantive Due Process > Scope

### **HN10** [down] **Corporate Formation, Corporate Existence, Powers & Purpose**

No court has yet gone so far as to hold that in all cases the same duties, rights, or prerogatives that shall attach to persons must attach likewise to corporations, and vice versa. The corporation is in a class by itself, and courts have universally recognized such a class. They have gone much further, and recognized the right of the legislature to classify and subclassify corporations, and formulate one class of legislation applying to public corporations; another class of legislation applying to private corporations, subdividing the legislation as to private corporations, making a certain code apply to quasi-public, and another code apply to those that are wholly private corporations, and no court has so far declared such classification, so long as it is reasonable and founded upon substantial differences of condition and not mere arbitrary and artificial distinctions, unconstitutional and void.

## **Headnotes/Summary**

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### **Headnotes**

**CONSTITUTIONAL LAW--CORPORATIONS--CRIMINAL LAW.**

## 1. CORPORATION A PERSON UNDER VALENTINE LAW AND MAY BE PUNISHED.

A "corporation" is within the meaning the expression "any person" as used in Sec. 4 of the Valentine antitrust law and may be punished thereunder the same as a natural person.

## 2. THAT A CORPORATION CANNOT BE IMPRISONED UNDER CRIMINAL LAW IS NOT A DISCRIMINATION IN FAVOR OF CORPORATION.

That a corporation cannot be punished by imprisonment does not impair the constitutionality of Sec. 4 of the Valentine antitrust law, as being a discrimination in favor of corporations.

**Counsel:** F. J. Rockwell and S. G. Rogers, for plaintiff:

Grant, Sieber & Mather and Gillmer & Gillmer, for defendant:

Cited and commented upon the following authorities: 2 Sutherland, Stat. Constr. Sec. 577; State v. Fertilizer Co. 24 Ohio St. 611; Standard Oil Co. v. State, 117 Tenn. 618 [100 S.W. 705]; 10 L.R.A. (N.S.) 1015]; Dorn v. Cooper, 139 Iowa 742 [117 N.W. 1; 118 N.W. 35]; 8 Cyc. 1076; Studebaker Bros. Mfg. Co. v. Morden, 159 Ind. 173 [64 N.E. 594]; State v. Railway, 23 Ind. 362; Southern Indiana Loan & Sav. Inst. v. Doyle, 26 Ind. App. 102 [59 N.E. 179]; Hughes v. State, 29 O. C. C. 237 (9 N.S. 369).

**Judges:** WANAMAKER, J.

**Opinion by:** WANAMAKER

## Opinion

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### [\*240] WANAMAKER, J.

The defendant, the General Fire Extinguisher Company, with [\*241] others, was indicted by the grand jury of this county at the September, 1909, term of this court, under what is generally known as the Valentine antitrust law of Ohio.

To this indictment the defendant, the General Fire Extinguisher Company, filed its motion to quash, challenging the sufficiency of the indictment upon two grounds, to-wit: first, that Sec. 4 of said law does not include a "corporation"; second, [\*\*2] that if it does include a corporation said law is unconstitutional and void by reason of the fact of there being a discrimination against natural persons, who are subject to both fine and imprisonment, and in favor of artificial persons, who, from the nature of the defendant, could be subject to fine only.

Other objections are raised by the motion but were not urged by counsel for defendant, and, therefore, will not be considered in this opinion.

Counsel for the state as well as the defendant advise the court that this question is an original one in Ohio, so far never having been raised in any of the numerous criminal prosecutions under the Valentine antitrust act, and that there is but little light in the adjudications of other states upon the questions herein raised. The importance of the question, as well as the diligence of counsel in the preparation of their briefs, justify the court in dealing at some length with the legal controversies involved.

Section 4 of this act (Sec. 4427-4 Rev. Stat.) reads as follows:

**HN1** [↑] "Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any [\*\*3] such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other

capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than \$ 50 nor more than \$ 5,000, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense."

**HN2<sup>↑</sup>** Criminal statutes must be construed strictly. That strict construction, however, must not be arbitrary, artificial or so narrow that the plain and obvious intendment of the statute is destroyed or diverted. It must be a reasonable construction, having due regard to the plain, ordinary and natural meaning and scope of the language employed in the act.

The word "corporation" does not appear in this Sec. 4; and, [\*242] therefore, it is claimed that the Valentine act finds its parallel in construction in the case of *State v. Fertilizer Co.* 24 Ohio St. 611. [\*\*4] This was a prosecution brought under a statute to prevent nuisances, and that statute did not include the word "corporation," but simply used the words "any person." The Supreme Court of Ohio, in passing upon the exceptions taken by the prosecuting attorney to the ruling of the trial court on a motion to quash the indictment upon the ground that the words "any person" did not include corporation, overruled the exception in the following language, to wit, page 616:

"Criminal laws are to be construed strictly in favor of the accused. In its primary sense, the word "person" means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation; nor do I know of any case where an attempt has before been made in this state to indict a corporation. We have no common-law crimes in Ohio, and the whole theory and machinery of our administration of criminal law seem adapted only to the prosecution and punishment of natural persons. There is no provision of law for bringing an indicted party into court by summons, or otherwise than by actual arrest of his person. Under such a state of legislation and practice, the legislature could not have [\*\*5] intended, in the use of the word "person," which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense, without any special or further provision as to the liability of corporations, or the mode of proceeding against them."

It will be noted that the Supreme Court of Ohio is here construing a criminal statute that does not, by its express terms, or by clear implication, include a "corporation." At the time of the decision, 1857, the corporation occupied such a small field in our industrial life that it is unlikely the legislature had any intention of including the artificial person within the term "any person"; but the language of the Supreme Court in *State v. Fertilizer Co.* expressly recognized the right of the legislature to include a "corporation" within the persons indictable under such a criminal law, in the last sentence above quoted, where it refers to "special or further provision as to liability of corporations, or the mode of proceeding against them." In the Valentine act are there special or further provisions as to liability of corporations, or the mode of proceeding against them, clearly [\*\*6] showing the intention of the legislature?

The old English cases, as well as the earlier decisions in many of the states, held that the invisible, intangible, artificial person, without body and without soul, was not within the reach of the criminal law, and, therefore, could not be indicted, prosecuted or punished. Having no soul, it could not be morally accountable; having no body, it could [\*243] not be punished. These artificial, technical and arbitrary distinctions have been swept away by the exigencies and necessities of the times. **HN3<sup>↑</sup>** The later decisions, under English and American statutes, hold that a corporation is indictable and punishable if the plain and obvious provisions of the statute make it so.

The doctrine of criminal liability of corporations is aptly stated in Bishop's New Crim. Law, Sec. 417, in the following language:

"A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense *ultra vires* and contrary to its nature. But within the sphere of its corporate capacity, 'and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act--in other words, of [\*\*7] crime--as an individual man sustaining to the thing the like relations.' \* \* \* If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them,--it can intend to do it, and can act therein as well viciously as virtuously."

Section 419. "Corporations can commit criminal nuisance the same as individuals.

"When the law casts upon any corporation an obligation of such a nature that the neglect of it would be indictable in an individual, the corporation neglecting it may be indicted."

Section 422. "Not every misfeasance which would be indictable in an individual is so in a corporation. It must be within, or not too far outside of, the corporate duty."

Quoting Judge Denman, the author continues in the same section:

"A corporation which, as such, has no such duties, cannot be guilty in these cases; but it may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large."

Section 180, *et seq.*, 1 McClain, Crim. Law, are to the same effect.

The prevailing opinions and decisions of state and federal courts for the last quarter of [\*\*8] a century are to the effect that a corporation may be indicted.

Counsel for the defendant, in addition to *State v. Fertilizer Co., supra*, cite a case from the Supreme Court of Tennessee, *Standard Oil Co. v. State* [117 Tenn. 618; 100 S.W. 705; 10 L.R.A. (N.S.) 1015], which was a prosecution brought under the Tennessee antitrust act, which is very similar to the Ohio antitrust act. The opinion of the court, appearing in the syllabus, is as follows:

"No fine can be imposed upon a corporation under a statute making it unlawful for any person or corporation to contract in restraint of competition, and providing that in case of a guilty corporation its charter shall be forfeited or its right to do business annulled, that a [\*244] guilty person or persons shall be fined or imprisoned, and that the guilty corporation or person shall return to the person injured the consideration received for property the sale of which is controlled by the combination."

Clearly the construction of any statute must be guided by the intention of the legislature in enacting the same. In *Standard Oil Co. v. State, supra*, the following language [\*\*9] appears on page 1020:

**HN4** [↑] "The fundamental rule \* \* \* of construction of all instruments, is that the intention shall prevail, and for this purpose the whole of the instrument will be looked to. The real intention will always prevail over the literal use of terms. Legislative acts fall within the rule, and it has been well said that a thing which is within the letter of a statute is not within the statute unless it be within the intention of the lawmakers. \* \* \* A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. And a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such a construction ought to be put upon it as does not suffer it to be included."

Numerous cases are cited in support of this well known and universally regarded doctrine of construction.

The court, in construing the Tennessee code upon that proposition, used the following language, on page 1024:

"The question, then, is whether the word 'person' is used in this statute to include both natural persons and artificial persons, or corporations. It is conceded, as it must [\*\*10] be, that the word 'person' in a statute may and oftentimes does include corporations. We think this must be held to be so, under Sec. 62 of Shannon's code, declaring that the word 'person' includes a corporation. The general provisions of Chap. 2 of the code, where this section is found, there declared to be applicable to the whole code, apply not only to the code as originally enacted, but to all amendments thereof, which include all statutes passed since its enactment, in the absence of a contrary purpose expressed in the statutes themselves."

And the Tennessee court, in construing their statute, held that it was the intention of the legislature not to visit a criminal penalty upon the corporation.

What was the intention of the legislature of Ohio in the enactment of this Valentine antitrust law? Manifestly a great mischief was to be legislated against, and that mischief was the control of production and prices of the commodities of life by combinations in illegal restraint of trade, whereby the rich and powerful might obtain unfair and iniquitous advantage over the poor and weak. It is notorious that [\*245] the big business of the country in production and trade is in the [\*\*11] hands of corporations--particularly the hands of big corporations. The individual to-day, as a natural person, does not produce and control to exceed 1 per cent of the world's commodities. His activity and efficiency as producer and transporter to the world's market, has been practically and substantially eliminated. He is simply the officer, agent, employe or servant of the corporation; and if the corporation is not amenable and responsible to and punishable by the state and nation for the doing of such mischief, the individual will, in addition thereto, become merely the slave of such corporation.

It is hardly to be presumed that the general assembly of Ohio, in enacting this law to provide against the mischief of trusts arbitrarily controlling production and prices, could have intended to relieve the corporation, doing 99 per cent of the mischief, from punishment by penalty of law, and legislate against only the individual doing 1 per cent of the mischief. However, the legislature has made its intention in that respect very clear in the last section of the act, which reads as follows:

Sec. 4427-12. Sec. 12. [HN5](#) "The word 'person' or 'persons,' whenever used in this act, shall be deemed [\*\*12] to include corporations, partnerships and associations existing under or authorized by the state of Ohio, or any other state, or any foreign country."

This Sec. 12 [HN6](#) must be read into every other section of the Valentine antitrust act.

As bearing upon the intention of the legislature to exclude "corporations" from the provisions of this act, so far as Sec. 4 is concerned, it is urged that the Valentine antitrust act, having provided, under favor of Sec. 2 of that act, for a prosecution by the attorney-general or the prosecuting attorney of the county, of proper suits or quo warranto proceedings in a court of competent jurisdiction where any such corporation or association exists or does business, or has a domicile, for the forfeiture of its charter, rights, franchises or privileges, and powers exercised by such corporation or association and for the dissolution of the same under the general statutes of the state for any violation of the provisions of this act by such corporation, that this penalty, being in effect a death penalty, is exclusive, and was all that the legislature intended to be visited upon any offending corporation.

The legislature, evidently, did not think this would [\*\*13] in all cases be sufficient, and, hence, they provided for criminal prosecution, and in order that there might be no question about any one penalty excluding the visitation of any other penalty they incorporated the following section in the act, which reads:

Sec. 4427-9. Sec. 9. [HN7](#) "The provisions hereof shall be held cumulative [\*246] of each other and of all other laws in any way affecting them now in force in this state."

From which it must follow that the proper officer may institute such criminal actions as may be advisable under and by virtue of the antitrust law, and after suitable penalties shall have been imposed by our courts, the officer may further proceed, by action in quo warranto for the forfeiture and surrender of the charter and the dissolution of the corporation.

It will be noted that both the Supreme Court of Ohio, in *State v. Fertilizer Co. supra*, as well as the supreme court of Tennessee in the *Standard Oil Co. v. State, supra*, limit the term "person" to "natural person," unless or in the absence of a contrary purpose expressed in the statute itself; both courts implying that the legislature may provide that the "corporation" shall be included [\*\*14] as well as the individual person.

[HN8](#) It is not the province of judges and courts to defeat the obvious intention of the lawmaking body under the guise of judicial interpretation or construction; it is their business rather to give force and effect to the plain intent and provisions of the statute. There is too much judge-made law nowadays. When judges rightly understand and faithfully observe the law as it is, giving rightful force and effect to the plain, clear and complete terms and provisions of the act in accordance, not merely with the letter but the spirit of the act, they will add much to confidence in courts, the safety of society and the security of the state. Let them leave lawmaking, law modifying

and law repealing to the legislative bodies, who are sworn to support the same constitution and laws that the judges are sworn to support.

Laws are made to be observed, not violated. The people generally do obey them, interpreting them according to their plain and clear intention and meaning. If this interpretation is generally accepted by the many who observe the law, why should courts not apply the same interpretation to the few who would defeat it?

The court therefore finds [**\*\*15**] upon this question that the legislature clearly and unmistakably intended to include, and did expressly include, the "corporation" within the criminal penalties of the law; and, therefore, there is neither right nor room for judicial interpretation. The law is its own interpreter. It is free from doubt and ambiguity; and if the court should so construe it as to mean anything else than what the clear and obvious terms of the statute mean to the average man, it would be lawmaking and law repealing under the guise of judicial interpretation. Any other finding would be neither more nor less than legal legerdemain.

The second objection, that of unconstitutionality of Sec. 4 of this [**\*247**] act, discriminating as to penalties by reason of the fact that imprisonment may be imposed upon the individual, but cannot, from the nature of the case, be imposed upon the corporation.

**HN9**[] It is unusual for complaint to be entered upon the ground of discrimination, when the discrimination is in favor of the complainant, and the rule is generally well settled that the complainant must leave such a grievance to a person actually aggrieved. The corporation finds itself in the situation of saying, in effect, [**\*\*16**] I cannot be held to the provisions of this act because you cannot imprison me as you can imprison an individual; hence you cannot fine me. The statement of the proposition is its own best answer.

**HN10**[] No court has yet gone so far as to hold that in all cases the same duties, rights or prerogatives that shall attach to persons must attach likewise to corporations, and *vice versa*. The corporation is in a class by itself, and courts have universally recognized such a class. They have gone much further, and recognized the right of the legislature to classify and subclassify corporations, and formulate one class of legislation applying to public corporations; another class of legislation applying to private corporations, subdividing the legislation as to private corporations, making a certain code apply to *quasi-public*, and another code apply to those that are wholly private corporations, and no court has so far declared such classification, so long as it was reasonable and founded upon substantial differences of condition and not mere arbitrary and artificial distinctions, unconstitutional and void.

A case directly in point, to which the court has been referred since the hearing upon [**\*\*17**] this motion is entitled the *United States v. Union Supply Company*, decided November 8, 1909, by the Supreme Court of the United States. Mr. Justice Holmes delivered the opinion of the court. Seldom it is that two cases so completely parallel to each other on all matters in controversy as the case last cited and the case at bar. The Supreme Court of the United States hold against the defendant company upon all contentions. Discrimination in punishment is here treated as a matter solely in the discretion of the court, and that discrimination is in no wise affected by the fact that imprisonment cannot be visited upon the corporation. This inability to visit imprisonment upon the corporation is not regarded with any favor by the court as any ground for impairing in any wise the validity or constitutionality of the law.

The motion is overruled.



## **People v. Sacramento Butchers' Protective Asso.**

Court of Appeal of California, Third Appellate District

January 22, 1910, Decided

Crim. No. 96

### **Reporter**

12 Cal. App. 471 \*; 107 P. 712 \*\*; 1910 Cal. App. LEXIS 332 \*\*\*

THE PEOPLE, Respondent, v. SACRAMENTO BUTCHERS' PROTECTIVE ASSOCIATION, WESTERN MEAT COMPANY et al., Defendants; J. O'KEEFE, Appellant

**Subsequent History:** [\*\*\*1] A Petition to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on March 23, 1910.

**Prior History:** APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. C. N. Post, Judge.

## **Core Terms**

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meats, conspiracy, Butchers', imprisonment, misdemeanor, courts, meat company, police court, superior court, depositions, retail, fine, member of the association, provisions, words, anti-trust, designate, prices, free competition, accomplish, charges, confer, felony, cases, jail, commitment order, constituting, exceeding, disclose, selling

## **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

### **HN1** **Accusatory Instruments, Informations**

Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate in making the order.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

### **HN2** **Accusatory Instruments, Informations**

If the evidence taken before the magistrate was not sufficient to warrant the order of commitment, that question should be inquired into and determined through some other proceeding than a motion to set aside the information.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

12 Cal. App. 471, \*471A07 P. 712, \*\*712A910 Cal. App. LEXIS 332, \*\*\*1

### **HN3** Accusatory Instruments, Informations

When, as a result of an examination, an order has in fact been made and entered upon the docket of the justice, no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

### **HN4** Monopolies & Monopolization, Conspiracy to Monopolize

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. If agreements and combinations to prevent competition in prices are, or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

### **HN5** Monopolies & Monopolization, Actual Monopolization

In order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN6** Conspiracy, Elements

It is equally true that all the conspirators, whether known or unknown, need not be prosecuted at the same time, but an indictment charging a person known with having a conspiracy with other persons unknown or with other persons whose names are given, but who are not joined as defendants, is good.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

### **HN7** Inchoate Crimes, Conspiracy

Independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents, who engage in the conspiracy, must be held to be parties to it, and be counted in computing the necessary number to constitute it.

## **Headnotes/Summary**

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### **Headnotes**

Criminal Law--Violation of "Anti-trust Law"--Motion to Set Aside Information.--An information charging the violation of the anti-trust law (Stats. 1907, p. 294), cannot be set aside on the ground of an immaterial variance between the

information and the offense charged in the complaint before the magistrate, nor on the ground that the complaint and evidence before the magistrate was insufficient to warrant the commitment.

Id.--Construction of Penal Code--Grounds for Setting Aside Information.--Under the familiar rule of construction, *expressio unius est exclusio alterius*, a trial court cannot set aside an information on any other grounds than those specified in [section 995 of the Penal Code](#), viz.: "1. That before the filing thereof the defendant had not been legally committed; 2. That it was not subscribed by the district attorney."

Id.--Insufficiency of Evidence--Presumption.--Assuming that the evidence before the magistrate was altogether insufficient to establish probable cause for believing that the offense for which the defendant moving to set aside the information was examined and held had been committed or that he committed it, that question cannot be urged and decided on such motion. But upon the filing of the information corresponding to the commitment, the presumption arises that the evidence on which the commitment was predicated was in all respects sufficient to justify the magistrate in making the order.

Id.--Commitment Based upon Depositions--Nature of Complaint.--The complaint is in the nature of a deposition on which the warrant of arrest is based, and not a complaint in the sense that it is a pleading. The commitment is based upon the depositions as such, and not upon the complaint only. If the commitment does not of itself describe the offense, but refers to the depositions, they must describe the commission of the offense to which the commitment refers, though the finding of the magistrate as to the sufficiency of the evidence to sustain the offense is conclusive.

Id.--Complaint not a Part of Order of Commitment.--The complaint upon which the warrant of arrest is based cannot properly be deemed a part of the order of commitment which is based upon the depositions taken at the preliminary examination.

Id.--Absence of Variance Between Complaint and Information.--If the complaint be deemed a deposition to which the commitment refers, there is no material variance between the offense charged in the information and that stated in the complaint. That deposition states an offense under the provisions of the anti-trust law against the personal defendant. While the offense is more fully and clearly stated in the information--a requisite strictly applied to criminal pleading, but not to depositions taken before a magistrate--the offense charged in both documents is one and the same, and for the violation of precisely the same provisions of the law.

Id.--Order of Commitment--Indorsement upon Depositions not Essential to Information.--The order of commitment is not required to be indorsed upon the depositions, as a condition of the authority of the district attorney to file an information.

Id.--Entry of Order upon Docket Sufficient.--The order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse the same upon the complaint or depositions in no manner deprives the order of its validity or affects any substantial right of the defendant.

Id.--Sufficiency of Information--Violation of Anti-trust Law--Combination to Enhance Price of Meat.--An information substantially charging a violation of the anti-trust law in the language of the statute, and accusing the personal defendant and the Western Meat Company, of which he is the managing agent, of having entered into a combination and conspiracy with the Sacramento Butchers' Protective Association and other persons, for the purpose of destroying free and full competition in the meat business, and in requiring a meat dealer named to pay a higher price for meat than was charged to members of the combination, states an offense under that law.

Id.--Averment and Proof of Control of Market not Essential.--It is not necessary either to allege or prove that the defendants or either of them, or any of the persons referred to in the information as being connected with the alleged combination, were in a position to control the market in the sale and purchase of the commodity to which the charge relates.

Id.--Purpose of Anti-trust Law.--The purpose of the anti-trust law is to prevent such business combinations as will result in restrictions in trade or commerce, or will prevent competition in the manufacture or sale of merchandise and other commodities for domestic use.

Id.--Identity of Members of Butchers' Protective Association.--Where the Sacramento Butchers' Protective Association, as such, is made a defendant in the information without reference to the members composing it, the information is not rendered defective by describing them as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and comprising the Sacramento Butchers' Protective Association, whose names are unknown, with whom it is alleged that the personal defendant entered into an unlawful combination and conspiracy. This was sufficient so to identify such persons as to apprise defendant appealing of the particular persons with whom he is charged with having been in league in the maintenance of an unlawful conspiracy.

Id.--Parties to Conspiracy.--Where conspiracy is charged, it is not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one.

Id.--Gist of Offense--Combination with Others--Persons Unknown.--The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information charges a party with having entered into a conspiracy with others not made defendants, it is sufficient to refer to the latter in the accusatory pleading as "persons unknown."

Id.--Pleading--Action of Manager and of Meat Company--Defense. Where the information with clearness charges that appellant, as manager and agent of the Western Meat Company, and said company itself entered into the alleged combination and conspiracy with the Butchers' Protective Association and the members thereof, for the purposes of the information, the showing therein is sufficient to connect both the company and its manager therewith. The alleged act of the agent must be deemed that of the company, and cannot be presumed to be without its knowledge or assent. If he in fact exceeded his authority in entering into the conspiracy, that would be matter of defense for the meat company.

Id.--Proper Joinder of Corporation and Manager.--Upon principle, and in furtherance of sound policy, both corporations and their officers and agents who engage in the conspiracy must be held to be parties thereto, and it was proper to join both the Western Meat Company and its manager in the information.

Id.--Dates of Execution of Conspiracy not Fixed--Probative Facts--Surplusage.--The information is not rendered insufficient because the dates upon which the acts of the alleged conspirators committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. The acts constituting the actual accomplishment of the object or purpose of the combination and conspiracy constitute mere probative facts of its existence, the dates of which would be matter of surplusage, and need not be alleged.

Id.--Nature of Offense Under Anti-trust Law--Misdemeanor--Limit of Penalty--Exclusive Jurisdiction of Superior Court.--If the nature of an offense under the anti-trust law be deemed a misdemeanor, the limit of imprisonment being one year, without prescribing the place of imprisonment, and the limits of the fine being not more than \$ 5,000 and not less than fifty dollars in all county seats in which the police court has no jurisdiction of such maximum fine, the jurisdiction of the superior court under the constitution of all misdemeanors not otherwise provided for is exclusive under the anti-trust law.

Id.--Test of Character of Crime.--The test of the nature of a crime as a felony or misdemeanor is not the characterization of it as one or the other, but the nature and mode of punishment of the crime is the sole test. The question is not decided whether the superior court has power to imprison the defendant in the state prison for the year provided for in the statute, the supreme court having expressly limited its penalty to that of a misdemeanor.

Id.--Jurisdiction of Justices' Courts Excluded.--All justices' courts being expressly limited in their jurisdiction to misdemeanors not exceeding \$ 500 or imprisonment not exceeding six months in the county jail, their jurisdiction under the anti-trust law is excluded.

Id.--Support of Verdict--Conflicting Evidence.--Where the evidence is conflicting, the verdict of the jury adjudging the appellant guilty of the crime charged against him cannot be disturbed where there was evidence tending to establish the truth of the charges against him.

Id.--Evidence--Absence of Discrimination as to Smoked Meats Harmless Ruling.--Where the sole charge was discrimination as to fresh meats against the Butchers' Protective Association, evidence that they made no discrimination as to smoked meats not under their control, if its object and purpose was to corroborate the charge, was not erroneous, but if such was not its object and its admission was erroneous, the error was not prejudicial.

Id.--By-laws of Butchers' Protective Association.--The court properly admitted the by-laws of the Butchers' Protective Association not only to disclose the identity of its members, but also to show the nature and purposes of the association, and the object of its connection with the Western Meat Company, and so far as tending to show the criminal conspiracy, and if there was no relevancy in either of these respects, their admission was harmless.

Id.--Proper Cross-examination of Members of Association--Contribution of Money for Counsel for Appellant.--The court properly allowed members of the association who testified for the defendant to answer questions by the cross-examiner as to whether they contributed money toward counsel for the defendant appealing.

Id.--Instructions--Circumstantial Evidence of Conspiracy.--Instructions by which the jury were told that the crime of conspiracy could be proved by circumstantial as well as by direct evidence were perfectly proper.

Id.--Formation of Conspiracy.--*Held*, that an instruction in regard to the formation of a conspiracy, which, in effect, and with reasonable clearness, declared to the jury that it is immaterial how or in what manner it is formed, so long as it sufficiently appears from the evidence to be formed for an unlawful purpose, is not erroneous.

Id.--Instruction as to Conviction Based on Evidence.--An instruction as to conviction based on evidence of discrimination in sale of fresh meats, to the effect that if the jury should find from the evidence in the case that there was a discrimination in the price charged for fresh meats, so as to charge a higher price to those not members of the combination, to which the defendant was a party, they should convict the defendant, was proper.

Id.--Untenable Objections to Anti-Trust Law.--The anti-trust law is not incompatible as to any provision of the constitution, nor with [section 182 of the Penal Code](#) relative to the subject of conspiracies. The unlawful combination here involved is made to apply to a different object from any mentioned in the code.

## Syllabus

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The facts are stated in the opinion of the court.

**Counsel:** L. T. Hatfield, James B. Devine, and Jesse W. Lilienthal, for Appellant.

U. S. Webb, Attorney General, J. Charles Jones, Eugene S. Wachhorst, District Attorney of Sacramento County, and Frank F. Atkinson, Assistant District Attorney, for Respondent.

**Judges:** HART, J. Chipman, P. J., and Burnett, J., concurred.

**Opinion by:** HART

## Opinion

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[\*475] [\*\*715] HART, J. The defendant, O'Keefe, was convicted of violating certain provisions of an act of the legislature of 1907 (Stats. 1907, p. 984, c. 530), entitled: "An act to define trust and to provide criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote full competition in commerce and all classes of business in the state."

This appeal is by O'Keefe from the judgment and the order of the trial court [\*\*\*2] denying him a new trial.

The information charges that the appellant, as the managing agent of the Western Meat Company, and said company, in pursuance of a combination and conspiracy into which they had previously entered with the Sacramento Butchers' Protective [\*476] Association and the individual members thereof, to execute and carry out certain contracts and agreements, the effect of the execution of which would be to destroy free competition in the retail meat business in said city of Sacramento, required and compelled one Albert Robinson, who was engaged in carrying on the retail meat business in said city, to pay to the appellant and said Western Meat Company higher prices for meats than the appellant and said company required the members of said Butchers' Protective Association, each of whom was likewise engaged in the retail meat business, to pay for the same class or character of meats.

The refusal of the court to grant appellant's motion to set aside the information, the order overruling the demurrer to the information, insufficiency of the evidence to justify the verdict, alleged errors in admitting and rejecting certain evidence, alleged erroneous instructions given [\*\*\*3] to the jury, and want of jurisdiction in the superior courts of criminal prosecutions under the act upon the provisions of which the information here is based, are the general reasons upon which a reversal of the judgment and the order is urged.

The act concerned here is what is commonly known as the "Cartwright Anti-Trust Law," and, as its title and provisions clearly indicate, its purpose is to prevent such business combinations as will result in restrictions in trade or commerce, or, in other words, in the destruction of free competition in the manufacture, sale and purchase of merchandise and other commodities for domestic use.

Section 1 of said act reads, in part, as follows:

"Section 1. A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or by any two or more of them for either, any or all of the following purposes: 1. To create or carry out restrictions in trade or commerce. . . . 3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. . . ."

1. The order denying the motion to set aside the information was proper.

The [\*\*\*4] grounds of the motion, stated in general language, are: That the defendant had not been legally committed by a magistrate; that the alleged offense set forth in the information [\*477] is not the offense stated in the "complaint" filed in the magistrate's court, in that the offense sought to be charged in said complaint is a misdemeanor, while the information purports to charge a felony, and further, that the "complaint" does not charge the alleged offense to have been committed against any particular person, while the information charges that the purported offense alleged therein was against one Albert Robinson; "that no order has been indorsed on the complaint holding defendant, O'Keefe, to answer to the charge contained in said complaint"; that no evidence was adduced before the magistrate authorizing the order holding O'Keefe to answer to the charge alleged in the "complaint." In addition to these, the motion advances some other grounds upon which it is claimed the information should be set aside, but they are not, in our judgment, of sufficient importance to require special notice.

The only grounds specified by the code upon which, upon a proper showing, a trial court is [\*\*\*5] authorized to set aside an information are the following: "1. That before the filing thereof the defendant had not been legally committed by a magistrate; 2. That it was not subscribed by the district attorney of the county." ([Pen. Code, sec. 995.](#))

Under the familiar rule of construction, *expressio unius est exclusio alterius*, a trial court is without jurisdiction to entertain or to grant a motion to set aside the information upon any ground other than those expressly specified in the designated section of the Penal Code. Assuming, therefore, that the evidence presented to the magistrate was altogether insufficient to establish probable cause for believing that the offense for which the defendant was examined and held had been committed, and that he committed it, that question could not properly be urged and decided on a motion of the character of the one under consideration. [HN1](#)<sup>↑</sup> Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate [\[\\*\\*\\*6\]](#) in making the order ([Western Meat Co. v. Superior Court, 9 Cal. App. 538, \[99 Pac. 976\]](#)), and, as the attorney general has very clearly pointed out in his brief, [HN2](#)<sup>↑</sup> if the evidence taken before the magistrate [\[\\*478\]](#) was not sufficient [\[\\*\\*716\]](#) to warrant the order of commitment, that question should have been inquired into and determined through some other proceeding than a motion to set aside the information. ([People v. Beach, 122 Cal. 37, \[54 Pac. 369\]](#); [People v. Lee Look, 143 Cal. 216, \[76 Pac. 1028\]](#); [Redmond v. State, 12 Kan. 172](#); [People v. Cole, 127 Cal. 545, \[59 Pac. 984\]](#); [Ex parte Dimmig, 74 Cal. 164, \[15 Pac. 619\]](#).)

The point sought to be made by the appellant that there is a variance between the allegations of the "complaint," so-called, and those of the information, cannot be maintained. The instrument upon which the warrant of arrest is authorized to be issued by a magistrate in the case of an indictable offense is not a "complaint" in the sense that it is a pleading, but is practically a deposition only, setting forth the facts stated [\[\\*\\*\\*7\]](#) by the informant, sufficiently showing the commission of an offense and its perpetration by the defendant to justify the issuance of a warrant of arrest by the magistrate. ([Pen. Code, secs. 811, 812](#).) The commitment is based upon all the depositions and not alone upon the so-called complaint, and the information is in turn founded upon the order of commitment. It is true that the order of commitment in the case at bar does not itself specifically designate or describe the offense for which the defendant was held, declaring only "that the offense in the within depositions mentioned has been committed," and it is, of course, also true, in the absence of a specific description in the order of commitment itself of some offense of which the superior court has jurisdiction, referring therein to the alleged crime for which the accused is ordered held under its generic description only, that if the depositions do not show the commission of the offense to which the commitment refers, or, showing it, do not disclose probable reason for the defendant's connection with its commission, then the commitment is without a prop to uphold it. But, as stated, [\[\\*\\*\\*8\]](#) the presumption prevails, on a motion to set aside an information, that the evidence or depositions taken by the magistrate sufficiently show that the offense mentioned in the commitment was committed by the defendant. In other words, as we have shown, upon such a motion as the one now under examination, the superior court cannot review and overrule [\[\\*479\]](#) the finding of the magistrate that the evidence taken before him was sufficient. ([People v. Beach, 122 Cal. 37, \[54 Pac. 369\]](#); [People v. Lee Look, 143 Cal. 216, \[76 Pac. 1028\]](#); [People v. Sehorn, 116 Cal. 503, \[48 Pac. 495\]](#); [People v. Cole, 127 Cal. 545, \[59 Pac. 984\]](#).)

If, however, the contention is that the so-called "complaint" or the deposition upon which the warrant was issued is necessarily made a part of the order of commitment by appropriate and sufficient words of reference, and, as thus viewed, the commitment designates or describes a distinctly different offense from that alleged in the information, thereby vitiating the latter ([People v. Nogiri, 142 Cal. 596, \[76 Pac. 490\]](#)), it is clear that the point [\[\\*\\*\\*9\]](#) is not well taken. Said deposition, in our opinion, states an offense under the provisions of the anti-trust law against the defendant, and, while perhaps such offense is more fully and clearly stated in the information--a requisite strictly applied to criminal pleadings but not to depositions before a magistrate--the offense charged in both documents is one and the same and for the violation of precisely the same provisions of the law. ([Redmond v. State, 12 Kan. 172](#); [People v. Lee Look, 143 Cal. 216, \[76 Pac. 1028\]](#).) No authority has been cited, and, indeed, none can be found, holding, even where the commitment itself undertakes to describe the offense for which a defendant is held for trial upon a felony charge, that such offense must be stated therein with the technical nicety and precision required in an indictment or an information, and if the deposition upon which the warrant of arrest was issued in this case is to be treated as a part of the order of commitment (and certainly it cannot be so regarded), the inartificiality of its allegations or its insufficiency in stating with technical accuracy the offense for which the defendant [\[\\*\\*\\*10\]](#) was ordered committed (if these shortcomings could truly be attributed to it), cannot be the basis of a motion to set aside the information, if the latter charges the same offense.

It is further claimed that the district attorney was without authority to file the information because the order of commitment was not indorsed on the "complaint" or upon any of the other depositions taken by the magistrate. But the point is without merit. ([People v. Wilson, 93 Cal. 377, \[28 Pac. 1061\]](#); [People v. Wallace, 94 Cal. 497, \[29 Pac. 950\]](#); [People v. Tarbox, 115 Cal. 57, \[46 Pac. 896\]](#).)

[\*480] In [People v. Wallace, supra](#), the court says: "**HN3** [↑] When, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order; citing [People v. Wilson, 93 Cal. 377, \[28 Pac. 1061\]](#). The law requires the justice to keep a docket in which must be entered each action, and all [\*\*\*11] proceedings therein ([Pen. Code, sec. 1428](#)); and we are of opinion that an order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse upon the complaint or the depositions taken in no manner deprives the order of its validity, or affects any substantial right of a defendant."

2. The information substantially follows the language of the statute, and clearly states an offense under said statute. Briefly stated, the information accuses the defendant and the Western Meat Company (a corporation), of which he is the managing agent in the city of Sacramento, of having entered into [\*\*717] a combination and conspiracy with the Sacramento Butchers' Protective Association and other persons, whose names are alleged to be unknown, for the purpose of destroying full and free competition in the retail meat business, by entering into and carrying out "contracts and understandings" made in furtherance of such combination and conspiracy, and as the result thereof, and in the execution of said combination and conspiracy, sold to one Albert Robinson, a dealer in meats in said city of Sacramento, [\*\*\*12] certain meat at a higher price than said O'Keefe, as agent of and for said company, sold the same class of meat to other persons, composing said association, and that by reason of said "compacts and understandings, plans and schemes," so carried out by said alleged conspirators, said Robinson was compelled to, and did, pay to said company a higher price for meat purchased by him of the company than was paid by said other persons, constituting the said Butchers' Protective Association; that because of said agreement, compacts, plans and schemes, so executed and carried out by said company, said O'Keefe and said association, and the members of said association, said alleged conspirators did then and there create [\*481] and carry out "restrictions in trade, and directly and indirectly preclude a free and unrestricted competition among the persons, firms, partnerships and associations of persons constituting and composing the said Sacramento Butchers' Protective Association and other persons, purchasers, consumers and dealers in the buying and selling of such article and commodity of merchandise, produce and commerce, to wit, meat," etc.

It will thus be observed that the information [\*\*\*13] is, as we have already stated, substantially in the language of the statute, and, while the rule that an offense may properly be stated in the language of the statute defining such offense cannot be uniformly followed, it is in our opinion applicable in this case. We cannot conceive of any other elements which could be required to be alleged in order to state an offense under the first and third subdivisions of section 1 of the anti-trust law than those involved in the allegations of the information here. If the evidence shows, as the information clearly charges, that the defendants had entered into and formed a combination by the terms of which members of the Sacramento Butchers' Protective Association were privileged to purchase meat from the Western Meat Company at prices lower than those at which other persons engaged in the retail meat business were to be allowed to purchase such meat, thus practically confining the business of selling meat at retail to those only who were fortunate members of said association, then a plain and palpable violation of not only the spirit, but of the letter, of the statute is disclosed. It was not necessary, as counsel for appellant contend, to [\*\*\*14] allege in the information that the meat company, the defendant O'Keefe and the Butchers' Protective Association were in a position to control the market with respect to meat. As we have stated, the object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of "merchandise, produce, or any commodity," or if such combination tends to restrict trade or to prevent free competition therein, such combination is against the letter and paramount object of the law. It is, [\*482] therefore, not necessary to prove, and much less to allege in the information in order to state the offense denounced by the statute, that the defendants or any of the persons referred to in the information as being

connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates.

As is said by the supreme court of Missouri, in the case of *State v. Armour Packing Co., 173 Mo. 356, [96 Am. St. Rep. 515, 73 S.W. 645]*, [\*\*\*15] "HN4"<sup>↑</sup> the gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. . . . If agreements and combinations to prevent competition in prices are, or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character."

In *United States v. E. C. Knight Co., 156 U.S. 1, [15 S. Ct. 249]*, Chief Justice Fuller, speaking for the court, says: "Again, all the authorities agree that, HN5"<sup>↑</sup> in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." (See *State v. Slutz, 106 La. 182, [30 South. 298]*; *State v. Thompson, 69 Conn. 720, [38 Atl. 868]*; *United States v. MacAndrews, 149 Fed. 836; Bailey v. State, 42 Tex. Cr. 289, [59 S.W. 900]*.)

It is further objected that the information is deficient in that it fails to disclose the identity of the persons referred [\*\*\*16] to therein as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and composing said Sacramento Butchers' Protective Association, the names of whom are unknown except as herein stated," etc. The further contention is made that it does not appear from the information but that O'Keefe acted in the transactions with Robinson independently and without the knowledge and sanction of the Western Meat Company.

Neither of these propositions can be sustained. We have seen that the rule of criminal [\*\*718] pleading is that the offense may be stated in the language of the statute if the latter fully and clearly describes the offense denounced as such by [\*483] its provisions. There is nothing wanting in the language of the law under which the appellant was prosecuted and convicted to fully and accurately define the offense sought to be described therein. The information directly charges that the "persons, firms, partnerships," etc., whose names are alleged to be unknown, are members of the Sacramento Butchers' Protective Association, with which, it is further alleged, the appellant was connected in the inauguration and prosecution of [\*\*\*17] the combination and conspiracy which the statute declares that it is unlawful to maintain. This was sufficient to so identify such persons as to apprise the appellant of the particular persons with whom he is charged with having been in league in the maintenance of an unlawful conspiracy.

In *State v. Slutz, 106 La. 182, [30 South. 298]*, it is said: "HN6"<sup>↑</sup> It is equally true that all the conspirators, whether known or unknown, need not be prosecuted at the same time, but an indictment charging a person known with having a conspiracy with other persons unknown or with other persons whose names are given, but who are not joined as defendants, is good." (See 4 Ency. of Pl. & Pr., 709, 710; 8 Cyc., p. 663, note 99; *State v. Thompson, 69 Conn. 720, [38 Atl. 868]*.)

In other words, where conspiracy is charged, it is manifestly not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one. The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information, as here, charges a party with having entered into such a conspiracy with others, not made [\*\*\*18] defendants, it is sufficient to refer to the latter in the accusatory pleading as "persons unknown." The "persons, firms, partnerships," etc., thus referred to in the information in the present case are not made defendants as individual persons, but only so in so far as they constitute in the aggregate the Sacramento Butchers' Protective Association.

The information with clearness charges that O'Keefe, as manager and agent of the Western Meat Company, and said company itself, entered into the alleged combination and conspiracy with the Butchers' Protective Association and the members of said association. There is, therefore, no merit [\*484] in the contention that, for aught that appears to the contrary from the allegations of the information, O'Keefe's alleged part in the conspiracy charged was without the knowledge or indorsement or assent of the company of which he was agent. If, as agent of the company, he joined the conspiracy, then certainly his act was that of the company, for the company acted through

him, and his act attached to and became that of the company, as the act of a person actually committing a murder necessarily attaches to another who had been in the conspiracy [\*\*\*19] to commit the murder, but who himself did no physical act toward the consummation of the object of the conspiracy. For the purposes of the information, the showing therein was sufficient to connect both the company and O'Keefe. But if, by becoming a member of the conspiracy, O'Keefe acted in excess of his authority as such agent, it then became a matter of defense for the meat company that he had thus exceeded his authority or acted in the premises without its knowledge or sanction.

In the case of Standard Oil Co. v. State, 117 Tenn. 618, [100 S. W. 705], where the company and its agent were jointly indicted under the anti-trust law of Tennessee, the supreme court of that state uses the following language: "We are of the opinion that, HNT independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents, who engage in the conspiracy, must be held to be parties to it, and be counted in computing the necessary number to constitute it. There are respectable authorities which tend to this conclusion"; citing People v. Duke, 19 Misc. Rep. 292, [44 N. Y. Supp. 336]; Samuels v. Oliver, 130 Ill. 73, [22 N. E. 499]; [\*\*\*20] Eddy on Corporations, sec. 362. (See, also, United States v. MacAndrews, 149 Fed. 823.)

There is no substantial ground upon which the information may be held to be insufficient because the dates upon which the acts of the alleged conspirators, committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. While in no manner vitiating the information, there was, in our opinion, no real necessity for alleging the acts constituting the actual accomplishment of the object or purpose of the combination or conspiracy. They constitute mere probative facts, since [\*485] the gist of the crime of conspiracy is in its formation for an unlawful purpose, and, therefore, the averments of the information with reference to the times at which such acts were committed may be treated as surplusage. In other words, the legislative power of the government very properly treated combinations formed for the purpose of restricting trade or for any other unlawful purpose very much in the light in which a loaded gun is regarded--a dangerous instrument to be lying around loose--and upon the same principle which sustains local legislative [\*\*\*21] measures declaring it to be a misdemeanor for one to have in his possession burglarious tools and instruments, deals with such combinations so that prevention may be accomplished before a cure becomes necessary. Therefore, the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of [\*\*719] such conspiracy, which is the ultimate fact to be proved in order to establish the wrong act against which the statute inveighs.

3. It is further contended and argued with much earnestness that the superior court is without jurisdiction of criminal cases arising under the anti-trust law, but that such cases are cognizable alone in the justice's or police court. This contention is untenable, as we think we can without difficulty show.

The argument upon this point arises out of the failure of the legislature to expressly declare, in the penal section of the statute, whether a violation of the provisions of the law constitutes a felony or a misdemeanor, or to expressly designate the jail or prison in which a party, upon conviction, may be imprisoned in the event the court, in the exercise of the discretion vested in it, elects to [\*\*\*22] impose the penalty of imprisonment. The section referred to provides that any person, firm, partnership, etc., violating either or all of the provisions of "this act" shall be "punished by a fine of not less than fifty (50) dollars nor more than five thousand (\$ 5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment." It is clear, from the nature and extent of the penal punishment which is authorized to be inflicted by the section mentioned, that neither the justices' courts nor the "police court" of the city of Sacramento, if such a court as [\*486] the latter exists, have jurisdiction to try criminal cases arising under the statute. That this is true will readily become obvious upon reading section 5 of article VI of the constitution, and from an examination of the statutes establishing the jurisdiction and powers of the inferior courts of the city of Sacramento as to misdemeanors.

The section of the constitution adverted to, after specifically outlining the jurisdiction of the superior courts as to numerous subjects, provides generally that those courts shall have jurisdiction "of cases of misdemeanor not otherwise [\*\*\*23] provided for." The jurisdiction of the class of misdemeanors to which the one in the case at bar belongs is not, as seen, expressly fixed, and, as we have stated, the penalty authorized to be imposed therefor is beyond the power of the justices' courts or of the "police court" of the city of Sacramento to impose, as will presently

more clearly be made to appear; hence, by the terms of the constitution itself, the superior court of the county of Sacramento has exclusive jurisdiction of the crimes defined in the statute involved here.

The criminal jurisdiction of justices' courts is expressly confined, by the provisions of [section 1425 of the Penal Code](#), to "all misdemeanors punishable by fine not exceeding \$ 500, or imprisonment not exceeding six months, or by both such fine and imprisonment." The jurisdiction thus in general language conferred in criminal cases on justices' courts is in addition to the jurisdiction vested in such courts of other expressly enumerated offenses, for none of which, however, does the penalty exceed a fine of \$ 500 or imprisonment for six months, or both.

There is no distinct court known and designated as the "police court" of [\*\*\*24] the city of Sacramento, exercising the jurisdiction ordinarily given to municipal police courts. The city justice's court of said city exercises the jurisdiction and performs all the functions of a police court under the authority and power vested in it by [section 1425 of the Penal Code](#), *supra*, and not from any power which may be supposed to have been given it by the charter of the city of Sacramento, approved by the legislature of 1893. (Stats. 1893, p. 564.) But, even upon the assumption that there resided in the legislature at the time of its approval of said [\*487] charter the power to create by such means or through such instrumentality municipal courts or judicial tribunals of any character, or to thus confer upon the city justices' courts judicial functions or duties in addition to those prescribed by statute--a power which it has been held did not exist in the legislature at that time ([Ex parte Sparks, 120 Cal. 395, 152 Pac. 715](#))--the provision of said charter with respect to the jurisdiction of the court thus sought to be set up or upon which new judicial functions were thus attempted to be conferred would not confer upon [\*\*\*25] such court jurisdiction of the offenses denounced by the statute concerned here. Said provision (article IV, subdivision 3, of said charter), substantially follows and copies all of [section 1425 of the Penal Code](#), and includes the following general language of said section: "And all misdemeanors punishable by fine not exceeding \$ 500, or imprisonment not exceeding six months, or by both such fine and imprisonment."

Section 4426 of the Political Code can have no application here because, as we have seen, there does not exist in the city of Sacramento a police or any other municipal court, strictly speaking, and if there did exist there such a court the section referred to would clothe it with no more power as to misdemeanors than is conferred upon justices' courts generally by [section 1425 of the Penal Code](#).

Counsel for appellant declare that they are sustained in the point now under review by the case of [Union Ice Co. etc. et al. v. Rose, 11 Cal. App. 357, 104 Pac. 1006](#). But counsel cannot point out the remotest analogy between the case at bar and the one cited favorable to their contention upon the point [\*\*\*26] under consideration.

The cited case involved an application to the district court of appeal of the second district, for a writ of prohibition to restrain the respondent, a police court judge in the city of Los Angeles, from further attempting to entertain jurisdiction of a criminal prosecution inaugurated under the [antitrust law](#), upon the [\*\*720] ground that the trial of the case was not, under the provisions of said law, within the jurisdiction of said court, and the appellate court, upholding the constitutionality of an act of the legislature of 1901 creating police courts for cities of the one and one-half class, to which the city of Los Angeles belongs, merely holds that the police [\*488] courts so created, having been given, by section 2 of said act, jurisdiction of *all* misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in cities where such police courts are held, are thus invested with jurisdiction to try cases involving offenses created by the Cartwright law. No one will undertake to challenge the soundness of that conclusion. Nor will the proposition be disputed that the legislature has the right and the power [\*\*\*27] to confer upon justices' and police courts jurisdiction of *all misdemeanors*, whatever may be the extent of the punishment authorized to be inflicted in the event of a conviction thereof, such courts being limited, of course, in the execution of their judgments of imprisonment to imprisonment in a local or county jail.

But it is at once perceivable upon reading the opinion in the cited case that it has no application here. There is, as we have shown, no police court in the city of Sacramento to which the provisions of the statute of 1901, *supra*, can apply. Besides, the court in that case in effect expresses the opinion that in those cities where the justices' and police courts are limited in their jurisdiction to the trial of misdemeanors for which no greater penalty than that

prescribed by [section 1425 of the Penal Code](#), and section 4426 of the Political Code, the jurisdiction of criminal prosecutions under the anti-trust law is exclusively in the superior courts.

Nor does the fact that the legislature omitted to specifically designate the jail or prison in which a sentence of imprisonment shall be executed under the statute here render any the less [\*\*\*28] manifest the soundness of the proposition that jurisdiction of these cases is alone in the superior courts of those counties where jurisdiction thereof is not otherwise expressly apportioned or assigned. We are not called upon here to inquire whether the legislature contemplated, in the enactment of the anti-trust law, that more than a county jail sentence of imprisonment should, under any circumstances, be imposed for a violation of its provisions, or intended to give to the superior courts the power to determine in any case whether an infraction of the law shall, by the nature of the punishment inflicted therefor, operate as a felony or as a misdemeanor. ( [Pen. Code, sec. 17; People v. Gray, 137 Cal. 267, 170 Pac. 20; In re Sullivan, 3 Cal. App. 193, 1\\*4891 184 Pac. 781](#).) Nor (the court in the present case having treated the offense of the appellant as a misdemeanor by the nature of the punishment imposed), are we required to speculate as to what may be the effect, if any, upon the question of the validity of the penal section of the statute of a want of uniformity in the nature of the punishments imposed which [\*\*\*29] may arise by reason of the jurisdiction in some instances being alone in the superior courts and in others exclusively in police courts. It is, nevertheless, true, as declared, that no proposition could be further removed from the realm of disputation than that, from the very nature and extent of the punishment prescribed, the justices' courts of the city of Sacramento are without jurisdiction of this class of misdemeanors. We judicially know that the judgments of imprisonment of justices' courts in criminal cases cannot be executed in any other than the county jail, except in those cases where, in certain cities, a justice's court performs the functions of a police court by taking cognizance of cases arising under city ordinances. We further know, judicially, that the judgments of the superior courts in criminal cases are, save in a few exceptional cases, executed either by imprisonment in a state prison or by the infliction of the death penalty. We can, therefore, judicially know, and thus readily determine, when a statutory offense is cognizable in the superior or the justice's court by reference to the nature and extent of the punishment prescribed, whether the statute designates [\*\*\*30] such offense as a felony or a misdemeanor or as neither, or whether or not it specifies the jail or prison in which the judgment is to be executed. The truth is that, in the determination whether a certain offense is a felony or a misdemeanor, no material aid is necessarily afforded by the mere characterization of the prohibited and penalized act as either the one or the other, since the nature and extent and mode of the punishment prescribed (or inflicted, where the superior court is clothed with a discretion of determining whether the sentence shall be executed by imprisonment either in a state prison or the county jail), is the sole test. ( [Pen. Code, sec. 17](#).) For illustration, if a statute should denounce a certain act as a felony, but limited the power of punishment therefor to imprisonment in the county jail for a term not exceeding six months [\*490] or a fine not exceeding \$ 500, or by both such fine and imprisonment, it would readily appear, notwithstanding its designation by the statute as a felony, that, from the nature of the punishment prescribed, the act so denounced and designated could be nothing more than an ordinary misdemeanor, of which [\*\*\*31] justices' courts have exclusive jurisdiction. Therefore, in the case at bar the nature of the punishment prescribed, being in excess of the punishment which a justice's court possesses the power to impose, fixes the jurisdiction in the superior court of Sacramento [\*\*721] county as clearly and as unquestionably as though such jurisdiction were conferred in express terms.

4. The contention that the evidence does not justify the verdict is not sustained by the record.

We shall not undertake an elaborate or detailed examination of the evidence as it is presented by the record and upon which the jury felt justified in adjudging the appellant guilty of the crime charged against him. It will suffice to say that the most that can be said of the evidence is that upon the question of the defendant's guilt, there exists therein a substantial conflict, and in that state of the record the verdict only represents the exercise of a power which resides exclusively within the province of the jury.

We may, however, point to these facts which not only stand undisputed, but some of which the appellant himself admitted at the trial: That there existed in the city of Sacramento at the time of the [\*\*\*32] trial an organization known as the Sacramento Butchers' Protective Association, which was composed of a large majority, if not all, with the exception of Albert Robinson, of the retail meat dealers in said city; that said Robinson was not a member of said association; that when he (Robinson) first applied to appellant to supply him with fresh meats to be sold in said

city by retail, said appellant stated to him that, before he could give him a definite answer with regard to the proposition, he (appellant) would be required to first confer with the main office at San Francisco; that appellant did finally furnish Robinson with fresh meats, but uniformly charged him, variously, a cent and a cent and a half and two cents per pound more for meats than he charged the members of the association for the same kind of meats. Appellant was a witness for himself, and [\*491] admitted charging Robinson more for meats than he required members of the association to pay for the same class of meats, and the only explanation he had to offer for thus discriminating against Robinson was that he had a right to do so, and had been so advised by his attorney.

There was other testimony received which [\*\*\*33] tended to establish the truth of the charge against the appellant. It was, for instance, shown that numerous complaints involving protests against selling meats to Robinson by the meat company were made to appellant by certain members of the butchers' association, and these complainants, except in the case of one who claimed that Robinson's place of business was situated nearer his place of business than the rules of the association permitted, were usually satisfied after inspecting Robinson's bills, disclosing that he was paying higher prices for meats than they were compelled to pay. It was, moreover, shown by the witness, Brier, the stenographer who reported the testimony at the preliminary examination of the appellant, that at said examination O'Keefe was a witness, and as such stated, among other things, that he (O'Keefe) "did not wish to encourage Robinson's trade, and also in his testimony said that he consulted with members of the Sacramento Butchers' Association about selling Robinson meat"; that O'Keefe further testified at said examination that "Robinson paid more for his meat than was paid by anybody else purchasing beef from his corporation at that time . . ."; that the [\*\*\*34] "defendant also testified in his examination that the prices on meat sold by him to Robinson from January 4th to 11th, inclusive, were higher than the prices on the meats sold by him during that time to members of the Sacramento Butchers' Protective Association"; that he stated that "he did not propose to give any satisfaction to Robinson; that he knew that Robinson was not a member of the association; that he knew the other dealers getting meat here were members of that association; stated that he talked with members of the association about selling Robinson meat prior to the time Robinson came to see him in reference to buying meat from the Western Meat Company, and prior to the time of selling Robinson meat; stated that it was his intention to consult as many of the members as he could before selling Robinson meats; that he would be governed [\*492] by the desires of the association in dealing with Robinson, and that in his dealings with Robinson he was governed by the desires of the members of the association," etc. There is considerable more testimony shown by the record corroborative of that of which the foregoing is a mere synopsis, but we have referred sufficiently to the [\*\*\*35] proof adduced by the people to show that the jury were justified in reaching the conclusion that the charge alleged in the information was established by the degree of proof required in criminal cases. As we have before stated, the gist or gravamen of the crime charged in the information is the formation by the parties named therein of the conspiracy for the purpose of destroying free competition in the retail meat business in the city of Sacramento, and, therefore, except in so far as it serves as evidence of the crime charged, the actual execution of the conspiracy is immaterial. It is enough, in other words, to show that the purpose of the combination into which the parties referred to in the information entered was to carry out contracts and agreements and understandings between them in restraint of trade. Therefore, while it is not for this court to analyze the evidence with the purpose of ascertaining and passing upon its probative force and effect, it may well be suggested that with the uncontradicted evidence of the appellant's admissions, considered with the other circumstances to which we have briefly referred, what possible ground is there presented here for holding, or [\*\*\*36] even doubting, that the conclusion [\*\*722] of the jury that the purpose of the combination was to circumvent legitimate competition in the business of retailing meats in the city of Sacramento is not justified. It is idle, and no answer to this position, to say, as is the fact, that the appellant and each of the members of the Butchers' Protective Association positively denied that there ever was any "understanding, compact or agreement" between the members of said association and the Western Meat Company or O'Keefe, as the manager of said company, "whereby it was understood or agreed in any manner, shape or form that the Western Meat Company was to charge persons who did not belong to that association a higher or a different price for fresh meats than would be charged members of the Butchers' Protective Association"; for thus there is, plainly, brought [\*493] about that conflict only which, under our system, forecloses interference by reviewing courts with the verdict of a jury or the findings of a court.

5. There are many alleged errors assigned in the rulings of the court upon questions involving the admission and rejection of evidence. All these we shall not undertake [\*\*\*37] to specially review, for it will be sufficient to say that

we have been unable, after a careful examination of these assignments, to find in any of the rulings, even if it might well be conceded that some of them were erroneous, anything prejudicial to the substantial rights of the appellant. But most of the objections interposed by appellant to the admission of certain testimony, in their very nature bear upon the weight rather than upon the question of the competency or relevancy of such testimony.

We may, however, point out a few of the overruled objections interposed by the defendant, and of which advantage is sought to be taken by appellant on this appeal, as illustrating the nonprejudicial effect of the rulings generally of the trial court, assuming that they or some of them were not strictly correct.

Certain witnesses, introduced by the people, testified that Robinson bought smoked and cured meats from the company and was charged therefor prices at which the same kind and quality of such meats were sold to other retailers, including the members of the butchers' association. There was no complaint, nor was there any dispute upon the proposition that the company discriminated [\*\*\*38] in prices against Robinson in the sale of smoked and cured meats. The charge was, as the evidence clearly discloses, that the discrimination complained of was made on the sale of fresh meats. The testimony with regard to smoked or cured meats was, in some measure, whether large or small is unimportant, corroborative of the evidence of the conspiracy charged, showing that the meat company discriminated in favor of the members of the butchers' association and against Robinson in the sale of fresh meats. In other words, it emphasized to some extent the direct proof of the existence of the conspiracy by showing that as to those meats in which the members of the association did not deal, the meat company did not discriminate against Robinson but sold him such [\*494] meats at normal prices. If such were not the purpose and effect of the testimony concerning cured or smoked meats, then it had none at all, and therefore, if erroneously admitted, could not have been prejudicial.

Objection was also made and overruled to the introduction in evidence by the people of the by-laws of the Butchers' Protective Association. We think the ruling was proper. The by-laws were not only proper for [\*\*\*39] the purpose of disclosing the identity of the members of the association, but also to show the nature and purposes of the association and the object of its connection, if any, with the Western Meat Company. Indeed, if the by-laws tended in any manner to disclose the criminal conspiracy charged in the information, they were competent evidence for that purpose. (*Judd v. Harrington*, 139 N. Y. 105, 134 N. E. 790; 10 Am. & Eng. Ency. of Law, p. 863.) But if the by-laws failed to show, or contained nothing tending to disclose the conspiracy charged, then, clearly they were harmless as evidence, and their admission into the record could have had no prejudicial effect upon the rights of the appellant.

The further claim is made that the court erred to the detriment of the defendant by allowing the people to inquire of the members of the association, upon cross-examination, whether they contributed money toward the employment of counsel for the defense or otherwise aided the defendant in the preparation and maintenance of his defense. The object of this cross-examination was, of course, to show that the members of the association were more than ordinarily interested [\*\*\*40] in the defense and were, therefore, partisans. It is not necessary to refer to authorities to show the manifest propriety of the cross-examination which appellant condemns. It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case, thus putting the jury in possession of a circumstance which may materially aid them in determining how much weight, if any, the testimony of such witness is entitled to.

Thus we have referred to some of the many objections against the validity of the judgment and order here based [\*495] upon the rulings of the trial court upon the evidence, and, as suggested, they fairly represent the general character, in their effect upon the rights of the appellant, of those other objections to which we must forbear giving special attention.

[\*\*723] 6. Many of the instructions of the court are assailed as involving erroneous statements of the law applicable to the case. We shall not specially review all these assignments. The charge of the court in its entirety is full, [\*\*\*41] clear and fair upon all the vital points in the case.

The instructions by which the jury were told that the crime of conspiracy could be proved by circumstantial as well as by direct evidence were perfectly proper. No reason exists for requiring the proof of the crime of conspiracy to be

by means of direct rather than by circumstantial evidence. No one has ever challenged the proposition that it is competent to prove any ultimate fact by circumstantial evidence. Indeed, it would be impossible to prove many cases of conspiracy or of any other crime without the aid of such evidence.

The italicized part of the following instruction is particularly criticized:

"The common design is the essence of the charge, and while it is necessary in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, *it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which* [\*\*\*42] *the unlawful combination was to be made effective* It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or [\*496] was to be executed at a remote distance from the other conspirators."

The evident and rational meaning of the portion of the foregoing instruction put in italics, when read with the remainder of said instruction, is that "no explicit or formal agreement" need be proved, if it be otherwise satisfactorily proved that two or more persons, in any manner, come to a mutual understanding to accomplish a common and unlawful design. In other words, the instruction in effect, and with reasonable clearness, declared to the jury that it is immaterial how or in what manner a conspiracy may be formed, so long as it sufficiently [\*\*\*43] appears from the evidence that it was formed for an unlawful purpose.

Several other instructions of similar import to the fore-going are complained of, but in view of what we have said with regard to the quoted instruction they need not be specially noticed.

The instruction to the effect that, if the jury should find from the evidence beyond a reasonable doubt that, in pursuance of an understanding or agreement, either express or tacit, between one F. J. Salcedo, a member of the butchers' association and the defendant, whereby O'Keefe agreed to charge, and did charge, Albert Robinson more for the meat purchased by him of said defendant than was charged by said defendant to any member of said association, with the intent to lessen competition, it would be the duty of the jury to convict the defendant, was pertinent, and based upon the testimony of the witness Brier and that of said Salcedo. It is not disputed that Salcedo was, at the times mentioned in the information, a member of the butchers' association, and it further appears that on several different occasions he personally remonstrated with the defendant against the sale of fresh meats to Robinson.

It will be remembered that [\*\*\*44] it was proved that the defendant himself admitted, while on the witness-stand at the preliminary hearing of the charge against him, that, in his dealings with Robinson "he was governed by the desires of the members of the association."

We have thus given attention to some of the more important objections to the charge of the court. As declared, the instructions as a whole with clearness correctly declared to [\*497] the jury the rules by which they were to be governed in considering the evidence.

Some intimation is thrown out by counsel for the appellant that the law against trusts and unlawful combinations is out of joint with the constitution, and as well conflicts with the law on the subject of criminal conspiracies as defined by the Penal Code. The specific ground for the constitutional objection to the law is not pointed out, and we do not think any such objection can be shown. Nor can we perceive any incompatibility, if such an objection could be successfully urged against the anti-trust law, between the latter and the code section pertaining to the crime of conspiracy. The essence or gist of conspiracy here, as is true of the crime as it is defined by section 182 of the Penal Code [\*\*\*45], is in the formation and maintenance of the conspiracy for the purpose of accomplishing some unlawful object, or, also under the code, for the purpose of accomplishing a lawful object by unlawful means. As we

have before declared, in the case at bar the actual acts constituting the crystallization of the object of the conspiracy constitute evidence only of the unlawful combination or agreement to co-operate together for the purpose of destroying free competition in trade, and the only distinction, which is none at all, so far as the crime itself is concerned, between the conspiracy charged here and that with which the code section deals, is that the former is made to apply to a different object from any mentioned in the code.

[\*\*724] We have found nothing in the record demanding a reversal of either the judgment or the order, and both are, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 23, 1910.

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## Corn Products Refining Co. v. Roser-Runkle Co.

Court of Common Pleas of Hardin County, Ohio

April, 1910, Decided

No Number in Original

**Reporter**

22 Ohio Dec. 663 \*; 1910 Ohio Misc. LEXIS 111 \*\*; 10 Ohio N.P. (n.s.) 596

CORN PRODUCTS REFINING CO. v. ROSER-RUNKLE CO.

**Prior History:** [\*\*1] DEMURRER to answer.

**Disposition:** Demurrer to the second defense sustained.

### **Core Terms**

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glucose, cause of action, set-off, pounds

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

#### **HN1[ Responses, Defenses, Demurrsers & Objections**

Any new matter constituting a defense, counterclaim, or set-off may be set forth in the answer, Ohio Gen. Code §§ 11314, 11315. A "defense" in the sense used in these sections means that which may be offered to defeat a suit, by denying, justifying, or confessing and avoiding, the cause of action. It goes only to the plaintiff's right.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

#### **HN2[ Pleadings, Crossclaims**

A counterclaim is a cause of action existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. Ohio Gen. Code § 11317.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

### [\*\*HN3\*\*](#) **Pleadings, Crossclaims**

A set-off is defined as a cause of action existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action that is founded on contract. Ohio Gen. Code § 11319.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Remedies > General Overview

### [\*\*HN4\*\*](#) **Public Enforcement, State Civil Actions**

The right to recover depends upon a violation of the Valentine **Antitrust Law**, Ohio Gen. Code §§ 6391 et. seq.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

### [\*\*HN5\*\*](#) **Pleadings, Crossclaims**

"Set-off" is the limit of the defendant's right to plead, and being statutory and unknown to the common law, the right to plead it is necessarily limited by Ohio Gen. Code § 11319, itself. The action should be a direct one.

## **Headnotes/Summary**

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### **Headnotes**

#### **MONOPOLIES--PLEADING.**

##### **1. Elements of Good Answer.**

A good answer under Gen. Code 11314 **et seq.** must set forth facts constituting a defense, set-off, or counterclaim.

##### **2. That Seller is a Monopoly is no Defense to Action for Goods Sold by It.**

In an action to recover for goods sold, it is no defense to say that the plaintiff is an unlawful trust and combination in restraint of trade.

##### **3. Cause of Action for Injuries to Business under Valentine Act does not Arise on Contract.**

The cause of action created in favor of one "injured in his business or property" under the Valentine **antitrust law**, Gen. Code 6391 **et seq.**, does not arise upon contract and is not a counterclaim or set-off in an action to recover for goods sold.

##### **4. Offering Premium for Exclusive Patronage of Buyer not In Restraint of Trade.**

The offer of a premium or reward to a customer in the way of profit-sharing in one's business for exclusive patronage during a given future period is not in restraint of trade nor against public policy.

**Counsel:** Smick & Hoge, for plaintiff.

George E. Crane, for defendant.

**Judges:** DUNCAN, J.

**Opinion by:** DUNCAN

## **Opinion**

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[\*663] DUNCAN, J.

This suit is brought to recover \$ 416.50 as the balance due on an account for fifty-nine barrels of glucose sold and delivered by the plaintiff to the defendant in the year 1908.

The first defense is a general denial.

For a second defense the defendant says that the plaintiff is a member of a trust and combination in restraint of trade and that at the time said sale was made said combination was the sole manufacturer of glucose in the United States, and that for the purpose of forestalling and preventing competition therein and to further give effect to their unlawful conspiracy against [\*664] trade, the plaintiff and other members offered in advance to give their customers, respectively, a rebate on all glucose purchased by them in the year 1907, to be determined by the profits of the company at the close of that year, provided the customer would purchase all the glucose from that member exclusively, required for use in its establishment during said year 1907 and the year 1908, which [\*\*\*2] the defendant accepted, and that the plaintiff thereafter raised the price of glucose twenty cents per hundred pounds and thereby created a fund for the purpose of and to be used to prevent threatened competition in the building of other glucose factories, and that as a result the defendant was compelled to buy said glucose of said trust and to pay therefor twenty cents more per hundred pounds than such glucose was reasonably worth, and that much more than it would have to pay but for said combination.

The defendant further says that during said year 1907, it purchased of the plaintiff 277,644 pounds of glucose and that under and pursuant to said offer and acceptance it is entitled to fifteen cents per hundred pounds thereof, amounting to \$ 416.50, as its share of plaintiff's profits for said year, for which the defendant prays judgment and set-off against plaintiff's claim.

A general demurrer is filed to this second defense.

This demurrer does not call upon the court to decide whether the facts set forth in this second defense of the answer constitute a cause of action, but whether the facts there alleged are sufficient in law to defeat the plaintiff's claim.

The civil code provides [\*\*\*3] that [HN1](#) "any new matter constituting a defense, counterclaim or set-off" may be set forth in the answer (Gen. Code 11314, 11315). A "defense" in the sense used in these sections means that which may be offered to defeat a suit, by denying, justifying or confessing and avoiding, the cause of action. It goes only to the plaintiff's right. It is not a claim in any sense. It is not a sword, but simply a shield. This, as distinguished from the words "counterclaim" and "set-off," used in the same connection. [HN2](#) A counterclaim as defined by the code is "a cause of action existing in favor of a defendant, and against a plaintiff \* \* \* between whom a several judgment [\*665] might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Gen. Code 11317.

The fact that the plaintiff was a member of a trust and combination in restraint of trade is not a defense at common law nor by statute to an action for goods sold by it, even though the price of those goods was fixed by the trust agreement. The plaintiff's cause of action is in no sense dependent upon or affected by [\*\*\*4] the alleged trust

agreement. That agreement the defendant was not a party to and it is entirely collateral to the transaction sued upon. There is no allegation in the answer tending to show that the sale in question was tainted with any illegality or was contrary to public policy, and the court is not called upon to give effect to any such transaction. If the statute, Gen. Code 6931 *et seq.*, made void all sales made by an unlawful trust, or authorized the purchaser of goods from a trust to plead its unlawful character as a defense, a different question would be presented. That the plaintiff is a member of an unlawful trust, etc., is no defense to an action for goods sold by it, has been decided many times. Jackson v. Brick Assn. 53 Ohio St. 303 [41 N.E. 257]; 35 L.R.A. 287; 53 Am. St. Rep. 637]; Kinner v. Railway, 69 Ohio St. 339 [69 N.E. 614]; Connolly v. Sewer Pipe Co. 184 U.S. 540, 545 [22 S. Ct. 431; 46 L. Ed. 679]; National Distilling Co. v. Importing Co. 86 Wis. 352 [56 N.W. 864]; 39 L.R.A. 902]; Dennehy v. McNulta, 86 F. 825 [\*\*5] [30 C.C.A. 422; 41 L.R.A. 609]; Hadley Dean Plate Glass Co. v. Glass Co. 143 F. 242 [74 C.C.A. 462].

It is not alleged in the answer that the defendant purchased all of its glucose of the plaintiff during the year 1907 and 1908, so as to bring itself within the terms of the proposition as one entitled to the rebate offered. The action is not based upon any of the terms of the alleged contract set up as a defense, nor is it in furtherance of or connected with it in any way. The prices were not fixed by or with reference to the so-called contract, nor the rebate, and the only way the defendant could [\*666] become a party to it was by doing something, not agreeing to do; that is to say, by purchasing all its glucose from the plaintiff during the years 1907 and 1908. It was simply the offer of a premium or reward in the way of profit sharing based upon the defendant's exclusive business in the purchase of glucose during those years, and even though "accepted," it did not bind or pretend to bind the defendant to purchase of the plaintiff a single pound of glucose, much less all it required in the prosecution of its business during said period. [\*\*6] In these respects this case is distinguished from the case of Continental Wall Paper Co. v. Voight & Sons Co. 16 Ohio F. Dec. 216 [212 U.S. 227; 29 S. Ct. 280; 53 L. Ed. 486], where for the plaintiff to recover it was necessary for the court to give effect to the trust agreement. The same as to McMullen v. Hoffman, 174 U.S. 639 [19 S. Ct. 839; 43 L. Ed. 1117]. Besides, the offer was legitimate. It tended to protect the trade and good will of the plaintiff and others making it, leaving the customer free to trade where he pleased. If there was an unlawful trust, it was outside and beyond and independent of the transaction sued on here. This so-called contract lacking the essential elements of a trust agreement, can not be set up as a counterclaim in this action.

If, then, the claim urged by the defendant by reason of the alleged excess of price charged it by the plaintiff for said glucose is not a set-off, it can not be pleaded as an answer in this case. The code defines HN3 [↑] a set-off as "a cause of action existing in favor of a defendant and against a plaintiff, between whom a several judgment might be [\*\*7] had in the action, and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract." (Gen. Code 11319.) It may be conceded that this action is founded on contract, the sale of the glucose, but is the defendant's cause of action founded on contract? If it is not, it can not be pleaded as a set-off. The right of action is not known at common law. It was created by statute (the Valentine antitrust law, Gen. Code 6391 *et seq.*). HN4 [↑] The right to recover depends upon a violation of that statute. The recovery is not one of compensation [\*667] or damages. The amount is twofold, the damages sustained by him "injured in his business or property." This being so, it can not be said that the defendant's cause of action is "founded on contract," but rather upon the statute for the collection of a penalty, the amount of which is thus fixed. The statute creates the right of action, fixes the amount of recovery and prescribes the remedy by suit to enforce it. HN5 [↑] "Set-off" is the limit of the defendant's right to plead, and being statutory and unknown to the common law, the right to plead it is necessarily limited by the statute itself, as [\*\*8] already indicated. Maxwell, Code Plead. p. 546; Pomeroy, Rem. & Rem. Rights Sec. 765; Phillips, Code Plead. Sec. 254. The action should be a direct one.

Holding these views, it follows that the demurrer to the second defense must be sustained. Exceptions noted.

## **State v. Glenn Lumber Co.**

Supreme Court of Kansas

July, 1910, Decided ; November 5, 1910, Filed

No. 17,085.

**Reporter**

83 Kan. 399 \*; 111 P. 484 \*\*; 1910 Kan. LEXIS 544 \*\*\*

THE STATE OF KANSAS, Appellant, v. THE GLENN LUMBER COMPANY, Appellee.

**Prior History:** [\*\*\*1] Appeal from Labette district court. Opinion filed November 5, 1910. Reversed.

**Disposition:** Judgment reversed and cause remanded.

### **Core Terms**

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counts, charging, cement

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

#### **HN1** **Accusatory Instruments, Informations**

It has been held in other jurisdictions that so long as any count of an information is held good the state can not appeal from an order quashing the others. But under the practice in Kansas the prosecution of several distinct offenses at the same time by means of an information containing several counts is a mere matter of convenience. For many purposes the proceeding under each count may be regarded as in effect a separate action. There is no reason why, where one count of an information has been quashed, a review of that ruling may not be had, even although the case proceeds to trial upon other counts charging other violations of the law. Where several counts are employed merely as different methods of describing the same illegal act the rule may be different.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

#### **HN2** **Accusatory Instruments, Informations**

The statute does not in terms authorize an appeal from an order requiring the state to amend an information by making two or more counts out of matter contained in one. But such an order, when the state refuses compliance,

necessarily ends the prosecution and in effect sets aside the information. It is therefore appealable under the statute authorizing an appeal "on quashing or setting aside an information." Crim. Code, § 283 (Kansas).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

**HN3**  **Regulated Practices, Monopolies & Monopolization**

See Laws 1889, ch. 257, § 1, Gen. Stat. 1909, § 5185 (Kansas).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

**HN4**  **Regulated Practices, Monopolies & Monopolization**

See Laws 1889, ch. 257, § 3, Gen. Stat. 1909, § 5187 (Kansas).

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

**HN5**  **Accusatory Instruments, Informations**

The real inquiry in each case must be whether the information sufficiently advises the defendant of the nature of the charge against him, so that he can properly prepare his defense and so that he is not placed at a disadvantage in the conduct of the trial on his part. If it accomplishes this the spirit of the law is complied with.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

**HN6**  **Regulated Practices, Monopolies & Monopolization**

It is not necessary for the state to specify the precise nature of an antitrust agreement, or do more than to characterize it as one intended and adapted to accomplish the results described in the statute. Such a requirement would go far to render the law ineffective, since it would often be difficult or impossible for the prosecutor to ascertain with certainty the details of the combination complained of.

## Syllabus

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### SYLLABUS BY THE COURT.

1. CRIMINAL LAW--*Appeal by the State--Order Quashing Part of an Information.* The state may appeal from an order quashing one count of an information, although another count charging a different act is held sufficient or is not attacked.
2. CRIMINAL LAW--*Appeal by the State--Order Requiring Separate Statements of Matter Pleaded in One Count.* Under the statute (Crim. Code, § 283) authorizing an appeal by the state in a criminal action "on quashing or setting

aside an . . . information" an appeal may be had from an order requiring matter pleaded in one count to be separately stated in different counts.

3. CRIMINAL LAW--*Right of Appeal--Rendition of Final Judgment*. Where a motion to quash an information is sustained, and the state refuses to amend, the fact that no formal final judgment is entered discharging the defendant is not ground for dismissing the appeal.

4. INFORMATION--*Statutory Offense--Agreement to Prevent Competition*. In a prosecution under the statute (Gen. Stat. 1909, § 5185) forbidding agreements [\*\*\*2] to prevent competition in the sale of articles, or to control their price, it is not necessary that the information describe the nature of the agreement complained of, further than to characterize it in the language of the statute as intended and adapted to accomplish certain results.

5. STATUTES--*Repeal by Implication--Antitrust Law*. The antitrust law of 1889 (Gen. Stat. 1909, §§ 5185-5193) is not repealed by that of 1897 (Gen. Stat. 1909, §§ 5142-5152.)

6. INFORMATION--*Duplicity*. An information is not bad for duplicity which charges in one count acts which would constitute a misdemeanor under either of the antitrust laws referred to.

**Counsel:** Fred S. Jackson, attorney-general, John Marshall, assistant attorney-general, Charles D. Shukers, special assistant attorney-general, and M. E. Williams, county attorney, for the appellant.

Thurmond & Farrar, and Glasse & Burton, for the appellee.

**Judges:** MASON, J.

**Opinion by:** MASON

## Opinion

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[\*400] [\*\*485] The opinion of the court was delivered by

MASON, J.: An information was filed against the Glenn Lumber Company, a corporation, charging it in ten separate counts with violating the antitrust laws. The defendant filed a motion [\*\*\*3] to quash the first eight, and to require the state to set out in separate counts the different offenses charged in each of the remaining two. The court sustained both motions and made an order giving the plaintiff thirty days to amend the information, if so desired, and the defendant twenty days in which to plead to such amended information. The state declined to amend, and appeals from the rulings upon the motions.

The defendant challenges the right of the plaintiff to be heard, upon the grounds that the state can not appeal from an order quashing a part of the counts of an [\*401] information or from the sustaining of a motion for the separate statement of several offenses, and that if such an appeal lies at all it can be brought only after a final judgment for the defendant, which was not formally rendered in this case.

**HN1** [↑] It has been held in other jurisdictions that so long as any count of an information is held good the state can not appeal from an order quashing the others. ( The State v. Stegman, 90 Mo. 486, 2 S.W. 798; The State v. Thompson, 41 Tex. 523.) But under the practice in this state the prosecution of several distinct offenses at [\*\*\*4] the same time by means of an information containing several counts is a mere matter of convenience. For many purposes the proceeding under each count may be regarded as in effect a separate action. A defendant may procure a reversal as to a part of the counts on which he has been convicted, although the judgment is affirmed as to the rest. ( The State v. Guettler, 34 Kan. 582, 9 P. 200.) We see no reason why, where one count of an information has been quashed, a review of that ruling may not be had, even although the case proceeds to trial upon other counts charging other violations of the law. Where several counts are employed merely as different methods of describing the same illegal act the rule may be different.

**HN2**[] The statute does not in terms authorize an appeal from an order requiring the state to amend an information by making two or more counts out of matter contained in one. But such an order, when the state refuses compliance, necessarily ends the prosecution and in effect sets aside the information. It is therefore appealable under the statute authorizing an appeal "on quashing or setting aside an . . . information." (Crim. Code, § 283.)

The full language [\*\*\*5] of the statute is that "appeals to the supreme court may be taken by the state in the following cases: . . . upon a judgment for the defendant [\*402] on quashing or setting aside an indictment or information." (Crim. Code, § 283.) Under a somewhat similar statute, containing, however, other provisions possibly affecting the matter, the supreme court of Missouri held that an order quashing an indictment could not be reviewed on appeal until a final judgment for the defendant had been formally entered. ([State v. Fraker, 141 Mo. 638, 43 S.W. 389](#).) We do not regard the omission to make a complete record, showing a technical final disposition of the case, as fatal to the right of review. The order sustaining the motion to quash by its own operation set aside the counts of the information so assailed, and left nothing pending in that respect against the defendant. True, the district court would for some purposes be regarded as retaining jurisdiction so long as an amendment might be contemplated, but when the state declined to amend it elected to treat the proceeding as [\*486] at an end, and the practical effect was a discharge of the defendant as to the counts [\*\*\*6] involved. The state's refusal to comply with the order requiring two of the counts to be recast created substantially the same situation with respect to them.

Upon the merits, the principal contention of the defendant is that the allegations of each of the first eight counts are too indefinite to advise it of the nature of the accusation against it. The statute under which they are drawn reads:

**HN3**[] "All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, [\*403] or which tend to advance or control the rate of interest for the loan or [\*\*\*7] use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void." (Laws 1889, ch. 257, § 1, Gen. Stat. 1909, § 5185.)

**HN4**[] "All persons entering into any such arrangement, contract, agreement, trust or combination, or who shall after the passage of this act attempt to carry out or act under such arrangement, contract, agreement, trust or combination . . . shall be guilty of a misdemeanor." (Laws 1889, ch. 257, § 3, Gen. Stat. 1909, § 5187.)

The first count, which, so far as concerns this question, is like the next seven, charges:

"That on the first day of July, 1909, at the county of Labette, in the state of Kansas, the said defendant, the Glenn Lumber Company, a corporation organized and existing under and by virtue of the laws of the state of Kansas, did then and there wrongfully and unlawfully make and enter into an arrangement, contract, agreement and combination with the Monarch Portland Cement Company, a corporation organized and existing under and by virtue of the laws of the state of Kansas, and others, whose names are to your informant now unknown, a more particular description of which arrangement, contract, agreement [\*\*\*8] and combination your informant is now unable to give, which arrangement, contract, agreement and combination was made with a view to prevent and which tends to and does prevent full and free competition in the importation, transportation and sale of cement, an article imported into and produced and manufactured and sold in the state of Kansas, and which arrangement, contract, agreement and combination was designed to and tends to and does advance and control the price and cost of cement to the consumer of such cement."

The state relies upon the familiar rule that in charging a purely statutory offense it is sufficient to employ the language of the statute. Of course, where a term is used which designates a common-law offense the pleader must allege the acts constituting it, but that is [\*404] not the case here. Another exception, the benefit of which the defendant invokes, has been thus stated:

"If the statute does not sufficiently set out the facts which constitute the offense so that the defendant may have notice of that with which he is charged, then a more particular statement of the facts than is contained in the statute becomes necessary." (10 Encyc. Pl. & Pr. 487.)

[\*\*\*9] (See, also, 22 Cyc. 339 *et seq.*; 27 Cyc. 909.)

A good illustration of a statute of the general character of that now under consideration to which this exception would obviously apply is that involved in [People v. Sheldon et al., 139 N.Y. 251, 34 N.E. 785](#), which made it a misdemeanor to conspire "to commit any act injurious . . . to trade or commerce." (p. 261.) In a prosecution under such a statute it would plainly be insufficient merely to allege that the defendant conspired "to commit an act injurious to commerce." The federal act of 1890 denouncing monopolies and contracts in restraint of interstate commerce (26 U.S. Stat. at L. p. 209, ch. 647) has been held to belong to the class to which the exception applies. ([In re Greene, 52 F. 104](#); [United States v. Nelson, 52 F. 646](#); [United States v. Patterson, 55 F. 605](#)) The language of that act, however, is extremely general--much more so than that of the Kansas statute. Under statutory provisions quite similar to those here involved the general rule that the information need only charge an offense in the very words of the statute was applied in [Commonwealth of Ky. v. Grinstead & Tinsley, 108 Ky. 59, 55 S.W. 720](#), [\*\*\*10] but denied in [State v. Witherspoon, 115 Tenn. 138, 90 S.W. 852](#).

**HN5** [↑] The real inquiry in each case must be whether the information sufficiently advises the defendant of the nature of the charge against him, so that he can properly prepare his defense and so that he is not placed at a disadvantage in the conduct of the trial on his part. If it accomplishes this the spirit of the law is complied with. In the present instance the pleading goes [\*405] somewhat beyond the bare letter of the statute. The information states the name of one of the other parties to the unlawful agreement, and mentions the specific commodity the cost of which is designed to be affected. What it lacks to make it sufficiently specific, if anything, is a statement of the character of the agreement to which the defendant is alleged to [\*\*487] have been a party, or, what is perhaps the same thing, the means by which the control of the price of cement was sought to be accomplished. The omission of such a statement was one of the grounds upon which the Tennessee court held the indictment bad in the case cited. We can not agree, however, that **HN6** [↑] it is necessary for the state to specify the precise [\*\*\*11] nature of the agreement, or do more than to characterize it as one intended and adapted to accomplish the results described in the statute. Such a requirement would go far to render the law ineffective, since it would often be difficult or impossible for the prosecutor to ascertain with certainty the details of the combination complained of. On the other hand, a case could hardly arise under this statute in which an accused person could be seriously hampered in his defense by the omission of an information to describe with exactness the nature of the agreement forming the basis of the charge.

The eighth and ninth counts each contained allegations similar to those already quoted, coupled with further averments evidently framed under the [antitrust law](#) of 1897 (Laws 1897, ch. 265, Gen. Stat. 1909, §§ 5142-5152), charging the defendant, among other things, with having entered into an agreement the parties to which bound themselves not to sell cement below a common standard figure. This was the basis of the motion to require a separate statement. The charges evidently referred to the same act, and were therefore properly united in one count, the prosecution being for a misdemeanor. ([The State v. Schweiter, 27 Kan. 499](#); [\*\*\*12] 10 Encyc. Pl. & Pr. 532-534; 22 Cyc. 380.)

[\*406] A final contention of the defendant is that the act of 1889, under which the first eight counts are drawn, is repealed by implication by the act of 1897 just referred to, on the theory that the later enactment is intended to cover the entire subject matter of the earlier one. A law forbidding combinations to prevent competition in buying and selling live stock, passed in 1891 (Laws 1891, ch. 158, Gen. Stat. 1901, §§ 2439-2441), has been held to have been so superseded, but for the reason that it treated but a single phase of a matter that was covered in every aspect by the law of 1897. ([The State v. Wilson, 73 Kan. 343, 84 P. 737](#).) The two statutes involved in this proceeding have much in common, but inasmuch as several subjects mentioned in the first are omitted from the second the legislature must be deemed to have intended them to stand together. A number of actions have been maintained since 1897 upon the statute of 1889. ([The State v. Harvester Co., 79 Kan. 371, 99 P. 603](#); [The State v. Harvester Co., 81 Kan. 610, 106 P. 1053](#).)

83 Kan. 399, \*406¶11 P. 484, \*\*487¶910 Kan. LEXIS 544, \*\*\*12

The judgment is reversed and the cause remanded [\*\*\*13] for further proceedings in accordance herewith.

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## Malakoff Gin Co. v. Riddlesperger

Court of Civil Appeals of Texas

December 10, 1910, Decided

No Number in Original

**Reporter**

133 S.W. 519 \*; 1910 Tex. App. LEXIS 888 \*\*

MALAKOFF GIN CO. v. RIDDLESPERGER et al.

**Subsequent History:** [\*\*1] Rehearing Denied January 14, 1911.

**Prior History:** Appeal from District Court, Henderson County; H. Gardner, Judge.

Action by the Malakoff Gin Company against Q. A. Riddlesperger and another. From a judgment for defendants, plaintiff appeals.

**Disposition:** Reversed and remanded.

## **Core Terms**

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gin, copartnership, demurrsers, cotton, purchaser, good will, gristmill, skill, stockholders, parties

**Counsel:** Richardson, Watkins & Richardson, for appellant.

Faulk & Faulk, for appellees.

**Judges:** TALBOT, J.

**Opinion by:** TALBOT

## **Opinion**

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[\*519] TALBOT, J. This suit was instituted by the appellant, Malakoff Gin Company, against the appellees, C. A. Riddlesperger and S. J. Riddlesperger, alleging, in substance, that on July 9, 1907, the plaintiff was a copartnership composed of Harry Flagg and others; that on said date the defendants sold and delivered to said copartnership their entire gin plant mill and machinery, consisting of a cotton gin, gristmill, and other machinery attached to the same situated in the town of Malakoff, Henderson county, Tex.; that as an inducement to the said purchase and sale the defendants also sold and conveyed to said copartnership, under its firm name of Malakoff Gin Company and their successors, their good will in the ginning business in the town of Malakoff, and obligated themselves in writing not to engage, either directly or indirectly, in the business of [\*\*2] ginning or milling, nor become interested in any other gin and mill in the Malakoff community so long as the said purchasers might operate said gin or mill in the community of Malakoff; that thereafter, in the year 1908, the copartnership, Malakoff Gin Company, by that name, was duly incorporated under the laws of Texas, the same parties who composed the said copartnership firm becoming the stockholders and officers of the said corporation, the plaintiff herein; that the corporation Malakoff Gin Company succeeded to and had [\*520] transferred to it all the gin and mill property and good will, purchased by the Malakoff Gin Company as a copartnership from the defendants, and has continued to run the same since the

date of their said purchase; that, in violation of their agreement not to engage in the business of ginning or milling, the defendants, on the 15th day of August, 1908, procured the erection of another gin and mill in the Malakoff community, and from that date up to the time of the institution of this suit have engaged in the operation of said gin in said community, ginning much cotton, to plaintiff's damage \$3,500, for which it prayed judgment. The defendants answered by general **[\*\*3]** and special demurrs, a general denial and special plea. These demurrs were, among other things, to the effect: (1) That plaintiff's petition showed no cause of action; (2) that the agreement alleged by plaintiff to have been made by the defendants with the Malakoff Gin Company as a copartnership not to engage in the business of ginning in the Malakoff community so long as said copartnership operated the gin or mill purchased from defendants in said community, the breach of which is the basis of this suit, was void because in violation of section 7 of the anti-trust law of this state, passed in 1903 (Laws 1903, c. 94), prohibiting a combination of capital, skill, or acts by two or more persons, firms, or corporations to abstain from engaging in or continuing business, etc., partially or entirely within this state or any portion thereof; (3) that said contract is void because it is contrary to the anti-trust law, in that it creates or tends to create and carry out restrictions in trade or commerce or aids to commerce, and creates and tends to create and carry out restrictions in the preparation of cotton and cotton seed for market or transportation, and creates or tends to create **[\*\*4]** and carry out restrictions in the free pursuit of ginning and preparing cotton and cotton seed for market or transportation, a business permitted and authorized by law. These special demurrs, as well as the defendants' general demurrer, were overruled, a jury impaneled, and, at the conclusion of the evidence, the court directed the jury to return a verdict for the defendants, which was done, and judgment entered in accordance therewith. From this judgment the plaintiff appealed.

The record does not affirmatively disclose the ground upon which the court's action in directing a verdict for the defendants was based; but the appellant assumes in its assignments of error and complains that the court erroneously construed the contract upon which it relies for a recovery to mean that, in order to constitute a violation of the stipulation therein to the effect that defendants would not, so long as the Malakoff Gin Company, as a copartnership firm, operated the gin or mill in question in the Malakoff community, engage in or become interested in any other gin or mill in that community said firm must continue to run and operate said gin and mill, and that the change of the firm to a corporation **[\*\*5]** and the succession and operation by it of said gin and mill, even though the members of said firm became the stockholders and officers of the corporation, would avoid that provision of the contract. This assumption on the part of the appellant is justified in view of the fact that the court overruled the defendants' exceptions to plaintiff's petition, and the question presented is: Was such construction of the contract erroneous? We have reached the conclusion that it was. There is practically no dispute about the facts. The Malakoff Gin Company was originally a copartnership composed of H. L. Flagg, J. A. Bartlett, and T. A. Bartlett As such copartnership, on July 9, 1907, they purchased from the appellees the gin and mill property described in the petition. The sale and purchase of the property is evidenced by a bill of sale executed by the appellees expressing a consideration of \$4,000 cash, and reciting, in substance, that, as a further inducement to the purchase by the gin company, the appellees covenanted and agreed with said company that, "during the time they operated the said gin or mill in the community in which Malakoff is situated, they would not directly or indirectly **[\*\*6]** engage in or be interested in any other gin or mill in said community." The Malakoff Gin Company as a copartnership took possession of the gin and mill and operated it during the fall and winter of 1907-08. In February or March, 1908, a Mr. Gilmore of Athens, Tex., bought a third interest in the copartnership business, and in April or May thereafter the copartnership was converted into a corporation under the laws of Texas; the corporate name being the same as the firm or copartnership name. The members of the copartnership became and were the stockholders of the corporation, and all the assets of the copartnership were transferred to the corporation. After the incorporation was perfected, the gin stand and boiler purchased from the appellees were moved to Ellis county, and another gin stand and boiler substituted therefor; but the gristmill and a part of the machinery or attachments used in operating the gin was retained at Malakoff, and the gristmill operated as it had been theretofore, and the ginning of cotton also continued. About six months after the incorporation of the company, the appellees put up a gin in Malakoff and have operated the same since that time in the ginning **[\*\*7]** of cotton. It thus appears, we think, that the dominant thought and purpose of the parties, in consummating the sale and purchase of the property in question with the stipulation in the bill of sale, for the alleged breach of which on the part of the appellees appellant relies for a recovery, was that **[\*521]** appellees should abstain from engaging in the operation of a cotton gin or gristmill in the Malakoff community during the time the purchasers of the gin or mill sold, or either of them, operated the same in that community, and that whether they operated as a copartnership or a corporation was of no concern to

appellees. The appellees, it seems, had been engaged in ginning cotton and operating a gristmill in Malakoff for a long time, and their good will and the patronage of their numerous customers, was very valuable in the business to which the members of the Malakoff Gin Company as a copartnership and as stockholders of said company as a corporation succeeded. This fact was, of course, well understood to both parties to the transaction, giving rise to this litigation, and it seems clear that it cannot be said, as a matter of law, that either of them contemplated or understood that a **[\*\*8]** change in the method or capacity of conducting said business from a copartnership to a corporation would, release the appellees from their obligation not to engage in a similar business for the term specified. Nor do we think it could be said, as a matter of law, that the taking in of a new partner in the copartnership or the increase of the members of stockholders in the corporation would work such a release. On the contrary, if it cannot be said that it conclusively appears that it was the intent of the appellees to obligate themselves to abstain from engaging in the business of ginning cotton and operating a gristmill in the Malakoff community, so long as the purchasers of their gin and mill, or any of them, either as members of the Malakoff Gin Company, as a copartnership or as a corporation, continued to operate said gin or mill in Malakoff, then whether such was their purpose and intention was a question of fact for the jury.

It would be a strained construction of the contract to say, as a matter of law arising upon the facts developed, that, if the members of the Malakoff Gin Company converted their copartnership into a corporation, that fact would absolve the appellees from **[\*\*9]** their obligation. It would seem more in consonance with the spirit of their contract, and with fairness to both parties, to say that, so long as the members of the original Malakoff Gin Company were interested in running the gin or mill sold to them by the appellees, it did not matter whether they run it as a copartnership or as a corporation. No case directly in point has been cited, and we have found none; but the principle involved seems to be illustrated in the case of Lottman Bros. Mfg. Co. v. Houston Waterworks Co., decided by the Court of Civil Appeals for the Fourth District, and reported in [38 S. W. 357](#). In that case the waterworks company had contracted with the manufacturing company, which was then a copartnership, to supply them for a specified time with water. After the execution of the contract and before its expiration, the manufacturing company incorporated the corporation succeeding to all the properties, interest, and rights of the firm. Thereupon the waterworks company claimed a release from the contract and refused to furnish the water in accordance with its terms. The court held that the incorporation of the manufacturing company's business by its members did not **[\*\*10]** affect their rights under the contract. It follows that in our opinion the trial court was not justified in directing the jury to return a verdict in favor of the appellees on the grounds discussed, if such action of the court was predicated upon said grounds.

But appellees contend, by appropriate cross-assignments of error presented, that the contract, upon which appellant bases its right to recover, was, for the reasons set forth in their demurrers, violative of the antitrust act of 1903, and the trial court's action should be upheld on that ground. In this contention we do not concur. We are of the opinion that said contract is not affected by that act of the Legislature. It was evidently the intention of the Legislature in the passage of the act of 1903, as well as in former enactments upon the subject, to prohibit the creation of trusts and the doing of the prohibitive acts specified in the act by them. Now, the first section of the act under consideration defines a trust to be "a combination of capital, skill, or acts by two or more persons, firms or corporations or associations of persons; or either two or more of them for either, any, or all of the purposes named in said act." **[\*\*11]** It follows that within the meaning of the statute there must be a "combination of capital, skill, or acts by two or more," and it has been held by the Supreme Court of this state, in construing an identical definition of a trust as that quoted, that "combination," as so used, means union or association, and that, if there be no union or association by two or more of their "capital, skill, or acts," there can be no combination, and hence no trust. [Gates v. Hooper, 90 Tex. 563, 39 S. W. 1079](#). In the case cited, Hooper, being a merchant doing business as such in the town of Batesville, entered into an agreement with Gates, who was likewise a merchant doing business as such in said town, by which Hooper agreed and bound himself for a valuable consideration moving from Gates to retire from the mercantile business in said town of Batesville for the period of 12 months and agreed to use his efforts to secure for Gates the patronage and customers that he himself had enjoyed in the mercantile trade at said place. It was alleged that said Hooper in disregard of his agreement, within less than a year resumed his mercantile business in Batesville to Gates' damage \$1,500, for which he prayed judgment. **[\*\*12]** A demurrer to Gates' petition on the ground that the contract set **[\*522]** put in said petition was void as a restraint of trade, and as preventing competition in the sale and purchase of merchandise, was sustained, and the cause dismissed. In reversing and remanding the case, the Supreme Court further said: "In the case stated in the petition there is no combination. The

plaintiff bought defendant's goods together with the good will of his business, both of which were subjects of purchase and sale, and, in order to render the sale of the good will effectual, the seller agreed that he would not for one year thereafter do a like business in that town. This was but a kind of covenant or warranty that the purchaser should have the use and benefit of such good will during that year, for it is clear that, if the seller had immediately engaged in a like business at the same place, the purchaser would have had no benefit therefrom. By this transaction neither the capital, skill, nor acts of the parties were brought into any kind of union, association, or co-operative action. The purchaser became the owner of the things sold, and the seller was by the terms of the contract restrained from doing a **[\*\*13]** thing which, if done, would have defeated in part the effectiveness of the sale. The Agreement that the seller would exert himself to aid the purchaser in securing patronage but constituted the former the agent of the latter for that purpose, and in no wise contravened the statute. [Welch v. Windmill Co., 89 Tex. 653 \[36 S. W. 71\]](#). Since the allegations do not show a 'combination,' we are of opinion that the transaction did not constitute a 'trust,' and that therefore the demurrer should have been overruled."

Appellees' cross-assignments in the case at bar complain only of the court's action in overruling his demurrs to appellant's petition, the substance of which demurrs is stated in the former part of this opinion. The petition alleged that, as an inducement to the purchase and sale of the property conveyed to the Malakoff Gin Company, the appellees also sold and conveyed to said company and their successors their good will in the ginning business in said town of Malakoff and community and entered into an obligation in writing whereby they agreed and bound themselves to the said Malakoff Gin Company and their successors and assigns that they would not either directly or indirectly **[\*\*14]** engage in the business of ginning or milling, or be interested in any other gin or mill in said Malakoff community, so long as said purchasers might operate said gin or mill in said community. For the purposes Of appellees' demurrs, these facts must be taken as true, and they present a case practically identical with the case of [Gates v. Hooper, supra](#), and upon the authority of that case we hold that the allegations of the appellant's petition do not show a "combination," as contemplated by the statute, and hence the transaction In question did not constitute a trust, and appellees' demurrs were properly overruled. It is true that the act of 1903 prohibits, as perhaps the former statutes did not do, the "combination" of the capital, skill, or acts of two or more persons, firms, or corporations, etc., to abstain from engaging in or continuing business partially or entirely within this state or any portion of it; but unless there is a combination formed, such as to constitute the transaction a trust, the statute is not contravened. It may be further said that the present case is distinguishable in the facts from the case of [Comer v. Burton-Lingo Co. et al., 24 Tex. Civ. App. 251, 58 S. W. 969](#), **[\*\*15]** decided by this court. In that case three firms engaged in the lumber business bought the stock of another firm of lumber dealers in trade, together with the good will of the business; the members of the firm selling agreeing, for a valuable consideration paid by the purchasing firm, not to go back into the lumber business or engage to work for any one in said business for a period of 10 years. In holding that this transaction was void under the antitrust law then in force, the court said: "It is charged against appellees that they entered into a combination to buy, and did buy, the stock in trade and good will of Comer & Morton. Such combination required the union of the acts and of part of the capital of the appellees, and, if the purpose of the combination was to create or carry out restrictions in trade or in the free pursuit of business or to prevent competition, it was unlawful." The record does not disclose any such union of acts or capital in the case under consideration, and the case mentioned cannot be relied on as authority supporting the appellees' contention.

The judgment of the court below is reversed and the cause remanded.



## **State v. Racine Sattley Co.**

Court of Civil Appeals of Texas

January 25, 1911, Decided

No Number in Original

**Reporter**

63 Tex. Civ. App. 663 \*; 134 S.W. 400 \*\*; 1911 Tex. App. LEXIS 1322 \*\*\*

State of Texas v. Racine Sattley Company.

**Prior History:** [\*\*\*1] Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

**Disposition:** Reversed and remanded.

### **Core Terms**

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parties, anti-trust, conspiracy, contracts, articles, interstate commerce, alleges, blank, written contract, co-conspirator, shipped, general demurrer, commodity, oils, exclusive contract, decisions, retail, sales, void

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

#### **HN1** [down arrow] **Responses, Defenses, Demurrsers & Objections**

A demurrer admits the truth of the facts alleged in the petition. In testing the sufficiency of the petition on general demurrer, the appellate court must indulge in its favor every reasonable intendment arising from the allegations therein.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN2** [down arrow] **Regulated Practices, Trade Practices & Unfair Competition**

Under the Texas **Antitrust Law** of 1903, the effect on the public of an agreement which is against public policy is not essential. The tendency is enough to bring it within the condemnation of the law. It is the policy of Texas to

prevent restrictions in trade. The law does not intend to regulate restrictions in trade, but to prohibit them entirely, without regard to their immediate effect on trade.

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Business & Corporate Compliance > ... > Readjustments > Formation > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview](#)

[Business & Corporate Compliance > ... > Sales of Goods > Readjustments > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

### **[HN3](#) [down] Public Enforcement, State Civil Actions**

The Texas **Antitrust Law** of 1903 prohibits conspiracies in restraint of trade. A conspiracy is a combination between two or more persons to do an unlawful act, or to do a lawful thing in an unlawful manner. The statute declares that the following acts shall constitute a conspiracy in restraint of trade: Where two or more persons, firms, corporations or association of persons who are engaged in buying or selling any article of merchandise, produce or other commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity. A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons for either, any or all of the following purposes: To create, or which may tend to create or carry out restrictions in trade or to create or carry out restrictions in the free pursuit of any business authorized or permitted by law. To prevent or lessen competition in the sale or purchase of merchandise. To make, enter into, maintain or carry out any contract, obligation or agreement by which they shall affect or maintain the price of any commodity between themselves and others, to preclude a free and unrestricted competition among themselves or others in Texas of any commodity. 1903 Texas Acts, pp. 119-121.

[Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > General Overview](#)

[Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Formation & Negotiation](#)

[Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Liability of Principals](#)

[Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Burdens of Proof](#)

[Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview](#)

[Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Joint & Several Liability](#)

[Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview](#)

[Business & Corporate Law](#) > ... > [Duties & Liabilities](#) > [Unlawful Acts of Agents](#) > [Criminal Activities](#)

[Criminal Law & Procedure](#) > ... > [Inchoate Crimes](#) > [Conspiracy](#) > [General Overview](#)

[Criminal Law & Procedure](#) > ... > [Inchoate Crimes](#) > [Conspiracy](#) > [Elements](#)

#### **HN4** [Causes of Action & Remedies, Breach of Contract](#)

If two persons pursue by their acts the same object, by the same means, one performing one part of the act and the other another part of the act, so as to complete it, with a view to the attaining of the object which they were pursuing, this will be sufficient to constitute a conspiracy. It is sufficient if the evidence shows that they performed different parts. The act of a co-conspirator, done in furtherance of the common design, is the act of all, though executed at a remote distance from the other conspirators. Co-conspirators are joint tort feasors. An offense is deemed to have been committed where any overt act in pursuance of the unlawful combination is performed by any one of the co-conspirators. Co-conspirators are responsible for the acts of each other, for the same reason that a principal is responsible for the authorized acts of his agent. Facet per alium, facet per se. Where an agreement, in violation of the [antitrust law](#), has been made, and one party pursues the course of conduct agreed on, the law will presume that the acts by him were the result of the agreement, and will hold all who entered into such agreement as instigators, aiders and abettors to the act and therefore responsible for the acts of each and all.

[Business & Corporate Compliance](#) > ... > [Transportation Law](#) > [Interstate Commerce](#) > [Restraints of Trade](#)

[Business & Corporate Compliance](#) > ... > [Transportation Law](#) > [Interstate Commerce](#) > [State Powers](#)

#### **HN5** [Interstate Commerce, Restraints of Trade](#)

Articles imported into a state and commingled with the common mass of property in the state are no longer articles of interstate commerce.

[Business & Corporate Compliance](#) > ... > [Ownership](#) > [Conveyances](#) > [Assignments](#)

[Contracts Law](#) > [Defenses](#) > [Ambiguities & Mistakes](#) > [General Overview](#)

[Contracts Law](#) > [Contract Interpretation](#) > [Ambiguities & Contra Proferentem](#) > [General Overview](#)

[Contracts Law](#) > ... > [Ambiguities & Contra Proferentem](#) > [Contract Ambiguities](#) > [Patent Ambiguities](#)

[Contracts Law](#) > [Contract Interpretation](#) > [Parol Evidence](#) > [General Overview](#)

[Education Law](#) > [Faculty & Staff](#) > [Employment Contracts](#)

#### **HN6** [Conveyances, Assignments](#)

A patent ambiguity can not be aided by oral evidence. Such is the law, and in such case, if the written instrument does not evidence a contract without the aid of oral evidence, it can not be enforced.

[Civil Procedure](#) > [Judgments](#) > [Pretrial Judgments](#) > [Judgments by Confession](#)

[Contracts Law](#) > [Defenses](#) > [Ambiguities & Mistakes](#) > [General Overview](#)

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

## **[HN7](#) [down] Pretrial Judgments, Judgments by Confession**

If there is a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if there is enough left to constitute a complete contract.

## **Headnotes/Summary**

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### **Headnotes**

#### **Demurrer.**

A demurrer admits the facts alleged and every reasonable intendment arising from the allegations. See petition held to sufficiently charge defendants with a conspiracy in restraint of trade in violation of the statute, Act of March 31, 1903, Laws, 28th Leg., p. 119.

#### **Unlawful Contract -- Restraint of Trade.**

An agreement between two firms or corporations engaged in buying or selling certain articles of merchandise that the one would not buy from nor the other sell to any other person or association any other makes of like goods during the period of the contract, created a conspiracy and combination in restraint of trade prohibited by the law against trusts, monopolies and conspiracies, Act of March 31, 1903, Laws, 28th Leg., p. 119.

#### **Unlawful Contract -- Interstate Commerce.**

A contract made in another State between a foreign corporation and a Texas dealer that, for one year, the one would sell its goods only to and the other buy only from the parties, respectively, if it contemplated future sales and purchases in Texas through traveling salesmen of the corporation (which the court can judicially recognize as the customary method of business) though the first purchase and sale was concluded outside of Texas and constituted interstate commerce, was not, as to such future sales to be made in Texas, an agreement in regard to interstate commerce nor beyond regulation by the laws of Texas prohibiting combinations and conspiracies in restraint of trade.

#### **Unlawful Contract -- Conspiracy.**

The fact that the only part performed by the non-resident corporation under its contract consisted in selling and shipping from another State the goods made the subject of the agreement between it and the purchaser which was unlawful under the Texas statutes, would not relieve it from liability because the same were acts of interstate commerce. The non-resident was a co-conspirator with the local dealer, and liable for the acts of the latter in conducting a business in pursuance of their mutual agreement which violated the Texas law.

#### **Interstate Commerce -- Shipment and Sale -- Original Packages.**

Though goods shipped into the State in pursuance of a contract of sale outside it are subjects of interstate commerce while in the original packages, they lose that character when, the transportation being completed, they are unpacked and mingled with other goods for sale by the purchaser; and a contract by the seller with the purchaser with respect to the conduct of the business after they are so unpacked and mingled which was in unlawful restraint of trade was not protected from the operation of the State law so declaring it on the ground that the transaction was interstate commerce.

**Contract -- Restriction of Trade -- Blank as to Place.**

Though a contract restricting trade in certain articles at a place left blank in the instrument, the ambiguity being a patent one, be incapable of being made certain by parol evidence as to the place intended so as to be made the basis of an action on the contract, it seems that it might still be held unlawful as a general restriction of trade in the articles, in an action to recover penalties for such act.

**Contract.**

An action for penalties for unlawful conspiracy or combination in restraint of trade is not one upon the contract creating such combination or restriction, nor dependent upon the validity of such instrument as a contract. The instrument was only evidence of such combination, and if intended and acted upon by the parties to unlawfully restrict trade at a certain point, the fact that the point was left blank in the contract itself did not affect their liability.

**Counsel:** Pat M. Neff and S. R. Scott, for appellant.

A contract which, if entered into within the State of Texas, and to be performed in the State of Texas is in violation of the anti-trust laws of Texas, though in fact entered into in another State, but to be performed and in fact carried out and performed within the State of Texas, is not protected from the provisions of the anti-trust laws of Texas by any provisions of the Constitution of the United States, nor by reason of the fact that it relates in any way to an interstate transaction. Acts of 1903, p. 119; Crump v. Ligon, 37 Texas Civ. App., 172.

Allen D. Sanford and Etheridge & McCormick, for appellee.

This is a penal action, and the State must bring itself squarely within the statute. Schloss v. Railway Co., 85 Texas, 601.

The entire transaction, as is affirmatively disclosed by the pleadings of appellant, constituted interstate commerce, and as such was protected by article 1, section 8, clause 3, of the Constitution of the United States, and same did not, therefore, offend against the anti-trust [\*\*2] laws of the State of Texas. Albertyte Co. v. Gust Feist Co., 102 Texas, 219.

The stipulation in the contract which, because of its supposed violation of the law, was made the basis of this suit, was entirely incomplete, and there existed no exclusive contract between appellee and the Bomar Hardware & Buggy Company. Morris v. Bank, 67 Texas, 602; Atkins v. V. B. School Township, 77 Ind., 447; Pepper v. Harris, 73 N. C., 365.

**Judges:** JENKINS, Associate Justice.

**Opinion by:** JENKINS

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**Opinion**

[\*665] [\*\*401] JENKINS, Associate Justice.--This is a suit in behalf of the State of Texas, brought by the county attorney of McLennan County to recover the penalty provided by statute for the violation of the antitrust law of 1903. There were originally two suits, one alleging a contract of July 30, 1904, in violation of said statute, and one of December 19, 1904, to the same effect. Said suits were consolidated and tried as one. The appellant filed two trial amendments, after which the court sustained a general demurrer to the petition, and the appellant declining further to amend, judgment was rendered for the appellee, from which judgment this appeal is prosecuted. Such being the case, the issue [\*\*3] is, did the petition, when taken together with the trial amendments, state a cause of action as against a general demurrer?

The petition, as amended, contained, substantially, the following allegations:

1. The authority of the county attorney to institute and prosecute this suit.
2. That the appellee, which will hereafter be referred to as the Racine Co., at the times the contracts, subsequently [\*\*402] alleged, were made, and prior thereto, was engaged in the business of selling at wholesale in the State of Texas, including Waco, Texas, farming implements, buggies, etc. It was also alleged that said Racine Co. was a manufacturer of such articles, and had a permit to do business in Texas and had an office at Dallas, Texas.
3. That at said dates and prior thereto, the Bomar Hardware and Buggy Company, which will hereafter be referred to as the Waco Company, was engaged in the hardware and implement business at Waco, Texas, selling articles of the kinds referred to in said contracts to the people of that city and vicinity, where there was a market for such articles, and where many citizens were engaged in the sale and purchase of such articles. That the Racine Company and the [\*\*\*4] Waco Company, on July 30, 1904, entered into a contract whereby the Racine Company sold to the Waco Company certain farm implements, etc., and agreed to sell to said Waco Company thereafter as ordered, such implements [\*666] as shown by their catalogue made a part of said contract, at the prices and upon terms therein named, to be shipped from Springfield, Illinois, to Waco, Texas, there to be distributed among and to become a part of the stock of said Waco Company to be by it sold at retail; and that it was known by said Racine Company and intended by them, that this should be done; that it was further provided in said contract that the Racine Company would not sell any of its said goods to anyone else at Waco, Texas, and that the Waco Company would not buy goods of like character from anyone else during the continuance of said contracts, to wit: from said July 3, 1904, to July 31, 1905, and that said parties entered into a like contract with each other on December 19, 1904, to remain in effect to July 1, 1905.

Said contract is attached as an exhibit to said petition, and the goods mentioned therein include plows, harrows, stalk cutters, listers, middle breakers, corn and cotton [\*\*\*5] planters, cultivators, wagons, drills, hay tools, and plow shares. Said contracts also contain the following clause: "The Racine-Sattley Company agrees to give the party of the second part the exclusive sale of the goods of the class herein ordered in \_\_\_ for the season ending July 1, 1905. And the said second party hereby agrees not to buy or sell any other makes of like goods for the same period." Both contracts were alike in all respects, except as to the dates. The petition alleges that though this blank was left in the written contract that it was intended and agreed by both of said parties that said contract was to be performed and carried out at Waco, Texas, and that it was so carried out at Waco, Texas, in pursuance of said agreement and contract.

4. That it was the intention of both parties to said contract that it should be carried out and have effect in Waco, Texas, and to affect the market at Waco, Texas, and that if said articles were interstate traffic when shipped they lost such character when received at Waco, Texas, and the original packages were broken and mixed with the retail stock of the Waco Company and by it sold at retail, and that it was the purpose and intent [\*\*\*6] of the Racine Company that this should be done.

5. That said contracts were in violation of the anti-trust laws of this State in that,

- (a) They are exclusive in character and constitute a conspiracy in restraint of trade.
- (b) They prevented and lessened competition.
- (c) They created and tended to create a restriction in trade.
- (d) They created a trust and combination, prohibited by law.
- (e) They created and carried out a restriction in the free pursuit of business by each of said parties.
- (f) They regulated and limited the output in said articles.
- (g) They destroyed all competition in said articles. By either direct averment or by fair intendment, all of such purposes and effects of said contract are alleged to relate to the market at Waco, Texas.

6. That one of said contracts and all negotiations leading up to the same, was made at Racine, Wisconsin, and that the other was signed [\*667] at Waco, Texas, by the Waco Company and the salesman of the Racine Company, subject to the approval of the Racine Company, and that the same was afterwards approved by said Racine Company at Racine, Wisconsin.

The court did not file its conclusions of law, and we are not advised, except [\*\*\*7] inferentially from the propositions discussed by counsel in their briefs, upon what ground the court sustained the demurrer.

I. [HN1](#)[<sup>↑</sup>] The demurrer for the purposes thereof admits the truth of the facts alleged in the petition. In testing the sufficiency of the petition on general remurrer, we must indulge in its favor every reasonable intendment arising from the allegations therein. [Wiggins v. Bisso, 92 Tex. 219, 47 S.W. 637](#); [Comer v. Burton Lingo Co., 24 Tex. Civ. App. 251, 58 S.W. 969](#); [State v. Missouri, K. & T. Ry. Co., 99 Tex. 516, 91 S.W. 214](#); [Raleigh v. Cook, 60 Tex. 438](#); [San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S.W. 289](#). Upon the authority of the cases above cited and upon those hereinafter referred to, we are of the opinion that, aside from the issue of interstate commerce, and the blank left in said contract, which are the only propositions referred to in the briefs herein, the petition states a good cause of action, upon a general demurrer and we see no reason why it is not good, even on special demurrer. It undertakes to allege a conspiracy between the parties therein named to do, and that they did, the acts therein named, with the corrupt purpose and intent to [\*\*\*8] effect that which is forbidden by the laws of this State; [\*\*403] and while in civil actions great latitude is allowed in setting out the particular acts from which a conspiracy is to be inferred, the petition in this case sets out specifically the acts complained of, viz: the making and carrying into effect the exclusive contract of purchase and sale of the articles mentioned. Such articles being of prime necessity to the mass of the people, an exclusive contract in reference to the sale and purchase thereof, if made and carried out in a manner to injuriously affect the people of Waco and that vicinity, would have been indictable at common law. But our anti-trust statute has materially enlarged the doctrine of the common law as to monopolies and combines.

[HN2](#)[<sup>↑</sup>] Under our statute the effect on the public of an agreement which is against public policy is not essential; the *tendency* is enough to bring it within the condemnation of the law. [Anheuser-Busch Brewing Assn. v. Houck, 27 S.W. 692](#); [San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S.W. 289](#). In view of our anti-trust statutes and the decisions thereon, it can not be doubted that it is the settled policy of this State [\*\*\*9] to prevent restrictions in trade. "The law did not intend to regulate restrictions in trade, but to prohibit them entirely, without regard to their immediate effect on trade." [Comer v. Burton Lingo Co., 24 Tex. Civ. App. 251, 58 S.W. 969](#). [HN3](#)[<sup>↑</sup>] Our anti-trust statute, among other things, prohibits conspiracies in restraint of trade. A conspiracy is a combination between two or more persons to do an unlawful act, or to do a lawful thing in an unlawful manner. The statute declares, among other things, that "the following acts shall [\*668] constitute a conspiracy in restraint of trade: Where two or more persons, firms, corporations or association of persons who are engaged in buying or selling any article of merchandise, produce or other commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity." Again the statute declares: "That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons for either, any or all of the following purposes: To create, or which may tend to create or carry out restrictions [\*\*\*10] in trade . . . or to create or carry out restrictions in the free pursuit of any business authorized or permitted by law. 3. To prevent or lessen competition in the . . . sale or purchase of merchandise. 5. To make, enter into, maintain or carry out any contract, obligation or agreement . . . by which they shall, in any manner, affect or maintain the price of any commodity . . . between themselves and others, to preclude a free and unrestricted competition among themselves or others in the State . . . of any commodity." Acts of 1903, pp. 119-121.

Had there been no decisions upon this subject, we should certainly think that the acts alleged in the petition herein violated this statute; in the light of the decisions, we think there can be no doubt of it. [Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S.W. 27](#); [Fuqua v. Pabst Brewing Co., 90 Tex. 298, 38 S.W. 29](#); [Texas Brewing Co. v. Anderson, 40 S.W. 737 at 738](#); [Texas Brewing Co. v. Durrum, 46 S.W. 880](#); [Wiggins v. Bisso, 92 Tex. 219, 47 S.W. 637](#); [San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S.W. 289](#); [Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S.W. 804](#); [Troy Buggy Works Co. v. Fife and Miller, 74 S.W. 957](#); [Simmons \[\\*\\*\\*11\] & Co. v. Terry, 79 S.W. 1103](#); [Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S.W. 918](#); [Waters-Pierce Oil Co. v.](#)

State, 177 U.S. 28; State v. Missouri, K. & T. Ry. Co., 99 Tex. 516, 91 S.W. 214; Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705 at 714; Hastings Industrial Co. v. Baxter, 125 Mo. App. 494, 102 S.W. 1075 at 1076; State v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 and 1009.

II. It is contended that the demurrer should have been sustained because the contract is alleged to have been made in the State of Wisconsin, that the goods were to be shipped from appellee's factory at Springfield, Illinois, to Waco, Texas, and therefore, related to interstate commerce.

It is true that the purchase of goods in one State to be shipped into another is interstate commerce, and therefore not within the provisions of the anti-trust laws of this State. But we do not think that it appears from the petition that the sales, except the first one, were contemplated to be made under said contract in another State. The petition alleges that the Waco Company was doing business at Waco, Texas, where it would naturally be inferred, nothing appearing to the contrary, it would make [\*\*\*12] its purchases. We are not to shut our eyes to such facts incident to commerce as are known to all men, among which is that [\*669] wholesale dealers ordinarily make sales to their customers in this State by sending their traveling salesmen to their customers' place of business. The reason why the first sale can not be said to have been made at Waco is that it was made subject to the approval of the Racine Company, at Racine, Wisconsin; but it is apparent that the reason for this is that the first sale was made on condition of the approval by the Racine Company of the exclusive contract with the Waco Company. Having thus secured a satisfactory customer for a stated time, it is reasonable to infer that future sales were intended to be made in the ordinary manner, and if so, they would be made at Waco, Texas. It is alleged that the Racine Company had traveling salesmen soliciting and doing business throughout the State of Texas, and in McLennan County, Texas, and one of the contracts was signed by one of its salesmen. It is the business of a salesman [\*\*404] to make sales, and it is not to be inferred that salesmen are traveling in Texas for the purpose of making sales in Wisconsin. [\*\*\*13] It is alleged that the Racine Company was doing business in Texas, and in McLennan County, and that it had an office in Dallas, Texas, in charge of its agent and representative. It is alleged that its business was the wholesale of buggies, plows, farming implements, etc. We think that the petition sufficiently alleges, as against a general demurrer, that it was the purpose of the Racine Company to sell goods under said contract at Waco, Texas, and that it was its purpose and intent that said contract should be and was carried into effect in Waco, Texas.

III. It plainly appears that it was the purpose and intent of the Waco Company that it should and did carry out its part of said contract in Waco, Texas. The petition alleges a conspiracy between the parties to said contract, and the facts alleged constitute a conspiracy. If we are correct in holding that the agreement alleged in the petition was in violation of the laws of the State, if the same was intended to be, or was carried into effect in this State, then we have a conspiracy, a necessary part of which was to be, and in fact was, carried into effect by the Waco Company at Waco, Texas. But, says appellee, all of the acts done [\*\*\*14] or contemplated to be done by it were to sell and ship goods, and these acts were to be performed outside of the State. As above stated, we do not so construe the contract, but, for the sake of argument, grant the correctness of this contention, still the Racine Company is no less guilty doing these unlawful acts in Texas, for the reason that the acts of its co-conspirator, the Waco Company, are, in law, its acts.

**HN4** [↑] "If two persons pursue by their acts the same object, by the same means, one performing one part of the act and the other another part of the act, so as to complete it, with a view to the attaining of the object which they were pursuing, this will be sufficient to constitute a conspiracy." Cyc., vol. 8, p. 622. "It is sufficient if the evidence shows (in this case if the petition alleges) that they performed different parts." Hudson v. State, 43 Tex. Crim. 420, 66 S.W. 668. The act of a co-conspirator, done in furtherance of the common design, is [\*670] the act of all. San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S.W. 289; Raleigh v. Cook, 60 Tex. 438; Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705; 8 Cyc., 641, 657, though executed at a remote distance [\*\*\*15] from the other conspirators." 8 Cyc., 683. "Co-conspirators are joint tort feasors. 8 Cyc., 847-848. "An offense is deemed to have been committed where any overt act in pursuance of the unlawful combination is performed by any one of the co-conspirators." Raleigh v. Cook, 60 Tex. 438; 8 Cyc., 687. Co-conspirators are responsible for the acts of each other, for the same reason that a principal is responsible for the authorized acts of his agent. "Facet per alium, facet per se." Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S.W. 936. Where an agreement, in violation of the antitrust law, has been made, and one party pursues the course of conduct agreed on, the law will presume that

the acts by him were the result of the agreement, and will hold all who entered into such agreement as instigators, aiders and abettors to the act and therefore responsible for the acts of each and all. [State v. Live Stock Exchange, 211 Mo. 181, 109 S.W. 675.](#)

IV. But aside from the law as to co-conspirators and the matter discussed in subdivision No. II of this opinion, does the petition show an interstate transaction? We think not. It alleges that the goods sold and contemplated to be sold [\*\*\*16] under said contract were to be shipped from Springfield, Illinois, to Waco, Texas, there to be mixed and mingled with other goods of the Waco Company, and to become a part of its stock to be there sold at retail, and that said contract was made with the knowledge, purpose and intent on the part of the Racine Company that this should be done. This same contention as to interstate commerce was made in the case of [Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S.W. 918.](#) The Supreme Court of the United States ([Waters-Pierce Oil Co. v. State, 212 U.S. 99, 53 L. Ed., p. 425 et seq.](#)), quotes with approval the charge of the learned trial judge on this subject, as follows: "Oils and other products of petroleum, and goods, wares and merchandise of any character which the defendant or its agent may have purchased or acquired in any manner outside of the State of Texas, and caused to be transported to its agents or others within the State, are subjects of interstate commerce, when they enter this State, and so remain until such commodities are removed from the original tanks, vessels and other packages in which they are imported into the State, and become mixed with the common mass [\*\*\*17] of property of similar character in this State. But . . . oil or other commodities purchased by defendant at points outside of the State, and transported into the State and removed from the original packages or vessels in which it was brought into the State, and mingled with property of similar character in the State, is not the subject of interstate commerce, but, on the contrary, is the subject of local commerce, and any agreement, or pool or arrangement entered into by the defendant with reference to such property, or the sale thereof, if any such sale there was, would be unlawful, if in violation of the anti-trust [\*671] laws of this State." In the case of [Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S.W. 936,](#) the same learned judge charged [\*\*405] the jury, among other things, as follows: "You are further instructed that even though the contract may have reference to interstate shipments of oils, yet if the parties go further and contract that such oils, after being sold by said Waters-Pierce Oil Company to parties in this State shall be sold by said parties at a price to be fixed by the duly authorized agents of defendant company, then you are informed that [\*\*\*18] such dealing with said oils, after its sale to parties in this State, is not protected by the interstate commerce laws, but such contracts if made, are subject to the laws of this State." The same result would follow if said contract, in being carried out in this State, would violate any other provision of the anti-trust laws of Texas. This charge was approved by this court and a writ of error was denied by the Supreme Court of this State. In [Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705,](#) it was held that [HNS](#) articles imported into the State and commingled with the common mass of property in the State, were no longer articles of interstate commerce. As was said by the Supreme Court of Tennessee in the case above referred to: "If it were otherwise, neither the Federal nor the State laws could be enforced in any case." This is obviously true, except as to contracts made and carried out wholly within the borders of a single State. If such is the case then indeed have the anti-trust laws bound the octopus with a rope of sand, and predatory and oppressive combines, like Job's war horse, can say, "Ha! Ha!"

For additional decisions on the issue of interstate commerce, see [Fuqua v. Pabst](#) [\*\*\*19] [Brewing Co., 90 Tex. 298, 38 S.W. 29;](#) [State v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902.](#)

V. Appellee's third counter proposition is as follows: "The stipulation in the contract which, because of its supposed violation of the law, was made the basis of this suit was entirely incomplete, and there exists no exclusive contract between appellee and the Bomar Hardware & Buggy Company."

We presume that this assignment is based on the proposition that [HNG](#) a patent ambiguity can not be aided by oral evidence. Such is the law, and in such case, if the written instrument does not evidence a contract without the aid of oral evidence, it can not be enforced. Such is the effect of the decisions cited by appellee, viz: [Morris v. Bank of Commerce, 67 Tex. 602;](#) [Pepper v. Harris, 73 N.C. 365;](#) [Atkins v. School Trustees, 77 Ind. 447.](#) In the Indiana case, suit was brought on a written contract for the employment of a school teacher for the scholastic year, the trustees having refused to employ the teacher under said contract. The written contract provided that the teacher should be paid at the rate of \$ 4.50 per day for the term of \_\_\_ weeks, and for his services should be paid the sum of \_\_\_ "the same [\*\*\*20] being the amount of wages agreed upon." The court held that while the same might be treated as an employment for an indefinite term, entitling the party to nominal damages for the breach of same, yet

as the blanks [\*672] in said contract were left, not by mistake, but intentionally, for the reason that the parties did not know, when the same was made, what would be the length of the scholastic term, and as there was no averment that the blanks should be filled when such fact should be ascertained, it could not form the basis of a suit to recover a definite amount for a definite term. The North Carolina case was a suit upon a written contract, in which A promised to pay B \_\_\_ dollars upon conditions precedent, stated in said contract. Held, that as said contract was unintelligible without the aid of oral testimony, no recovery could be had upon the same. The Texas case was a suit upon a note signed by several parties, in which there was a clause authorizing any attorney, in case of default, to waive process, accept service and confess judgment against \_\_\_ for the amount of the note, interest and ten per cent attorney's fees. Under the supposed authority, an attorney appeared, accepted [\*\*\*21] service and confessed judgment for the interest, principal and attorney's fees against all of the makers of the note. Held, that he was not authorized to do so. These cases are but applications of the well established rule of law as to patent ambiguities, above stated.

But there is another rule of law, and that is, **HN7**[<sup>↑</sup>] if there be a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if there be enough left to constitute a complete contract. For example, in the Texas case, supra, the void clause as to confessing judgment, did not render the note void, it being a complete contract without said clause. If this rule be applied to this case it is at least doubtful if the appellee would be benefited by said clause being treated as null and void. Without filling said blank, and treating the word "in" as surplusage, the instrument would show an exclusive contract for the sale of said goods everywhere for the season ending July 1, 1905. However, it is not necessary for us to so hold, and we do not pass upon this point. Again, in the Texas case, supra, Chief Justice Willie said that if it [\*\*\*22] was absolutely necessary to fill the blank with the names of all of the makers of the note in order to give effect to the power conferred, there might be some reason for so doing. Perhaps, if it was necessary to decide the point in this case, it might well be said in view of the allegations, that the goods were to be shipped to Waco, Texas, where the Waco Company was in business, there to be mixed and [\*\*\*406] mingled with their stock of goods of like character, and to be sold by them at retail, that the blank in said contract could not be consistently filled with any words except "Waco, Texas."

But we rest our decision upon another point; and that is, that *this is not a suit upon a contract* in which judgment is asked for the enforcement of such contract, or for damages on account of the breach of the same, as in the cases cited by appellee. This is a suit to recover a penalty on account of an alleged illegal agreement made and acted upon by the parties thereto. The written contract is but evidence tending to support the charge made by the petition, and it is wholly immaterial that it does not support the entire charge. If the written contract [\*673] as plead would have [\*\*\*23] tended to support any material part of the State's case, it would have been admissible in evidence on a trial of this cause. By way of illustration, suppose the charge was murder, and the defendant is alleged to be a co-conspirator with another party who did the killing. Upon the trial the State offers in evidence a letter written by the defendant to the murderer in which he stated that he will furnish arms, or otherwise aid the murderer in killing \_\_\_ at a certain time, the same being on or about the time the murder was committed, and in connection therewith the State offers to prove, by oral evidence, that the party referred to in said blank was the deceased, would not such letter be admissible in evidence? Undoubtedly so. And it would be equally admissible if, instead of being a letter, it was a written contract in which the defendant agreed for a valuable consideration, to furnish such aid, though, if a contract of this nature was enforceable at law, it would be void for uncertainty and, therefore, would be subject to general demurrer in a suit to recover the consideration therein agreed upon.

For the reasons hereinabove set out we think the court erred in sustaining the general [\*\*\*24] demurrer to appellant's petition, and so holding, we reverse and remand this case.

*Reversed and remanded.*



## **Standard Oil Co. v. United States**

Supreme Court of the United States

Argued March 14, 15, 16, 1910; restored to docket for reargument April 11, 1910; reargued January 12, 13, 16, 17, 1911. ; May 15, 1911, Decided

No Number in Original

### **Reporter**

221 U.S. 1 \*; 31 S. Ct. 502 \*\*; 55 L. Ed. 619 \*\*\*; 1911 U.S. LEXIS 1725 \*\*\*\*

THE STANDARD OIL COMPANY OF NEW JERSEY ET AL. v. THE UNITED STATES.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

THE facts, which involve the construction of the Sherman Anti-trust Act of July 2, 1890, and whether defendants had violated its provisions, are stated in the opinion.

### **Core Terms**

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Oil, commerce, restraint of trade, monopoly, monopolize, contracts, decree, interstate commerce, cases, restrain, stock, combinations, words, Freight, courts, subsidiary corporation, public policy, common law, prohibitions, conspiracy, engrossing, embraced, products, Traffic, attempt to monopolize, interstate, petroleum, parties, unreasonable restraint, proceedings

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

#### **HN1** [] **Antitrust & Trade Law, Sherman Act**

See [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Sentencing > Fines

#### **HN2** [] **Antitrust & Trade Law, Sherman Act**

See [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#).

Governments > Legislation > Interpretation

**HN3** Legislation, Interpretation

Although debates may not be used as a means for interpreting a statute, that rule is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

Governments > Legislation > Interpretation

**HN4** Legislation, Interpretation

Where words are employed in a statute that had a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

**HN5** Antitrust & Trade Law, Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.

Antitrust & Trade Law > Sherman Act > General Overview

**HN6** Antitrust & Trade Law, Sherman Act

By reference to the terms of [§ 8](#) of the Sherman Act, [15 U.S.C.S. § 8](#), it is certain that the word "person" clearly implies a corporation as well as an individual.

Antitrust & Trade Law > Sherman Act > General Overview

**HN7** Antitrust & Trade Law, Sherman Act

One of the fundamental purposes of [15 U.S.C.S. § 1](#) is to protect, not to destroy, rights of property.

**Lawyers' Edition Display****Headnotes**

Federal courts -- jurisdiction -- defendants of several districts. --

Headnote:

The presence of one of the defendants in the Federal district in which suit by the United States under the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201), 4, is brought to restrain

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violations of that act, gives the circuit court jurisdiction, and justifies it in making an order under 5 for the service of process upon all the other defendants, wherever they may be found.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Appeal -- prejudicial error -- exceptions to pleadings. --

## Headnote:

The overruling of the exceptions taken on the ground of impertinence to so much of the bill filed by the United States under the act of July 2, 1890, 4, to restrain violations of that act, as counted upon facts occurring prior to its enactment, cannot be regarded as prejudicial error, where the court gave no weight to the testimony adduced under the averments complained of, except in so far as it tended to throw light upon the acts done after the passage of the statute, the results of which, it was charged, were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Statutes -- construction -- congressional debates. --

## Headnote:

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by resorting to them to ascertain the history of the period when the statute was adopted.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

Monopoly -- under anti-trust act -- undue restraint. --

## Headnote:

Only undue restraints of interstate or foreign trade or commerce are prohibited by the provisions of the act of July 2, 1890, 1, 2, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of such trade or commerce, and making guilty of a misdemeanor every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of such trade or commerce.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Monopolies -- undue restraints of trade or commerce -- reason as criterion. --

## Headnote:

The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character, embraced by the prohibitions of the act of July 2, 1890, 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had, or had not, brought about the wrong against which the statute provided.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

## Commerce -- power of Congress -- validity of anti-trust act. --

## Headnote:

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The prohibitions of the anti-trust act of July 2, 1890, 1, 2, against restraints or monopolization of trade or commerce, do not exceed the authority of Congress to regulate commerce, as applied to undue restraints of interstate or foreign commerce in petroleum and its products, by contract, combination, or conspiracy, or monopolization, or attempts to monopolize any part of such commerce.

[For other cases, see Commerce, I.; Monopolies, II., in Digest Sup. Ct. 1908.]

Constitutional law -- delegation of legislative power. --

Headnote:

Legislative power is not unconstitutionally delegated to the courts by the provisions of the act of July 2, 1890, 1, 2, prohibiting combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempt to monopolize any part of such commerce, because the general language of these provisions leaves it to the judiciary to decide whether, in a given case, the particular acts come within the condemnation of the statute.

[For other cases, see Constitutional Law, III. b, 2.]

Evidence -- presumption -- intent. --

Headnote:

The unification of power and control over the oil industry which results from combining in the hands of a holding company the capital stock of the various corporations trading in petroleum and its products raises a presumption of an intent to exclude others from the trade, and thus centralize in the combination a perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, in violation of the prohibitions of the act of July 2, 1890, 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempt to monopolize any part of such trade or commerce.

[For other cases, see Evidence, II. e, 5, in Digest Sup. Ct. 1908.]

Monopolies -- anti-trust act -- holding company. --

Headnote:

The combination of the stocks of the various corporations trading in petroleum and its products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, constitutes a violation of the prohibitions of the act of July 2, 1890, 1, 2, against combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part of such trade or commerce.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

Judgment -- dissolution of monopoly -- effect. --

Headnote:

Power to make normal and lawful contracts or agreements is not taken from the stockholders of the subsidiary corporations, or the corporations themselves, by a decree for the dissolution of a holding company found to offend against the anti-trust act of July 2, 1890, which enjoins such stockholders and corporations from in any way conspiring to violate the statute, or from monopolizing or attempting to monopolize, in virtue of their stock ownership, and prohibits all agreements between them tending to produce or bring about further violations of the

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statute, but such decree merely restrains them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolves.

[For other cases, see Judgment, III. a, 2, in Digest Sup. Ct. 1908.]

Judgment -- dissolution of monopoly -- time for compliance. --

Headnote:

The magnitude of the interests involved and their complexity require that six months be given in which to execute a decree for the dissolution of a holding company controlling the oil industry in violation of the anti-trust act of July 2, 1890, and for the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

[For other cases, see Judgment, II. a, in Digest Sup. Ct. 1908.]

Injunction -- against violating anti-trust act -- extent of relief. --

Headnote:

The possible serious injury to the public from an absolute cessation of interstate commerce in petroleum and its products by the agencies embraced in a holding company controlling the oil industry, in violation of the anti-trust act of July 2, 1890, requires that upon dissolving the holding company, the subsidiary corporations should not be enjoined from carrying on interstate commerce until the dissolution of the combination should be effected, in accordance with the decree, by the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

## Syllabus

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The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.

The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants.

Allegations as to facts occurring prior to the passage of the Anti-trust Act may be considered solely to throw light on acts done [\*\*\*\*2] after the passage of the act.

The debates in Congress on the Anti-trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation.

While debates of the body enacting it may not be used as means for interpreting a statute, they may be resorted to as a means of ascertaining the conditions under which it was enacted.

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The terms "restraint of trade," and "attempts to monopolize," as used in the Anti-trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the act.

The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable.

The early struggle in England [\*\*\*3] against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution.

At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of, trade.

At the time of the passage of the Anti-trust Act the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. *Mogul Steamship Co. v. McGregor*, 1892, A.C. 25.

A decision of the House of Lords, although announced after an event, may serve reflexly to show the state of the law in England at the time of such event.

This country has followed the line of development of the law of England, and the public policy has been to prohibit, or treat as illegal, contracts, or acts entered into which intent to wrong the public and which unreasonably [\*\*\*4] restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices.

The Anti-trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it.

The Anti-trust Act contemplated and required a standard of interpretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibitions.

The word "person" in [§ 2](#) of the Anti-trust Act, as construed by reference to [§ 8](#) thereof, implies a corporation as well as an individual.

The commerce referred to by the words "any part" in [§ 2](#) of the Anti-trust Act, as construed in the light of the manifest purpose of that [\*\*\*5] act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce.

The words "to monopolize" and "monopolize" as used in [§ 2](#) of the Anti-trust Act reach every act bringing about the prohibited result.

Freedom to contract is the essence of freedom from undue restraint on the right to contract.

In prior cases where general language has been used, to the effect that reason could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-trust Act, the unreasonableness of the acts under consideration was pointed out and those cases are only authoritative by the certitude that the rule of reason was applied; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, and *United States v. Joint*

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Traffic Association, 171 U.S. 505, limited and qualified so far as they conflict with the construction now given to the Anti-trust Act of 1890.

The application of the Anti-trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects dehors its authority as to render the statute unconstitutional. [\*\*\*\*6] *United States v. E. C. Knight Co., 156 U.S. 1*, distinguished.

The Anti-trust Act generically enumerates the character of the acts prohibited and the wrongs which it intends to prevent and is susceptible of being enforced without any judicial exertion of legislative power.

The unification of power and control over a commodity such as petroleum, and its products, by combining in one corporation the stocks of many other corporations aggregating a vast capital gives rise, of itself, to the *prima facie* presumption of an intent and purpose to dominate the industry connected with, and gain perpetual control of the movement of, that commodity and its products in the channels of interstate commerce in violation of the Anti-trust Act of 1890, and that presumption is made conclusive by proof of specific acts such as those in the record of this case.

The fact that a combination over the products of a commodity such as petroleum does not include the crude article itself does not take the combination outside of the Anti-trust Act when it appears that the monopolization of the manufactured products necessarily controls the crude article.

Penalties which are not authorized by the law cannot [\*\*\*\*\*7] be inflicted by judicial authority.

The remedy to be administered in case of a combination violating the Anti-trust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power.

The constituents of an unlawful combination under the Anti-trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever; and a dissolution of the offending combination should not deprive the constituents of the right to live under the law but should compel them to obey it.

In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity.

<sup>173</sup> Fed. Rep. 177, modified and affirmed.

**Counsel:** Mr. John G. Johnson and Mr. John G. Milburn, with whom Mr. Frank L. Crawford was on the brief, for appellants:

The acquisition in 1899 by the Standard Oil Company of New Jersey of the stocks of the other companies was not a combination of independent enterprises. [\*\*\*\*8] All of the companies had the same stockholders who in the various corporate organizations were carrying on parts of the one business. The business as a whole belonged to this body of common stockholders who, commencing prior to 1870, had as its common owners gradually built it up and developed it. The properties used in the business, in so far as they had been acquired by purchase, were purchased from time to time with the common funds for account of the common owners. For the most part the plants and properties used in the business in 1899 had not been acquired by purchase but were the creation of the common owners. The majority of the companies, and the most important ones, had been created by the common owners for the convenient conduct of branches of the business. The stocks of these companies had always been held in common ownership. The business of the companies and their relations to each other were unchanged by the transfer of the stocks of the other companies to the Standard Oil Company of New Jersey.

The Sherman Act has no application to the transfer to, or acquisition by, the Standard Oil Company of New Jersey of the stocks of the various manufacturing and producing [\*\*\*\*9] corporations, for the reason that such transfer and acquisition were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate and

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foreign commerce, nor within the power of Congress to regulate interstate and foreign commerce. [United States v. Knight, 156 U.S. 1; In re Greene, 52 Fed. Rep. 104.](#)

The contracts, combinations and conspiracies of [§ 1](#) of the Sherman Act are contracts and combinations which contractually restrict the freedom of one or more of the parties to them in the conduct of his or their trade, and combinations or conspiracies which restrict the freedom of others than the parties to them in the conduct of their business, when these restrictions directly affect interstate or foreign trade. Purchases or acquisitions of property are not in any sense such contracts, combinations or conspiracies. Contracts in restraint of trade are contracts with a stranger to the contractor's business, although in some cases carrying on a similar one, which wholly or partially restricts the freedom of the contractor in carrying on that business as otherwise he would. [Holmes, J., in Northern Securities Case, 193 U.S. 404;](#) Pollock on Contracts, [\*\*\*\*10] 7th ed., p. 352. Such contracts are invalid because of the injury to the public in being deprived of the restricted party's industry and the injury to the party himself by being precluded from pursuing his occupation. [Oregon Steam Navigation Co. v. Windsor, 20 Wall. 68;](#) [Alger v. Thacker, 19 Pick. 54.](#) Combinations in restraint of trade are combinations between two or more persons whereby each party is restricted in his freedom in carrying on his business in his own way. [Hilton v. Eckersley, 6 El. & Bl. 47.](#)

The cases in which combinations have been held invalid at common law as being in restraint of trade deal with executory agreements between independent manufacturers and dealers whereby the freedom of each to conduct his business with respect to his own interest and judgment is restricted. [Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173;](#) [Salt Co. v. Guthrie, 35 Oh. St. 666;](#) [Arnot v. Pittston and Elmira Coal Co., 68 N.Y. 558;](#) [Craft v. McConoughy, 79 Illinois, 346;](#) [India Bagging Association v. Kock, 14 La. Ann. 168;](#) [Vulcan Powder Co. v. Hercules Powder Co., 96 California, 510;](#) [Oil Co. v. Adoue, 83 Texas, 650;](#) [Chapin v. Brown, 83 Iowa, 156.](#)

The cases in which trusts and [\*\*\*\*11] similar combinations have been held invalid as combinations in restraint of trade all deal with devices employed to secure the centralized control of separately owned concerns. [People v. North River Sugar Refining Co., 54 Hun, 354;](#) [S.C., 121 N.Y. 582;](#) [State v. Nebraska Distilling Co., 29 Nebraska, 700;](#) [Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508.](#)

A conspiracy in restraint of trade is a combination of two or more to deprive others than its members of their freedom in conducting their business in their own way by acts having that effect. A combination to boycott is a sufficient illustration.

The Sherman Act did not enlarge the category of contracts, combinations and conspiracies in restraint of trade. [United States v. Trans-Missouri Association, 166 U.S. 290;](#) [United States v. Joint Traffic Association, 171 U.S. 505;](#) [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211;](#) [Montague v. Lowry, 193 U.S. 38;](#) [Swift v. United States, 196 U.S. 375;](#) [Loewe v. Lawlor, 208 U.S. 274;](#) [Continental Wall Paper Co. v. Voight & Sons, 212 U.S. 227,](#) all involved combinations, either expressly by the terms of the agreements constituting them, restricting the freedom of each of the [\*\*\*\*12] members in the conduct of his or its business, or in the nature of conspiracies to restrict the freedom of others than their members in the conduct of their business. [The Northern Securities Case, 193 U.S. 197,](#) was a combination which, through the device adopted, restricted the freedom of the stockholders of two independent railroad companies in the separate and independent control and management of their respective companies.

Purchases and acquisitions of property do not restrain trade. The freedom of a trader is not restricted by the sale of his property and business. The elimination of competition, so far as his property and business is concerned, is not a restraint of trade, but is merely an incidental effect of the exercise of the fundamental civil right to buy and sell property freely. The acquisition of property is not made illegal by the fact that the purchaser intends thereby to put an end to the use of such property in competition with him. Every purchase of property necessarily involves the elimination of that property from use in competition with the purchaser and, therefore, implies an intent to effect such elimination. [Cincinnati Packet Co. v. Bay, 200 U.S. 179.](#)

[\*\*\*\*13] The transfer to, and acquisition by, the Standard Oil Company of New Jersey of the stocks of the various corporations in the year 1899 was not, and the continued ownership of those shares with the control which it

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confers is not, a combination or conspiracy in restraint of trade declared to be illegal by the first section of the Sherman Act. Because of the common ownership of the different properties in interest they were not independent or competitive but they were the constituent elements of a single business organism. This situation was not affected by the transfer to the Standard Oil Company of New Jersey, who had the same body of stockholders and had controlled the separate companies and continued to control them through the Standard Oil Company of New Jersey. These considerations differentiate the present case from the Northern Securities Case, 193 U.S. 197. The Northern Securities Case dealt with a combination of diverse owners of separate and diverse properties which were bound by the law of their being as quasi-public corporations invested with public franchises to continue separate, independent and competitive, creating through the instrumentality of the holding company [\*\*\*\*14] a common control which would necessarily prevent competitive relations.

There is no warrant for the assumption that corporations engaged in the same business are naturally or potentially competitive regardless of their origin or ownership. If the same body of men create several corporations to carry on a large business for the economical advantages of location or for any other reason, and the stocks of these corporations are all in common ownership, it is a fiction to say that they are potentially competitive or that their natural relation is one of competition.

The common owners of the Standard Oil properties and business had the right to vest the properties and business in a single corporation, notwithstanding that such a transaction might tend to prevent the disintegration of the different properties into diverse ownerships. The Sherman Act does not impose restrictions upon the rights of joint owners.

The acquisitions prior to 1882 were lawful and their effect upon competition was incidental. The purpose of the trust of 1879 was to bring the scattered legal titles to the joint properties then vested in various individuals into a single trusteeship. The purpose of the Trust [\*\*\*\*15] Agreement of 1882 was to provide a practicable trusteeship to hold the legal title to the joint properties, an effective executive management and a marketable symbol or evidence of the interest of each owner. The only question raised in the case of *State v. Standard Oil Company, 49 Oh. St. 137*, was whether it was Ultra vires for the Standard Oil Company of Ohio to permit its stock to be held by the trustees instead of by the real owners. The method of distribution adopted on the dissolution of the trust was the only feasible plan of distribution. Each certificate-holder was given an assignment of his proportionate interest in all the companies. All being parts of the common business there was no basis for separate valuations. The value of the interest of every owner was dependent upon its being kept together as an entirety. The transaction of 1899 was practically an incorporation of the entire business by the common owners through the ownership of the Standard Oil Company of New Jersey. That was the plain purpose, object and effect of the transaction.

The first section of the Sherman Act deals directly with contracts, combinations and conspiracies in restraint of trade. The [\*\*\*\*16] second section deals directly with monopolizing and attempts to monopolize. Monopolizing does not enlarge the operation of the first section nor does its absence restrict the operation of that section.

The first section deals with entities, a contract, combination, a conspiracy; and the entities themselves are expressly declared to be illegal, and may be annulled or destroyed. The second section deals with acts.

At common law monopoly had a precise definition. Blackstone, Vol. 4, p. 160; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 756. Monopoly imports the idea of exclusiveness and an exclusiveness existing by reason of the restraint of the liberty of others. With the commonlaw monopoly the restraint resulted from the grant of the exclusive right or privilege. Under the Sherman Act there must be some substitute for the grant as a source of the exclusiveness and restraint essential to monopolizing. The essential element is found in the statement of *Judge Jackson* (*In re Greene*, 52 Fed. Rep. 116) that monopolizing is securing or acquiring "the exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein." Exclusion by competition [\*\*\*\*17] is not monopolizing. Pollock on Torts, 8th ed., p. 152; Mogul Case, L.R. 23 Q.B.D. 615; (1892) App. Cas. 51. Monopolizing within the act is the appropriation of a trade by means of contracts, combinations or conspiracies in restraint of trade or other unlawful or tortious acts, whereby "the subject in general is restrained from that liberty of . . . trading which he had before." In the absence of such means or agencies of exclusion, size, aggregated capital, power, and volume of business are not monopolizing in a legal sense.

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Swift v. United States, 196 U.S. 375, was the case of a combination of corporations, firms and individuals separately and independently engaged in the business, together controlling nearly the whole of it, to monopolize it by certain acts and course of conduct effective to that end when done and pursued by such a combination.

Richardson v. Buhl, 77 Michigan, 632; People v. North River Sugar Refining Co., 54 Hun, 354; State v. Standard Oil Co., 49 Oh St. 137; State v. Distillery Co., 29 Nebraska, 700; Distilling Co. v. People, 156 Illinois, 448, and Anderson v. Shawnee Compress Co., 209 U.S. 423, rest upon special grounds and are not applicable to this case.

[\*\*\*\*18] See on the other hand, *In re Greene*, 52 Fed. Rep. 104, Jackson, J.; *Trenton Potteries Co. v. Oliphant*, 58 N.J. Eq. 507; *Oakdale Co. v. Garst*, 18 R.I. 484; State v. Continental Tobacco Co., 177 Missouri, 1; *Diamond Match Co. v. Roeber*, 106 N.Y. 473; *Davis v. Booth & Co.*, 131 Fed. Rep. 31; *Robinson v. Brick Co.*, 127 Fed. Rep. 804.

The acquisition of existing plants or properties however extensive, though made to obtain their trade and eliminate their competition, is not a monopoly at common law or monopolizing under the Sherman Act, in the absence of the exclusion of others from the trade by conspiracies to that end or contracts in restraint of trade on an elaborate and effective scale, or other systematic, wrongful, tortious or illegal acts. When such monopolizing is present the remedy of the act is to prohibit the offending conspiracies, contracts, and illegal acts or means of exclusion, leaving the individual or corporation to pursue his or its business with the properties and plants that have been acquired or created shorn of the monopolizing elements in the conduct of the business.

The acquisition of competing plants and properties cannot be rendered unlawful by imputing to [\*\*\*\*19] such acquisitions an intent to monopolize. The acquisition of plants and properties does not exclude anyone from the trade and therefore the intent to monopolize cannot be attributed to such acquisitions. The proposition that an acquisition of property is rendered invalid because of a collateral intent to monopolize is not sustained by the authorities relied upon to support it. *Addyston Pipe Case*, 85 Fed. Rep. 291, and cases there cited. The substantial acquisitions made by the owners of the Standard Oil business antedated the Sherman Act and they resulted from separate transactions extending over a long period of years. They were in all cases accretions to an existing business. They formed an insignificant part of the business as it now exists. The Sherman Act is intended to prevent present monopolizing or attempts to monopolize. Whether acquisitions made many years ago were or were not associated with an attempt to monopolize has no relation with the present attempt at monopolizing.

The Standard Oil Company of New Jersey was not monopolizing, or attempting to monopolize, or combining with anyone else to monopolize, interstate and foreign trade in petroleum and its products [\*\*\*\*20] when this proceeding was instituted, or at any time.

The ownership of the pipe lines has not been a means of monopolizing. Substantially all of the pipe lines owned by the Standard Oil companies have been constructed by those companies. There has never been any exclusion of anyone from the oil fields either in the production of oil, or its purchase, or its storage, or its gathering or transportation by pipe lines. Ownership of the pipe lines does not give the Standard companies any advantages in dealing with the producers which are not open to others.

The decree erroneously includes and operates upon several of the appellant companies.

The sixth section of the decree is unwarranted and impracticable in various of its provisions.

It was error to deny the motion of the appellants to vacate the order permitting service upon them outside of the Eastern Division of the Eastern District of Missouri, and to set aside the service upon them of the writs of subpoena issued thereunder; and error to overrule the pleas of the appellants to the jurisdiction of the court over them. The appellants were not residents of the Eastern District of Missouri nor were they found therein when the [\*\*\*\*21] order was made authorizing the service of process upon them outside of the district. There was no proceeding pending in that district involving a controversy for the determination of which the appellants were necessary parties.

Mr. D. T. Watson, also for appellants:

The Government has failed to maintain the affirmative of the issue made by the pleadings. *Brent v. The Bank*, 10 Pet. 614; *The Siren*, 7 Wall. 154; *United States v. Stinson*, 197 U.S. 200, 205.

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The transfer in 1899 to the Standard Oil Company of New Jersey of the various non-competitive properties jointly used by them as one property was not a restriction of interstate trade, or an attempt to monopolize, or a violation of the Sherman Act.

The Sherman Act permits trusts, combines, corporations and individuals to enter into and compete for interstate trade so long as they act lawfully. It does not seek to regulate the methods nor forbid those who enter into trade from doing their business in the form of a trust, corporation or combine, provided they carry it on lawfully.

The Standard Oil Company of New Jersey after 1899 might legitimately and properly compete for interstate trade, notwithstanding the combination [\*\*\*\*22] of the group of properties gave it a great power, only provided it did not restrain such trade or by unlawful means seek to gain a monopoly contrary to the provisions of the Sherman Act.

There is nothing in this case to show that after 1899 the combination did unlawfully compete, restrict or seek to monopolize interstate trade; yet such evidence was indispensable to prove that the combination was violating the Sherman Act in 1906. See the Calumet & Hecla Case, Judge Kanappen, 167 Fed. Rep. 709, 715; Judge Lurton, 167 Fed. Rep. 727, 728; Judge Gray in United States v. Reading Co., decided December 8, 1910.

There is a great difference between the Northern Securities Case and the case at bar.

On the question of potential competition, the idea of competition between properties all owned by the same persons is a novelty. The idea that properties themselves compete, and that if one man owns two or more he must compete with himself, is startling. Competition between joint owners is also novel. Fairbanks v. Leary, 40 Wisconsin, 642, 643; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454.

Competition is the striving of two or more persons, or corporations, either individually [\*\*\*\*23] or jointly, for one thing, i.e., trade; it is personal action; the strife between different persons. Properties do not compete. Their relative locations may more readily enable their owners to use them in competition, but of themselves and as against each other, they do not compete.

This idea makes the Sherman Act read that the same person or group of individuals shall not own and operate two or more sites for refineries or for stores or for any kind of manufactory which might be used by different owners in competition. *Joint Traffic Association Case, 171 U.S. 505, 567.*

The words "potential" or "naturally competitive" are not in the Sherman Act. *Cascade Railroad Co. v. Superior Court*, 51 Washington, 346. The rule of potential competition refers only to the ownership of the physical properties which produce the oil which goes into interstate commerce, and not to the oil itself. *United States v. E.C. Knight Co.*, 156 U.S. 1; *Northern Securities Co. v. United States*, 193 U.S. 407.

The Sherman Act is a highly penal one. In a criminal prosecution under the act the degree of proof is beyond a reasonable doubt. In a civil suit under it, the degree is not so great, but the proof [\*\*\*\*24] must be direct, plain and convincing. *United States v. Trans-Missouri Freight Assn., 58 Fed. Rep. 77; Northern Securities Co. v. United States, 193 U.S. 197, 401*; State v. Continental Tobacco Co., 177 Mississippi, 1.

There is a distinction between private traders and railroad companies; and see also distinction under Sherman Act between quasi-public corporations and private traders. *Trans-Missouri Case*, 166 U.S. 290.

The mere method in which stocks are held is not prescribed by the Sherman Act; all methods are lawful if not used to restrict trade or gain an unlawful monopoly. Under the court's ruling the effectiveness of a large business organization may, by reason of that very fact, bring it under the Sherman Act.

The decree below was not justified by the facts found by the court; or by the Sherman Act; after the court in § 5 permitted the distribution among the shareholders of the Standard Oil Company of New Jersey of the stocks held by that company, it did without lawful authority so to do, define and limit the method of that distribution; restrict the distributees in the future sale, use and disposal of their stocks; restrict the distributees in the sale, use and disposal [\*\*\*\*25] of their properties; and in the contract relations thereafter to exist, as well as the use and disposition of the different properties in such a drastic manner as to greatly injure and destroy the value of the same

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and render their future profitable use practically impossible. The decree disintegrates properties built with appellants' moneys for joint use so as to create units that never before existed and compels these units separately to carry on business and compete with other units, directly contrary to the purpose of their creation. It allows the future operation and use of the refineries, pipe lines, and other properties of the appellants only under the vague and indefinite, but broad and comprehensive, terms of § 6 of the decree, by subjecting those who in the future operate them to attachment for contempt for unwittingly violating vague and indefinite terms. It prohibits appellants from engaging in all interstate commerce until the discontinuance of the operation of the illegal combination, thus inflicting a new penalty for an indefinite and uncertain period.

All of such restrictions are unauthorized by the Sherman Act, are in violation of the settled rules governing [\*\*\*\*26] injunctions, and are contrary to the provisions of the different decrees heretofore approved by this court under the Sherman Act, and especially the one in the Northern Securities Case.

The decree authorized by the Sherman Act is wholly negative, and one that merely enjoins -- stops an illegal thing in operation when the petition is filed or which then is foreseen. Lacassagne v. Chapius, 144 U.S. 124; E.C. Knight Co. Case, 156 U.S. 1, 17; Harriman v. Northern Securities Co., 197 U.S. 244, 289; Swift & Co. v. United States, 196 U.S. 375, 402; United States v. Reading Co., decided by Circuit Court of the Third Circuit, December 8, 1910.

The Sherman Act prescribes certain specific methods of relief which are exclusive of all others. Noyes on Intercorporate Relations, 2d ed., 1909, § 406; *Greer, Mills & Co. v. Stoller*, 77 Fed. Rep. 1, 3; *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 71; *Barnet v. National Bank*, 98 U.S. 555, 558; *East Tennessee R.R. Co. v. Southern Tel. Co.*, 112 U.S. 306, 310; *Farmers' Bank v. Dearing*, 91 U.S. 29, 35; *United States v. Union Pacific Railroad Co.*, 98 U.S. 569.

The decree hampers and greatly injures the value of the stock of the stockholders, [\*\*\*\*27] though they are not parties to the bill.

A corporation, when party to a bill in equity, does represent its stockholders, but only within the scope of corporate power, and not as to the individual rights of the stockholder to do with his property as he chooses. Taylor & Co. v. Southern Pacific Co., 122 Fed. Rep. 147, 153, 154. A corporation has no right to conclude or affect the right of any shareholder in respect of the ownership or incidents of his particular shares. Brown v. Pacific Mail Steamship Co., Fed. Cas. No. 2025; 5 Blatch. 525; Morse v. Bay State Gas Co., 91 Fed. Rep. 944, 946; Harriman v. Northern Securities Co., 197 U.S. 244, 288-290.

The decree follows the appellants and their properties after the dissolution.

The Sherman Act closely limits and defines the power of the court on a petition filed to give equitable relief. The petition must pray that such violations shall be enjoined or otherwise prohibited; and it is these violations of the act that the court may now enjoin, and only such violations. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *New Haven R.R. Case, 200 U.S. 361, 404*.

The Sherman Act does not [\*\*\*\*28] give power to the courts to strike down and disintegrate a non-competing group of physical properties used to manufacture an article of trade. These physical properties are bought and held and used under state laws; they do not enter into interstate commerce and hence are not under Federal control. New Haven R.R. Co. v. Interstate Com. Comm., 200 U.S. 361, 404; State v. Omaha Elevator Co., 75 Nebraska, 637.

The effect of the decree is ruinous. For instance, these companies jointly own 54,616 miles of pipe lines, of which the seven individual defendants and their associates built over 50,000 miles, in which they have an investment of over \$61,000,000.

The decree splits up this pipe line system into eleven parts, takes away from the owners, who jointly built the pipe lines and who created the sub-companies, all control over the different sub-companies, and compels the eleven different parts to stand alone, independently of their principal and of each other, to be hostile to and to compete with their principal and with one another.

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Pipe lines are never parallel but always continuous, and each line has a value which depends wholly upon its connection with other parts of the system, [\*\*\*\*29] and whether all are used together as one whole. The carrying out of the decree would cut the pipe line system into isolated segments, prevent such use, and make the successful operation of the pipe lines impossible.

The decree would especially destroy the value of the stock of all shareholders who each had five shares or less. The stockholders on August 19, 1907, holding from one to four shares each numbered 1,157, and the stockholders owning five shares each numbered 439, out of a total number of 5,085 stockholders.

Considering the case de novo, and not on the findings of the court below, it is not true that when the petition in this case was filed in 1906, the seven individual appellants and their associates, private traders in oil, were, contrary to the provisions of the Sherman Act, carrying on a conspiracy to restrain interstate and foreign trade in oils, and to gain by illegal means a monopoly thereof.

The Federal law allowed and allows each of the individuals to compete freely for the interstate and foreign traffic in oil and its products. He may use all the weapons that his ingenuity and skill can suggest, to wage a successful warfare. His rights to compete are not [\*\*\*\*30] limited to merely such means as are fair or reasonable, but are only limited to such as are unlawful and directly tend to the violation of the Sherman Act. The Federal law also allows and assures to each competitor whatever share, however large, of the interstate or foreign trade in oil he or they may win provided his means are not unlawful. The Sherman Act was passed to protect trade and further competition. It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense. It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporations or combinations is immaterial.

The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade, and seems to have been then limited to a royal grant, as, for example, giving the exclusive right to manufacture playing cards. It was and is a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessities of life. No one of these falls under Federal jurisdiction, [\*\*\*\*31] but each is subject to state control only.

The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that act.

There was and is no such thing as a Federal crime, aside from express congressional acts, and as no such act was in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

This case involves, and only involves, the question of the restraint and monopolization of interstate and foreign trade in oil in November, 1906, when the petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States.

The appellants were lawfully entitled to so hold and use in interstate trade all of its combined properties.

To succeed in this case, the Government must also show that the said Standard Oil Company was then in 1906 using its power to actually restrain interstate or foreign trade in oil, or was then in 1906 excluding or attempting [\*\*\*\*32] to exclude by illegal means others from said trade and attempting to monopolize the same, or a part thereof.

The Sherman Act does not compel private traders, however organized, to compete with each other. The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry. The growth and success of the Standard Oil Company was the result of individual enterprise and the natural laws of trade. It was not the result of unlawful means, but of skill, unremitting toil, denials and hardships, and is an instance of where the continuous use for forty years of skill, labor and capital reached a great success.

To prove a violation of § 1 of the Sherman Act the Government must clearly show that when the petition was filed appellants were then actually restraining interstate trade in oil.

To prove a monopoly under §2 of the Sherman Act, the Government must show that the appellants were, when the petition was filed, then using unlawful means to maintain their control of the industry and that the appellants were then by unlawful means excluding others from said industry.

The Attorney General and Mr. Frank B. Kellogg, [\*\*\*\*33] with whom Mr. Cordenio N. Severance was on the brief, for the United States:

It is immaterial that this conspiracy had its inception prior to the enactment of the Sherman Law, or that many of the rebates and discriminations granted by the railroads which enabled the defendants to monopolize the commerce in petroleum antedated the enactment of the Interstate Commerce Act; the principles of the common law applied to interstate as well as to intrastate commerce. *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92; *Murray v. C. & N.W.R. Co.*, 62 Fed. Rep. 24; *Interstate Com. Comm. v. B. & O.R. Co.*, 145 U.S. 263; *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174; *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247; *People v. Chicago Gas Trust*, 130 Illinois, 268; *Richardson v. Buhl*, 77 Michigan, 632; *State v. Nebraska Distilling Co.*, 29 Nebraska, 700; *Distilling & Cattle Feeding Co. v. People*, 156 Illinois, 448.

From the earliest date these various corporations were held together by trust agreements which were void at common law. But whether they were void or not, the combination was a continuing one; there was no vested right by reason of the acquisition of these stocks [\*\*\*\*34] by the trustees, and when the Sherman Act was passed the continuance of the combination became illegal. *United States v. Freight Association*, 166 U.S. 290, cited and approved in *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86; *Thompson v. Union Castle Steamship Co.*, 166 Fed. Rep. 251; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *Finck v. Schneider Granite Co.*, 86 S.W. Rep. 221; *Ford v. Chicago Milk Assn.*, 155 Illinois, 166.

The Standard Oil Company, through various defendant subsidiary corporations is engaged in producing and purchasing crude petroleum in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Oklahoma, Kansas and California; in transporting the same by pipe lines from the States in which the same is produced into the various other States to the manufactoryes of the various defendants; in manufacturing the same into the products of petroleum and transporting those products, largely in the tank cars of the Union Tank Line Company (controlled by the Standard Oil Company of New Jersey) to the various marketing places throughout the United States, and in selling and disposing of the same. This clearly makes the defendants engaged in interstate commerce.

Swift & Co. v. United States, 196 U.S. 375; Shawnee Compress Co. v. Anderson, 209 U.S. 423; Loewe v. Lawlor, 208 U.S. 274.

The amalgamation of the stocks of all these companies in 1899 in the Standard Oil Company of New Jersey as a holding corporation was a combination in restraint of trade within § 1 of the Sherman Act. United States v. Northern Securities Co., 193 U.S. 197; Harriman v. Northern Securities Co., 197 U.S. 244; Shawnee Compress Co. v. Anderson, 209 U.S. 423; Swift & Co. v. United States, 196 U.S. 375; Loewe v. Lawlor, 208 U.S. 274; Continental Wall Paper Co. v. Voight, 148 Fed. Rep. 939; 212 U.S. 227; Burrows v. Inter. Met. Co., 156 Fed. Rep. 389; Montague v. Lowry, 193 U.S. 38; Distilling & Cattle Feeding Co. v. People, 156 Illinois, 48; Harding v. Am. Glucose Co., 55 N.E. Rep. 577; Dunbar v. American Tel. & Teleg. Co., 79 N.E. Rep. 427; Missouri v. Standard Oil Co., 218 Missouri, 1; Merchants' Ice & Cold Storage Co. v. Rohrman, 128 S.W. Rep. 599; State v. International Harvester Co., 79 Kansas, 371; International Harvester Co. v. Commonwealth, 124 Kentucky, 543; State v. Creamery Package Mfg. Co., 126 N.W. Rep. 126.

The Northern Securities Case and other authorities [\*\*\*\*36] cited under this head are conclusive of the proposition that this is a combination in restraint of trade. The court held that the inhibitions of the Sherman Act were not limited to those direct restraints upon trade and commerce evidenced by contracts between independent lines of railway to fix rates or to maintain rates, or manufacturing or other corporations to limit the supply or control prices; that the power of suppression of competition and therefore of restraint of trade exercised or which could be exercised by reason of stock ownership and control of the various corporations, was as much in violation of the Anti-trust Act as direct restraint by contract. There is nothing in the act which can be construed to prohibit the suppression of competition by reason of stock control of railways and at the same time to permit it in manufacturing

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industries, pipe line companies, or car line companies engaged in the manufacture and transportation of oil. The contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, which are inhibited by the first section of the act as applied to these classes of corporations cannot be distinguished from those [\*\*\*\*37] contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, when applied to railway companies. The thing inhibited is the restraint of interstate commerce. The thing to be accomplished is the maintenance of the freedom of trade. The inhibition against the suppression of competition by any instrumentality, scheme, plan or device, to evade the act, applies to all corporations and all devices. The real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained and monopolized. Nowhere in the decisions of this court is there authority for the proposition that combinations by stock ownership or the purchase of competing properties is invalid as to railroads but valid as to trading and manufacturing companies. The act of Congress and the decisions of this court, so far as the principle goes, places them upon the same plane. In the argument of the Freight Association cases it was urged by counsel that the inhibitions of the Sherman Act in this regard did not apply to railroads, but only included trading companies. It is now urged that they apply to railroads [\*\*\*\*38] and do not apply to manufacturing and trading companies. But this court in the Freight Association cases clearly laid down the rule that while there are points of difference existing between the two classes of corporations, yet they are all engaged in interstate commerce, that the injuries to the public have many common features, and that the inhibitions apply to all. [166 U.S. 322](#).

The transfer of the stocks of these companies in 1899 to the Standard Oil Company of New Jersey had no greater legal sanctity than the transfer to the trustees in 1882, nor was it different from the transfer of the stocks of the Northern Pacific and Great Northern Railways to the Northern Securities Company in 1901, two years after the organization of the present corporate Standard Oil combination. It is the usual course of reasoning urged in all of these trust cases -- because a person has a right to purchase property, he may therefore purchase a competitor, and because he may purchase one competitor he may purchase all of his competitors, and what an individual may do a corporation may do. These were the identical arguments pressed with great ability by counsel in the Northern Securities Case and [\*\*\*\*39] in the subsequent case of *Harriman v. Northern Securities Co., 197 U.S. 291*; but this court held to the contrary. The position is also contrary to the almost universal trend of the American decisions both Federal and state. The exercise of an individual right disconnected from all other circumstances may be legal, but when taken together with the other circumstances may accomplish the prohibited thing.

The second section of the act prohibits a person or a single corporation from monopolizing or attempting to monopolize any part of the commerce of the country by any means whatever, and also from conspiring with any other person or persons to accomplish the same object. The two sections of the act were manifestly not intended to cover the same thing; otherwise the second section would be useless. Any contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade which tends to monopoly is prohibited by the first section.

*Addyston Pipe Case, 175 U.S. 211; United States v. Northern Securities Co., 193 U.S. 334.*

The question then is: What is the meaning of the word "monopoly," as used in the second section of the act? Of course Congress did not [\*\*\*\*40] have in mind monopoly by legislative or executive grant. National Cotton Oil Co. v. Texas, 197 U.S. 129; Burrows v. Inter. Met. Co., 156 Fed. Rep. 389, opinion by Judge Holt. Such monopolies could not exist in this country except by grant of Congress or the States, and it has been held that exclusive grants to pursue an ordinary legitimate business are void. Butchers' Union Co. v. Crescent City Co., 111 U.S. 754. Neither did Congress have in mind an absolute monopoly. This can only be obtained by legislative grant. In a country like ours, where everyone is free to enter the field of industry, no absolute monopoly is probable. It is sufficient to bring it within the act if the combination or the aggregation of capital "tends to monopoly . . . or are reasonably calculated to bring about the things forbidden." Waters-Pierce Co. v. Texas, 212 U.S. 86. Originally monopoly meant a grant by sovereign power of the exclusive right to carry on any employment. The only act of exclusion was the grant itself. If the grant was void, then there was no monopoly. These monopolies were common in all monarchial countries. Monopoly, however, came to have a broader meaning under the common law in [\*\*\*\*41] the later days, and especially in the United States, and in order to arrive at what Congress intended by the act of 1890 it is important to understand the history of the times and the general understanding of monopoly as defined by the courts and the political economists, and the monopolies which were known to the people generally and against which Congress was legislating. Prior to the passage of this law, the various trust cases had been decided, in which trusts, like the

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Standard Oil of 1882, had been held illegal because they tended to create a monopoly. People v. North River Sugar Refining Co., 54 Hun, 354; State v. Nebraska Distilling Co., 29 Nebraska, 700; State v. Standard Oil Co., 49 Oh. St. 137. Various other decisions had defined monopoly as known in this country, -- such cases as Alger v. Thacher, 19 Pick. 51; People v. Chicago Gas Trust, 130 Illinois, 268; Salt Co. v. Guthrie, 35 Oh. St. 666; Craft v. McConoughy, 79 Illinois, 346; Central R.R. Co. v. Collins, 40 Georgia, 582.

These cases were decided before the Sherman Act was passed, and defined monopoly at common law as it was understood and existed in this country. They embrace trusts like the Standard Oil trust; [\*\*\*\*42] agreements fixing prices, dividing territory, or limiting production, thereby tending to enhance or control the price of products; general agreements restraining individuals from engaging in any employment except as incident to the sale of property; purchases by corporations of all or a large proportion of competing manufacturing or mechanical plants; combinations of separate businesses in the form of partnership but really for the purpose of controlling the trade; and various other forms of acquiring monopoly. There was no unlawful exclusion of anyone else from doing business in these cases. They show that the term "monopoly" as applied in American jurisprudence meant monopoly acquired by mere individual acts, as distinguished from grant of government, although the individual act in and of itself was not illegal; the concentration of business in the hands of one combination, corporation, or person, so as to give control of the product or prices; as said by Mr. Justice McKenna, in the Cotton Oil Case, "all suppression of competition, by unification of interest or management."

The case of *Craft v. McConoughy, supra*, well illustrates this argument. The pretended copartnership formed [\*\*\*\*43] between the dealers of the town of Rochelle, while carrying on the business separately, enabled them to control the prices to the detriment of the surrounding country. It was therefore a monopolizing or an attempt to monopolize a part of the commerce of the State; and the monopolization would have been just as effective had these separate business enterprises been stock corporations and the stock placed in the hands of a holding company. A similar illustration was the case of *Smiley v. Kansas, 196 U.S. 447* (affirming 65 Kansas, 240), in which an attempt to control the grain trade of a particular station was held illegal under a state statute. The Standard combination is an attempt to control and monopolize a vast commerce of the entire country, as these people undertook to control and monopolize a local commerce.

The term "monopoly," therefore, as used in the Sherman Act was intended to cover such monopolies or attempts to monopolize as were known to exist in this country; those which were defined as illegal at common law by the States, when applied to intrastate commerce, and those which were known to Congress when the act was passed. The monopoly most commonly known in this [\*\*\*\*44] country, and which the debates in Congress<sup>1</sup> show were intended to be prohibited by the act, were those acquired by combination (by purchase or otherwise) of competing concerns. The purchase of a competitor, as a separate transaction standing alone, was the exercise of a lawful privilege, not in and of itself unlawful at common law nor prohibited by statute, yet in the Northern Securities Case the purchase of stock in a railway was held to be illegal when done in pursuance of a scheme of monopoly.

It is not necessary in this case, and we doubt whether in any case it is possible, to make a comprehensive definition of monopoly which will cover every case that might arise. It is sufficient if the case at bar clearly comes within the provisions of the act. We believe that the defendants have acquired a monopoly by means of a combination of the principal manufacturing concerns through a holding company; that they have, by reason of the very size of the combination, been able to maintain this monopoly through unfair [\*\*\*\*45] methods of competition, discriminatory freight rates, and other means set forth in the proofs. If this act did not mean this kind of monopoly, we doubt if there is such a thing in this country. The men who framed the Constitution of this country were familiar with the history of monopolies growing out of acts of the Government. They guarded the people against these by constitutional provisions, but they left open the widest field for the exercise of individual enterprise, and it was the abuse of these personal privileges, made easy by state laws permitting unlimited incorporation, which gave rise to the evils that convinced the people of the necessity for the passage of the Sherman Anti-trust Act. It was not monopolies as known to the English common law, but monopolies such as were commonly understood to exist in this country which that act prohibited.

<sup>1</sup> Cong. Rec., Vol. 21, part 3, pp. 2456-2460, 2562, 2645, 2726, 2728, 2791, 2928; Cong. Rec., Vol. 21, part 5, pp. 4089, 4093, 4098, 4101; Vol. 21, part 6, p. 5954.

As a natural conclusion from the foregoing definition of monopoly by appellants' counsel they claim that the inhibitions of the second section are against the unlawful means used to acquire the monopoly, but that acquired monopoly is not illegal; therefore that the court can only restrain the means by which the monopoly was acquired, [\*\*\*\*46] leaving the monopoly to exist. We believe this to be an altogether too refined construction of the act. If such be the true interpretation, the result would be that one could combine all the separate manufactures in a given branch of industry in this country by use of unlawful means such as discriminatory freight rates, but, if not attacked by the Government before it had obtained complete control of the business, its very size, with its ramifications through all the States, would make it impossible for anyone else to compete, and it could control the price of products in the entire country and would be beyond the reach of the law. It could, by selling at a low price where a competitor was engaged in business and by raising the price where there was no attempt at competition, absolutely control the business without itself suffering any loss; and yet the Government would be powerless to destroy the monopoly because the unlawful means had been abandoned.

If the court finds this combination to be in restraint of trade and a monopoly, it is authorized by § 3 to enjoin the same and has plenary power to make such decree as is necessary to enforce the terms and provisions of the act. [\*\*\*\*47] *Northern Securities Co. v. United States*, 193 U.S. 336, 337, 344; *Swift & Co. v. United States*, 196 U.S. 375; *United States v. Marigold*, 9 How. 560, 566; *Crutcher v. Kentucky*, 141 U.S. 57; *In re Rapier*, 143 U.S. 110; *The Lottery Case*, 188 U.S. 321; *United States v. General Paper Co.*, opinion of Judge Sanborn in settling the decree, not reported; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *Chicago, Rock Island & Pacific R.R. Co. v. Union Pacific R.R. Co.*, 47 Fed. Rep. 15, 26.

Evidence that the defendant companies obtained rebates and discriminatory rates in the transportation of their product as against their competitors, and engaged in unfair and oppressive methods of competition thereby destroying the smaller manufacturers and dealers throughout the country, is material in this case. State of Missouri v. Standard Oil Co., 218 Missouri, 1; *State of Minnesota v. Standard Oil Co.*, 126 N.W. Rep. 527; Standard Oil Co. v. State of Tennessee, 117 Tennessee, 618; S.C., 120 Tennessee, 86; *S.C.*, 217 U.S. 413; *State of South Dakota v. Central Lumber Co.*, 123 N.W. Rep. 504; *Citizens' Light, Heat & Power Co. v. Montgomery*, 171 Fed. Rep. 553; State of Nebraska v. Drayton, 82 Nebraska, [\*\*\*\*48] 254; *S.C.*, 117 N.W. Rep. 769; *People v. American Ice Co.*, 120 N.Y. Supp. 443.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it into operation. *United States v. Standard Oil Co., 152 Fed. Rep. 294; Lincoln v. Claflin, 7 Wall. 132; United States v. Babcock, 24 Fed. Cas. 915*, No. 14,487; *United States v. Cassidy, 67 Fed. Rep. 698, 702*; The Anarchist Case, 122 Illinois, 1; *United States v. Johnson, 26 Fed. Rep. 682, 684; People v. Mather, 4 Wend. 230.*

This conspiracy was a continuing offense. Every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law. 19 Am. & Eng. Ency. of Law, 2d ed, "Limitations of Actions;" *United States v. Greene*, 115 Fed. Rep. 343; Ochs v. People, 124 Illinois, 399; Spies v. People, 122 Illinois, 1; 8 Cyc. 678; *State v. Pippin*, 88 N. Car. 646; *United States v. Bradford*, 148 Fed. Rep. 413; *Commonwealth v. Bartilson*, 85 Pa. J\*\*\*\*491 St. 489; *People v. Mather*, 4 Wend. 261; *State v. Kemp*, 87 No. Car. 538; American Fire Ins. Co. v. State, 22 So. Rep. (Miss.) 99; *Lorenz v. United States*, 24 App. D.C. 337; People v. Willis, 23 Misc. (N.Y.) 568; Raleigh v. Cook, 60 Texas, 438; Commonwealth v. Gillespie, 10 Am. Dec. (Pa.) 480.

## **Opinion by: WHITE**

Opinion

[\*30] [\*504] [\*\*\*633] MR. CHIEF JUSTICE **WHITE** delivered the opinion of the court.

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The Standard Oil Company of New Jersey and 33 other corporations, John D. Rockefeller, William Rockefeller and five other individual defendants prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4, of the act of July 2, 1890, c. 647, p. 209, known as the Anti-trust Act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about twelve thousand pages, containing a vast amount of confusing and conflicting testimony [\*31] relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way [\*\*\*\*50] to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering one hundred and seventy pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio and sixty-two other corporations and partnerships, as also seven individuals were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade [\*\*\*634] and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several States and Territories of the United States and the District of Columbia [\*\*\*\*51] and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, viz: John D. Rockefeller, William Rockefeller and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

[\*32] "That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various States for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several States, and monopolizing [\*\*\*52] the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870, a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination and either transferred property to the corporation or to individuals to be held for the benefit of all parties [\*\*505] in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained and in further [\*\*\*53] execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members [\*33] obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question the following results were brought about: a. That the combination, in addition to the refineries in Cleveland which it had acquired as previously stated, and which it had either dismantled to limit production or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio and elsewhere. The properties thus

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acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some [\*\*\*\*54] in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners who had become stockholders in the Standard Oil Company of Ohio and thus members of the alleged illegal combination. b. That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey.c. That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement, [\*34] by which various independent firms, corporations, limited partnerships and individuals engaged in purchasing, transporting, refining, shipping and selling oil and the products thereof [\*\*\*\*55] among the various States turned over the management of their said business, corporations and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said [\*\*\*635] trust agreement was in restraint of trade and commerce and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin. <sup>1</sup>

<sup>1</sup> 1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.

Acme Oil Company, Pennsylvania.

Atlantic Refining Company of Philadelphia.

Bush & Co. (Limited).

Camden Consolidated Oil Company.

Elizabethport Acid Works.

Imperial Refining Company (Limited).

Charles Pratt & Co.

Paine, Ablett & Co.

Standard Oil Company, Ohio.

Standard Oil Company, Pittsburg.

Smith's Ferry Oil Transportation Company.

Solar Oil Company (Limited).

Sone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2d. The following individuals, to wit:

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[\*\*\*56] [\*35] [\*\*506] The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corporations [\*36] in various States, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of

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W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, jr., estate of Josiah Macy, William H. Macy, jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardwell, W. G. Warden, Joseph L. Warden, Warden, Frew & Co., Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York, George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company.

Baltimore United Oil Company.

Beacon Oil Company.

Bush & Denslow Manufacturing Company.

Central Refining Co. of Pittsburg.

Chesebrough Manufacturing Company.

Chess Carley Company.

Consolidated Tank Line Company.

Inland Oil Company.

Keystone Refining Company.

Maverick Oil Company.

National Transit Company.

Portland Kerosene Oil Company.

Producers' Consolidated Land and Petroleum Company.

Signal Oil Works (Limited).

Thompson & Bedford Company (Limited).

Devoe Manufacturing Company.

Eclipse Lubricating Oil Company (Limited).

Empire Refining Company (Limited).

Franklin Pipe Company (Limited).

Galena Oil Works (Limited).

Galena Farm Oil Company (Limited).

Germania Mining Company.

Vacuum Oil Company.

H.C. Van Tine & Company (Limited).

Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for."

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Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which of course in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of \$3,000,000 and the latter a capital stock of \$5,000,000, subsequently increased to \$10,000,000 and \$15,000,000 [\*\*\*636] respectively. The bill alleged "that pursuant to said trust [\*\*\*57] agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships, who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various States and Territories [\*37] of the United States as aforesaid, to transfer their property situated in said several States to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania and Ohio, and other corporations organized or acquired by said trustees from time to time. . . ." For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling, and shipping of oil," as per a list which is excerpted in the margin. <sup>1</sup>

<sup>1</sup> List of Corporations the Stocks of Which Were Wholly or Partially Held by the Trustees of Standard Oil Trust,

## Capital

S.O. trust

## **Stock.**

**ownership.**

## New York State:

## Acme Oil Company, manufacturers

\$300,000

Entire.

of petroleum products.

Atlas Re

200,000

Do.

of petrole

American Wick Manufa

25,000

Do.

## Company, manufacturers of lamp

wicks.

Bush & Denslow Manufacturing

300,000

50 per cent.

Company, manufacturers of petroleum products.

Chesebrough Manufacturing Com-

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500,000  
2,661-5,000  
pany, manufacturers of petroleum.  
Central Refining Company (Lim-  
200,000  
1-67.2 per ct.  
ited), manufacturers of petroleum  
products.  
Devoe Manufacturing Company,  
300,000  
Entire.  
packers, manufacturers of petroleum.  
Empire Refining Company (Lim-  
100,000  
80 per cent.  
ited), manufacturers of petroleum  
products.  
Oswego Manufacturing Company,  
100,000  
Entire.  
manufacturers of wood cases.  
Pratt Manufacturing Company,  
500,000  
Do.  
manufacturers of petroleum products.  
Standard Oil Company of New  
5,000,000  
Do.  
York, manufacturers of petro-  
leum products.  
Sone & Fleming Manufacturing  
250,000  
Do.  
Company (Limited), manufacturers  
of petroleum products.  
Thompson & Bedford Company  
250,000

80 per cent.

(Limited), manufacturers of petroleum products.

Vacuum Oil Company, manufac-

25,000

75 per cent

turers of petroleum products.

New Jersey:

Eagle Oil Company, manufacturers

350,000

Entire.

of petroleum products.

McKigan Oil Company, jobbers of

75,000

Do.

petroleum products.

Standard Oil Company of New

3,000,000

Do.

Jersey, manufacturers of petroleum products.

Pennsylvania:

Acme Oil Company, manufacturers

300,000

Do.

of petroleum products.

Atlantic Refining Company, manu-

400,000

Do.

facturers of petroleum products.

Galena Oil Works (Limited), manu-

150,000

86 1/4 per cent.

facturers of petroleum products.

Imperial Refining Company (Lim-

300,000

Entire.

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ited), manufacturers of petroleum products.

Producers' Consolidated Land and  
1,000,000  
65/132 per cent.

Petroleum Company, producers  
of crude oil.

National Transit Company, trans-  
25,455,200  
94 per cent.  
porters of crude oil.

Standard Oil Company, manufac-  
400,000  
Entire.

turers of petroleum products.

Signal Oil Works (Limited), manu-  
100,000  
38 3/4 per cent.  
facturers of petroleum products.

Ohio:

Consolidated Tank-Line Company,  
1,000,000  
57 per cent.  
jobbers of petroleum products.

Inland Oil Company, jobbers of pe-  
50,000  
50 per cent.  
troleum products.

Standard Oil Company, manufac-  
3,500,000  
Entire.  
turers of petroleum products.

Solar Refining Company, manu-  
500,000  
Do.  
facturers of petroleum products.

Kentucky:

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Standard Oil Company, jobbers of

600,000

Do.

petroleum products.

Maryland:

Baltimore United Oil Company,

600,000

5,059-6,000

manufacturers of petroleum products.

West Virginia:

Camden Consolidated Oil Com-

200,000

51 per cent.

pany, manufacturers of petro-  
leum products.

Minnesota:

Standard Oil Company, jobbers of

100,000

Entire.

petroleum products.

Missouri:

Waters-Pierce Oil Company, job-

400,000

50 per cent.

bers of petroleum products.

Massachusetts:

Beacon Oil Company, jobbers of

100,000

Entire.

petroleum products.

Maverick Oil Company, jobbers of

100,000

Do.

petroleum products.

Maine:

Portland Kerosene Oil Company,

200,000

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Do.

jobbers of petroleum products.

Iowa:

Standard Oil Company, jobbers of

600,000

60 per cent.

petroleum products.

Continental Oil Company, jobbers

300,000

62 1/2 per cent.

of petroleum products.

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[\*\*\*58] [\*38] [\*\*507] The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree [\*39] adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself [\*40] was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in 64 of the companies which it controlled to some of the remaining 20 companies, it having

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controlled before the decree 84 in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected [\*\*\*\*59] for transfer was [\*\*\*637] virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the Attorney-General of Ohio instituted contempt proceedings in the quo warranto case based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time also proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an [\*41] Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

"That during the third period of said conspiracy and in pursuance thereof the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation [\*\*508] obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, [\*\*\*\*60] and selling oil into and among the various States and Territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; "so that the business and objects of said [\*\*\*638] company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including [\*\*\*\*61] voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and [\*42] to hold, purchase, mortgage, and convey real estate and personal property outside the State of New Jersey.'"

The capital stock of the company -- which since March 19, 1892, had been \$10,000,000 -- was increased to \$110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of \$97,250,000. The bill contained allegations referring to the development of new oil fields, for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining [\*\*509] [\*\*\*\*62] and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practises in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practises against competing [\*43] pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, [\*\*\*\*63] the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of

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the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to [\*\*\*\*64] be in violation of the first and second sections of the Anti-trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the [\*44] district in which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the Anti-trust Act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on non-resident defendants [\*\*\*639] or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the averments of the bill of complaint, particularly those which [\*\*\*\*65] related to acts alleged to have been done by the combination prior to the passage of the Anti-trust Act and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of independent or competing concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or [\*\*\*\*66] of their purpose, intent or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5 [\*45] to 10, 1909, under the expediting act of February 11, 1903, before a Circuit Court consisting of four judges.

The court decided in favor of the United [\*\*510] States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-trust Act, "except as evidence of their (the defendants') purpose, of their continuing conduct and of its effect." ([173 Fed. Rep. 177.](#))

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under S 2 of the Anti-trust Act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies and one foreign

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company which the Standard Oil Company of New [\*\*\*\*67] Jersey controls by stock ownership; these 38 corporate defendants being held to be parties to the combination found to exist.<sup>1</sup>

The bill was dismissed as to all other corporate defendants, 33 in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."<sup>2</sup>

[\*46] The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control [\*\*\*\*68] over the said 37 subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Oil Company, and the 37 subsidiary corporations were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end that our attention may be completely concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that in consequence of the presence within the district of the Waters-Pierce Oil Company, the court, under the authority of § 5 of the [\*\*\*640] Anti-trust Act, rightly took jurisdiction over the cause and properly ordered notice to be served upon [\*\*\*\*69] the non-resident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the Anti-trust Act, -- whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill, -- we think by no possibility in the present stage of the case can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the [\*47] passage of the Anti-trust Act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts the opposing contentions pressed in the argument are numerous and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which by being disposed of would decide them all. For [\*\*\*\*70] instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the first and second sections of the Anti-trust Act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on [\*\*511] the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public and is

<sup>1</sup> Counsel for appellants says: "Of the 38 (37) corporate defendants named in section 2 of the decree and as to which the judgment of the court applies, four have not appealed, to wit: Corsicana Refining Co., Manhattan Oil Co., Security Oil Co., Waters-Pierce Oil Co., and one, the Standard Oil Co. of Iowa, has been liquidated and no longer exists."

<sup>2</sup> Of the dismissed defendants 16 were natural gas companies and 10 were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, 7 in number, were: Florence Oil Refining Co., United Oil Co., Tidewater Oil Co., Tide Water Pipe Co. (L't'd), Platt & Washburn Refining Co., Franklin Pipe Co. and Pennsylvania Oil Co.

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strewn with the wrecks resulting from crushing out, without regard to law, the individual rights [\*\*\*\*71] of others. Indeed, so conclusive, it is urged, is the proof on these subjects that it is asserted that the existence of the principal corporate defendant -- the Standard Oil Company of New Jersey -- with the vast accumulation of property which it owns or controls, because of its infinite potency [\*48] for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. [\*\*\*\*72] It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime to which that proof is addressed, there may be found acts of wrongdoing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business or of the methods and habits of dealing which, even if wrong, were commonly practised at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years, a duty difficult to rightly perform and, even if satisfactorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-trust Act. We shall [\*49] therefore -- departing from what otherwise would be the natural order [\*\*\*\*73] of analysis -- make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the Anti-trust Act by the text, and after discerning [\*\*\*641] what by that process appears to be its true meaning we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this we shall then approach the facts. Following this course we shall make our investigation under four separate headings: First. The text of the first and second sections of the act originally considered and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon [\*\*\*\*74] which they rely. Third. The application of the statute to facts, and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"SECTION 1. HN1[<sup>↑</sup>] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by [\*50] imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. HN2[<sup>↑</sup>] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty [\*512] of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, [\*\*\*\*75] or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. [HN3](#) [↑] Although debates may not be used as a means for interpreting a statute ([\*United States v. Trans-Missouri Freight Association, 166 U.S. 318\*](#), and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the [\*\*\*76] enactment of a particular law, that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section [\*51] is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it [\*\*\*77] was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, [\*\*\*642] or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, c. 85.)"

Hawkins thus defined them:

"A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, [\*52] working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which [\*\*\*78] he had before.' (Hawk. P.C. bk. 1, c. 29.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessities of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance [\*\*\*79] prices, one of the wrongs arising from monopoly, it came to be that laws were

passed relating to offenses such as forestalling, regrating and engrossing by [\*\*513] which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. [\*53] This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI, ch. 14, as follows:

"Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, [\*\*\*\*80] shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in East India Company v. Sandys, Skin. 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F.B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing'; and that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject [\*\*\*\*81] between party and party; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is 'engrossing' ex rei natura, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and whosoever [\*54] hath the sole trade to any country, hath the sole trade of buying and selling the produce of that country, at his own price, which is an 'engrossing'."

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." It is [\*\*\*643] illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is [\*\*\*\*82] to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C.J., in Mitchel v. Reynolds (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business [\*55] was void. And that at common law the evils consequent upon engrossing, etc., caused those [\*\*\*\*83] things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning [\*514] them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly [\*\*\*84] by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition [\*56] of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts [\*\*\*85] which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co. v. McGregor* (1892), A.C. 25. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-trust Act, it serves reflexly to show the exact state of the law in England at the time the Antitrust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778-1779, [\*\*\*86] by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person [\*644] on his right to pursue his calling, hence only operating subjectively, came generally to be recognized [\*57] in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices -- in other words, to monopolize -- came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, [\*\*\*87] sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject or many judicial decisions which illustrate it would unnecessarily prolong this opinion. We append in the margin a note to treatises,

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&c., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.<sup>1</sup>

It will be found that as modern conditions [\*\*515] arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was [\*\*\*\*88] thought [\*58] justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in National Cotton Oil Co. v. Texas, 197 U.S. 115, and Shawnee Compress Co. v. Anderson, 209 U.S. 423; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, [\*\*\*\*89] but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be [\*59] of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that [HN4](#) where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used [\\*\\*\\*\\*901](#) in that sense unless the context compels to the contrary.<sup>1</sup>

As to the first section, the words to be interpreted are: **HN5** "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . **[\*\*\*645]** is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts [\*\*\*\*91] to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an allembracing enumeration to make sure that no form of contract or combination by which an undue restraint of [\*60] interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain

<sup>1</sup> Purdy's Beach on Private Corporations, vol. 2, pp. 1403, et seq., chapter on Trusts and Monopolies; Cooke on Trade and Labor Combinations, App. II, pp. 194-195; Am. & Eng. Ency. Law, 2d ed., article "Monopolies and Trusts," pp. 844, et seq.

<sup>1</sup> *Swearingen v. United States*, 161 U.S. 446; *United States v. Wong Kim Ark*, 169 U.S. 649; *Keck v. United States*, 172 U.S. 446; *Kepner v. United States*, 195 U.S. 100, 126.

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interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself **[\*\*516]** simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any **[\*\*\*\*92]** act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace **[\*61]** "Every person who shall monopolize, or attempt to monopolize, **[\*\*\*\*93]** or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, . . ." **HN6**<sup>↑</sup> By reference to the terms of **§ 8** it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, **[\*\*\*\*94]** restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it **[\*62]** was intended to be the complement of the first, it becomes obvious that the criteria **[\*\*646]** to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked **[\*\*\*\*95]** concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on

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one side or the other concerning the meaning of [\*\*\*\*96] the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we [\*\*517] have stated it was our purpose to consider and dispose of.

[\*63] Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory [\*\*\*\*97] classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained -- the light of reason -- the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application [\*64] of the act by precise definition, but while clearly [\*\*\*\*98] fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Freight Association, 166 U.S. 290*, and *United States v. Joint Traffic Association, 171 U.S. 505*. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when [\*\*\*\*99] separated from its [\*\*\*647] context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed [\*65] contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute [\*\*\*\*100] forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That [\*\*518] is to say, the cases but decided that the

nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for is established by all of the numerous decisions [\*\*\*\*101] of this court which have applied and enforced the Anti-trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the Freight Association Case and before the decision in the Joint Traffic Case, the case of *Hopkins v. United States*, 171 U.S. 578, was decided, [\*66] the opinion being delivered by Mr. Justice Peckham, who wrote both the opinions in the Freight Association and the Joint Traffic cases. And, referring in the Hopkins Case to the broad claim made as to the rule of interpretation announced in the Freight Association Case, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the Joint Traffic Case this statement was expressly reiterated and approved and illustrated [\*\*\*\*102] by example; like limitation on the general language used in Freight Association and Joint Traffic Cases is also the clear result of *Bement v. National Harrow Co.*, 186 U.S. 70, 92, and especially of *Cincinnati Packet Co. v. Bay*, 200 U.S. 179.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore [\*\*\*\*103] only that which obtains between things which do not differ at all.

[\*67] If it be true that there is this identity of result between the rule intended to be applied in the Freight Association Case, that is, the rule of direct and indirect, and the rule of reason which under the statute as we construe it should be here applied, it may be asked how was it that in the opinion in the Freight Association Case [\*\*\*648] much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met, for if it be now deemed that the Freight Association Case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute [\*\*\*\*104] by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the Freight Association Case, especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the Hopkins Case and in *Cincinnati Packet Company v. Bay*, 200 U.S. 179.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases from the context [**\*68**] and the subject and parties with which the cases were concerned, it may be conceived that the language referred [**\*\*519**] to conflicts with the construction which we give the statute, they are necessarily now limited and qualified.

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We see no possible escape from this conclusion [\*\*\*\*105] if we are to adhere to the many cases decided in this court in which the Anti-trust Law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-trust Law aside from the contention as to the Freight Association and Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the defendants are concerned they are all embraced under two headings: --

a. That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects dehors the reach of its authority to regulate commerce, by enabling that body [\*\*\*\*106] to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is based upon the decision in *United States v. E.C. Knight Co., 156 U.S. 1*. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express [\*69] notice. *United States v. Northern Securities Co., 193 U.S. 197, 334*; *Loewe v. Lawlor, 208 U.S. 274*; *Swift & Co. v. United States, 196 U.S. 375*; *Montague v. Lowry, 193 U.S. 38*; *Shawnee Compress Co. v. Anderson, 209 U.S. 423*.

b. Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which is essentially necessary to the well-being of society and which it is insisted is protected by the constitutional guaranty of due process [\*\*\*\*107] of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of [\*\*\*649] being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning [\*\*\*\*108] makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from [\*70] the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

We come then to the third proposition requiring consideration, viz:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

## 1. The creation of the Standard Oil Company of Ohio;

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2. The organization of the Standard Oil [\*\*\*\*109] [\*\*520] Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the Supreme Court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the [\*71] situation as it existed at the time of the entry of the decree below, since during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property [\*\*\*\*110] which was formerly held by the trustees under the trust agreement, the situation of course had somewhat changed, a change which when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin. <sup>1</sup>

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<sup>1</sup> SECTION 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil and Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company, of California, Standard Oil Company, of Indiana, Standard Oil Company, of Iowa, Standard Oil Company, of Kansas, Standard Oil Company, of Kentucky, Standard Oil Company, of Nebraska, Standard Oil Company, of New York, Standard Oil Company, of Ohio, Swan and Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company, have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations, in violation of section 2 of the anti-trust act.

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SECTION 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than \$90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations and stock in other corporations as follows:

**Total**

**Owned by**

**Name of company.**

**capital**

**Standard Oil**

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stock.

**Company.**

Anglo-American Oil Company, Limited

# 1,000,000

# 999,740

Atlantic Refining Company

\$5,000,000

\$5,000,000

Borne-Scrymser Company

200,000

199,700

Buckeye Pipe Line Company

10,000,000

9,999,700

Chesebrough Manufacturing Company,

Consolidated

500,000

277,700

Colonial Oil Company

250,000

249,300

Continental Oil Company

300,000

300,000

Crescent Pipe Line Company

3,000,000

3,000,000

Eureka Pipe Line Company

5,000,000

4,999,400

Galena-Signal Oil Company

10,000,000

7,079,500

Indiana Pipe Line Company

1,000,000

999,700

Lawrence Natural Gas Company

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450,000

450,000

Mahoning Gas Fuel Company

150,000

149,900

Mountain State Gas Company

500,000

500,000

National Transit Company

25,455,200

25,451,650

New York Transit Company

5,000,000

5,000,000

Northern Pipe Line Company

4,000,000

4,000,000

Northwestern Ohio Natural Gas Company

2,775,250

1,649,450

Ohio Oil Company

10,000,000

9,999,850

People's Natural Gas Company

1,000,000

1,000,000

Pittsburg Natural Gas Company

310,000

310,000

Solar Refining Company

500,000

499,400

Southern Pipe Line Company

10,000,000

10,000,000

South Penn Oil Company

2,500,000

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2,500,000

Southwest Pennsylvania Pipe Lines

3,500,000

3,500,000

Standard Oil Company (of California)

17,000,000

16,999,500

Standard Oil Company (of Indiana)

1,000,000

999,000

Standard Oil Company (of Iowa)

1,000,000

1,000,000

Standard Oil Company (of Kansas)

1,000,000

999,300

Standard Oil Company (of Kentucky)

1,000,000

997,200

Standard Oil Company (of Nebraska)

600,000

599,500

Standard Oil Company (of New York)

15,000,000

15,000,000

Standard Oil Company (of Ohio)

3,500,000

3,499,400

Swan and Finch Company

100,000

100,000

Union Tank Line Company

3,500,000

3,499,400

Vacuum Oil Company

2,500,000

2,500,000

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Washington Oil Company

100,000

71,480

Waters-Pierce Oil Company

400,000

274,700

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That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

**Total****Owned by****Name of company.****capital****National Transit****stock.****Company.**

Connecting Gas Company

\$825,000

\$412,000

Cumberland Pipe Line Company

1,000,000

998,500

East Ohio Gas Company

6,000,000

5,999,500

Franklin Pipe Company, Limited

50,000

19,500

Prairie Oil and Gas Company

10,000,000

9,999,500

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[\*\*\*111] [\*72] Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by the [\*73] proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the [\*74] proof operated to destroy the "potentially of competition" which otherwise would have existed to such an extent as [\*\*\*650] to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have [**\*75**] construed it upon the inferences deducible from the facts, for the following reasons:

- a. Because the unification of power and control over petroleum and its products which was the inevitable [\*\*\*\*112] result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.
  - b. Because the *prima facie* presumption [\*\*521] [\*\*\*651] of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, 1, the conduct of the persons or corporations who were mainly instrumental [\*\*\*\*113] in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; 2, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that State, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the States of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in Section 2, are engaged in the various branches of the business of producing, purchasing and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

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Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the [**\*76**] expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose [\*\*\*\*114] to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business [**\*\*522**] [**\*\*\*652**] power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development [\*\*\*\*115] which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, [**\*77**] the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all [**\*\*523**] lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences which this situation [\*\*\*\*116] suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz:

#### **Fourth. The remedy to be administered.**

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States, 196 U.S. 375.* But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted [\*78] the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found [\*\*\*\*117] to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

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 HN7<sup>↑</sup> one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

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Let us then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New [\*\*\*\*118] Jersey corporation in so far as it held the stock of the various corporations, recited in §§ 2 and 4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company [\*\*\*653] in exchange for its stock. To [\*79] make this command effective § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporation or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations [\*\*\*\*119] and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock and until it was consummated, the defendants named in § 2, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things a delay of thirty days was granted for the [\*\*524] carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And [\*\*\*\*120] this also is true of § 5 of the decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership [\*80] in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad: a. Because it was not sufficiently specific and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. New Haven R.R. v. Interstate Commerce Commission, 200 U.S. 404. Besides it is said that the restraint imposed by § 6 -- even putting out of view the consideration just stated -- was moreover calculated to do injury to the public and it may be in and of itself to [\*\*\*\*121] produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the [\*81] Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of [\*\*\*\*122] agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might

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result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest it was obviously right. We think [\*\*\*654] that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so [\*\*\*123] as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation but by all the subsidiary companies until the dissolution of the combination by the transfer of the stocks in accordance with the decree, the injunction provided for in § 7 thereof should not have been awarded.

Our conclusion is that the decree below was right and [\*82] should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

**Concur by:** HARLAN (In Part)

**Dissent by:** HARLAN (In Part)

## **Dissent**

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MR. JUSTICE HARLAN concurring in part, and dissenting in part.

A sense of [\*\*\*124] duty constrains me to express the objections which I have to certain [\*\*525] declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce -- all in violation of what is known as the Anti-trust Act of 1890. 26 Stat. 209, c. 647. The evidence in this case overwhelmingly sustained that view and led the Circuit Court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow that because an illegal restraint of trade or an [\*\*\*125] attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, [\*83] that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed -- unwisely, I think -- that although the New Jersey corporation, being an illegal combination, must go out of existence, they may join in an agreement to restrain commerce among the States if such restraint be not "undue."

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In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the Antitrust Act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the longsettled interpretation of the act, but has usurped the constitutional [\*\*\*\*126] functions of the legislative branch of the Government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery -- fortunately, as all now feel -- but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then [**\*84**] imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All [**\*\*\*\*127**] agreed that the National Government could not, by legislation, regulate the domestic trade carried on wholly within the several States; for, power to regulate such trade remained with, because never surrendered by, the States. But, under authority expressly [**\*\*\*655**] granted to it by the Constitution, Congress could regulate commerce among the several States and with foreign states. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law devised by the fathers for the safety of the Government and for the protection and security of the essential rights inhering in life, liberty and property.

Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-trust Act of 1890 in these words (the italics here and elsewhere in this opinion are mine):

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [\*\*\*\*128] States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, [\*85] to monopolize any part of the trade or commerce among the [\*\*526] several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State [\*\*\*\*129] or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, c. 647.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the *Trans-Missouri Freight Case*. *166 U.S. 290*. The question there was as to the validity under the Anti-trust Act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules and regulations in respect of freight traffic over specified routes. Two

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questions were involved: first, whether the act applied to railroad carriers; second, whether [\*\*\*\*130] the agreement the annulment of which as illegal was the basis of the suit which the United States brought. The court [\*86] held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said:

"The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by [\*\*\*\*131] this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever." *United States v. Freight Assn.*, 166 U.S. 290, 312, 324, 326.

The court then proceeded to consider the second of the above questions, saying: "The [\*\*\*656] next question to be discussed is as to what is the true construction of the statute, [\*87] assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby [\*\*\*\*132] declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term 'contract in restraint of trade,' all [\*\*527] contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and [\*\*\*\*133] unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. . . . If only that kind of contract [\*88] which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the [\*\*\*\*134] answer to the statement of their validity now is to be found in the terms of the statute under consideration. . . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking

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branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. . . .

"If the act ought to read, as contended for by defendants, [\*\*\*\*135] Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants [\*89] is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the Anti-trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, [\*\*\*\*136] and the question then arises whether the agreement before us is of that nature."

I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight Case in order to show beyond [\*\*\*657] question, that the point was there urged by counsel that the Anti-trust Act condemned only contracts, combinations, trusts and conspiracies that were in unreasonable restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States" shall be illegal, and that no distinction, so far as interstate commerce was concerned, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress determined [\*90] to meet, and did meet, the situation by an absolute, statutory prohibition of "every contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Still more; [\*\*\*\*137] in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of judicial legislation, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen, "we cannot and ought not to do."

[\*\*528] It thus appears that fifteen years ago, when the purpose of Congress in passing the Anti-trust Act was fresh in the minds of courts, lawyers, statesmen and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the Freight Association Case. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert [\*\*\*\*138] the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so amend the act as to recognize the right to restrain interstate commerce to a reasonable extent. The public press, magazines and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent and scope of the Anti-trust Act had been judicially determined by this court, and that the only question remaining open for discussion was the [\*91] wisdom of the policy declared by the act -- a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations and trusts that reasonably restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the [\*\*\*\*139] decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to reasonable restraints. Finally, an opportunity came again to raise the same question which this court had, upon full

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consideration, determined in 1896. I now allude to the case of *United States v. Joint Traffic Association*, 171 U.S. 505, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies to have the court declare illegal, under the Anti-trust Act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the Government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the Anti-trust Act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the Joint Traffic Case. Among other things, the court said: "Upon comparing that agreement [the one in the Joint Traffic Case, then under consideration, 171 U.S. 505] with the one set forth [\*\*\*\*140] in the case of United States v. Trans-Missouri Freight Association, 166 U.S. 290, the great similarity between them suggests that a similar result should be reached in the two cases" (p. 558). [\*92] Learned counsel in the Joint Traffic Case urged a reconsideration of the question decided in the Trans-Missouri Case contending that "the decision in that case [the Trans-Missouri Freight Case] is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-trust statute has been received by the public with surprise and alarm." They suggested that [\*\*\*658] the point made in the Joint Traffic Case as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U.S. 559) that "the report of the Trans-Missouri Case clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided."

The question whether the court should again consider the point decided in the *Trans-Missouri Case*, 171 U.S. 573, was disposed of in the most decisive [\*\*\*\*141] language, as follows: "Finally, we are asked to reconsider the question decided in the Trans-Missouri Case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation [\*\*529] of the matter involved. There have heretofore been in effect two arguments of precisely the same [\*93] questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri [\*\*\*\*142] Case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition [\*\*\*\*143] to the conclusion arrived at in the Trans-Missouri Case. The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White [in the Freight Case] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of [\*94] the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result,

which, for reasons already stated, ought to be reconsidered and reversed. As we have twice already deliberately and earnestly considered [\*\*\*\*144] the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed."

These utterances, taken in connection with what was previously said in the Trans-Missouri Freight Case, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the Anti-trust Act as prohibiting and making illegal not only every contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempts to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the Freight Association Case was referred to: In Bement v. National Harrow Co., 186 U.S. 70, 92, the court said: "It is true that it has been held by this court that the act (Anti-trust Act) included any restraint of commerce, whether reasonable or unreasonable" -- citing United States v. Trans-Missouri Freight Asso., 166 U.S. 290; United States v. Joint Traffic Association, 171 U.S. 505; [\*\*\*659] Addyston Pipe [\*\*\*\*145] &c. Co. v. United States, 175 U.S. 211. In Montague v. Lowry, 193 U.S. 38, 46, which involved the validity, under the Anti-trust Act, of a certain association formed for the sale of tiles, mantels, and grates, the court referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination in restraint of interstate trade or commerce [\*95] in violation of the Anti-trust Act. In Loewe v. Lawlor, 208 U.S. 274, 297, all the members of this court concurred in saying that the Trans-Missouri, Joint Traffic and Northern Securities cases "hold in effect that the Antitrust Law has a broader application than the prohibition of restraints of trade unlawful at common law." In Shawnee Compress Co. v. Anderson (1907), 209 U.S. 423, 432, 434, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In United States v. Addyston Pipe Company, 85 Fed. Rep. 271, 278, Judge Taft, speaking for the Circuit [\*\*530] Court of Appeals for [\*\*\*\*146] the Sixth Circuit, said that according to the decision of this court in the Freight Association Case, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In Chesapeake & Ohio Fuel Co. v. United States (1902), 115 Fed. Rep. 610, 619, the Circuit Court of Appeals for the Sixth Circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the Trans-Missouri, the Joint Traffic and the Addyston Pipe and Steel Co. cases: "In the exercise of this right, Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States." As far back as Robbins v. Shelby Taxing District, 120 U.S. 489, 497, it was held that certain local regulations, [\*\*\*\*147] subjecting drummers engaged in both interstate and domestic trade, could not be sustained by reason of the fact that no discrimination [\*96] was made among citizens of the different States. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed at all." Under this view Congress no doubt acted, when by the Antitrust Act it forbade any restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained at all by combinations, trusts or monopolies, but must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also Minnesota v. Barber, 136 U.S. 313, 326; Brimmer v. Rebman, 138 U.S. 78, 82, 83.

In the opinion delivered on behalf of the minority in the Northern Securities Case, 193 U.S. 197, our present Chief Justice referred to the contentions made by the defendants in the Freight Association Case, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said: "Both these contentions were decided against the association, [\*\*\*\*148] the court holding that the Anti-trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable." One of the Justices who dissented in the Northern Securities Case in a separate opinion, concurred in by the minority, thus referred to the Freight and Joint Traffic cases: "For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind -- a consideration which was the turning point of the Trans-Missouri Freight

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Association case. . . . Size has nothing to do with the matter. A monopoly of 'any part' of commerce among the States is unlawful."

In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill [**\*97**] offered in the Senate and which proposed to amend the Anti-trust Act in various particulars. That report contains a full, careful and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. [\*\*\*\***149**] Among other things said in it which bear on the questions involved in the present case are these: " [\*\*\*\***60**] The Anti-trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In [\*\*\*\***150**] the case of *People v. Sheldon*, 139 N.Y. 264, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public [**\*\*531**] prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' . . . To amend the Anti-trust Act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial [**\*98**] statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity." The result was the indefinite postponement by the Senate of any further [\*\*\*\***151**] consideration of the proposed amendments of the Anti-trust Act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the Anti-trust Act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason," or "the light of reason." It is more than once intimated, if not suggested, that if the Anti-trust Act is to be construed as prohibiting every contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule [\*\*\*\*152] of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court [\*99] was delivered by a Justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the Trans-Missouri Case delivered the opinion in the Joint Traffic Association Case, and the Association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the Justice who expressed the views of the court, or of the ability of the profound, astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words, would amount to "judicial legislation"? Now this court is [\*\*\*\*153] asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be

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remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the Anti-trust Act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to [\*\*\*661] make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with [\*\*\*\*154] [\*100] the "rule of reason." In effect the court says, that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In *St. Louis, I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 295, the court had occasion to determine the meaning and scope of the original Safety Appliance Act of Congress passed for the protection of railroad employes and passengers on interstate trains. 27 Stat. 531, § 5, c. 196. A particular construction [\*\*532] of that act was insisted upon by the interstate carrier which was sued under the Safety Appliance Act; and the contention was that a different construction, than the one insisted upon by the carrier, would be a harsh one. After quoting the words of the act, Mr. Justice Moody [\*\*\*\*155] said for the court: "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking [\*101] body. . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead [\*\*\*\*156] of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." And at the present term of this court we were asked, in a case arising under the Safety Appliance Act, to reconsider the question decided in the Taylor Case. We declined to do so, saying in an opinion just now handed down: "In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving in interstate traffic, as open to further discussion here. If the court was wrong in the Taylor case the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now to disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate [\*\*\*\*157] to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule." *C. B. & Q. Ry. Co. v. United States*, 220 U.S. 559. When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Anti-trust Act as would allow reasonable restraints of interstate commerce, this [\*102] court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits all restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon [\*\*\*\*158] the authority [\*\*\*662] of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress

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and obtain an amendment of the Anti-trust Act if they think this court was wrong in its former decisions; and (5) this court cannot and will not judicially legislate, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations and trusts in restraint of interstate commerce, "You may now restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widelyextended [\*\*\*\*159] and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily [\*\*533] applied [\*103] by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry -- difficult to solve by proof -- whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be no restraint of trade, in any form, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it could not add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, [\*\*\*\*160] in my judgment -- if we look to the future -- the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanancy of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and coordinate departments -- legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Constitution was ordained and established in order to accomplish the objects stated in its Preamble by the means, but only by the means, provided either expressly or by necessary implication, by the instrument itself. No department of that government can constitutionally exercise the [\*104] powers committed strictly to another and separate department.

I said at the outset that the action [\*\*\*\*161] of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress -- an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "judicial legislation," read words into the Antitrust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare [\*\*\*\*162] a public policy, nor to amend legislative enactments. "What is termed the policy of Government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden v. Collector, 5 Wall. 107*. Nevertheless, if [\*\*\*663] I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating [\*105] the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.

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After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared [\*\*\*\*163] by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the People of the United States -- the source of all National power -- shall, in their own time, upon reflection and through the legislative department of the Government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The Supreme Law of the Land -- which is binding alike upon all -- [\*\*534] upon Presidents, Congresses, the Courts and the People -- gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids any restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice [\*\*\*\*164] Bradley wisely said, when on this Bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. *Boyd v. United States, 116 U.S. 616, 635.* We shall do well to heed the warnings of that great jurist.

[\*106] I do not stop to discuss the merits of the policy embodied in the Anti-trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

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## United States v. Union P. R. Co.

Circuit Court, D. Utah

June 24, 1911

No. 993

**Reporter**

188 F. 102 \*; 1911 U.S. App. LEXIS 5174 \*\*

UNITED STATES v. UNION PAC. R. CO. et al.

### **Core Terms**

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traffic, route, tonnage, rates, railroad, lines, stock, percent, transportation, competitor, transcontinental, connections, commerce, roads, interstate, carriers, suppress, thence, anti-trust, railroad company, own line, sea, conspiracy, restrain, freight, ending, river, interstate commerce, one hand, intermediate

**Opinion by:** [\*\*1] ADAMS

### **Opinion**

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[\*109] Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. To bring any transaction within the condemnation of the first section of the anti-trust law, it must be a contract, combination, or conspiracy in restraint of interstate or international commerce. This restraint [\*\*110] must be substantial in character and the direct and immediate effect of the transaction complained of. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and cases cited. The most important feature of the complaint in this case, and the one chiefly relied upon by counsel for the government in support of their contentions, is the purchase in 1901 by the Union Pacific Company of a controlling interest in the capital stock of the Southern Pacific Company. Its consequences are alleged to have been the destruction or restriction of free competition in transcontinental commerce. Whether such consequences followed depends upon whether these companies were or could have been independent and substantial competitors before the transaction in question occurred. *Kimball v. Atchison, T. & S.F.R. Co. (C.C.)* 46 Fed. 888. Most [\*\*2] obviously, if they were not and could not then have been such competitors, the securing of control of both by one did not destroy or stifle competition. *Northern Securities Co. v. United States*, 193 U.S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679.

The question then is: Was the line of the Union Pacific Company, extending only from Omaha and Kansas City on the east to Ogden on the west a competing line prior to 1901 for transcontinental business with the Southern Pacific Company, whose line extended from New York on the east over the sea to New Orleans, and thence by rail to San Francisco and Portland on the west? The question is not whether it constituted a continuous line over which traffic might possibly be moved from the Atlantic seaboard or interior to the Pacific Coast, but whether it constituted a feasible route over which it could enter naturally and profitably into competition with the Southern Pacific route for that traffic.

Claim is not made that it was such a competitor for any business originating on or near to its main line, but only for business originating in New York or Pittsburg common points, 1,000 or more miles away from its line. Its traffic between New York [\*\*3] and interior points, on the one hand, and Portland, Or., on the other, was of trifling

importance, amounting for the fiscal year preceding the purchase of the Huntington stock to only 0.46 per cent. of its total tonnage. Accordingly its competitive relation to the Southern Pacific route with respect to traffic in and out of San Francisco, the chief gateway for transcontinental business, will first be considered.

It had a connection at Granger with its subsidiary lines, the Oregon Short Line and the Oregon Railroad & Navigation Line, extending to Portland, and there with a line of steamboats irregularly and infrequently running between that port and San Francisco. But this detour through Portland and over the sea was long, unreliable, and unsatisfactory, and afforded no opportunity for fair and remunerative competition with the Southern Pacific for San Francisco trade. It was about 1,700 miles in length, as against 800 miles in direct line from Ogden to San Francisco. In fact, prior to 1901 it had never been employed in any substantial way as an outlet for the Union Pacific's west-bound freight into San Francisco. It is inconceivable, therefore, that the Huntington stock was [\*\*4] purchased to prevent, or had the [\*111] effect of preventing, in any substantial way, free competition with so devious and impracticable a route.

We shall accordingly dismiss it from further consideration so far as transcontinental business is concerned, and pass to the important question upon which argument was concentrated: Whether the right, privilege, or practice, whatever it may have been, of connecting with the rails of the Southern Pacific at Ogden and of using that company's line between Ogden and San Francisco, together with the right, privilege, or practice of connecting at Omaha and Kansas City with the lines of other railroads, which by themselves and by successive connections led to the points of origin of the traffic, constituted the Union Pacific a competitor of the Southern Pacific for that traffic. It is certain the Union Pacific by itself could do none of that business. It extended neither to its origin nor destination. It depended for success upon its connections with other railroads at the east and with its alleged competitor at the west end of its own line.

Prior to the enactment of the provisions of the fourth section of the act of June 29, 1906 (34 [\*\*5] Stat. pt. 1, p. 590 [U.S. Comp. St. Supp. 1909, p. 1159]) known as the "Hepburn Act," there was no way of coercing railroad companies into establishing through routes or joint rates with each other. In Southern Pacific v. Interstate Com. Com., 200 U.S. 536, 553, 26 Sup. Ct. 330, 334, 50 L. Ed. 585, the Supreme Court speaking of a time antedating the Hepburn act, said:

"It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing with the commission of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads. It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next [\*\*6] succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses."

Whether, therefore, the great Eastern lines and their connections, which gathered up the west-bound freight, should favor the Union Pacific, the Southern Pacific, or the Santa Fe routes, as their final connection into San Francisco, was optional with them. If they favored the Union Pacific, the terms of their arrangement, whether for a reasonable participation by each in the through rates, or on the basis of local rates for the service of each, or otherwise, were not within the power of the Union Pacific itself to determine, or of the courts, in the absence of legislative authority, to enforce. If, perchance, the Union Pacific had for a time a voluntary arrangement with the Chicago, Milwaukee & St. Paul, the Michigan Central, and the New York Central for a through route and joint rates on traffic destined from New York common points to Ogden and thence to San Francisco, can it be true that that fact by itself would have constituted the Michigan Central a competitor of the Southern Pacific for [\*\*7] [\*112] that traffic within the intent and meaning of the anti-trust law? If not, it does not seem to us that the Union Pacific Company, another intermediate link, like it, in the same temporary through route, could have been such a competitor. But we do not rest our conclusion on this feature of the case alone.

In view of the fact that the Southern Pacific owned and operated the road from Ogden to San Francisco, with which alone (except for the circuitous and impracticable route via Portland and the sea to San Francisco) the Union Pacific could have connected, and over which alone it could have carried its traffic into San Francisco, we are unable to understand how the Union Pacific could have been an independent competitor with the Southern Pacific for business over that road into San Francisco. While the Union Pacific was entirely dependent upon the Southern Pacific for its connection westward, the Southern Pacific was not at all dependent upon the Union Pacific for its connection eastward. The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden, through Denver, Kansas City, and St. Louis, to Chicago and other interior [\*\*8] points, and thence by many available connections to New York and the seaboard. This was obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success. The latter was in no position to coerce any action by the Southern Pacific. Its hands were tied.

But, it is argued, it could retaliate by using its influence to induce initial carriers or shippers to route transcontinental freight by way of Portland and the sea to San Francisco. This being such a long and unreliable route, little success could have been reasonably expected in such retaliation. If the Rio Grande should have been favored by the Southern Pacific as its Eastern connection, the Union Pacific, in the language of the witnesses, would have been practically bottled up at Ogden. With the advantage possessed by the Southern Pacific as an initial carrier to deflect all east-bound traffic to another line at Ogden, and with the right to exact on all east or west bound traffic local rates, instead of a fair and just proportion of an established through rate, the Southern Pacific would easily have put a quick and decisive ending to any hostile rivalry or competition, if such [\*\*9] had been hazarded by the Union Pacific. This absolute dependence by the latter upon the Southern Pacific for a distance of 800 miles of its only through route, to say nothing of its dependence upon the voluntary action of its Eastern connections already pointed out, in our opinion, rendered any equal or profitable competition between them impossible. No real rivalry in the nature of things could have subsisted as long as the success of one was dependent upon the consent or favor of the other. Instead of the situation being competitive, the two roads really acted together and co-operated between themselves and with their connections in securing as much of the transcontinental traffic, each for the other, according to their respective facilities, as they could get, and participated in the total revenue on a basis of comparative service rendered. Their relations were like those of a limited partnership, rather than those of hostile competitorship.

[\*113] But it is said the Pacific Railroad acts, *supra*, obligated the Union Pacific and Central Pacific (the predecessor in right of the Southern Pacific so far as the road from Ogden to San Francisco is concerned) to the establishment [\*\*10] of through routes and maintenance of joint rates, and take these roads out of the operation of the rule announced in the case of *Southern Pacific Company v. Interstate Com. Com., supra*. But we do not so interpret them. Those acts required the two roads, the one from Ogden east to Omaha and Kansas City, and the other from Ogden west to San Francisco, or their predecessors, to be "operated and used for all purposes of communication, travel and transportation so far as the public and government are concerned, as one continuous line" (section 12, Act July 2, 1862, 12 Stat. 495), and also required them in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others \* \* \*" (section 15, Act July 2, 1864, 13 Stat. 362).

The act of 1862 not only provided for the continuous operation of the roads, but empowered them to consolidate ([section 16](#)); and so likewise did the act of 1864 ([section 16](#)). These acts were obviously intended to secure a permanent physical [\*\*11] connection between the roads and to provide generally for equal accommodations to the public on the basis of independent carriers; but we discover in them no provisions or machinery by which the Southern Pacific, as successor to one of them, could have been compelled by the courts or otherwise to make agreements governing interchange of traffic or through rates, or fixing the division of such through rates between the two roads. Section 15 of the act of 1864 is not substantially different, so far as the matter under consideration is concerned, from section 3 of the interstate commerce act of 1887 (24 Stat. 380). They both forbid discrimination in rates between connecting lines. Section 3 has been held by the Interstate Commerce Commission and by the Court of Appeals of this circuit not to invest the commission or the courts with power to compel carriers to make contracts or agreements for through billing of freight or for joint rates. On the contrary, it was held that such matters

are left to the voluntary determination of the interested carriers. L.R. & Mem. R.R. Co. v. E. Tenn., etc., Co., 3 Interst. Com. R. 1; Little Rock & M.R. Co. v. St. Louis & S.W. Ry. Co., 63 Fed. 775, [\*\*\*12] 11 C.C.A. 417. See, also, to the same effect, Oregon Short Line, etc., v. Northern Pacific R. Co. (C.C.) 51 Fed. 465, 474, and Chicago & N.W. Ry. Co. v. Osborne, 52 Fed. 912, 914, 3 C.C.A. 347.

The voluminous evidence of officers, agents, and shippers to the effect that active competition existed between the Union Pacific and Southern Pacific roads prior to 1901 must be considered in the light of the legal and physical relations of the roads to each other and of other related facts. Whether there was competition or not, in view of all these things, is a mixed question of law and fact, and not susceptible of determination by the preponderance of proof as an issue of fact only. Without doubt there was active competition, but [\*114] it was chiefly in co-operation with initial lines, which had the routings of freight, and for the benefit of such initial lines and their connections to Omaha or Kansas City, as well as for the benefit of the Union Pacific Company itself. Even so far as it was for the benefit of the latter company, it operated necessarily for the benefit of the Southern Pacific to an extent of about eight-twentieths of the haul after the Union Pacific took it at [\*\*\*13] Omaha or Kansas City. In this condition of things, the opinions of any number of witnesses as to whether the two were competing lines within the meaning of the law is of little aid, and the general statement of those witnesses that the two roads had separate soliciting agents throws little, if any, light upon the ultimate issue.

The immediate and actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock, and thereby the control of the operations of the Southern Pacific line, were, according to the proof, to secure a permanent working and reliable connection at Ogden over an existing road for its through traffic; a connection not dependent upon the grace of a dominant copartner, but one within its own control. We recognize the proposition that, if the necessary and direct result of the purchase of the Huntington stock was to destroy or substantially suppress free and natural competition, before then existing between the two companies, or if that purchase put it within the power of the Union Pacific Company to destroy or suppress such competition, the latter-named company would undoubtedly be held to have intended the natural and reasonable consequences [\*\*\*14] of its act, and, notwithstanding the dominant purpose just mentioned, would have violated the anti-trust law. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; Northern Securities Co. v. United States, 193 U.S. 197, 328, 332, 357, 24 Sup. Ct. 436, 48 L. Ed. 679.

Our conclusion is that all the facts of this case, considered in their natural, reasonable, and practical aspect, and given their appropriate relative signification, do not make the Union Pacific a substantial competitor for transcontinental business with the Southern Pacific in or prior to the year 1901. We therefore pass to a consideration of some less important matters relied upon by the government to establish destruction of competition between those companies.

It is contended that it was destroyed or suppressed in transcontinental business between the Atlantic seaboard and Middle states, on the one hand, and Portland and Willamette Valley common points, on the other hand. The route of the Southern Pacific for this business was by its own line via New Orleans and San Francisco to Portland, and that of the Union Pacific was by its own line from Omaha and Kansas City to Ogden, [\*\*\*15] together with its connections and subconnections eastward from Omaha and Kansas City, and its subsidiary lines, the Oregon Short Line and Oregon Railroad & Navigation Company running northwestwardly into Portland and the Valley. The geographical relation of these routes to each other, and the dependence of one of them, at least, upon voluntary arrangements with other lines, would seem to render natural and fair competition between them for the Portland trade impossible; but the [\*115] slight volume of the traffic here involved affords a controlling and decisive consideration. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in this trade was only 0.10 per cent. of its total tonnage. For the same year the tonnage of the Union Pacific Company in this trade was only 0.46 per cent. of its total tonnage.

Again, it is contended that the control of the Southern Pacific Company acquired by the Union Pacific Company suppressed free competition between them for business between the Atlantic seaboard and Colorado and Utah common points. The route of the Southern Pacific available for this traffic was from New York to New Orleans or Galveston by sea; thence [\*\*\*16] over its own line to Ft. Worth, Tex.; thence over its connection, the Colorado & Southern, to Denver; thence over another connection, the Denver & Rio Grande, into Utah.

The route of the Union Pacific Company available for it was its own line from Kansas City and Omaha to Denver and Ogden, with its numerous initial connections and subconnections, and also a line by sea from New York to Newport News and Savannah; thence by connections at those places with such railroads as would favor them through the interior of the country to the beginning of its own rails at Kansas City or Omaha.

Physically and practically speaking, in view of the circuity of the route of the Southern Pacific and of the necessary dependence of both companies upon volunteer connections, real rivalry between them for this traffic does not seem to have been possible; but here again the traffic itself was of little volume and comparatively unimportant. For the year ending January 30, 1900, the tonnage of the Southern Pacific in this business was only 0.19 per cent. of its total tonnage. For the same year the tonnage of the Union Pacific in this traffic was only 0.47 per cent. of its total tonnage.

A like contention [\*\*17] is made concerning the traffic between San Francisco, on the one hand, and Portland and points in the Willamette Valley, on the other hand; but this traffic was also small. For the year ending June 30, 1901, the tonnage of the Southern Pacific in this traffic was only 0.36 per cent. of its total tonnage, and the tonnage of the Union Pacific Company in it for the same period was only 1.27 per cent. of its total tonnage.

A similar contention is made concerning the traffic from Portland and Willamette Valley common points, on the one hand, and Ogden and its common points, on the other. The route of the Southern Pacific Company for this business was by the so-called Shasta route from Portland to Sacramento, and thence via the old Central Pacific route to Ogden. This was a long and circuitous route, compared to that of the Union Pacific Company from Portland via Oregon Railroad & Navigation Company and Oregon Short Line to Ogden. Not only is this so, but the business was trifling. For the year ending June 30, 1901, the tonnage of the Southern Pacific in it was only 0.01 per cent. of its total tonnage, while that of the Union Pacific was only 0.35 per cent. of its total tonnage.

[\*\*18] A like contention is made concerning traffic from San Francisco, on the one hand, and points in Montana, Idaho, Eastern Oregon, and [\*116] Washington, on the other hand. Without commenting upon the uncompetitive character of those routes for this business, it suffices to call attention to the insignificance of the traffic itself. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in it was only 0.02 per cent. of its total tonnage, while that of the Union Pacific Company for the same time was only 0.23 per cent. of its total tonnage.

Claim is also made that the control which the Union Pacific Company acquired by the purchase of the Huntington stock suppressed free competition between them for the Oriental traffic. Many considerations arising out of the relations of the two roads to the transpacific steamship lines which carried the traffic from the coast have conducted to the conclusion reached; but bearing in mind that we are not considering this case in view of the present Oriental traffic, but in view of what it was 10 years ago, when the transaction complained of occurred, we find adequate reason for it in the small amount of this business also. [\*\*19] For the year ending January 30, 1901, the tonnage of the Southern Pacific in handling it was only 0.20 per cent. of its total tonnage, while that of the Union Pacific both through San Francisco and Portland gateways was only 0.41 per cent. of its total tonnage.

The aggregate of all the business done by the Union Pacific and Southern Pacific Companies over all these routes for the years specified, which we believe fairly represent the general conditions prevailing at or before the Huntington stock was purchased, was for the Southern Pacific Company 0.88 per cent. of the entire tonnage of that system, and for the Union Pacific Company 3.10 per cent. of its aggregate tonnage. Tables in evidence also disclose that the total revenue derived from the traffic over these minor routes by the Southern Pacific Company for the year preceding the year of the Huntington purchase amounted to only 1.25 per cent. of the total revenue of that system.

Certainly the desire to appropriate the trifling business done by the Southern Pacific Company on these minor lines, or to suppress a competition in traffic which was in the aggregate of such small proportions, could not have been the inspiration [\*\*20] of the vast outlay involved in the purchase of the Huntington stock. Neither was the suppression of competition in this infinitesimally small proportion of the business of both companies a substantial or natural consequence of that important transaction. It did not amount to a direct and substantial restraint of either interstate or international commerce. It was at best only contingently, incidentally, and infinitesimally affected by it.

This is not sufficient to bring it within the condemnation of the anti-trust law. United States v. Joint Traffic Association, 171 U.S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Anderson v. United States, 171 U.S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Field v. Barber Asphalt Co., 194 U.S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; Northern Securities Co. v. United States, supra; Cincinnati Packet Co. v. Bay, 200 U.S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; Phillips v. Iola Portland Cement Co., 61 C.C.A. 19, Fed. 593; Arkansas Brokerage Co. v. Dunn & Powell, 97 C.C.A. 454, 173 Fed. 899; United [\*117] States v. Standard Oil Company (C.C.) 173 Fed. 177, and cases cited.

This concludes consideration of the effect of the transaction chiefly relied upon by the [\*\*21] government in this case. But it is contended that the purchase by the Union Pacific of a controlling interest in the stock of the Northern Pacific Company was also violative of the anti-trust law. Without dwelling on the reason for the purchase of this stock, disclosed in the preceding statement of facts, it is sufficient to say that, if any controlling interest was thereby acquired, it was lost some time before this suit was instituted, and that none of that stock is now held by or for the Union Pacific Company. As there is no showing of any like ambitious project in this respect for the future, we fail to discover any opportunity or reason for the injunctive relief on this account.

The transaction of 1904, by which a syndicate of men interested in the Union Pacific Company purchased for their individual account \$30,000,000 in face value of the stock of the Santa Fe Company, and the investment in 1906 of \$10,000,000 by the Union Pacific in acquiring 5 per cent. of that stock are not claimed to have conferred any actual power of control upon the Union Pacific over operations of the Santa Fe Company. The proof does not disclose that any such control was acquired or attempted to [\*\*22] be exercised. Even if the motive of the purchasers was to gain some inside information concerning the operations of the great competitor of the Union Pacific Company, they chose an entirely lawful way for doing it, and their acts afford no reason for judicial condemnation.

Much of the argument relating to the construction of the San Pedro route is addressed to the proposition that, because the San Pedro line was not completed at the time the Huntington stock was purchased, and because there was no competition then existing between the roads in question, there could have been no contract, combination, or conspiracy in restraint of it. The contention of the government in this particular, that a contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, would be in violation of the anti-trust law, may well be conceded. United States v. Patterson (C.C.) 59 Fed. 280; Interstate Com. Com. v. Philadelphia & R. Ry. Co. (C.C.) 123 Fed. 969; Thomsen v. Union Castle Mail S.S. Co., 92 C.C.A. 315, 166 Fed. 251; Pennsylvania [\*23] R. Co. v. Commonwealth, 3 Sadler (Pa. Sup. Ct. Cases) 83, 91, 7 Atl. 374.

But this concession does not settle the question before us. The San Pedro line, as originally projected and as ultimately constructed, does not appear to have been naturally competitive with the Union Pacific, Southern Pacific, or any of the subsidiary lines. It is practically a continuation of the Union Pacific or Oregon Short Line southwardly, and, generally speaking, its course is at right angles, rather than parallel with, either the Union Pacific or Southern Pacific line. If it, as an existing route, had been acquired by the Union Pacific, it would have served rather as a short cut from Los Angeles to [\*118] Salt Lake City, to avoid the circuitous route between those points via San Francisco, than as a natural competitor for any of the business of that route. While it was calculated to deprive the Southern Pacific of a long haul on traffic destined between Los Angeles and Salt Lake City and beyond, it would be unfortunate indeed if that fact should have prevented its construction, especially when it was practically at right angles with the Southern line, and much shorter and much better adapted [\*\*24] to serve the public. In these circumstances it, as projected and built, was not, in our opinion, naturally competitive with the Southern Pacific line, as alleged in the bill.

It is however, contended that in the adjustment of differences between the Union Pacific and its allied or subsidiary companies with the Clark interests, resulting in the construction of one line between Salt Lake City and Los Angeles, instead of two, as projected, there was a suppression of competition which would have existed between the two, if they had built separately. We, however, are unable to discover anything in the transaction except a laudable purpose to adjust differences and construct a line of railroad between the two points which would serve their joint interests as well as those of the public. The evidence discloses that it was not feasible to construct two lines of road over the only practicable route through the canyon in the mountains, known as "Meadow Valley

Wash." This, with other reasons of a practical nature, fully justified the abandonment of the project of constructing two lines and the consolidation of them into one.

Some minor agreements fixing the relations between the new San **[\*\*25]** Pedro line and the other lines composing the system of the Union Pacific, as well as the provisions for fixing through and local rates, were made; but there are so incidental to the main transaction, already found not to have violated the interstate commerce act, as to warrant no further consideration. If it be true, as already pointed out, that the San Pedro line was not naturally competitive with the Union Pacific or Southern Pacific lines, none of these incidental things would disturb legitimate competition within the purview of the **antitrust law**.

The evidence discloses certain transactions between the Southern Pacific Company, on the one hand, and the Phoenix & Eastern and the California & Northwestern Railroad Companies, on the other hand, which are claimed to have been in restraint of competition between them; but as they affect local transportation only, and are not complained of in the bill as substantive wrongs, and as neither of the two last-mentioned companies are made parties to this action, it is not perceived how any independent relief with respect to them can be granted. We therefore refrain from considering them, except in so far as they afford relevant evidence **[\*\*26]** on issues joined in the case.

Having now found that the several contracts or transactions specifically complained of in this case did not offend against the **antitrust law**, it seems hardly necessary to discuss the claim, little debated by counsel, that they evidence a combination or conspiracy to do so. In determining whether a combination or conspiracy in violation of the first section of the anti-trust act, namely, to restrict competition and thereby restrain commerce, was entered into, the facts already **[\*119]** found may properly be supplemented by reference to actual consequences and results. These often reflect the original meaning and purpose of preceding transactions. The proof shows that after 1901, as well as before, the rates for transcontinental traffic were the same over both the Union Pacific and Southern Pacific lines, and that there has since then been with respect to either of these lines no impairment of service, no deterioration of the physical properties, no discontinuance of efforts to satisfy the public, and no complaints of shippers of any inferior or inadequate service.

The large number of initial carriers striving for that traffic have continued their **[\*\*27]** active solicitation for business over the line which assured them the longest haul or otherwise benefited them most, and although some agents of the two roads, which before 1901 were separate, are now joint, they have continued to exercise their influence to secure business for either road according to its availability, and always in opposition to other active competitors, like the Santa Fe and Denver & Rio Grande roads. A substantial majority of the stock of the Southern Pacific Company has been held by parties other than the Union Pacific Company; but we fail to find any complaint by such holders of any discrimination against their road or of any failure to properly promote its welfare. None of the minor points charged to have been deprived of competitive opportunities by the Huntington purchase are shown to have suffered as a result of that purchase. On the contrary, hundreds of millions of dollars have since 1901 been expended on these roads. Their physical condition has been vastly improved, and their efficiency for public service as well as for private profit has been greatly enhanced. The whole proof, taken together, we think, fails to disclose any conspiracy to restrain **[\*\*28]** interstate or foreign commerce, in violation of the first section of the act.

The same consideration lead to the conclusion that no combination or conspiracy to monopolize or attempt to monopolize trade or commerce among the states or with foreign nations was entered into. Moreover, the fact that the Union Pacific Company did not secure or undertake to secure the control of the Santa Fe road, a thoroughly sufficient, well-equipped, and powerful rival for transcontinental business, or the Denver & Rio Grande road, a potential, and later an actual, powerful rival for the same business, affords additional and conclusive evidence of no such combination or conspiracy. The purchase by the Union Pacific Company, soon after acquiring the Huntington stock, of a majority of the capital stock of the Northern Pacific Company, tends to the opposite conclusion; but, in view of the main reason for its acquisition and its disposition by the Union Pacific Company, we are indisposed to give to that purchase alone any considerable significance.

The conclusions of fact already stated dispose of this case without the necessity of determining the question, much debated in brief and argument, whether **[\*\*29]** securing control of the Southern Pacific Company by purchasing

stock of individual owners could in any view of the case have contravened the anti-trust law. On the facts of this case, with all their reasonable and fair inferences, we conclude that the government has failed to substantiate the averments of its bill.

[\*120] Mr. Justice VAN DEVANTER, while a Circuit Judge, participated in the hearing, deliberation, and conclusion in this case, and he now concurs in this opinion.

The bill must be dismissed, and a decree will be entered to that effect.

SANBORN, Circuit Judge, concurs.

**Dissent by:** HOOK

## Dissent

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HOOK, Circuit Judge (dissenting). Briefly stated, the decision of the court, in which I am unable to concur, is that the Union Pacific and Southern Pacific Railroads, universally regarded as parallel in a broad geographical and legal sense, for about 2,000 miles, were not competitors in 1901 for transcontinental or other traffic, and therefore their merger in that year was not contrary to the Sherman antitrust act. I agree with the court upon the minor features of the case, including, in a general way, that of the control of the San Pedro line by the Union Pacific Company.

[\*\*30] The latter is much as if a railroad company, with a line from the west through Omaha or Kansas City to Chicago, should obtain control of a branch from Omaha or Kansas City to St. Louis. In the absence of a more direct competitive relation than appears here, the Sherman act should not be held to cover such tangential acquisitions.

But the chief complaint of the government is of an unlawful contract or combination in restraint of trade and commerce, by which the Union Pacific and Southern Pacific transportation systems are held under a single control, and competition between them is suppressed or destroyed. The combination was effected through the purchase by the Union Pacific of part of the capital stock of the Southern Pacific. Upon this two important questions arise. The first, which is one of law, is whether the purchase by one railroad company of corporate stock of another, less than the majority, but sufficient in amount according to the practical experience of men to enable the purchaser to dominate or control the policies and operations of the other, is a form of combination within the prohibitions of the Sherman act. The conclusion of the court being against the government [\*\*31] on another ground, it was unnecessary to determine this question; but as I do not assent to the conclusion, and as the question lies at the threshold of the government's case, I should briefly express my view concerning it.

There is no substantial difference between the holding of the corporate stocks of two companies by a third, such as was condemned in the [\*Northern Securities Case\*, 193 U.S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679](#), and the holding by one of those two of the stock of the other. The form is somewhat different, but the effect, which is the chief concern of the law, is the same. If prior competition disappears as a direct and natural result, trade and commerce are restrained. If it is unlawful in the one case, it must be so in the other. It would be idle to hold that, while two competing railroad companies cannot lawfully submit to a common control through a separate stockholding organization, they may do so by dispensing with that medium. That would be regarding shadows and letting the substance go. The [\*121] language of the Sherman act in this particular is broad. It covers every contract and combination in restraint of interstate and foreign trade or commerce, [\*\*32] whether in the form of trust or otherwise. The essential, effective character of the arrangement is to be regarded, rather than its casual vestiture; the substance, rather than the form. In [\*Harriman v. Northern Securities Co.\*, 197 U.S. 244, 297, 25 Sup. Ct. 493, 49 L. Ed. 739](#), it was assumed that the act could be violated by the direct holding of stock of a competing corporation.

I grant it is a serious thing to disturb a great business transaction like that shown in the case at bar; but, given the power of Congress to legislate, and clear words to express what a judge conceives to have been its purpose, his duty is plain, whatever he may think of the wisdom of the law. Even if public regulation is believed to be a wiser

solution of the important economic problem than enforced competition, with its necessary wastes and burdens, nevertheless his judgment of a law embodying the latter policy should proceed as with distinct approval of its selection. It is quite clear that, with the growth and development of governmental regulation of common carriers engaged in interstate commerce, there is decreasing reason for holding them subject to the Sherman act, and it may be that as [\*\*33] regards rates of transportation the Interstate Commerce Commission could perform its duties with equal justice to the public and greater justice to the railroads if they were released. But certainly that is for Congress, not the courts. The judicial function is properly exercised when the Sherman act is construed and applied as though it were the only legislative remedy on the statute books.

The other question in the case is decided by the court against the government. It is whether the two great transportation systems, the Union Pacific and the Southern Pacific, were in a substantial sense competitors in interstate and foreign commerce. This question involves the relative location of their lines on land and sea, and not only the parts they actually performed, but also those they were naturally capable of performing, in the movement of traffic. Albeit in part within the domain of judicial knowledge, this seems to me to be a pure question of fact. Some hundreds of witnesses, practical railroad men and shippers of wide experience, testified upon it, and a great mass of evidence was taken, showing almost without dispute that, using the term "competition" as business men understand [\*\*34] and use it, there was active, vigorous, and substantial competition between the Union Pacific and the Southern Pacific before the former obtained control of the latter. But the court holds the question of competition to be one of mixed law and fact, not determinable by the evidence alone, and as such it is answered against the government.

Roughly stated, the situation was this: In 1901, when the stock purchase was made, the Union Pacific had lines of railroad from the Missouri river, at Council Bluffs, Iowa, and Kansas City, Mo., to Cheyenne, Wyo.; thence a line through Ogden, Utah, to Portland, Or., lines of steamers from Portland to San Francisco, Cal., and from San Francisco and Portland to Oriental ports; and certain rights under an act of Congress (13 Stat. 356) with respect to the Central Pacific Railroad, which was controlled by the Southern Pacific, from [\*122] Ogden to San Francisco. At the Missouri river the Union Pacific had many connections with the principal cities of the country and the Atlantic seaboard by the roads of other companies directly interested in routing west-bound traffic by its line as against the Sunset Route, so-called, of the Southern Pacific. [\*\*35] On the other hand, the Southern Pacific had a steamship line from New York to New Orleans, La., thence a railroad to Southern California and up through San Francisco to Portland, the above-mentioned railroad from Ogden to San Francisco, a steamship line from San Francisco to the Orient, and a steamship line from San Francisco to Panama, being the Pacific link of the Panama rail and water route from New York to San Francisco. The Southern Pacific also had at New Orleans connections similar to those of the Union Pacific by the roads of other companies directly interested in routing west-bound traffic by its line as against that of the Union Pacific. The most important competition, so termed by railroad men and shippers, between the two companies, was for transcontinental business. There was also active competition at intermediate points, where considerable traffic originated. The two companies were distinct in control, management, and operation, with separate officers, directors, traffic and operating officials, commercial agencies, and soliciting agents. Since the combination common officers and directors of traffic and operation were elected or appointed, competitive commercial [\*\*36] agencies were consolidated or abolished, the activities of the two systems have been in close harmony, not in rivalry, and competition has disappeared.

Reduced to the simplest terms the conclusion of the court that the two companies were not competitors and the Sherman act was not violated is based on these two grounds: (1) Trade and commerce were not restrained, because before the combination the competitive interstate and foreign traffic of the two railroad companies was not a substantial percentage of their total traffic, including in such total the traffic entirely within the several states, over which Congress had no control. (2) Trade and commerce were not restrained because before the combination one of the lines of railroad, the Union Pacific, was an intermediate one in a through route, and depended for competitive traffic upon the business interests of connecting carriers, and therefore could not by itself alone, unaided by the concurrence of its natural allies, make a joint through rate over the entire route. In other words, each party to a contract or combination between railroad companies, which the government assails as being contrary to the Sherman act, must have [\*\*37] owned or controlled an entire through route over which competitive traffic moved.

That it may have performed an essential part, or have been a necessary factor, in the transportation, is insufficient. That connecting carriers may have voluntarily joined it in making through rates for the traffic is immaterial.

With the greatest deference to my Brothers, I am so profoundly impressed with the conviction that these conditions are without substantial relevance to the question before us that I am constrained to dissent from the opinion of the court. Moreover, their introduction so greatly narrows the act of Congress, which, however it may be [\*123] regarded, is the law of the land, that very little is left of it when applied to railroads. *Under one or both of those tests, the Union Pacific could probably have lawfully purchased control of all the great parallel railroad systems in the United States.* It could doubtless have been shown in most instances that the interstate and foreign traffic of each, for which it competed with the Union Pacific or with any of the others, was but a small percentage of its total traffic of all kinds, and we know that all of them depended upon [\*\*38] connecting lines at least for transcontinental and much other traffic, and could not, unaided, have made joint through rates with respect to it. Nor is it clear that what could have been done in 1901 might not as well be done to-day. It is suggested that by the passage of the Hepburn act (June 29, 1906) Congress empowered the Interstate Commerce Commission to prescribe through routes and joint rates where connecting carriers have refused, and therefore a different rule respecting competition has since prevailed. I am wholly unable to perceive the material pertinence of that act, much less its controlling effect. The matter of compulsory joint rates is purely adventitious, except as business may be facilitated over a combined route. A joint through rate merely implies a single charge, less than the aggregate of the locals, for a continuity of transportation over two or more connecting lines. Carriers always had the power to make such rates, and commonly did so with allies of their own selection; but whether the traffic movement was under joint rates or combinations of local rates does not seem to me to determine the existence or nonexistence of competition. If rival lines or routes [\*\*39] contended for the traffic, and it moved, by single line or by combination of connecting lines, there was competition. If not, if must be that until 1906, when the Hepburn act was passed, the Southern Pacific, with its through water and rail route from New York to San Francisco, never had a competitor for transcontinental traffic in any of the great railroad systems in the United States or in all combined.

The traffic for which the Union Pacific and Southern Pacific competed in 1901, and which one or the other secured, was of enormous volume when considered by itself. It ran into millions of dollars, and with the natural development of the country and the growth of commerce, reasonably to have been foreseen, it has since then greatly increased. The competition was direct, not incidental, and the business for which they strove was appreciable or substantial, not insignificant. But tables of figures are given by defendants from which it appears that the interstate and foreign traffic between competitive points secured by each was but a small percentage of the tonnage of its entire system, and it is therefore argued that the competition to which the act of Congress applies was relatively [\*\*40] so small there could have been no restraint or suppression in a substantial sense, and hence no intent to restrain or suppress it. The comparisons being with the total tonnage of the railroads, obviously an element is included which is wholly beyond the power of Congress, namely, the traffic local to the states. The logical conclusion from this view must be that the Sherman act is not violated whenever the trade or commerce within its operation, affected by the contract or combination, however great in [\*124] volume, is overshadowed by that exclusively within the jurisdiction of the states. In other words, though substantial competition in interstate or foreign commerce has been actually suppressed, it must be held there was no intention to suppress it. The magnitude of the traffic shown by the proofs was too great, and the competition for it too earnest and active, to dismiss it as merely incidental to the principal business of the companies, and as not furnishing a motive for the merger or combination. A contention somewhat similar was made by defendants in the Northern Securities Case. It was there argued ([193 U.S. 261, 262, 24 Sup. Ct. 436, 48 L. Ed. 679](#)) that the entire [\*\*41] interstate commerce of the two railroads, the Great Northern and the Northern Pacific, the rates on which could be controlled by them without other competition or consent of connecting lines, was less than 3 per cent. of their total interstate commerce, and that the restraint could not in any event affect more than that per cent. of their commerce of that character. The argument, however, was without avail.

In a broad and substantial sense, in the sense in which the terms are used in constitutions and statutes and in railroad and business circles, the Union Pacific and Southern Pacific lines were parallel and competing. That they were so regarded by practical men having to do with transportation in its various phases is shown, I think, by an overwhelming mass of evidence. But, had no witness testified regarding it, we should come to the same

conclusion. There are occasions when courts in the exercise of their judicial functions are entitled to look out into the world of affairs to observe whether there is not a common knowledge of the subject before them, so universal and pervading as not to admit of testimonial controversy. That is termed "Judicial notice," and it proceeds [\*\*42] upon the assumption that a judge should not be blind to what all others see and understand. It embraces the great currents of trade and commerce in his country -- the general movements of products and manufactures -- as completely as it does the important features of its physical geography, the location of the cities, the ports, the navigable waters, and the lines of railroad.

The question whether a combination of two transportation lines is contrary to the Sherman act is not always to be reduced to a close consideration of the number of tons of competitive freight they carried within a given period, much less the precise relation of the competitive tonnage to their total business of all kinds. Were they, at the time of the combination, in a substantial degree competitive factors in interstate and foreign commerce? Were they so laid upon land and sea as inherently to possess a substantial competitive capacity for the movement of such traffic? It is not merely the extent to which that capacity was utilized yesterday, but the extent to which the transportation facilities were naturally capable of being utilized; and reasonable, not speculative, regard should be had for the developments [\*\*43] of to-morrow. Were it otherwise, Congress in the making of laws would be denied that ordinary foresight which men engaged in business commonly possess and practice. Competition, as the antithesis of monopoly, is the influence which those in the same line of business have on each other, and that influence may as well be manifested in [\*125] an existing capacity and preparedness as in the degree of active exercise. A moment's reflection will show this is old doctrine in the judicial construction and application of laws against monopolies and restraint of trade. A railroad company may have great, if not controlling, influence on competition, regardless of the amount of the traffic it actually carries at the time. With a line of railroad scarcely less permanent than a navigable waterway, it stands equipped and ready to do the business when conditions arise, and the duty to do it comes from the very character of its corporate being and the source of its powers and franchises. It may at once be both a curb and a spur to other lines -- a curb as regards rates, and a spur as regards quality of service, which are the two great points at which transportation touches the public interest. [\*\*44] The influence of the Mississippi river and its navigable tributaries upon the trade and commerce of St. Louis is well known, yet of the enormous freight tonnage into and out of that city, largely interstate, scarcely one-half of 1 per cent. moves by water. To be more exact, of the total rail and river traffic in 1910, nearly 52,000,000 tons, but thirty-six hundredths of 1 per cent., was transported by water; in 1909, but sixty-seven hundredths of 1 per cent. of that year's tonnage. But who would contend that if the rivers were the subject of private ownership, instead of being common highways for the use of all, their control by a railroad company could not restrain trade or commerce because, as measured by relative percentages, the competition appeared to be so slight?

When the argument was made at the hearing that, because the Union Pacific was an intermediate, not a through line, it was not a competitor for traffic moving over it and its connections for which it could not have made a joint through rate, counsel admitted that the rule contended for would have made it lawful under the Sherman act for all intermediate lines in transcontinental transportation, such as the Chicago, [\*\*45] Rock Island & Pacific from Chicago to El Paso, the Atchison, Topeka & Santa Fe from Chicago to Mojave (before it gained entrance to San Francisco), the Missouri, Kansas & Texas from St. Louis and Kansas City to Texas points, the St. Louis & San Francisco from St. Louis and Kansas City to the Southwest, the Missouri Pacific with the Denver & Rio Grande from St. Louis to Ogden, and the Union Pacific to have combined and agreed among themselves, as was done in the Trans-Missouri Freight Association Case, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, if they confined their combination to transcontinental traffic; in other words that those intermediate railroads could not be competitors for the traffic, and a confederation with respect thereto could not be unlawful. It seems to me that a statement of the contention shows its unsoundness. Anything that affects the rate over a substantial part of a transportation route is calculated to affect the charge as an entirety; and so of the other features of railroad competition. The competition of the all-water route by the Atlantic and Pacific Oceans with the all-rail transcontinental routes in the United States is so fully recognized that [\*\*46] it is safe to say almost every car load rate to the Pacific coast from the territory between the Missouri river and the Atlantic seaboard exhibits a recognition of its influence. And yet it is contended that the [\*126] Union Pacific in the direct line of traffic movement, with 1,000 miles of railroad from the Missouri river to Ogden, and nearly 900 miles thence to Portland, with its steamship lines, is not a competitor for transcontinental traffic.

The practical aspect of the question is shown by the cases in which railroad companies have asserted the existence of competition from rival lines or routes of transportation as evidencing conditions justifying discriminations and preferences under the interstate commerce act -- that the rates objected to as discriminative were controlled by competition, and if they abandoned the rates they would lose the business. An instance of this appears in [Texas & Pacific Railway v. Interstate Commerce Commission, 162 U.S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.](#) The Texas & Pacific Railroad from New Orleans to El Paso, Tex., and the Southern Pacific Railroad thence to San Francisco, formed a through route over which traffic, both foreign [\\*\\*47](#) and domestic, moved. The Texas & Pacific Company successfully defended its right to charge and receive more for its proportion of the through rate on traffic originating in New Orleans than it charged and received on import traffic originating in London and Liverpool and billed through New Orleans over the same route to San Francisco, and it did so on the ground asserted that the rate from the English cities to San Francisco was determined by competition with the following routes: By vessel around the Horn; by vessel and by rail across the Isthmus of Panama; and ([162 U.S. 216, 16 Sup. Ct. 674, 40 L. Ed. 946](#)) by vessel and by rail across Canada. Were all those transportation agencies subject to the laws of the United States, could it with reason be urged that a contract or combination between them, suppressing a competition which actually existed, would not contravene the Sherman act, because all but one of them were composed of connecting links severally owned or controlled? If that which men engaged in transportation recognize as substantial competition in shaping their policies and their conduct is not so regarded in the courts, the statute will not have the operation intended [\\*\\*48](#) by its enactment. Laws are generally framed to apply to the everyday affairs of men, who are not given to the study of nice differences and distinctions, and that should always be borne in mind in determining their meaning.

But it is said there was no competition, because the Union Pacific depended upon the Southern Pacific line from Ogden to San Francisco. It is true that much of the transcontinental traffic of the Union Pacific went that way; but it is not unusual for railroad systems to connect at points and interchange business, though they are active competitors in other respects. In fact, a large proportion of them are so related. Competition, within the laws which seek to preserve it, does not imply absolute nonintercourse, as between hostile armies, which exchange no prisoners and give no quarter. Moreover, the use of the Ogden line was neither a necessity to the Union Pacific nor a pure favor or concession by the Southern Pacific. Aside from the mutual benefits from the interchange of traffic, the former had its own line from Ogden, by way of Portland, which, though not as desirable, was more than an important strategic advantage necessary to be reckoned with. But [\\*\\*49](#) were all this otherwise, the undeniable fact remains, [\\*127](#) after stripping the case of all debatable considerations, that the Union Pacific secured this west-bound traffic by active competition, and had transported it as competitive for 1,000 miles before it reached Ogden.

I think that upon the main feature of the case the government is entitled to a decree.



## Larabee Flour Mills Co. v. Missouri P. R. Co.

Supreme Court of Kansas

July, 1911, Decided ; July 7, 1911, Filed

No. 15,167.

### **Reporter**

85 Kan. 214 \*; 116 P. 901 \*\*; 1911 Kan. LEXIS 47 \*\*\*

THE LARABEE FLOUR MILLS COMPANY, Plaintiff, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

**Prior History:** [\*\*\*1] Original proceeding in mandamus. Opinion filed July 7, 1911. Judgment for the plaintiff for damages.

## **Core Terms**

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mill company, damages, corn, mandamus, allowance, expenses, profits, alternative writ, supersedeas, attorney's fees, writ of error, peremptory, witnesses, commerce, furnish, flour

## **LexisNexis® Headnotes**

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Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Breach > General Overview

### **HN1[] Types of Damages, Compensatory Damages**

It is not always easy to draw the line between profits that are a legitimate element of compensation and those that are too remote, contingent or uncertain. The old idea that profits were never recoverable was long since exploded; and now, even in actions on contract, it is said that they may be recovered when proximate and certain. The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Remedies > Damages > General Overview

### **HN2[] Remedies, Writs**

See Civ. Code, § 723 (Kansas).

85 Kan. 214, \*214 P. 901, \*\*901 911 Kan. LEXIS 47, \*\*\*1

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

### **HN3** **Jurisdictional Sources, Constitutional Sources**

The jurisdiction of the Supreme Court of Kansas in mandamus is the creation of the constitution and the statutes of the state of Kansas. The Supreme Court of Kansas is the sole judge of what that constitution and those statutes provide. The jurisdiction of the Supreme Court of Kansas in mandamus over persons within its jurisdiction can not be affected by act of congress. The federal judiciary act does not and was not intended to affect the jurisdiction of the Supreme Court of Kansas. The jurisdiction of the Supreme Court of Kansas in mandamus attaches upon the issuance of the alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced. The alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Supersedeas Bonds

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

### **HN4** **Judgments, Entry of Judgments**

The damages comprehended by Kansas statutes governing writs of mandamus are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ. The allowance of a writ of error does not operate to remove a mandamus suit from the supreme court of the state into the supreme court of the United States; its only effect is to bring up the record for purposes of review. The allowance of a writ of error does not

operate as a supersedeas; the taking the supersedeas bond brings about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, is the action of the state court.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Evidence > ... > Testimony > Expert Witnesses > General Overview

#### **HN5** Attorney Fees & Expenses, Reasonable Fees

The opinions of expert witnesses in cases regarding attorney's fees are never conclusive upon the court and are not conclusive upon a commissioner.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

#### **HN6** Attorney Fees & Expenses, Reasonable Fees

The service performed, the character and importance of the litigation and the result obtained thereby must be considered by the court, and furnish a sufficient basis upon which to determine what are fair and reasonable amounts to be allowed as compensation for attorneys.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Contracts Law > Defenses > Illegal Bargains

Transportation Law > Carrier Duties & Liabilities > Damages

Contracts Law > Defenses > Public Policy Violations

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

#### **HN7** Regulated Industries, Transportation

A plaintiff is entitled to recover whatever damages it has sustained by the wrongful suspension of the transfer service unless the service sought to be enforced was a necessary part of the purposes of some unlawful trust or combination, and unless some violation of the trust law entered into was a part of the cause of action in the original proceeding.

## **Syllabus**

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SYLLABUS BY THE COURT.

DAMAGES--*Jurisdiction*--*Refusal to Transfer Cars*--*Mandamus*--*Supersedeas Bond*--*Measure of Damages*--*Loss of Profits*--*Attorneys' Fees*--**Antitrust Law** as a Defense. In original proceedings in mandamus to compel a railway company to furnish transfer services to a shipper judgment was given for the plaintiff and the peremptory writ allowed. Thereupon the defendant sued out a writ of error to the supreme court of the United States, where the judgment was affirmed. The plaintiff then filed in this court a claim for damages. Held,

(1) The judiciary act (4 Fed. Stat. Anno., pp. 195-734) was not intended to affect and does not affect the jurisdiction of this court.

(2) The jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and continues unabated, not only until the peremptory writ issues but until obedience thereto is enforced.

(3) The allowance of the writ of error did not operate to remove the suit from the supreme court of the state to the supreme court of the United States but merely operated to bring [\*\*\*2] up the record for review.

(4) The allowance of the writ of error did not supersede the judgment; the taking of the bond brought about the supersedeas.

(5) The damages in mandamus proceedings comprehended by section 723 of the code are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expense reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the supreme court of the United States.

(6) Damages incurred prior to the issuance of the alternative writ cannot be recovered.

(7) Damages for loss of profits may be recovered where the amount of such loss and the fact that it resulted by defendant's refusal to comply with the alternative writ can be determined by the court with reasonable certainty.

(8) In such an action where the defendant claims in mitigation of damages that plaintiff might and should have compelled it to furnish cars by serving a written demand and making the cash deposit provided by the statute, the burden rested upon the defendant to show that it stood ready to furnish the service upon such demand.

(9) [\*\*\*3] In view of the undisputed character and importance of the litigation, the services performed and the results obtained, the amounts allowed by the commissioner as attorneys' fees for plaintiff's attorneys are approved.

(10) The defendant claimed that plaintiff was not entitled to recover any damages because during the time the damages arose plaintiff was a member of an organization in violation of the antitrust laws. *Held*, that the plaintiff was entitled to recover whatever damages it sustained by the wrongful suspension of the transfer service unless the service sought to be enforced by the mandamus was a necessary part of the purposes of such unlawful trust or combination.

**Counsel:** Joseph G. Waters, John C. Waters, Charles Blood Smith, and John F. Switzer, for the plaintiff.

B. P. Waggener, for the defendant.

**Judges:** PORTER, J.

**Opinion by:** PORTER

## **Opinion**

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[\*216] [\*\*902] The opinion of the court was delivered by

PORTER, J.: In this case judgment awarding a peremptory mandamus was rendered December 8, 1906, and the defendant railway company was ordered to resume the transfer service for the plaintiff. ([Larabee v. Railway Co., 74 Kan. 808.](#)) Thereafter defendant sued out a [\*\*\*4] writ of error to the supreme court of the United States, where the judgment was affirmed. ([Missouri Pacific Ry. v. Larabee Mills, 211 U.S. 612, 53 L. Ed. 352, 29 S. Ct. 214.](#)) After the affirmance of the judgment by that court the plaintiff filed here a claim for damages arising out of the defendant's refusal to furnish transfer service covering the period from the suspension of such service, August 29, 1906, until it was resumed under the peremptory writ. The Hon. H. C. Sluss was appointed commissioner to take the testimony

and report his findings of fact and conclusions of law. The report has been made, and a number of exceptions have been filed thereto by the plaintiff and by the defendant.

The plaintiff's principal objection arises over the disallowance of a claim for the loss of profits covering a period of 117 days, at \$ 100 per day, and aggregating \$ 11,700. The basis of this claim is the alleged inability of the mill company to grind corn and market corn products.

The commissioner's findings and his reasons for disallowing the claim are stated as follows:

"I find from the evidence that the mill company's mill is equipped for grinding corn and the production of corn products, [\*\*\*5] and has a maximum capacity of 100,000 pounds of corn per day; that the mill company ground but little corn during the period of the suspension of the transfer service. There is no evidence of the price of corn or of corn products during that period, or of the cost of manufacture; nor evidence of the work and profits of other mills of similar character and similarly located as the mill company's; the only evidence being the estimate of witnesses based on the maximum capacity of the mill, and the fact that it was an unusually [\*217] good corn year, and the fact that the mill company had made money in handling corn through their elevator located on the Santa Fe during the same period, and the belief of the witness that the mill company could have ground a large amount of corn, and that the [in] view of the conditions it would have yielded a profit of ten cents per hundred pounds. I conclude that the evidence is too indefinite and uncertain, based too largely upon estimate, opinion and assumption to justify a finding that there was a loss of profit by reason of inability to grind corn, or if there was a loss, how much it amounted to; and I find the claim not proven."

These conclusions [\*\*\*6] are in harmony with settled rules respecting damages for loss of profits, and meet with our approval. It is true, as said by Judge Brewer in the opinion in [Hoge v. Norton, 22 Kan. 374](#), cited by the plaintiff:

**HN1**[] "It is not always easy to draw the line between profits that are a legitimate element of compensation and those that are too remote, contingent or uncertain. The old idea that profits were never recoverable was long since exploded; and now, even in actions on contract, it is said that they may be recovered when proximate and certain. 'The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes.' ([Griffin v. Colver, 16 N.Y. 489](#).)" (p. 379.)

The difficulty here is, that from the evidence presented the commissioner was not able, nor are we able, to determine with reasonable certainty that any loss of profits was occasioned by reason of plaintiff's inability to grind corn, or the amount of such loss, if any.

[\*\*\*7] The commissioner rightly refused to allow any damages to the mill company for losses which it claimed to have sustained by the suspension of transfer service prior to the issuance of the alternative writ, holding that up to that time it was optional with the plaintiff to avail itself of mandamus or to pursue its remedy in [\*218] an ordinary action for damages, and that the only power of this court to award damages is by virtue of its jurisdiction in the mandamus proceeding, and that such jurisdiction had its inception with the alternative writ. The provision of [\*\*903] the code authorizing the allowance of damages in mandamus proceedings is:

**HN2**[] "If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs." (Civ. Code, § 723.)

( [McClure v. Scates, 64 Kan. 282, 67 P. 856](#).)

Objection is made by the defendant to the allowance of certain claims for wages of men and teams in hauling flour, grain and mill stuffs to the Santa Fe tracks, and the contention is made that it was the duty of the plaintiff to mitigate its damages by all reasonable means within [\*\*\*8] its reach, and that it was within its power to have compelled the defendant railway company to furnish all the cars needed to reach common points by serving a written demand and making the cash deposit provided by the statute. The commissioner held that the burden of proof was upon the

defendant to show that to the knowledge of the mill company the defendant was prepared to furnish and ready and willing to furnish to the mill company promptly, on reasonable request, such cars as were needed to enable it to deliver its product to common points as promptly and satisfactorily as could be done by shipment over the Santa Fe in the manner the particular shipments were made, and that there was a failure of proof on the part of defendant to establish this contention. Upon the statement of the facts, the conclusions of the commissioner appear to be sound, and to require no elucidation or comment. The defendant objects to the allowance of this claim, aggregating \$ 2386.86, on the further ground that the only evidence in support of it was incompetent. We have examined the evidence of the witness, Larabee, and agree with the [\*219] commissioner's conclusion that it was not secondary or hearsay, [\*\*\*9] that it was competent, and that the objections to its admission were properly overruled.

One of the main controversies is over the allowance of attorneys' fees for plaintiff's attorneys. The ninth claim, for the sum of \$ 2500 for services of Waters & Waters in bringing and prosecuting the mandamus proceeding, was allowed, the commissioner finding that mandamus was a proper and necessary proceeding to be instituted by the mill company, that Waters & Waters were employed for that purpose, that they instituted and successfully conducted the same, and that their services were reasonably worth the amount claimed. It is sufficient to say that we approve the finding and the allowance of the claim.

The tenth, twelfth, thirteenth, fourteenth and fifteenth claims are for the professional services and expenses of attorneys employed by the mill company to represent it in the supreme court of the United States. The contentions of the defendant respecting these claims are so clearly stated and so fully met and answered by the commissioner that we quote from his report, as follows:

"Upon these claims I find, that, following the judgment of this court awarding the peremptory mandamus, the Pacific [\*\*\*10] company caused a writ of error to be issued December 24, 1906, to the supreme court of the United States from said judgment, and on the same day filed a supersedeas bond in this court, which bond was approved by the court, and thereupon the Pacific company filed its petition in error in the supreme court of the United States, together with its transcript of the record and of the cause. The Pacific company presented the following assignments of error:

"That the supreme court of Kansas erred:

"(1) In deciding that the switching service required was not in any part interstate commerce.

"(2) In deciding that the subject matter of the suit was not governed by the acts of congress regulating commerce.

"(3) In deciding that the Pacific company was under [\*220] obligation to perform the transfer service required of loaded cars destined to points without the state of Kansas.

"(5) In deciding that it had jurisdiction to compel the Pacific company to render the transfer service required in the carriage of property subjects of interstate commerce destined to points without the state of Kansas.

"(6) In assuming jurisdiction of the suit in so far as it involved the carriage of property [\*\*\*11] the subject of interstate commerce.

"(7) In deciding that chapter 345, Laws of 1905, of Kansas, was not invalid in so far as it attempted to compel the transfer or carriage of property subject to interstate commerce destined to points without the state of Kansas."

The commissioner finds that these assignments of error and the propositions involved therein "were supported by a masterly and exhaustive analysis of the provisions of the constitution and the statutes and decisions" bearing upon the subject in the briefs of the defendant's counsel. The report then proceeds as follows:

"It was reasonably necessary for the mill company to employ counsel to represent it in the supreme court of the United States of professional standing, learning and experience to adequately combat the contentions and answer and arguments of counsel for the Pacific company. For this purpose the mill company employed, in addition to Waters & Waters, W. H. Rossington, Charles Blood Smith and John F. Switzer, who were well equipped and

qualified to adequately present the case of the mill company to the supreme court of the United States. The compensation and expenses of these gentlemen under that employment [\*\*\*12] constitute the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth claims of damages filed by the mill company."

The contentions of the defendant are that these claims cover expenses incurred in [\*\*904] the supreme court of the United States and not in this court, that the judiciary act of the United States (4 Fed. Stat. Anno., [\*221] pp. 195-734) deprives this court of all power to allow in this proceeding any damages or expense incurred as a result of the proceeding in error, that the supersedeas bond taken at the time the writ of error was allowed was conditioned that the plaintiff in error should answer all damages, and that the only remedy of the mill company was to apply to the supreme court of the United States for the allowance of its claim for damages, and that upon the affirmance of the judgment in this case that court did allow to the mill company the sum of \$ 20 as and for its counsel fees in that court.

Again, the conclusions of the learned commissioner are so clearly and forcibly stated that we adopt them as a part of our opinion. His language is:

"Upon this objection I conclude:

"(1) That the HN3[<sup>↑</sup>] jurisdiction of this court in mandamus is the [\*\*\*13] creation of the constitution and the statutes of the state of Kansas.

"(2) That this court is the sole judge of what that constitution and those statutes provide.

"(3) That the jurisdiction of this court in mandamus over persons within its jurisdiction can not be affected by act of congress.

"(4) That the judiciary act does not and was not intended to affect the jurisdiction of this court.

"(5) That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

"(6) That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.

"(7) That HN4[<sup>↑</sup>] the damages comprehended by the Kansas statutes are the injuries sustained as the natural and [\*222] [\*\*\*14] probable consequences of the wrongful refusal to comply and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ.

"(8) That the allowance of the writ of error did not operate to remove the suit from the supreme court of the state into the supreme court of the United States; its only effect was to bring up the record for purposes of review.

"(9) The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the supreme court of Kansas.

"I conclude that the objection should be disallowed, and a claim for the reasonable compensation of the attorneys mentioned for their services in the case in the supreme court of the United States, and their reasonable and necessary expenses, should be allowed as part of the damages sustained by the mill company."

The commissioner also finds that no agreement has ever been made between the mill company and any of its attorneys as to the amount of their compensation, and that the attorneys will claim [\*\*\*15] and accept in full discharge of plaintiff's liability to them whatever amount the court shall determine to be reasonable and allowed as part of the plaintiff's damages. After reciting at some length the character of the service performed by the plaintiff's

attorneys in the preparation of their briefs and arguments in answer to the defendant's contentions in the controversy the commissioner concludes from all the evidence that a reasonable allowance for the services of Waters & Waters in the supreme court of the United States is the sum of \$ 5000, and a like sum was allowed for the services of W. H. Rossington and Charles Blood Smith. The attorneys were also allowed their expenses in attending court. To John F. Switzer was allowed \$ 500 for services in the preparation of briefs.

[\*223] A number of attorneys well known to the court were called as witnesses by both parties and gave their opinions as to what were reasonable attorneys' fees for the services in question. As usual in such cases there was a wide divergence of opinion expressed. The commissioner found that these opinions were given in answer to two sets of hypothetical questions, propounded by the plaintiff and defendant [\*\*\*16] respectively, and without opportunity on the part of the witnesses to give the question of what was really involved in the case a thorough and careful study; and he concludes that none of the witnesses had given the elements of the case such study and consideration as would justify the court in adopting the opinions of any of them as a basis for its judgment. The commissioner, calling to his aid his own general knowledge and professional experience, and considering all the circumstances in evidence, "the character and the importance of the litigation, the labor and time necessarily involved therein and the result of the same" ( *Noftzger v. Moffett*, 63 Kan. 354, 359, 65 P. 670), proceeded to find the several amounts which he believed to be reasonable compensation for the services rendered. This he was warranted in doing. *HN5*<sup>↑</sup> The opinions of expert witnesses in such cases are never conclusive upon the court and were not conclusive upon the commissioner. ( *Noftzger v. Moffett, supra*; *Bentley v. Brown*, 37 Kan. 14, *\*\*905* 14 P. 43.) *HN6*<sup>↑</sup> The service performed, the character and importance of the litigation and the result obtained thereby are all conceded; and these elements, as held [\*\*\*17] in *Noftzger v. Moffett, supra*, must be considered by the court, and furnish a sufficient basis upon which to determine what are fair and reasonable amounts to be allowed as compensation for the attorneys. In view of these considerations we are not inclined to disturb the findings of the commissioner or to regard the allowances as excessive or unreasonable.

[\*224] The claims allowed by the commissioner and approved by the court are as follows:

"First claim.--For expense of hauling flour, grain and mill stuffs from mill to Santa Fe tracks	\$ 2,386 85
"Second and third claims.--Wages of men unloading flour transferred by teams	1,381 25
"Fourth claim.--Loss resulting from closing down of mill thirteen and one-half days	1,890 00
"Ninth claim.--Waters & Waters, attorneys' fees in this court	2,500 00
"Tenth, twelfth, thirteenth, fourteenth and fifteenth claims.--Attorneys' fees and expenses in supreme court of the United States	11,480 00
"Seventeenth claim.--Larabee's expenses to Topeka	186 00
"Eighteenth claim.--Expenses and per diem of plaintiff and counsel at St. Louis	160 00
"Twenty-first claim.--F. D. Larabee, attendance on commissioner	30 00
	\$ 20,014 10

[\*\*\*18] One further question remains to be considered. The defendant raised the point before the commissioner that the plaintiff is not entitled to recover any damages in this proceeding for the reason that the mill company "during the period in which the damages claimed arose, was a member of the Southern Kansas Millers' Commercial Club; that this club was an association of millers, and the object and purpose of it was to control the price of wheat and flour, and prevent competition in the purchase of wheat and in the sale of flour, and included in its membership and allied associations substantially all the persons engaged in the milling business throughout Kansas, Oklahoma and Texas; and was an organization in violation of the antitrust laws of Kansas."

A large amount of evidence was taken which tended strongly to prove this charge, although it was not sufficient to satisfy the commissioner that it had been established. It becomes unnecessary for us to weigh the evidence because of a further finding of the commissioner, which appears to be supported by the evidence, that the performance of the switching service, which [\*225] was the subject matter of this action, was no part of the [\*\*\*19] purpose of the organization of the Southern Kansas Millers' Commercial Club, and in no sense a part of or necessary to the carrying out of any of the purposes for which the club was organized. Under the authority of Barton v. Mulvane, 59 Kan. 313, 317, 52 P. 883, HN7 [↑] the plaintiff is entitled to recover whatever damages it has sustained by the wrongful suspension of the transfer service unless the service sought to be enforced was a necessary part of the purposes of some unlawful trust or combination, and unless some violation of the trust law entered into was a part of the cause of action in the original proceeding. To the same effect are: Bement v. National Harrow Co., 186 U.S. 70, 46 L. Ed. 1058, 22 S. Ct. 747; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L. Ed. 679, 22 S. Ct. 431; Loeb v. Columbia Township Trustees, 179 U.S. 472, 479, 45 L. Ed. 280, 21 S. Ct. 174; Embrey v. Jemison, 131 U.S. 336, 348, 33 L. Ed. 172, 9 S. Ct. 776; National Distilling Co. v. Cream City Importing Co., 86 Wis. 352, 355, 56 N.W. 864.

It follows from what has been said that the report of the commissioner is approved and his findings and conclusions of law are confirmed.

WEST, [\*\*\*20] J., not sitting.

**Dissent by:** BENSON

## **Dissent**

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BENSON, J. (dissenting as to one item): I concur in the foregoing opinion except that part confirming the report of the commissioner relative to attorneys' fees for services in the supreme court of the United States. The commissioner reports: "I find that the mill company has incurred a liability to \_\_ (naming attorney) for professional services in the case on appeal . . . in the sum of \_\_ dollars." A similar finding was made (stating name and amount) upon the claim of each of two firms, and one other attorney. Had the plaintiff employed other lawyers findings of a similar nature might have been made as to them also.

The question is not what liability the plaintiff incurred to any attorney or firm of attorneys, nor what [\*226] number it retained, but the question is, What is a reasonable attorneys' fee for necessary services whether performed by one or many attorneys? In my opinion the commissioner should be requested to find and state the amount of a reasonable attorneys' fee for attending to the case for the plaintiff in the supreme court of the United States. The evidence reported shows that well-known attorneys of large practice [\*\*\*21] differ in their estimates from \$ 2500 to \$ 50,000 for the services in question. In such a situation we should know what the commissioner, who has thoroughly examined every phase of the litigation, considers a reasonable fee.

## Dukate v. Adams

Supreme Court of Mississippi

March, 1912, Decided

No Number in Original

**Reporter**

101 Miss. 433 \*; 58 So. 475 \*\*; 1912 Miss. LEXIS 12 \*\*\*

W. K. M. DUKATE ET AL. v. WIRT ADAMS, STATE REVENUE AGENT.

**Prior History:** [\*\*\*1] APPEAL from the chancery court of Harrison county.

HON. T. A. WOODS, Chancellor.

Suit by Wirt Adams, state revenue agent against W. K. M. Dukate and others. From a judgment overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

**Disposition:** Decree affirmed and cause remanded.

## Core Terms

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revenue agent, forfeitures, past-due, district attorney, attorney-general, anti-trust, obligations, combine, decree

## LexisNexis® Headnotes

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Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Governments > Courts > Judges

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### HN1 [down arrow] US Department of Justice Actions, Criminal Actions

In § 5004 of the Code (Mississippi), a violation of the anti-trust law is referred to as an "offense." Section 1589 of the Code (Mississippi) provides that the term "offense," when used in any statute, shall mean any violation of law liable to punishment by criminal prosecution. By the last sentence of § 5004 of the Code (Mississippi), it is made the duty of the several circuit judges of Mississippi to specially call attention of the grand jury of their respective districts to that provision.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

101 Miss. 433, \*433LA<sup>58</sup> So. 475, \*\*475LA<sup>912</sup> Miss. LEXIS 12, \*\*\*1

Governments > State & Territorial Governments > Employees & Officials

## [\*\*HN2\*\*](#) [down] **Public Enforcement, State Civil Actions**

Section 5004 of the Code (Mississippi) imposes simply a civil liability. The language therein, "to be recovered by an action in the name of the state, at the relation of the attorney-general or district attorney," can be appropriately used only with reference to a civil case.

Civil Procedure > Parties > Capacity of Parties > General Overview

Governments > State & Territorial Governments > Employees & Officials

## [\*\*HN3\*\*](#) [down] **Parties, Capacity of Parties**

Civil suits brought by the attorney-general or district attorney in their official capacity for the benefit of other parties are always brought in the name of such parties on the relation of the attorney-general or district attorney, as the case may be.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

## [\*\*HN4\*\*](#) [down] **US Department of Justice Actions, Criminal Actions**

Criminal prosecutions, under § 27 of the Constitution (Mississippi), and the laws enacted pursuant thereto, must be commenced, if in the circuit court, by indictment, and, if in the court of a justice of the peace, by an affidavit. In neither of these instances is the action thereby begun a proceeding at the relation of the attorney-general or district attorney.

Governments > Local Governments > Duties & Powers

Governments > Courts > Court Personnel

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Employees & Officials

Governments > State & Territorial Governments > Employees & Officials

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

## [\*\*HN5\*\*](#) [down] **Local Governments, Duties & Powers**

See § 4738 of the Code (Mississippi).

Governments > Legislation > Interpretation

## [\*\*HN6\*\*](#) [down] **Legislation, Interpretation**

While punctuation is a valuable aid in the construction and interpretation of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute, if necessary, to give effect to what appears to be the plain meaning thereof.

Governments > State & Territorial Governments > Employees & Officials

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

### **HN7** State & Territorial Governments, Employees & Officials

The true intention of § 4738 of the Code (Mississippi) is to confer upon a revenue agent the power to sue for all penalties and forfeitures of every character owing the state, and for all past-due obligations and indebtedness of any character whatever owing to the state.

Governments > State & Territorial Governments > Employees & Officials

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

### **HN8** State & Territorial Governments, Employees & Officials

Section 5004 of the Code (Mississippi) and § 4738 of the Code (Mississippi), are parts of the same Code, were adopted at the same time, and must be construed together, and, so construed, the authority granted to the attorney-general and district attorney by § 5004 of the Code (Mississippi) is not exclusive.

## **Headnotes/Summary**

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### **Headnotes**

1. APPEAL AND ERROR. *Review. Constitutional questions. Matters not necessary to decision. Constitution 1890, Sec. 147. Code 1906, Sec. 5004. Laws 1908, Ch. 204. Interlocutory order. Civil Cause.*

Under Constitution 1890, Sec. 147, providing that no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, etc., but that if the supreme court shall find error in the proceedings other than as to jurisdiction and it shall be necessary to remand the case, the supreme court may remand it to that court which in its opinion can best determine the controversy; the question of the constitutionality of the laws of 1908, chapter 204, conferring jurisdiction upon chancery courts of suits for penalties for violation of antitrust laws, will not be determined unless the supreme court should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction.

2. SAME.

Sec. 147 of the Constitution of 1890, applies to appeals to settle the principles of the case as well as to appeals from final decrees.

3. APPEAL AND ERROR. *Jurisdiction. "Civil cause." Code 1906, Secs. 5004-1589. Constitution 1890, Sec. 147.*

Notwithstanding the fact that Sec. 5004, Code 1906, imposing a penalty for violation of the anti-trust laws, refers to the violation of such laws as an "offense" and requires the circuit judges to call the attention of the grand jury to this provision, and section 1589 provides that "offense" when used in the statutes shall mean any violation of law liable

to punishment by criminal prosecution; still as the penalty is to be recovered in an action in the name of the state on the relation of the attorney-general or district attorney, such action is a "civil" rather than a "criminal" action within Sec. 147 of the Constitution of 1890, providing that no judgment shall be reversed for error in bringing the same in equity or law, and an action for the penalty will not be reversed because brought in the chancery court.

#### 4. EQUITY. *Action for penalty. Pleading. Multifariousness.*

A bill is not multifarious when the only relief sought by it is the infliction of a penalty prescribed by Sec. 5004, Code of 1906, and which alleges that the trust and combine charged to have been entered into by defendant was unlawful, as such allegation was the foundation of the right to recover the penalty.

#### 5. PENALTIES. *Forfeitures. Actions to enforce. By whom brought. Code 1906, Sec. 4738.*

Although in Sec. 4738, Code 1906, providing that it shall be the duty of the revenue agent to sue all corporations "for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the state or any county etc.,," there is no comma between the words "forfeitures" and "for all past due" the statute will not be held to limit the right of the revenue agent to suits for penalties or forfeitures to those growing out of past due obligations of the state, but will be held to permit him to sue for any penalties or forfeitures.

#### 6. STATUTES. *Construction and operation. Mistake in punctuation.*

While punctuation is a valuable aid in the construction and interpretation of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute if necessary, to give effect to what appears to be the plain meaning thereof.

#### 7. ANTI-TRUST LAWS. *Penalties. Actions to enforce. By whom brought. Code 1906, Secs. 4738-5004.*

Sec. 4738 and 5004, Code 1906, are parts of the same Code, were adopted at the same time, and must be construed together, and so construed, the authority granted to the attorney-general and district attorney by Sec. 5004 is not exclusive.

**Counsel:** Jeff Truly, Ford, White & Ford and Edwin Thurrack, for appellant, filed an elaborate brief fully covering all the points in the case but too long for publication.

E. J. Gex and Flowers, Alexander and Whitfield, for appellee, filed an extended brief, too long for publication.

Argued orally by E. T. Merrick and Jeff Truly, for appellant.

Argued orally by J. N. Flowers, for appellee.

**Judges:** SMITH, J.

**Opinion by:** SMITH

## **Opinion**

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[\*\*476] [\*435] SMITH, J., delivered the opinion of the court.

Appellee filed his bill in the court below, alleging that appellants, under the guise of a limited partnership, had entered into a trust and combine for the purpose of controlling the trade in sea foods in Mississippi, and praying that this partnership be declared to be an unlawful trust and combine, and that appellants be decreed to pay to the state the statutory [\*\*\*2] penalty for having entered into such trust and combine. To this bill a demurrer was interposed and overruled, and this appeal granted to settle the principles of law governing the case.

The points relied upon by appellants to obtain a reversal of the decree rendered in the court below may be [\*436] reduced to three: First, that chapter 204 of the Laws of 1908 is unconstitutional, in so far as it attempts to confer jurisdiction upon the chancery court to hear and determine suits arising out of violations of the anti-trust law, for the reason that this anti-trust law makes the formation of a trust or combine a crime, and that under the Constitution the criminal laws cannot be enforced by the chancery court; second, that the bill is multifarious, for the reason that it unites two distinct and unconnected matters--that is, it seeks to have this limited partnership declared unlawful, and also to have penalties awarded for the violation of the anti-trust statute; third, that the revenue agent is without power to institute this suit.

Under section 147 of the Constitution, the question of the constitutionality of chapter 204 of the Laws of 1908 does not arise, unless we should reverse [\*\*\*3] the decree of the court below for some reason other than that the cause was not of equity jurisdiction. It is true that this is an appeal to settle the principles of the case; but this section of the Constitution, nevertheless, applies, for it is not limited to appeals from final decrees. *Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32.*

But it is said that this is a criminal and not a civil case, that, consequently, section 147 of the Constitution does not apply, and that the case of *Grenada Lumber Co. v. State, 98 Miss. 536, 54 So. 8*, which held to the contrary, was erroneously decided. Out of deference to counsel, we have re-examined this matter, in view of all of the arguments advanced by them, and see no reason to recede from the views expressed in the Grenada Lumber Co. case. In reaching this conclusion, we have not left out of view the fact that [HN1](#)<sup>↑</sup> in section 5004 of the Code the violation of the anti-trust law is referred to as an "offense," that section 1589 of the Code provides that "the term 'offense,' when used in any statute, shall mean any violation of law liable to punishment by criminal [\*437] prosecution," and that by the last [\*\*\*4] sentence of section 5004 it is made "the duty of the several circuit judges of the state to specially call attention of the grand jury of their respective districts to this provision."

It may be that a person violating the anti-trust law is liable to punishment by criminal prosecution, as to which we express no opinion; but he certainly is not by reason of anything contained in [HN2](#)<sup>↑</sup> section 5004, which imposes simply a civil liability. The language, "to be recovered by an action in the name of the state, at the relation of the attorney-general or district attorney," can be appropriately used only with reference to a civil case. [HN3](#)<sup>↑</sup> Civil suits brought by the attorney-general [\*\*477] or district attorney in their official capacity for the benefit of other parties are always brought in the name of such parties on the relation of the attorney-general or district attorney, as the case may be. [HN4](#)<sup>↑</sup> Criminal prosecutions, under section 27 of the Constitution, and the laws enacted pursuant thereto, must be commenced, if in the circuit court, by indictment, and, if in the court of a justice of the peace, by an affidavit. In neither of these instances is the action thereby begun a proceeding "at the [\*\*\*5] relation of the attorney-general or district attorney."

Prior to the adoption of the Code of 1906, there was no civil liability of the character now under discussion imposed for violations of the anti-trust law; such violations being punished by fine and imprisonment. When the Code of 1906 was adopted, the fine and imprisonment features of the statute were omitted, and the present civil liability substituted therefor. Section 5004 of the Code seems to have been adopted as a substitute for the latter part of Sec. 4, Ch. 88, of the Laws of 1900, which provided for a criminal prosecution, and directed the circuit judges to charge the grand juries relative thereto. Why this provision was brought forward in Section 5004 is not clear, for the grand jury has nothing [\*438] to do with the collection of the penalty thereunder imposed. This may have occurred by an oversight, or out of a desire to retain as much of the phraseology of the old law as possible, and without due consideration of the effect thereof. But, be that as it may, this direction to the circuit judges cannot have the effect of converting into a criminal what was clearly intended to be a civil liability.

The bill is not [\*\*\*6] multifarious. The only relief sought by it is the infliction of a penalty prescribed by section 5004 of the Code. In order that this may be done, the trust and combine alleged to have been entered into by appellants must be declared to be unlawful.

[HN5](#)<sup>↑</sup> Section 4738 of the Code provides that the revenue agent "shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies, and associations of persons for all past-due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all

past-due obligations and indebtedness of any character whatever owing to the state or any county, municipality or levee board, and for damages growing out of the violation of any contract with the state or any county, municipality, or levee board, and shall have a right of action and may sue at law or in equity in all such cases where the state or any county, municipality or levee board has the right of action or may sue."

It is contended by counsel for appellants that under this section the revenue agent is not empowered to sue for all penalties and forfeitures owing to the state, but only for penalties [\*\*\*7] and forfeitures for all past-due obligations, etc., owing to the state. This argument is based upon the absence of a comma between the words "or forfeitures" and the words "for all past-due" in the fifth line of the section. They seem to concede that, were this comma not absent, the revenue agent would have power to sue for all penalties and forfeitures. HN6[<sup>↑</sup>] While punctuation is a valuable aid in the construction and interpretation [\*439] of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute, if necessary, to give effect to what appears to be the plain meaning thereof. If the contention of appellants is correct, the revenue agent would have no power to sue for penalties or forfeitures owing the state, except such as were incident to past-due obligations to the state; neither would he have any power to sue for past-due obligations, being limited to a suit for the recovery of the penalties and forfeitures incident thereto. It is manifest that HN7[<sup>↑</sup>] the true intention of the statute is to confer upon the revenue agent the power to sue for all penalties and forfeitures of every character owing the state, and for all past-due [\*\*\*8] obligations and indebtedness of any character whatever owing to the state, and, consequently, the court, carrying out this plain intent, will insert the comma in the place hereinbefore indicated.

Counsel for appellants also contend that since section 5004, which imposes the penalty sued for, provides that it shall be recovered by an action in the name of the state at the relation of the attorney-general or district attorney, that the grant of power to sue to these officials excludes any power to sue therefor in any other officials, and that, consequently, the revenue agent is without authority to bring this suit. HN8[<sup>↑</sup>] This section, however, and section 4738, are parts of the same Code, were adopted at the same time, and must be construed together, and, so construed, the authority granted to the attorney-general and district attorney by section 5004 is not exclusive. To so hold would practically strip the revenue agent of all power, for in very few, if any, cases is he given the sole authority to collect or sue for money owing the state; such authority being generally also vested in other officials.

The decree of the court below, therefore, is affirmed, and the cause remanded for further [\*\*\*9] proceedings.

*Affirmed and remanded.*

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## *Smith v. Morganton Ice Co.*

Supreme Court of North Carolina

May 15, 1912, Filed

No Number in Original

**Reporter**

159 N.C. 151 \*; 74 S.E. 961 \*\*; 1912 N.C. LEXIS 247 \*\*\*

J. M. SMITH v. MORGANTON ICE COMPANY ET ALS.

**Prior History:** [\*\*\*1] APPEAL by defendant from Long, J., at December Term, 1911, of BURKE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

**Disposition:** No error.

## Core Terms

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damages, ice company, ship, price fixing, punitive, injure

## LexisNexis® Headnotes

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### [HN1](#) **Regulated Practices, Price Fixing & Restraints of Trade**

Under 1907 N.C. Sess. Laws ch. 218, N.C. Revisal, § 3028a(b), any person, firm, corporation, or association to directly or indirectly destroy or willfully injure, or undertake to destroy or injure the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed. Chapter 167 of 1911 N.C. Sess. Laws amended the above section by interpolating the words "by circulating false reports" tending to damage the credit of said opponent or rival. The effect of the amendment is to narrow and restrict the forbidden conduct tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed to the single instance when it is done by circulating false reports.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Remedies > Damages > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

## **HN2** Regulated Practices, Price Fixing & Restraints of Trade

Punitive damages may be allowed or not, as the jury see proper; but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accomplished by fraud or malice, or recklessness or other unlawful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury, not only as to the allowance of damages, which is sometimes called smart money or punitive damages, not only as to the allowance, but as to the amount that is allowed.

## **Headnotes/Summary**

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### **Headnotes**

#### **1. Antitrust Laws -- Interpretation of Statutes.**

The anti-trust law of 1907, ch. 218 (Revisal, sec. 3028), since its amendment by chapter 167, Laws of 1911, restricts unlawful conduct "tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports."

#### **2. Antitrust Laws -- Commencement of Action.**

By express terms of the statute, the repeal of chapter 218, Laws of 1907 (Revisal, sec. 3028b), does not affect any action theretofore commenced. Revisal, sec. 2830.

#### **3. Antitrust Laws -- Common Law.**

By express provision, chapter 218, Laws of 1907 (Revisal, sec. 3028b), shall "not be construed so as to repeal or restrict the common-law doctrine preventing unlawful combinations in trade and commerce," and this provision is still effective, being reenacted by chapter 167, sec. 9, Laws of 1911.

#### **4. Antitrust Laws -- Punitive Damages -- Instructions.**

The plaintiff was a dealer in meats in M., and desirous of dealing in ice, also, made a contract with an ice plant at N., a nearby town, whereby he could sell ice in M. for a profit at 35 cents per hundred pounds. The defendant procured an agreement with the only other ice plant in the town of M. by which it would not sell ice there, and by threats of competition at N. deterred the Ice Manufacturing Company there from shipping ice to the plaintiff, and at least temporarily broke up his meat and ice business, whereupon the defendant put the minimum price of ice at M. at 50 cents per hundred pounds: *Held*, (1) the conduct of the defendant was violative of the common-law doctrine against monopolies; (2) conceding that the defendant did not know of plaintiff's contract, its unlawful conduct was the preventing plaintiff from obtaining the ice; (3) exemplary or punitive damages are recoverable in an amount to be allowed in the discretion of the jury, if the jury find that defendant's acts were maliciously done; (4) the defendant's acts if done without right or justifiable cause would constitute malice; (5) an instruction was not error when considered in connection with the charge as a whole, that the jury could "award exemplary damages for any injury they may find that the plaintiff suffered by the interference in his business by the defendant's attempt to fix the price of ice at M." for the illegal purposes, etc.

**Counsel:** John T. Perkins for plaintiff.

M. Silver and Avery & Ervin for defendants.

**Judges:** CLARK, C. J.

Opinion by: CLARK

## Opinion

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[\*152] [\*\*962] CLARK, C. J. Though this State enacted an antitrust law in 1891, this case is the first that has reached this Court in which it has been attempted to enforce such legislation by civil action, and none has so far come up on the criminal side of the docket.

The defendant ice company owned an ice plant in Morganton. The plaintiff had a fresh-meat market-which required ice, and he desired to deal in ice. The defendants procured an agreement with the Deaf and Dumb School in Morganton, the only other ice plant in that town, not to sell ice to any one. They then went to the neighboring towns that had ice plants and procured agreements from them not to ship ice to Morganton to plaintiff unless he would agree to sell at a minimum price in Morganton of 50 cents per 100 pounds. The plaintiff already had a contract with the ice company in Newton to ship him all the ice he wished at [\*\*\*2] 17 1/2 cents per 100, which he was selling at 35 cents per 100 pounds, at a profit. The defendants by threats that they would ship ice to Newton and put wagons on the streets there to dispose of their ice and cause the Newton company to lose money, deterred the Newton company from shipping plaintiff any more ice, and for a time at least broke up both the plaintiff's ice business as well as his meat market, whereby the defendants obtained a monopoly and control of the ice business in Morganton and sold ice at the minimum price to the public of 50 cents per 100 pounds.

Laws 1907, ch. 218, now Pell's Revisal, 3028a, subsec. (b), made it unlawful for [HN1](#) "any person, firm, corporation, or association to directly or indirectly destroy or willfully injure, or undertake to destroy or injure the business of any opponent or business rival in the State of [\*153] North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed."

This action was begun when the above section was in force, but chapter 167, Laws 1911, subsection (b), amended the above section by interpolating the words "by *circulating false reports*" tending to [\*\*\*3] damage the credit of said opponent or rival. The effect of the amendment made in subsection (b) by the act of 1911 is to narrow and restrict the forbidden conduct "tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports." Under the act of 1907 all conduct of any nature done with such purpose or intention was made unlawful. Under the act of 1911 no conduct with that purpose or intention is unlawful save only that of "circulating false reports."

The other subsections in the act of 1911 apply only when the [\*\*963] methods forbidden are: (a) Sales on condition that purchasers shall not deal with competitors. (c) Destruction or injury by reason of lowering price. (d) Lowering or raising price with purpose of increasing profit when rival is destroyed. (e) Differentiating prices with intent to injure business of another. (f) Agreements not to buy or sell in certain territory with intention of preventing competition. (g) Conspiracy to keep down or put up prices. (h) Solicitation [\*\*\*4] of trade, patronage, or goodwill by means of false statements. The conduct alleged against the defendants in this case is therefore not prohibited by the antitrust act of 1911.

Section 11 of the act of 1911 specifically repealed the above act of 1907. This action was begun in 1909. Whatever the purpose in thus restricting the provisions of subsection (b) and in repealing the act of 1907, this action begun before its repeal is saved from its operation by Revisal, 2830, which provides: "The repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred or the recovery of any rights accruing under such statute." The act of 1907 contained the provision, now Pell's Revisal, 3028b, that it shall "not be construed so as to repeal or restrict the common law doctrine [\*154] preventing unlawful combinations in trade and commerce, which is hereby reenacted and declared to be in full force in this State," except as inconsistent with that statute. This last provision is reenacted in the act of 1911, ch. 167, sec. 9.

Therefore this action is governed by the act of 1907, ch. 167, sec. 9; Pell's Revisal, 3028a, subsec. (b), or by the common law existing [\*\*\*5] prior to the adoption of any statute on the subject. Under these the charge of the court and the verdict of the jury should be sustained.

The defendants' first exception is to evidence of the contract which the plaintiff had made with the Newton Ice Company, and the second is to the refusal of the issues tendered by the defendant. The third exception is to the refusal of a nonsuit. These exceptions are without merit, require no discussion, and indeed do not seem to be insisted upon by the defendants in their brief.

The fourth and fifth exceptions are because the court refused to charge that there was no evidence that the defendants at any time knew of the existence of a contract between the plaintiff and the Newton Ice Company by which the latter was to furnish the ice to the former. The witness, Wagoner, of the Newton Ice Company, testified that they could manufacture and sell ice to the plaintiff in any quantities he wished at 17 1/2 cents, and would have done so but for the interference of the defendant, and in fact that they had a contract with the plaintiff to furnish him what ice he needed and ordered and as often as he should order it during the season. The plaintiff's evidence [\*\*\*6] was to the same effect. There was ample evidence to justify the jury to find that the defendants were aware of the contract. Besides, it is not material whether the defendants by threats induced the Newton Ice Company to break a contract to ship ice to the plaintiff or merely prevented them from shipping, if they otherwise would have done so.

Exception six is because the court refused to charge that the plaintiff could recover only actual damages. Exception seven is to the following charge: "It is made unlawful in this State for any person or persons to attempt to injure and break up the business of another for the [\*155] purpose of fixing a rate at which any article of commerce shall be sold; and the court charges you that if you find from the greater weight of the evidence that the defendants attempted to break up the business of the plaintiff and did break up his business, as alleged, and did injure him therein in the selling of ice in Morganton, for the purpose of fixing minimum price at which ice should be sold when his competition was removed, and that, pursuant to this intention, the defendants tried to induce nearby manufacturers of ice not to sell to the plaintiff, and [\*\*\*7] prevented the Newton Ice Company from fulfilling their contract and fixed the price at which ice should be sold at a minimum at retail in Morganton as 50 cents per hundred, when the plaintiff had arranged and was then and there able to sell ice at a less price, you may award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid."

The eighth exception is because the court charged the jury: "If you find that such contract as the plaintiff claims did exist, then if the defendants knowingly and intentionally procured it to be violated, they may be held liable for the wrong, although it may have been done for the purpose of promoting their own business, but in order to justify the finding of punitive damages against the defendant, the act done must have been done with the unlawful purpose to cause such damage or loss without right or justifiable cause on the part of the defendant, which constitutes damage."

The ninth exception is because the court told the jury that under the decision in [Haskins v. Royster, 70 N.C. 601](#), [\*\*\*8] the Court had defined the word "malice" as follows: "The act done must have been done without right or justifiable cause on the part of the defendant, which constitutes malice."

The tenth and last exception is because the court charged that it was held in [Hayes v. R. R., 141 N.C. 195, 53 S.E. 847](#), Brown, J.: "This Court has said, in many cases, that [HN2](#)[<sup>↑</sup>] punitive damages may be allowed [\*\*964] or not, as the jury see proper; but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accomplished [\*156] by fraud or malice, or recklessness or other unlawful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury, not only as to the allowance of damages, which is sometimes called smart money or punitive damages--not only as to the allowance, but as to the amount that is allowed."

Upon examination of the foregoing instructions they are found to be a correct exposition of the law on the subject.

The defendants insist that there was error in allowing the jury to consider the question of exemplary or punitive damages, and particularly urge that [\*\*\*9] there was error in instructing the jury that they could "award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid." But construed in connection with the context and with the whole charge, this exception is hypercritical. The conduct with which the defendants were charged and of which the jury, in response to the first three issues, find that they were guilty made them liable not only for the actual damages sustained, but also for punitive damages, if the jury found, as they must have done, that such conduct was willful and malicious as the latter word was construed in the charge and in the decisions of this Court which were quoted to them, to wit, that the act was done with the unlawful purpose, without right or justifiable cause on the part of the defendants, of interfering with the business of the plaintiff. If there was error, it was against the plaintiff, as the charge should have been that the jury could allow "exemplary damages *in addition to* the actual damages sustained" by the wrongful act of the defendants.

There [\*\*\*10] is no error, and the defendants are not entitled to a new trial. It is, however, singular, that with numerous and glaring instances of the violation of law and right, in the manner herein shown by other parties and to a far vaster extent in the twenty-one years since this statute was passed, and indeed in violation of the common law, which punishes such offenses, that this case, in which a small infraction of the law is involved, is the only one that has come to this Court. The enforcement [\*157] of the law and the protection of the plaintiff and the public in this instance is noteworthy when with a statute so widely known and discussed and when the evil has been so great and manifest there has been no attempt to enforce the law in other cases.

No error.

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## **United States v. Union P. R. Co.**

Supreme Court of the United States

Argued April 19, 22, 23, 1912. ; December 2, 1912, Decided

No. 446.

**Reporter**

226 U.S. 61 \*; 33 S. Ct. 53 \*\*; 57 L. Ed. 124 \*\*\*; 1912 U.S. LEXIS 2131 \*\*\*\*

UNITED STATES v. UNION PACIFIC RAILROAD COMPANY. <sup>1</sup>

**Prior History:** [\*\*\*\*1] APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

THE facts, which involve the validity under the Sherman Anti-trust Act of 1890 of the purchase by the Union Pacific Railroad Company of a dominant interest of the stock of the Southern Pacific Company, and whether the same was a combination in restraint of interstate commerce within the purview of the act, are stated in the opinion.

### **Core Terms**

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stock, railroad, Northern, interstate commerce, rates, roads, transportation, dominating, acquire, decree, destroying, connections, coast, restraint of trade, commerce, freight, traffic, route, effectually, Steamship, restrain, cases, act of congress, combinations, interstate, extending, carrying, effected, lines, interstate trade

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Transportation Law > Rail Transportation > Lands & Rights of Way

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN1[] Regulated Industries, Transportation**

The Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof.

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<sup>1</sup> See also p. 470, post.

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[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Transportation Law > Interstate Commerce > Federal Powers](#)

## [\*\*HN2\*\*](#) **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, to destroy or restrict free competition in interstate commerce is to restrain such commerce.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

## [\*\*HN3\*\*](#) **Antitrust & Trade Law, Sherman Act**

A combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act](#)

## [\*\*HN4\*\*](#) **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This general phraseology embraces all forms of combination, old and new.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Governments > Legislation > Interpretation](#)

## [\*\*HN5\*\*](#) **Antitrust & Trade Law, Sherman Act**

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting the Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, and the courts should construe the law with a view to effecting the object of its enactment.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Energy & Utilities Law > Utility Companies > Rates > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

**HN6** [down] **Antitrust & Trade Law, Sherman Act**

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.

Antitrust & Trade Law > Sherman Act > General Overview

**HN7** [down] **Antitrust & Trade Law, Sherman Act**

In determining the validity of a combination a court has a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

**HN8** [down] **Sherman Act, Remedies**

The remedies provided in the Sherman Antitrust Act of 1890, 26 Stat. 209, c. 647, generally speaking, are two-fold in character: 1st. To forbid the doing in the future of acts like those which the court has found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

**Lawyers' Edition Display****Headnotes**

Monopoly -- combination by carriers -- stock control. --

Headnote:

A combination which places railroads engaged in interstate commerce in such a relation as to create a single dominating control in one corporation whereby natural and existing competition in interstate commerce is unduly restricted or suppressed constitutes a restraint of interstate commerce forbidden by the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), whether accomplished through a holding company or through a direct transfer of a dominating stock interest from one company to the other.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

Monopoly -- combination by carriers -- stock control. --

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Headnote:

A purchase by one railway company of a dominating stock interest in another, though legal in the state where made, and within corporate powers conferred by state authority, cannot escape condemnation under the Sherman anti-trust act of July 2, 1890, if it contravenes the prohibitions of that statute against combinations and conspiracies in restraint of trade, enacted by Congress in the exercise of its supreme authority over interstate commerce.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

Monopoly -- combination by carriers -- stock control. --

Headnote:

The acquisition by the Union Pacific Railroad Company, then operating a line from Missouri river points to Portland, and thence to San Francisco by steamship connection, of 46 per cent of the outstanding capital stock of the Southern Pacific Company, with the intent and result, not only of securing the California connection at Ogden over the Central Pacific line, and thus effecting such a continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco, as was contemplated by the acts of July 1, 1862 (12 Stat. at L. 489, chap. 120), July 2, 1864 (13 Stat. at L. 356, chap. 216), and June 20, 1874 (18 Stat. at L. 111, chap. 331, U. S. Comp Stat. 1901, p. 3577), but of obtaining the dominating control of the entire Southern Pacific system, consisting of lines by water and rail, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to Panama, and from San Francisco to the Orient, and a half interest in another line between the two latter points, which system was actively competing with the purchasing road for interstate business, large in volume, though small in comparison with the total traffic carried, creates, contrary to the act of July 2, 1890, a combination in restraint of interstate trade.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

Injunction -- against monopolies -- scope of relief. --

Headnote:

The Federal district court, in relieving against a combination in restraint of interstate trade, created contrary to the act of July 2, 1890, by the acquisition by the Union Pacific and Central Pacific lines from inant stock interest in the Southern Pacific Company, a competing railway system, should, by its decree, provide against the right to vote such stock while in the ownership or control of the Union Paeific Railroad Company, or any corporation owned by it, or while held for it by any corporation or person, and forbid any transfer or disposition thereof in such wise as to continue its control, and should enjoin the payment of dividends on the stock while so held, except to a receiver appointed by the court to collect and hold such dividends until disposed of by its decree.

[For other cases, see Injunction, I. g, in Digest Sup. Ct. 1908.]

Appeal -- remanding for further hearing -- dissolution of monopoly. --

Headnote:

Any plan for the disposition of the shares of stock of the Southern Pacific Company, found by the Federal Supreme Court to have been acquired by the Union Pacific Railroad Company, contrary to the act of July 2, 1890, prohibiting combinations in the restraint of interstate trade, must be such as effectively to dissolve the unlawful combination, and must be subject to the approval and decree of the district court, which shall proceed, upon the presentation of any plan, to hear the government and the defendants, and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views of the Supreme Court.

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[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

Appeal -- remanding for further hearing -- dissolution of monopoly. --

Headnote:

Nothing in the decision of the Federal Supreme Court that the acquisition by the Union Pacific Railroad Company of a dominant stock interest in the Southern Pacific Company constitutes a restraint of interstate commerce forbidden by the act of July 2, 1890, should be construed as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for permitting the Union Pacific Company to retain the California connection at Ogden over the Central Pacific line, and thus effect such a continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco as was contemplated by the acts of July 1, 1862, July 2, 1864, and June 20, 1874, or as preventing the court from adopting and giving effect to any such plan so presented.

[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

Appeal -- remanding for further hearing -- dissolution of monopoly. --

Headnote:

Plans for dissolving a combination created by the purchase by the Union Pacific Railroad Company of a dominant stock interest in the Southern Pacific Company, which the Federal Supreme Court finds to constitute a restraint of interstate commerce forbidden by the act of July 2, 1890, should be presented to the Federal district court within three months from the receipt of the mandate of the Supreme Court, failing which, or upon the rejection by the court of plans submitted within that period, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve the unlawful combination.

[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

## Syllabus

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The purchase by the Union Pacific Railroad Company of forty-six per cent of the stock of the Southern Pacific Company, with the resulting control of the latter's railway system by the former, is an illegal combination in restraint of interstate trade within the purview of the Sherman Anti-trust Act of 1890 and must be dissolved.

The Sherman Anti-trust Act of July 2, 1890, 26 Stat. 209, c. 647, applies to interstate railroads which are among the principal instrumentalities of interstate commerce.

The Sherman Act is intended to reach and prevent all combinations which restrain freedom of interstate trade, and should be given a reasonable construction to this end.

The opinions in Standard Oil Co. v. United States and United States v. American Tobacco Co., 221 U.S. 1 and [\*\*\*2] 106, contain no suggestion that the decisions of the court in the Trans-Missouri and Joint Traffic Cases were not correct in holding the combinations involved to be illegal while applying the rule that the statute should be reasonably construed.

The Sherman Law prohibits the creation of a single dominating control in one corporation whereby natural and existing competition in interstate trade is suppressed; such prohibition extends to the control of competing interstate railroads effected by a holding company as in the Northern Securities Case and to the purchase by one of two competing railroad companies of a controlling portion, even if not, as in this case, a majority of the stock of the other.

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The Sherman Law, in its terms, embraces every contract or combination in form of trust or otherwise or conspiracy in restraint of interstate trade.

Congress is supreme over interstate commerce, and a combination which contravenes the Sherman Law is illegal although it may be permissible under, and within corporate powers conferred by, the laws of the State where made.

Courts should construe the Sherman Law with a view to preserve free action of competition in interstate trade, which [\*\*\*\*3] was the purpose of Congress in enacting the statute.

Competition is the striving for something which another is actively seeking and wishes to gain.

Competition between two transcontinental railway systems such as the Union Pacific and Southern Pacific includes not only making of rates but the character of service rendered and accommodation afforded; and the inducement to maintain points of advantage in these respects is greater when the systems are independent than when the corporation owning one of the systems also dominates and controls the other.

The Union Pacific and Southern Pacific are competing systems of interstate railways and their consolidation by the control of the latter by the former through a dominating stock interest does, as a matter of fact, abridge free competition, and is an illegal restraint of interstate trade under the Sherman Law.

In this case held, that while there was a great deal of non-competitive business, a sufficiently large amount of competitive business was affected to clearly bring the combination made within the purview of the Sherman Law.

In this case also held, that the necessity of the Union Pacific to obtain an entrance to San Francisco [\*\*\*\*4] and other California points over the lines of the Southern Pacific was not such as to justify the combination complained of in this case in view of the provisions for a continuous railroad to the Pacific Coast and for interchange of traffic without discrimination contained in the acts of July 1, 1862, 12 Stat. 489, 495, § 12, c. 120, and of July 2, 1864, 13 Stat. 356, 362, § 15, c. 216.

Doubtless courts could restrain one railroad constructed under the acts of July 1, 1862, and July 2, 1864, from making discriminations, contrary to the provisions of those acts in regard to interchange of traffic, against another railroad also constructed under those acts.

The obligation to keep faith with the Government in regard to management of railroads constructed under acts of Congress continues notwithstanding changed forms of ownership and organization, as does also continue the legislative power of Congress concerning such railroads.

Although a railroad corporation may lawfully acquire that portion of another railroad which connects, but does not compete, with any part of its own system, it may not acquire the entire system a substantial portion of which does compete with its lines.

[\*\*\*\*5] The effect of such a purchase and its legality under the Sherman Law may be judged by what was actually accomplished, and the natural and probable consequences of that which was done.

In determining the validity of a combination the court may look to the intent and purpose of those conducting the transaction and to the objects had in view.

While in small corporations a majority of stock may be necessary for control, in large corporations, where the stock is distributed among many stockholders, a compact united ownership of less than half may be ample to control and amount to a dominant interest sufficient to effect a combination in restraint of trade within a reasonable construction of the Sherman Law.

In applying the general rules as to relief under the Sherman Law as declared in *Standard Oil Co. v. United States, 221 U.S. 1, 78*, the court must deal with each case as it finds it; and where the combination has been effected by purchase by one corporation of a dominant amount of stock of its competitor the decree should provide an

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injunction against the right to vote stock so acquired, or payment of dividends thereon except to a receiver, and any plan for disposition of the [\*\*\*6] stock should be such as to effectually dissolve the unlawful combination.

Whether the decree can provide for the purchase by the Union Pacific of such portions of the Southern Pacific as are only connecting and are not competitive and which effect a continuous line to San Francisco, not now determined; but leave granted to the District Court to consider any plan proposed to effect such results.

Unless plans for dissolution are presented to, and affirmed by, the District Court within a reasonable period, in this case three months, that court should proceed to dissolve the combination by receiver and sale.

The decree below, dismissing the bill generally, being affirmed by this court as to all matters other than the purchase of Southern Pacific stock, is reversed in part and the District Court retains its jurisdiction over the cause to see that the decree outlined by this court in this opinion is made effectual. (See also p. 470, post.)

188 Fed. Rep. 102, reversed in part.

**Counsel:** Mr. Cordenio A. Severance, The Attorney General and Mr. Frank B. Kellogg, for the United States, appellant:

The maintenance of free competition among railways has become the settled-policy of the Nation.

[\*\*\*7] The Interstate Commerce Act, in its provisions against contracts, agreements, or combinations between common carriers for pooling, enforces the competitive principle.

The Sherman Law, as construed by the courts, is directed against all attempts to suppress competition among interstate carriers or to monopolize interstate commerce. National Cotton Oil Co. v. Texas, 197 U.S. 115; Northern Securities Co. v. United States, 193 U.S. 197; United States v. Standard Oil Co., 173 Fed. Rep. 177; United States v. Joint Traffic Ass'n, 171 U.S. 505; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290.

This policy has found expression in the constitutions and laws of thirty-seven States and two Territories.

The courts have recognized and enforced the policy, both under statutory and constitutional provisions, and also in the absence of such provisions. Central R.R. Co. v. Collins, 40 Georgia, 582; Clarke v. Central R. & B. Co., 50 Fed. Rep. 338; Commonwealth v. South Penn Road, 1 Pa. Co. Ct. Rep. 214; Continental Securities Co. v. Interborough R.T. Co., 165 Fed. Rep. 945; Currier v. Ry. Co., 48 N.H. 322; East St. Louis Connecting Ry. v. Jarvis, 92 Fed. Rep. 735; East Line and Red [\*\*\*8] River Co. v. Texas, 75 Texas, 434; Edwards v. Southern Ry. Co., 66 S. Car. 277; Gulf, Col. & S. Fe R.R. Co. v. Texas, 72 Texas, 404; Hamilton v. Savannah, &c. Ry., 49 Fed. Rep. 412; Langdon v. Branch, 37 Fed. Rep. 449; Louisville & Nash. R.R. Co. v. Kentucky, 97 Kentucky, 675; S.C., 161 U.S. 677; Morrill v. Railway Co., 55 N.H. 531; Pearsall v. Great Northern Ry., 161 U.S. 646; Penn. R.R. Co. v. Commonwealth, 7 Atl. Rep. 368, 374; State v. Vanderbilt, 37 Oh. St. 590; Stockton v. Central R.R. of N.J., 50 N.J. Eq. 52; Tex. & Pac. Ry. Co. v. So. Pac. Ry., 41 La. Ann. 970; Yazoo &c. Ry. Co. v. Southern Ry. Co., 83 Mississippi, 746.

It is immaterial that one of two competing roads may be organized under the laws of another State or situated beyond the borders of the State having the prohibition. Currier v. Ry. Co., 48 N.H. 322; Investigation into Union Pacific and Southern Pacific, 12 I.C.C. Rep. 347; Morrill v. Railway Co., 55 N.H. 531; Union Pacific v. Mason City & Ft. Dodge Ry. Co., 199 U.S. 160; United States v. Union Pacific R.R. Co., 188 Fed. Rep. 121.

Prior to the acquisition of the stock of the Southern Pacific Company by the Union Pacific the lines of those two systems were [\*\*\*9] competitive, and such acquisition, having eliminated such competition, was therefore in restraint of trade and in violation of the Anti-trust Act. East St. Louis Connecting Ry. v. Jarvis, 92 Fed. Rep. 735; East Line and Red River Co. v. Texas, 75 Texas, 434; East Line and Red River Co. v. Rushing, 69 Texas, 306; Gulf, Col. & S. Fe R.R. Co. v. Texas, 72 Texas, 404; Harriman v. Northern Securities Co., 197 U.S. 244; Kimball v. A., T. & S.F. Ry. Co., 46 Fed. Rep. 888; Louis. & Nash. R.R. Co. v. Kentucky, 97 Kentucky, 675; S.C., 161 U.S. 677; Northern Securities Co. v. United States, 193 U.S. 197; Pearsall v. Great Northern Ry., 161 U.S. 646; Penna.

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R.R. Co. v. Commonwealth, 7 Atl. Rep. 368, 374; Standard Oil Co. v. United States, 221 U.S. 1; State v. Montana Ry. Co., 21 Montana, 221; State v. Vanderbilt, 37 Oh. St. 590; Stockton v. Central R.R. of N.J., 50 N.J. Eq. 52; Tex. & Pac. Ry. Co. v. Southern Pacific Ry., 41 La. Ann. 970; United States v. Am. Tobacco Co., 221 U.S. 106; United States v. Joint Traffic Ass'n, 171 U.S. 505; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 302; United States v. Trans-Missouri Freight Ass'n, 58 Fed. Rep. 64; United States v. Union Pac. R.R. [\*\*\*\*10] Co. et al., 188 Fed. Rep. 110.

The clause in the Pacific Railroad Act authorizing the Central Pacific and the Union Pacific to consolidate their lines gave the Union Pacific no right to buy the Southern Pacific. Louis. & Nash. R.R. Co. v. Kentucky, 161 U.S. 677; Pearsall v. Great Northern Ry., 161 U.S. 646; Un. Pac. v. Mason City & Ft. Dodge Ry. Co., 199 U.S. 160.

The acquisition of the controlling interest in the Southern Pacific system by the Union Pacific tended to suppress competition, and therefore was in restraint of trade; also tended to monopoly, and is in violation of the Sherman Act. Harriman v. Northern Securities Co., 197 U.S. 244; Northern Securities Co. v. United States, 193 U.S. 197; Penna. R.R. Co. v. Commonwealth, 7 Atl. Rep. 368, 374; Stockton v. Central R.R. of N.J., 50 N.J. Eq. 52; United States v. Am. Tobacco Co., 221 U.S. 106.

The ownership by the Union Pacific of less than a majority of the stock in the Southern Pacific, Santa Fe, Northern Pacific, Great Northern, and San Pedro lines tended to suppress competition and create a monopoly and is inhibited by the Sherman Act. Central R.R. Co. v. Collins, 40 Georgia, 582; Gibbs v. Consolidated Gas Co., 130 [\*\*\*\*11] U.S. 408; Loewe v. Lawlor, 208 U.S. 274; Louis. & Nash. R.R. Co. v. Kentucky, 161 U.S. 677; Northern Securities Co. v. United States, 193 U.S. 197; Pearsall v. Great Northern Ry., 161 U.S. 646; Penna. R.R. Co. v. Commonwealth, 7 Atl. Rep. 368, 374; People v. Chicago Gas Trust Co., 130 Illinois, 268; Salt Co. v. Guthrie, 35 Oh. St. 666; Stockton v. Central R.R. of N.J., 50 N.J. Eq. 52; United States v. Standard Oil Co., 173 Fed. Rep. 179; Standard Oil Co. v. United States, 221 U.S. 1; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290.

The fact that the Union Pacific has, since the commencement of this suit, sold the balance of its stock in the Great Northern and Northern Pacific and in the Santa Fe is no reason why an injunction should not be granted. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290.

The control of the San Pedro road under the circumstances of this case tended to suppress competition and is void, although that line was not completed at the time of the acquisition of the stock therein. Commonwealth v. Beech Creek R.R. Co., 1 Pa. Co. Ct. Rep. 223; Farrington v. Stucky, 165 Fed. Rep. 325; Hamilton v. Savannah, Florida & W. Ry., 49 Fed. Rep. 412; [\*\*\*\*12] Hartford & New Haven R.R. Co. v. N.Y. & New Haven R.R. Co., 3 Robertson (N.Y. Superior Court), 411; Inter. Com. Comm. v. Phila. & Reading R.R. Co., 123 Fed. Rep. 969; Langdon v. Branch, 37 Fed. Rep. 449; Penna. R.R. Co. v. Commonwealth, 7 Atl. Rep. 368, 374; State v. Hartford & New Haven R.R. Co., 29 Connecticut, 538; Thomsen v. Union Castle Mail Steamship Co., 166 Fed. Rep. 251; United States v. Patterson, 59 Fed. Rep. 280; United States v. Standard Oil Co., 173 Fed. Rep. 177; Standard Oil Co. v. United States, 221 U.S. 1.

The combination of steamship lines between American and foreign ports for the purpose of suppressing competition is within the inhibitions of the Sherman Act. Thomsen v. Union Castle Mail S.S. Co., 166 Fed. Rep. 251.

The Government's brief contains a synopsis of the constitutional and statutory provisions of the several States and Territories on the subject of parallel and competing lines.

Mr. N. H. Loomis and Mr. P. F. Dunne for appellees:

The object which the Union Pacific had in view in acquiring an interest in the Southern Pacific, was not to suppress competition or to obtain a monopoly, but to secure a permanent relationship with the Southern Pacific [\*\*\*\*13] which would insure for it a perpetual through line to San Francisco, as contemplated by Congress, and give to it as well, an entrance into all the traffic producing centers of California.

As to the conception which Congress and the public had, of a single, indivisible line of railroad extending from the Missouri River, with continuous rails to the Pacific Ocean, see act of July 1, 1862. Not only did Congress provide

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for the permanent physical continuity of the proposed railroads, but gave power to any two or more of them to consolidate and thus place themselves under a single management. §§ 10, 12, 16, act of July 1, 1862, 12 Stat. 497; § 16, act of July 2, 1864, 13 Stat. 362. See *Ames v. Kansas, 111 U.S. 449.*

The hope and expectation of a single, indivisible line of railroad from the Missouri River to the Pacific Ocean could not be fully realized as long as the ownership was vested in separate corporations and the operation in different managements.

It is clear from the testimony that the officials of the Union Pacific regarded the Southern Pacific not as a competitive, but as a connecting line.

The testimony of the witnesses and the surrounding circumstances demonstrate [\*\*\*\*14] that the object and intent of purchasing the stock of the Southern Pacific, was to protect the integrity of the through line from the Missouri River to the Pacific coast and to procure for the Union Pacific a permanent entrance into interior California points; it was not to obtain a competing line or to stifle competition.

This intent was shown by betterments. As to deducting intent from actions of the parties see *United States v. American Tobacco Company, 221 U.S. 106.*

The Southern Pacific was not bound to agree to joint tariffs under any law in force when the stock purchase was made.

There was no law in 1901 by which that company could be forced to grant other than local rates between Ogden and San Francisco on traffic tendered to it by the Union Pacific; nor did the Pacific Railroad Act of July 2, 1864, which required the Union Pacific and the Central Pacific, as well as the other roads included therein, to be operated and used for all purposes of communication and travel so far as the public and Government are concerned as one continuous line extend to requiring joint tariffs. L.R. &c. R.R. Co. v. E.T. Va. & G., 2 I.C.C. Rep. 456, and 3 I.C.C. Rep. 1, 6.

This court has [\*\*\*\*15] held that the fixing of rates is a legislative power which cannot be exercised by the courts. *The Express Cases, 117 U.S. 1, 28;* *Central Stock Yards v. Louisville & C. Ry. Co., 192 U.S. 568, 571;* *Oregon Short Line & U.N. Ry. Co. v. Northern Pacific R. Co., 51 Fed. Rep. 465, 474;* *Little Rock & M.R. Co. v. St. Louis S.W. Ry. Co., 63 Fed. Rep. 775.*

The want of power to compel railroads to enter into such agreements led to the adoption of the Hepburn Act, §§ 15, 34 Stat. 590, and the Interstate Commerce Commission was authorized to establish through routes, fix rates and to determine the division of the through rate between connecting carriers; but as to the law prior thereto, see *Southern Pacific v. Int. Com. Comm., 200 U.S. 536, 553;* *Chicago & N.W. Ry. v. Osborne, 52 Fed. Rep. 915.*

The want of legal power on the part of the Union Pacific to compel the Southern Pacific to recognize the usual incidents of a through route and the discretion possessed by the Southern Pacific to do as its own welfare might dictate with respect to through rates, gave to that company additional advantages, and made it possible for the Southern Pacific to more effectively control the situation.

The so-called [\*\*\*\*16] Portland route to San Francisco is not a practicable one. Union Pacific officials had frequently considered the opening of the Portland gateway for San Francisco traffic, but had always concluded that it would be an unprofitable move and therefore it was not done. One serious objection was the length of the line. Portland is substantially the same distance from Omaha as San Francisco is, and the rate to San Francisco through Portland would have to be the same as the rate via the short, direct line through Ogden; and the rate to Portland was the same as the rate to San Francisco. The Union Pacific would receive no greater revenue for hauling freight through Portland to San Francisco than it would for the same freight delivered at Portland.

As a matter of fact the Portland route to San Francisco has never been used, although it has been open, physically, since 1884.

The most conclusive point, showing that the Portland route to San Francisco is and always has been, an impracticable one, is the fact that the Northern rail lines terminating at Seattle, Tacoma and Portland have never been able to carry any substantial amount of transcontinental traffic to or from San Francisco.

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[\*\*\*\*17] The Government's argument is that the Portland route to San Francisco could have been used by the Union Pacific, in view of the successful operation of the Sunset line between New York and San Francisco via New Orleans by the Southern Pacific. The conditions surrounding the operation of the Sunset route are so dissimilar, however, that it cannot be regarded as a parallel case. In the first place it is operated under a single management from New York to San Francisco and California business is given preferred attention. The freight is carried by boat from New York to New Orleans without stop, the California freight quickly transferred to cars waiting upon the wharves and transported in trainload lots to Los Angeles and San Francisco. It is a service which cannot be duplicated by any other broken water and rail line.

The traffic upon which complainant mainly relies to establish competitive relations between the Union Pacific and the Southern Pacific in 1901, was traffic between the Atlantic seaboard and the middle west on the one hand and California points on the other. As to all this traffic the Union Pacific and Southern Pacific were not competitors, but connections, and in [\*\*\*\*18] a sense, partners.

A railroad is not a competitor of its connections on business handled by them jointly under a through tariff.

*Southern Pacific v. Interstate Commerce Commission, 200 U.S. 536.*

*In the Standard Oil Case, 221 U.S. 1, 80,* this court recognized the legality of combining various pipe lines, in order to make a continuous line, and declared that an agreement or combination so to do would not be repugnant to the Sherman Act.

Some of the reasons why Union Pacific was not a competitor of Southern Pacific's Sunset route are that it was a connection of the Southern Pacific, handling through business on a joint tariff, to which the Southern Pacific had voluntarily agreed. In entering upon this relationship and agreeing to the joint tariff, the Union Pacific knew that the Southern Pacific possessed another line via New Orleans and that it would endeavor to route traffic that way and get the long haul whenever circumstances permitted it. But notwithstanding that fact the Union Pacific was willing to continue the relationship. As a matter of fact it had no choice about the matter; it was compelled to submit to these conditions. The Southern Pacific was not only a partner [\*\*\*\*19] but a dominant partner -- a partner with which the Union Pacific was required to associate or go out of business. With no rails of its own into California and no other railroad but the Southern Pacific to handle its California traffic, it was impossible for it to occupy the position of an independent, hostile competitor.

The same principle is also controlling when we consider that as between the Union Pacific and the Southern Pacific, San Francisco is a local non-competitive point on the Southern Pacific, situated eight hundred miles distant from the western terminus of the Union Pacific.

In the next place, the Government's argument assumes that two parts of the same railroad can compete with each other; that is to say, that that portion of the Southern Pacific Railroad extending from San Francisco to Ogden can compete with that portion thereof extending from San Francisco to New York.

This assumption cannot be correct, as it is obvious that a railroad company cannot compete with itself.

Furthermore, the Union Pacific was a constituent member of the Ogden route before the purchase, and it continued as such thereafter. If the Ogden route, including the Union Pacific, competed [\*\*\*\*20] with the Sunset route before the purchase, it still competes with it; if it did not compete with it before the purchase, it does not compete with it now. Competitive conditions between the two routes have not been changed by placing the Union Pacific and the Southern Pacific under a common management.

As the Southern Pacific controlled the routing of California business, and the Union Pacific could obtain the business through the friendly interposition of that company only, it cannot be maintained that the Union Pacific was a competitor of the company it was dependent upon to get the business.

If the Southern Pacific was a competitor of the Union Pacific on California business, because of the Sunset route, and the Union Pacific cannot own the stock of the Southern Pacific, then it will be impossible for any of the large railroads of the country to extend their lines by purchase or consolidation. Every railroad with more than one

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gateway is in the same predicament. If the Government were devising a scheme to prevent the consolidation of all railroads, regardless of whether they were parallel or connecting lines, a better one could not have been concocted than the theory adopted [\*\*\*21] in this case.

Another reason why the Union Pacific should not be considered as a competitor of the Southern Pacific on transcontinental business to and from California points is that it is but one link in the all-rail through line from the Atlantic seaboard to San Francisco, while the Southern Pacific has a continuous line from New York to San Francisco, under a single management. The Union Pacific is dependent not only on the Southern Pacific on the west, but on its eastern connections as well, to fix a through rate or to maintain a through service; in itself it could do nothing without the voluntary cooperation of the lines extending east from Omaha or Kansas City.

If one line is the competitor of another merely because both of them happen to be links in systems of through routes which compete with each other, practically every railroad in the United States is a competitor of every other railroad in the United States, and under those conditions not one line could purchase or consolidate with another line because of its being a competitor.

Complainant's testimony as to the existence of separate soliciting agencies and of the consolidation of certain of those agencies subsequent [\*\*\*22] to 1901 does not prove that the Southern Pacific and Union Pacific were in competition with each other.

All the large railroad systems in the United States have several gateways, representing different routes, through which their traffic may be handled; for instance, the New York Central, Pennsylvania and Baltimore & Ohio railroads have among others, their St. Louis and Chicago gateways; the Chicago, Milwaukee & St. Paul, its Omaha, Kansas City and St. Paul gateways; the Missouri Pacific, its Pueblo and El Paso gateways; the Southern Railway, its Memphis and New Orleans gateways; the Louisville & Nashville, its St. Louis, Memphis and New Orleans gateways.

It is the effort of soliciting agents to secure business through these different gateways, as varying circumstances require them to solicit in favor of the one or the other, which induces the belief that there is competition between the routes represented by them, even though the agents may be working in the interests of the same carrier. A brief consideration of the proposition will disclose its fallacy.

Complainant's witnesses who expressed the opinion that the Union Pacific and Southern Pacific were competing upon California [\*\*\*23] business did so entirely upon the assumption that the rivalry of soliciting agents was the competition of railroads. The testimony shows, however, how fallacious such testimony is and demonstrates that the strife for business may merely be the competition which is constantly going on between agents in the service of the same principal.

As the work of soliciting agents against each other may be in pursuance of a common employment and the results of their labors for the benefit of the same railroad or combination of connecting railroads, testimony as to the rivalry of soliciting agents cannot be used to show the existence of competition between the routes which they represent.

The fact that two railroads have separate soliciting agents does not necessarily prove that the railroads they represent are competitors.

The Government itself asserts that the Union Pacific and Southern Pacific are not competing at the present time and yet it appears that there are separate soliciting agencies representing those companies at New York and San Francisco and other points.

The other alleged competitive routes of minor importance did not make the Union Pacific and the Southern Pacific competitors [\*\*\*24] in any direct and substantial sense.

In order to bring the competition within the inhibition of the Sherman Act, it must be direct and substantial. Competition which is indirect and remote is not competition within the meaning of the statute; traffic unsubstantial in amount is not included within the terms of the law. When the Government seeks to set aside transactions as in restraint of trade and commerce, the burden rests upon it not only to prove the restraint of commerce, but the restraint of a substantial volume of commerce. It must affirmatively show that the competition was of some practical importance and that the restraint of commerce involved was unreasonable.

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The Sherman Act was not intended to apply to combinations whose effect upon interstate commerce was indirect or incidental only, or which might remotely affect that commerce. [United States v. Joint Traffic Assn., 171 U.S. 505, 568.](#)

This court puts contracts which only indirectly and incidentally restrain interstate commerce upon the same basis with respect to validity as legislation of the States, of which there are numerous examples, which incidentally and indirectly affect interstate commerce and yet are [\*\*\*\*25] valid because it is not a direct regulation of such commerce. [Anderson v. United States, 171 U.S. 604, 615,](#) and [Addyston Pipe and Steel Co. v. United States, 175 U.S. 211, 229.](#)

This court held in one of the most important and farreaching decisions ever announced by it, that the Sherman Act does not prohibit every contract, combination, etc., in restraint of trade, but only those which unreasonably restrain trade and commerce. [Standard Oil Co. v. United States, 221 U.S. 1;](#) [United States v. Am. Tobacco Co., 221 U.S. 106;](#) [Cincinnati Packet Co. v. Bay, 200 U.S. 179;](#) [Phillips v. Cement Co., 125 Fed. Rep. 594;](#) [Kimball v. Atchison & C. Ry. Co., 46 Fed. Rep. 888;](#) State v. Cent. of Ga. Ry., 109 Georgia, 716.

Treating all of the traffic over the various routes of minor importance as competitive and considering it in the aggregate, it is a mere bagatelle when compared with the entire traffic of the Union Pacific and the Southern Pacific. It amounts to only 0.88 per cent of the tonnage of the Southern Pacific and to only 3.10 per cent. of the tonnage of the Union Pacific, while the revenue of the Southern Pacific from this traffic aggregates only 1.25 per cent of its total revenue, an amount [\*\*\*\*26] which it is not conceivable that the Union Pacific would have cared to invest millions in Southern Pacific stock to suppress. See [Rogers v. Nashville &c. Ry. Co., 91 Fed. Rep. 299,](#) and cases supra.

The purchase of the stock of the Northern Pacific and the Santa Fe by defendants, and the settlement of right of way controversies with the Clark interests, which resulted in the joint construction and ownership of the San Pedro road, were not acts performed with the object of suppressing competition or of acquiring a monopoly, nor did they have that effect.

A review of the entire record demonstrates that a monopoly has not been created, that there has been no suppression of competition, and that there was no conspiracy to effectuate either purpose. The record shows, on the other hand, that the interest which the Union Pacific acquired in the Southern Pacific has been of direct and substantial benefit to trade and commerce.

The Union Pacific ownership of Southern Pacific stock was not a control, and did not import, as a matter of law, the power in any view of the case to restrict competition. The Union Pacific merely became a minority stockholder, having by its first purchase acquired [\*\*\*\*27] only about 37 1/2 per cent of the stock and never acquired a majority. While the Union Pacific may have been able to keep control with less than a majority of stock there was always a possibility that it could not do so. Stock control condemned by this court has been of an actual majority. [Pearsall v. Great Northern Ry., 161 U.S. 671;](#) [Northern Securities Case, 120 Fed. Rep. 726;](#) [S.C., 193 U.S. 106;](#) Noyes on Intercorporate Relations, § 294; and see [Pullman Co. v. Mo. Pac. R.R., 115 U.S. 578.](#)

The acquisition and ownership by the Union Pacific of the Huntington stock by out and out sale to it by a stockholder in the market, is not, as such, within the power of Congress to regulate, under the [commerce clause of the Constitution.](#) [United States v. Knight Co., 156 U.S. 1.](#)

The acquisition and ownership of property by a corporation or citizen of a State is not interstate commerce. The Union Pacific is a Utah corporation and had power to purchase stock of the [Southern Pacific Nat. Bank v. Matthews, 98 U.S. 628;](#) [St. Louis R.R. v. Terre Haute R.R., 145 U.S. 407;](#) [Paul v. Virginia, 8 Wall. 168.](#)

A state corporation is subject to regulation by Congress only to the extent and by the measure [\*\*\*\*28] of its engagement in interstate commerce. [Employers' Liability Cases, 207 U.S. 463, 499.](#) See [Ashley v. Ryan, 153 U.S. 436, 442;](#) [Louisville & Nashville Case, 161 U.S. 677;](#) [Mobile &c. R.R. Co. v. Mississippi, 210 U.S. 187, 202.](#)

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The authority of the several States to permit railroads within their respective territory to consolidate on terms prescribed by each is inconsistent with the assertion of a power of Congress to the same effect, as it could only prescribe a uniform rule.

The purchase by the Union Pacific of the Huntington stock by out and out sale is not within the purview of the Sherman Law. An out and out sale is quite distinguishable from a collateral stipulation or covenant running with the sale.

The combination or conspiracy prohibited by the Sherman Law is essentially a process terminable in future. It is not like a sale completed when made. *Mitchell v. Reynolds*, 1 P. Wms. 181. For some of these collateral agreements to sales see *Diamond Match Co. v. Roeber*, 106 N.Y. 473; *Nordenfeldt v. Maxim*, App. Cas., 1904, 535; *Bancroft v. Embossing Co.*, 72 N.H. 407; *Packet Co. v. Bay*, 200 U.S. 179.

Something more than the acquisition of a competing property is necessary to [\*\*\*\*29] bring the purchaser and seller within the *Sherman Law. Shawnee Compress Co. Case*, 209 U.S. 434; *Chemical Co. v. Provident Co.*, 64 Fed. Rep. 950; *The Greene Case*, 52 Fed. Rep. 115; *Roller Co. v. Cushman*, 143 Massachusetts, 355, 364; *Oakdale Co. v. Garst*, 28 Atl. Rep. 973. See also *Harriman v. Menzies*, 115 California, 19; *Collins v. Locke*, L.R., 4 App. Cas. 674; *Skrainka v. Scharring-Hausen*, 8 Mo. App. 522; *Leslie v. Lorillard*, 110 N.Y. 519; *Cohen v. Berlin*, 56 N.Y. Supp. 558; *Kellog v. Larkin*, 3 Pinney (Wis.), 123; *Dolph v. Troy Co.*, 28 Fed. Rep. 554; *Mathews v. Associated Press*, 32 N.E. Rep. 981; *Vinegar Co. v. Voehrbach*, 148 N.Y. 58; *Macaulay v. Tierney*, 19 R.I. 255; *Bohn v. Mfg. Co.*, 54 Minnesota, 233; *Cote v. Murphy*, 159 Pa. St. 420; *Ins. Co. v. Bd. of Underwriters*, 67 Fed. Rep. 317; *Nat'l Ass'n v. Cumming*, 170 N.Y. 315; *Vogelen v. Ganter*, 167 Massachusetts, 92, opinion of Holmes, J.

A competitor may be driven out by lawful competition, *Mogul S.S. Co. v. McGregor*, L.R., 23 Q.B.D. 612; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 459; *Bonsack v. Smith*, 70 Fed. Rep. 388, and if so he may also lawfully be bought out by voluntary contract.

Mere size or aggregation by purchase [\*\*\*\*30] does not necessarily amount to violations of the Sherman Law.

The same stockholders may lawfully own a controlling interest in each of two competing corporations. *Bigelow v. Lcalumet Co.*, 167 Fed. Rep. 704, 727.

**Opinion by:** DAY

## Opinion

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[\*79] [\*54] [\*\*\*130] MR. JUSTICE DAY delivered the opinion of the court.

The case was begun in the United States Circuit Court for the District of Utah to enforce the provisions of the so-called Sherman Anti-trust Act of 1890, 26 Stat. 209, c. 647, against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of the late Collis P. Huntington, who had [\*\*55] formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares or about 37 1/2% (subsequently increased to 46%) of the outstanding stock of the Southern Pacific Company. The stock is held for the Union Pacific Company by one of its [\*\*\*\*31] proprietary companies, The Oregon Short Line Railroad Company. The Government contends that the domination over and control of the Southern Pacific Company given to the Union Pacific Company by this purchase of stock brings the transaction within the terms of the Anti-trust Act. A large amount of testimony was taken and the case heard before four Circuit Judges of the Eighth Circuit, resulting in a decree dismissing the bill. *188 Fed. Rep. 102*.

Prior to the stock purchase in 1901 the Union Pacific [\*80] system may briefly be described as a line of railroad from the Missouri River to the Pacific coast, namely, from Omaha, Nebraska, or perhaps more strictly from Council

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Bluffs, Iowa, and from Kansas City, Missouri, to Ogden, [\*\*\*131] Utah, and Portland, Oregon, with various branches and connections, and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the [\*\*\*32] branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by The Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line. The boat line from Portland to San Francisco and to the Orient, The Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the State of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New Orleans through Louisiana, Texas, New Mexico, Arizona, California and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and [\*\*\*33] operated by the Southern Pacific, and later the same ships entered the port of Galveston, [\*81] where also the Southern Pacific reached tidewater, and it had branches extending to various points in northern Texas connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of The Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles in length and connecting at the latter place with the Union Pacific and The Denver & Rio Grande Railroad Company's line. It also had various branches in and about California aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama which, with the Panama Railroad and its boats, constituted the so-called Panama Route.

The contention of the Government is that, prior to the stock purchase, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce, [\*\*\*34] and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific has eliminated competition between these two systems, and that such domination makes the combination one in restraint of trade within the meaning of the first section of the act of Congress of July 2, 1890, and the transaction an attempt to monopolize interstate trade within the provisions of the second section of the act.

In view of the recent consideration of the history and meaning of the act ([Standard Oil and Tobacco Cases, 221 U.S. 1](#) and 106, respectively) it would be superfluous to enter upon any general consideration of its origin and scope. In certain aspects the law has been thoroughly considered and its construction authoritatively settled, and in determining the present controversy we need but [\*82] briefly restate some of the conclusions reached. [HN1↑](#) The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. [United States v. Trans-Missouri Freight Association, 166 U.S. 290](#); [United States v. Joint Traffic Association, 171 U.S. \[\\*\\*\\*35\] 505](#). [\*\*56] The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof. [United States v. Joint Traffic Association, supra](#). In that case an agreement between competing interstate railroads for the purpose of fixing and maintaining rates was condemned.

"It is," said the court (p. 571), "the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In the [Northern Securities Co. v. United States, 193 U.S. 197](#), this court dealt with a combination differing in character from that considered in the Trans-Missouri and Joint [\*\*\*132] Traffic Cases, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually

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destroying [\*\*\*\*36] the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice Harlan, announcing the affirmance of the decree of the Circuit Court said (p. 337):

"In all the prior cases in this court [HN2](#) the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in [\*83] other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the [\*commerce clause of the Constitution\*](#)? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

Mr. Justice Brewer, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended [\*\*\*\*37] to reach and destroy those contracts which were in direct restraint of trade, unreasonable and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy, he declared, might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads, or, viewing the possibilities of combination, the control of the whole transportation system of the country, and, in concluding his concurring opinion, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce -- one in conflict with state law and within the letter and spirit of the statute and the power of Congress."

Of the Sherman Act and kindred statutes, this court, speaking by Mr. Justice McKenna, said in [\*National Cotton Oil Co. v. Texas, 197 U.S. 1\\*\\*\\*\\*381 115, 129\*](#):

[\*84] "According to them, competition not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. [\*United States v. E.C. Knight Co., 156 U.S. 1\*](#); [\*United States v. Trans-Missouri Freight Association, 166 U.S. 290\*](#); [\*United States v. Joint Traffic Association, 171 U.S. 505\*](#); [\*Northern Securities Co. v. United States, 193 U.S. 197\*](#); [\*Swift & Co. v. United States, 196 U.S. 375\*](#)."

In the recent discussion of the history and meaning of the act in the Standard Oil and Tobacco Cases this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished, and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule and there was no suggestion that they had not been correctly decided. In the Tobacco Case, after referring to the previous decision in the Standard Oil Case and the decisions in the Trans-Missouri [\*\*\*\*39] and Joint Traffic Cases, the doctrine was tersely summarized by the Chief Justice, speaking for the court, as follows (p. 179):

"Applying the rule of reason to the construction of the statute, it was held in the [\*\*57] Standard Oil Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain [\*85] the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding [\*\*\*\*40] that they were reasonable, but that the duty to interpret which inevitably arose from the general

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character of the term restraint of trade [\*\*\*133] required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce, -- the free movement of which it was the purpose of the statute to protect."

We take it therefore that it may be regarded as settled, applying the statute as construed in the decisions of this court, that HN3<sup>↑</sup>] a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. Swift & Co. v. United States, 196 U.S. 375.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities Case, the controlling interest in [\*\*\*41] the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. HN4<sup>↑</sup>] The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly [\*86] held this general phraseology embraces all forms of combination, old and new. "In view of the many new forms of contracts and combinations," said the Chief Justice in the Standard Oil Case (p. 59), "which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other, could hardly be conceived. If it is true, as contended by the Government, that [\*\*\*42] a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company and thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was in our opinion within the terms of the statute.

That the purchase was legal in the State where made and within corporate powers conferred by state authority constitutes no defense, if it contravenes the provisions of the Anti-trust Act, enacted by Congress in the exercise of supreme authority over interstate commerce. Northern Securities Co. v. United States, supra, 334; Standard Oil Co. v. United States, supra, 68; United States v. American Tobacco Co., supra, 183.

It is said, however, and this was the view of the majority of the Circuit Judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads, and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, [\*\*\*43] business men and shippers, who, with [\*87] practical unanimity, expressed the view that prior to the stock purchase in question the Union Pacific and Southern Pacific systems were in competition, sharp, well-defined and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific through its agents, advertisements and literature had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have [\*\*58] freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

HN5<sup>↑</sup>] To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement, fixed at the same figure whichever route was used and then apportioned [\*\*\*44] among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of

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representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. [\*\*\*134] The inducement to maintain these points of advantage -- low rates, superiority of service and accommodation -- did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

[\*88] **HN6** The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher [\*\*\*\*45] rates. *United States v. Joint Traffic Association, supra, 577*. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall v. Great Northern Railway Co., 161 U.S. 646, 676; United States v. Joint Traffic Association, supra.*

It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was [\*\*\*\*46] a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a [\*89] negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific Coast did not prevent competition for this traffic. The Union Pacific and its connections were engaged in the same carrying trade, and as a matter of fact were competing for that trade, by all the usual means of competition resorted to by rival railroad systems. As this court said, speaking by Mr. Justice Holmes, in *Swift & Co. v. United States, supra, 398*: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." That commerce, as conducted from the East to the Pacific Coast, was in a substantial [\*\*\*\*47] part the subject matter of rivalry and competition between these two systems. Since the stock transfer the companies have common officers and the rival soliciting agencies have been for the most part abandoned.

It is contended that the Union Pacific was but a connecting road and really had no line to San Francisco, but was dependent upon the Southern Pacific for such terms as it could make over the old Central Pacific line from Ogden to San Francisco. The facts disclose, as we have already said, that the Union Pacific had a line to Portland by way of the Oregon Short Line and the Oregon Railroad & Navigation Company, and thence to San Francisco by steamboat connection. It may be admitted that this was a much longer route than by way of the Ogden connection, and that as a practical matter nearly all of the freight intended for San Francisco and nearby points went over the Ogden route, nevertheless the Portland route was a factor in rate making to the coast, and the testimony shows that the Union Pacific and the Southern [\*\*59] Pacific up to the time of the sale of the stock had been working for many years under a satisfactory arrangement as to rates. It is going too far to say [\*\*\*\*48] that the Union Pacific was entirely at the [\*90] mercy of the Southern Pacific in making rates for freight by way of the Ogden connection because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time. One of the reasons for the Central Pacific leasing its lines to the Southern Pacific, as set forth in the

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lease, was that the Union Pacific had secured control of the Oregon Short Line and thereby obtained an outlet to the [\*\*\*135] Pacific, other than over the Central Pacific, "and thus in that respect placed itself in opposition to the interests of the Central Pacific," and that it was "not only to the best interests of, but absolutely necessary that, the Central [\*\*\*\*49] Pacific Railroad Company, in order to maintain itself against these diversions (of the Union Pacific and others), should be operated in connection with a friendly through line to the waters of the Atlantic."

Nor do we think it can be justly said that because of the connection with the Rio Grande road at Ogden the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. In this connection it is said that since the consolidation, notwithstanding the former published rates are maintained, the favoring attitude of the Southern Pacific to the Union Pacific practically destroyed the carrying trade from Ogden to the East for the Rio Grande system and necessitated the construction by the latter road of a new connection for California points, and that [\*91] such would have been the fate of the Union Pacific upon disagreement as to rates with the Southern Pacific. In reference to this point we think it is pertinent to consider the acts of Congress known as the Pacific Railroad Acts. These acts required the two roads, the Central Pacific and Union Pacific, to be "operated [\*\*\*50] and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line" (12 Stat. 489, 495, act of July 1, 1862, c. 120, § 12), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others . . ." (13 Stat. 356, 362, act of July 2, 1864, c. 216, § 15). They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the Interstate Commerce Acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which [\*\*\*51] might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others, and the purpose of Congress [\*92] to secure a continuous line of road, operating from the Missouri River to the Pacific Coast as one road, is further emphasized in the act of Congress of June 20, 1874, c. 331, 18 Stat. 111, making it an offense for any officer or agent of the companies authorized to construct the roads or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time and transportation, [\*\*\*52] without any discrimination of any kind in favor of or adverse to any or either of said companies. Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter [\*\*60] and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts ([Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co., 163 U.S. 564, 603, 604](#)), and might possibly have resulted in a forfeiture of all rights under the acts of Congress. The obligation to keep faith with the Government continued, as did the legislative power of Congress concerning these roads, notwithstanding changed forms of ownership and organization. Union Pacific Railroad Company v. Mason City &c. [Railroad Co., 199 U.S. 160](#).

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection via Ogden and to avoid the situation which has been termed the [\*\*\*53] "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business [\*93] in California, as it is apparent that much of it would not have gone over the "Sunset" route of the Southern [\*\*\*136] Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the State of California, but this case is not be be

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decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done, and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco [\*\*\*\*54] and Portland and other Pacific Coast points, with various branches and connections, besides a steamship line from San Francisco to Panama and from San Francisco to the Orient and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road.

**HN7** In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view. Swift & Co. v. United States, supra, 396; United States v. St. Louis Terminal, 224 U.S. 383, 395. It appears that at the time the Union Pacific was [\*94] about to raise the means to effect the Southern Pacific stock purchase it authorized the issuance of \$100,000,000 of bonds "for the purpose of meeting present and future financial requirements of the Company," provision [\*\*\*\*55] being made for the use of the proceeds from \$40,000,000 of this amount in the purchase of the Southern Pacific stock, with no designation whatever as to the purpose to which the balance, \$60,000,000, should be applied. It is said that the remaining \$60,000,000 were intended to be used in the acquisition of a part interest in the railroad system of the Chicago, Burlington & Quincy Railway Company, in view of the imminent probability of the purchase of that system by the Northern Pacific Railway Company and the Great Northern Railway Company. As a matter of fact, the Northern Pacific and Great Northern having each secured a half interest in the Burlington, the Union Pacific did acquire a large amount of the Northern Pacific stock with this \$60,000,000. The failure to secure control of the Northern Pacific by acquiring a majority of its common stock resulted in the formation of the Northern Securities Company, terminating in the litigation of the Northern Securities Case and the judgment of this court reported in 193 U.S. 197. When that combination was declared illegal the Union Pacific interests undertook to compel a return of the Northern Pacific stock which they had turned over [\*\*\*\*56] to the Northern Securities Company and opposed a distribution among the stockholders of the latter company of the stock of the Northern Pacific Company and the Great Northern Company which had been put into the combination. That attempt was dealt with in Harriman v. Northern Securities Company, 197 U.S. 244, and of the effect of the return of the Northern Pacific stock to the Union Pacific interests instead of the distribution of the stock and assets of the Northern Securities Company among its stockholders this court said (p. 297):

[\*95] "It is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would [\*\*61] directly contravene the object of the Sherman Law and the purposes of the Government suit.

"The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition."

In view of the testimony we think the [\*\*\*\*57] evident purpose of issuing the \$100,000,000 of bonds was to acquire a fund to be used for the acquisition of the stock of the Southern Pacific, a great competitive system, and also of the stocks of other competing roads.

After acquiring the Southern Pacific stock, Mr. Harriman, who dominated in the affairs of the Union Pacific, became President and Chairman of the Executive Committee of the Southern Pacific Company, with the same ample power which he had in like positions in the Union Pacific Company and the companies owned and controlled by it. These facts cannot be [\*\*\*137] lost sight of in determining the object and scope of the transaction in question, which resulted, as we have said, in that unified control which has in its power the suppression of competition.

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But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent. Which was afterwards somewhat increased and diminished until about 46% of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. [\*\*\*\*58] It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is [\*96] ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46% is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest.

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade within the meaning of the Sherman Act, the question remains, What should be the relief in such circumstances? HN8[<sup>1</sup>] The remedies provided in the statute, generally speaking, were said by this court in the Standard Oil Case, supra, to be two-fold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. [\*\*\*\*59] 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In applying this general rule of relief we must deal with each case as we find it, and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as [\*97] to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the [\*\*\*\*60] court.

As the court below dismissed the Government's bill, it was unnecessary there to consider the disposition of the shares of stock acquired by the Union Pacific Company, which acquisition, we hold, constituted an unlawful combination in violation of the Anti-trust Act. In order to effectually conclude the operating force of the combination such disposition shall be made subject to the approval and decree of the District Court, and any plan for the disposition of this stock must be such as to effectually dissolve the unlawful combination thus created. The court shall proceed, upon the presentation of any plan, to hear the Government and defendants and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views herein expressed.

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and [\*\*62] Galveston to San Francisco and Portland, would [\*\*\*\*61] permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri River to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the Government or any party in interest, if so desiring, from presenting to the District Court a plan for accomplishing [\*98] this result, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the District Court within three months from the receipt of the mandate of this court, failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

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The Government has appealed from the [\*\*\*138] decree which is a general one dismissing the bill. So far as concerns the attempt to acquire the Northern Pacific stock and the stock of The Atchison, Topeka [\*\*\*62] & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles & Salt Lake Railroad Company, and other features of the case which were dealt with and disposed of by the decree and opinion of the court below, it is sufficient, without going into these matters in detail, to say that as to them we find no reason to disturb the action of the court below, but for the reasons stated the decree should be reversed and one entered in conformity to the views herein expressed, so far as concerns the acquisition of the Southern Pacific stock.

Reversed in part, the District Court to retain its jurisdiction to see that the decree above outlined is made effectual.

MR. JUSTICE VAN DEVANTER took no part in the hearing or determination of this case.

For opinion on motion to amend the mandate see p. 470, post.

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End of Document

## **United States v. Lake Shore & M. S. R. Co.**

District Court, S.D. Ohio, E.D.

December 28, 1912

No. 1,584

**Reporter**

203 F. 295 \*; 1912 U.S. Dist. LEXIS 981 \*\*

UNITED STATES v. LAKE SHORE & M.S. RY. CO. et al.

### **Core Terms**

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coal, Valley, traffic, stock, roads, railroads, Lake, Shore, coal company, shares, river, lines, shippers, fields, purchasing, rates, properties, trunk line, commerce, connections, conditions, railroad company, originating, ownership, freight, capital stock, bonds, joint ownership, transportation, continuation

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

#### **HN1[] Regulated Industries, Energy & Utilities**

Mere differences in locations of coal mines within the same general field, as well as differences in quality owing to differences in fields, cannot rightfully be made the basis for eliminating effective competition as between railroads traversing substantially the same territory along parallel lines from neighboring mines of the same coal field, or even of different coal fields, to the same general destinations; and the evil effects upon competition concerning rail roads and coal mines so related are accentuated wherever a union of interests is created and maintained between such producers and carriers of coal, particularly where producers and carriers through artificial methods become practically one and the same.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

#### **HN2[] Antitrust & Trade Law, Sherman Act**

Freedom of competition is required in commerce among the states.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

### [\*\*HN3\*\*](#) **Regulated Industries, Transportation**

Ohio has a statutory policy respecting parallel and competing railroads. The policy of the United States and of Ohio, as expressed by legislation and judicial interpretation, is quite as distinctly opposed to any union of ownership and arrangement involving the power to control parallel railroads or the transportation of traffic that is tributary to and must pass over one or both of them, as it is to formal consolidation of such railroads.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

### [\*\*HN4\*\*](#) **Regulated Industries, Transportation**

A mere instrumentality that separate railroad properties combined under one control is a combination as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

### [\*\*HN5\*\*](#) **Antitrust & Trade Law, Sherman Act**

For purposes of **antitrust law**, the form given to a combination is of no consequence. The generic designation of the first and second sections of the Sherman Antitrust Act, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

### [\*\*HN6\*\*](#) **Interstate Commerce, Restraints of Trade**

The commodities clause in **§ 1** of the Hepburn Act, as construed by the Supreme Court, has been held to be constitutional.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN7\*\*](#) **Antitrust & Trade Law, Sherman Act**

As respects the power of the court to require such sales and distributions of illegally combined interests to be made, it is clearly given by § 4 of the Sherman Anti-Trust Act, 26 U.S. Stat.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pretrial Matters > Continuances

International Trade Law > State Legislation > General Overview

International Trade Law > General Overview

#### **HN8** [down arrow] **Antitrust & Trade Law, Sherman Act**

To vitiate a combination, such as the Sherman Antitrust Act condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

#### **HN9** [down arrow] **Antitrust & Trade Law, Sherman Act**

In bringing a suit under the Sherman Antitrust Act, it is not necessary that the proofs should show that precisely similar methods were adopted to bring about the continuance averred, or that all the parties theretofore engaged continued as actors.

**Opinion by:** **[\*\*1]** WARRINGTON

### **Opinion**

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**[\*297]** Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit was brought to enjoin further performance of certain agreements alleged to have been made in pursuance of combinations and conspiracies formed and carried out in restraint of trade among the several states, particularly trade in bituminous coal, in violation of Act Cong. July 2, 1890, commonly known as the Sherman Anti-Trust Act (July 2, 1890, c. 647, 26 Stat. 209 [U.S. Comp. St. 1901, p. 3200]); many of the acts alleged having been committed in whole and others in part within the Eastern Division of the Southern Judicial District of Ohio.

The defendants consist of six railroad companies and three coal companies, named in the margin.<sup>1</sup> The railroad companies are all **[\*298]** Ohio corporations, except the Chesapeake & Ohio, which was organized in Virginia and all are engaged in transporting interstate commerce. The coal companies named were created as follows: The Sunday Creek under the laws of New Jersey, and the other two under the laws of West Virginia.

**[\*\*2]** *The Railroads.* It is important to understand the geographical relations of the railroads, and similarly their relations to the coal fields involved. The Lake Shore extends from Buffalo to Chicago, passing through Ohio near the southerly shore of Lake Erie to Toledo, and thence across the northerly portion of the state, and has a number

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<sup>1</sup> The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, the Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

of intermediate branches. A large majority of its capital stock is owned by the New York Central. The Chesapeake & Ohio extends from Old Point Comfort to Cincinnati, running generally along the south side of the Ohio River from a point east of Huntington, W. Va., to and through Kentucky to Cincinnati, and also has a number of intermediate branch lines. It owns a great majority of the stock of the Chesapeake & Ohio Railway of Indiana, and so reaches Chicago. Thus one of these east and west trunk lines passes through Ohio near its northerly boundary, and the other along the south shore of the Ohio river near the south boundary of Ohio. Two of the remaining defendant railroads are wholly within Ohio, running generally in a north and south direction, viz., the Hocking Valley from Toledo by way of Columbus, Lancaster, Logan, and Gallipolis to **[\*\*3]** Pomeroy on the Ohio river (passing through Kanauga on the Ohio river opposite Point Pleasant, W. Va.), with a branch line running from Logan to Athens; and the Toledo & Ohio Central has two divisions running from Toledo, one by way of Fostoria, Bucyrus, and Thurston to Corning in Perry County, and the other by way of Findlay, Kenton, and Columbus to Thurston on the first division. The Kanawha & Michigan runs south from Corning to the Ohio river, crossing the river from Kanauga, Ohio, to Point Pleasant, W. Va., and continuing thence through Mason, Putnam, Kanawha, and Fayette counties by way of Charleston to Gauley Bridge, in that state, using the tracks of the Hocking Valley between Hobson and Gallipolis, by way of Kanauga; and the Zanesville & Western runs east and west from Thurston through the counties of Fairfield, Perry, and Muskingum to Zanesville, Ohio, although it seems to be part of an old road which formerly continued westwardly from Thurston to Columbus, parallel with the Hocking Valley.

*The coal Fields.* The Ohio coal fields directly in question are situated in Athens, Perry, Hocking, and Muskingum counties, and known as the Hocking Valley coal fields; and those in **[\*\*4]** West Virginia are situated in the Kanawha coal district. The four railroads last named are connected with portions of these coal fields of Ohio, and the Kanawha & Michigan with the Kanawha coal fields. The principal coal mines along the Hocking Valley are located in Athens, Perry, and Hocking counties, those along the Toledo & Ohio Central are in Fairfield, Perry, Hocking, Athens, and Muskingum, those along the Zanesville & Western are in Muskingum and Perry counties, and those along the Kanawha & Michigan are in Putnam, Kanawha, and Fayette counties, **[\*299]** W. Va., besides some that are located in Perry and Athens counties, Ohio; and the principal part of the freight traffic of all the defendant railroad companies, except the Lake Shore, is bituminous coal in car load shipments, the principal mines along the Chesapeake & Ohio being in Kanawha, New River, and Big Sandy districts of West Virginia and Kentucky. A large part of the freight traffic of the Lake Shore is bituminous coal in car load shipments derived from branch roads tapping the Appalachian coal fields. The coal of the various fields mentioned is shipped on these roads from the portions of coal fields with which **[\*\*5]** they are severally connected as before pointed out, to lake ports and to points in the North and Northwest.

*Competitive Conditions.* The Hocking Valley and the Toledo & Ohio Central, when the latter and the Kanawha & Michigan are operated as they were for a long time as a through line, are naturally competing roads. However, evidence was offered to show that the river division of the Hocking Valley, running from Logan to Kanauga (and thence to Pomeroy, as stated), cannot be treated as a competitor of the Kanawha & Michigan, because of difficult grades on such river division. The Hocking Valley, as far south as Athens, and the Toledo & Ohio Central, are naturally competing roads. It is to be noted, however, that claim is made that competing relations cannot be ascribed to roads connected as these all seem to be with different sets of coal mines, even where such mines are located in the same coal field. As it seems to us, a broader view than this must be taken. The destinations of the coal shipped from these coal fields and the effect on the prices to be exacted of the coal purchasing and consuming public located at points beyond the lake ports and the boundaries of Ohio must **[\*\*6]** be taken into consideration; and not merely the producers of coal and the carriers transporting it. Manifestly it can make no difference to the coal purchaser or consumer whether coals of the same quality be derived from one particular mine or another of the same field, no matter how close together or how far removed from one another such mines may be, so long as the prices of the coals and the freight charges to be paid are influenced by natural competitive conditions both at the mines and in transportation; and the right to have such conditions maintained cannot be validly abridged through arbitrary or unusual methods. This is equally plain respecting coals of different qualities originating in different fields and requiring varying distances of transportation over lines naturally competing in material parts; for the purchaser or consumer will obviously select the coal according to his particular needs or ability to sell or to pay.

It must follow that HN1[<sup>7</sup>] mere differences in locations of coal mines within the same general field, as well as differences in quality owing to differences in fields, cannot rightfully be made the basis for eliminating effective competition as between railroads [<sup>\*\*7</sup>] traversing substantially the same territory along parallel lines from neighboring mines of the same coal field, or even of different coal fields, to the same general destinations; and the evil effects upon competition concerning rail roads and coal mines so related are accentuated wherever a union of interests is created and maintained between such producers and carriers [<sup>\*300</sup>] of coal, particularly where producers and carriers through artificial methods become practically one and the same. If these views are at all applicable to a case such as this, the Kanawha & Michigan, when employed as a carrier exclusively in connection with either the Toledo & Ohio Central or the Hocking Valley, may, we think, be safely treated as a natural competitor of the one or the other of such roads, according as the connection may exist; because the destinations of its coal in either event are, in any rational competitive sense, the same as those of the other road respecting the coal originating on its line. It results (1) that traffic originating on either the Hocking Valley or the Toledo & Ohio Central should be accorded the benefits of free competition; (2) that when coal originating on the [<sup>\*\*8</sup>] line of the Kanawha & Michigan is carried in part over both of these other roads to destinations beyond Ohio, as also coal originating on that road in West Virginia and destined to common points within Ohio, it is to the interest of the Kanawha & Michigan actually to employ the legitimate advantages arising from its opportunity to forward such coal (and this forms the great bulk of its traffic) over either of the other roads. The issue in a general sense is whether these competitive conditions have been suppressed; and the situation is further complicated by uniting coal interests with the railroad interests proper.

*Combination and Conspiracy -- Alleged Origin and Continuation.* The combination and conspiracy averred originated in 1899 and have been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in quo warranto by the state of Ohio against the Hocking Valley. State ex rel. v. Railway, 12 Ohio Cir. Ct. R. (N.S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21st of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions [<sup>\*\*9</sup>] of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railroad Company, the Sunday Creek Coal Company, the Sunday Creek Company, and the Continental Coal Company; from exercising control or management of the Kanawha & Michigan, the Toledo & Ohio Central, the Zanesville & Western, and the coal companies before mentioned; and from performing a certain contract between it, the Toledo & Ohio Central, and the Continental Coal Company for division of freight between such railroads. It was adjudged, also, that the road of the Toledo & Ohio Central for its entire length is paralleled to and competitive with the road of the Hocking Valley from Toledo to Logan; that the roads of the Hocking Valley and the Kanawha & Michigan are parallel lines between Logan and Corning respectively and the Ohio river; and that the Kanawha & Michigan and Toledo & Ohio Central together are competitive with the entire line of the Hocking Valley. This judgment was allowed to become final.

In March following the Lake Shore and the Chesapeake & Ohio entered into an agreement (sometimes [<sup>\*\*10</sup>] referred to by the parties as the [<sup>\*301</sup>] Schaff-Stevens agreement and sometimes as the agreement of March 12th, and again of March 17th), which has become the subject of a controlling issue in the present cause. Indeed, the government's position is that the operation and effect of this agreement, with what has been done under it, have been to continue the scheme so condemned by the judgment of the Ohio Circuit Court; while that of the defendants is that the agreement is valid, and that the acts of the parties thereto and of all the other defendants, since the date of the agreement, have in to wise been repugnant to any federal statute. It is not claimed that the issues determined in the state quo warranto suit are decisive of issues concerning interstate commerce; but it is urged that, apart from the state case, interpretation of the March agreement and of the conduct of the parties to it and those directly affected by it is distinctly aided by looking into the conduct of those who were interested in the properties before the agreement. Stated otherwise, the contention is that a view of the situation existing before the agreement and of the situation that has since existed [<sup>\*\*11</sup>] cannot but be helpful to a proper solution of the controversy.

We do not propose to recite or discuss all the details of either situation, for such a course would occupy far too much space, and, moreover, is not necessary. If the locations and connections of the railroads and their relations

to the coal properties are recalled, as before pointed out, it will not be difficult to apply the controlling features of the evidence adduced on the one side to prove, and on the other to disprove, the alleged combination and conspiracy and continuation thereof. In 1899 a plan for the reorganization of the Columbus, Hocking Valley & Toledo Railway Company (predecessor of the Hocking Valley) was entered into under date of January 4th, and direction of J. P. Morgan & Co. After judicial sale of the railroad property of the company, the purchasing trustees at such sale conveyed this property to the Hocking Valley, and the title thereto is still in that company. It was part of this plan to have the Hocking Valley acquire interests in the Toledo & Ohio Central and the Columbus, Sandusky & Hocking Railroad Companies, or successor companies, and in February, 1899, the stockholders of the Hocking [\*\*12] Valley adopted a regulation reserving 50,000 shares of its preferred and 50,000 shares of its common stock for the purpose of acquiring such interests. These reserved shares were from time to time listed on the New York Exchange at the instance of the Hocking Valley and for the express purpose of acquiring such interests. The purchases of the stock in the Toledo & Ohio Central were made in the name of a New Jersey corporation, called the Middle States Construction Company, which was organized in February, 1899, for that purpose. In 1899 and 1900 the Hocking Valley, through the issue of over \$8,000,000 of its reserved preferred and common stock, purchased the bonded indebtedness of this construction company; and this indebtedness was secured by and convertible into the stock of the Toledo & Ohio Central, under a deed of trust of the Construction Company to the Central Trust Company of New York. Through the issue of the remainder of its reserved stock, the Hocking Valley, in 1902, purchased all the stock in [\*302] and all the bonds of the Zanesville & Western, which through judicial sale had acquired the portion of the Columbus, Sandusky & Hocking Railroad extending from Thurston, [\*\*13] in Fairfield county, to Zanesville, in Muskingum county, with certain branch lines. It is not definitely shown when and in what amounts the purchases of the stock in the Toledo & Ohio Central were made; but it appears by stipulation that the Construction Company, in the years 1899 and 1900, acquired 58,921 shares of such stock, and the listing papers before mentioned show that the total issue of stock of the Toledo & Ohio Central was 102,080 shares, preferred and common. Moreover, from 1902 to 1909 the president and general manager of the Hocking Valley, not to speak of other officers selected later, occupied corresponding positions in the Toledo & Ohio Central and the Zanesville & Western. The control thus signified in the Hocking Valley carried with it also the control of the Kanawha & Michigan. In 1890 the Toledo & Ohio Central acquired 45,000 shares, and in 1899 an additional 100 shares of the capital stock of the Kanawha & Michigan, constituting a majority of that company's outstanding capital stock, and these two roads were operated practically as a through line; and, further, as early as February, 1891, the former guaranteed the 100-year bonds of the latter at the rate of [\*\*14] \$10,000 a mile for 134 miles, or \$1,340,000, and thereafter advanced it moneys from time to time. Further, in 1903, the Hocking Valley exchanged its holdings of stock and bonds in the Zanesville & Western for the shares held by the Toledo & Ohio Central in the Kanawha & Michigan. Thus the Hocking Valley attained practical control of the two parallel systems of railroad between Toledo and the Ohio river, including the Zanesville & Western; and, apart from influence exerted by certain trunk lines alluded to later, the Hocking Valley alone remained in control of this entire system of railroads until the execution of the agreement of March 12, 1910.

We shall gain a better knowledge of the situation as it existed prior to the March agreement, if at this point we look further into the coal fields, which were tributary to this system of roads and especially into certain portions of such fields that were under the practical control of the Hocking Valley. Much evidence was offered upon this subject, and some of it is clarified by admissions contained in some of the pleadings. By several methods the Hocking Valley procured control of large coal properties both in the Hocking and Kanawha [\*\*15] fields. Pursuant to the plan of reorganization of 1899, that company and the Buckeye Coal & Railway Company were incorporated under the laws of Ohio, February 25, 1899, and thereafter they joined in the execution of a mortgage under date of March 1st following, providing for the issue of first-mortgage bonds in the sum of \$20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of acquiring the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale; and such trustees received from the new coal company 2,495 shares of its total capital stock of 2,500 shares, and thereupon entered into a traffic agreement with the Hocking [\*303] Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the same time turned over the stock in the coal company to the Hocking Valley. Out of the sales proceeds of the first mortgage bonds mentioned the Hocking Valley acquired the stock and properties of the Ohio Land & Railway and the New [\*\*16] York & Western Coal Companies, which had belonged

to and been controlled by the Columbus, Hocking Valley & Toledo Railway Company; also all the stock in the Boston Coal, Dock & Wharf Company and the Rabould Coal Company; also a majority of the preferred and likewise of the common stock of the Sunday Creek Coal Company, and afterwards the Hocking Valley increased its holdings in that company to 12,963 shares of preferred and 19,400 shares of common out of a total issue of 15,000 shares of preferred and 22,500 of common.

A different method was adopted for securing control of the Kanawha Hocking Coal & Coke and the Continental Coal Companies, as also quite a number of other coal properties to which we shall refer in a moment. The Toledo & Ohio Central and the Hocking Valley entered into a contract to guarantee first-mortgage bonds of the coal companies last named, the details of which are not essential to an understanding of the case. It suffices to state that agreements were made under which syndicates were formed to underwrite bonds of the companies (\$3,250,000 par value in all of the first company and \$3,023,000 par value in all of the second company); the Toledo & Ohio Central [\*\*17] and the Hocking Valley guaranteeing payment of such bonds, but the Hocking Valley assuming the entire obligation as between it and the other guarantor company. In connection with these guarantees the coal companies agreed to deliver all their coal to the Kanawha & Michigan for transportation, and by further agreement such coal was to be equally divided between the Hocking Valley and the Toledo & Ohio Central and so carried northwardly and beyond the Ohio terminus of the Kanawha & Michigan, and the Kanawha & Michigan agreed to purchase all its fuel coal from the coal companies at a price at least 20 cents per ton above production cost. The stock of these two coal companies and certain beneficial certificates of the first company were issued to J.P. Morgan & Co. to secure performance of these contracts of guaranty. The bonds so guaranteed were sold and large portions of the proceeds were used to purchase coal properties of 28 owners (consisting mostly of companies) at prices varying from \$8,875 to \$541,125 and aggregating \$5,194,940.04. The remainder, after paying organization expenses, was placed in the treasuries of the coal companies. Further, the Toledo & Ohio Central owned [\*\*18] the entire capital stock of the Imperial Coal Company and also the National Coal Company; the former being \$300,000 and the latter \$160,000 par value.

We are unable to discover from the evidence the acreage of these coal lands or their precise locations. An estimate made by the vice president of the Sunday Creek Company, of its unmined coal acreage on December 31, 1910, showed that there were 42,710 acres in Athens, Perry, and Hocking counties of Ohio and 33,000 in Kanawha and Fayette counties of West Virginia. But in July, 1905, the Sunday [\*\*304] Creek Company (not the Sunday Creek Coal Company, another subsidiary company of the Hocking Valley) was organized under the laws of New Jersey with an authorized capital stock of \$4,000,000 for the purpose of engaging in business in the state of Ohio and owning and developing lands containing coal and other minerals. It is averred in the bill that the Sunday Creek Company controls more than 100,000 acres of land, including about 50 mines and about 350 coke ovens, and owns the beneficial certificates of the Continental Coal Company and the Kanawha & Hocking Coal & Coke Company; and these averments are admitted in the answer of the [\*\*19] Sunday Creek Company, as also in the joint answer of the Hocking Valley and the Chesapeake & Ohio, and the coal property held by the Sunday Creek Company seems to comprise all the coal properties so accumulated as before shown. At the time of the incorporation of the Sunday Creek Company the Hocking Valley exchanged \$3,236,300 par value of the stock it held in the Sunday Creek Coal Company for the same amount of stock of the Sunday Creek Company; and the Toledo & Ohio Central exchanged 2,037 shares of the preferred and 3,100 shares of the common stock it held in the Sunday Creek Coal Company for a like amount of the stock of the Sunday Creek Company. Thus the Hocking Valley and the Toledo & Ohio Central, in the proportions mentioned, acquired \$3,750,000 par value of the total of \$4,000,000 par value of the capital stock of the Sunday Creek Company; and on April 23, 1906, 2,488 shares were ordered to be issued in a single certificate in the name of the Central Trust Company of New York, to the end that they would not be issued except with its approval, the remaining 12 shares having apparently been issued as qualifying shares for directors.

*The Trunk Lines' Purchase of a Majority [\*\*20] of the Hocking Valley Capital Stock.* Prior to the merger so made of the coal interests of the Hocking Valley, to wit, June 29, 1903, five of the trunk line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company, entered into an agreement with J.P. Morgan & Co. to purchase from that company 69,242 shares of common capital stock of the Hocking Valley at a price and upon terms specified; Morgan & Co. having "arranged to borrow the moneys forthwith

to make payment for said shares to the depositors under a syndicate agreement dated December 4, 1902." Morgan & Co. were to carry the loan for the benefit of the purchasing companies for three years; and such purchase was completed. The aggregate purchase price was \$7,270,410, and each of the purchasing companies obtained one-sixth interest in the shares so purchased, except the Pittsburgh, Chicago, Cincinnati & St. Louis, which acquired two-sixths. As indicative of the effect of this upon the policy of the Hocking Valley, it is sufficient to state that an advisory committee [\*\*21] (composed of representatives of the trunk lines) and the president of the Hocking Valley had frequent conferences relative to the financial affairs of the Hocking Valley and the coal companies in which it was interested, and the introduction or not of track connections between the lines [\*305] of the Hocking Valley system and the independent coal mining operators and the like. Among the results of these conferences were the incorporation of the Sunday Creek Company for the purpose of handling the coal interests of the Hocking Valley, as before pointed out, and maintaining an operating system that was satisfactory to the trunk lines. One of the features of this operating system was to restrict rail connections with coal mines to such as were already in operation, and to refuse and by litigation to contest applications for rail connections with new mines. These conditions were in practical effect continued until the agreement of March, 1910.

*Shares of Capital Stock in the Sunday Creek Company Placed in Names of Trustees.* It should be stated here that, when the Sunday Creek Company was organized, the 5,137 shares of stock in that company, which belonged to the Toledo & Ohio [\*\*22] Central, were issued in one certificate in the name of John H. Doyle, as trustee, who indorsed the certificate in blank and delivered it to the vice president and general manager of the Toledo & Ohio Central; and, further, in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, it is testified that such stock was sold to him to be held as trustee for the stockholders of the Toledo & Ohio Central, in whose names its stock might from time to time be registered on the books of the company, and to whom any dividends should be paid. This arrangement was effected through the redelivery of the old stock certificate to the trustee, from which he at the time erased his original indorsement, and a contract executed by him and the Toledo & Ohio Central bearing date April 30, 1908; and this certificate and contract are still in his possession. After the date of this contract the trustee on two or three occasions issued a proxy to the president of the Sunday Creek Company, at his request, to vote the stock at annual meetings; but the trustee has not received any request or any suggestion from the Toledo & Ohio Central, or the officers of any other railroad company, [\*\*23] with respect to the giving of proxies or the voting of the stock. On April 30, 1908, another contract, similar to the one so made between John H. Doyle and the Toledo & Ohio Central, was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the Hocking Valley in the Sunday Creek Company. After reciting that the Hocking Valley is the owner of 32,375 shares of the Sunday Creek Company (also, among other things, that all these shares with others were pledged through a trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, and that in view of the penalties imposed for violation of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U.S. Comp. St. Supp. 1911, p. 1288]) and of a desire to obey the law if constitutional, and at the same time to preserve to the owners of the capital stock of the railway the equity in such coal properties, which could not be disposed of by reason of such pledge), it was agreed that the railway company had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien [\*\*24] of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders [\*306] of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares of stock at all meetings of stockholders of the company, to collect dividends, and (if the Hocking Valley is not in default under its mortgage) to distribute them among the holders of the stock. The only other provisions of the contract so made with John H. Doyle and the Central Trust Company that need be noticed are set out in the margin.<sup>2</sup>

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<sup>2</sup> "In the event, however, that the said Supreme Court shall decide said commodity clause of said Hepburn Act unconstitutional, then said trustee shall dispose of the equity in said coal stocks sold and assigned to it in trust for the purposes of this agreement (subject, however, to the lien of the first consolidated mortgage, and its rights as pledgee trustee thereunder), when and as directed in writing by the persons, firms or corporations holding and owning of record a majority in amount of the stock of the Railway Company as hereinafter provided, and when such sale or distribution is made by the trustee hereunder, and the entire proceeds, whether of stocks, bonds, moneys, or other securities, shall have been actually paid to and received by the said trustee, then the said trustee shall distribute, less its proper charges and expenses, all such proceeds in kind received from the disposition of said stocks, among such persons, firms and corporations, their successors and assigns, as shall be stockholders

[\*\*25] Nothing further has been done with the stock of the Sunday Creek Company, and no sale or other disposition of the coal properties has been made in pursuance of these trusts or otherwise. The railroad control of the coal interests remained practically the same, at least until the date of the March agreement, as it was before.

*Conclusion Respecting Situation Prior to March Agreement of 1910.* We are bound to hold that the situation described was indefensible under the anti-Trust Act; indeed, no attempt has been made here to justify it. It is quite plain that by the reorganization commenced in 1899 and the course pursued thereafter until the trunk lines obtained their interests in the Hocking Valley the purpose was to unite and hold the four railroads,<sup>3</sup> and their several coal interests under a single controlling power; and we are satisfied from the evidence that this design was consummated at the instance of such companies, and finally rendered more secure through the interests and indirect control of the trunk lines. One of the reasons offered to induce and defend the reorganization was the existence of "undue and bitter competition." After stating that the principal business [\*\*26] of the Columbus, Hocking Valley & Toledo (the predecessor of the Hocking Valley) was the transportation of bituminous coal from mines on adjacent property, it was declared that the business was strictly and intensely competitive, [\*307] and that the field in Ohio was covered by seven railroad lines (including in their number the lines of the present Hocking Valley, the Toledo & Ohio Central, and the Columbus, Sandusky & Hocking, the predecessor of the Zanesville & Western), and that of these seven lines three operated in one district and the other four lines in a field lying east of that district. The three lines so alluded to could have been no others than the exclusively Ohio lines now in question. It was further declared that, in addition to the competition above indicated, the situation was complicated by the fact that of late years the West Virginia coals were rapidly supplanting the Ohio coals in the markets reached by the latter. And, in short, the evidence fairly shows that the union of interests so induced was carefully developed, and that its inevitable tendency and effect were to combine and monopolize the stocks and interests of these railroad companies and coal [\*\*27] companies, and so to stifle competition in restraint of trade among the states within the settled meaning of the Anti-Trust Act.

*The Conditions Created by and Maintained Since the March Agreement.* Has the situation described been so changed by or under the agreement of March 12, 1910, as to entitle defendants as they claim to a dismissal of the bill? They forcibly urge that what was done prior to the March agreement has nothing to do with what has been done since. Objections were continuously made to the introduction of evidence tending to show conditions existing before the agreement. Complainant insists that what followed the execution of the March agreement was but a continuation of what preceded it. The fact that we have considered the evidence shows, if course, that we regard it as admissible. It cannot escape notice that some of the defendants were parties to such earlier transactions, and that others acquiesced in and adopted such transactions before the March agreement was made. [Lincoln v. Claflin, 74 U.S. \(7 Wall.\) 132, 138, 19 L. Ed. 106](#); [United States v. Standard Oil Co. \(C.C.\) 152 Fed. 290, 294](#), per Sanborn, Circuit Judge, and Circuit Judges Van Devanter, Hook, and Adams concurring. The acts and transactions of the first period therefore ought to aid in some measure to elucidate the intent and effect of the March agreement, and of the acts and transaction of the parties since, no matter what conclusion may be reached touching the second period. [Standard Oil Co. v. U.S., 221 U.S. 1, 76, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. \(N.S.\) 834](#), Ann. Cas. 1912D, 734; [Darius Cole Transp. Co. v. White Star Line, 186 Fed. 66](#), 108 C.C.A. 165 (C.C.A. 6th Cir.); [U.S. v. E.I. Du Pont De Nemours Co. \(C.C.\) 188 Fed. 128, 134](#).

*The March Agreement.* The agreement was signed by the Lake Shore and the Chesapeake & Ohio, and, so far as now material in substance provided, that the Lake Shore would purchase from the Hocking Valley the bond it held of the Middle State Construction Company, which as stated was exchangeable for the entire capital stock of the Toledo & Ohio Central (such stock to carry with it, for the benefit of the Toledo & Ohio Central, the ownership of

of record of the Railway Company on the first day of the months in which said proceeds and all of them shall have been finally received, pro rata in proportion to their said record holdings of stock of the Railway Company. Any such sale or disposition, however, it is understood shall be made subject to the lien of the first consolidated mortgage thereon and to all the terms and conditions of the said mortgage, and only in the event that said Railway Company is not then in default of any requirement of said mortgage."

<sup>3</sup> The Columbus, Hocking Valley & Toledo, the Toledo & Ohio Central, the Columbus, Sandusky & Hocking, and the Kanawha & Michigan Railway Companies.

45,100 shares of stock in the [\*\*29] Kanawha & Michigan, 5, 137 shares of stock in the Sunday Creek Company, and the entire capital stock in and all the bonds of the [\*308] Zanesville & Western) at an aggregate purchase price of \$10,197,874.67; and would make provision for loaning to the Sunday Creek Company as needed and on its notes \$1,143,110.50. Such purchase to be coupled with an agreement that a contract for 25 years would be made and should provide that the line of the Hocking Valley and the line of the western division of the Toledo & Ohio Central, between their terminals at Toledo and their connections with the Kanawha & Michigan at Chauncey, might (for cost alone of maintenance and operating expenses according to joint usage) be used at the option of either for the movement of its through freight trains; that an additional agreement should be made to protect the Toledo & Ohio Central and the Hocking Valley under their previous guaranty of bonds of coal companies, and given (as before stated) under an agreement for an equal division of the coal traffic derived from the properties of such coal companies; that an arrangement for distribution of the business, so far as could legally be made, should be effected [\*\*30] to protect the interests of the Toledo & Ohio Central and the Hocking Valley respecting their guaranty of such coal bonds. Upon making such purchase, the Lake Shore was to sell to the Chesapeake & Ohio 22,550 shares of the Kanawha & Michigan for \$1,623,600 and 11,540 shares of the Hocking Valley for \$1,384,800 (which latter stock seems to have been the one-sixth interest that the Lake Shore acquired at the time of the purchase made by the trunk lines). Still another contract was to be made "for trusteeing or otherwise jointly handling" the 45,100 shares (a majority of the stock and called the "controlling interest then to be owned by the two companies") in the Kanawha & Michigan. In case the stock was so placed in trust, provision was to be made for such trackage agreements with the Kanawha & Michigan as would protect the purchasing companies against loss of control of the property. Privilege was to be given to make certain connections between the Kanawha & Michigan Railway with the Virginian Railway or with the Lake Shore or Chesapeake & Ohio, the intent being that the lines of the Kanawha & Michigan could be used to the fullest extent by either of the purchasing companies in [\*\*31] building up its interest either in local territory on the Kanawha & Michigan or in making through routes and connections beyond it, protecting, however, all the stockholders of that company. Provision was also made for acquiring all or part of the outstanding stock of the Kanawha & Michigan; for having the Kanawha & Michigan purchase the securities of the Pomeroy Belt Railway Company and indemnifying the Hocking Valley against liability assumed by it in the purchase thereof and granting to it a trackage right over such belt road, etc., for securing to the Hocking Valley trackage between Athens and Hobson over the Kanawha & Michigan for Hocking Valley through business from or to its line between Gallipolis and Pomeroy. The whole agreement was made subject to a condition that the other roads embraced in the trunk line purchase, before pointed out, should sell their holdings in the stock of the Hocking Valley to the Chesapeake & Ohio.

The Chesapeake & Ohio thereupon acquired the holdings of the other trunk lines of Hocking Valley stock, which, with the one-sixth it had [\*309] previously obtained through the trunk lines syndicate purchase and the one-sixth derived under the March [\*32] agreement, gave to the Chesapeake & Ohio 69,240 shares of such stock. The preferred stock of the Hocking Valley was retired in April, 1910, leaving 110,000 shares of common, of which the Chesapeake & Ohio now owns (through increase of its holdings) 88,258 shares, and that company and the Lake Shore now each own 40,271 shares of the stock of the Kanawha & Michigan (being 80,542 of a total capital of 90,000 shares). The result is that, instead of five trunk lines holding as formerly, only two, to wit, the Lake Shore and the Chesapeake & Ohio, now hold the controlling power, it is true through independent ownerships, in the Hocking Valley, the Toledo & Ohio Central, the Kanawha & Michigan, the Zanesville & Western, and also (subject to the trusts and pledge before stated) the Sunday Creek Company. Their interests in the Sunday Creek Company cover its entire outstanding capital stock (included in this are the 12 qualifying shares belonging to the Hocking Valley).<sup>4</sup>

Now it is to be observed of the March agreement that its avowed purpose was not to avoid violation of any federal act, [\*\*33] but to comply with the decree of the Ohio Circuit Court in the quo warranto case. Such a purpose might, it is true, be entirely consistent with the federal Anti-Trust Act; but whether this was so here must be tested by the intent to be inferred both from the agreement and the extent and nature of the control thereby secured over the railroads and the coal traffic and other commerce dependent on them ( *United States v. St. Louis Terminal*, 224

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<sup>4</sup> Compare holding shown by stipulation (Rec. 572), with holding stated in Exhibit E, to bill.

U.S. 394, 395, 32 Sup. Ct. 507, 56 L. Ed. 810; and such intent and control may, we think, be further ascertained from comparison of important features of the situation existing before the agreement with some of those found in the situation created under it. In applying these tests, it should be stated in the outset that the government has failed in several respects to sustain the averment that there has been since the agreement a continuation of the same conditions as those existing before. Admittedly a change in the ownership of the stocks and bonds of the railroads has been made under the agreement, as before pointed out; and it must be conceded under the evidence adduced that the independent coal operators in the coal fields in question have **[\*\*34]** received greater concern and accommodations at the hands of the railroads since the agreement than they were given before. But we are convinced that the changes so wrought in ownership of stocks have resulted in a concert of action and control of the railroads and coal interests secured by the agreement, which is inconsistent with HN2<sup>↑</sup> the rule requiring freedom of competition in commerce among the states; and that rule is too firmly established to be shaken by argument against the beneficial results ascribed to it. United States v. Union Pacific R.R. Co., 226 U.S. 61, 87, 88, 33 Sup. Ct. 53, 57 L. Ed. ; United States v. St. Louis Terminal, supra, 224 U.S. 401, 32 Sup. Ct. 507, 56 L. Ed. 810; Loewe v. Lawlor, 208 U.S. 274, 293, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Northern Securities Co. v. United States, 193 U.S. 331, 332, 24 Sup. Ct. 436, 48 L. Ed. 679; Pearsall v. Great Northern Railway, 161 U.S. 646, 676, 16 Sup. Ct. 705, 40 L. Ed. 838; United States v. E.C. Knight Co., 156 U.S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325; Chesapeake & O. Fuel Co. v. United States, 115 Fed. 619, 620, 53 C.C.A. 256 (C.C.A. 6th Cir.); United States v. Standard Oil Co. (C.C.) **[\*\*35]** 173 Fed. 177, 188 (C.C.A. 8th Cir.).

Evidence was adduced to show that, owing to litigation and other causes, some of the provisions of the March agreement have not been carried out; and some of the evidence tends to show that, if all its provisions had been carried into effect, it would have resulted beneficially to the volume of traffic and those interested in it along the lines of the roads in question. This does not indicate a purpose not to carry out the March agreement ultimately; but it does show that a virtual consolidation of all these naturally competing roads (coupled with the division of the coal traffic provided for), so far as concerns the through traffic in coal to the lakes, is necessary to accomplish the result stated, although it does not purport to show how long such increase in volume would last. It is contended by learned counsel, however, that all the provisions of the agreement are valid and enforceable, so long at least as the interested stockholders themselves are satisfied with its performance.

Moreover, evidence was offered to show that the Ohio roads are controlled and operated independently of one another and of either the Lake Shore or the Chesapeake **[\*\*36]** & Ohio or both; and similarly as respects the Sunday Creek Company, and all these roads either collectively or separately. It is true that the officers of the railroads and the railroad offices are distinct, and this is true of the Sunday Creek Company; also that the managerial officers of these subordinate companies have been instructed to exercise their own judgment respecting the interests they represent, and yet the natural and probable effect of all this needs but little consecutive thought. Such officials are at last dependent for their positions upon the will of the two trunk line companies controlling the stocks; and it is vain to say that such officers do not become sensitive to the interests and policies of the real masters of the situation. Illustrations of this, as also of the effect of the new regime upon interstate commerce and trade, are contained in the evidence relating to both the coal and railroad properties. We have seen that the Sunday Creek Company still holds the same title to the coal properties that it held before the execution of the agreement of March, 1910; and that the Chesapeake & Ohio and the Lake Shore together have been brought into the same relation **[\*\*37]** to the entire capital stock of this coal company that the Hocking Valley alone previously bore to it.<sup>5</sup> In the March agreement no allusion was made to the trust agreements under which the stock of the Sunday Creek Company was on **[\*311]** April 30, 1908, placed in the names of trustees. The shares placed (rather continued) in the name of John H. Doyle, as trustee, were in the March agreement treated as the property of the Toledo & Ohio Central; and the same general policy concerning the coal handled by the Sunday Creek Company that prevailed before the March agreement has been pursued since. This has resulted in the continuance of an equal division substantially of the coal traffic originating on the Kanawha & Michigan between the Hocking Valley and the Toledo & Ohio Central. All the coal carried in Kanawha & Michigan equipment is so divided. While the coal

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<sup>5</sup> It should be stated that as early as June, 1905, provision was made by the Sunday Creek Company for purchasing certain trust certificates representing the beneficial interests in the stock of the other two coal companies which are parties to this cause, and this arrangement seems to have been carried out.

that is carried in the equipment furnished by the other two companies respectively is divided according to such equipment, yet it would seem from the correspondence and testimony that the desire and effort are to equalize either the cars received or the advantages and consequent profit of transportation, say as between coal [\*\*38] and coke, since coke appears to yield more freight revenue to the carrier than coal. Further, some of the evidence (concerning at least the conduct of the Lake Shore) discloses an apparently asserted right to demand, rather than a design simply to persuade, the allowance of such division; and seemingly the officers of the Kanawha & Michigan are disposed to yield it in the same spirit. This augments the similarity in purpose between the division now made of the coal traffic, and the division that was admittedly made prior to the March agreement in obedience to contract.

We do not overlook the testimony to the effect that this additional agreement has not been executed; but it is not perceivable how the companies can in substance do the same thing that the agreement provided for, and escape its effect on the ground either that it has not been reduced to writing and signed, [\*\*39] or that such a division is fair. In short, our interpretation of the evidence is that this division of traffic is not due alone to a desire to be fair to connecting companies; but that it is actuated also by a purpose practically to carry out the provision of the March agreement in this behalf, and so protect the Toledo & Ohio Central and the Hocking Valley as joint guarantors "on the bonds of certain coal companies for equal division of the coal from these coal properties." Such a provision or practice is inconsistent with the statutory right accorded to shippers since 1910, say along the Kanawha & Michigan, to secure the benefit of competitive through rates by routing their own traffic by way of either the Hocking Valley or Toledo & Ohio Central, according as they might be able through perfectly legitimate means to induce the one or the other company to file and publish lower rates. See amendment to section 15 of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U.S. Comp. St. 1901, p. 3165]), passed June 18, 1910, c. 309, § 12, 36 U.S. Stat. L. 552 (U.S. Comp. St. Supp. 1911, p. 1301), striking from amended section 15 Act June 29, 1906, c. 3591, § 4, 34 Stat. [\*\*40] L. 590 (U.S. Comp. St. Supp. 1911, p. 1301), the limitation: "Provided no reasonable or satisfactory through route exists." That it would be entirely practicable for shippers of coal to secure, with respect to through traffic, substantial competition with the Hocking Valley and the Toledo & Ohio Central, but for the joint ownership and control [\*312] of the Kanawha & Michigan, seems to us obvious. The president of the Kanawha & Michigan, and its general freight agent, testified, in substance, that they had made no effort to secure from the Hocking Valley or the Toledo & Ohio Central in favor of their own company a greater division of the freight rate charged for through traffic; in other words, the motive is lacking to bring about real competition between these parallel roads. Nor does it appear that the officers of either the Hocking Valley or the Toledo & Ohio Central have done anything respecting a greater or less division of the freight rate charged for through traffic. And we do not discover that the officers of the Sunday Creek Company have ever sought to induce any of these railroads to file or publish lower freight rates; and the president of the company (who has filled [\*\*41] the office since June, 1910) testified:

"We do not do any routing \* \* \* unless it is where coal must be delivered on one road or the other."

Further similarity between the course pursued before the March agreement and since is to be found in the "operating proposition" as it is characterized in the evidence, which "practically makes each road (the Hocking Valley and the Toledo & Ohio Central) a double track railroad." The arrangement consists of moving the north-bound through freight trains of the Toledo & Ohio Central, over the Hocking Valley railroad from Hobson to Fostoria, and of returning the south bound freight trains of the Hocking Valley over the western division of the Toledo & Ohio Central from Hickox to Columbus; and this is a continuation of the same reciprocal use that was commenced in 1901. Stress is laid both in the evidence and argument upon the economy of this interchange of facilities, since it secures easier grades over the Hocking Valley, as compared with those of the Toledo & Ohio Central, and avoids the necessity of building double tracks and of operating opposing trains over single track roads with the usual sidings. These advantages may be conceded from [\*\*42] an operating point of view; yet the logic of it all would in the end destroy competition between parallel roads generally. The reciprocal use in this instance developed only with the noncompetitive period of these railroads. It is not meant by this there may not be circumstances under which reciprocal trackage arrangements may to a certain extent be lawfully entered into and carried out. Nor is it meant that this trackage arrangement, standing alone disassociated from the joint ownership and control of the Kanawha & Michigan, would violate the federal Anti-Trust Act. What is meant is that this trackage arrangement, considered in connection with the other facts pointed out, tends to disclose a unity of purpose and concert of action

on the part of the companies involved to maintain conditions that are inimical to effective competition. Testimony was offered to show that giving to the Chesapeake & Ohio and the Lake Shore equal interests in the Kanawha & Michigan and adding the advantages of this reciprocal use of tracks, operate to stimulate rather than to retard the transportation of coal, and, in fact, have resulted in substantial increase in volume of traffic; and, further, that, **[\*\*43]** if these arrangements were broken up, the traffic in West Virginia coal would be monopolized by the Kanawha & Michigan and the Toledo & **[\*313]** Ohio Central. This loses sight of the natural development of the coal fields tributary to the Kanawha & Michigan, which should occur under normal conditions. It also evades the obvious question whether, if the Kanawha & Michigan were owned and operated independently of both the Hocking Valley and Toledo & Ohio Central, and those roads were brought into competition for the traffic originating on the Kanawha & Michigan, there would not be a still greater stimulus given to interstate trade than has heretofore existed. There would, in that event, be neither reason nor opportunity for a monopoly of such traffic by the Kanawha & Michigan and Toledo & Ohio Central. The conceded easier grades of the Hocking Valley furnish adequate answer to the suggestions of such a monopoly. *Pearsall v. Great Northern Railway*, 161 U.S. 676, 16 Sup. Ct. 705, 40 L. Ed. 838; United States v. Union Pacific R.R. Co., supra.

Insistence is made that a number of the things complained of were in and of themselves lawful, and so, in effect we take it, their union **[\*\*44]** or joint use could not become unlawful. For instance, it is urged that it would have been well within the power of the Lake Shore to purchase the entire stock of the Toledo & Ohio Central and the Kanawha & Michigan, because the Kanawha & Michigan is a continuation of the Toledo & Ohio Central. Likewise it is insisted in respect of the Chesapeake & Ohio that it possessed charter power to purchase the stock of the Hocking Valley, and that it was both its purpose and right to secure control of a railroad leading directly to the lake ports. Let these claims be conceded for sake of discussion; still, does it follow that the Lake Shore and the Chesapeake & Ohio could lawfully become joint and equal owners in the controlling portion of the stock in the Kanawha & Michigan? Could they at the same time add to this mutual control of that road the reciprocal trackage arrangement respecting the other roads, and so virtually consolidate these railroads as respects the through traffic in coal? These questions are stated, not merely with reference to the apparent violation involved of **HN3** the statutory policy of Ohio respecting parallel and competing railroads ( *State v. Hocking Valley*, 12 Ohio Cir. **[\*\*45]** Ct. R. [N.S.] 66, 67, before cited), but particularly with respect to the effect that such joint ownership and trackage arrangement must have upon interstate commerce. The policy of the United States and of Ohio, as expressed by legislation and judicial interpretation, is quite as distinctly opposed to any union of ownership and arrangement involving the power to control parallel railroads or the transportation of traffic that is tributary to and must pass over one or both of them, as it is to formal consolidation of such railroads. *Northern Securities Case, supra, 193 U.S. 362, 24 Sup. Ct. 436, 48 L. Ed. 679; United States v. St. Louis Terminal, supra, 224 U.S. 395, 32 sup. Ct. 507, 56 L. Ed. 810; United States v. Union Pacific R.R. Co., supra; State v. Hocking Valley, supra.* We have seen that the Ohio Circuit Court ousted the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan. The Hocking Valley, it is true, does not now own stock in the Kanawha & Michigan; but the Chesapeake & Ohio does, and it also owns the controlling interest in the Hocking Valley. **[\*314]** The Chesapeake & Ohio thus holds stock in two roads, which are in substantial **[\*\*46]** degree parallel and naturally competing. Can this result, or the results before pointed out as brought about since the March agreement was executed, be rightfully traceable to the charter powers of these two railroad companies, the one to reach the lake ports and the other the coal fields?

It cannot be that those companies can justify their separate stock purchases of the control of these roads, and also escape responsibility for the inevitable tendency of the present conditions to stifle free competition simply on the theory that the companies holding the legal titles to the roads are alone responsible for this result; for that would be to overlook, not only the manifest unity of purpose of the Lake Shore and the Chesapeake & Ohio, but also and especially their acquiescence, not to say concurrence, in the acts of the subordinate companies. This cannot be avoided on the ground that corporate ownership of stock in railroad corporations created by a state is not interstate commerce (considered in the Northern Securities Case); nor, in the present instance, by the fact that capital stock in two of the competing roads is held separately by two corporations instead of one corporation; **[\*\*47]** for the other matters involved here, or anything like them, were not present in the Northern Securities Case. To ignore such matters would be to furnish an easy method to frustrate the statutory inhibitions in question. Indeed, if these two purchasing companies are not in effect equivalent to a committee to regulate rates, certainly the subordinate railroad companies under their control are, within the meaning of the concurring opinion of the late Justice Brewer,

in the Northern Securities Case. When speaking of the single holding company in question there, the learned justice said ([193 U.S. 362, 24 Sup. Ct. 467, 48 L. Ed. 679](#)):

"In this case it [HN4](#)<sup>↑</sup> was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates."

If the intention of placing the ownership of the stocks in question in the Lake Shore and the Chesapeake & Ohio can be rightly inferred from what has actually been done since, "the purpose to combine and by combination destroy competition" ( [Northern Securities Case, 193 U.S., at page 362, 24 Sup. Ct. 467, 48](#) [\\*\\*48](#) L. E.d 679) existed when the March agreement was executed, quite as certainly as such purpose was held to exist in that case "before the organization of the corporation, the Securities Company." [HN5](#)<sup>↑</sup> The form given to a combination is of no consequence. As the learned Chief Justice said in the [Tobacco Case, 221 U.S. 181, 31 Sup. Ct. 648, 55 L. Ed. 663](#):

"\* \* \* It was pointed out (in the Standard Oil Case) that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

It hardly need be said that the cases relied on by the defense, like [Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 721, 728](#), 94 C.C.A. [\[\\*315\]](#) 13, decided by the present Mr. Justice Lurton in this court, and by Judge Knappen in the court below, have no application.

There is to be added the apparent purpose of the Lake Shore and the Chesapeake & Ohio to retain their relations with the Sunday Creek Company. The feature of the trust agreements of present importance is quoted in the margin of an earlier portion [\\*\\*49](#) of this opinion. It provided that, in case the Supreme Court should hold the commodities clause constitutional, each trustee was to dispose of the equity in the railroad companies in the Sunday Creek stock, as directed by the holders of a majority of the capital stock of the Hocking Valley and the Toledo & Ohio Central respectively, and distribute the entire net sales proceeds among such holders. [HN6](#)<sup>↑</sup> It need not be stated that the commodities clause, as construed by the Supreme Court, has been held to be constitutional. [United States v. Delaware & Hudson Co., 213 U.S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836](#); [United States v. Lehigh Valley R.R. Co., 220 U.S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458](#). The first of these cases was decided May 3, 1909, about 10 months prior to the date of the March agreement, and considerably more than a year before the commencement of this suit. It is said that such sales cannot be enforced in this case, because of infirmities in the pleadings. If in the view we take of the evidence this objection can be regarded as material ([Lockhart v. Leeds, 195 U.S. 427, 436, 25 Sup. Ct. 76, 49 L. Ed. 263](#)), we perceive no sufficient reason why at this stage of the case the [\\*\\*50](#) objection cannot be met by amendment. [Neale v. Neale, 76 U.S. \(9 Wall.\) 8, 9, 19 L. Ed. 590](#); [The Tremolo Patent, 90 U.S. \(23 Wall.\) 527, 23 L. Ed. 97](#). [HN7](#)<sup>↑</sup> As respects the power of the court to require such sales and distributions to be made, we think it is clearly given by section 4 of the Anti-Trust Act (26 U.S. Stat. 209; Standard Oil Case, 221 U.S. 78, [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. \(N.S.\) 834](#), Ann. Cas. 1912D, 734; [Union Pacific Case, supra](#)); and, if the trustees or the absent stockholders, in the Hocking Valley are indispensable parties defendant, they may be brought in ([Hoe v. Wilson, 76 U.S. \[9 Wall.\] 501, 504, 19 L. Ed. 762](#); [Rogers v. Penobscot Mining Co., 154 Fed. 606, 616](#), 83 C.C.A. 380). It is to be observed that there is no Ohio legislation authorizing railroad companies to hold shares of stock in coal companies. The Ohio Circuit Court held in the quo warranto suit before cited that the Hocking Valley was not a "kindred" corporation within the meaning of the statute empowering private corporations to hold shares of stock "in other kindred but not competing private corporations," etc. Section 8683, 4 Ohio Gen. Code, 239; 12 Ohio Cir. Ct. R. (N.S.) 59-63. If [\\*\\*51](#) these companies are to be allowed potential control both of producing and transporting coals in 100,000 acres of coal lands, it is difficult to see why in spite of the commodities clause common carriers may not combine the benefits of transportation with the benefits arising from the control of any of the other necessities of life, no matter in what quantities. Attorney General v. Great Northern Ry. Co., 29 Law Journal (N.S. Equity) 798, 799; approved in [New Haven R.R. v. Interstate Com., 200 U.S. 393, 26 Sup. Ct. 272, 50 L. Ed. 515](#).

[\*316] The only remaining matter needing consideration is the testimony offered in open court tending to show that the grades of the southern division of the Hocking Valley are so difficult as to prevent successful movement over it of through coal trains; and, further, that by reason of the configuration of the territory adjacent to the Kanawha river there is no room for the construction of a track additional to that of the Kanawha & Michigan on the one side or to the tracks of the Chesapeake & Ohio on the other.

Decisions are cited to show that these physical conditions warrant alike disuse of the southern division for through coal service, [\*\*52] and the joint control acquired of the stock in the Kanawha & Michigan. Among these is United States v. Union Pacific R. Co. (C.C.) 188 Fed. 102, reversed in part December 2, 1912 (226 U.S. 61, 33 Sup. Ct. 53, 57 L. Ed. , before cited). We think the undisturbed portion of the decision below is distinguishable, and what is said in this behalf will serve to indicate our views concerning the other cases cited in connection with it. The material points of distinction appear in certain facts: (a) The San Pedro line from Salt Lake to Los Angeles was found to be practically a continuation of the Union Pacific or (its subsidiary company) the Oregon Short Line, and not a natural competition of any other line in question; (b) the physical obstacles encountered on the San Pedro line find no analogy here, unless it be south of the Ohio river and adjacent to the Kanawha & Michigan or a portion of the Chesapeake & Ohio, but it is not shown that connection between the Chesapeake & Ohio and the Hocking Valley is not otherwise reasonably available; (c) there was nothing in the Union Pacific Case to correspond in any way with the combined coal interests here and the relations between them and [\*\*53] the present railroad companies. In that case the failure to build two projected parallel lines of railway between Salt Lake City and Los Angeles was held not to be violative of the Anti-Trust Act; while here, without repeating what has been said before respecting the present railroads and coal properties, the resultant fact cannot be ignored that between Toledo and Kanauga, two actually existing parallel lines of railroad have practically been converted into one line so far as respects the through traffic in coal. The disuse of the southern division of the Hocking Valley is claimed to be justified in the face of several admitted facts. It was constructed as a substantial portion of the Hocking Valley system, and there is no showing that it was not projected by experienced railroad men. At the time the reorganization was commenced in 1899, the railroad agencies concerned found that there had been undue and bitter competition in the coal traffic dependent upon the railroads operating in the Hocking field. The suppression of competition worked out through that reorganization was obviously calculated to engender neglect of either the Kanawha & Michigan north of the Ohio river, or [\*\*54] the southern division of the Hocking Valley, as respects the movement of heavier trains. The railroad defendants here were participants in the policy that succeeded that plan of reorganization. And yet it is in effect insisted that the original plan and construction of the road, as well as its continued maintenance, [\*317] should be condemned as part of a through line and its practical abandonment for that purpose sanctioned by judicial decree.

There is a clear distinction between the power to grant relief respecting past failure to construct one of two projected parallel lines, as occurred in the Union Pacific Case along the course of the San Pedro division, and the power to prevent the elimination of one of two parallel roads in actual existence and operation. After all, the difficulty north of the Ohio river is due alone to differences in grades, and it may be judicially noticed that grades may be changed. Delavan v. New York, N.H. H.R. Co. (Sup.) 137 N.Y. Supp. 207, 212. It hardly would be contended, even apart from express statutory inhibition that such differences would warrant formal consolidation. It may be said of this situation as Mr. Justice Lurton said December [\*\*55] 16, 1912, of a situation involved in the cases of the Reading Company concerning prices of coal at the seaboard, that "the situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices" of coal at the lake ports and beyond. The paramount evil here is the joint ownership of the Kanawha & Michigan, and, so long as that continues, effective competition will we think remain impossible. Effective competition is not limited alone to a matter of freight rates. It embraces a variety of other subjects, such as quality and promptness and sufficiency of service both as to equipment and roadbed, which are dependent above all upon separate and independent ownership or control alike of the competing roads and of the commerce under compulsion to use them. Surely the necessity to maintain such conditions as these is not affected, as claimed, by anything contained in the act to regulate commerce; for plainly that act was not intended to supplant either the settled rule respecting freedom of competition or the purpose of the Anti-Trust Act to deal with corporate ownerships or agreements that constitute [\*\*56] barriers to such competition.

In the Northern Securities Case, after declaring the comprehensive character of the statute, Justice Harlan expressed the prevailing general rule, as we understand it, thus ([193 U.S. 332, 24 Sup. Ct. 454, 48 L. Ed. 679](#)):

"That [HN8](#)<sup>↑</sup>] to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Are the averments of the bill charging continuance in different form of the combination begun in 1899, so far supported by the proofs offered in that behalf as to justify the granting of relief touching the situation created by and under the March agreement? Comparison of that agreement and what has been done under it, with the first situation, cannot we think fail to show material identity between the two periods in dispute. True, combination by the March agreement [[\\*\\*57](#)] [[\\*318](#)] or by anything done since then is denied by the answers, and testimony was introduced in support of the denial. We need not recapitulate either the terms of the agreement or the facts and conditions already stated. We cannot believe that the changes in ownership of stocks, in managerial officers and the like, have operated to relieve the railroads and coal interests in question from the influence in practical effect and consequence of a unified control. It cannot be that, in the absence of intent or design, substantially the same things of controlling importance could have been worked out during the later period that were before. [HN9](#)<sup>↑</sup>] It is not necessary that the proofs should show that precisely similar methods were adopted to bring about the continuance averred, or that all the parties theretofore engaged, like the withdrawing trunk lines, continued as actors. The results attained and remaining in the combination at and after the date of the March agreement are the true tests of the trend of the evidence as an entirety.

Upon the whole we conclude that the March agreement, and what has been and is being done under it, operate unreasonably to restrain and monopolize commerce [[\\*\\*58](#)] among the states, and consequently that complainant is entitled to relief; but the precise extent and nature of relief to be awarded cannot at this stage be determined. The case has been tried on the issue of continuance or not of the antecedent combination and restraint; and this has resulted in leaving the court unadvised of the claims of counsel for either side as to the nature and extent of relief, if any, that should be granted. However, we now hold (1) that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit (Bates Fed. Eq. Proc., § 639; [Perrin, Adm'r, v. Lepper \[C.C.\] 26 Fed. 545, 548](#); St. Louis, etc., Ry. Co. v. Wilson, 114 U.S. 60, 62, [5 Sup. Ct. 738, 29 L. Ed. 66](#); [Woodward v. McConaughay, 106 Fed. 758](#), 45 C.C.A. 602 [C.C.A. 9th Cir.]); (2) that the joint ownership and control of the Kanawha & Michigan must be terminated. The questions not decided and upon which leave will be given for further argument are (a) whether the holders of capital stock in the Hocking Valley, [[\\*\\*59](#)] other than the Chesapeake & Ohio, are indispensable parties to the cause; (b) in what manner the termination of the joint ownership and control of the Kanawha & Michigan shall be effected; (c) whether in connection with the means adopted for the termination of such joint ownership and control of the Kanawha & Michigan the reciprocal trackage arrangement over the Hocking Valley and the Toledo & Ohio Central must be terminated; and (d) to what further extent and in what further respects, if any, relief shall be granted touching the control and operation of the other railroads mentioned.

Such further argument will be had at a date hereafter to be fixed between January 21st and 31st next.

KNAPPEN, Circuit Judge, concurs.

**Dissent by:** DENISON (dissenting in part and concurring in part)

## Dissent

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[\*319] DENISON, Circuit Judge (dissenting in part and concurring in part). I quite agree that the present ownership of the Sunday Creek stock by or for the railroads is unlawful, and that the coal companies and the railroads should be separated. This conclusion must be tentative, until the other necessary parties can be heard, but it seems probable that all the facts have been developed. I would [\*\*\*60] base this result on the commodities clause of the Hepburn Act and the "mere instrumentality" theory of the *Lehigh Case*, 220 U.S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, rather than upon the Sherman Act; but the use of either basis brings the same result. Beyond the matter of the coal companies, and in the mere present relation of the railroads to each other, I am unable to see any monopoly or restraint of commerce forbidden by the anti-trust law. Some of the considerations compelling me to this opinion are these:

1. It is true that the history of their former relations during the 1900-1910 period must be studied for whatever bearing it may have on their present intent; but this study discloses to me, not continuance but change, not identity but antithesis. The Hocking and the Central<sup>6</sup> were parallel roads with common termini and with other common points. They had competed bitterly for the Hocking coal district traffic to Columbus and to Toledo, as well as for all other traffic originating on their lines and destined to common points. In 1900, the Hocking bought the Central, and from then until March, 1910, this naturally and theretofore actually competing line was owned by the [\*\*\*61] Hocking. The Hocking dictated the policy of both. Both had the same directors and managing officers. The merger was complete. Competition was not restrained; it was eliminated. No more perfect union and joinder in operation, while saving the former corporate identity of each, could be stated. After March, 1910, these two roads continued physically as before; but neither the Hocking nor its dominating stockholder had any ownership of the Central or had any interest, direct or indirect, in such ownership; nor did the Central or its dominating stockholder have any ownership of or direct or indirect interest in the Hocking. No director or officer of one road was director or officer in the other, or had any share in its management or operation. No more complete severance of the two roads could be formulated. There remained no connecting link (except the common control of the Kanawha, hereafter discussed).

[\*\*\*62] 2. Since March, 1910, there has been full and complete competition between these two roads (save only for the Kanawha traffic). As to all the Hocking coal district traffic bound for Columbus or Toledo, and as to all other business originating on these roads, competition is unimpaired. So reads all the evidence; there is no proof to the contrary. The competitive conditions prevailing before the unlawful merger of 1900 have been restored -- excepting only that the rate-cutting [\*320] war then in progress has not been resumed. Both roads maintain their rates against sudden or secret cuts, as they are bound to do by both state and federal law. To base the assumption that they are combining in restraint of trade solely upon their maintenance of the same rates between common points would, by the same token, convict every railroad in the United States which is obeying the law; yet such assumption is, to my mind, the only basis for believing that such combination has existed since March, 1910 (still excluding from our thought and reasoning the Kanawha traffic).

3. The conclusion just stated -- that there is no other basis for inferring a suppression of competition -- is not [\*\*\*63] affected by observing the joint trackage contract. It is true this contract was made during the period of undue intimacy, and probably it would not have been made between roads actively competing as strangers to each other; but this does not determine its character or effect. In March, 1910, the two purchasers (the Chesapeake & Ohio and the Lake Shore) of these roads found this joint trackage contract in existence. They saw that the entire physical and traffic situations on both roads were accommodated to this contract. They saw that it served, in large measure, as a substitute for double tracking each road; that it enabled each road to haul more traffic and give better service and at a less cost, and so, presumably, at a less rate, than either could otherwise have done, except by expending vast amounts in double tracking; that it was an operating arrangement having no connection whatever with competitive traffic seeking; that of itself it was of great and undisputed benefit to both railroads and to the shipping public, and of itself did not and could not work any harm to any interest, public or private. Under these

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<sup>6</sup>I will refer to the Hocking Valley Railway Company as "the Hocking"; to the Toledo & Ohio Central and the Zanesville & Western Railroads as "the Central"; to the Kanawha & Michigan Railway Company as "the Kanawha"; to the Lake Shore & Michigan Southern Railway Company as "the Lake Shore"; and to the Chesapeake & Ohio Railway Company as "the Chesapeake & Ohio" or "the C. & O."

circumstances, the purchasers preserved and continued this public [\*\*64] and private benefit, and I cannot see how such conduct has any bearing, even evidential, to convict them of suppressing competition in traffic getting.

4. The conclusion that since March, 1910, competition in traffic originating on these lines has not been restrained, is confirmed by the fact that there is no complaint by shippers of such traffic. Serious or long continued restraint of proper competition is a disease producing inevitable and well-known symptoms -- discrimination, excessive rates, poor service, unfair practices, and the like. The relations now said to be unlawful had been in existence for a year when this bill was filed, and for another year before the testimony was closed; and we did not have pointed out to us in the argument, nor have I seen in the record, any instance of any complaint by any shipper or consignee on any of these subjects.<sup>7</sup>

[\*\*65] [\*321] 5. If I am so far correct, there remains for consideration among the primary inquiries only the matter of joint control of the Kanawha by the other two roads; and the conclusion which we reach as to whether or not this joint ownership and control, as developed in this case, are violative of the law, must, I think, determine the whole case. I agree that the fact of the ownership of this stock by the Chesapeake & Ohio and the Lake Shore, instead of by the Hocking and the Central, is not of itself controlling. The presence of the former roads, instead of the latter, in the field of the problem, can affect only the question of the dominant intent in the whole transaction. The name in which they entered their Kanawha stock purchases means nothing. I agree, also, that the entire arrangement of March, 1910, was accompanied by, and in some degree depended upon, a clear understanding (and, therefore, an agreement) that the Kanawha should, as far as it could, divide its through north-bound traffic equally between the Hocking and the Central. This does not become less true because they never executed the contemplated written agreement, nor because their perfected understanding [\*\*66] referred to a division that should be "fair" rather than to one that should be "equal." Under the anticipated conduct of all parties -- equal furnishing of cars, etc. -- no division which was not equal would be fair, and the two mean the same thing.

6. We are brought, then, to general question when and how far the purchase, by two parallel and competing roads, of a common connection and continuing road, under an agreement to divide the through traffic derived therefrom, violates the law, and then to the specific question of application to the facts of this case.

Purchase by one line of a connecting and continuing line has never been thought unlawful, although, if the purchasing line is one of two or more competing for the through traffic from the connecting line, such purchase, inevitably, strongly tends to destroy existing competition.<sup>8</sup> Such a joint purchase by two competing lines has never been held ipso facto unlawful. Indeed, the Supreme Court has said (by what is probably a dictum, *Southern Pac. Co. v. Interstate Com. Com.*, 200 U.S. 559, 26 Sup. Ct. 330, 50 L. Ed. 585) that such competition is not the competition which an analogous statute was intended to preserve. In [\*\*67] March, 1910, the first carrier had the right to select the continuing carrier. After June, 1910, this right belonged to the shipper, if he chose to exercise it; and it calls for a construction of the statute which has not yet been given to say that an agreement between carriers as to how they will divide and carry this kind of traffic (a very different [\*322] thing from a pooling contract) or the carrying on of such division when this bill was filed is a monopolizing or restraint of trade or commerce contemplated by the act.<sup>9</sup> At the same time it is clear that competition between carriers for traffic from one

<sup>7</sup> I do not overlook the broad complaint that the rates from the Hocking district were too large in proportion to the rates from the Kanawha district; but, in fact, all rates were fixed with relation to the Pittsburgh-Ashtabula rate. This rate was not made by these defendants, but it was the "keystone of the arch." When the Commission reduced this Pittsburgh rate from 88 to 78 cents, the Hocking voluntarily reduced its Hocking-Toledo rate from 85 to 75 cents, and the 75-cent rate has been sustained by the Commission. See Interst. Com. Com'n R., opinion No. 1941, case No. 4274, New Pittsburgh Coal Co. v. Hocking Valley Ry. Co., vol. 24, p. 244.

<sup>8</sup> At one time, the New York Central, the Erie and the Lehigh competed at Buffalo for the east-bound through traffic from the Lake Shore, and the Michigan Central, Grand Trunk, and Lake Shore competed for the westbound through traffic from the New York Central. The purchase of the Lake Shore by the New York Central restricted, if it did not end, this competition, for not until June, 1910, could joint rates have been compelled, nor, if there had been through joint rates, did the shipper, until that time, have the right of reselection. See 36 Stat. at Large, 552, 553. Formerly, a through joint route could be compelled only as there was no existing "practicable" through route. And see note 14 as to joint through routes after June, 1910.

connecting line may affect the condition of the shipper upon the originating line, and I see no reason to doubt the proposition which, in this respect, must underlie the opinion of the court, viz., that the forbidden restraint *may be* found in this joint purchase of a common extension by two competing roads; but it seems clear that in a case of this class the criterion must consist in the principle stated by [\*Mr. Justice Lurton in the St. Louis Terminal Case, 224 U.S. 394, 32 Sup. Ct. 510, 56 L. Ed. 810:\*](#)

"Whether it (the transaction in question) is a facility in aid [\*\*68] of interstate commerce or an unreasonable restraint forbidden by the act of Congress \* \* \* will depend upon the intent to be inferred from the extent of the control thereby secured over the instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted."

[\*\*69] From this statement and from the very recent, familiar decisions of the Supreme Court, including the Union Pacific Merger Case, *supra*, and the [\*Reading Case, 226 U.S. 324, 33 Sup. Ct. 90, 57 L. Ed. 810,\*](#) it seems accurate to say that whether the situation created in March, 1910, operated in aid of interstate commerce or in the forbidden, unreasonable restraint thereof will depend upon (1) the extent of commerce restraining power inherent in the joint ownership of the Kanawha; (2) the characterizing intent and purpose of this joint ownership to be inferred not only from the power secured, but from all the proofs; in other words, whether such restraint of competition as was inherent in the joint ownership would amount to a primary, and therefore direct, restraint of trade, or would rather be incidental to ends primarily lawful; and (3) the amount of restraint, actual or potential, which did take place.

7. If this joint ownership has the prohibited effect, it must be found (a) in competition as to divisions; (b) in competition as to rates; or (c) in competition as to service.

(a) Clearly this joint ownership tends to prevent the Central and the Hocking from bidding up against [\*\*70] each other in the divisions that they will offer to the Kanawha for this traffic, and so the other Kanawha stockholders might make less money. This is not the kind of competition which the statute desires to preserve. It serves no public interest. It tends, because of a disproportionate division to the initiating carrier, to poor service by the continuing carrier and to indifference by both to the interests of the shipper. It has long been recognized as a traffic evil. On its elimination we cannot predicate guilt.

(b) It is clear, too, that an agreement to divide traffic would, as a [\*323] general proposition, have some tendency to prevent competition in rates; that is, the Hocking would not be so likely to name its lowest rate from the Ohio to the lake as if it was not sure of half the traffic any way, and so the through rate from the Kanawha district to the lake might not fall to the point where it would be brought by full competition.<sup>10</sup> This is, I think, as strongly as this feature can be stated. It is, of course, now perfectly well settled that free competition is the policy of the law, and it is none of our concern whether this is, as to railroads, the best economic [\*\*71] policy; but, when we are trying to decide whether we are compelled to find a dominating intent to restrict trade merely because one inducement to compete in rates is removed, we cannot shut our eyes to the small part which rate competition now plays. These contracting parties knew, in 1910, as we all now know perfectly well, that under the thorough and efficient administration of the Interstate Commerce Law rate cutting, as a means of getting business, either from shippers or from connecting lines, has ceased. All rates, through as well as local, must be published, and cannot be cut until after 30 days' notice. A published cut is reasonably sure to be met by all who are competing without a differential. No contract for traffic in consideration of a cut can be made, and, as cutting rates will not get business away from a competitor, rates are not voluntarily cut. I do not mean to say that this disappearance of rate cutting makes lawful a contract to maintain rates -- not at all; but it does affect and minimize the evidential importance of a contract removing one

<sup>9</sup>Without doubt, two parallel roads might join in building, from a common terminus, and owning a new road connecting with and continuing both. Joining in buying an existing extension seems to stand, logically, on the same ground, unless, as matter of fact, the purchase was with the dominant purpose of stopping existing or normal competition.

<sup>10</sup>The actual effect of the (theoretical) rate sustaining interrelationship is minimized by the fact that coal rates go by districts, and a change in one district would affect all the others. (See note 2.)

inducement to cut rates, when we are determining the character of the entire transaction of which that removal is only [\*\*72] one element.<sup>11</sup>

(c) Coming to competition in service, it is not to be denied that such a traffic-dividing agreement as here exists tends to discourage this kind of competition, and that there is here, in theory, some degree of restraint, more likely to have actual effect than is the restraint as to rates.<sup>12</sup>

[\*\*73] We find, then, both as to rates and service, some impediment to ideally free competition; but that ideal is rare, if it exists at all. We must have a practical standard of comparison. That standard must be [\*324] the lawful situation which would exist, except for the agreement said to be forbidden. This lawful situation is usually that which was displaced by the agreement under attack; but in this case the next earlier situation was itself unlawful, and to get on solid ground we must go back to 1899. The theoretically perfect remedy would be to restore the condition existing in 1899. The bill of complaint and the logic of the situation lead there and lead us nowhere else. When we get there, we find that the Central practically owned the Kanawha. For 10 years it had been the majority stockholder, and it was in absolute control. For the Kanawha traffic, the Kanawha and the Central formed one through unitary line from the mines to the lake. The Hocking could not compete for part of the haul, and, so far as concerns any benefit to the Kanawha shippers, the Hocking might as well have been out of existence.<sup>13</sup> As compared with this situation, I cannot doubt that the present [\*\*74] arrangement is an aid, not a restraint, to competition.

This was in 1899. If we ought to look for a standard of comparison in 1910, that standard must be such other lawful arrangement as might naturally have resulted in the course of separating the two Ohio roads, if the contract for joint control of the Kanawha had not been made. This other arrangement would almost certainly have been the purchase of the Kanawha by or for either the Hocking or the Central exclusively in its own interest. The Kanawha had always been operated in connection with one or the other or both of these roads. It had little reason for existence, except as an extension of one or both of these roads. Except in co-operation with them, it could not get its coal to market. It is not impossible that a wholly independent purchaser for the Kanawha might have been found, but that there should be an independent purchaser who did not plan to resell to one of the other through lines, and who would pay anything like the price which the road was worth [\*\*75] to either one of the Ohio lines as an extension, is highly improbable. Suppose, then, that it had been purchased in 1910, by or for the Central (and the government concedes this would have been lawful), it follows that all the Kanawha traffic would have gone through Ohio over the Central so far as the Kanawha and the Central, acting directly or indirectly, could have brought about this result. So long as a satisfactory through route was provided by the Kanawha-Central line, the Kanawha could not have been compelled to establish a through route or rate by way of the Hocking, and the Hocking could not have competed at all.<sup>14</sup> Even if the Kanawha could have been compelled to establish [\*325] a

<sup>11</sup> In the same way, when some tendency to maintain high rates is only an incident of the contract under attack, we may well remember that the shippers' meritorious grievance on this point is the maintenance of an unreasonable rate, and for that he has an effective remedy.

<sup>12</sup> While each road is content with half the Kanawha traffic, and the Kanawha has the power to equalize, the agreement to divide tends to make both Ohio roads careless as to good service. Now that the shipper has the absolute right of through routing, the Kanawha's power to equalize rests solely on its relations to the Sunday Creek mines, which originate a considerable part of the tonnage, available as an equalizing medium, so that here, too, the Sunday Creek ownership is the real evil. With this removed, the agreement to divide the Kanawha traffic becomes comparatively ineffective, and the shippers' right of through routing must bring the freight solicitors to them in competition.

<sup>13</sup> There was then (in 1899) no way of compelling the Kanawha to join the Hocking in a through route or joint rate; nor was there, indeed, in 1910. (See note 14.)

<sup>14</sup> In March, 1910, the Commission could direct two roads to join in a through rate and route only, "provided no reasonable or satisfactory through route exists." 34 S.L. 590. It seems clear that the Kanawha-Central route would have been made and kept a "reasonable and satisfactory through route" so that the power to compel the Kanawha to join with the Hocking never would have arisen. In June, 1910, this proviso was cut out, but its place was taken by the provision (36 S.L., 552): "And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially

through route and rate via the Hocking the same as via the Central, the Kanawha-Central could have made the part of the rate south of the Ohio river so high, and the part north of the river so low, that the Hocking could not make a competing local rate; or, even if this trouble was overcome, there would still remain the numerous practical obstacles which the Kanawha-Central management could oppose to a diversion of part of its through traffic. In any of these events, the Kanawha shippers [\*\*76] would have no remedy from the law or from the Interstate Commerce Commission, excepting to compel a reasonable through rate; and that remedy has never been impaired.

[\*\*77] These considerations lead me directly to the conclusion that the Kanawha-Hocking-Central relationship now attacked produced (inherently) for the Kanawha district shippers less monopoly and more competition and better service than would have followed from either of the alternative arrangements which would naturally have resulted in 1910, if this one had not been made. The other would have been concededly lawful. I cannot find unlawful monopoly, resulting from inherent power to restrain competition, where that power is less than it would be in the lawful alternative situations.

8. If the intent unlawfully to monopolize or restrain may not be inferred merely from the existence of the power, where that power is of the limited extent and of the peculiar nature which have been described, is that intent otherwise proved by this record?

The five trunk lines had been engaged in an unlawful combination and had been directed by the Ohio Supreme Court to dissolve such combination. It is their purported dissolution which is now under review. Where the only question is whether the defendants are in bad faith continuing a violation of the law after having pretended to quit, it seems to [\*\*78] me reasoning in a circle to draw, from their former misconduct, any serious inference of their present bad faith.

If the Chesapeake & Ohio and the Lake Shore had purchased the Kanawha stock with no interest in the subject-matter, except to control its traffic for the Hocking and the Central, the question would be different; but that was not the sole interest of either purchaser. The Chesapeake & Ohio desired an outlet to Lake Erie for all of its own great [\*326] traffic.<sup>15</sup> For this purpose, it desired to buy the Hocking. This purpose and this desire were beyond criticism; but to reach Gallipolis, the nearest point on the Hocking, it must build across the Ohio river and over 30 miles of difficult country, and it must then, for its traffic, either practically rebuild the Hocking river division, 75 miles, to Logan, or build, new, 50 miles, to Athens, in order, one way or the other, to reach the modernized lines of the Hocking. Why should it be required to do this, paralleling the Kanawha, when it could buy such an interest in the Kanawha as secured to it the indefeasible right to use the Kanawha as this connecting link? What rule of public policy required it to build this [\*\*79] new road instead of buying the existing road?

Turning to the Lake Shore, we find that it desired to buy the Central for the purpose of reaching the coal fields and getting both coal traffic and fuel coal for itself and its allied New York Central lines, and to make connections for through traffic both ways, with the Coal & Coke and the Western Maryland roads. These were rightful and

less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This is awkwardly expressed, because of the lack of definite antecedent for "to do so"; but it seems to mean that if the condition in 1899 was restored, and if the Hocking demanded from the Kanawha a joint through route, via either Athens or the river division, the Kanawha could not be required to comply, because such route would embrace substantially less than the entire length of the Kanawha to Corning, and less than the entire route between its termini, the Kanawha district and Toledo, over railroads "operated in conjunction and under a common management and control." So the Hocking solicitors, in the Kanawha district, would have been helpless.

<sup>15</sup> That this was real, not pretended, is shown by what happened. In 1909, the first full year before the change, the C. & O. delivered to the Kanawha for hauling over its line, 4,000 tons of coal and coke and 70,000 tons of other freight. In 1911, the first full year after the change, it so delivered 811,000 tons of coal and coke, and 168,000 tons of other freight. Between the same periods, southeasterly bound freight received by the C. & O. from the Kanawha increased from 122,000 tons to 199,000 tons. This enormous tonnage given by the C. & O. to the Kanawha was not merely diverted from the other connections of the C. & O., because there was no decrease in the tonnage given to these other connections.

legitimate objects, also beyond criticism. So was its desire to have this feeder reach **[\*\*80]** the Kanawha district. Apparently, no one questions that it could rightfully have purchased the Kanawha outright, nor is there, to my mind, any reason for ascribing to the Lake Shore any moving purpose in the whole transaction of March, except that just mentioned.

We find, then, that the Chesapeake & Ohio had the legal right to buy the Kanawha and a strong and lawful motive for so doing, and that the Lake Shore had the same right and an equally strong and lawful motive, and that this underlying and justifying motive by each had nothing to do with the thought of suppressing competition between the Hocking and the Central; yet the Lake Shore knew that, if the Chesapeake & Ohio made the purchase, the Lake Shore would be defeated in its plan of reaching the Kanawha fields, and the Lake Shore's subsidiary, the Central, would get no Kanawha traffic which the Kanawha could divert; and the Chesapeake & Ohio knew that, if the Lake Shore made the purchase, not only would the former's subsidiary, the Hocking, get little through traffic, but the whole scheme for the Chesapeake & Ohio outlet to the lake would be defeated. Under these circumstances, what more natural than that they should join **[\*\*81]** in buying the Kanawha, each secure against exclusion by the other, and what primary or characterizing unlawful purpose can be found in such a joint purchase? If this joint purchase was, for these reasons, rightful and lawful, as I believe it was, the arrangement for dividing between **[\*327]** the Central and the Hocking the traffic originating on the Kanawha, though important in itself, becomes relatively a mere incident of the main transaction, and its real purpose was to prevent a monopoly of this traffic by either purchaser. It makes little difference how express the equal division agreement was. Such an agreement would be implied from such a situation. Nothing else would be fair or right. If a receiver should be appointed for the Kanawha, the court would direct him to do just what this division agreement called for and what these parties have been doing, viz., divide this traffic equally between the two Ohio lines, so far as he could do so and so far as they were equal in their furnishing of cars and other facilities; in other words, "to treat them fairly."

9. The remaining element of the assumed general criterion is the amount of restraint, actual or potential, which **[\*\*82]** did take place.<sup>16</sup> Here, again, we find that the natural symptoms of a suppression of competition did not exist. No one complains of any suppression or of any practices resulting therefrom; and this for the very good reason that there never was any competition to suppress. It is difficult to prove that defendants have put a burden upon a thing which never existed. Not only is the record barren of any suggestion that the Kanawha shippers ever had the benefit of any competition between the Central and the Hocking, but it affirmatively shows that during the 10 years before 1910 competition was impossible, because the Hocking controlled everything; and that before 1900 it was impossible, because the Kanawha belonged to the Central.

It is certain, then, that the result which will condemn the **[\*\*83]** agreement must be found in the suppression of "potential" competition, and we must ascertain what this means. In the Union Pacific Case the thought was applied with reference to undeveloped traffic from territories already reached by the two roads, and which traffic might grow into larger volume; but the same idea must extend to new and likely methods of competition and even, in some instances, to the building of new roads or branches to make competitive territory out of that which has been tributary to one road only. Whether competition, between the roads now existing, in cutting rates, etc., is probable enough or would be serious enough under the facts of this case to be that potential competition which must be preserved, has been discussed. It is still possible that the Ohio road which saw the Kanawha sold away from it would have built a new line to the Kanawha district even in spite of the great topographical difficulties. Such new road apparently could not have reached any mines now on the Kanawha, because there is room for no new track along the river next to these mines; but, treating the district and not the individual mines as the shipping unit, it could have reached other **[\*\*84]** parts and developed new mines. That **[\*328]** it would have done so is, however, the merest surmise. It is not even probable, so far as the record informs us; and I cannot condemn the joint Kanawha purchase because it has possibly prevented the building of another line in some unknown location at some vague future time. An arrangement which removes the motive for building a competing line cannot, for that

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<sup>16</sup> The Kanawha traffic to be divided was about twenty-five per cent. of the total traffic of the two Ohio roads. This appears only as to the Hocking; I assume a similar ratio on the Central. I reach this result by taking the figures for 1911 (Ex. 138) and excluding the south-bound tonnage from the total of Kanawha and excluding the C. & O. tonnage from total Kanawha and total Hocking.

reason alone, amount to an unlawful forestalling of potential competition, unless such forestalling was a substantial and moving purpose of the arrangement, and unless the building of such other line was at least reasonably probable -- indeed, the latter condition covers both, because it could not be the main and sufficient motive, unless the new road was foreseen as probable.

Finally, in testing the actual results, we must look to the Kanawha shippers. All this controversy is to protect their interests -- and, of course, the correlative interests of the public which buys from them. Have the shippers been injured? Are their rights in jeopardy? On one hand, it appears that there is somewhat less of motive on the part of the Central and the Hocking to compete on a part of [\*\*85] the through haul than there would be under certain other circumstances which never did exist, which would not have been a probable alternative, but which perhaps might have come into existence. I find nothing else to put on this side of the scale. On the other hand, it appears that the great trouble in coal shipments is to get cars, and that the Kanawha, even when in combination with the Central and the Hocking, was poorly supplied with cars and served its shippers poorly. It was greatly interested in its own coal companies, and it would have supplied them if it could, even if it did not impartially distribute all the cars it could get. Under these conditions, coal shipments from the mines along the Kanawha amounted, in the last six months of 1909, to 36,000 cars. With the transfers in March, 1910, there came a new outlet to all the western C. & O. territory, and direct and close relations which made it to the interests of these two trunk lines to furnish cars to the Kanawha.<sup>17</sup> It seemingly must have been due, at least in a large part, to these greater facilities that the shipments by the mines along the Kanawha had increased in the last six months of 1911, to 42,000 cars. This [\*\*86] does not seem to indicate a substantial restraint of trade and commerce. It seems to me clear that the Kanawha shippers and their dependent public have been benefited by the transaction of March, 1910, taken as a whole, and that interstate trade and commerce have been promoted thereby;<sup>18</sup> while the only restraint affecting such shippers or such commerce is theoretical rather than actual, and such as [\*329] it is, arises out of a natural, if not necessary, incident of the main transaction.

10. There remain for consideration two further suggestions. It is [\*\*87] said that the Hocking and the Kanawha are competing roads, and hence that the former cannot take part in managing the latter, either directly or through the instrumentality of the Hocking's chief stockholder. I am not satisfied that these two roads are in any fair sense competing. The portion of the Kanawha extending from Hobson north 40 miles to Corning, and that portion of the Hocking extending from Logan south 50 miles to the river, are substantially parallel and 20 miles apart. There is some traffic to and from two or three small towns, Pomeroy, Middleport, and Gallipolis, but the Kanawha does not reach these towns with its own track, and runs to them over the Hocking under a trackage contract which does not permit it to compete with the Hocking, except by the latter's sufferance. A small amount of coal is produced at some mines along the southern part of the Hocking river division. The Kanawha might, by building its own spurs and branches, reach these three towns and these mines, but the whole of the traffic so reachable and as to which, theoretically, there might be competition, is negligible both in percentages and in total volume; neither is any reason shown to anticipate [\*\*88] increase.

The relative positions of the Hocking and the Kanawha are not those of parallel and competing roads, but those of connecting and continuing roads having an end overlap. It is, in principle, though not in degree, as if the New York Central ran from the east to Niagara Falls through Buffalo, and the Michigan Central, from the west, to Buffalo, through Niagara Falls. Here would be from Buffalo to Niagara Falls two parallel roads, and they might compete for the freight originating at those and intermediate points. This could hardly be thought sufficient to deprive these two roads of their substantially connecting, rather than competing, character. So here, one looking at the map must, I think, observe that the Hocking and the Kanawha form substantially a connecting and continuing line from Gauley

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<sup>17</sup> Up to July, 1909, the Hocking, Central, and Kanawha cars were pooled and used interchangeably on these roads. During the nine months intermediate the end of this pooling arrangement and May 1, 1910, the date of full effect of the March contracts, the Central furnished to the Kanawha an average of 266 cars per month. During the same months of 1910 and 1911 it so furnished an average of 1,466 per month.

<sup>18</sup> In 1909 the New York Central lines were furnishing 1,600 cars per month to the Central; in 1911, 8,300 cars per month. Coal production at the mines on the Central increased 500,000 tons for 1911 over 1909.

Bridge to Lake Erie, and do not lose this character because a branch or spur of the Hocking Toledo-Athens main line branches off at Logan, parallels the north end of the Kanawha and strikes it at Kenauga.

It is true the Ohio court made a finding that these roads were parallel and competing, but the court was considering that portion of the Kanawha north of the river, and not, **[\*\*89]** as we must do, the entire road; and also was treating the Kanawha as part of one system with the Central, a thing which we now cannot do. That court was also considering intrastate commerce, as to which the conclusion of fact might well be different from the proper conclusion regarding the immense volume of traffic involved under this record.

11. It is also said that the C. & O. and Kanawha are competing roads, and hence the former cannot take part in the management of the latter. The roads are parallel from Gauley Bridge to Charleston, a distance of 30 miles along opposite sides of the Kanawha river. The mines on one side ship over the Kanawha; on the other side, over the C. & O. On neither side can they practically reach the other railroad. **[\*330]** The cost of crossing the river would be prohibitive. On neither side could another railroad track be built, the river valley being, at many places, a mere gorge. From Charleston to the Ohio river the courses are generally divergent, one tending north, the other west. Charleston is a common point, and there should be, at this point, competition for freight originating at Charleston or coming in over the Coal & Coke Railroad **[\*\*90]** and destined for the Northwest. The interest of the C. & O. in the Kanawha would theoretically tend to restrict this competition, though the tendency would be imperfect, because over its own lines the C. & O. would get the entire haul to Chicago, while the other way it would be interested in half the profit on the haul from Charleston to Armitage, and half of the volume of the traffic from Armitage to Toledo. One common point, with the amount of traffic existing at Charleston, would, in any event, be hardly sufficient to give a competing character to these railroads, but, even if the theoretical but imperfect tendency to limit this competition could ever sufficiently invalidate and interest by one in the other, yet, in this case, such tendency must yield to the undisputed testimony, which is that the competition at Charleston between the soliciting agents has continued active and vigorous since March, 1910, as before.

The map also suggests that control of the Kanawha might be used to block the making of a through line from the seaboard to the lakes, by way of the Virginian, the Kanawha and the Central, which through line would, as a whole, compete with the C. & O. It is sufficient **[\*\*91]** to say of this suggestion that no such issue is suggested by any pleading, and that the Lake Shore, in purchasing its interest in the Kanawha, guarded against interference by the C. & O. with such possible future plan. <sup>19</sup>

Upon the whole case I see two great shipping districts with interests involved -- the Hocking coal district and the Kanawha coal district. The Hocking shippers were subject to a monopolistic combination of all transportation facilities. They *now* have these facilities divided between two trunk lines, wholly independent of each other, as to competition between which there exists no obstacle which a court can remove. The Kanawha shippers were *always* subject to that monopoly **[\*\*92]** which results from having only one railroad outlet. This has been neither increased nor diminished; but by the alliance between their railroad outlet and two strong lines the shippers can reach much new territory, and the outlet has its facilities and usefulness much increased. As to the one feature (joint Kanawha control), in which the position of the shippers might be better, we are asked, it seems to me, to *create* competition.

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<sup>19</sup> Indeed, the entire subject-matter of this numbered paragraph should be disregarded for the same reason. Paragraph 20 of the bill limits the issue to the charge of a continued combination between the Hocking, the Central, the Zanesville and the Kanawha. It is important to know what the C. & O., as owner of the Kanawha, is doing with the Kanawha; but, to the issue tendered and made, it is immaterial whether the C. & O. is under disability to become the owner of the Kanawha.

## United States v. Great Lakes Towing Co.

District Court, N.D. Ohio, E.D.

February 11, 1913

No. 8,003

**Reporter**

208 F. 733 \*; 1913 U.S. Dist. LEXIS 1267 \*\*

UNITED STATES v. GREAT LAKES TOWING CO. et al.

### Core Terms

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towing, tugs, towing company, Lakes, ports, wrecking, vessels, harbor, wrecking company, vessel owner, properties, terminal, rates, percent, monopoly, stock, do business, facilities, contracts, exclusive contract, unification, eliminated, tariff, interstate commerce, stockholders, practices, promoters, commerce, lighters, lumber

### LexisNexis® Headnotes

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Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

#### [HN1](#) [down arrow] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1](#), in terms declares illegal every combination, in whatever form and of whatever nature, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Energy & Utilities Law > Antitrust Issues > Monopolization

#### [HN2](#) [down arrow] Antitrust & Trade Law, Sherman Act

A combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce, and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the anti-trust act that a combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing

competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

**HN3**  **Antitrust & Trade Law, Sherman Act**

While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the federal **antitrust law**, the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman Act.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

**HN4**  **Sherman Act, Defenses**

Good motives furnish no defense to a violation of the Sherman antitrust act.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

**HN5**  **Antitrust & Trade Law, Sherman Act**

The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the tendency to this evil result must be recognized, even though not in a given case yet realized in actual experience. Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

**HN6**  **Antitrust & Trade Law, Sherman Act**

The general principles affecting the remedy to be applied for a Sherman Act violation are that the continuation of the prohibited acts should be forbidden, and that the combination should be so dissolved as to neutralize the force of the unlawful power; that this result should be accomplished with as little injury as possible to the interests of the general public, and with due regard to vested property interests innocently acquired. In cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute.

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## Opinion

[\*\*1] [\*734] Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The United States filed its petition in equity against the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, the Pittsburgh Steamship Company, and 46 other defendants, corporate and individual, charging the maintenance of a monopoly in transportation of persons and property in commerce between the States and with Canada, and a combination in restraint of such commerce, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200), known as the "Sherman Act." The specific monopoly and restraint charged relate to the business of vessel towing on the Great Lakes; the proofs being specially directed to the [\*735] harbors of Duluth, Sault Ste. Marie (Michigan), Port Huron, Detroit, Chicago (embracing South Chicago, Gary, Whiting, and Indiana Harbor), Toledo, Sandusky, Lorain, Cleveland, Fairport, Ashtabula, Conneaut, Erie, and Buffalo (including Tonawanda and Black Rock).

Previous to and in the year 1899 the towing into and out of the harbors mentioned [\*\*2] of vessels engaged in commerce on the Great Lakes was done by independent tug or towing companies, or individuals operating each at only one port, or, at most, at two or three ports in the immediate vicinity of each other. These tug operators were, generally speaking, in active competition with other operators (if any) at the same port, although competition was sometimes and in some places suspended by arrangements for operation on joint account, or for division of business. At Chicago were the Dunham Towing & Wrecking Company, with 17 tugs and a wrecking outfit, the Barry Bros. Towing Line, with 10 tugs, and the Hauser & Lutz Towing & Dock Company, with 3 tugs; at Buffalo, the Hand & Johnson Tug Line and the Maytham Tug Line, each with 7 tugs and a one-half ownership in a fifteenth tug; at Tonawanda were Hartman and others, with 5 tugs; at Erie and Conneaut, Ash and his associates, with 3 tugs; at Duluth, the White Line Towing Company, with 8 tugs, one lighter, and one scow, and the Inman Tug Company, with 8 tugs; at Cleveland, the Vessel Owners' Towing Company, with 10 tugs, the Cleveland Tug Company, with 5 tugs, and J. C. Gilchrist, 1 tug; at Toledo, Sullivan, usually with [\*\*3] at least 8 tugs, and Nagle, with usually 3 tugs; at Ashtabula, the Ashtabula Tug Company, with 8 tugs; at Port Huron, the Thompson Towing & Wrecking Association, with 12 tugs and 3 lighters; at Bay City, James Davidson, with 2 tugs; at Huron, Dewhirst and others, with 2 tugs; at Fairport, the American Transportation Company, with 2 tugs; at Escanaba, the Escanaba Towing & Wrecking Company, one tug and wrecking appliances; at Sault Ste. Marie, Mich., the Soo River Lighter & Wrecking Company, with two lighters; at Detroit, the Westcott Wrecking Company, Limited, with one steamer, and the Isaac Watt Wrecking Company, Limited, with one steamer; at Cheboygan, the Swayne Wrecking Company, with one steamer. While the list above given is not absolutely complete, it is nearly so, and is sufficiently complete for present purposes.

In the spring of 1899 the Great Lakes Towing Syndicate was formed, for the purpose of acquiring towing and wrecking properties, a committee of this syndicate being sent out to inspect, appraise, and take options on such properties. The Great Lakes Towing Company was organized July 6, 1899, under the laws of New Jersey, with an authorized capital stock of \$5,000,000, [\*\*4] the first of the purposes stated in the certificate of incorporation being

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"to do a general towing, wrecking, salvage, dredging and contracting business on the Great Lakes, in all the harbors thereof, and in all streams and waters tributary thereto, or connected therewith and elsewhere."

The promoters of this organization were largely, if not exclusively, persons heavily interested, directly or by representation, in transportation on the Great Lakes (notably of coal, oil, and ore); some being [\*736] interested in producing as well as in vessel owning and operating, others being interested in docking facilities. Through this syndicate, and on or before August 22, 1899, the Great Lakes Towing Company purchased the properties (in case of corporate vendors, their entire capital stocks or properties, or both) of the various tug owners and operators

mentioned in the margin of this opinion,<sup>1</sup> these purchases embracing 74 tugs, 6 lighters, and 1 scow. The aggregate net purchase price paid for these properties, as indicated by journal entries on the books of the Great Lakes Towing Company, was \$3,112,930.92, the vendors receiving, in cash value, much less than the prices so indicated, <sup>[\*\*5]</sup> in many cases receiving preferred stock in whole or in part payment, and not usually any considerable amount of common stock, which latter carried the voting power; the control being held by the promoters and those having like interests. Later in 1899 and in the early part of 1900, the Great Lakes Towing Company bought the properties of still other tug owners and operators, whose names are given in the margin,<sup>2</sup> such added purchases aggregating 34 tugs and 1 steamer. The Great Lakes Towing Company (which we shall hereafter call the Towing Company) thus immediately acquired all the properties of all the prominent towing operators at each of the 14 ports in question, except those of Nagle and Sullivan, at Toledo, and the two steamers of the Swayne and Isaac Watt Wrecking Companies, respectively. It will be seen that the control of these properties was soon afterwards acquired by the Towing Company, either by purchase or by contract.

<sup>[\*\*6]</sup> The Union Towing & Wrecking Company was incorporated after the organization of the Great Lakes Towing Company, and was practically the successor of the Inman Tug Company and the White Line Tug Company, both of Duluth. It took over the properties of these two companies, as well as those of the Independent Towing Company, the Escanaba Towing & Wrecking Company, and the Soo River Righter & Wrecking Company. The property of Barry Bros. (Chicago) was ultimately conveyed to the Dunham Towing & Wrecking Company. The properties of the Maytham Tug Line and one or more other companies were conveyed to the Hand & Johnson Tug Line. The properties operated at the lower lake ports were, for the most part, conveyed to the Great Lakes Towing Company, which also took, and has always held, the entire of the capital stock of the Hand & Johnson Tug Line, the Thompson Towing & Wrecking Association, the Union Towing & Wrecking Company, the Dunham Towing & Wrecking Company, and the Great Lakes Towing Company, Limited. All five <sup>[\*737]</sup> of these last-named companies have been kept alive, but the policy and activities of each of them, in all the ports in which they respectively do business, have <sup>[\*\*7]</sup> at all times been absolutely controlled by the Great Lakes Towing Company, through boards of directors and otherwise. The other corporations whose stocks and properties were bought by the Towing Company have been treated as defunct, although they have not been formally wound up.

In connection with each of the purchases made by the Towing Company, whether in 1899 or subsequently, the vendors (and if corporate, usually their managers and principal stockholders as well) were required to and did agree in writing that during the succeeding five years they would "in all proper ways in their power, aid and assist the party of the second part (the Towing Company), its nominees, successors and assigns, in retaining, extending and successfully prosecuting the business" formerly conducted by the vendor; and that during the same period of five years they would not "directly or as shareholders, in or by or through any interest in any corporation, partnership or association, engage in or be interested, directly or indirectly, in the business of *towing and wrecking* or in any branch thereof, *upon the Great Lakes*, their harbors, connecting and tributary waters (except Lake Ontario and its <sup>[\*\*8]</sup> harbors and the waters east thereof), excepting only and so far as they, or either of them, shall be interested in or with the party of the second part, as shareholder or employee." The Towing Company, at and within a few months following its organization, bought apparently more tugs than needed to do all the business required at the 14 ports, if properly distributed. Occasionally the Towing Company made sales of tugs, but always under agreement of the purchasers (and with attempt to make such agreement follow the title) that the tugs should not be used in vessel towing *at any of the 14 ports in question*; other ports as well being usually included in the restriction.

In 1900 Maytham's Towing & Wrecking Company was organized at Buffalo, and after a bitter and expensive competition with the Towing Company, its property, including 18 tugs, was in the following year bought by the Towing Company. Soon thereafter, and in 1901, the Independent Towing Company was organized at Buffalo, and

<sup>1</sup> The Maytham Tug Line, the Hand & Johnson Tug Line, Ash, and others, Ashtabula Tug Company, Vessel Owners' Towing Company, Thompson Towing & Wrecking Association, Soo River Lighter & Wrecking Company, James Davidson, White Line Towing Company, Inman Tug Company, and Barry Bros., Independent Tug Line.

<sup>2</sup> The Cleveland Tug Company, the American Transportation Company, the Westcott Wrecking Company, Ltd. (whose name was thereupon changed to the Great Lakes Towing Company, Ltd.), the Dunham Towing & Wrecking Company, the Escanaba Towing & Wrecking Company, Dewhurst, and others, Sault Ste. Marie Tug Company, Hartman, and others, and Gilchrist.

after a long and aggressive competition (which in three months of 1903 cost the Towing Company \$20,000, as compared with earnings in 1901) its property, likewise, was in 1903 bought by the Towing [\*\*9] Company, and its manager taken into the latter's employ.

In connection with the purchase of the Independent Tug Company's property and business, an agreement was made with Sullivan for carrying on the towing business at Toledo and in the Detroit and St. Clair rivers on joint account, for a period of five years from January 1, 1904, each operator contributing an equal number of tugs, the business being conducted in the name of the Great Lakes Towing Company, with Sullivan as manager, under salary; the Towing Company agreeing not to do any other towing business at Toledo, and Sullivan agreeing not to do *any towing* except under the agreement in question, either alone or in association with others. This agreement was subsequently extended [\*738] to January 1, 1910. In April, 1904, an agreement was made with Nagle whereby, in consideration of a fixed payment of \$2,000 per year for five years, he agreed that none of his three tugs should, during that period, be used "in vessel towing business on the Great Lakes, their harbors, tributary and connecting waters" (there being, however, no restriction upon Nagle's use of the tugs for other than towing business), Nagle calling this [\*\*10] annual payment "alimony," and an officer of the Towing Company characterizing it as "blackmail." This payment of \$2,000 per year was made to Nagle solely to get rid of his competition (without buying his tugs), and without the requirement of any active service. In 1905 an agreement was made with the owners of three tugs, whereby one or the other of two tugs named was to be used on joint account with the Towing Company in wrecking and other work in the vicinity of Detroit, the owners agreeing that the third tug (which was not included in the joint account operation) should during the life of the contract do no wrecking work or vessel towing in Detroit river or elsewhere, with the same restrictions as to the first and second tugs (except upon request of the Towing Company), when not employed under the contract; the towing of dredges or scows and the towing of vessels in Canadian ports other than Anherstberg (where the Towing Company did business) being excepted. Other contracts for joint operation were made, but they are less significant than those to which we have called attention.

As early as 1900 the Towing Company adopted a tariff of service rates. For the first few years after [\*\*11] 1899 there was occasional competition at various of the ports where the Towing Company operated. That at Buffalo has already been referred to. The Sullivan and Nagle arrangements grew out of competition at Toledo. At Duluth there was more or less competition as late as 1903, and at Chicago until 1905, and to a slight extent later. The record of correspondence between officers of the Towing Company and officers and managers of its subsidiaries, from 1899 on, abounds with expressions of determination to wipe out all injurious competition, and such policy was vigorously and aggressively pursued. Wherever rates were cut by competitors the cut was at least met. After competition ceased the rates were restored. We are not satisfied that the Towing Company started general rate cutting, and it may be that it did not cut below its competitors. Indeed, it would generally seem unnecessary that it should do so. Its policy, however, was "not to lose any business on account of not making the necessary rate to get it." Competitive practices were not limited to general rate cutting, but embraced special concessions in various forms, where necessary to get business away from the opposition.

[\*\*12] The Towing Company adopted, as early as 1900, a system of exclusive contracts, by which, in consideration of the vessel owners employing *throughout the entire season* the Towing Company's *tug and wrecking service at all ports* covered by its tariffs (so far as the vessel owner had occasion for such service), a large discount was given from tariff rates. In 1910 a flat discount of 20 per cent. was given on all bills. The discount was at no time less than 20 per cent., and in later years [\*739] it varied with the class of service, ranging in 1910 from 20 per cent. on lake towing, boiler work, wrecking service, harbor towing of line boats, and first-class coarse-freight carriers, to 30 per cent. on lumber boats. No discounts were allowed except under such exclusive contracts. The vessel owner, moreover, was guaranteed that his contract rates, taken together, should not exceed the sum of the "cut rates" made to meet competition. As expressed by the Towing Company's president:

"The advantage of the contract to the vessel owner is that it saves him 20 per cent. on the tariff at all points, and even though there may be competition at some, and they cut rates, on the [\*\*13] whole he would make a saving by doing business with us. And, again, should he be of opinion that there will be competition all along the line and the cut rates less than our contract rates, our contract protects him against that."

The Towing Company has long had a practical monopoly of harbor towing at the 14 ports. In May, 1900, its president advised the Buffalo manager that:

"Notwithstanding the heroic efforts made by the opposition company, we have secured practically all of the package freight boats, all of the ore and grain boats, and many of the lumber carriers, in all something like 500 boats, which we estimate represent fully 75 per cent. of the towing in dollars and cents which will be done on the Lakes this season. \* \* \* As near as we can figure, if all the uncontracted towing was done by the opposition, they still would not earn sufficient money to pay their operating expenses."

As written by the Towing Company's secretary in April of the same year:

"I believe we now have about enough of the ore boats pledged to us so that the opposition could not put a tug into Lorain, or any other Lake Erie points between Cleveland and Buffalo, and half make living expenses."

[\*\*14] In the same month the Towing Company's president wrote the president of the Union Towing & Wrecking Company, at Duluth:

"It seems to us now that there will be no occasion to make a general cut in rates unless it is for the lumber trade, and if we can fix it so that we do not have to open up the rates in the lumber business, I think we can put the other fellows to sleep and not impair our own revenue."

In June of the same year the Towing Company's secretary wrote a Canadian vessel owner, in soliciting him to make an exclusive contract:

"We have contracts now with about 80 per cent. or 90 per cent. of all the boats using tugs on the Great Lakes, for all their service."

The lumber carrying vessels were the hardest to secure. To this end an aggressive campaign was made through the Lumber Carriers' Association. In July, 1903, the president of the Towing Company was claiming that "over 90 per cent. of the entire lumber tonnage has contracted with us to do all of their work for from one to five years"; and in November, 1903, upon the purchase of the Independent Towing Company at Buffalo, and the making of the contract with Sullivan respecting the Toledo situation, the Towing Company's [\*\*15] president reported to its executive committee that "this eliminates all the opposition the Great Lakes Towing Company has that looks at all dangerous." It is entirely safe to say that since 1904 the Great Lakes Towing Company [\*740] has had no real competition in harbor towing at either of the 14 ports, except to a limited extent at Chicago for a little later period, and that it now controls 95 per cent. of the harbor towing on the Great Lakes at the 14 ports concerned.

The Towing Company does not monopolize the wrecking business as completely as that of harbor towing. There are several wrecking companies doing an active business, especially under employment by underwriters, who, having no need of towing service, are of course unaffected by the exclusive contracts employed by the Towing Company. The Towing Company's port to port towing business amounts to but about 2 per cent. of its total business, although in dollars and cents aggregating a substantial amount.

The Towing Company contends that the combination represented by it does not constitute an unreasonable restraint upon or monopoly over commerce, and thus is not within the condemnation of the Sherman act; that it [\*\*16] is in effect merely a protective association organized for the mutual benefit of its members and promoters, whose principal expectation of gain lay in the benefits expected to accrue from improvement of the towing and wrecking service rendered their vessels, and whose purpose was not to create a monopoly nor to restrain commerce, but to facilitate it. It is shown that the size of steam vessels carrying bulk freight on the Great Lakes increased, during the five-year period preceding 1900, from 300 to 500 feet in length, and from 3,000 to 4,000 tons to 7,000 or 8,000 tons carrying capacity (a further increase having taken place since); that a similar increase took place with respect to the size and capacity of passenger steamers; that the increase in the size of freighters was accompanied by a corresponding increase in facilities for loading and unloading, through the substitution of the clam shell (and its predecessor, the scoop bucket) for the former slow method, of raising by crane or derrick buckets filled by hand in the vessel's hold. Defendants contend that the towing and wrecking facilities furnished at

the important ports on the Great Lakes were totally inadequate to meet this [\*\*17] increase in the size and number of vessels; that while there were frequently tugs enough in commission, if they could be utilized, to meet the demands for harbor towing, at many of the ports a ruinous system of cut-throat competition existed, whereby the larger tugs were used for "scout service" in meeting vessels many miles from the harbor, leaving small and insufficient tugs to do the actual harbor towing, this resulting in lack of system for furnishing tugs, absence of system of delivering orders to ships, and of uniform system for notifying incoming vessels where they belonged, accompanied by graft, lack of fixed tariffs, and by other demoralizing incidents; that at times competing concerns made arrangements for division of business, whereby each tug line was to do all the towing of vessels belonging to certain owners, the latter having nothing to say as to what tugs should serve them; that many of the tug companies were financially irresponsible, and vessel owners were thus left without adequate remedy for negligent or unskillful towing; that before the formation of the Great Lakes Towing Company some of the larger vessel interests were considering forming individual tug lines [\*\*18] for their own [\*741] service. It is also contended that the ice breaking tug service at the great grain ports of Duluth, Chicago, and Buffalo was inadequate. It is shown that, in the organization of the Great Lakes Towing Company, vessel owners contributed allotted amounts and took corresponding portions of stock, the vessel owners being expected to give their business to the new association; that the promoters tried first to buy out all tug operators at ports where bulk freighters did much business, instead of driving such operators out of business. It is also shown that the Towing Company has so increased the power and changed the construction of ice breaking tugs as to lengthen the navigation period at the great grain ports by three weeks each year; that harbor towing service has been improved, delays largely eliminated, the delivering of orders systematized, and a responsible concern substituted for a number of concerns, some of whom were not responsible. Finally, it is urged that in the towing service a natural monopoly is impossible; that the organization of the Towing Company is practically a mere unification of the system of harbor towing, analogous to railway terminal [\*\*19] service, and that in the absence of a natural monopoly such mere unification is not objectionable, the language of the decision in the St. Louis Terminal Case being invoked as decisive of the legality of the Towing Company's status.

The general propositions applicable to the facts presented are too well settled to justify much discussion. [HN1↑](#)  
The Sherman act in terms declares illegal every combination, in whatever form and of whatever nature, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations. [Northern Securities Co. v. United States, 193 U.S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679](#), and cases there cited. While by its later decisions the Supreme Court has interpreted the statute as not restraining the "power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose," and has declared that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract and render difficult, if not impossible, any movement of trade in interstate commerce, the free movement of which it was [\*\*20] the purpose of the statute to protect ( Standard Oil Co. v. United States, 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. [N.S.] 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U.S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663; [United States v. Reading Co., 226 U.S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243](#), it may yet be regarded as well settled that [HN2↑](#) a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce, and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the anti-trust act ( Standard Oil Co., supra; American Tobacco Co., supra; Reading Case, supra); and that a combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate [\*742] commerce is unduly restricted or suppressed, is within the condemnation of the act (Standard Oil Co. Case, supra; American Tobacco Co. Case, supra).

We entertain [\*\*21] no doubt that tugs employed in the business of towing, into and out of harbors and between ports, of vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. [Foster v. Davenport, 63 U.S. \(22 How.\) 244, 16 L. Ed. 248](#); [Moran v. New Orleans, 112 U.S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653](#); [Harmon v. Chicago, 147 U.S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216](#). It inevitably follows that any undue restraint upon such business of towing and wrecking offends against the Sherman act.

The intention of the Great Lakes Towing Company and its promoters to obtain complete control of the towing and wrecking service in at least the 14 ports mentioned is, we think, clearly established by the considerations to which we have referred. Referring to the more prominent of those considerations:

**HN3** While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the federal [\*\*22] Anti-Trust Law (see authorities cited in *Darius Cole Transp. Co. v. White Star Line [C.C.A. 6] 186 Fed. 63, 65*, 108 C.C.A. 165), the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman act. *Shawnee Compress Co. v. Anderson, 209 U.S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865*. The fact that the restraint of competition was not limited to the locality where the seller was doing business, but was made to extend to *all harbors* upon the Great Lakes (except Lake Ontario), tends to show an intention on the part of the Towing Company to get more than reasonable protection incidental to the good will of the business sold. Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service points* covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other [\*\*23] corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justified a presumption of an intent to dominate and control the towing facilities. *Standard Oil Co. v. United States, 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834*, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A [\*743] wicked purpose to wreck the property and business of those then engaged in towing is not essential to a violation of the statute.

The Towing Company's object in employing the system of customers' exclusive contracts was clearly to make successful competition impossible. As written by the Towing Company's president during the competition at Buffalo in 1903:

"Some of the line managers, and a very large per cent. of the vessel owners, have been induced to contract with this company, with the [\*\*24] understanding that those who remained outside when the opposition was destroyed would have to pay the full tariff rates."

That these contracts greatly contributed to the suppression of competition is likewise clear. They enabled the Towing Company to do each year a profitable business, despite competition at certain localities which would have been ruinous to an operator in that one locality, for rate cutting at one port did not affect the regular tariff rates at any of the other ports. As expressed by the Towing Company's secretary in 1900:

"As a matter of fact \* \* \* these contracts are what are saving us from having the business entirely demoralized at all points."

It is true that the Towing Company has not attempted to do business on Lake Ontario or at any of the nearly 40 other harbors on the Great Lakes enumerated in the margin.<sup>3</sup> But this fact has nothing to do with the question of defendants' attempt to monopolize business at the 14 ports in question. It is not necessary to a violation of the federal statute that a complete monopoly of all towing on the Great Lakes be effected. *Northern Securities Co. v. United States, 193 U.S. 197, 332, 24 Sup. Ct. 436, 48 L. Ed. [\*\*25] 679*. A monopoly in 14 ports is as offensive

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<sup>3</sup> Two Harbors, Minnesota; Ft. William, Port Arthur, Michipicoten, Parry Sound, Depot Harbor, Midland, Collingwood, Owen Sound, Kincardine, Goderich, Port Dalhousie, Canada; Ontonagon, Houghton and Hancock, Manistique, Gladstone, Cheboygan, Petoskey, Traverse City, Manistee, Ludington, Muskegon, Grand Haven, Holland, South Haven, Benton Harbor, Alpena, Saginaw, Bay City, Harbor Beach, Mich.; Menominee, Green Bay, Two Rivers, Manitowoc, Sheboygan, Milwaukee, Racine, Kenosha, Waukegan, Wis.

against the act as a monopoly in 50 ports. We may remark, in passing, that we are satisfied that the business at none of the ports outside the 14 in question (unless it be Milwaukee) was such as to be attractive to the Towing Company.

We do not doubt that in 1899 the tug service, both towing and wrecking, at certain of the lake ports in question was unsatisfactory, although from the fact that no new tugs were built by the Towing Company for 7 years thereafter (and but four in 10 years) and no new lighters or wrecking appliances acquired during the first four years, it would appear that there was in 1899 no great dearth of tugs, or even of tugs of [\*<sup>26</sup>] sufficient size, if properly employed. The question is whether the unsatisfactory towing facilities, including their practical operation, justified the making of this combination. Of the claim that the towing Company was merely a mutual protective association, it is enough to say that defendants' contentions in this regard are not sustained. Not all, or even nearly all, vessel owners needing the service [\*<sup>744</sup>] in question were included as (or even invited to become) members of the association. Nor can we assent to the suggestion that the combination was not organized for profit. The betterment of the service was unquestionably one of its attractive features, and probably the leading one; but we are satisfied the promoters confidently anticipated a profitable operation, and that but for such anticipation the combination would not have been formed. Cogent evidence of this conclusion is found in the declaration of the Towing Company's directors on August 16, 1899, that the properties proposed to be taken by the syndicate --

"had made net earnings which in the aggregate would pay a fair interest on \$3,500,000 [much more than was proposed to be paid for the properties], which [\*<sup>27</sup>] net earnings will undoubtedly be largely increased as a result of single management and of combined operation of the properties."

It is also to be noted that the officers reported to the stockholders in 1901 that the company had earned during the season of 1900, "in spite of a bitter competition" (principally the Maytham competition, it would seem), a net undivided profit of over \$90,000, after paying 7 per cent. on the preferred stock. The dividend was passed, however, so as to leave the company strong to meet such competition the next season. We are satisfied that the Towing Company's operations have proved financially profitable to its stockholders.

The fact that the towing and wrecking service has been improved under the Towing Company's administration cannot legalize the combination if otherwise unlawful. Not only do HN4[<sup>↑</sup>] good motives furnish no defense to a violation of the anti-trust act ( Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

Has the Towing Company acquired this domination of the [\*<sup>28</sup>] towing and wrecking service by normal methods alone; or, as otherwise stated, has it unduly restrained or suppressed competition? We think it clear that the Towing Company's domination does not result from normal methods alone. Whatever may be the views of individual economists, under the federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. HN5[<sup>↑</sup>] The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the tendency to this evil result must be recognized, even though not in a given case yet realized in actual experience. United States v. Union Pacific R.R. Co., 226 U.S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; Joint Traffic Association Case, 171 U.S. 505, 576, 19 Sup. Ct. 25, 43 L. Ed. 259; Standard Sanitary Mfg. Co. v. United States, *supra*. Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the [\*<sup>29</sup>] ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful. It needs no discussion to demonstrate that complete unification of the [\*<sup>745</sup>] towing and wrecking facilities at 14 principal ports, accompanied by restraints with respect to competition imposed upon the sellers of towing properties in excess of the legitimate protection necessary to the preservation of the business purchased, excessive restrictions against competition under joint operating contracts and on sales of tugs, bitter rate wars, and a system of exclusive contracts with customers such as is found here, all adopted or engaged in for the purpose of effectuating monopolistic control, are abnormal methods of doing business and eliminating competition, and that a restraint of natural competition by such means is undue restraint. We think the St. Louis Terminal Case (224 U.S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810), so far from sustaining the legality of the combination

maintained by the Towing Company, contains a direct denial of such legality. It was there held that the unification of substantially every terminal railroad facility by which the traffic of St. Louis is served [\*\*30] constituted a combination in restraint of trade. It is true that the court, speaking through Mr. Justice Lurton, there said:

"It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact"

the fact referred to being the "physical or topographical conditions peculiar to the locality"; the route exclusively occupied by the combination being the only practical route for entering the city. It was also held that the terminal was not under a "common control and ownership," because all needing its use were not admitted to an "equal control and management upon an equal basis with the present proprietary companies." To our minds there is a strong analogy between the "physical or topographical conditions" existing in the St. [\*\*31] Louis Terminal Case and the artificial condition created by the Towing Company. A prominent vice of the situation before us is that there are here involved 14 separate "terminals," no one "terminal" being allowed to stand by itself; that the towing facilities furnished at each "terminal" (speaking more especially with respect to prices) are not furnished to all on equal terms as respects the service at that "terminal," but discrimination is made for or against a customer according to whether he does or does not give the Towing Company all his business (not merely towing, but wrecking as well) at each of the other "terminals" covered by the Towing Company's tariffs. No more effective obstacle to successful competition could well be devised than is found in this exclusive contract system. It is manifest that no competitor doing business at less than all 14 of the ports could compete with the Towing Company on anything like equal terms. With the field already occupied by a strong combination, with a large patronage fixedly secured through stockholding interests, the formation of another company equipped to do business at all 14 ports would seem a commercial and financial impossibility. [\*\*32] The Towing Company seems to have appreciated [\*746] this condition, for as early as April, 1900, its president wrote the local manager at Buffalo:

"I think you can safely assert that there is no one concern or combination of concerns that can carry out promises and take care of the vessel towing at all the ports all the time without at least 60 tugs. Taking all the tugs, outside our own, engaged in the vessel towing business, there is not one third of this number, including the poor ones, which are in a majority"

and in August of that year, during the Maytham competition at Buffalo, the Towing Company's president did not believe that the Maythams, "notwithstanding their good reputation and conservative business principles," could "possibly induce capital to invest to the extent of \$200,000." Yet several times that sum was paid on the very first purchase of towing facilities made by the Towing Company.

It is urged that all vessel owners already enjoy all the rights which by the decree in the St. Louis Terminal Case were given outside railroads, in that all such vessel owners are at liberty to buy stock in the Towing Company, upon the market, and thereby participate [\*\*33] in the ownership and management of that company's business. But all may not be able to acquire large stock interests, and the rights of minority stockholders may well fail to assure that "equal control and management upon an equal basis" with all other vessel owners, including the stockholders in the Towing Company, which would be necessary to make the relief analogous to that required in the Terminal Case. We see, however, no substantial analogy in this respect between the vessel owners here and the railroads in the Terminal Case. The analogy is rather between the railroads there and the tug companies here.

We conclude that the Towing Company and the corporations controlled by it constitute a combination denounced by the anti-trust act. We thus come to the question of the remedy to be applied. HNG [↑] The general principles affecting this subject are that the continuation of the prohibited acts should be forbidden, and that the combination should be so dissolved as to neutralize the force of the unlawful power; that this result should be accomplished with as little injury as possible to the interests of the general public, and with due regard to vested property interests innocently [\*\*34] acquired. In cases where the illegality of the combination results alone from purely administrative

conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute. Standard Oil Case, supra; St. Louis Terminal Case, supra; Union Pacific R.R. Case, *supra*.

The complete elimination of the offending administrative practices to which attention has been called, including (as the more prominent) customers' exclusive contracts and destructive rate competition (especially as applied to temporary rate reductions in particular harbors), and including all unfair advantages possessed by the Towing Company by reason of its size, financial strength or connections, accompanied by the according of equal and "most favored" treatment to all vessel owners, regardless of the amount of their business, and whether or not they are stockholders in the Towing Company, and whether or not they in fact exclusively patronize that company wherever it does [\*747] business (thus, and in all other ways, safeguarding the rights of all others engaged or wishing to engage in towing), would greatly lessen the presently existing evils, and possibly [\*\*35] might substantially remove them. But, having in mind the magnitude of the combination and the extent of its activities, and the fact that it was organized to secure a monopoly, as well as for the benefit and profit of its members, together with its present practical occupancy of the territory, thereby placing all would-be competitors at such great disadvantage as practically to deter them, in large measure, from entering the field; together with the further fact that the decree of this court commanding the cessation of purely administrative practices would not be self-executing -- it seems unlikely that a decree merely enjoining administrative practices would give complete relief, in the absence of radical change in fundamental principles upon which the Towing Company is organized and operated.

If the Towing Company shall present a feasible and satisfactory plan whereby its service shall be given for the equal benefit of all requiring the same (accompanied by a complete elimination of the offending administrative practices mentioned), so that the company becomes in truth "the bona fide agent and servant" of every vessel owner who shall use or need its facilities, and so that the [\*\*36] rights of competitors are completely safeguarded, the injunction need only forbid continued operation except in full compliance with the terms of such plan; and the Towing Company is given 30 days for presenting such plan, if it cares to do so. Otherwise, the parties will be heard upon a plan for the dissolution of the combination, and upon the form of a decree for injunction, and receivership if necessary, to effectuate such dissolution. The question against what ones of the defendants injunction should issue is reserved until the precise form of relief is determined.

The proof does not show that the Pittsburgh Steamship Company has been a party to the combination charged, and counsel for complainant so concedes. As to that defendant the bill of complaint should be dismissed with costs.

No decree or order under this opinion will be entered until further directions.



## **Robert H. Ingersoll & Bro. v. McColl**

District Court, D. Minnesota, Third Division

March 17, 1913

No Number in Original

**Reporter**

204 F. 147 \*; 1913 U.S. Dist. LEXIS 1652 \*\*

ROBERT H. INGERSOLL & BRO. v. MCCOLL

### **Core Terms**

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watch, patent, Dollar, license, trade-mark, advertising, retail, prices, patented article, dealers, jobbers, contractual relationship, merchants, benefits, monopoly

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

#### **HN1 [down arrow] Intellectual Property, Misuse of Rights**

Although the owner of a patent may control the price of the patented article, it does not follow that the owner of a trademark can do so. No such power is vested in the owner of a copyright. The owner of an unpatented medicine cannot control the price in the hands of retail dealers with whom he has no contractual relations. An attempt to do so would be a violation of the antitrust law. It is very clear that the owner of a trademark is in no better position than the owner of a copyright.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Contracts Law > Contract Conditions & Provisions > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > ... > Utility Patents > Product Patents > Machines

## **HN2**[ **Ownership & Transfer of Rights, Assignments**

The Sherman Act clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act was never contemplated by its framers. If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Patent Law > Ownership > General Overview

## **HN3**[ **Ownership & Transfer of Rights, Licenses**

If a license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Sherman Act, 15 U.S.C.S. § 1 et seq., then it is void, because such restriction is not a reasonable condition imposed upon the licensee of a patent by the owner thereof, nor is it a condition suitable to protect the use of a patent and secure its benefits.

Patent Law > Anticipation & Novelty > General Overview

Patent Law > Utility Requirement > Proof of Utility

## **HN4**[ **Patent Law, Anticipation & Novelty**

There is a presumption of novelty and utility created by the issuance of patents.

Antitrust & Trade Law > Sherman Act > General Overview

Trademark Law > Conveyances > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Trademark Law > Special Marks > Trade Names > General Overview

## **HN5**[ **Antitrust & Trade Law, Sherman Act**

The right of a patentee to do what he may please to do with the patented article is not unrestricted. He cannot impose upon a purchaser a condition which is unreasonable. He cannot impose an unreasonable condition, for the purpose of enabling him to violate the Sherman Act. If it appears that a license restriction so imposed on the sale of a product is not for the purpose of securing the benefits of the patented improvements therein, but in order that the patentee may protect the trademark or trade name under which it sells the product, such a condition is not imposed to protect the use of the patent or the monopoly which the law conferred upon it. It is an unreasonable one that is beyond the power of the patentee to impose upon a purchaser and is void as to him.

**Opinion by:** [\*\*1] WILLARD

## Opinion

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[\*147] WILLARD, District Judge. This is a suit for the infringement of patent No. 787,041, granted April 11, 1905, for improvements in lantern pinions used in watches; patent No. 855,950, granted June 4, 1907, for improvements in lever escapements used in watches; patent No. 926,329, granted June 29, 1909, for improvements in watches relating to stem-winding and setting; and patent No. 958,987, granted May 24, 1910, for improvements in center frictions in watches. The infringement is said to consist in this:

The plaintiffs are owners of the patents. They cause to be manufactured for them a watch known under three names, "Ingersoll Dollar Watch," "Yankee Dollar Watch," and "Yankee." This they sell to jobbers, who sell to retail merchants. Each watch is packed in a box, on the outside cover of which is pasted the following notice:

"License.

"Robt. H. Ingersoll & Bro., Makers, New York, Chicago, London, San Francisco.

"Mechanism in this watch is covered by United States patents, and the watch is licensed and sold under and subject to the following conditions, assented to by purchase and controlling all sales and uses thereof, any violation [\*148] [\*\*2] of which license conditions revokes and terminates all rights and license as to this and all other watches of makers in violator's possession, and subjects the violator to suit for infringement of said letters patent:

"(1) Jobbers may sell only to retail dealers, may not sell to any one designated by makers as objectionable, may not detach or sell without this notice, and may sell only at rates specified in schedules furnished by makers.

"(2) Retailers may advertise and sell only to buyers for use at ONE DOLLAR.

"(3) No donation, discount, rebate, premium, or bonus may be allowed or given in connection with any sale at wholesale or retail.

"(4) Guarantee, with date of sale indorsed thereon, to accompany each watch."

The defendant, a retail druggist in St. Paul, never bought any watches from the plaintiffs, and never had any contractual relations with them. He did, however, buy from a jobber in Duluth several of the Yankee watches, advertised them for sale in his store at 83 cents each, and sold them at that price. He knew at the time of so advertising and selling them of the license restriction imposed by the plaintiffs in regard to the price. The prayer of the bill is [\*\*3] that he be enjoined from selling a Yankee watch for less than \$1, and for damages and profits.

The real question in the case is whether this is a suit to protect a trade-mark, or one to protect a patent.

The Supreme Court of the United States has not yet directly decided that such a price restriction upon a patented article is binding upon a person who has entered into no contractual relation with the patentee. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 345, 28 Sup. Ct. 722, 52 L. Ed. 1086; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 402, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor has the Circuit Court of Appeals of this circuit so decided, but that court in the case of *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C.C.A. 594, did hold that such a price

restriction could be enforced against a person who had entered into contractual relations with the owner of the patent.

But [HN1](#) although the owner of a patent may control the price of the patented article, it does not follow that the owner of a trade-mark can do so. No such power is vested in the owner of a copyright. [Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086](#). The owner of an unpatented [\[\\*\\*4\]](#) medicine cannot control the price in the hands of retail dealers with whom he has no contractual relations. An attempt to do so would be a violation of the Anti-Trust Law. [Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502](#). It is very clear that the owner of a trade-mark is in no better position than the owner of a copyright. If this suit is really for the protection of a trade-mark, it cannot be maintained. Nor can it be maintained on the ground of any contractual relation between the plaintiffs and the defendant, because there was none.

Can it be maintained on the ground that the purpose is to protect a patent? In [E. Bement & Sons v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, on page 756 \(46 L. Ed. 1058\)](#), the court said:

[\[\\*149\] HN2](#) "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act (Sherman Act) we have no doubt was never contemplated [\[\\*\\*5\]](#) by its framers."

In [Henry v. Dick Co., 224 U.S. 1, 31, 32 Sup. Ct. 364, on page 372 \(56 L. Ed. 645\)](#), the court said:

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable."

In Standard Sanitary Mfg. Co. v. United States, 226 U.S. [20, 33 Sup. Ct. 9, 57 L. Ed. , decided by the Supreme Court November 18, 1912](#), the court said:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was a part of a contract and combination [\[\\*\\*6\]](#) with many other companies, and constituted a violation of the Sherman Law; but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in [Henry v. A.B. Dick Co., 224 U.S. 1 \[32 Sup. Ct. 364, 56 L. Ed. 645\]](#), which contravenes the views herein expressed."

From these authorities the rule to be deduced is this: [HN3](#) If the license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Anti-Trust Act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor is it "a condition suitable to protect the use of a patent and secure its benefits."

It is necessary, therefore, to examine the evidence to see what the real purpose of the license restriction is in this case. Putnam, a witness for the plaintiffs, has been connected with their business for 15 or 16 years, and is, and for more than 10 years has been, their general [\[\\*\\*7\]](#) sales manager. He testified, among other things, as follows:

"Q. Please state what the fact has been, and is, in reference to the use of the complainant during this period of trade-marks and brand names in connection with the manufacture and sale of its products, and if trade-marks or brand names have been used thereon, please give some of the principal names employed. A. The general name under which its principal watch products have been sold is 'Ingersoll.' Different classes or grades of watches have been given identifying names, each of which has been largely advertised and has become a trade-mark for such

particular watch. These names as now and recently used are 'Yankee,' 'Eclipse,' 'Midget,' and 'Junior.' There are and have been other names, but they are not in such common or large use.

"Q. Please state whether these names 'Ingersoll,' or the universal general trade-mark name for the product, and the names 'Yankee,' 'Eclipse,' 'Junior,' 'Midget,' and other names, have been in any way advertised as trade-mark [**\*150**] or brand names of the product? A. Each of such names has been largely advertised; the name 'Yankee' has been very largely advertised.

"Q. Of these [**\*\*8**] different trade-mark names, 'Yankee,' 'Eclipse,' 'Junior,' 'Midget,' which has been the most extensively advertised? A. 'Yankee,' or, as it has been commonly known and advertised, the 'Dollar Watch.'

"Q. About when was the name 'Yankee' adopted by the complainant as a trade-mark name for a part of its product? A. Some time prior to 1897.

"Q. At the time of its adoption, and since, has this name 'Yankee' been applied to a watch of particular construction? By that I mean distinctive construction, although it may have varied at different times? A. Yes.

"Q. At the time that the word 'Yankee' was adopted as a trade-mark name, and during the period that it was so adopted by the complainant, has there been a retail selling price for such Yankee watch, designated and requested to be employed and used by retailers? If so, please state what this retail selling price was. A. Since 1897 or thereabouts, there has been such retail selling price, and it was at that time and ever since one dollar.

"Q. How has this fact of one dollar being indicated and requested as the retail selling price been employed in connection with the Yankee watch in advertising it to the trade and public? [**\*\*9**] By that I mean has this term 'Dollar Watch' come to be associated with the Ingersoll Yankee watch as a trademark name or phrase? A. It has.

"Q. Please explain to what extent, if any, the term 'Dollar Watch' has become associated with and is now used, if at all, as a trade-mark name or phrase for the Ingersoll Yankee watch in advertising by the plaintiff, by the trade, and by the public. A. It is my opinion, based upon observations and knowledge, that the term 'Dollar Watch,' as applied to the Yankee watch, has lost, if it ever had, a monetary significance to the trade or to the public, and it is my belief that the two terms interchangeably used -- 'Dollar Watch' and 'Yankee Watch' -- as trade-marks are associated definitely in the public mind with the same watch, the principal Ingersoll product in watches.

"Q. Please state to what extent, if any, the term 'Dollar Watch' has been employed since 1897 in advertising the Ingersoll Dollar watch. A. In almost every advertisement and show card the term 'Dollar Watch' has been used, and usually in such advertising and show cards the picture of a watch has been shown, on which watch has appeared the trade-mark 'Yankee.' During the [**\*\*10**] period referred to in the question, much more than a million dollars has been expended in the various ways referred to in my answer to question 17, and the largest part of such sum has been directed to the advertising of the Yankee or Dollar watch.

"Q. During this period, has the newspaper or magazine advertising of the Ingersoll Watch contained the term 'Dollar Watch,' and, if so, in a general way to what extent? A. Almost always.

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"Q. Referring to the license shown upon the box marked 'Exhibit F,' containing the watch marked 'Exhibit G,' referred to Saturday in the testimony of Arthur H. Brown, please state, if you know, the date at which this license system was adopted, connected with the manufacture or sale of the Ingersoll Yankee or Dollar watch. A. In this particular form, this license system was adopted about six years ago.

\*\*\*

"Q. Please state the fact as to whether, prior to the adoption of this license system some six years since, in connection with the Yankee or Dollar watch, this watch, under the name 'Ingersoll Yankee,' 'Yankee,' 'Ingersoll Dollar Watch,' or 'Dollar Watch,' had obtained any reputation, either in the trade or with the public. A. [**\*\*11**] I can perhaps best answer this question by stating that in the year 1899 about one-half million Ingersoll Yankee watches

were sold, and that the sale thereof increased yearly until in 1905 or thereabouts the sale had reached at least a million of these Ingersoll Yankee or Ingersoll Dollar watches. They were handled by many thousands of merchants throughout the United States and foreign countries.

"Q. About what is the annual output of the Ingersoll Yankee or Dollar watch at present? A. About 2,000,000 per year."

[\*151] He further testified that the Yankee or Dollar watch, since it was put upon the market in about 1897, contained mechanism covered by letters patent of the United States, in that connection he also said:

"Q. Have any notices of the dates or numbers of the patents covering the mechanism embodied therein been placed upon the watches? If so, please state where. A. For a great many years past, and I believe always, each Yankee watch has had stamped upon it the word 'patented' and the dates of such patents as from time to time they existed in such watch. Such notice has usually been stamped upon that part of watch known as the barrel bridge, which is, [\*\*12] commonly speaking, a part of the rear movement plate or rear of the watch movement."

He further said:

"Q. What was the occasion or reason, if any, for the adoption by the complainant of this license system for the Ingersoll Yankee or Dollar watch, if you know? A. About 1899, or possibly 1900, when the sale of this Ingersoll Yankee watch or Ingersoll Dollar watch had reached into may hundreds of thousands, a few merchants, both retailers and jobbers, sought to take advantage of the reputation of this watch, established by large advertising and large sale, by offering it to the public or to the trade, as the case might be, at less than the prices which the complainant had fixed upon for such watches. This caused protests from merchants, both retailers and jobbers, throughout the country, who threatened, if such cut prices were allowed to continue, that they would cease handling and dealing in and buying from the complainant this Ingersoll Yankee watch. Thereupon complainant, knowing that its continuance as a business organization for the manufacture and sale of watches depended upon the good will of these merchants, both jobbers and retailers, and the continued and continuous [\*\*13] buying, handling, and selling by them of this watch, cast about for a plan by which it could properly and lawfully fix, determine, and control the price at which this Yankee watch might be sold by the merchants, both retailers and wholesalers, and, having found what, in their opinion was a proper means, determined upon and did adopt such means, out of which this present license system later grew.

"Q. Prior to the adoption of the license system in its present or original form, did the complainant have a means of controlling the prices of the Ingersoll Yankee or Dollar watch in the hand of dealers, or did it simply indicate the prices at which it desired the dealers to sell, without any means of enforcing such prices? A. While always indicating the price, it knew of no means, and believed it had no means, of controlling such prices.

"Q. And until the license system was adopted, it was simply optional with the dealers to observe these prices, I understand? A. If you mean by 'license system' any system which the complainant had adopted, including the system adopted about 1899 or 1900, the answer is 'Yes.'

"Q. I understand that a license system was adopted about 1899 or 1900, [\*\*14] which after various modifications about six years since took the present form? A. That is correct."

This testimony strongly indicates that the purpose of the plaintiffs was to protect the trade-mark, and that the patented improvements placed in the watch were of little or no consequence. There were always in the watch such patented improvements, but they were not always the same. The dates of patents placed upon the interior mechanism of the watch varied from time to time. The license system was adopted in 1900, but the earliest one of the patents in suit was not granted until 1905. The case of these same plaintiffs against Snellenberg (C.C.) 147 Fed. 522, indicates that further evidence in support of the inference drawn from the testimony already in the case might [\*152] have been obtained. The purpose of that suit was the same as the purpose of this suit. One of the patents there involved was for an improvement in escapement mechanism, and was issued in December, 1890; that patent expired in 1907. The escapement patent here in suit was granted on June 4, 1907. The other patent in that suit was for an improved clock pinion, and was granted in January, 1891. That patent [\*\*15] expired in 1908.

The lantern pinion patent in this suit was granted on April 11, 1905. The plaintiffs make a high-grade watch, which contains none of the mechanism covered by the patents in suit.

There has been no judicial determination of the validity of any one of them. There has been no litigation concerning any one of them. No testimony was presented by the plaintiffs to show that any one of the patents was of any value. The defendant produced as a witness a watchmaker of 30 years' experience, who testified that there was nothing new in any of them. The plaintiffs presented no evidence in rebuttal. There is nothing in the case to show what patents relating to the subject-matter of these improvements were granted prior to the patents in suit. While the defendant's watchmaker testified that he understood the scope of the claims of two of the patents, yet it appeared that one at least of the other two he had never read. His evidence probably is not sufficient to overcome the HN4[<sup>15</sup>] presumption of novelty and utility created by the issuance of the patents.

The most important evidence, however, remains to be stated. In addition to the Yankee, Eclipse, Midget, and Junior, the \*\*16 plaintiffs sell other watches, one of which is called the Defiance. These watches, according to Putnam, have probably hundreds of special names. One of the watches offered in evidence was called the McColl, and was so named at the request of the defendant. He bought 27 dozen Yankee watches and 18 dozen of the other kind. He paid 65 cents each for the Yankee and 55 cents each for the McColl watches. The Defiance and the McColl contain the same mechanism as the Yankee. The parts of the Yankee and the parts of the McColl and the Defiance are interchangeable. In fact, it is the same watch under three different names. The barrel plates of the Defiance and the McColl contain the dates of all the patents in suit. There is nothing on either of these watches to indicate that the plaintiffs are in any way connected with them. They are sold without any license restriction, such as it attached to the sale of the Yankee. While the purchaser of the Yankee is required to seal it for not less than \$1, a purchaser of identically the same watch, if it is called the Defiance or the McColl, can sell it for any price he chooses.

If the purpose of the license restriction were to secure the \*\*17 benefits of the patents, no sound reason can be given why it should not have been applied to the watch when it is called the Defiance, as well as when it is called the Yankee. It is very evident that the plaintiffs care nothing for the patents. They say in one of their briefs:

"A point was made at the argument that complainant makes three watches under different names and embodies in them the same patents, and that only one of them, the Yankee watch, is sold under the license restriction. What inference it is sought to draw from this fact is not apparent. Complainant, having a complete monopoly under the statute, is not bound to \*153 exercise all of it. It may release any part of it that it sees fit and reserve the rest. If it wishes to release the 'Defiance' and the 'McColl' watches entirely from the patent monopoly by unrestricted sale, and retain a portion of its monopoly of sale with respect to the Yankee watch, it may do so."

HN5[<sup>16</sup>] The right of a patentee to do what he may please to do with the patented article is not unrestricted. It is limited in the manner indicated by the cases hereinbefore cited. He cannot impose upon a purchaser a condition which is unreasonable. \*\*18 He cannot impose an unreasonable condition, for the purpose of enabling him to violate the Anti-Trust Act. It appears from the evidence in this case that the license restriction so imposed on the sale of the Yankee watch is not for the purpose of securing the benefits of the patented improvements therein, but in order that the plaintiffs may protect the trade-mark or trade-name under which they sell the watch. Such a condition was not imposed "to protect the use of the patent or the monopoly which the law conferred upon it." It is an unreasonable one, is beyond the power of the plaintiffs to impose upon the defendant, and is void as to him. Whether or not it would be valid if the defendant had made a contract directly with the plaintiffs, and thereby bound himself not to sell the Yankee watch for less than \$1, it is not necessary to decide.

Let the bill be dismissed, with costs



## **State ex rel. Jones v. Mallinckrodt Chemical Works**

Supreme Court of Missouri

April 28, 1913, Decided

No Number in Original

**Reporter**

249 Mo. 702 \*; 156 S.W. 967 \*\*; 1913 Mo. LEXIS 97 \*\*\*

THE STATE ex rel. SEEBERT G. JONES, Circuit Attorney of City of St. Louis, v. MALLINCKRODT CHEMICAL WORKS, Appellant.

**Prior History:** [\*\*\*1] Appeal from St. Louis City Circuit Court. -- Hon. James E. Withrow, Judge.

**Disposition:** Affirmed.

## **Core Terms**

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forfeiture, prescribed, provisions, charter, forfeit, fines, pools, do business, insistence, sections, cases, trusts, blank, prosecuting attorney, immunity, trial court, conspiracies, instituted, printed, papers, criminal prosecution, managing officer, no person, combinations, anti-trust, mailing, certificate of incorporation, circuit court, thirty days, innocence

## **LexisNexis® Headnotes**

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Business & Corporate Law > Corporations > Corporate Formation > General Overview

### **HN1 [down arrow] Corporations, Corporate Formation**

Mo. Rev. Stat. § 10322 (1909) states: It shall be the duty of the Secretary of State, on or about the first day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this state, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article one of this chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be inclosed in said letter of inquiry.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Perjury > Elements

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Perjury > General Overview

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Perjury > Penalties

## [\*\*HN2\*\*](#) [down] Corporate Formation, Corporate Existence, Powers & Purpose

Mo. Rev. Stat. § 10323 (1909) states: The affidavit required by this article shall be made by the president, secretary, treasurer or managing officer of such corporation in this state, and shall be made before some person authorized to administer oaths in this state. Mo. Rev. Stat. § 10324 states: Every person who shall make, or cause to be made, and file or cause to be filed, said affidavit, knowing the facts stated therein to be false, shall, on conviction, be adjudged guilty of perjury, and shall be punished by imprisonment in the penitentiary for a term not exceeding seven years.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

## [\*\*HN3\*\*](#) [down] Corporate Formation, Corporate Existence, Powers & Purpose

Mo. Rev. Stat. § 10325 states in part: It shall be the duty of the Secretary of State, at any time upon satisfactory evidence that any company or association of persons duly incorporated under the laws of this or any other state, doing business in this state, has entered into any trust, combination or association, in violation of the preceding sections of this article, to demand that it shall make the affidavit as above set forth in this article as to the conduct of its business. In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in Mo. Rev. Stat. § 10322 (1909).

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

## [\*\*HN4\*\*](#) [down] Corporate Formation, Corporate Existence, Powers & Purpose

Mo. Rev. Stat. §§ 3026 to 3034, inclusive, provide what shall be stated in reply to an inquiry by said stock companies and associations, and when the same shall be filed with the Secretary of State. Mo. Rev. Stat. § 3026 states: That every incorporated company, organized under the laws of this state whose capital stock is divided into shares, shall annually, on the 1st day of July, report to the Secretary of State, the location of its principal business office, the name of its president and secretary, the amount of its capital stock, the par value thereof and its actual value at the time of making the report, the cash value of all of its real and personal property situated in this state, on the 1st day of June, immediately preceding the date of the report, and the amount of city, county and state taxes, paid by any such company for the year last preceding the report.

Business & Corporate Compliance > ... > Corporate Governance > Record Inspection & Maintenance > Recordkeeping

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Business & Corporate Law > Foreign Corporations > General Overview

Business & Corporate Law > Foreign Corporations > Qualifications

## [\*\*HN5\*\*](#) [down] Corporations, Recordkeeping

Mo. Rev. Stat. § 3028 requires all corporations doing business in this state, both domestic and foreign, to keep their books and accounts in such manner as to enable them accurately and promptly to comply with the requirements of said Mo. Rev. Stat. §§ 3025 to 3034, both inclusive; also that no such company shall be exempt from the duty of making such report, because perchance it may not have received the blanks, which Mo. Rev. Stat. § 3025 requires the Secretary of State to send to it and all such companies. Mo. Rev. Stat. § 3029 prescribes by what officer of the company the report shall be signed and sworn to.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

#### [\*\*HN6\*\*](#) **Corporate Formation, Corporate Existence, Powers & Purpose**

Mo. Rev. Stat. § 3030 states in part: Every incorporation to which Mo. Rev. Stat. §§ 3025 to 3034, inclusive, apply, failing, within 60 days from July the 1st in each year to make the report herein provided for, shall be subject to a fine of not less than \$ 50 nor more than \$ 1,000, for each offense, and each succeeding 30 days of such failure shall constitute a separate offense and be subject to a like fine, which said fines shall be cumulative, and one action may be maintained to recover one or more such fines, to be recovered before any court of competent jurisdiction. No suit shall be maintained for any such offense unless brought within six months from September 1st of the year in which the report is due, which date shall be the time when such right of action accrues.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Governments > Local Governments > Finance

#### [\*\*HN7\*\*](#) **Corporate Formation, Corporate Existence, Powers & Purpose**

Mo. Rev. Stat. § 10325 states in part: It is hereby made the duty of the Secretary of State, as soon as practicable after the first day of September in each year, to report to the prosecuting attorney of the county in which any such delinquent corporation may be located, the fact of its failure to make the required report, and the prosecuting attorney shall, at the first court term after he receives the report from the Secretary of State, institute proceedings in the name of the state, at the relation of the county, to recover the fine or fines herein provided for, which shall be applied to the county revenue fund, except that for instituting and prosecuting said suits the prosecuting attorney shall receive as his compensation one-fourth of the penalty collected; and in case any such suit shall be taken to either of the courts of appeals or the supreme court, then the attorney-general is hereby required to assist the prosecuting attorney, and the attorney-general shall also be entitled to one-fourth of the amount recovered from the corporation violating the law. The Secretary of State shall, whenever a corporation makes its report after the time provided by law for the making of such report, certify that fact to the prosecuting attorney.

Business & Corporate Law > Foreign Corporations > General Overview

Governments > Local Governments > Finance

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

#### [\*\*HN8\*\*](#) **Business & Corporate Law, Foreign Corporations**

Mo. Rev. Stat. § 3032 requires the assessor of each county in the state, and the president of the board of assessors of the city of St. Louis, to report to the Secretary of State all corporations, domestic and foreign, doing business therein, etc. Mo. Rev. Stat. § 3033 requires the Secretary of State to refer all such reports to the legislature, etc. And Mo. Rev. Stat. § 3034 confers upon the circuit attorney of the city of St. Louis, the same duties that said Mo. Rev. Stat. §§ 3025 to 3033 confer upon the prosecuting attorneys of the various counties of the state.

Civil Procedure > Parties > Capacity of Parties > General Overview

### [\*\*HN9\*\*](#) [] **Parties, Capacity of Parties**

Mo. Rev. Stat. § 10322 (1909) requires a suit under that statute to be brought in the name of the state and at the relation of the circuit attorney.

Governments > Legislation > Interpretation

### [\*\*HN10\*\*](#) [] **Legislation, Interpretation**

All statutes standing in pari materia should be read and construed together in order to get at the full and clear design of the legislature.

Business & Corporate Law > Corporations > Corporate Governance > General Overview

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

### [\*\*HN11\*\*](#) [] **Corporations, Corporate Governance**

The penalties and forfeitures prescribed by Mo. Rev. Stat. § 10322 (1909) consist of a forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this state. And by Mo. Rev. Stat. § 10327, it is provided: In all suits instituted under this article to forfeit the charter of corporations, or to forfeit the right of a corporation to do business in this state where a judgment of forfeiture is obtained the court shall allow the circuit attorney a fee of not less than \$ 25 nor more than \$ 500.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > General Overview

### [\*\*HN12\*\*](#) [] **Congressional Duties & Powers, Bills of Attainder & Ex Post Facto Clause**

An "ex post facto law" is one that makes an action done before the passage of the law, criminal, that was innocent when committed and that punishes the individual who committed it; or that aggravates a crime and makes it greater than it was when committed; or that changes the punishment and inflicts greater punishment than the law annexed to the crime when committed.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Governments > State & Territorial Governments > General Overview

Business & Corporate Law > Corporations > Corporate Formation > General Overview

### **HN13** [ ] Franchise Relationships, Franchise Agreements

A corporation is a legal fiction, a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the state, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

### **HN14** [ ] Corporate Formation, Corporate Existence, Powers & Purpose

Mo. Rev. Stat. § 10325 provides that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit mentioned in Mo. Rev. Stat. § 10322 (1909).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

### **HN15** [ ] Procedural Due Process, Self-Incrimination Privilege

There is a distinction between an individual and a corporation; the latter, being a creature of the state, has no constitutional right to refuse to produce its books and papers in court for examination in the trial of a proceeding by the state against it; nor can the officer in charge of the corporation charged with a violation of the statutes plead the criminality of the corporation as a refusal to produce the books.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

### **HN16** [ ] Corporate Formation, Corporate Existence, Powers & Purpose

Mo. Rev. Stat. § 10325 states in part: In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in Mo. Rev. Stat. § 10322 (1909): Provided, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article; and provided further, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning that he may testify or produce books or papers.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Business & Corporate Law > Corporations > Corporate Governance > General Overview

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

### [\*\*HN17\*\*](#) [blue download icon] US Department of Justice Actions, Criminal Actions

The first proviso of Mo. Rev. Stat. § 10325, namely, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article, is the immunity that is granted to the officer of the corporation making it and which presupposes that he had thereby disclosed some matter or thing that he and the company had previously done in violation of said chapter 98, commonly known as the "Anti-Trust Laws" of the state; while the second refers to the immunity that is granted to any and all officers, agents, employees and others who may be witnesses in any proceeding, which might be brought against any such corporation to forfeit its charter or certificate of incorporation or its right or privilege to do business in this state, for any reason known to said laws.

Business & Corporate Compliance > ... > Corporations > Articles of Incorporation & Bylaws > Minimum Formal Requirements

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Criminal Law & Procedure > Sentencing > Fines

### [\*\*HN18\*\*](#) [blue download icon] Articles of Incorporation & Bylaws, Minimum Formal Requirements

Mo. Rev. Stat. § 10322 (1909) states in part: Provided, however, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the court may assess against such corporation in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this state, a fine not to exceed \$ 5,000 and not less than \$ 100: Provided, however, that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit herein prescribed, the trial court may, in its discretion, and for good cause shown, upon the payment of all costs together with the attorneys' fees of \$ 10, to be paid to the prosecuting attorney or the circuit attorney in the city of St. Louis, remit the penalty herein prescribed.

## Headnotes/Summary

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### Headnotes

**1. DEFECT OF PARTIES: Waiver.** A defect of parties, apparent on the face of the petition, should be raised by demurrer; and even if so raised, defendant waives the defect by answering to the merits.

**2. PROPER PLAINTIFF: In Name of State: Defect of Parties.** A suit to oust a corporation of its charter and franchises for failure to make the affidavit required by the statute (Sec. 10322, R.S. 1909) concerning its relation to trusts, should be brought in the name of the State at the relation of the prosecuting or circuit attorney. And even were it admitted that a petition entitled, "The State of Missouri, at the Relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis, Relator, v. Mallinckrodt Chemical Works, a Corporation, Respondent," and beginning: "Comes now Seebert G. Jones, circuit attorney within and for the city of St. Louis, in the State of Missouri, and states that the respondent is," etc., is not a suit brought in the name of the State, but solely in the name of the circuit attorney, yet the defect is apparent on the face of the petition, and should have been raised by demurrer, and that not having been done it was waived by answering over on the merits. [[Overruling State to Use of Tapley v. Matson, 38 Mo. 489](#); [Higgins v. Railroad, 36 Mo. 418](#); [Proctor v. Railroad, 42 Mo. App. 124](#); [Headlee v. Cloud, 51 Mo. 301](#).]

**3. PROPER PLAINTIFF: In Name of State: To Use of City: Fines and Forfeitures.** The petition will not be held defective on the ground that, the ultimatum of the suit being to impose a fine and forfeiture, the suit should have been brought "for the use of the city, in accord with the Constitution, requiring all such fines and penalties to go direct to the school fund," for several reasons: *First*, if it was a defect to bring the suit in the name of the State at the relation of the circuit attorney, that was a defect apparent on the face of the petition, and should have been raised by demurrer, and was waived by answer; *second*, even though the statute (Sec. 10304, R.S. 1909) which requires all fines and penalties collected under the provisions of chapter 98 to be paid into the State Treasury were unconstitutional and void, the rest is not, for that section is separable from the rest of the act; and, *third*, whatever disposition is to be made of the fines hereafter collected is a matter of future determination when different persons make claim to them.

**4. CORPORATION: Annual Affidavit: Forfeiture of Charter: No Allegation of Trust Agreement: Statutes in Pari Materia.** Articles one and three of Chapter 98, R.S. 1909, are not *in pari materia*. Each is an independent statute, prescribing different penalties for its violation. Article three requires a corporation to file an annual affidavit showing whether it has entered into any combination or agreement with any other corporation, and prescribing a forfeiture of its charter and the imposition of fines if it fails to file such affidavit within a designated time; and in a procedure brought thereunder it is not necessary either to allege or prove that the corporation has entered into a pool, combination or trust. Article one has for its aim a different purpose, namely, to prosecute and punish a corporation for entering into such a combination or trust.

**5. CORPORATION: Annual Affidavit: Ex Post Facto Law.** A statute enacted in 1907, under which the Secretary of State in 1910 required a corporation organized and existing prior to 1907, to make and file an affidavit that it had not within the year next preceding July 1, 1910, entered into any combination or agreement of trust with any other, is not *ex post facto* in its operation as to such corporation. It in no wise attempts to make criminal an act which had been committed prior to its enactment.

**6. CORPORATION: Annual Affidavit: Procedure: Quo Warranto Unnecessary.** The statute requiring a corporation to make and file with the Secretary of State an affidavit showing that within the last preceding year it has not entered into any combination or agreement of trust with any other corporation, prescribes in detail the procedure for its own violation, and therefore it is wholly unnecessary for the circuit or prosecuting attorney to resort to the writ of *quo warranto* or an information in the nature of a *quo warranto*, and hence the petition is not defective for failure to meet the necessary requirements of either.

**7. CORPORATION: Annual Affidavit: County Includes City of St. Louis.** The statute (Sec. 10322, R.S. 1909) requiring a corporation to make an affidavit showing it has not within one year violated the antitrust laws, and prescribing the form of the affidavit, beginning with the words, "State of Missouri, County of \_\_," does not mean that the affidavit could be made only in a county, and that no alteration in the affidavit could be made by the officers of a corporation in the city of St. Louis. Another statute (Sec. 8057, R.S. 1909) provides that where the word "county" is "used in any law, general in its character to the whole State, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city;" and that statute authorizes such an alteration in the affidavit as makes it applicable to that city.

**8. CORPORATION: Annual Affidavit: Constitutionality of Statute: Equal Protection: Different Punishment for Partnerships.** The statute which requires a corporation to make and file an affidavit showing it has not entered into combinations and trust arrangements with other corporations or their officials, and subjecting it to a fine and a forfeiture of its charter for a failure to make such affidavit, while exempting partnerships, individuals and associations of individuals from such duty and penalty, does not violate the Fourteenth Amendment to the U.S. Constitution, in denying to such corporation and its officers the equal protection of the laws. The State may impose a different or greater punishment upon a corporation than that imposed on an individual or partnership for the same offense, without denying to it that equal protection guaranteed by that amendment -- one reason being that corporations derive all their powers from the State, and individuals and partnerships have no charters which can be forfeited by the State.

**9. CORPORATION: Annual Affidavit: Inadequate Remedy: Fine as Only Punishment.** Experience has taught the courts, both State and Federal, that fines alone are ineffectual to destroy pools, trusts, conspiracies and combinations in restraint of trade, and in limiting production and fixing and maintaining prices.

**10. CORPORATION: Annual Affidavit: Self-incrimination.** The statute (Sec. 10322, R.S. 1909) requiring the president, secretary or managing officer of a corporation to make and file an affidavit showing it has not entered into any of the trusts, pools or other combinations denounced by article one of the same chapter, is not violative of that part of the Constitution which provides that no person shall be compelled to testify against himself, for section 10325 provides that "no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit" required by said section 10322, and that section, when read in connection with said section 10322, includes all matters and things prohibited by article one of the chapter, among other things, penalties and forfeitures.

**11. CORPORATION: Annual Affidavit: Two Affidavits on Same Paper.** The fact that the two affidavits required by Sec. 10322, and by Secs. 3025-3034, R.S. 1909, respectively, were printed on the same piece of paper, the one on the front side and the other on the back, where both were received by respondent on June 14th, and the one was executed, but the other was not, and the excuse for refusing to execute it was, not that they were not sent separately, but that respondent's officers did not believe they were obliged to execute or answer it, will not save the respondent, who knowingly elected to violate it, from an enforcement of the penalties and forfeiture prescribed by the statute.

**12. CORPORATION: Annual Affidavit: Filing Permitted After Final Judgment.** The leniency extended to a corporation which has failed to file the affidavit required by Sec. 10322, R.S. 1909, to file such affidavit before final judgment, is irrevocably withdrawn after final judgment of forfeiture has been entered by the trial court. The provisions of the statutes of this and other States and of Congress may seem severe, but their purpose is to put an end to illegal combinations in restraint of trade; and a corporation, which knowingly and intentionally refused to obey the law, and which in its brief in the Supreme Court made no request to be permitted to file the affidavit, but only made it in oral argument and upon the condition that the court find the statute valid and it guilty of its violation, is not entitled to leniency.

*Held*, by BOND, J., dissenting, that, the failure of defendant's officer to file the affidavit being due to advice of counsel that the inquiries made by the blank affidavit were inquisitorial and unconstitutional, the extreme penalty of forfeiture should not go, but defendant should be permitted to file the affidavit and the judgment of forfeiture should be modified.

**Counsel:** Barclay, Fauntleroy & Cullen and Schnurmacher & Rassieur for appellant.

(1) The trial court erred in overruling the demurrer because of the defect of parties plaintiff. The State would be the only authorized plaintiff, yet the petition in no manner alleges that the State brings the suit or is plaintiff. R.S. 1909, sec. 10322; *Patterson v. Temple*, 27 Ark. 202; *U. S. v. Dougherty*, 7 Blatchf. 424. (2) The trial court erred in not sustaining the demurrer, for defects in not alleging the necessary party plaintiff to be the State, and the body of the petition alone demonstrates the party moving. *State v. Matson*, 38 Mo. 489; *Higgins v. Railroad*, 36 Mo. 418; *Proctor v. Railroad*, 42 Mo. App. 124; *Headlee v. Cloud*, 51 Mo. 301. (3) The demurrer should have been sustained because of defect of parties plaintiff, in that the action should be "for the use" of the city of St. Louis, in accord with the Constitution, since all such fines and penalties go direct to the school fund. The provision (Sec. 10304) in this law for payment into the State Treasury is unconstitutional. *Constitution of Missouri*, art. [\*\*2] 11, sec. 8; *In re Stead*, 116 Mo. 537; R.S. 1909, sec. 3030; *State v. Land Co.*, 97 Mo. App. 226. (4) The trial court erred in overruling the demurrer because there is no allegation in the petition that defendant ever had any connection with any contract or understanding or other agreement illegal under the law against pools, trusts and monopolies. The omission to file the affidavit of innocence, without such allegations and proof, is no ground to forfeit the charter of defendant. R.S. 1909, sec. 10304. While the terms of section 10322 may appear at first glance to warrant forfeiture, they are to be read along with section 10304 in pari materia, and together the paramount intent is to forfeit for breach of the law. Want of affidavit warrants beginning of suit (if the requirement be valid) but that alone is not

sufficient to forfeit the charter. R.S. 1909, sec. 10298; [Taylor v. Taylor, 10 Minn. 107](#); [Edelstein v. U. S., 149 Fed. 636](#). The entire chapter on pools, trusts and conspiracies should be included and considered in reaching the intent of section 10322, and the literal terms of the latter (or rather its implication) as to forfeiture should be narrowed in order to harmonize with section [\*\*\*3] 10304, which defines the controlling purpose of the whole enactment. That is necessary according to established rules for interpretation of statutes. [State v. Emerson, 39 Mo. 89](#); [State v. King, 44 Mo. 283](#); [State v. Diving, 66 Mo. 375](#); [State v. Hemen, 70 Mo. 441](#); [Cole v. Skranka, 105 Mo. 303](#); [Kane v. Railroad, 112 Mo. 34](#). (5) The trial court erred in not sustaining the demurrer (on the last ground thereof) because the required statutory affidavit of innocence (recited in the petition) cannot lawfully be demanded of any officer or defendant, in that the statement exacted therein that the company has not, "at any time within one year" from the date of the affidavit, participated in any of the forbidden agreements, is ex post facto and makes the requirement inconsistent with section 10304, as well as unconstitutional and void. Constitution of Mo., art. 2, sec. 15; State [ex rel. v. Hardware Co., 109 Mo. 118](#). (6) The trial court erred in not sustaining the demurrer because the petition does not state a cause of action, in that a proceeding by quo warranto, either ancient, original, or by information of that nature, is essential to obtain forfeiture of franchise of a business corporation. [\*\*\*4] R.S. 1909, sec. 2631. Section 10322 does not conflict with or repeal section 2631, nor authorize any other proceeding than by quo warranto to forfeit such a charter. (7) The trial court erred in not sustaining the demurrer to the petition because the form of the affidavit demanded of innocence by the officers of defendant could only be made in a county, and no authority to alter the form in any respect is given by the law to company officers in St. Louis City. Hence, they could not swear to same in its procrustean form without being penalized under section 10324. R.S. 1909, sec. 10322. (8) The trial court, by refusing the peremptory instruction for defendant, denied to defendant and its officers the equal protection of the laws guaranteed to them by the [14th Amendment to the Federal Constitution](#), and denied to defendant and its officers their rights and immunities thereby secured, in that it is unreasonable and oppressive to require corporate officers to make such an affidavit of innocence, and yet to leave every "partnership, individual or association of individuals" (also within the law against monopolies, sections 10299, 10303) in the same situation and circumstances immune from [\*\*\*5] such requirement. [Railroad v. Ellis, 165 U.S. 150](#); [Paddock v. Railroad, 155 Mo. 524](#). (9) The trial court erred in not finding for defendant because the requirement of the affidavit of innocence is not validated by the supposed immunity defined in section 10325, because as to the affidavit the immunity is not complete and not commensurate with the constitutional guaranty to the officers of the defendant against the giving of a self-incriminating affidavit. State [ex rel. v. Hardware Co., 109 Mo. 118](#); [Counselman v. Hitchcock, 142 U.S. 547](#); [Glickstein v. U. S., 222 U.S. 141](#); [Edelstein v. U. S., 149 Fed. 642](#).

Elliott W. Major, Attorney-General, and Charles G. Revelle, Assistant Attorney-General, for respondent; Seebert G. Jones and Forrest G. Ferris of counsel.

(1) The requirement in Sec. 10322, R.S. 1909, that an affidavit be made is not void as violative of the Constitution which provides that "no person shall be compelled to testify against himself in a criminal cause," because that section provides that "no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit." The immunity afforded by the statute is coextensive [\*\*\*6] with the constitutional privilege of silence, and it is sufficient. R.S. 1909, sec. 10325; People [ex rel. v. Foundry and Iron Co., 201 Ill. 236](#); [State v. Jacks, 69 Kan. 387](#); [Jack v. Kansas, 199 U.S. 272](#); State ex inf. v. Standard Oil Co., 218 Mo. 375; [Brown v. Walker, 161 U.S. 596](#); [Hale v. Henkel, 201 U.S. 43](#). (2) Section 10322 does not deny to appellant corporation the "equal protection of the laws," although it applies only to corporations and exempts individuals and partnerships. People [ex rel. v. Foundry Co., 201 Ill. 236](#); State ex inf. v. Oil Co., 218 Mo. 368; Land & Fruit Co. v. Curry, 103 Pac. (Cal.) 341; Constitution, art. 12, sec. 5. (3) The Legislature had the power by this statute to require the affidavit to be filed, and to provide that a failure in that regard should subject the offending party to a penalty to be adjudged against it by the courts. People [ex rel. v. Foundry Co., 201 Ill. 236](#); [Kaiser Land Co. v. Curry, 103 Pac. 341](#). This is a proceeding under article 3 of chapter 98, R.S. 1909, not under article 1 of said chapter. Section 10304, by its terms, applies only to violations of the provisions of article 1, and section 10322 does not refer to section 10304. (4) [\*\*\*7] This is a proceeding authorized and provided by statute (section 10322) to enforce a statutory requirement. A statement of the facts under the statute is all that is required of the pleading. (5) This proceeding was brought by the circuit attorney "in the name of the State and at the relation of the circuit attorney," as required by statute, and the petition is sufficient in its allegations as to parties. R.S. 1909, secs. 10322, 1794, 1813; Bliss on Code Pleading (1 Ed.), secs. 145, 150; Phillips on Code Pleading, secs. 175, 177; State ex inf. v.

Evans, 166 Mo. 349; State ex inf. v. Tobacco Co., 177 Mo. 6. It was not a requirement of law that this proceeding be brought "for the use of the city of St. Louis." State v. Newell, 140 Mo. 282; Cunningham v. Railroad, 165 Mo. 270, 276. (6) The form of the affidavit required is not unreasonable. To enforce the requirement is not to deny "due process of law." (7) The word "county" in section 10322 includes the "city of St. Louis." R.S. 1909, sec. 8057, rule 19; Kansas City v. Neal, 122 Mo. 234.

**Judges:** WOODSON, J. Bond, J., dissents in separate opinion.

**Opinion by:** WOODSON

## Opinion

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[\*710] [\*\*969] In Banc.

WOODSON, J. -- This was a suit instituted [\*\*\*8] in the circuit court of the city of St. Louis, by the respondent against the appellant, to have its charter forfeited for failure to make and file with the Secretary of State, an anti-trust affidavit, as required by sections 10322 and 10323, Revised Statutes 1909, regarding pools, trusts, conspiracies and discriminations.

A trial was had before the court without the intervention of a jury, which resulted in a decree in favor of the respondent forfeiting the charter of the appellant as prayed.

In proper time all necessary steps for an appeal were duly taken, and thereafter the cause was appealed to this court.

The petition filed in the cause was as follows:

"State of Missouri, City of St. Louis, ss.

"In the Circuit Court of the City of St. Louis, October Term, 1910.

[\*711] "The State of Missouri, at the Relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis, Relator,  
v.

Mallinckrodt Chemical Works, a Corporation, Respondent.

"Comes now Seebert G. Jones, circuit attorney within and for the city of St. Louis, in the State of Missouri, and states that the respondent is, and at all times hereinafter mentioned was, a corporation duly organized, incorporated [\*\*\*9] and existing, under and by virtue of the laws of Missouri, located and transacting and conducting business in the city of St. Louis and State of Missouri, and as such corporation, respondent is amenable to the provisions of chapter 98 of the Revised Statutes of Missouri of 1909, entitled 'Pools, trusts, conspiracies and discriminations.'

"Relator states that on or about the first day of July, A. D. 1910, the Secretary of State of the State of Missouri, in obedience to the requirements of section 10322 of said Revised Statutes, duly addressed and mailed to the president of Mallinckrodt Chemical Works, 3600 North Second street, St. Louis, Missouri, the respondent incorporated company, a letter of inquiry as to whether the said respondent corporation had all or any of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the provisions of article 1 of said chapter 98 of said Revised Statutes, and requiring an answer, under oath, of the president, secretary, or managing officer of said respondent company, and said Secretary of State duly inclosed in said letter of inquiry a form of affidavit, being the same form required by the [\*\*\*10] laws of the State of Missouri and prescribed and set forth in said section 10322 of said Revised Statutes and being in words and figures as follows, to-wit:

[\*712] (Here the petition sets forth a full copy of the form of affidavit prescribed in section 10322.)

"And thereupon it became the duty of said respondent corporation to make answer to such inquiry by filing or causing to be filed with the said Secretary of State the affidavit prescribed in and required by sections 10322 and 10323 of said Revised Statutes, but respondent corporation, unmindful of its said duty, in disregard of the statutes and laws of this State in respect to pools, trusts and conspiracies and discriminations and in violation of said sections 10322 and 10323, has failed and refused, and still fails and refuses, to make answer to such inquiry, under oath of its president, secretary, treasurer or managing officer, as required by said sections, and has failed, neglected and refused, and still fails, neglects and refuses to file or cause to be filed with the said Secretary of State such affidavit, described and required by said sections to be made and filed, although more than thirty days have elapsed since [\*\*\*11] the date of the mailing of such inquiry to respondent corporation by said Secretary of State, as aforesaid.

"And relator further states that the fact of such failure of respondent corporation and its officers to make such answer and file such affidavit in response to said letter of inquiry, within thirty days from the mailing thereof, has been by said Secretary of State duly certified to relator, the said circuit attorney of the city of St. Louis.

"Relator states that by reason of the premises respondent has forfeited its charter and subjected itself to the forfeitures and penalties imposed by sections 10322 and 10327 of said Revised Statutes.

"Wherefore, relator prays that respondent's charter and its certificate of incorporation be declared and adjudged forfeited, void and of no effect, and that the [\*713] costs of this proceeding be adjudged against respondent.

"Seebert G. Jones,

"Circuit Attorney of the city of St. Louis.

"Forest G. Ferris,

"Assistant Circuit Attorney."

The appellant filed a demurrer to the petition and assigned numerous grounds therefor, which was by the court overruled; and thereupon the defendant answered, the substance of which is as follows:

[\*\*\*12] 1. Plaintiff has no legal capacity to sue in manner and form as in said petition attempted;

2. There is a defect of parties plaintiff;

[\*\*\*970] 3. This defendant cites the *Fourteenth Amendment of the Constitution of the United States* as a bar to the allegations of said petition;

4. This defendant cites section 23 of the second article of the Constitution of the State of Missouri as a bar to the allegations of the petition;

5. Defendant for further defense admits that, on the first day of June, 1910, and from that day to the present time, defendant was and still is a corporation duly organized and existing according to law, and that at the said time mentioned defendant was and is doing business and had and has an office in the city of St. Louis, Missouri.

For further answer defendant denies generally each and every allegation of the petition herein, except as above admitted.

By answering over, counsel for appellant waived the demurrer and the attending rulings thereon, which relieves this court of the duty to review the same.

The facts of the case are few and undisputed.

The evidence showed that on the 13th day of June, 1910, the Secretary of State inclosed in an envelope, [\*\*\*13] properly addressed to the appellant, postage prepaid, the letter and the contents thereof mentioned in the petition, which was duly registered by the postal authorities, [\*714] and was on the following day, June 14, 1910, delivered to and received by the appellant. The contents of said letter consisted of a sheet of paper, on the one side of which was printed a blank form of the affidavit, required by sections 10322 and 10323, Revised Statutes 1909, to be made by the president, secretary or other managing officer of the appellant company, and by him filed in the office of the Secretary of State, within thirty days from the date of the mailing of said blank by the Secretary of State to the company.

In order to have a clear conception of this case, it will be necessary for us to copy some of the most important statutes involved in the case, and to state the substance of the provisions of certain others, which are incidentally or collaterally involved.

Sections 10322, 10323, 10324 and 10325 read as follows:

**HN1** Sec. 10322. *Secretary of State to make inquiry -- form of affidavit.* It shall be the duty of the Secretary of State, on or about the first day of July of each year, to [\*\*\*14] address to the president, secretary or managing officer of each incorporated company in this State, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article one of this chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be inclosed in said letter of inquiry, as follows:

"AFFIDAVIT.

State of Missouri, )  
                            )  
                            ) ss.  
                            )  
County of \_\_\_.         )

"I, \_\_\_, do solemnly swear that I am the \_\_ (president, secretary or managing officer) of the corporation known and styled \_\_, duly incorporated under the laws of \_\_, on the \_\_ day of \_\_, 19 \_\_, and now transacting or conducting business in the State of Missouri, [\*715] and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said \_\_, known and styled as aforesaid, is not now, and has not at any time within one year from the date of this [\*\*\*15] affidavit, created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employee, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract, [\*\*\*16] or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination, or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract or agreement with any person, association of persons or corporation designed to lessen or which tends to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State, or under the terms of which it is proposed, stipulated, provided, agreed or understood that any particular or specified article, product or commodity shall be dealt in, sold or

offered for sale in this State to the exclusion, in whole [\*\*971] or in part, of any competing article, product or commodity.

—

"(President, secretary or managing officer.) [\*\*\*17]

"Subscribed and sworn to before me, a \_\_ within and for the county of \_\_, this \_\_, day of \_\_, 19 \_\_.

"(Seal) \_\_.

[\*716] "And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the prosecuting attorney of the county or the circuit attorney in the city of St. Louis, wherein said corporation is located, and it shall be the duty of such prosecuting attorney or circuit attorney, at the earliest practicable moment, in the name of the State, and at the relation of said prosecuting or circuit attorney, to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this State: Provided, however, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the court may assess against such corporation, [\*\*\*18] in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this State, a fine not to exceed five thousand dollars and not less than one hundred dollars; Provided, however, that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fees of ten dollars, to be paid to the prosecuting attorney or the circuit attorney in the city of St. Louis, remit the penalty herein prescribed.

**HN2** [T] "Sec. 10323. *Affidavit, by and before whom made.* The affidavit required by this article shall be made by the president, secretary, treasurer or managing officer of such corporation in this State, and shall be made before some person authorized to administer oaths in this State.

[\*717] "Sec. 10324. *Penalty for false affidavit.* Every person who shall make, or cause to be made, and file or cause to be filed, said affidavit, knowing the facts stated therein to be false, shall, on conviction, be adjudged guilty of perjury, and [\*\*\*19] shall be punished by imprisonment in the penitentiary for a term not exceeding seven years.

**HN3** [T] "Sec. 10325. *Duty of Secretary of State -- production of books.* It shall be the duty of the Secretary of State, at any time upon satisfactory evidence that any company or association of persons duly incorporated under the laws of this or any other State, doing business in this State, has entered into any trust, combination or association, in violation of the preceding sections of this article, to demand that it shall make the affidavit as above set forth in this article as to the conduct of its business. In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in section 10322 of this article. *Provided,* that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article; and provided further, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or [\*\*\*20] papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers."

Upon the reverse side of the sheet of paper previously mentioned, there was printed a blank form of the inquiry, which section 3025, Revised Statutes 1909, [\*718] requires the Secretary of State, on or before June 15th of each year, "to send by mail to every stock company or association, . . . which is organized for purposes of gain, or to hold property within this State."

**HN4** [↑] Sections 3026 to 3034, inclusive, provide what shall be stated in reply to said inquiry by said stock companies and associations, and when the same shall be filed with the Secretary of State. Said sections in so far as the appellant is concerned, provide, either literally or substantially as follows:

Section 3026. That every incorporated company, . . . organized under the laws of this State whose capital stock is divided into [\*\*\*21] shares, shall annually, on the 1st day of July, report to the Secretary of State, the location of its principal business office, the name of its president and secretary, the amount of its capital stock, . . . the par value thereof and its actual value at the time of making the report, the cash value of all of its real and personal property situated in this State, on the 1st day of June, immediately preceding the date of the report, and the amount of city, county and State taxes, paid by any such company for the year last preceding the report.

Section 3027 relates to foreign corporations doing business in this State; and consequently it is immaterial to the propositions involved in this case.

**HN5** [↑] Section 3028 requires all corporations doing [\*\*972] business in this State, both domestic and foreign, to keep their books and accounts in such manner as to enable them accurately and promptly to comply with the requirements of said section 3025 to 3034, both inclusive; also that no such company shall be exempt from the duty of making such report, because perchance it may not have received the blanks, which section 3025 requires the Secretary of State to send to it and all such companies.

[\*\*\*22] Section 3029 prescribes by what officer of the company the report shall be signed and sworn to.

[\*719] Since several provisions of section 3030 require consideration at the hands of this court, we will for that reason, and here, copy it in full, which is as follows:

**HN6** [↑] "Sec. 3030. Every incorporation to which sections 3025 to 3034, inclusive, apply, failing, within sixty days from July the 1st in each year to make the report herein provided for, shall be subject to a fine of not less than fifty nor more than one thousand dollars, for each offense, and each succeeding thirty days of such failure shall constitute a separate offense and be subject to a like fine, which said fines shall be cumulative, and one action may be maintained to recover one or more such fines, to be recovered before any court of competent jurisdiction. No suit shall be maintained for any such offense unless brought within six months from September 1st of the year in which the report is due, which date shall be the time when such right of action accrues; **HN7** [↑] and it is hereby made the duty of the Secretary of State, as soon as practicable after the first day of September in each year, to report to the prosecuting [\*\*\*23] attorney of the county in which any such delinquent corporation may be located, the fact of its failure to make the required report, and the prosecuting attorney shall, at the first court term after he receives the report from the Secretary of State, institute proceedings in the name of the State, at the relation of the county, to recover the fine or fines herein provided for, which shall be applied to the county revenue fund, except that for instituting and prosecuting said suits the prosecuting attorney shall receive as his compensation one-fourth of the penalty collected; and in case any such suit shall be taken to either of the Courts of Appeals or the Supreme Court, then the Attorney-General is hereby required to assist the prosecuting attorney, and the Attorney-General shall also be entitled to one-fourth of the amount recovered from the corporation violating the law. The Secretary of State shall, [\*720] whenever a corporation makes its report after the time provided by law for the making of such report, certify that fact to the prosecuting attorney."

Section 3031 has reference to the dissolution of domestic corporations, and the retirement of foreign corporations from [\*\*\*24] the State. Neither of those provisions are material to this case.

**HN8** [↑] Section 3032 requires the assessor of each county in the State, and the president of the board of assessors of the city of St. Louis, to report to the Secretary of State all corporations, domestic and foreign, doing business therein, etc.

Section 3033 requires the Secretary of State to refer all such reports to the Legislature, etc.

And section 3034 confers upon the circuit attorney of the city of St. Louis, the same duties that said sections 3025 to 3033 confer upon the prosecuting attorneys of the various counties of the State.

It was also shown that the appellant in due time and in proper form, made out, swore to and filed with the Secretary of State, the report required by said sections 3025 to 3034, which as previously stated, was printed on the reverse side of the sheet of paper upon which was printed the blank affidavit of innocence of all pools, trusts, combinations, conspiracies, etc., required of said companies by said sections 10322 and 10323; also that appellant declined or refused to make, sign, swear to or file with the Secretary of State, said affidavit of innocence, or as it is sometimes termed the [\*\*\*25] "anti-trust affidavit," required by said last two sections to be made, signed and sworn to by the president or other officer of the company mentioned therein.

The evidence also showed that the Secretary of State, in compliance with the requirements of said section 10322, notified the circuit attorney of the city of St. Louis that the appellant had not, within thirty days from the date of his mailing said inquiry to it or at [\*721] any other time, answered the same under oath or otherwise, as was required by said section 10322.

I. Counsel for appellant, in this court, have assigned twenty-five errors; they have, however, apparently abandoned about one-half of them; and we will devote our time to the consideration of the remainder of them.

Attending the first, it is insisted by counsel for appellant that the suit should be dismissed, because the petition shows upon its face a defect of parties plaintiff.

If that were true, then counsel should have demurred to it for that reason. In fact, that was one of the grounds stated in the demurrer, [\*\*973] as disclosed by the record, which was by the trial court overruled.

If counsel for appellant intended or wished to rely upon that [\*\*\*26] point, they should have declined to plead further and should have stood upon the demurrer, but instead of so doing, they filed an answer to the merits. That action of counsel waived whatever merit there may have been in the question, which cannot be again raised by answer, as was here attempted. This is elementary. [[Roberts v. Walker, 82 Mo. 200.](#)]

All objections appearing upon the face of the petition are waived by answering, except first, that it does not state facts sufficient to constitute a cause of action, and second, that the court has no jurisdiction to try the cause. [Sec. 1804, R.S. 1909; [Elfrank v. Seiler, 54 Mo. 134.](#)]

We, therefore, rule this question against appellant.

II. It is next insisted by counsel that the petition does not state facts sufficient to constitute a cause of action against the appellant, for the reason that the [\*722] suit is brought in the name of Seebert G. Jones, circuit attorney within and for the city of St. Louis, and not in the name of the State of Missouri, which it is claimed is the only party authorized by section 10322, Revised Statutes 1909, to bring the suit. In other words, they insist that the suit should have been instituted [\*\*\*27] in the name of the State and at the relation of the circuit attorney.

By reading said [HN9](#)[] section 10322 it will be seen that it requires the suit to be brought in the name of the State and at the relation of the circuit attorney.

If I correctly understand counsel they do not differ as to what the law is governing this question, but they differ as to the facts. Counsel for appellant insists that the suit is brought in the name of Jones as circuit attorney, and counsel for respondent contend that the record shows that it was brought in the name of the State and at the relation of the prosecuting attorney, as required by said statute.

In stating the case, we copied the petition in full, including caption. The latter reads as follows:

"The State of Missouri, at the Relation of Seebert G. Jones, Circuit Attorney of St. Louis, Relator. v. Mallinckrodt Chemical Works, a Corporation, Respondent."

The petition proper, begins by stating: "Comes now Seebert G. Jones, circuit attorney within and for the city of St. Louis in the State of Missouri, and states that the respondent is," etc.

Counsel for appellant insist that the caption of the petition constitutes no part thereof; and that the character [\*\*\*28] of the suit must be determined from the allegations contained in the body thereof, which determines the parties thereto.

In support of this insistence we are cited to the following cases: State to use of [J. D. Tapley v. Matson, \[\\*723\] 38 Mo. 489](#); [Higgins v. Railroad, 36 Mo. 418](#); Proctor v. Railroad, 42 Mo. App. 124; [Headlee v. Cloud, 51 Mo. 301](#).

The first case mentioned was a suit instituted in the name of the State to the use of the administrator *de bonis non* of the estate of Joseph Tapley, deceased, against the securities on the bond of the former administrator. In the caption of the petition the plaintiff was designated as the administrator *de bonis non* of the estate of Tapley, deceased, but no allegation of that character was stated in the body of the petition. In other words, the petition failed to state that Tapley had departed this life intestate, that an administrator of his estate had been duly appointed, qualified and took charge of his estate, that said administratorship had ceased and that plaintiff had been appointed administrator *de bonis non* as his successor in office. The insufficiency of the petition was for the first time raised in this court; and [\*\*\*29] after considering the question, the court held that the petition was bad and that because the error appeared upon the face of the record, the judgment of the circuit court should be reversed.

In the case of [Higgins v. Railroad, supra](#), the suit was instituted by an infant through its guardians, to recover the statutory penalty of \$ 5000, for the negligent killing of her father. The caption of the petition was stated in the following language: "Hatty Higgins, Infant, by Eliza Higgins, her Guardian, Plaintiff, v. Hannibal & St. Joseph Railroad Company, Defendant," but no allegation of that character was stated in the body of the petition. On appeal, this court held the petition insufficient for the failure to state in the body of the petition that the plaintiff was the duly appointed, qualified and acting guardian of the infant plaintiff.

In [Headlee, Admr., v. Cloud, supra](#), the plaintiff in the caption of the petition described himself as the [\*724] public administrator, but failed to state in the body thereof that he was the duly elected, qualified and acting administrator of the estate of the deceased, etc. The defendants demurred to the petition, which was by the circuit court [\*\*\*30] sustained; and upon appeal, this court held the petition was insufficient and affirmed the judgment.

In the case of [Proctor v. Railroad, supra](#), the railroad was in the hands of the defendants, receivers. In both the caption and the body of the petition, it was stated that they were receivers thereof, that they had been duly appointed as such by Judge Brewer, and that they were in charge of, and were operating the railroad at the times complained of, etc. Service was had upon the station agent, and the receivers moved to dismiss for the reason that service was not had upon them personally. While this case has no special bearing upon the case at bar, yet it recognizes the doctrine announced by this court in the cases previously cited and considered; and if we are to be controlled by the rule therein announced, then the judgment of forfeiture rendered by [\*\*974] the circuit court against the appellant will have to be reversed for they are directly in point.

While I have not found any case overruling the cases mentioned in terms, yet the later reports are full of cases holding to the contrary. The later cases hold that even though it be conceded that a suit was brought in the name [\*\*\*31] of the wrong party, nevertheless, the defendant would be in no position to question that error in this court, for the reason it was apparent upon the face of the petition, and it should have been raised by demurrer, and having failed to do so the error was waived by answering to the merits.

This question was before this court in the case of State [ex rel. v. Fidelity and Guaranty Co., 236 Mo. 352, 139 S.W. 163](#), l.c. 365, where many of the authorities are reviewed, and the contrary rule announced.

[\*725] The same rule is announced by this court in the case of [Ashton v. Penfield, 233 Mo. 391, 135 S.W. 938](#), l.c. 417.

These cases are in harmony with section 1794, Revised Statutes 1909.

The petitions in the case of State ex inf. v. [Evans, 166 Mo. 347, 66 S.W. 355](#), and State ex inf. v. [Tobacco Co., 177 Mo. 1, 75 S.W. 737](#), are substantially the same in form as this one.

We are, therefore, of the opinion that the earlier cases cited are erroneous, and should be overruled; also that this insistence of counsel for appellant is not well founded.

III. It is next contended that the petition is defective because the suit should have been brought "for the use of the city of St. Louis, in [\*\*\*32] accord with the Constitution (section 8, article 11 thereof) since all such fines and penalties go direct to the school fund. The provision (section 10304) in this law for payment into the State Treasury is unconstitutional."

This contention is untenable for two reasons: first, because this error, if error it is, was waived by answering to the merits; and what has been stated in paragraph two of the opinion regarding a kindred question is equally applicable and controlling here; and, second, even though it be conceded that the provision of section 10304, which directs all fines and penalties collected under and in pursuance to chapter 98 of the Revised Statutes of 1909, shall be paid into the State Treasury, is unconstitutional, null and void, and that it should be paid to city of St. Louis, for the use of the school fund, as provided for by said section 8 of the Constitution, still it would not necessarily follow therefrom that this suit should abate or be dismissed for that reason. That provision of the section might well be declared unconstitutional, and in no manner would [\*726] it affect or nullify the remaining provisions thereof, or any other section of that chapter.

[\*\*\*33] But independent of that, whatever disposition will be made of the fines and penalties that may be collected from appellant, is a matter for future consideration by those who may make claim to them.

However, in passing, it may not be out of place to state that this court has in a number of cases of this character ordered fines of this character paid into the State Treasury, and has thereby recognized the constitutionality of said section of the statute.

IV. The fourth assignment of error is stated in this language:

"The trial court erred in overruling the demurrer because there is no allegation in the petition that defendant ever had any connection with any contract or understanding or other agreement illegal under the law against pools, trusts and monopolies. The omission to file the affidavit of innocence, without such allegations and proof, is no ground to forfeit the charter of defendant. [R.S. 1909, sec. 10304.] While the terms of section 10322 may appear at first glance to warrant forfeiture, they are to be read along with sections 10304 *in pari materia*, and together the paramount intent is to forfeit for breach of the law. Want of affidavit warrants beginning of suit [\*\*\*34] (if the requirement be valid) but that alone is not sufficient to forfeit the charter."

There is no question but what counsel for appellant are correct in the contention that [HN10](#) [↑] all statutes standing *in pari materia* should be read and construed together in order to get at the full and clear design of the Legislature. We have so held in numerous cases, and especially in the following: [State ex rel. v. Patterson, 207 Mo. 129, 105 S.W. 1048](#), I.c. 144; [State ex inf. v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902](#), I.c. 354 to 357.

[\*727] With that rule of statutory construction in mind, we have carefully considered all of chapter 98, Revised Statutes 1909, consisting of five articles; and after doing so we are fully satisfied that article three thereof, the one governing this case, is complete within itself, in so far as this case is concerned, and that it was the design of the Legislature, as therein expressed, to discourage the formation of pools, trusts and combines; also to compel them to disclose the existence of all such pools, trusts and combines, if such existed, the knowledge of which would lie peculiarly within the minds of the officers thereof mentioned in the statute, [\*\*\*35] by requiring such companies to make and file the annual affidavits, and the imposition of the penalties and forfeitures therein mentioned, which are independent of the sworn reports, penalties and forfeitures mentioned in the first article of this chapter.

The penalties and forfeitures mentioned in the first articles have reference to those which are imposed for the actual formation of pools, trusts, conspiracies and combinations in restraint of trade, etc., while those mentioned in article three refer to those imposed for failure to file the affidavit, and are enforceable even though the company may never have entered into any such pool, trust, conspiracy or combination mentioned in the first article.

[\*\*975] If the contention of counsel for appellant is correct, namely, that article three imposes no penalties, then there would be no penalty enforceable against a company for a failure to make and file the affidavit required thereby, for the reason that the penalties and forfeitures prescribed by article one, in so many terms, are imposed for the unlawful formations of pools, trusts, etc., and for failure to make and file the report required thereby with the Secretary of State.

[\*\*\*36] This article like all other statutes, in order to make it effectual, the Legislature prescribed by sections 10322 and 10327 contain penalties which should [\*728] be adjudged against any such company for its failure to make and file the affidavit required.

HN11[] The penalties and forfeitures prescribed by section 10322 consist of "a forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this State." And by section 10327, it is provided, "In all suits instituted under this *article* to forfeit the charter of corporations, or to forfeit the right of a corporation to do business in this State where a judgment of forfeiture is obtained . . . the court shall allow the circuit attorney . . . a fee of not less than \$ 25 nor more than \$ 500."

From the foregoing observations it is perfectly clear, as previously stated, that this article is complete within itself; that is, it imposes certain duties named therein, upon all domestic and foreign corporations doing business in this State, and prescribes the manner in which those duties must be discharged, the mode of prosecution in case they fail to do so, and the punishment to be inflicted in case [\*\*\*37] they are convicted of such failure.

We have also considered said section 10304, cited by counsel, which is one of the sections of the statute composing article 1 of said chapter 98. That chapter is entitled "Pools, Trusts, Conspiracies and Discriminations," and said article is entitled, "Definitions, Procedure and Penalties." Sections 10298 to 10301, inclusive, thereof, clearly define each and all of said terms. Section 10302 makes it a felony for any person to violate any of the provisions of those sections. Section 10303 designates the courts in which the prosecutions shall be brought and by what officers they shall be instituted, etc., and section 10304 prescribes the fines and forfeitures which shall be imposed against all domestic and foreign corporations doing business in this State, for having violated the provisions of any of the sections of that *article*.

[\*729] From this, it is also seen that this article is complete in itself and resort to other provisions of the statutes is not necessary for a successful prosecution and punishment of any such company which may be adjudged guilty of violating any of the provisions of said article.

From this consideration of articles [\*\*\*38] one and three, of said chapter 98, it is obvious that each is complete in itself and independent of each other as to penalties and forfeitures, and consequently said section 10323 of article 3, is not modified or controlled by section 10304 of article 1 as insisted by counsel for appellant.

Moreover, by reading the two sections it will be seen that the punishment prescribed by each widely differ, and neither is made to depend upon the other, nor is it provided that the one shall be added to or subtracted from the other. But as previously stated, by each are separate punishments imposed for separate offenses.

We, therefore, decide this question against the appellant.

V. It is next insisted that said section 10322 requiring the appellant to file with the Secretary of State the anti-trust affidavit mentioned in the petition is an *ex post facto* law, and violative of section 15 of article 2, of the Constitution of this State.

Counsel have not indicated in what manner this section of the statute violates said section of the Constitution, and I have been unable to detect any conflict between them.

The record shows that the appellant was organized and had existed under the laws of [\*\*\*39] this State for many years prior to the date it was required to make the affidavit in question and file it with the Secretary of State, and upon investigation I find that said section 10322 was enacted in the year 1907, some three [\*730] years prior to the date when the appellant was required to make and file said affidavit; and by reading said section 10322, it will

be seen that it only required the affidavit to state that the company had not at any time within one year from the date thereof (which if filed, should have been dated about August 1, 1910) participated in any of the forbidden matters stated in said article three. From this it appears that the said statute was in force for some two or three years prior to the period of one year which the affidavit would have covered, had it been made and filed as required by law.

**HN12** [+] An "ex post facto law" is "one which makes an action done before the passage of the law, criminal, which was innocent when committed and which punishes the individual who committed it; or which aggravates a crime and makes it greater than it was when committed; or which changes the punishment and inflicts greater [\*\*976] punishment than the law annexed [\*\*\*40] to the crime when committed." [Calder v. Bull, 3 Dallas (U.S.) 386; *Ex parte Bethurum*, 66 Mo. 545, l.c. 548.]

If we test this statute by this definition of an *ex post facto* law, it will be seen that it does no violence to said section of the Constitution, for it neither makes an act done prior to its passage criminal, which was innocent when committed, nor does it aggravate a crime or make it greater than it was when committed, nor does it change the punishment or inflict greater punishment than the law annexed to the crime at the time it was committed. I say this for the reason that the wrong complained of in the petition was the failure of appellant to state under oath, as required by said section 10322, that it had not done any of the things therein prohibited, and declared to be unlawful, within one year immediately preceding the date of the affidavit required thereby to be filed, which would have been for the year beginning on or about August 1, 1909, and ending on or about August 1, 1910, the first [\*731] day of which was about two years subsequent to the passage of the statute in question, and therefore the statute was passed two years prior to the date of the wrong [\*\*\*41] complained of in the petition.

We are, therefore, of the opinion that section 10322 in no manner violates said section 15 of the Constitution.

VI. Counsel next insist that the petition does not state a cause of action against the appellant for the reason that it is neither a proceeding by *quo warranto*, ancient or original, or by information in the nature of *quo warranto*, which it is claimed was essential to obtain a forfeiture of the franchise of a corporation organized under the laws of this State.

There would have been much force in this insistence had the Legislature simply declared the matters complained of to be unlawful, without prescribing the remedy therefor, for in that case there would have been no remedy known to our law by which that result could have been obtained, except by *quo warranto* or by an information in the nature thereof; but the Legislature did not stop at the point suggested. It proceeded further and prescribed in detail the remedy, even the courts in which such prosecutions should be brought, the officers by whom they should be instituted, the name of the plaintiff and at whose relation they should be instituted, the acts which should constitute [\*\*\*42] the offense as well as the kind of judgment that should be rendered, and the fines and forfeitures that should be imposed upon the offending parties. Also what steps the guilty company might take if it saw proper to take any, after the institution of the prosecution, and before final judgment was rendered to appease the law and be restored to its former legal status.

[\*732] Under these ample provisions of the statute, it was wholly unnecessary for the circuit attorney to have resorted to a writ of *quo warranto*, or to an information in the nature thereof. The majesty of the law could have been, and was, as completely vindicated under the provisions of this article, as if resort had been had to *quo warranto* or to an information in the nature thereof.

This insistence is without merit and is ruled against appellant.

VII. Counsel also insist that the petition does not state a cause of action against the appellant, for the reason that it was a physical impossibility for it to have made the affidavit mentioned therein.

This insistence is predicated upon the further contention that according to the provisions of said section 10322, the affidavit "could only be made in a [\*\*\*43] county, and no authority to alter the form in any respect is given by the law to company officers in St. Louis City."

This insistence is untenable, for the reason that paragraph nineteen of section 8057, Revised Statutes 1909, provides that where the word "county" is "used in any law, general in its character to the whole State, the same

shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city."

The application of this statute to the question in hand can in no manner be considered as being inconsistent with the meaning of, and the object to be accomplished by, article three of chapter 98 of the statutes, nor with any law which is specially applicable to the city of St. Louis.

This court has recognized and given force to this rule of construction in so many cases, that it can no longer be considered an open question.

[\*733] VIII. Counsel for appellant challenge the constitutionality of said section 10322, the contention being that it violates the Fourteenth Amendment of the Constitution of the United States, in that it denies to the appellant and [\*\*\*44] its officers the equal protection of the laws by requiring them to make the affidavit mentioned therein, and at the same time exempting therefrom all "partnerships, individuals or association of individuals who may be engaged in the same character of business."

This precise question was presented and ruled on adversely to the contention of appellant in the case of State ex inf. v. Standard Oil Co., 218 Mo. 1. At page 368, 116 S.W. 902, we said:

"Their position is that those sections are in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.

"In one sense that may be true, but it is not true in a legal sense.

**HN13**[] "A corporation is a legal fiction -- a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the State, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit [\*\*\*45] its charter, with all corporate franchises. That the State has the power to enforce this agreement, or law of forfeiture, is not questioned by respondents, but they insist that it is a different and greater punishment than is imposed upon an individual for the commission of the same offense. In answer to that, it may be said that an individual is a natural person, created [\*\*977] by his Maker, and not by law, and, therefore, has no franchise to exercise or to forfeit, consequently [\*734] the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

"While it is true, to forfeit the charter of a corporation for usurpation of power is equivalent to taking its life, as it were; but we suppose it will not be seriously argued that, because the statute does not demand the life of the individual, as it does of the corporation, as a punishment for his violation of the law, the law should and must be declared unconstitutional and void upon that ground. And, upon the other hand, where a statute denounces certain acts, whether committed by individuals or corporations, or both, it should [\*\*\*46] not be declared unconstitutional because it provides for imprisonment of the former and a fine, or forfeiture of the latter's charter, as punishments for their violation of the statute. But if the contention of counsel for respondents is sound, then any individual could form an unlawful combination in restraint of trade with any corporation, and when proceeded against for such unlawful conduct either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same but different. And we might add that, if their position is tenable, then the Legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit, ergo, there is no punishment the Legislature could provide, excepting a fine against each. Such a contention regarding the proposition here involved if followed to its logical conclusion would lead to an absurdity, and, at the same time, shows the unsoundness of respondents' contention."

249 Mo. 702, \*734<sup>1</sup> 56 S.W. 967, \*\*977<sup>1</sup> 913 Mo. LEXIS 97, \*\*\*46

And in passing, we might state that experience [\*\*\*47] has taught the courts, both State and Federal, that [\*735] fines alone are ineffectual to destroy pools, trusts, conspiracies and combinations in restraint of trade in limiting production and in fixing and maintaining prices.

In order to accomplish that end, the strong arm of the criminal law will have to be resorted to, and the guilty be incarcerated.

That case was carried to the Supreme Court of the United States, and was by that court affirmed.

Those cases, as previously stated, decide this question against appellant's contention here, and we see no reason for changing our views of the law regarding the same.

IX. Counsel for appellant also contend that said section 10322 is unconstitutional, null and void, for the reason that it violates that section of the Constitution which provides that "no person shall be compelled to testify against himself in a criminal case."

Their position is stated in this language:

"The trial court erred in not finding for defendant because the requirement of the affidavit of innocence is not validated by the supposed immunity defined in section 10325, because as to the affidavit the immunity is not complete and not commensurate with the constitutional [\*\*\*48] guaranty to the officers of the defendant against the giving of a self-incriminating affidavit." In support of this contention counsel cite: State [ex rel. v. Hardware Co., 109 Mo. 118, 18 S.W. 1125](#); [Counselman v. Hitchcock, 142 U.S. 547, 35 L. Ed. 1110, 12 S. Ct. 195](#), followed and approved in [Glickstein v. United States, 222 U.S. 139, 56 L. Ed. 128, 32 S. Ct. 71](#); and [Edelstein v. United States, 149 F. 636](#).

We have carefully considered these cases and are of the opinion that they are not controlling in this case.

In the first case cited, there was no statute of immunity whatever exempting the officer of the corporation [\*736] from prosecution for any crime the affidavit might disclose he was guilty of. In that case, this court very properly held, that the section requiring the affidavit to be made, and prescribing a punishment for a failure to do so, was violative of that provision of the Constitution which provides that no person shall be compelled to testify against himself. It was in consequence of that decision that the Legislature enacted [HN14](#)<sup>1</sup> section 10325, which provides that "no person shall be subject to any criminal prosecution on account of any matter or thing truthfully [\*\*\*49] disclosed by the affidavit" mentioned in section 10322.

We held in the Standard Oil case, *supra*, that the immune statute there under consideration was valid and sufficiently broad and comprehensive to exempt from prosecution the parties therein mentioned, from all crimes they may have disclosed by the proceedings had in that case. In discussing that question (p. 375), the court used this language:

"Section 8989, Revised Statutes 1899, granted immunity to all the witnesses who were produced by respondents and who testified in compliance with the order of the court. No witness can avail himself of section 23 of article 2 of the Constitution of 1875, nor of the [Fifth Amendment of the Constitution of the United States](#), as to giving oral testimony, because said statute grants him immunity from prosecution; nor can he set those constitutional provisions up against an order for the production of books and papers, as the same statute would equally grant him immunity in respect to matters provided thereby. [[Hale v. Henkel, 201 U.S. 43](#) to 73, 50 L. Ed. 652, 26 S. Ct. 370.]

"Nor was it intended by section 11 of article 1 of the Constitution, nor the [Fourth Amendment of the Constitution of the United States](#), known as the search-and-seizure clauses, to interfere with the power of courts to compel the production upon trial of documentary [\*737] evidence under a subpoena *duces tecum*. [[Hale v. Henkel, supra](#), l.c. 73.]

"While an individual may [\*\*978] lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers.

**HN15** [↑] "There is a distinction between an individual and a corporation; the latter, being a creature of the State, has no constitutional right to refuse to produce its books and papers in court for examination in the trial of a proceeding by the State against it; nor can the officer in charge of the corporation charged with a violation of the statutes plead the criminality of the corporation as a refusal to produce the books. [*Hale v. Henkel, supra, pp. 74* to 76.] The rule above announced has the sanction of the highest court in the land and was applied in a criminal prosecution, and a *fortiori* should the same rule apply to a civil proceeding like the case [\*\*\*51] at bar."

If we correctly understand counsel, they do not challenge the validity of section 10325, but insist that its provisions are not as broad as is the constitutional guaranty against self-incrimination, or to exempt the officer of appellant from prosecution for every crime the affidavit in question might disclose he might be guilty of. In our opinion this insistence is not well founded. The material part of that section is as follows:

**HN16** [↑] "Section 10325 . . . . In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in section 10322 of this article: Provided, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article; and provided further, [\*738] that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate [\*\*\*52] him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers."

**HN17** [↑] The first proviso of this section, namely, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article, is the immunity that is granted to the officer of the corporation making it and which of course presupposes that he had thereby disclosed some matter or thing that he and the company had previously done in violation of said chapter 98, commonly known as the "Anti-Trust Laws" of the State; while the second refers to the immunity that is granted to any and all officers, agents, employees and others who may be witnesses in any proceeding, which might be brought against any such "corporation to forfeit its charter or certificate of incorporation or its right or privilege to do business in this State," for any reason known to said laws.

If we bear in mind the different crimes to which these two immunities refer, much light will be shed upon the [\*\*\*53] apparent confusion that seems to rest in the minds of the learned counsel for appellant. Their position is thus stated: "The immunity extended to a witness in testifying or producing books or papers, in a prosecution or proceeding to enforce the provisions of this article reaches anything which might tend to incriminate him or subject him to a penalty or forfeiture; [\*739] whereas, in the first proviso [referring to disclosures by such an affidavit of innocence as is our immediate concern at present] the immunity extends only to any criminal prosecution and does not even preclude the use of such affidavit in a proceeding to recover a penalty or forfeiture, as in the second proviso ordained." In other words, their contention is, that the words "criminal prosecution," as used in the statute, have a much more restricted meaning than the words "criminal case" or "criminal cause" of the Constitution.

The inference drawn therefrom is, that the affidavit required by section 10322 might disclose some possible crime, which the immunity granted by section 10325 would not cover, and they suggest, for instance, that the affidavit might disclose some crime which might not be covered by [\*\*\*54] the immunity granted under the first proviso which extends only to "criminal prosecutions," which would not preclude its use in a proceeding to recover a "penalty or forfeiture" mentioned in the second.

This position is untenable, for the reason previously stated, that the first proviso grants immunity from prosecution for all matters and things which might be "disclosed by the affidavit required [to be made] by this article," and if we turn to section 10322, the section requiring the affidavit to be made, it will be seen that it prescribes what the

affidavit shall contain, namely, all the matters and things which "article one of this chapter" prohibits corporations and certain others from doing, and which, by turning to sections 10302 and 10304, it will be seen include penalties and forfeitures therein, and being so included by express words, the affidavit therefore could not (if otherwise competent, which I seriously doubt) be used either under the first or second proviso. So says the statute, and so say we.

[\*740] X. The last insistence presented by counsel, and supported by argument, is that the finding of the trial court should have been for the appellant for the reason [\*\*\*55] that the Secretary of State did not serve upon it [\*\*979] two separate and distinct blank affidavits or reports, the one required by section 3025 to 3034, both inclusive, and the other by section 10322, all Revised Statutes 1909.

The record shows that both of said blanks were printed upon one piece or sheet of paper; one of which was printed upon one side thereof, and the other upon the other side.

Section 3025 required the Secretary of State to send the one mentioned therein, on or before June 15th of each year; and section 10322, required him to send the one therein mentioned on or about July 1st of each year.

The record shows that said sheet of paper, with those blank affidavits or reports so printed thereon was by the Secretary of State, sent to the appellant by registered letter, on June 13, 1910, and that it was by the latter received on June 14th, the following day.

The law required the appellant to execute and return this annual report to the Secretary of State with in sixty days from July 1st of each year, and the antitrust affidavit within thirty days from the date the Secretary of State mailed the blank to it.

The record also shows that the appellant, by its properly [\*\*\*56] constituted officer, duly executed the former and returned the same to the Secretary of State on the 22nd day of July, 1910, with the blank affidavit printed on the reverse side thereof, as previously stated, unexecuted.

Upon the receipt of said paper the Secretary of State filed said corporation report on said 22nd day of July, and noted said facts upon the records kept in his office for that purpose; and thereupon, the same day, the Secretary of State remailed said paper, with [\*741] the said executed report on the one side and the blank anti-trust affidavit on the other, back to the appellant for execution. Said paper was placed in an envelope, properly addressed to appellant, postage prepaid and deposited in the United States post office at Jefferson City, Missouri.

Appellant declined to execute this affidavit as required by said section 10322, and assigned as a reason therefor, that it did not believe that it was obliged to so do.

In our opinion there is no merit in this contention.

The blanks were in proper form and were sent to appellant in due time, and were by it accepted the next day, which gave it ample time to execute and return them to the Secretary of State, [\*\*\*57] as provided for by said statutes.

Appellant knowingly and intentionally refused to make the anti-trust affidavit, and its secretary, Mr. Oscar L. Biebinger, testified that the reason for not making it was, that, "I did not believe we were obliged to answer it."

Appellant having knowingly elected to violate the law, there remains nothing to be done, except to enforce the penalties and forfeitures prescribed by the statute for such conduct.

XI. If I correctly understand counsel for appellant, they requested, in oral argument of the cause in this court, that, in case we should hold that the company was guilty of the charges made in the petition, this court now permit it to make the affidavit required of it by section 10322, upon such terms as we might deem just and proper under the circumstances. But counsel have made no such request in their brief or printed argument, nor have we been cited to any statute or other law which authorizes any such procedure.

[\*742] After some investigation we find that section 10322 prohibits any such procedure. That section of the statute after providing "for the forfeiture of its charter or certificate of incorporation, or its right or privilege [\*\*\*58] to do business in this State," contains this provision:

HN18 [+] "Provided, however, that if such corporation shall file the affidavit required by the *provisions of this article prior to the rendition of final judgment in said action*, the court *may* assess against such corporation in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this State, a fine not to exceed five thousand dollars and not less than one hundred dollars: Provided, however, that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit herein prescribed, the trial court may, in its discretion, and for good cause shown, upon the payment of all costs together with the attorneys' fees of ten dollars, to be paid to the prosecuting attorney or the circuit attorney in the city of St. Louis, remit the penalty herein prescribed."

The only leniency this statute extends to a corporation which has violated the provisions thereof, is irrevocably withdrawn after the final judgment of forfeiture has been rendered by the trial court. This is in keeping with the strenuous legislation that has [\*\*\*59] been enacted by the Legislature of this and practically of all the other States of the Union; also by the Congress of the United States.

They seem to be determined to put an end to all pools, trusts, conspiracies and combinations in restraint of trade, limiting production and in fixing and maintaining prices.

While some of those provisions seem to be rather severe, yet they have not, so far, been sufficient to [\*743] break up those combinations; and when one of them knowingly and intentionally refused to obey the law of its creation, I am not prepared, under present conditions, to say that it is entitled to much consideration.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur except *Bond, J.*, who dissents in separate opinion.

**Dissent by: BOND**

## Dissent

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### DISSENTING OPINION.

BOND, J. -- I am constrained to dissent to the opinion of the majority of the court in this case. As I understand the opinion it concedes that unless certain cases cited therein are overruled, the petition in this case states no cause of action; and, hence, would not warrant the judgment of the trial [\*980] court. I doubt the wisdom of repudiating these rulings. If the [\*\*\*60] theory can obtain, after a full consideration of all the applicatory statutes, that the simple omission to file a prescribed affidavit is sufficient ground for forfeiting the charter of the defendant, then this court, under its statutory power (R.S. 1909, sec. 2083) to render such judgment as ought to have been rendered in the trial court, should permit the appellant, as requested in its reply brief, to comply with the formality of filing the affidavit under the authority of section 10322, Revised Statutes 1909.

There is not the faintest suggestion in this record that the charter or business of the defendant corporation exists or is conducted in violation of the antitrust law of this State. Nor is there any proof, even arising to the dignity of an inference, to be found in the record which discloses that the failure of the officer of the defendant company to make the affidavit prescribed was caused by any other motive than a declination to answer inquiries which his learned counsel [\*744] (as stated on the argument) advised him were inquisitorial and unconstitutional.

Under these circumstances I think the case should be reversed and remanded to the circuit court with directions [\*\*\*61] to permit the filing of the affidavit and to enter judgment in the matter according to the provisions of section 10322, Revised Statutes 1909.

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End of Document

## **Continental Sec. Co. v. Interborough Rapid Transit Co.**

District Court, S.D. New York

June 2, 1913

No. 2-214; No. 4-5

**Reporter**

207 F. 467 \*; 1913 U.S. Dist. LEXIS 1324 \*\*

CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID TRANSIT CO. et al. (two cases)

### **Core Terms**

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mortgage, monopoly, Railway, demurrer, subways, stock, shareholder, lines, obnoxious

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Demurrs

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

#### **HN1[] Defenses, Demurrs & Objections, Demurrs**

Where a demurrer was argued before one judge, and nothing has occurred to change the rule that such decision is the law in the case, that is, if the facts appear on final hearing to be the same as previously inferred by the court from the bill of complaint, it is the trial judge's duty to adopt the view of law approved on demurrer, without regard to his own opinion.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### **HN2[] Price Discrimination, Competitive Injuries**

Competition means more than an opportunity for selection. Competitors are persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival. Unity of object with diversity of method is the essence of competition; but, if methods become too widely separated, competition usually disappears, because the superiority of one must be admitted. Competition between sail and steam may still exist as to freight, but there is none as to passenger traffic.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN3** **Monopolies & Monopolization, Actual Monopolization**

Under the New York **antitrust law**, defendants' doings, to be obnoxious to N.Y. Consol. Laws ch. 20, §§ 340-46 (1909), must amount to either an unlawful restraint of trade, the prevention of competition in a necessary of life, or a monopoly.

Civil Procedure > Preliminary Considerations > Equity > General Overview

### **HN4** **Preliminary Considerations, Equity**

Equity acts in the present tense.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Evidence > Judicial Notice > General Overview

Governments > Courts > Judicial Precedent

### **HN5** **Federal & State Interrelationships, Erie Doctrine**

The United States District Court for the Southern District of New York is foreign to the state of New York; though it is bound to take judicial cognizance of state law, yet that law remains a fact to be ascertained as carefully, though in a different way, as any other fact in a case. The evidences of the law are not only statutes but decisions certainly of the highest state court. A new statute or a new decision is new fact evidence, and the federal court is bound to consider it.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Energy & Utilities Law > Utility Companies > General Overview

### **HN6** **Energy & Utilities, State Regulation**

The New York Public Service Commission statutes mean what they suggest; and in New York a monopoly regulated by law and subject to visitation is preferred in respect of public utilities over unrestricted competition.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > Preliminary Considerations > Equity > General Overview

### **HN7** [down] **Judges, Discretionary Powers**

Although a complainant's motives are of great moment when he asks for relief resting in grace or discretion, when he insists on a legal right, his morality or honor are not material.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

### **HN8** [down] **Private Actions, Remedies**

It is not the rule in New York that, in the absence of pecuniary damage, a single shareholder can take upon himself the pleasure or duty of vindicating the rights of the people of the state.

**Opinion by:** **[\*\*1]** HOUGH

## **Opinion**

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**[\*468]** HOUGH, District Judge. Some time is saved by settling the terminology to be used in considering these causes.

Interborough Rapid Transit Company is a corporation formed in 1902 for the purpose of taking over and operating the underground railway system then building under what was known as the McDonald contract with the city of New York. It is hereinafter called "the Interborough" and its railway system the "Subway."

Manhattan Railway Company is a corporation which before and at the formation of the Interborough was in control of and operated the railway system in Manhattan and Bronx, commonly known as (and hereinafter called) the "Elevated." The corporation is hereinafter called "the Manhattan."

Metropolitan Street Railway Company is a corporation which prior to February, 1902, controlled and operated very numerous street or surface car lines in Bronx and Manhattan, commonly known as and hereinafter called the "Metropolitan System"; the company itself is hereinafter called the "Metropolitan."

Metropolitan Securities Company is a corporation (hereinafter called "Securities Company") formed principally for the purpose of holding all the stock of the **[\*\*2]** New York City Railway (hereinafter called "City Company"), to which concern the Metropolitan System was leased in 1902 for a very long term.

The individual defendants are divers persons who in and just before 1906 were interested and prominently concerned in the management of the affairs of the Interborough and Metropolitan System. Of them August Belmont is averred to be the chief actor in Interborough affairs and Thomas F. Ryan to hold a like position of influence if not control in Metropolitan matters.

The Interborough-Metropolitan Company (hereinafter called the "Inter-Met") is a corporation formed in early 1906 for the purpose of aiding "financially or otherwise any corporation engaged in the transportation of passengers in the city of New York or its suburbs or territory adjacent thereto," and with the widest possible powers of acquisition, retention, and disposition of the securities of other corporations.

The Windsor Trust Company is hereinafter called "Windsor Company"; the Morton Trust Company has been absorbed in or merged with the Guaranty Trust Company; but, as these trust companies are concerned in these causes only as trustees under certain mortgages, the phrase **[\*\*3]** "Morton Company" will be understood to refer as well to the original trustee as to its successor.

These shortened names cover sufficiently all the defendants in both cases.

**[\*469]** Jurisdiction depends wholly on diversity of citizenship, and complainant is a New Jersey corporation, owned by the Venner family, and in my judgment amply proven to be but one of the names under which Mr. Clarence H. Venner conducts some branch or branches of his business.

**HN1[]** In action No. 1 (begun April, 1908) a demurrer was argued in the following December before Ray, J., whose opinion is reported in (C.C.) [165 Fed. 945](#). Nothing has occurred to change the rule that such decision is the law in this case, so far as proof has sustained allegation. That is, if the facts appear on final hearing to be the same as inferred by the court from the bill of complaint, it is my duty to adopt the view of law approved on demurrer, without regard to my own opinion. Judge Ray's analysis of the bill is most exhaustive and obviates the necessity of now stating facts except in so far as the evidence requires change.

Action No. 2 admittedly presupposes success in action No. 1. As No. 1 asserts the Inter-Met to **[\*\*4]** be in essence a violation of the New York "Anti-Trust" Law (Consol. Laws 1909, c. 20, §§ 340-346) and demands therefore its shackling if not destruction, so No. 2 seeks to set aside a certain mortgage made November 1, 1907, to Morton Company by Interborough under the baleful and unlawful influence of Inter-Met. If the latter company be not the illegal thing asserted in No. 1, then the mortgage complained of in No. 2 cannot be touched, but Morton Company defends not only on the ground asserted by the defendants in No. 1 but by declaring that, even if all the allegations of the bill in No. 1 be true, the property rights created by the mortgage in question are protected and the mortgage itself a valid obligation in favor of the bondholders for whom Morton Company, as trustee, defends.

By supplemental bills in No. 2, complainant seeks to prevent the consummation of the so-called "Dual-Subway" scheme, by which the city of New York has recently contracted with the Interborough and Brooklyn Rapid Transit Company to permit and assist in the creation of new underground railways. The method of attack in these supplemental bills is to try to prevent the Inter-Met from voting Interborough **[\*\*5]** stock, for without such vote the enormous mortgage necessary for the "Dual-Subway" scheme and approved by the Public Service Commission, over the complainant's protest, cannot legally be executed. Complicated as are these bills, the position of complainant may be simply stated thus: *owing to the* original, intentional, and inherent *illegality* of Inter-Met, every act done by it, or through its influence, to support and perpetuate said illegality is *null and void* and should *now by this court*, and at the single *instance of one small shareholder* in Interborough, be utterly set aside. Before considering these demands of complainant, the evidence may be reviewed only so far as it varies, enlarges, or explains the *allegata* of the bill as stated by Judge Ray. At page 950 of 165 Fed., it is stated that down to the time of formation of the Inter-Met the Interborough was engaged in "actual competition" with the Metropolitan System in the business of transporting passengers. In the sense that travelers could choose whether to go to many places by one route rather than the other, this needs no proof; **[\*470]** it is matter of common knowledge. But **HN2[]** competition means **[\*\*6]** more than such an opportunity for selection.

Competitors are persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival. Unity of object with diversity of method is the essence of competition; but, if methods become too widely separated, competition usually disappears, because the superiority of one must be admitted. Competition between sail and steam may still exist as to freight, but there is none as to passenger traffic. In this view of the word-meaning, the record contains no proof of competition between Interborough and Metropolitan.

**HN3** [↑] Under the law as quoted [at page 956 of 165 Fed.](#), defendants' doings, to be obnoxious to the statute, must amount to either an unlawful restraint of trade, the prevention of competition in a necessary of life, or a monopoly. With which of these three epithets did Judge Ray brand the Inter-Met? Plainly, I think, it was declared a monopoly ([pages 956, 957 of 165 Fed.](#)), so that my inability to find any competition to suppress, actually existing in 1906, does not change the law of this case, as imposed by the demurrer decision. But in what does [\*\*7] the monopoly consist? Evidently ([page 957 of 165 Fed.](#)) in "practically owning all the railroad lines \* \* \* between the Bronx and the Battery, subject only to such control as the Public Service Commission may exercise." If, however, there was no actually existing competition to suppress, why should the Inter-Met have been formed ([page 953 of 165 Fed.](#)) "with the intent and purpose of acquiring \* \* \* a large majority of the shares of" Interborough, Metropolitan, and Securities Company? The answer to this query is in my opinion plainly found in the testimony of Messrs. Ryan and Belmont (action No. 1, Ryan, Q. 38 et seq., Belmont, especially Q. 219 et seq. and Q. 465). The Metropolitan had exhausted the possibilities of surface transportation and with its enormous fixed charges could not earn dividends; but subways were new and of unknown capacity both as money-raisers and money-earners. It was a bold and ingenious move for the Metropolitan to put forward, as a possible addition to its system, connecting subways. This was done to the detriment of Interborough, whose managers saw plainly enough that subways must be extended, if successful, not only for financial but political reasons; [\*\*8] and to have a bold rival in any plan for such extension seemed intolerable. This is shown by the evidence as the reason for Inter-Met, not the suppression of existing competition, as alleged in the bill. What was wished was elimination of a rival in any future bargaining with the city for subway additions and extensions. Whether the threatened rivalry was real, whether there was any substance in the threat of future competition, not in operating railways, but getting the chance to build them, is immaterial. From that motive resulted the "practical ownership" of all railways between Bronx and Battery ([page 957 of 165 Fed.](#)) which must be held monopoly in this case.

The demurrer decision [at page 961 of 165 Fed.](#) considers the allegations of the bill in respect of equity rule 94. The evidence shows that after Mr. Venner and the rest of the world knew what was proposed in respect of forming Inter-Met, but before it was done, he [\*471] caused to be bought in the name of and for complainant 300 shares of Interborough. The proofs show that since suit begun the Second and Third avenue street car lines, "Belt Line," and Union Railway Company have become separated from the Metropolitan [\*\*9] System, as well as several cross-town lines. The dropping of cross-town lines seems to me immaterial, but it is obvious that, if there was any competition between Bronx and Battery in 1905, there is a great deal more in 1913. On the other hand, the prevention of competition in building new subways in Manhattan and Bronx continues, and the recent contracts for the "Dual System," considered in connection with Mr. Belmont's testimony, seem to show that "wisdom is justified of her children," for what was planned for in 1906 seems to have arrived in 1913, but to have so arrived in consonance with legislation passed since 1906 and, with the approval of the Public Service Commission, a creation of 1907.

With respect of the Windsor Company's mortgage (Inter-Met, 4 1/2's), the method of bond issue is shown, and every holder of Interborough stock could do just what he pleased, he could take the 4 1/2's as an overwhelming majority of shareholders did or take dividends as this complainant has done. As to Morton Company's mortgage, it is plain that every dollar of proceeds was expended for benefit of Interborough alone.

The result of the demurrer decision is that in December, 1908, and from [\*\*10] a reading of the bill in action No. 1 only, it was decided, that ([page 966 of 165 Fed.](#)) "the rights of the public and of many stockholders" had been invaded, wherefore the action would lie.

Reverting now to my attempted summary of complainant's position in 1913, the first inquiry is whether the original illegality of Inter-Met has continued; is it still an obnoxious monopoly under the law of New York? This is vital, for [HN4](#) equity acts in the present tense.

The citation of decisions such as the Trans-Missouri Case are not in point. That obnoxious association was dead, and the Supreme Court wrote its epitaph; but, if it had been alive under conditions wholly different from those obtaining when bill filed, it would have been necessary to mold the decree to actualities not history.

The only monopoly declared from the allegata was "practical ownership" of all transportation lines from Battery to Bronx; that has been broken; it no longer exists. But what the evidence shows to have been the real object of Inter-Met (i.e., a monopoly of subway building) has been attained and retained nearly as fully in 1913 as in 1908. I conclude that the corporation constituted a monopoly in both years, [\[\\*\\*11\]](#) if it was one at the earlier date.

But is such monopoly obnoxious? It was so held five years ago. Since then much has happened, and complainant insists that even if the law of New York has changed, or if it has been better ascertained, I am still bound by the demurrer decision. This doctrine is denied.

[HN5](#) This court is foreign to the state of New York; though it is bound to take judicial cognizance of state law, yet that law remains a fact to be ascertained as carefully (though in a different way) as any other [\[\\*472\]](#) fact in the case. The evidences of the law are not only statutes but decisions certainly of the highest state court. A new statute or a new decision is new fact evidence, and I am bound to consider it.

In my opinion *People v. Willcox*, 207 N.Y. at 98, 100 N.E. 705, is the best evidence yet available; that [HN6](#) the Public Service Commission statutes mean what they suggest; and that in New York a monopoly regulated by law and subject to visitation is preferred in respect of public utilities over unrestricted competition. The Inter-Met therefore is not an *obnoxious* monopoly. Nor do I find [\*Central N.Y., etc., Co. v. Averill\*, 199 N.Y. 128, 92 N.E. 206, 32 L.R.A. \[\\*\\*12\] \(N.S.\) 494, 139 Am. St. Rep. 878](#), inconsistent with the case last cited. That relates to contracts in restraint of trade; no such question is here presented.

The next query is whether even an admitted or proven infringement of the law by Inter-Met so far nullified its acts as to render void either the Windsor or Morton Company's mortgages. The Windsor Company took title to Interborough stock by the voluntary act of the several stockholders; it is well said that each shareholder took back a purchase-money mortgage on the same by accepting his 4 1/2 per cent. bonds. The Windsor title to the stock rests on no act of the Inter-Met, and, no matter how illegal was the object of forming that corporation, the Windsor mortgage is valid. As to the Morton mortgage, it cannot be pretended that the act of Interborough shareholders in furthering by their deposit of stock a scheme of monopoly rendered it impossible for them to mortgage their corporate property for legitimate and nonmonopolistic purposes. This they did by the Morton mortgage, so that, even if to some extent action No. 1 could prevail, the main bill in action No. 2 must fail.

Finally, is there any defect in these proceedings [\[\\*\\*13\]](#) owing to the fact that they are brought by one shareholder who has shown no personal loss, damage, or injury whatever? Much time has been devoted to picturing the evil results of monopoly, but nothing has been done toward showing that complainant has lost a dollar by exactly what Mr. Venner knew was going to be done when he caused the stock to be purchased.

Rule 94 has, I think, been complied with; and [HN7](#) although a complainant's motives are of great moment when he asks for relief resting in grace or discretion, when he insists on a legal right, his morality or honor are not material. The demurrer decision held that the rights of the public and of stockholders had apparently been invaded. It now appears that no stockholders' pecuniary rights have been lessened. It was not held that, [HN8](#) in the absence of pecuniary damage, a single shareholder could take upon himself the pleasure or duty of vindicating the rights of the people of the state. That such is not the rule in New York is amply held in [\*Thomas v. Musical, etc., Union\*, 121 N.Y. 45, 24 N.E. 24, 8 L.R.A. 175](#), and intimated by the Circuit Court of Appeals, in respect of the statute here involved, in [\*National, etc., Co. v. Mason-Builders' \[\\*\\*14\] Ass'n\*, 169 Fed. 259](#), 94 C.C.A. 535, 26 L.R.A. (N.S.) 148.

[\*473] Because, therefore, complainant has shown no right to maintain these actions, because the existing mortgages attacked are valid hypothecations, even if assented to by the Inter-Met, and finally because the Inter-Met itself as it stands to-day is not shown to be an illegal monopoly, the bills are severally dismissed, with costs.

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## **Standard Oil Co. v. State**

Supreme Court of Mississippi

March, 1914, Decided

No Number in Original

**Reporter**

107 Miss. 377 \*; 65 So. 468 \*\*; 1914 Miss. LEXIS 95 \*\*\*

STANDARD OIL CO. OF KENTUCKY et al. v. STATE ex rel., ATTORNEY-GENERAL.

**Prior History:** [\*\*\*1] APPEAL from the chancery court of Lauderdale county.

HON. SAM WHITMAN, Chancellor.

Suit for penalties for the violation of the anti-trust laws of the state of Mississippi, on the relation of the attorney-general against the Standard Oil Company of Kentucky and others. From an order overruling their demurrer, defendants appeal.

The facts are fully stated in the opinion of the court.

**Disposition:** Affirmed and remanded.

### **Core Terms**

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commerce, conspiracy, monopoly, petroleum product, manufacture, monopolize, pipe, general government, decree, interstate, intrastate, delivery, parties, interstate commerce, intrastate commerce, amended bill, anti-trust, do business, transportation, territories, injunction, commodity, demurrer, cause of action, federal court, trade in, attorney-general, transactions, appearance, petroleum

### **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Governments > State & Territorial Governments > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Transportation Law > Intrastate Commerce

**HN1**  Interstate Commerce, State Powers

107 Miss. 377, \*377LA<sup>65</sup> So. 468, \*\*468LA<sup>1914</sup> Miss. LEXIS 95, \*\*\*1

Where the sales and distributions were made after the petroleum products had been received by it in this state and had become incorporated into the general mass of property therein, they constitute intrastate commerce and are governed by the state's laws, for an article which is one of interstate commerce by reason of the fact that it is the subject of a sale by a citizen of one state to a citizen of another, and it being transported from one state to the other, loses its character as such when the transportation has been completed and it is mingled with and becomes a part of the general mass of property in the state of its destination. It then becomes, in so far as the power of the general and state governments to regulate commerce is concerned, subject exclusively to the operation of the state laws.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Transportation Law > Intrastate Commerce

## **HN2** [] **Public Enforcement, State Civil Actions**

A conspiracy that has for its object the creation of a monopoly only in that part of the commerce in a commodity which is interstate is subject only to the laws of the general government, and one which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the states affected thereby; but one having for its object the creation of a monopoly in both the inter and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the states affected thereby.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Energy & Utilities Law > Antitrust Issues > General Overview

Transportation Law > Intrastate Commerce

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN3** [] **Conspiracy, Penalties**

A conspiracy and acts done in furtherance thereof may violate both the laws of a state and of the general government, but be punishable only under the laws of the latter, and it may be that a conspiracy to monopolize both inter and intrastate commerce in a commodity, but to be consummated by dealing with the commodity only while it is the subject of an interstate transaction, would be punishable only under the laws of the general government. However, if, with the intent to monopolize commerce in petroleum products throughout the United States, the corporations had agreed to do and had actually done only such things as relate to that portion of the commerce therein which is intrastate, they would have been punishable only under the laws of the general government, even though they intended to, and in fact did thereby, monopolize also that portion of the commerce therein that is wholly intrastate. In other words, a conspiracy to monopolize trade in any commodity to be punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein to be accomplished in part at least by transactions which are also wholly intrastate.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

International Law > Authority to Regulate > General Overview

International Trade Law > General Overview

**HN4** [down] **Public Enforcement, State Civil Actions**

Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN5** [down] **Public Enforcement, State Civil Actions**

The federal statute has no application where the sale, transportation, and delivery of an article all takes place within a state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

**HN6** [down] **In Rem & Personal Jurisdiction, In Personam Actions**

Where a summons or citation or the service thereof is quashed on motion of a defendant he gains a continuance of the cause, but nothing else, since, as provided by Miss. Code Ann. § 3946 (1906), his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case.

## **Headnotes/Summary**

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### **Headnotes**

1. MONOPOLIES. *Trust and combinations in restraint of trade. Action for penalty. Jurisdiction. Commerce. Intrastate commerce. Imports. Commerce. Concurrent power to govern. Inter-state Commerce. Anti-trust laws. Offenses. Statutes Pleading. Appearance. Waiver of objection. Jurisdiction acquired. Special Appearance.*

Where several oil companies formed a combination whereby the stock of each was transferred to the Standard Oil Company, the purpose being to destroy competition and monopolize the trade in petroleum throughout the United States, and each of the subsidiary companies was assigned certain territory in which to do business, the state of Mississippi being assigned to the Standard Oil Company of Kentucky, and such company, in furtherance of the conspiracy and to destroy competition, on numerous occasions offered petroleum for sale on the same day, in different localities of the state at different prices. In such case the conspiracy being one having as one of its objects a monopoly of that portion of the trade lying wholly in Mississippi, to be accomplished, in part at least, by transactions lying wholly within the state, was punishable under the laws of the state.

2. TRANSACTIONS CONSTITUTING INTRASTATE COMMERCE. *Imports.*

Sales and distributions of petroleum where made by a company after the petroleum had been received by it in this state and had become incorporated into the general Map of property therein, constituted intrastate commerce, and are governed by state's laws.

3. INTERSTATE AND INTRASTATE COMMERCE. *Concurrent power to govern.*

107 Miss. 377, \*377LA<sup>65</sup> So. 468, \*\*468LA<sup>1914</sup> Miss. LEXIS 95, \*\*\*1

A conspiracy which has for its object the creation of monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the state affected thereby; but one having for its object the creation of a monopoly in both interstate and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the state affected thereby.

**4. INTERSTATE COMMERCE. *Concurrent power to punish.***

A conspiracy to monopolize both inter and intrastate commerce in a commodity but to be consummated by dealing with the commodity only while it is the subject of an interstate transaction is punishable only under the laws of the general government.

**5. INTRASTATE COMMERCE. *What law governs.***

A conspiracy to monopolize trade in any commodity, to be punishable under state laws, must have as one of its objects a monopoly in the intrastate trade, to be accomplished in part at least by transactions which are also wholly intrastate.

**6. MONOPOLIES. *Anti-trust laws. Action for penalty. Pleading.***

The fact that in a suit by the state against several oil companies for the penalty for violating the anti-trust statute, the bill prayed for the imposition of separate and joint penalties was immaterial, since each is liable for the full penalty.

**7. MONOPOLIES. *Anti-trust law. Action for penalty. Pleading.***

Where a bill was filed by the state against several oil companies for the penalty for the violation of the anti-trust law of the state, it was not error for the court to refuse to eliminate from the bill, facts which also disclosed a violation of the federal **antitrust law**. When the two offenses against the federal and the state law are part and parcel of the same conspiracy.

**8. ENTERING APPEARANCES. *Waiver of objection.***

Where in an action against two foreign corporations, their attorney entered into a written agreement with plaintiff's attorney agreeing that the two companies would appear in the case without further process and continued; "It is however expressly understood that this agreement is merely to facilitate the progress of the case and defendants are not to be understood thereby as waiving any of their defenses, or as waiving their right to object to the jurisdiction of this court to entertain this suit because of their nonresidence." Such an agreement was a waiver of process and an entering of appearance by the corporations.

**9. APPEARANCE. *Jurisdiction acquired. Special appearance.***

Where a summons or citation or the service thereof is quashed on motion of a defendant, he gains a continuance of the cause, but nothing else, since, as provided by Code 1906, section 3946, his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case.

**Counsel:** Hunter C. Leak, Humphrey, Middleton & Humphrey, and Mayes & Mayes, for appellants.

Ross A. Collins, Frank Johnston and Geo. H. Ethridge, for appellee.

**Judges:** SMITH, J.

**Opinion by:** SMITH

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**Opinion**

[\*379] [\*\*469] SMITH, J., delivered the opinion of the court.

This is a suit instituted by the attorney-general to recover from appellants the penalties prescribed by our [\*380] anti-trust statute for an alleged violation of the statute by them. This is its second appearance in this court. When here before, the only defendant to the bill was the Standard Oil Company of Kentucky, and we then held that the bill failed to state a cause of action, because of the failure to allege that the sales made on the same day in different localities at different prices were made [\*\*\*2] for the purpose of destroying competition. On the return of the cause to the court below an amended bill was filed, bringing in new parties defendant, to wit, the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana, and alleging, with great wealth of detail, a conspiracy made for the purpose of monopolizing the trade in petroleum and its products. Afterwards a supplemental bill was filed making the Galena Signal Oil Company a party defendant. To these bills general and special demurrs were interposed by the Standard Oil Company of Kentucky, and the other defendants appeared specially and excepted to the jurisdiction of the court. These demurrs and exceptions were overruled, and an appeal granted by this court to settle the principles of the case.

The grounds of the general demurrer filed by the Standard Oil Company of Kentucky here relied on are: First, "the said amended bill shows no cause of action against this defendant which is cognizable by this court or by any state court of Mississippi;" second, "the said amended bill does not follow up and amend the original bill, but is a departure therefrom, and from the judgment and decree of the supreme court [\*\*\*3] heretofore rendered in this cause, and is an attempt to state another and a wholly different cause of action from that attempted to be stated in the original bill;" and third, "the said amended bill is multifarious." These will be taken up and disposed of in the order here set forth.

Under the first ground of this demurrer the contention of counsel for appellants is that the amended [\*381] bill presents a case of a conspiracy to destroy competition, and to monopolize interstate commerce, in petroleum products, and therefore a violation of the federal anti-trust law, cognizable only in the federal courts. The amended bill set forth at great length the formation of the original Standard Oil Trust of 1882 by a large number of persons and corporations engaged in the petroleum industry, followed later by the incorporation of the Standard Oil Company of New Jersey, the name of which corporation was afterwards changed to the Standard Oil Company, which company acquired all of the stock of the corporations then parties to the trust agreement, and thereby practically took the place of the trustees provided for therein, all of which was for the purpose of enabling the parties to the original [\*\*\*4] agreement, and afterwards the Standard Oil Company and its subsidiary corporations, to destroy competition and monopolize the trade in petroleum and its products throughout the United States and its territories, including the state of Mississippi; that in furtherance of this conspiracy in which all of the parties defendant to the bill participated, the territory in which each of the subsidiary corporations was to do business was assigned to it, and no other corporation was permitted to do business therein; that the prices at which petroleum products were to be sold were, after its organization, fixed by the Standard Oil Company, which company controlled and directed all of the operations of the subsidiary companies; that, in furtherance of the design of this trust and combination to monopolize the trade in petroleum products, the state of Mississippi was set apart to the Standard Oil Company of Kentucky, which company was given the exclusive privilege of making sales and distribution of petroleum products therein; that this company has been continuously from the 1st day of January, 1906, engaged in the sale [\*\*\*470] and distribution of petroleum products in this state, maintaining [\*\*\*5] for that [\*382] purpose depots in the various counties thereof, from which sales and distributions are made by means of tank wagons; that other persons, firms, and corporations are engaged in Mississippi in the sale and distribution of petroleum products who are not acting with appellants and have no connection with the combination and conspiracy complained of; that in furtherance of this conspiracy the Standard Oil Company of Kentucky on numerous occasions offered for sale petroleum products on the same day in different localities of the state at different prices, the difference of freight and other necessary expenses of sale and delivery considered, for the purpose of enabling the conspirators to monopolize the trade therein in Mississippi and throughout the United States and its territories. The bill further set forth that the combination here complained of was ordered to be dissolved into its several component parts by the supreme court of the United States in the case of Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, but that notwithstanding the conspiracy had remained in effect, [\*\*\*6] and that the conspirators had continued to act in concert as theretofore in the same manner and for

the same purpose. The prayer was for the imposition of the penalties provided by our anti-trust law and for the exclusion of appellants from doing business in the state. From this general statement of the allegations of the bill it appears that the conspiracy here complained of is one that has for its object the monopolizing of both the inter and intrastate commerce in petroleum products, that portion of this commerce which is wholly within the state of Mississippi being monopolized, or attempted to be monopolized, by the exclusion therefrom of all of the corporations included in this conspiracy, and permitting the Standard Oil Company of Kentucky alone to deal in petroleum products therein, and by that company's selling such [\*383] products, within the state at different places on the same day at different prices, whenever it becomes necessary so to do, in order to destroy competition at such places.

It is true that no petroleum is produced in the state of Mississippi, and all petroleum sold and distributed by the Standard Oil Company of Kentucky in this state must necessarily [\*\*\*7] have been imported from another state. [HN1](#) These sales and distributions, however, as we understand the bill, were made by this company after the petroleum products had been received by it in this state and had become incorporated into the general mass of property therein; they therefore constituted intrastate commerce, and are governed by the state's laws, for an article which is one of interstate commerce by reason of the fact that it is the subject of a sale by a citizen of one state to a citizen of another, and it being transported from one state to the other, loses its character as such when the transportation has been completed and it is mingled with and becomes a part of the general mass of property in the state of its destination. It then becomes, in so far as the power of the general and state governments to regulate commerce is concerned, subject exclusively to the operation of the state laws. [Leisy v. Hardin, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128](#). The bill, therefore, presents a case of the violation of the laws both of the general government and of the state of Mississippi. This seems not to be disputed by counsel for appellant, their contention being [\*\*\*8] that under the allegations of the bill the principal object of this conspiracy was to enable the conspirators to monopolize interstate commerce, and that the intent there alleged to monopolize intrastate commerce is a mere incident to the principal object, and that the two intents are so inseparably connected that the jurisdiction of the federal courts to punish therefor must be exclusive. In this we think counsel are in error. The [\*384] monopoly of intrastate commerce is one of the material objects of this conspiracy, and such a monopoly is not necessary, if such fact be material, to the maintenance of a monopoly of interstate commerce, the monopoly of the commerce of one character simply constituting a powerful factor in bringing about a monopoly of the other.

[HN2](#) A conspiracy which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is interstate is subject only to the laws of the general government, and one which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the states affected thereby; but one having for its object the creation [\*\*\*9] of a monopoly in both the inter and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the states affected thereby.

It is true that under our form of government [HN3](#) a conspiracy and acts done in furtherance thereof may violate both the laws of a state and of the general government, but be punishable only under the laws of the latter, and it may be that a conspiracy to monopolize both inter and intrastate commerce in a commodity, but to be consummated by dealing with the commodity only while it is the subject of an interstate transaction, would be punishable only under the laws of the general government.

In the case at bar, if, with the intent to monopolize commerce in petroleum products throughout the United States, appellants had agreed to do and had actually done only such things as relate to that portion of the commerce therein which is intrastate, they would have been punishable only under [\*471] the laws of the general government, even though they intended to, and in fact did thereby, monopolize also that portion of the commerce therein that is wholly intrastate. In other words, a conspiracy to monopolize trade in any [\*\*\*10] commodity to [\*385] be punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein to be accomplished in part at least by transactions which are also wholly intrastate. The controversy here complained of, having as one of its objects a monopoly of that portion of the trade in petroleum products which lies wholly within the state of Mississippi, to be accomplished in part at least by transactions lying wholly within the state, is punishable under the laws thereof. Whether or not this conspiracy is punishable under the laws of the general

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government is immaterial, and has no real bearing on this controversy, for it is beyond the power of that government to regulate commerce which lies wholly within the state, and its laws can have no effect thereon, except in so far as it is necessarily affected thereby by reason of its intimate connection with interstate commerce.

The foregoing views find support in, and the question here under consideration seems to have been fully answered by, the case of *Addyston Pipe Co. v. United States*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136. In that case a proceeding was commenced in behalf [\*\*\*11] of the United States, under the so-called anti-trust act of Congress, passed July 2, 1890, 26 Stat. 209, ch. 647 (U. S. Comp. St. 1901, p. 3200). It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale, and transportation of iron pipe at their respective places of business in the states of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the states, etc.

"The trial court dismissed the petition ( *United States v. Addyston Pipe & Steel Co. (C. C.)* 78 F. 712), but [\*386] upon appeal to the circuit court of appeals the judgment of the court below was reversed, with instructions to enter a decree for the United States perpetually enjoining defendants from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination."

The six corporations defendant to [\*\*\*12] the petition were domiciled, one in Ohio, one in Kentucky, two in Alabama, and two in Tennessee.

"It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement (comprising some thirty-six in all), in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had, since that time, operated their shops, and had been selling and shipping the pipe manufactured by them into other states and territories, under contracts for the manufacture and sale of such pipe with citizens of such other states and territories."

One of the means by which this monopoly was to be maintained was that certain cities were assigned to each corporation in which none of the other conspirators would bid against it for sale of pipe, or, rather, the bids of the other members of the conspiracy would always be higher than that made by the corporation to which the cities had been assigned. A sale made by one of these [\*\*\*13] corporations was an interstate one, and therefore interstate commerce, when the city in which the sale was made was situated in a state other than the one of the corporation's factory, and was intrastate when the factory and the city wherein the sale was made were both in the same state. The judgment of the circuit court of appeals, reversing the decree of the trial court [\*387] and directing that a decree be entered enjoining the defendants to the petition from maintaining the combination in cast-iron pipe and from doing business under such combination, was modified by the supreme court so as to exclude therefrom that portion of the combination which affected intrastate commerce and be limited to that portion thereof which affected interstate commerce.

It will be observed that this conspiracy or combination had for its object a monopoly of both the inter and intrastate commerce within states and territories mentioned in the agreement, thirty-six in number, the monopoly of the commerce of each character to be brought about and maintained, as in the case at bar, by transactions both interstate and intrastate.

In its opinion modifying the decree of the lower court the supreme [\*\*\*14] court, through Mr. Justice PECKHAM, said:

"The views above expressed lead generally to an affirmance of the judgment of the court of appeals. In one aspect, however, that judgment is too broad in its terms--the injunction is too absolute in its directions--as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably an inadvertence merely. HN4<sup>↑</sup> Although the jurisdiction of Congress over

commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.

[\*388] "In regard to such [\*15] of these defendants as might reside and carry on business in the same [\*\*472] state where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it.

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the federal power derived from the commerce clause in the Constitution.

[\*\*\*16] "To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character. As thus modified the decree is affirmed."

But it is said by counsel for appellants that the federal anti-trust law as construed in United States v. E. C. Knight Company, 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325, does not include agreements to manufacture, and that in modifying this injunction which was a mere minor feature of the decision, the court pointed out that the injunction was too broad--

"because, said they, inasmuch as these people who were engaged in these transactions were manufacturers, and [\*389] consequently might contract about the manufacture of an article, the sale of that article, and the delivery of that article, and because the whole process of manufacture, sale, and delivery might take place within the limits of one state, to such a transaction the act of Congress could not extend; and, therefore, the injunction by its terms should not be broad [\*\*\*17] enough to include a transaction of that sort. That feature of the decision has no application whatever to the case at bar, and that for the reason that this amended bill shows clearly that the Standard Oil Company is not occupying Mississippi with an article produced in Mississippi, to be vended and delivered within the limits of the state of Mississippi; but, on the contrary, the whole case made in the bill is to the effect that the article dealt with, and about which this suit is brought, was not produced by the Kentucky company, but by another company. Neither was it produced by any agency whatever within the limits of the state of Mississippi; it was not a Mississippi manufacture or production; the bill shows all through that it was an article introduced by transportation and commerce across the state line; it was a foreign production as to the state of Mississippi; the subject of commerce, alone, so far as the state of Mississippi is concerned, and nothing else. Wherefore, as we have shown, this bill does not fall within the qualified reservation made in the Addyston pipe case, but clearly falls under the rule expounded in the three cases which we have cited and relied on above. [\*\*\*18]"

Counsel, we think, misconceive the ground of this decision. It is true that the parties to the combination were manufacturers, but the court pointed out that, although a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific [\*390] articles were proper subjects for regulation because they did form part of such commerce, and that the combination then under consideration related, not to the manufacture, but to the sale and delivery of specific articles. The decision in all of its aspects proceeds altogether on the theory that the combination there complained of, both in its interstate and

intrastate character, was one relating to the sale and delivery of a commodity, and the court nowhere gives as a reason for the modification of the injunction that the parties to the combination were manufacturers, but places it solely upon the ground that the HN5<sup>15</sup> federal statute has no application where the sale, transportation, and delivery of an article all takes place within a state. Had the [\*\*\*19] court proceeded on the theory that the combination had for its purpose a monopoly in the manufacture and not in the sale and delivery of articles, the injunction, under the authority of the Knight Case, must necessarily have been dissolved *in toto* instead of partially.

In support of their contention that the jurisdiction of the federal courts over this alleged conspiracy is exclusive, counsel for the Standard Oil Company of Kentucky have called our attention to the following language contained in the opinion of the supreme court of the United States in the case of *Standard Oil Co. v. United States*, beginning at page 81 of 221 U.S., at page 524 of 31 Sup. Ct., at page 653 of 55 L. Ed. (34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734):

"We think that, in view of the magnitude of the interests involved and their complexity, the delay of thirty days allowed for executing the decree was too short, and should be extended so as to embrace a period of at least six months."

"During these six months, therefore," say counsel, "it was lawful to continue the then existing combination," and if the state be now permitted to recover from appellants [\*\*\*20] the penalties alleged to have been incurred by [\*391] them for maintaining the combination during that time, they will thereby be punished for doing what the supreme court of the United States has adjudged lawful. "This but illustrates," they say, "in another way the confusion that must inevitably result where there is a proceeding taken under the Sherman anti-trust law and a proceeding taken under a state trust law growing out of exactly the same facts. One or the other must necessarily be exclusive; otherwise confusion will inevitably result; that is, one court may, for reasons which seem equitable, permit a combination to exist for a limited period, in the interest of the public, while the other court may be visiting the same corporation with enormous penalties for continuing the same combination during exactly the same period."

We think counsel misconceive the effect of this modification which the supreme court directed the trial court to make in its decree. The combination which was and had been [\*\*473] adjudged to be in violation of law was not thereby made lawful during the six months given it in which to dissolve, nor was it thereby relieved from any penalties incurred [\*\*\*21] under any statute, or from liability to damage inflicted upon any one by continuing in existence for that time. The court did not so intend; but, even if it had, it would thereby have exceeded its jurisdiction, for the reason that under our form of government no court, unless specially authorized by law, has the power to grant permission to do unlawful acts.

In order to dissolve the combination as it then existed, it was necessary for the Standard Oil Company of New Jersey to dispose of the stock owned by it in the other corporations, by means of which it controlled their operations. This could not be done on the instant. It was therefore necessary to grant it time in which to do so, and the granting of this time in which the decree should be complied with simply meant that the parties to the combination would not be in contempt of court by [\*392] not complying with its decree before the expiration thereof. But even if we concede that the existence of this combination during these six months was lawful, it was lawful only in so far as the laws of the general government are concerned, and the parties thereto were not, by reason of this decree, licensed to engage in commerce lying [\*\*\*22] wholly within a state in violation of the laws thereof; for, as we have heretofore pointed out, and as the supreme court of the United States has more than once decided, the general government can exercise no control over commerce that is wholly intrastate. The confusion which counsel say if the result of permitting the courts, both of the general government and of the states, to deal with causes of this character, if confusion in fact it can be called, is only such as will necessarily arise in all cases where the laws both of the general government and of the states have been violated.

We have not left out of view the line of cases cited by counsel, of which *Standard Oil Company v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, *Swift v. United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518, and *Montague & Co. v. Lowry*, 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608, are a type, holding that a case is stated under the federal anti-trust laws of which the federal courts have

jurisdiction, although the combination and agreement complained of includes both interstate [\*\*\*23] and intrastate transactions. The views herein expressed are not in conflict with these cases, but rather are in accordance therewith, for, as we have pointed out, the combination and agreement of the character here under consideration may violate the laws both of a state and of a general government and be punished in the courts of each.

There is no merit in the remaining grounds of the general demurrer, for the amended bill does not "state another and wholly different cause of action from that attempted to be stated in the original bill"; it simply [\*393] states the same cause of action, attempted to be stated in the original bill, more fully and probably in unnecessary detail, and the new defendants, being parties to the conspiracy alleged in the bill, were properly made defendants thereto. The fact that the bill prays for the imposition of separate and not joint penalties is immaterial. The course here pursued with reference to the joinder of defendants is the same as that pursued in the cases of Grenada Lumber Co. v. State, 98 Miss. 536, 54 So. 8, and Dukate v. Adams, 101 Miss. 433, 58 So. 475.

The special demurrs which seek to [\*\*\*24] eliminate from the bill all of the allegations which set forth facts which disclose a violation of the federal anti-trust law were properly overruled, conceding without deciding that this question can be thus presented. The intent to violate the federal statute is so intimately connected with the intent to violate the statute, in fact being a part and parcel of the same conspiracy, that one cannot be intelligently set forth without disclosing the other; or, to be more accurate, the one can be more intelligently set forth in language which also discloses the other. Moreover, the facts thereby disclosed may be necessary in order to connect the other defendants with the acts of the Standard Oil Company of Kentucky, and to enable the court to determine the true intent with which the various sales of petroleum products set forth in the bill were made by this company. The allegation contained in paragraph 24 of the bill setting forth the dissolution by the federal courts in 1911 of the combination here complained of, as it then existed, simply explains why the methods alleged to have been pursued by appellants in order to continue to maintain a monopoly in petroleum products after this dissolution [\*\*\*25] was ordered were different from those alleged to have been pursued by them prior thereto, and therefore the allegation is proper, though probably not a necessary one.

This brings us to the exceptions filed by the other defendants to the jurisdiction of the court. There can be [\*394] no question of the court's jurisdiction of the subject-matter, and if it had jurisdiction of the person of the defendants, its jurisdiction was complete. These other defendants have no local agent in this state upon whom service of process could be had, so that they were summoned by publication in a newspaper. They appeared specially and excepted to the jurisdiction of the court. The ground of these exceptions was that the service of process by publication was void for the reason that:

"Foreign corporations can be served with process in a state only when doing business therein, and such service must be upon an agent who represents the corporation in such business."

[\*\*474] The court overruled these exceptions and the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana joined in this appeal. After publication for these defendants had been made, the following written agreement [\*\*\*26] was entered into between the attorney-general and Mr. Hunter C. Leake, attorney of record for the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana, and was by the attorney-general filed in the court below among the papers in this cause:

"In this cause it is agreed between the attorney-general, representing the state, and Hunter C. Leake, representing the Standard Oil Company of Louisiana and the Standard Oil Company of New Jersey, that the two companies named will appear in this cause without further process, making such appearance to the November term, 1913, and plead, answer or demur to the bill then.

"It is, however, expressly understood, that this agreement is merely to facilitate the progress of this cause, and the two companies named herein are not to be understood thereby as waiving any of their defenses, or as waiving their right, if any they have, to object to the jurisdiction of this court to entertain this suit as to them or either of them because of their nonresidence of the [\*395] state of Mississippi, and the fact claimed by them that they are not doing business in this state, or any other defensive point which they may desire to make.

[\*\*\*27] "This September 6, 1913.

"[Signed]

ROSS A. COLLINS,

"Attorney-General, State of Mississippi.

"HUNTER C. LEAKE."

This agreement, which is altogether ignored by these exceptions, constitutes in plain and unambiguous language a waiver of process and the entering of an appearance by the defendants in the cause. The reservation of all defenses to the bill contained in this agreement was unnecessary, and added nothing thereto, and the reservation of the right to object to the jurisdiction of the court "to entertain this suit as to them, or either of them, because of their nonresidence in the state of Mississippi, and the fact claimed by them that they are not doing business in this state," cannot be construed to be the reservation of a right to object on the ground that no process had been served, for the occasion of the making of the agreement was that "further process" might be waived.

This question, however, is of no material importance, for the reason that, had the agreement not been made, or, conceding that appellant had the right under the agreement to appear specially for the purpose of filing the motion requesting the court to quash the citation, and conceding, further, [\*\*\*28] that the citation should have been quashed in response to appellant's request, the issuance of further process for them would not have been necessary, for:

**HN6** [↑] "Where a summons or citation or the service thereof is quashed on motion of a defendant he gains a continuance of the cause, but nothing else, since, as provided by Code 1906, section 3946, his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case." Illinois Central R<sup>3961</sup> Railroad Company v. Ann Swanson, 92 Miss. 485, 46 So. 83.

Affirmed and remanded, with leave to appellants to answer within sixty days after mandate is filed in court below.

*Affirmed and remanded.*

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## *International Harvester Co. v. Kentucky*

Supreme Court of the United States

Argued April 24, 1914 ; June 22, 1914

No. 298

### **Reporter**

234 U.S. 589 \*; 34 S. Ct. 947 \*\*; 58 L. Ed. 1484 \*\*\*; 1914 U.S. LEXIS 1110 \*\*\*\*

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. COMMONWEALTH OF KENTUCKY

**Prior History:** [\*\*\*\*1] ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

## **Core Terms**

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anti-trust, previous case, do business, cases

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > US Supreme Court Review > General Overview

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

### **HN1[] Public Enforcement, State Civil Actions**

If a federal question involving the validity of a state anti-trust act is considered and decided adversely in a state court, it, as well as the question of due service, is properly before the United States Supreme Court on review.

## **Syllabus**

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Where the state court has denied a motion to quash the service of process on a foreign corporation, and has also held that the statute on which the action is based is not unconstitutional, both the question of validity of the service and that of the constitutionality of the act are before this court for review.

*International Harvester Company v. Kentucky*, ante, p. 579, followed to effect that the plaintiff in error was doing business in the State in which process was served.

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*International Harvester Company v. Kentucky*, *ante*, p. 216, followed to the effect that the provision of the anti-trust statute of Kentucky under which this suit was brought is unconstitutional under the due process provision of the Fourteenth Amendment.

149 Kentucky, 41, reversed.

THE facts, which involve the sufficiency of service of process upon a foreign corporation doing business in the State of Kentucky and also the constitutionality of the anti-trust act of Kentucky, are stated in the opinion.

**Counsel:** *Mr. Alexander Pope Humphrey* and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff [\*\*\*\*2] in error in this case and in No. 297. <sup>1</sup>

*Mr. Charles Carroll*, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, *Mr. Frank E. Daugherty*, *Mr. J. R. Mallory*, *Mr. J. C. Dedman*, *Mr. C. R. Hill* and *Mr. C. D. Florence*, were on the brief, for defendant in error in this case and in No. 297. <sup>1</sup>

**Judges:** White, McKenna, Holmes, Day, Lurton, Hughes, Van Devanter, Lamar, Pitney

**Opinion by:** DAY

## **Opinion**

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[\*590] [\*\*947] [\*\*\*1484] MR. JUSTICE DAY delivered the opinion of the court.

A penal action was instituted by the defendant in error against the plaintiff in error in the Boyle Circuit Court of Kentucky under the anti-trust laws of that State. Summons having been served upon an alleged agent of the plaintiff in error, it filed a motion to quash the return for the reason, as alleged, that the person upon whom service had been made was not the authorized agent of the plaintiff in error and that it was not doing business in Kentucky. The facts in this case which are identical with those set out in the previous case, *International Harvester* [\*\*\*3] *Company of America v. The Commonwealth of* [\*\*948] Kentucky, just decided, *ante*, p. 579, show that the plaintiff in error had prior to the commencement of this action revoked the authority of an agent designated by it in compliance [\*591] with the laws of Kentucky and had removed its office from the State, but that it had continued through its agents, the party served in this case being one of them, to solicit orders to be accepted outside of the State for the sale of machines which were to be delivered in Kentucky, and that its agents were authorized to receive money, checks and drafts in payment therefor, or take the notes of purchasers payable at any bank in Kentucky.

There are two questions in this case. The Court of Appeals, deciding that this case was governed by the previous case from Breckenridge County (147 Kentucky, 655), held that the service was good and that the antitrust act was not unconstitutional and violative of the Fourteenth Amendment to the United States Constitution. 149 Kentucky, 41. HN1 [↑] Since the Federal question involving the validity of the anti-trust act was considered and decided adversely in the Court of Appeals, it, as well as the [\*\*\*\*4] question of due service, is properly before us. *Miedreich v. Lauenstein*, 232 U.S. 236, 243, and cases there cited.

As we have just dealt with the sufficiency of service in the previous case, involving the same question, it may be disposed of here by merely referring to that decision. And as the constitutional validity of the anti-trust act was

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<sup>1</sup> For abstracts of arguments see *ante*, p. 579.

<sup>1</sup> For abstracts of arguments see *ante*, p. 579.

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specifically determined in cases Nos. 276, 291 and 292, entitled *International Harvester Company of America v. The Commonwealth of Kentucky*, decided June 8, 1914, *ante*, p. 216, that question is also concluded.

We therefore reach the conclusion that the plaintiff in error was doing business in Kentucky and that the service was sufficient, but that the law under which the action was brought is unconstitutional and that the judgment of the Court of Appeals must be reversed, and accordingly remand the case to that court for further proceedings not inconsistent with this opinion.

*Reversed.*

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## Co-operative Live Stock Com. Co. v. Browning

Supreme Court of Missouri

July 2, 1914, Decided

No Number in Original

**Reporter**

260 Mo. 324 \*; 168 S.W. 934 \*\*; 1914 Mo. LEXIS 120 \*\*\*

CO-OPERATIVE LIVE STOCK COMMISSION COMPANY v. JAMES A. BROWNING et al., Appellants.

**Prior History:** [\*\*\*1] Appeal from Jackson Circuit Court. -- Hon. Thomas J. Seehorn, Judge.

**Disposition:** Reversed and remanded.

### **Core Terms**

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livestock, feeders, Traders, stockers, stockyards, commission merchant, pool, customers, patrons, buying and selling, buy, conspiracy, combinations, restraint of trade, transportation, prices, confederation, damages, stock, cattle, manufacture, speculators, large number, commerce, importation, selling, lessen, bought and sold, commodity, packers

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

#### [HN1](#) [down arrow] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Mo. Rev. Stat. § 10298 (1909) provides: Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the State of Missouri or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

#### [HN2](#) [down arrow] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Mo. Rev. Stat. § 10300 provides. Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust,

agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade, by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party to such pool, trust, combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this Act.

[Antitrust & Trade Law](#) > ... > [Price Fixing & Restraints of Trade](#) > [Horizontal Refusals to Deal](#) > General Overview

### **HN3** Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Mo. Rev. Stat. § 10301 provides in part: All arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in the State of Missouri of any product, commodity or article, and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations, or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this act.

[Business & Corporate Law](#) > ... > [Management Duties & Liabilities](#) > [Causes of Action](#) > General Overview

[Civil Procedure](#) > [Preliminary Considerations](#) > [Venue](#) > [Multiparty Litigation](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Forfeitures](#) > [Proceedings](#)

[Antitrust & Trade Law](#) > ... > [Private Actions](#) > [Costs & Attorney Fees](#) > General Overview

[Antitrust & Trade Law](#) > ... > [Private Actions](#) > [Remedies](#) > General Overview

### **HN4** Management Duties & Liabilities, Causes of Action

Mo. Rev. Stat. § 10305 provides: Any person injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the State of Missouri in which the defendant or defendants, or any of them, reside, or have any officer, agent or representative, or in which any such defendant or any agent, officer or representative may be found, without regard to the amount in controversy, and shall recover threefold the damage by him sustained, and the costs of suit, including a reasonable attorney's fee. Mo. Rev. Stat. § 10313 provides: The enactment and taking effect of this law shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred by any corporation or person on account of the violation of any law of the State of Missouri prior to the taking effect of this Act.

[Governments](#) > [Legislation](#) > [Statutory Remedies & Rights](#)

### **HN5** Legislation, Statutory Remedies & Rights

In order to properly appreciate the meaning of all remedial statutes, it is the duty of the court to investigate and ascertain the evil that existed, which the legislature intended to abolish by the enactment, as well as the inducements offered and instrumentalities created for the abolition of said evil.

## Headnotes/Summary

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### Headnotes

**1. CAUSE OF ACTION: Conspiracy Between Commission Merchants Not to Buy from or Sell to Another Commission Merchant: Damages.** Sections 10298-10305, Revised Statutes 1909, forbidding a combination "in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this State or any article or thing bought or sold whatsoever," and giving to "any person injured in his business or property" by such combination the right to "recover threefold the damages by him sustained," do not give to a commission merchant a cause of action against other commission merchants engaged in buying and selling live stock for entering into a pool and combination to neither sell to nor buy from him live stock, nor to permit any other commission merchant to remain a member of their live-stock exchange who either sells to or buys from him. Such commission merchant is not engaged in trade, but is simply the agent of those who are. Nor could a combination between the other commission merchants result in "restraint of competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this State." Nor are such other commission merchants purchasers within the meaning of the statute, since the combination was not entered into for the purpose of doing the things prohibited by the statute, but solely to injure the said merchant's commission business. In order that such commission merchant may have a cause of action under such statutes against the other commission merchants composing the association or exchange, it is necessary both to allege and prove that as a result of such combination injury resulted to plaintiff's patrons or customers, or to stock raisers or shippers, or to the trade in live stock at the particular stock yards, or that importation of live stock thereto or transportation of live stock therefrom was lessened.

**2. HISTORY OF STATUTE: Combinations in Restraint of Trade.** To properly ascertain the meaning of a remedial statute it is the duty of courts to read it in the light of its historical setting, to hold in view the existing evils it was intended to abolish, and to examine the instrumentalities provided by the Legislature for their destruction; and if the antitrust statutes are so viewed, it is apparent that their purpose was to prohibit pools and combinations that would restrict commerce or increase the prices of the necessities of life, either by limiting competition or the supply, or by "boycotts" or rebates to drive small dealers out of business. They never were intended to give to a mere agent engaged in the purchase and sale of any such necessary for others the right to recover damages from other such agents for the mere refusal to buy from or sell to him.

**Counsel:** Edward J. White, Martin L. Clardy, J. Walter Farrar, Ball & Ryland, Kinley & Kinley and R. W. Goldsby for appellants.

(1) The petition is insufficient. *State v. Loomis*, 115 Mo. 307; Cooley, Const. Lim. (6 Ed.), 484; 2 Story on Const. (5 Ed.), 1950; *Gladdish v. Live Stock Exch.*, 113 Mo. App. 725; *Anderson v. United States*, 171 U.S. 604; *United States v. Greenhut*, 51 F. 210; *In re Greene*, 52 F. 104; *Rice v. Oil Co.*, 134 F. 464. (2) The verdict and judgment were against the law. R. S. 1899, secs. 8981, 8978. (3) The acts of 1899 and 1907 are unconstitutional, insofar as they or either of them purport or may be construed to give an action against defendants. State *ex rel. v. Associated Press*, 159 Mo. 461; *State v. Coffee Co.*, 171 Mo. 634; *Shiveley v. Lankford*, 174 Mo. 535; State *ex rel. v. Vandiver*, 222 Mo. 206; *State v. Julow*, 129 Mo. 163; *In re Goode*, 3 Mo. App. 230; State *ex rel. v. Lafayette Co. Ct.*, 41 Mo. 39; *State v. Persinger*, 76 Mo. 346; *Witzman v. Railroad*, 131 Mo. 612.

Gage, Ladd & Small for respondent.

(1) "We would seem to lack perception of the true nature of things [\*\*\*2] were we to be deceived or blinded by the screen or pretense which the conspirators raised to mask their operations. Courts should be as astute to discover and discern the truth as the guilty are to conceal it." *Foot-Race Case*, 147 F. 327. (2) There is abundant evidence tending to prove that the defendants and all other members of the traders' exchange boycotted and threatened others not members of their exchange for and from doing business with the plaintiff. (3) In order to constitute a boycott or threaten to boycott, it was not necessary to use or threaten violence to the person or property of anyone.

It is sufficient if there was an injury or threat to cause a loss to another's business. [Door Co. v. Fuelle, 215 Mo. 4221. \(4\)](#) "The rule of reason" is excluded by our statutes, and any combination which tends to limit or control or lessen trade or competition, no matter how little, falls within the condemnation of the antitrust laws of this [State.](#) [State v. People's Ice Co., 246 Mo. 221. \(5\)](#) As a matter of law an agreement between defendants or between them and other members of the traders exchange not to buy from or sell to the plaintiff's customers through the plaintiff, was a combination, [\[\\*\\*\\*3\]](#) agreement, trust, pool, association and conspiracy, etc., to restrain and limit trade and competition at this great cattle market at the stockyards in Kansas City, and whether such limitation or restraint of trade was "great or small," the law was violated. State [ex rel. v. People's Ice Co., 246 Mo. 221. \(6\)](#) "It is the combination or agreement that results in restraint of trade that the statute denounces, whether the result is accomplished by the act of each individual on his own account, doing as he agreed to do, or by the joint action of all. . . . It is the combination to accomplish that result that the statute is aimed to prevent." State [ex rel. v. Live Stock Exchange, 211 Mo. 193; State ex rel. Barker v. Assurance Co., 158 S. W. 644. \(7\)](#) All the sections and articles of our antitrust statutes are in pari materia and must be construed as if contained in one act. Hence it follows that section 8981 in article 2 of chapter 143, relating to pools, trusts and conspiracies, Revised Statutes 1899, which gives triple damages to any person injured in his property or business arising from any violation of that article, also gives such triple damages arising from any violation of any provisions [\[\\*\\*\\*4\]](#) of article 1 of said chapter 143. [State v. Oil Co., 218 Mo. 354; State v. Elevator Co., 106 N. W. 983; Brewing Co. v. Belinder, 97 Mo. App. 64. \(8\)](#) It is too late to challenge the constitutionality of our antitrust statutes for the alleged reason that they interfere with the right to contract or take property without compensation, or due process of law, or deny any person the equal protection of the law. All these questions have long since been foreclosed and settled by this court. [Standard Oil Case, 218 Mo. 378. \(9\)](#) The case of [Anderson v. United States, 171 U.S. 604](#), so much relied on by the defendants, is not in point. All that case decided, as has been held by the Court of Appeals of this State and the Supreme Court of Kansas, was that the members of the traders exchange were not engaged in interstate commerce; and therefore the Sherman Act did not apply. [Brewing Co. v. Belinder, 97 Mo. App. 64; State v. Wilson, 84 Pac. 737](#). Furthermore as pointed out in State [ex rel. v. Live Stock Exchange, 211 Mo. 197](#), and [State v. Aikens, 83 Kan. 792](#), all the rules of the traders exchange were not before the court in the Anderson case, especially the rule requiring the payment of a thousand [\[\\*\\*\\*5\]](#) dollar entrance fee, and the approval of two-thirds of the members before any person could enter the portals of the exchange and be a trader on the yards with none to molest or make him afraid. Besides, it may be said that when the Anderson case was decided this antitrust legislation was a sort of a "Mysterious Stranger" -- to be kept at a dignified and perfectly proper distance -- and did not meet with the cordial reception and hearty welcome which its great virtues entitled it to, and which it has since, upon better acquaintance, been accorded, especially by the Supreme Court of this State. [\(10\)](#) The statutes so far as they provide for a civil suit to recover triple damages are not penal. [Atlanta v. Foundry & Pipe Works, 127 F. 23; Casey v. Transit Co., 116 Mo. App. 250. \(11\)](#) It is settled in this State that the enforcement and construction of these antitrust statutes is not to be "approached with a sour face," but these statutes are remedial and must be liberally construed, so as to advance the remedy for the great wrongs therein denounced. It is the policy and purpose of the law that these statutes shall be rigidly enforced against all wrongdoers, and that the guilty shall not escape [\[\\*\\*\\*6\]](#) through any astute or artificial construction which subverts the general intent of the lawmakers -- which was to destroy the whole brood of trusts and combines against trade in this State, from the least unto the greatest. [State v. Oil Co., 218 Mo. 359; State ex inf. v. Ins. Co., 152 Mo. 43. \(12\)](#) The antitrust laws apply to commission merchants. The learned counsel for the appellants, neither at the trial of the case below nor in their briefs in this court, made any claim or point that the antitrust statutes did not apply to combines or boycotts against commission merchants, and therefore we did not argue that point or submit any authorities. In State [ex rel. v. Live Stock Exchange, 211 Mo. 181](#), this court passed upon the very question, and held that the statute did apply to commission merchants, members of the Kanass City Live Stock Exchange. See, also, [State v. Wilson, 73 Kan. 334](#). So the record in this case shows that all the live stock -- cattle, hogs and sheep -- which comes to Kansas City is sent to commission merchants and sold by them. It is true that they sell on commission and do not own the stock, but they are the parties who actually sell it on the market, and for the most [\[\\*\\*\\*7\]](#) part the owners never know for what the stock is sold until after a report of the sales is made. The commission men represent the owners, stand in the place of the owners and they are certainly bound and controlled by the antitrust laws of this State. And they can enter into an agreement and combine for the purpose of restraining trade and competition, or of lessening or raising prices, or doing anything which the owner himself could do in violation of the [antitrust law](#). The [antitrust law](#) was primarily enacted for the purpose of protecting the producers and the consumers of farm products and other necessities of life from combinations or

monopolies which affect the prices or which tend to lessen competition in the trade. It is well known that nearly all of the food products, both raw material and finished, are for the most part handled by commission men, who, of all others, are in a position to enter into combines affecting the prices and trade and competition in the same. Butter, eggs, cheese, potatoes, flour, sugar, apples, oranges, lemons, fruits of all kinds, live stock -- cattle, hogs, sheep, goats -- poultry are bought and sold, and the prices are fixed, as a matter of fact, [\*\*\*8] by commission merchants. And this antitrust statute was passed mainly, for the very purpose of protecting the producers and consumers of these food stuffs -- the farmers and the town people -- from combines and trusts formed by commission men. Therefore, to read them out of the benefits or the penalties of these statutes, would be to defeat the primary purpose of the law. There is nothing in the statutes saying that the combines or contracts or agreements in restraint of trade, condemned by the statutes, can only be or must be made by the owners of the products. But the statute says, "If any two or more persons or corporations who are engaged in buying or selling any article of commerce," Sec. 8978, R. S. 1899; that "all arrangements, contracts, agreements or combination between persons or corporations, or between persons or any association of persons or corporations, designed or made with a view to lessen, or which tend to lessen, full and free competition," Sec. 8966, R. S. 1899; and "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade [\*\*\*9] or competition," Sec. 8965. The same language is used in the revised law of 1907. So that it is nowhere suggested or implied in any section of the statute, or in any of the language used, that a vicious agreement in restraint of trade can only be made by the owners of the produce; but it is assumed that such agreements may be made by others, to-wit, by their agents and other persons engaged in the actual business of buying or selling or fixing the prices, such as commission merchants. To hold otherwise would be to expose the producers of food stuffs (the farmers) and the consumers (the town people) to all the evils which the statute so clearly intended to prevent. This cannot be the law. The section of the statute providing the remedy says that "any person injured in his business" by a violation of the statute shall have a cause of action. He does not have to be the owner of anything, but if his business is injured or destroyed by an illegal combine, he can recover his damages. These statutes are highly salutary and remedial in their purpose, and are not to be destroyed or repealed by a strict or hostile construction. *State v. Oil Co.*, 218 Mo. 359, 384, 460; *State ex inf. v. Ins. Co.*, [\[\\*\\*\\*10\] 152 Mo. 43](#); *State ex inf. v. Oil Co.*, [194 Mo. 148](#); *State ex inf. v. Packing Co.*, [173 Mo. 356](#). All who are engaged in trade must be embraced in these antitrust laws, otherwise they are void as discriminatory and invading the equal protection of the law provisions of the Federal Constitution. The first Illinois antitrust law was declared void because it exempted "live stock while in the hands of the raiser." [Connolly v. Pipe Co.](#), [184 U.S. 554](#).

**Judges:** WOODSON, J. Brown, Bond and Walker, JJ., concur; Graves and Faris, JJ., concur in result; Lamm, C. J., dissents.

**Opinion by:** WOODSON

## Opinion

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### [\*331] [\*\*934] In Banc

WOODSON, J. -- The plaintiff instituted this suit November 5, 1907, in the circuit court of Jackson county against the defendants, to recover \$ 96,000, actual and treble damages alleged to have been sustained by reason of a pool, trust, combination and agreement made and entered into by and between them and others, to destroy the plaintiff's business -- live stock commission business -- at Kansas City, Missouri, in violation of the statutes hereinafter mentioned.

A trial was had which resulted in a [\*\*935] verdict of \$ 19,500, in favor of the plaintiff, and under the statute [\*\*\*11] the court trebled that sum and rendered judgment for the plaintiff and against the defendants for the sum of \$ 57,500.

This suit is novel, in that it differs from all others growing out of pools, trusts and combines, with which I am familiar, and is a fight between agents or the so-called middle men, and not between the State or her officers against manufacturers and carriers or financial or industrial institutions for conspiring to control commerce, prices, etc., except in an incidental manner, if at all, which will be presently stated, coupled with the earnest insistence of counsel for defendants that the petition does not state facts sufficient to constitute a cause of action against the defendants, and these facts necessitate a reproduction of it here, formal parts being omitted:

[\*332] PETITION.

"Plaintiff states that it is, and at all the times hereinafter mentioned, was a corporation duly organized under the laws of the State of Colorado, and duly authorized and licensed to do business in the State of Missouri.

"That at all such times the plaintiff was and still is empowered and authorized to carry on, and actually engaged in, the business of a live stock commission [\*\*\*12] merchant, buying and selling cattle, hogs, sheep and live stock of all kinds, on commission, for its patrons and customers, at the Kansas City stockyards, in Kansas City, Jackson county, Missouri; and that the defendants and others are and were at all such times traders and speculators engaged in buying and selling cattle, hogs, sheep and other live stock, and especially live stock known as 'stockers' and 'feeders' hereinafter mentioned, at said stockyards, and were and are members of a voluntary association known as the Traders Live Stock Exchange.

"The Kansas City Stockyards Company is and for many years has been a corporation owning and conducting said stockyards at said Kansas City, for the purpose of affording a market for the buying and selling of live stock produced in the State of Missouri, and other States and Territories; and that by its charter said company is required to keep said market open and free for the use of all persons and corporations desiring to trade thereat, and for that purpose it has at all times owned and maintained large yards and pens, together with the necessary driveways, troughs, buildings and equipment for the care, handling and sale of such live [\*\*\*13] stock.

"That at all such times and at the present time large numbers of cattle, hogs, sheep and other live stock have been and are daily shipped and transported from said State of Missouri, and other States and Territories [\*333] to said Kansas City stockyards, and are bought and sold upon said market. That said market is the second largest live stock market in the United States.

"That the live stock so sold upon said market is divided into two general classes; fat stock, or stock fit to be slaughtered, which is nearly all purchased by the packers and order buyers (said order buyers being persons who purchase such stock on orders for dealers at other localities), and 'stockers' or 'feeders,' which, for the most part, consist of cattle not fitted or ready for slaughter, and which are bought at said market by the defendants and other members of said Traders Live Stock Exchange, who, as aforesaid, are and were traders and speculators upon said market, and who, in turn, resell the same to farmers and cattle feeders, to be taken to the country to be fed and fattened, and ultimately returned to the market as fat cattle, to be sold for slaughter.

"That a greater number of such stockers [\*\*\*14] and feeders are and have, for many years past, been bought and sold in said Kansas City stockyards than at any other market in the United States; and that such stockers and feeders constitute a very large part of the cattle received at said market, more than seven hundred thousand such stockers and feeders being annually received and sold thereat.

"That besides the plaintiff, there are and at all such times were a large number of other persons and corporations doing business at said Kansas City stockyards, as live stock commission merchants, all, or practically all, of whom, except the plaintiff, are and were at all such times members of a voluntary association known as the Kansas City Live Stock Exchange. That the plaintiff never was a member of said association, and during the times herein mentioned has been the only commission merchant doing business at said stockyards not a member of said Kansas City Live Stock Exchange. That at all such times the plaintiff has [\*334] charged less commissions for buying and selling cattle, hogs, sheep and other live stock for its patrons and customers, than were charged and collected for buying and selling such live stock by the other commission [\*\*\*15] merchants at said stockyards, who,

as aforesaid, were and are all members of said Kansas City Live Stock Exchange, and that plaintiff has sold large numbers of fat cattle for its patrons and customers.

"That at all times herein mentioned the plaintiff has had and still has a very large number of patrons and customers, raisers and feeders of live stock, who were and are desirous of buying and selling their stockers and feeders through the plaintiff, as such commission merchant, and would have done so and would do so now but for the combination and conspiracy against the plaintiff entered into and maintained by the defendants, as hereinafter stated.

"Plaintiff states that it commenced its said business as a commission merchant at said stockyards on the first day of September, 1906, and ever since said time has been and still is engaged in such business at said stockyards, as hereinbefore stated.

"Plaintiff further states that at the time of and immediately before the date of the commencement of business by the plaintiff, the defendants, as such traders and speculators, buyers and sellers, of live stock, and especially of stockers and feeders at said stockyards in Kansas City, Jackson [\*\*\*16] county, Missouri, created, entered into and became members of and participated in a pool, trust, agreement, combination, confederation and understanding among and between themselves and each other and between themselves and other members of said Traders Live Stock Exchange, in restraint of trade and competition in the importation, transportation, purchase and sale of such stockers and feeders at said Kansas City stockyards, in this State, by agreeing among and between themselves and with each other, and between themselves [\*335] and other members of said Traders Live Stock Exchange and the members of said Kansas City Live Stock Exchange, to refuse to buy from or sell to any of the plaintiff's patrons or customers through the plaintiff as such commission merchant, any such stockers and feeders at said stockyards, and in pursuance of such pool, trust, agreement, combination, confederation and understanding, have ever since then refused and still refuse to so buy or sell through the plaintiff, any such stockers or feeders at said Kansas City stockyards.

"Plaintiff further states that at the time and immediately before the date of the commencement of business by the plaintiff, the [\*\*\*17] defendants as such traders and speculators, buyers and sellers of live stock, and especially of stockers and feeders at said stockyards in Kansas City, Jackson county, Missouri, created, entered into and became members of and participated in a pool, trust, agreement, combination, confederation and understanding among and between themselves and with each other, and between [\*\*936] themselves and other members of said Traders Live Stock Exchange and the members of said Kansas City Live Stock Exchange, to regulate, control and fix the price of such stockers and feeders, so bought and sold at said Kansas City stockyards, by agreeing among and between themselves and with each other, and between themselves and other members of said Traders Live Stock Exchange, and the members of said Kansas City Live Stock Exchange, not to buy from or sell to any of the patrons or customers of the plaintiff through the plaintiff as such commission merchant, any such stockers or feeders, and ever since then, in pursuance of such unlawful combination and understanding, refusing, and still refusing to so sell to or buy from the patrons or customers of the plaintiff any such stockers or feeders at said Kansas [\*\*\*18] City stockyards.

[\*336] "And plaintiff states that at the time and immediately before the date of the commencement of business by the plaintiff, the defendants, and other members of said Traders Live Stock Exchange, as such traders and speculators, buyers and sellers of live stock, and especially of stockers and feeders, at said stockyards in Kansas City, Jackson county, Missouri, created, entered into and became members of and participated in a pool, trust, agreement, combination, confederation, association and understanding to control and limit the trade in such stockers and feeders and to limit competition in such trade by refusing to buy from or sell to any of the patrons or customers of the plaintiff through the plaintiff as such commission merchant, any such stockers and feeders, for the reason that plaintiff was not a member of or party to such pool, trust, agreement, combination, confederation, association and understanding, and boycotted and threatened and ever since then have boycotted and threatened, and still boycott and threaten any and all persons from so buying or selling any such stockers or feeders to the plaintiff's patrons or customers through the plaintiff [\*\*\*19] as such commission merchant; and that plaintiff is not and never has been a member of or party to said pool, trust, agreement, combination, confederation, association and understanding in reference to such stockers and feeders aforesaid.

"Plaintiff says that the defendants, ever since the plaintiff commenced business as aforesaid, have maintained and continued and still maintain and continue such pool, trust, agreement, combination, confederation, association and understanding and conspiracy in restraint of trade aforesaid. That at all the dates and times herein mentioned, the defendants have entered into, among and between themselves and with each other, and between themselves and other members of said Traders Live Stock Exchange, and the members of said Kansas City Live Stock Exchange, arrangements, [\*337] contracts, agreements, combinations and understandings designed and made with a view to lessen, and which tend to lessen lawful trade and full and free competition in the importation, transportation and sale in this State of such stockers and feeders at said Kansas City stockyards in Kansas City, Jackson county, Missouri, in this, that at the time aforesaid when plaintiff [\*\*\*20] commenced business, ever since then and still, the defendants, by an arrangement, contract, agreement, combination, understanding and conspiracy in restraint of trade, among and between themselves and with each other and between themselves and other members of said Traders Live Stock Exchange and the members of said Kansas City Live Stock Exchange, at all such times have refused and still refuse to buy from any of the patrons or customers of the plaintiff through the plaintiff, as such commission merchant, any such stockers and feeders, and have at all such times refused and still refuse to sell to any of the customers or patrons of plaintiff, through the plaintiff as such commission merchant, any such stockers or feeders.

"Plaintiff further states that defendants, and said other traders and speculators at said stockyards, also bought and sold thereat, large numbers of cows, calves and other live stock, and that all the above agreements, combinations, pools, trusts, arrangements, conspiracies and acts of defendants and others, hereinbefore set forth, against the plaintiff and its customers and patrons, also related to, embraced and included cows, calves, and all other live stock so [\*\*\*21] dealt in by said defendants and other traders and speculators, as well as stockers and feeders as hereinbefore set forth.

"And plaintiff states that by reason of the unlawful and illegal acts and conspiracies of the defendants, aforesaid, the plaintiff has been wholly prevented from buying or selling or doing any business as such commission [\*338] merchant, in such stockers and feeders, cows, calves and other live stock bought and sold and dealt in by the defendants and said other traders and speculators and members of said Traders Live Stock Exchange, at said stockyards, as aforesaid, and is still so prevented and disabled from doing any such business. That but for the said unlawful acts and conspiracies of the defendants, as aforesaid, the plaintiff, owing to its large number of patrons and customers, would have done a large business at said stockyards in buying and selling such stockers and feeders, cows, calves and other live stock on commission, from which it would have realized a profit of twenty thousand dollars in the aggregate, from the date when it commenced business as aforesaid up to the date of the filing of the petition herein.

"Plaintiff states that before it [\*\*\*22] commenced business as aforesaid, as such commission merchant, Blanchard & Ehrke and Burnside-Jardon Company were and for a long time had been engaged in the live-stock commission business at said stockyards, and had a large number of customers and patrons, for whom said commission merchants did a large business, in handling such stockers, feeders, cows, calves and other live stock dealt in by the defendants and said other traders and speculators; that for the purpose of enabling the plaintiff to start its said business with a large number of customers for the class of live stock last above mentioned, at great expense, it purchased from said Blanchard & Ehrke and said Burnside-Jardon Company, their said live-stock commission business, including the good will and patronage thereof, and also entered into contracts, employing agents and salesman for the purpose of carrying on said business, and paid out large sums of money as salaries to such agents and salesmen, in endeavoring to carry on said business, but that plaintiff was wholly unable to do any such business whatever, on account of the unlawful and illegal acts [\*339] and conspiracies of the defendants, as aforesaid, and was [\*\*\*23] obliged, at great cost and expense to itself, to cancel said contracts of employment; by reason of all of which the plaintiff was damaged and actually lost the sum of twelve thousand dollars.

"Plaintiff further states that the defendants, at the time they entered into the unlawful trusts, agreements, combinations and conspiracies hereinbefore set forth, knew that the necessary inevitable result thereof, and of their acts aforesaid, in pursuance thereof, would be to prevent the plaintiff from deriving the profits aforesaid, and to cause it the actual loss and damage aforesaid.

"That the plaintiff has been injured in its business by the defendants, by reason of the unlawful acts and conspiracies of the defendants aforesaid, and thereby sustained damages in the sum of at least thirty-two thousand dollars.

"Wherefore, plaintiff prays judgment against the defendants for the sum of ninety-six thousand dollars, being three-fold damages sustained by it, for costs of suit, and for reasonable attorneys' fees, all as required and allowed by the statutes in such case made and provided."

ANSWER.

[\*\*937] The answer was:

"First: That the defendants deny each and every allegation in said [\*\*\*24] petition contained.

"Second: That section 1 of the Laws of 1899 (page 316), being section 8978, Revised Statutes 1899, and section 4 of said act being section 8981, Revised Statutes 1899, are unconstitutional in that, said enactment (a) violates section 28 of article 4 of the Constitution of Missouri, by containing more than one subject, and by failing to express in the title of said act, as being within the object and scope thereof, a private personal right of action in damages for its violation; [\*340] and (b) in so far as said act and each section thereof undertakes to prohibit and make unlawful a refusal to buy from, sell to or deal with any person or corporation for any reason whatever or for the reason stated in said act, it is unconstitutional and in violation of section 30 of article 2 of the Constitution of Missouri, and Amendment Fourteen of the Constitution of the United States, in that it deprives persons of liberty and property without due process of law; and (c) said act violates said provisions of the Constitution of the State of Missouri and of the United States by depriving persons of liberty and property without due process of law, in so far as said act undertakes [\*\*\*25] to prohibit and make unlawful any agreement between two or more persons to refrain from or refuse to do business with any other person for any reason or for the reason mentioned in said act.

"Third: The act of March 19, 1907 (Laws 1907, page 377), is unconstitutional in that:

(a) Its title contains more than one subject in violation of section 28 of article 4 of the Constitution of the State of Missouri:

(b) It violates section 30 of article 2 of the Constitution of Missouri, and Amendment Fourteen of the Constitution of the United States, in so far as it undertakes to make unlawful an agreement between two or more persons to refuse to buy from or sell to any other person for the reason mentioned in said act, and in so far as it undertakes to prohibit individuals from separately or together refusing to have dealings with any other persons in the conduct of their individual business it undertakes to deprive them of liberty and property without due process of law within the meaning of the State and Federal Constitutions aforesaid.

"Wherefore, the defendants pray judgment."

I. It is earnestly insisted by counsel for appellants that the petition filed in the cause does not state [\*\*\*26] [\*341] facts sufficient to constitute a cause of action against their clients.

This insistence is predicated upon many grounds stated; but from the view we take of the case it will not be necessary to follow counsel through their long and able arguments made in support thereof.

I am satisfied that the statutes under which this suit was brought and prosecuted, do not give the plaintiff a cause of action against the defendants, even though it should be conceded that everything charged in the petition be true.

In passing upon the sufficiency of the petition we must first get a clear conception of the principal facts charged therein before we can intelligently apply the law thereto.

(a) The petition charges that the plaintiff is a corporation organized for the purpose of buying and selling live stock on commission, at the Kansas City Stock Yards; (b) that the Kansas City Stock Yards is a corporation, organized for the purpose of affording a market for buying and selling live stock, and that its charter requires it to keep said

market open and free for the use of all persons desiring to trade thereat; (c) that the live stock bought and sold on that market consisted of two classes, [\*\*\*27] fat stock purchased by packers, and stockers or feeders, which are not fit for slaughter and are sold to feeders, and after being fattened are then sold to the packers; (d) that the Kansas City Live Stock Exchange is a voluntary association, composed of individuals and corporations each engaged in buying and selling in said yards, live stock on commission -- the fat stock to the packers, and the thin or stockers, to the traders, who will be specially noticed later; (e) that the Traders Live Stock Exchange, of Kansas City, was a voluntary association, composed of individuals and corporations, each engaged in buying and selling [\*342] live stock of all kinds on their own account. Their principal business, however, was to purchase feeders and stockers, which they then sold to farmers and feeders; (f) that defendants were members of the latter exchange; (g) and the plaintiff, as previously stated, was a commission merchant, or agency pure and simple, engaged in buying and selling live stock of all kinds, for a commission, for its various patrons; but it was not a member of the Kansas City Live Stock Exchange or of the Traders Live Stock Exchange, previously mentioned.

Now, the gravamen [\*\*\*28] of the plaintiff's charge is, that the defendants, who were traders, as previously mentioned, and members of the Traders Live Stock Exchange, entered into a pool, trust and combination, among themselves, and the other members of the Traders Live Stock Exchange, whereby it was agreed and understood that none of them would buy of or sell to plaintiff, any kind of live stock; also that they would not buy from or sell to any member of the Kansas City Live Stock Exchange, who bought or sold live stock to the plaintiff, and thereby forced the plaintiff out of business, to its great damage, etc.

In other words, the plaintiff charges that in violation of an act of the Legislature approved March 19, 1907, Laws 1907, pp. 377 to 382, being same as sections 10298, 10300, 10301, 10305 and 10313, Revised Statutes 1909, defendants entered into a pool, trust and combine, by which they agreed among themselves and with others, that they would not trade with the plaintiff; also by which they agreed not to trade with anyone who did trade with it and thereby drove the plaintiff out of business, to its damage, etc.

Those sections of the statute, in so far as here material, read as follows:

**HN1** [↑] "Section 10298. [\*\*\*29] Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding [\*343] with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity [\*\*938] in this State or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this act.

**HN2** [↑] "Section 10300. Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade, by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party to such pool, trust, combination, confederation, [\*\*\*30] association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this act.

**HN3** [↑] "Section 10301. All arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this State of any product, commodity or article, . . . and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations, or understandings [\*344] shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this act.

**HN4** [↑] "Section 10305. Any person injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful [\*\*\*31] by this act may sue therefor in any circuit court of this State

in which the defendant or defendants, or any of them, reside, or have any officer, agent or representative, or in which any such defendant or any agent, officer or representative may be found, without regard to the amount in controversy, and shall recover threefold the damage by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Section 10313. The enactment and taking effect of this law shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred by any corporation or person on account of the violation of any law of this State prior to the taking effect of this act."

In approaching the construction of these statutes two things should be borne in mind: first, what object did the Legislature intend to accomplish by said enactment? and, second, in what manner were the rights of the plaintiff affected by the economy thereof? I say economy, because the rights of the plaintiff, if any, are secondary and incidentally flow from the principal object of the act.

**HN5↑** In order to properly appreciate the meaning of all remedial statutes, to which these belong, it is the [\*\*\*32] duty of the court to investigate and ascertain the evil that existed, which the Legislature intended to abolish by the enactment, as well as the inducements offered and instrumentalities created for the abolition of said evil.

If we look back of the year 1899 (when this class of legislation was first enacted in this State, of which the present statutes are amendatory), which it is our duty to do, it will be seen from the current literature [\*345] of the day, and especially in the great daily papers of the country, that those who were engaged in almost all classes of production, manufacture, transportation and financial business, were organizing their respective businesses into pools, trusts and combines, for the purpose of limiting competition, reducing expenses and increasing their profits, with no intention, however, at that time, if I am correctly informed, to restrict commerce or to increase the prices of the necessities of life. But as time passed, the survivors of the new regime, becoming more avaricious and expert in combinations, conceived the idea that, since the law of supply and demand governed both the buying and selling prices of all articles of commerce, they could [\*\*\*33] respectively extend the pools, trusts and combines, so as to limit not only competition, and lessen expenses, but also limit the supply of practically all of the necessities of life, and thereby increase the demand and correspondingly increase the prices to be paid therefor, by the public. Not only that, but by a system of boycotts, rebates, etc., the "big business" drove the little fellows out of business entirely, and thereby established pools, trusts and monopolies among themselves, and thereby, as previously stated, enabled them to not only limit production and restrain trade, but also to fix and maintain both buying and selling prices of all articles of commerce.

By that cold-blooded, avaricious and narrow business policy which so limited production, stifled trade and increased prices, an outraged and long-suffering public, through its Legislature, in 1907, enacted, among others, the statutes previously set out, for the purpose of destroying said pools, trust and combinations, and thereby restore competition and left the regulation of prices to be governed according to the old law of supply and demand, and to protect the weak against the strong, or the individual against the [\*\*\*34] combinations.

[\*346] I think that this is a true brief history of our legislation upon this subject.

It goes without saying that the plaintiff contends that it belongs to the weak and individual class mentioned, and that the statutes under consideration were intended for its protection, and the punishment of the strong.

Is this contention of plaintiff sound? I think not; for the reasons to be presently stated.

By looking at said section 10298, previously copied, it will be seen that it is leveled at all persons who enter into any pool, trust or combination for the purpose of limiting trade and competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this State, etc.

[\*\*939] The plaintiff, as previously stated, was simply a commission merchant or agency, engaged in buying and selling live stock for others, on the Kansas City stockyards, for a commission. The plaintiff neither produced, manufactured, owned or carried any article of commerce, nor was it authorized to so do by its charter. That being true, as stated in the petition, it would be illogical and we would be unwarranted under the language of these

statutes to [\*\*\*35] hold that the pool, trust or combine formed against the plaintiff could in any manner result in "restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this State." This is true for the reason that the plaintiff, as stated, was not engaged in trade, within the meaning of the statute, but was the agent of those who were so engaged, and as such it could not lessen competition, importation, transportation, manufacture, purchase or sale of any product or commodity of this State.

The questions of competition in transportation, restraint of trade and the purchase and sale of live stock shipped to Kansas City, are controlled by the transportation [\*347] companies, the owners of the stock, and the purchasers thereof, and not by the commission man or sales agent, at Kansas City.

But it might be suggested that the defendants were purchasers within the meaning of the language used. In answer to that suggestion, it is sufficient to state that while they are purchasers, yet it is not stated, nor is it a fact, that the combination charged against them was entered into for the purpose of doing the things prohibited [\*\*\*36] by the statutes, but that it was formed solely to injure the plaintiff's commission business, and that by reason thereof, it, and not the public, was damaged.

There is no allegation contained in the petition that the unlawful pool, trust and combination formed by the defendants and other members of the Traders Exchange was formed for the purpose of doing injury to the plaintiff's patrons or customers, or to damage any other stock raiser, shipper, buyer or seller, but the charge is that they simply agreed among themselves not to buy or sell live stock through the plaintiff as a commission merchant.

For these reasons the patrons of the plaintiff should be entirely eliminated from the consideration of the case; all references to them but before the legal propositions involved in the case.

There is no pretense that the combination charged against the defendants was intended to or did have any effect upon competition in the transportation of live stock to Kansas City; that it resulted or could in any manner have resulted in the restraint of trade, or was intended to or could have fixed or maintained prices within the meaning of the antitrust statutes; but as charged in the petition, was [\*\*\*37] entered into for the purpose of injuring the plaintiff in its business as a commission merchant.

But independent of that, it is common knowledge, which the Legislature knew, as well as all others do, [\*348] that the live stock business of Kansas City does not depend upon any one or more commission merchants, but upon the broad territories of rich land in the center of which that city is located -- blessed with copious rainfalls and deep floods of warm sunshine, producing the finest quality and greatest quantity of grain and grass that grow upon God's footstool, the food of man and beast. Recognizing these natural conditions favorable to a great live stock market, the Legislature enacted the laws in question for the use and benefit of the public, and not for the benefit of the commission men who sell the stock on the market.

That being true, and the further fact appearing from the petition that the plaintiff is not a member of the Kansas City Live Stock Exchange, and not a member of or eligible to membership in the Traders Exchange, and having no authority under its charter to purchase or sell live stock on its own account, but upon commission only, I see no legal objection to [\*\*\*38] the right of the defendants, individually or collectively, to determine with whom they will or will not deal, so long as that agreement does not limit commerce or control prices.

I am now speaking of the plaintiff's rights and duties under the statutes, and not at common law, which I presume would afford redress for a wrong of this character if proven to the satisfaction of the jury.

If I correctly understand the meaning of the petition, the right of recovery is not predicated solely upon the facts that the conspiracy charged to have been made and entered into by and between the defendants and the members of the Traders Exchange, would entitle it to a recovery, if it were not for the further fact charged, that some agreement and the enforcement thereof not only damaged the plaintiff, but that it also, in a degree, destroyed competition in the live stock business at Kansas City, and tended to fix and maintain prices. That is to say, there being at the time [\*349] complained of, say two hundred live stock commission merchants in Kansas City and the plaintiff being one of them, then the unlawful conspiracy of the defendants against the plaintiff thereby destroyed competition

in [\*\*\*39] that business to the extent of one two-hundredths part thereof, by forcing it, one of the sales' competitors, out of the market.

I must confess that this is a novel proposition and probably would be more forceful had the plaintiff been engaged in the buying and selling of live stock upon its own account and not for others upon commission, as the petition charges. Should such an agreement be carried into execution it would reduce the number of commission merchants in Kansas City from two hundred to one hundred and ninety-nine, but would that in any manner result in restraint of trade in the [\*\*940] live stock business or tend to increase the prices to be paid therefor upon that market?

A commission merchant, as such, neither produces nor ships live stock to any market, but his business is, as charged in the petition, confined to selling live stock to packers, order men and traders, raised and shipped to market by third parties. In other words, the commission man is simply an agent engaged in the business of selling one man's cattle to another for an agreed or a reasonable fee. That being unquestionably true, then can it be said that this petition charges or could truthfully charge [\*\*\*40] that the live stock owner, the packer, trader or the consuming public was or could be damaged by the agreement complained of in this case?

It seems to me that the most damaging conclusion that could be drawn from the statements is that by forcing the plaintiff from the Kansas City market, the number and possibly the efficiency of the sales' agencies of the market were diminished to that extent; but can it be declared as a matter of law that the natural result of that diminution of agency would necessarily [\*350] lessen competition or increase the price of live stock in Kansas City, within the meaning of the statutes? I think not. No authority is cited in support of or against this proposition, and I have been unable to find any bearing upon the subject.

In order to accomplish such an effect under the statutes, if possible, which I deny, the petition should have charged and the evidence should have shown that by thus driving plaintiff out of business, the selling agencies of live stock on the Kansas City stockyards were so diminished and impaired that they were unable to handle the live stock consigned to that market, and that by reason thereof the market became glutted and the [\*\*\*41] demands of the public could not be supplied, although there was a superfluity of live stock on the market for sale.

In construing these statutes, can it be seriously contended that the Legislature, when enacting them, had in mind this remote, if possible, condition of affairs, which had never existed and in all probabilities never will? This is one of the instances where the asking of the question answers it in the negative.

But by way of illustration: Suppose some member of this court and I had been trading with The Peck Dry Goods Company of Kansas City; that this afternoon we should step into that store and request *one of the clerks* therein to show us certain articles of merchandise; that in response thereto the clerk should say to us he would not do so because he considered us undesirable customers; that thereupon we should walk out of the store and agree between ourselves not to trade with The Peck Dry Goods Company any more, *through that clerk*; and that we should notify said company of that fact, could it be seriously contended that our said agreement would be a violation of the antitrust statutes of this State and that we would be liable to Peck & Company for treble [\*\*\*42] damages or for any other kind of damages for that matter? I think, clearly, not; [\*351] and that being unquestionably true, then how can it be logically said that the defendants in this case are liable to the plaintiff, the commission man or sales' agent of the stock growers mentioned in this case? There is not one whit of difference in principle between the two cases. Neither could or would interfere in the remotest degree with commerce, tend to stifle trade, create a monopoly or to fix or maintain prices. It might damage the individual commission man or sales' agent, but no one else.

Entertaining these views of the petition and the statutes upon which it is bottomed, I am clearly of the opinion that no cause of action is stated against the defendants.

The judgment of the circuit court is, therefore, reversed and the cause remanded.

PER CURIAM. -- The foregoing opinion of Woodson, J., written in division, with the illustration added near the end thereof, is adopted as the views of the Court in Banc.

260 Mo. 324, \*351A68 S.W. 934, \*\*940A914 Mo. LEXIS 120, \*\*\*42

The judgment is therefore reversed and the cause remanded.

*Brown, Bond and Walker, JJ.*, concur; *Graves and Faris, JJ.*, concur in result; *Lamm, C. J.*, dissents. [\*\*\*43]

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## State ex rel. Moose v. Frank

Supreme Court of Arkansas

July 13, 1914, Opinion Delivered

No Number in Original

**Reporter**

114 Ark. 47 \*; 169 S.W. 333 \*\*; 1914 Ark. LEXIS 578 \*\*\*

STATE ex. rel. WM. L. MOOSE, ATTORNEY GENERAL, v. FRANK.

**Prior History:** [\*\*\*1] Appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed.

**STATEMENT BY THE COURT.**

The complaint in this cause alleged that appellees were engaged in the laundering business in the city of Little Rock, some of the appellees being corporations, others being a copartnership and still others the individual business of the proprietors of the defendant laundries mentioned in the complaint. It was alleged in the complaint that appellees, in violation of the anti-trust law, have agreed with each other to fix prices to be charged their customers and that they carried on their business under said agreement, the effect of the agreement being to stifle competition and increase the prices of laundering. The second paragraph of the complaint alleged that the appellees, for the purpose of driving out competition in the city of Malvern, in this State, had unlawfully combined with each other to do laundering for the people of that city at prices less than those charged the people of Little Rock and other places. A large sum of money was demanded in each paragraph of the complaint as a penalty, against appellees, because of their alleged unlawful combination.

Separate [\*\*\*2] demurrers were filed for appellees, and among other grounds of demurster the act of the General Assembly of this State, under which the proceeding was brought, was attacked as unconstitutional; and in all the demurrers it was alleged that the complaint did not state facts sufficient to constitute a cause of action. The circuit court held that the complaint did not state a cause of action and sustained the demurster and the State has prosecuted this appeal from that judgment of the court.

The suit was instituted under the authority of section 1 of the anti-trust act passed at the 1905 session of the General Assembly of this State (Acts 1905, page 1), as amended by Act No. 161 of the Acts of 1913. Section 1 of the act of 1905 reads as follows:

"Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or who shall hereafter, create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, [\*\*\*3] with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated or fixed, or who are now, or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, whether made in this State or elsewhere, to fix or limit in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy

issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject [\*\*\*4] to the penalties as provided by this act."

**Disposition:** Judgment affirmed.

## Core Terms

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manufacture, commodity, price fixing, anti-trust, laundry, repair, laundering, article of merchandise, convenience, merchandise, words

## LexisNexis® Headnotes

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Governments > Legislation > Interpretation

### [HN1](#) Legislation, Interpretation

When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

### [HN2](#) Regulated Practices, Price Fixing & Restraints of Trade

In construing Arkansas's antitrust act, the court must bear in mind that it is highly penal, and as such must receive a strict construction.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### [HN3](#) Regulated Practices, Price Fixing & Restraints of Trade

A study of its terms makes the fact plain that the legislature has not included within the inhibition of Arkansas's antitrust act agreements relating to the price of labor.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### [HN4](#) Regulated Practices, Price Fixing & Restraints of Trade

In the context of determining whether a laundry is violating an antitrust act, it has been uniformly held that a laundry is not a manufacturing establishment. In the common understanding, the function of a laundry is to make clothes clean, rather than to make clean clothes. A laundry's principal business is washing and ironing, and in carrying on the business it needs soaps and dyes. Even if a laundry does manufacture these two articles for its own use, instead of buying them, such manufacture does not make the "washing and ironing" concern a manufacturing plant and business as defined by statute, lexicon or judicial utterance.

Governments > Legislation > Interpretation

## **HN5** Legislation, Interpretation

In the interpretation of criminal statutes different rules apply from those which obtain in civil matters, or where contracts are involved. Nothing is to be added to criminal statutes by intendment, and, as a rule, they are to have a strict construction.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

## **HN6** Regulated Practices, Price Fixing & Restraints of Trade

In the context of interpreting an antitrust act, the word "commodity" has two significations. In its most comprehensive sense it means convenience, accommodation, benefit, advantage, interest, commodiousness; but the use of the word in this sense is obsolete. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN7** Regulated Practices, Price Fixing & Restraints of Trade

The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the legislature of the State of Arkansas has not made such an agreement unlawful.

## **Headnotes/Summary**

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### **Headnotes**

1. MONOPOLIES--UNLAWFUL COMBINATIONS.--An agreement fixing the price for laundering, is not unlawful under section 1, Acts of 1905, p. 1, prohibiting combinations to fix the price of any commodity, convenience or repair.
2. MONOPOLIES--UNLAWFUL COMBINATIONS.--An agreement fixing the price of laundering is not included within the terms "any article or thing whatsoever," as used in section 1, Act 1905, p. 1.
3. STATUTES--PENAL STATUTES--CONSTRUCTION.--Act of 1905, p. 1, § 1, known as the anti-trust act, is highly penal in its nature, and therefore will be strictly construed.

**Counsel:** Wm. L. Moose, Attorney General, Bradshaw, Rhoton & Helm and E. L. McHaney, for appellant.

1. The act is constitutional. [76 Ark. 303](#); 81 Id. 519; [212 U.S. 322](#), L. Ed. 530.
2. Our contention is that the agreement violates the anti-trust act by fixing the price of a "commodity," or an article of "convenience" or "repair." As to the doctrine of ejusdem generis, see [95 Ark. 114](#). Words are given their obvious and natural meaning. [67 Ark. 566](#); 71 Id. 561. Words judicially interpreted are presumed to have been used by the

114 Ark. 47, \*47 L.A. 69 S.W. 333, \*\*333 L.A. 914 Ark. LEXIS 578, \*\*\*4

Legislature in that sense. 84 Ark. 316; [123 Mass. 493](#); 12 Id. 252; [73 U.S. \(16 Wall.\) 632](#); [18 L. Ed. 904](#). A privilege is a commodity. [87 Mass. 428](#); [134 Mass. 419](#); [102 Ia. 602](#); [70 N. W. 107](#).

Morris M. & Louis M. Cohn, for appellees.

1. A combination to regulate the price of laundering does not come within the terms of the act. [95 Ark. 114](#); [159 Mo. 410](#); 81 Am. St. 368; [60 S. W. 91](#); 51 L. R. A. 151; [215 Mo. 421](#); [114 S. W. 997](#); 22 L. R. A. (N. S.) 607; 23 Id. 1284; [56 Neb. 386](#); [76 N. W. 900](#); 23 L. R. A. (N. S.) 1260; 45 Id. 355; [117 Fed. 570](#); 52 Atl. 326; [62 S. W. 481](#); [59 S. W. 916](#).
2. [\*\*\*5] The act is unconstitutional. [58 Ark. 421](#); 29 L. R. A. 79; 22 Id. 340; [210 Fed. 173](#); [165 U.S. 578](#); 14 L. R. A. (N. S.) 361; [231 Ill. 340](#).
3. Laundering is not a "commodity." Cases, supra. 95 Ark. 114; [118 N. W. 276](#); 23 L. R. A. (N. S.) 1284; [86 Tex. 250](#); 22 L. R. A. 483; [24 S. W. 398](#); [231 U.S. 495-503](#); 52 Atl. 326.

**Judges:** SMITH, J.

**Opinion by:** SMITH

## Opinion

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[\*50] [\*\*334] SMITH, J., (after stating the facts). It is conceded by the State that an agreement to fix the price of laundering is not an agreement to fix the price of "any article of manufacture, mechanism or merchandise;" but it is contended that the facts here alleged constitute an agreement to fix the price of a commodity, convenience or repair. And it is not contended by the State that the business of laundering is included in the terms "any article or thing whatsoever." This last contention could not be sustained, because if the business of laundering is not a commodity, convenience or repair, then it would [\*51] not be embraced in the words "article or thing whatsoever." Such a construction would be precluded by the decision of this court in the case of [State v. Chicago, R. I. & P. Ry. Co., 95 Ark. 114](#). [\*\*6] That case was a proceeding against [\*\*335] that railroad for a violation of the anti-trust act of 1905 for entering into a pool, trust, agreement, combination, confederation, and understanding with certain domestic corporations, all owning and operating certain lines of railroads within the State, for the purpose of fixing rates to be charged for the service of carrying freight and passengers. In the opinion in that case, it was said: "Counsel for the State do not contend that freight or passenger rates are articles of merchandise, manufacture, mechanism, commodity, convenience or repair, or that they are products of mining; but they do contend that the words "or any article or thing whatsoever" include passenger and freight rates. We can not agree with their contention. This is a plain case for the application of the doctrine of *ejusdem generis*.

"The rule is [HN1](#) [↑] 'when general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.' 2 Lewis Sutherland on Statutory Construction (2 ed.), § 422."

(1-2) And it was there further said: "Our 'antitrust act' does not in [\*\*7] express terms attempt to deal with the questions of transportation by railroads or other carriers, or the fixing of rates therefor. It would be a violent presumption, indeed, to say that the Legislature in this vague and indefinite manner attempted to deal with a subject which so vitally affects the welfare of the people, and a proper solution of which has ever been one of the greatest concern and complexity. It seems evident to us that the framers of the act intended that the words 'or any article or thing whatsoever' should take their meaning from the things specifically mentioned before, and that, when so construed, the allegations of the complaint do not constitute a violation of the terms of the act."

[\*52] (3) [HN2](#) [↑] In construing this act, we must bear in mind that it is highly penal, and as such must receive a strict construction. [Hughes v. State, 6 Ark. 131](#); [Grace v. State, 40 Ark. 97](#); [Stout v. State, 43 Ark. 413](#).

114 Ark. 47, \*521<sup>69</sup> S.W. 333, \*\*335<sup>14</sup> Ark. LEXIS 578, \*\*\*7

Discussing the original anti-trust act of the General Assembly of 1899, Mr. Justice RIDDICK, in [State v. Lancashire Fire Insurance Co., 66 Ark. 466, 51 S.W. 633](#), said: "Whatever the [\*\*\*8] Legislature may have intended, such intention can have no effect unless expressed in the statute; for this, being a penal statute, can not be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself."

Nor are we concerned with any consideration of the economic questions involved in this act. [HN3](#)<sup>↑</sup> A study of its terms makes the fact plain that the Legislature has not included within the inhibition of this act agreements relating to the price of labor.

The question has several times been before the courts of various States as to whether a laundry was a manufacturing establishment or not, and so far as we are advised [HN4](#)<sup>↑</sup> it has been uniformly held that it is not. In the case of [Downing v. Lewis et al., 76 N.W. 900, 56 Neb. 386](#), it was contended the sale of a laundry and an agreement entered into between the parties with reference thereto violated the anti-trust law of that State which prohibited any combinations or agreements where persons are engaged in the manufacture or sale of any article of commerce or consumption, or for any persons so engaged to enter into any combination or agreement relating to the [\*\*\*9] price of any article or product of such manufacture, and the court there decided that a laundry was not a manufacturing establishment, and in so deciding that question it was there said: "It seems perfectly plain that a laundry, the business of which is to wash and iron linen, and other articles of wearing apparel and domestic use, which have become soiled in the service for which they were fabricated, is not a manufacturing establishment, within the meaning of the section quoted. In the [\*53] common understanding, the function of a laundry is to make clothes clean, rather than to make clean clothes."

In [Commonwealth v. Keystone Laundry Co., 203 Pa. 289, 52 A. 326](#), where a law of the State of Pennsylvania which exempted from taxation so much of the capital stock of a manufacturing corporation as was invested in the carrying on of manufacturing was under construction, a laundry company claimed the exemption of that act. It was held that the laundry company was not a manufacturing company, even though it manufactured soaps and dyes as incidental to its business; the court there used the following language: "Its principal business, as properly stated by the [\*\*\*10] court below, is washing and ironing, and in carrying on the business it needs soaps and dyes, and even if it does manufacture these two articles for its own use, instead of buying them, such manufacture does not make the 'washing and ironing' concern a manufacturing plant and business as defined by statute, lexicon or judicial utterance."

Other cases to the same effect are [Muir v. Samuels, 110 Ky. 605, 62 S.W. 481](#); In re [White Star Laundry Co., 117 F. 570](#).

In the case of [State ex rel. Star Publishing Co. v. The Associated Press, 159 Mo. 410, 60 S.W. 91](#), which was a suit by mandamus to compel respondent, a press association, whose business it was to gather news to furnish relator with its service, relator, among other things, claimed that respondent was a member of a combination and monopoly consisting of an association of newspapers organized to fix the price for news service and so coming within the scope of the anti-trust law. The writ was denied, and it was there said: "The business is merely one of personal service; an occupation. Unless there is a 'property' to be 'affected with a public interest,' there is no basis [\*\*\*11] laid for the fact or charge of a monopoly. (Citing authorities.) \* \* \* There is one remaining point to be considered, and that relates to the antitrust laws. \* \* \* The law on the subject in this State prohibits 'any pool, trust, agreement, combination,' etc., 'to regulate or fix the price of any article of manufacture, [\*54] mechanism, merchandise, commodity, convenience, repair; any product of mining, or any article or thing whatsoever; or the price or premium to be paid for the insurance of property,' or to fix or limit the production of the things whose price may not be regulated or fixed. Nothing is discoverable in this section which is at all applicable to the business in which respondent is engaged. Whether we apply [\*\*336] to the words of the statute the rule of *noscitur a sociis*, or that of *ejusdem generis*, the result must be the same, and there is a special reason why the ruling in this regard should be a strict one, and this is because the statute is highly penal."

The case of [Rohlf v. Kasemeier, 140 Iowa 182, 118 N.W. 276](#), was a prosecution against a number of physicians for entering into an agreement to fix and maintain fees to be [\*\*\*12] charged for their services. The section of the statute of that State under which the indictment was returned reads as follows: "Any corporation organized under

the laws of this or any other State or county for transacting or conducting any kind of business in this State, or any partnership, association or individual, creating, entering into or becoming a member of, or party to, any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be guilty of a conspiracy."

In its opinion the Supreme Court of that State said: "The first point to be decided is, do the acts charged constitute a crime under this section of the Code? It will be noticed that it forbids a combination, agreement or understanding to regulate or fix the price of any article of merchandise or commodity, or of merchandise to be manufactured, mined, produced or sold in this State. The primary inquiry is, Are the charges [\*\*\*13] of a physician or surgeon for his medical skill or ability an article of merchandise or commodity to be produced or sold in this [\*55] State? For appellant it is contended that the word 'commodity' is broad enough to cover the charge made for professional services or skill, and that the trial court was in error in holding to the contrary.

"It must be remembered that the word is found in a criminal statute, and that [HN5↑](#) in the interpretation of such statutes different rules apply from those which obtain in civil matters, or where contracts are involved. Nothing is to be added to such statutes by intendment, and, as a rule, they are to have a strict construction. \* \* \* As already indicated, the word must be taken in connection with the others used in the statute, and it is manifest that the commodity referred to must have been such as could be manufactured, mined, produced or sold in the State, and the price was to be of an article of merchandise or commodity. If the contention of appellant be correct, the statute covers all kinds of personal labor, both skilled and unskilled, under the term 'commodity.' \* \* \*

"The statute before us has nothing to do with commerce; nor does it have [\*\*\*14] to do with restraint of trade, or commerce, as does the Sherman act. It has to do with pools and trusts organized in this State to fix or regulate the price of any particular commodity or to fix or limit the amount or quality of any article, commodity or merchandise to be produced or sold in the State. Surely, it has no reference to the amount or quality of labor to be produced or sold. Such a construction would be ridiculous. And, if it will not bear that interpretation, it follows that the word 'commodity,' when used with reference to prices, should not be held to include labor. No case has been cited which supports appellant's contention, and we have not been able to find any."

The Supreme Court of Texas, in the case of [Queen Insurance Co. v. State, 86 Tex. 250, 24 S.W. 397](#), defined the word "commodity" as used in the anti-trust law of that State as follows: [HN6↑](#) "The word 'commodity' has two significations. In its most comprehensive sense it means convenience, accommodation, benefit, advantage, interest, [\*56] commodiousness; but according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily [\*\*\*15] used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think this was the meaning intended to be given to it by the Legislature in the statute in question."

If the business of laundering is not a commodity, then an agreement fixing prices for the performance of that service is not within the inhibition of the anti-trust act. No other word or term in that act could include that business. The act does use the word "repair," but it can not be seriously contended that this word is sufficient to embrace the business of laundering. It may be true, that to some extent laundries do repair the clothes which they wash; but it does this as a mere incident to that business; and by such service they merely "repair" the damage which they have done in performing their service of making the clothes clean. [HN7↑](#) The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the Legislature of this State has not made such an agreement unlawful. [\*\*\*16] [Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997](#); [Cleland v. Anderson, 66 Neb. 252, 92 N.W. 306](#); *State v. Duluth Board of Trade*, 23 L.R.A. (N.S.) 1260.

The judgment of the court below sustaining the demurrer is, therefore, affirmed.

## McCall Co. v. O'Neil

Court of Common Pleas of Franklin County, Ohio

November 12, 1914, Decided

No Number in Original

**Reporter**

25 Ohio Dec. 591 \*; 1914 Ohio Misc. LEXIS 49 \*\*; 17 Ohio N.P. (n.s.) 17

MCCALL CO. v. PATRICK J. O'NEIL.

**Prior History:** [\*\*1] AGREED statement of facts.

### **Core Terms**

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patterns, patentee, purchaser, terms, patent law, prices, illegal contract, patented article, obligations, liquidated damages, public policy, provisions, antitrust, discard, patent, manufacturers, articles, monthly, notice, retail, stock, transportation, thirty-one, amounting, catalogue, commodity, shipment, parties

### **LexisNexis® Headnotes**

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Contracts Law > Defenses > Illegal Bargains

[\*\*HN1\*\*](#) [ **Defenses, Illegal Bargains**

It is a well settled principle of law that courts will not lend their aid to the enforcement of illegal contracts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[\*\*HN2\*\*](#) [ **Public Enforcement, State Civil Actions**

See Ohio Gen. Code § 6391.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Infringement Actions > Exclusive Rights > General Overview

[\*\*HN3\*\*](#) [ **Price Fixing & Restraints of Trade, Vertical Restraints**

The right to make, use and sell an invented article existed without and before the passage of the patent law. The act secured to the inventor the exclusive right to make, use and vend the thing patented. While the patent law should be fairly and liberally construed to affect the purpose of congress to encourage useful inventions, the rights and privileges which it bestows should not be extended by judicial construction beyond what congress intended. In framing the patent act and defining the rights and privileges of patentees thereunder congress did not use occult phrases, but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years, and a patentee may not by notice limit the price at which future retail sales may be made, such articles being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

#### **HN4** **Ownership & Transfer of Rights, Assignments**

When the transfer of a patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile under the statute. It is not a license for qualified use, but an attempt to unduly extend the right to vend. While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to the purchaser has placed the article beyond the limits of the monopoly secured by the act.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

#### **HN5** **Antitrust & Trade Law, Exemptions & Immunities**

Patentees are not immune by virtue of the patent law from the provisions of the antitrust statute.

Contracts Law > Defenses > Illegal Bargains

Criminal Law & Procedure > Defenses > General Overview

#### **HN6** **Defenses, Illegal Bargains**

It is undoubtedly true that the mere fact that a vendor may be engaged in a combination in restraint of trade or tending to the establishment of a monopoly will not constitute a defense to a vendee who has purchased an article manufactured and sold by the illegal trust or combination. If the contract of sale is collateral to and in no wise connected with the illegal agreement effecting the unlawful combination or trust, the unlawful character of the combination or trust from which the article is purchased is no defense. The rule is, however, different where the vendor relies upon the illegal contract for recovery.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Contracts Law > Defenses > Illegal Bargains

Criminal Law & Procedure > Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Illegality

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

### **HN7** Contracts, Sales of Goods

While a voluntary purchaser of goods at stipulated prices under a collateral independent contract cannot avoid payment merely on the ground that a vendor was an illegal combination, a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense.

Contracts Law > Defenses > Illegal Bargains

Contracts Law > Defenses > Public Policy Violations

### **HN8** Defenses, Illegal Bargains

The court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract; and while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that a court deny its aid to carry out illegal contracts, without regard to individual interests or knowledge of the parties.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Ownership > Patents as Property

### **HN9** Inequitable Conduct, Anticompetitive Conduct

The sole object and purpose of the patent law is to enable a patentee to prevent others from using his patented article without his consent, but that his own right of using the patented article was not enlarged by the patent law. The right of a patentee to the use of his patent was subservient to the paramount claims and interests of society at large, just as the right of any other owner in and to the use of his property is subservient to such paramount rights of the public. The right of property in a patented invention or discovery and a right of property in any other article or thing which is the subject of ownership are the same.

## **Headnotes/Summary**

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### Headnotes

#### **CONTRACTS--MONOPOLIES.**

##### **1. Contract Fixing Price for Resale of Goods Sold Violates State Anti-trust Law.**

A contract undertaking to fix the price at which goods sold may be resold by the purchaser, with a provision that for a breach of any of the terms or conditions thereof the other party shall have the right to exercise the option to be relieved from its obligations and to recover the sum therein provided as liquidated damages, is clearly within the inhibition of Sec. 6391 G. C., the anti-trust statute, and is therefore void; hence a court will not lend its aid to a party relying on such a contract and seeking to recover its fruits, notwithstanding the purchaser may, as a consequence, be relieved from paying for goods he has received.

## 2. Rule applies to Patented Articles.

This rule with reference to contracts in violation of the anti-trust law applies with the same force in cases where the goods so sold are covered by a patent.

**Counsel:** Watson, Stouffer, Davis & Gearhart, for plaintiff.

Ralph Henney and M. L. Bigger, for defendant.

**Judges:** BIGGER, J.

**Opinion by:** BIGGER

## Opinion

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[\*591] BIGGER, J.

The action is upon an account. By agreement of the parties a jury was waived and the case is submitted to the court upon the following agreed statement of facts:

"The plaintiff is a corporation and on or about May 13, 1910, it entered into a contract with the Davis Pennell Company, a corporation of Columbus, Ohio, which contract is hereto attached; that said contract continued to be and remained in force as between said parties until about February 13, 1912, when said The Davis Pennell Company, having sold and transferred its business, including its right and interest to and in said contract, to the defendant, said defendant assumed all the obligations of said contract on the part of said The Davis Pennell Company to be performed including a standing credit of \$ 100; and the plaintiff consented in writing to the said transfer [\*592] of said contract and obligations to defendant. That between February 1, 1912, and December 8, 1912, both dates inclusive, plaintiff sold and delivered to the [\*\*2] defendant under said contract, goods and merchandise of the amount and value of \$ 379.25; that during said period defendant paid and was given credit for goods returned in the sum of \$ 234.38, leaving a balance unpaid of \$ 144.87. That in the month of January, 1913, defendant failed and refused to pay said sum of \$ 144.87 and has never since paid the same or any part thereof; that upon defendant's failure to pay said sum, plaintiff exercised what it alleges as its right and option provided in said contract to be released therefrom and all future obligations arising out of the same and gave to defendant two weeks' notice in writing to make said payments and of its intention to exercise its option to be released from the obligations of said contract and of its intention to claim liquidated damages as therein provided; that there then remained an unexpired term of said contract of thirty-one months during which, according to its terms, defendant had agreed to order thirty-one monthly issues of patterns of not less than \$ 15, per month, amounting during said term to \$ 465; also thirty-one monthly issues of fashion sheets consisting of 13,000 fashion sheets at \$ 7.50 per thousand, amounting [\*\*3] to \$ 97.50; also thirty-one monthly issues of McCall's large catalogues, consisting of 167 numbers at 17 1-2 cents each, amounting in all to \$ 12.53; also thirty-one monthly issues of magazines consisting of 310 numbers at three cents each amounting in all to \$ 9.30, making the total amount of goods to be ordered by defendant and delivered by plaintiff for said unexpired term of said contract, the sum of \$ 484.33. Plaintiff claims under the provisions of said contract and the exercise of the alleged right of option aforesaid and the giving of said notice, that there then became due and owing to the plaintiff two-thirds of said sum of \$ 494.33 or a total of \$ 389.55; that no part of said \$ 389.55 has been paid; that no part of said \$ 144.87 as balance due for merchandise or no part of said \$ 100 as a standing credit, has been paid and that plaintiff claims against the defendant \$ 634.32, with interest from February 1, 1913.

[\*593] It is further stipulated and agreed that the McCall Company have sold all of their goods and their customers have sold all of the goods purchased from the McCall Company at catalogue retail prices, as stipulated and provided in the contract referred [\*\*4] to herein; that defendant, O'Neil, by virtue of the contract herein sued upon could sell the patterns to be purchased under said contract at such uniform catalogue retail prices and at no other

price; that the McCall Company has customers selling these patterns in every city of the United States of 10,000 inhabitants or more, at such uniform catalogue prices and at no other price."

The contract attached is as follows:

"Columbus, Ohio, 4-29, 1910.

"The McCall Company,

"New York City, N. Y.

"Please deliver to freight at New York City, addressed to us a stock of McCall Patterns, at the uniform price of seven and one-half cents for each pattern (excepting those retailed for ten cents, the price of which is five cents each), amounting to \$ 200 net, including the June issue, to be paid ten days after date of shipment; also ship us each month by cheapest route not exceeding an average of \$ 15 per month of your selection of the new monthly patterns, at same prices as above, commencing with July issue; also fashion sheets and other publications in quantities, and at prices specified on the reverse side of this form, during the term of this contract, commencing with June issue.

"We will [\*\*5] re-order at the prices above named, once each week, or oftener, patterns sold, thus keeping patterns on hand as above specified. The patterns are not to be sold for other than catalogue retail prices, and the stock of patterns is to be kept and offered for sale on the first (main) floor. We will send you an inventory of our stock of patterns on hand at your request, not exceeding twice each year.

[\*594] "All goods ordered for delivery after the first stock are to be paid for on or before the fifth day of the month succeeding date of shipment; if not then paid, subject to sight draft. All prices quoted are net.

#### **Discarded Patterns.**

"All patterns purchased from you under this contract-order that are reported discarded by you semiannually -- January and July--can be returned by us at contract price, in exchange for other patterns at full contract price, at any time within sixty days from the date such discarded patterns are respectively reported by you, provided this contract shall be in force at the time of such return. All patterns returned by us under any such discard report are to be credited to a special account, to be known as our discard exchange account, the credit [\*\*6] to same to continue for a period of six months from the date of such discard report unless this contract shall be sooner terminated; and all patterns ordered by us within such period of six months and while this contract is in force, excepting our monthly standing order, shall be charged to such discard exchange account unless our credit to the same is earlier exhausted.

"If either of us shall intentionally break any of the above terms or conditions of this contract, and refuse or fail, after two weeks' notice in writing given by the other, promptly to perform any of said terms or conditions, then the other of us shall have the right to exercise the option of being released from all future obligations under this contract, and to recover and receive, as liquidated damages and not as a penalty, a sum equal to two-thirds of the agreed charge for all goods the contract provides shall be delivered during the remaining term of the contract after the breach is committed. Failure to require compliance with the strict letter of this contract-order shall not forfeit nor prejudice any right thereunder, not constitute a waiver thereof. Failure to pay for any shipment under this agreement for [\*\*7] three months after the same shall become due and thereafter for two weeks subsequent to notice from you, [\*595] in writing, shall be deemed an abandonment and total breach of this contract on our part, and shall entitle you to exercise the option of being released from all future obligations under this contract and to recover, as liquidated damages and not as a penalty, the sum hereinabove agreed to be paid as liquidated damages for any breach of the above terms or conditions of this contract.

"We will not transfer the stock of McCall Patterns from No. 454 E. Long Street without your written consent, and will pay all transportation charges to and from your New York office.

25 Ohio Dec. 591, \*595 L 1914 Ohio Misc. LEXIS 49, \*\*7

"We will not sell any other patterns than the McCall Patterns received from you during the term of this contract-order.

"This contract is to remain in force from date, and for five years after first shipment of patterns, and thereafter until the expiration of three months' notice given by either party in writing, subsequent to the expiration of such five years.

"All terms are herein printed or written. Signed in duplicate after being read.

Date 4-29, 1910.

"Purchaser's Signature:

"The Davis Pennell [\*\*8] Co.

"Per Earl J. Pennell Sec., Treas.

#### **Guarantee Against Loss In Patterns.**

"It is agreed that at the end of five years and three months from date of first shipment of patterns, provided this contract shall have continued in force so long, the above purchaser may take an invoice of the stock of patterns on hand, purchased under this contract, and if the result of the business shows that the above purchaser has paid us more cash for patterns purchased under this contract than has been received for them, we will, upon demand made by such purchaser and receipt of the patterns in good salable condition at our New York Office within thirty days after the expiration of such five years and three months, pay such loss in cash, provided all terms of this contract have been complied with.

[\*596] "The above contract-order is accepted subject to the approval of the home office.

Date 4, 29, 1910.

"THE MCCALL COMPANY,

'By O. L. Travis."

There are some other provisions supplemental to these, but they do not in any way vary or affect the terms of the contract here recited or their legal effect.

Briefs have been submitted in which counsel have discussed at considerable length the [\*\*9] provisions of this contract with reference to what is denominated liquidated damages; the plaintiff contending that the provision therein is really one for liquidated damages, while the defendant's counsel contends that construing the contract as a whole this provision should be held to be only in the nature of a penalty, inserted for the purpose of compelling compliance with the provisions of the contract, and therefore not enforceable.

Counsel for the defendant also presents another question, which is that this contract is one which is contrary to public policy and in contravention of the antitrust law of this state. This question is logically first in order; for if the contract is unenforceable there will be no occasion to consider and determine the other questions presented in argument.

**HN1** [↑] It is a well settled principle of law that courts will not lend their aid to the enforcement of illegal contracts. Is this an illegal contract?

Section 6391 G. C. provides that:

**HN2** [↑] A trust is a combination of capital, skill or acts by two or more persons, first, partnerships, corporations or associations of persons for any or all of the following purposes: \* \* \*

"4. To fix at a standard or figure [\*\*10] whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make, enter into, execute or carry our contracts, obligations or agreements of any kind or description by which they bind or have bound themselves not to sell, dispose of or [\*597] transport an article or commodity or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between themselves and others so as to directly or indirectly preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity," etc.

Such combinations are declared to be unlawful, against public policy, and void.

Now, this contract by its terms undertakes to fix the price at which the articles sold shall be re-sold by the purchaser. [\*\*11] The contract then provides that for a breach of any of its terms and conditions the other party should have the right to exercise the option to be released from its obligations and to recover the sum therein provided as liquidated damages.

That such an agreement falls clearly within the inhibition of the antitrust statute seems too clear to admit of any doubt. In its terms the price at which these articles are to be sold to the public is fixed and determined by the agreement, and they are to be sold at that price and at no other price. Clearly, this provision of the contract is unlawful under the statute of this state, contrary to public policy, and void. Unquestionably the plaintiff could not upon the agreed statement of facts call upon the court to enforce this provision of the contract. There is nothing in the agreed statement of facts to show that these articles are patented articles; but counsel for the plaintiff in argument makes the statement that the articles sold to the defendant were in fact patented articles, and asks that the plaintiff may be permitted to show that fact. After careful consideration, however, I have reached the conclusion that even if that were established [\*\*12] it would not change the situation insofar as the right of the plaintiff to recover is concerned. It was long a mooted question as to what extent, if at all, a patentee might by agreement control the price at which the vendee [\*598] might resell a patented article. This question was, however, finally settled by a decision of the Supreme Court of the United States. That court first decided in the case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 [28 S. Ct. 722; 52 L. Ed. 1086], that this right did not exist under the copyright statute, but expressly reserved its decision as to whether or not it existed under the patent law. This question was, however, finally presented for decision in the case of *Bauer v. O'Donnell*, 229 U.S. 1 [33 S. Ct. 616; 57 L. Ed. 1041].

The following is the syllabus in that case:

**HN3** [↑] "The right to make, use and sell an invented article existed without and before the passage of the patent law. The act secured to the inventor the exclusive right to make, use and vend the thing patented.

"While the patent law should be fairly and liberally construed to affect the purpose of congress to encourage [\*\*13] useful inventions, the rights and privileges which it bestows should not be extended by judicial construction beyond what congress intended.

"In framing the patent act and defining the rights and privileges of patentees thereunder congress did not use occult phrases, but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years, and a patentee may not by notice limit the price at which future retail sales may be made, such articles being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold. \* \* \*

**HN4** [↑] "When the transfer of a patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile under the statute. It is not a license for qualified use, but an attempt to unduly extend the right to vend.

"While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to the purchaser has placed the article beyond the limits of the monopoly secured by the act."

[\*599] [\*\*14] This decision puts at rest the hitherto mooted question of the right of a patentee to control the price at which the patented article may be sold where it is sold outright to a purchaser, as in the case at bar. It being established, therefore, by this decision that the patent law of the United States does not confer this right upon patentees, it follows that such [HN5](#)<sup>↑</sup> patentees are not immune by virtue of the patent law from the provisions of the antitrust statute.

As I understand the argument of plaintiff's counsel, it is claimed that even if the court should conclude that this provision of the contract is illegal, that notwithstanding that, since the defendant obtained the goods he should not be permitted to escape payment by reason of this provision of the contract, and that it should have no effect upon the right to recover upon the account here sued upon. But I cannot concur in this view of the effect of this provision; having reached the conclusion that it is unlawful, contrary to public policy and void. [HN6](#)<sup>↑</sup> It is undoubtedly true that the mere fact that a vendor may be engaged in a combination in restraint of trade or tending to the establishment of a monopoly will not constitute a defense [\*15] to a vendee who has purchased an article manufactured and sold by the illegal trust or combination. If the contract of sale is collateral to and in no wise connected with the illegal agreement effecting the unlawful combination or trust, the unlawful character of the combination or trust from which the article is purchased is no defense. The rule is, however, different where the vendor relies upon the illegal contract for recovery, as in this case.

Authorities upon this proposition might be multiplied, at great length, but the principle is nowhere more clearly decided than in the case of [Continental Wall Paper Co. v. Voight](#), 212 U.S. 227 [29 S. Ct. 280; 53 L. Ed. 486]. This case is in principle a parallel to the one at bar upon this question in as much as it is a suit upon an account for goods sold and delivered, and the court refused its aid to enforce the contract for the purchase price of the goods for the reason that the [\*600] contract itself contained provisions which were a violation of the federal antitrust law. The syllabus in that case is as follows:

"Where a number of manufacturers situated in different states engaged in manufacturing [\*16] an article sold in different states organize a selling company through which their entire output is sold in accordance with an agreement between themselves to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect is to restrain and monopolize interstate and foreign trade and commerce, and is illegal under the antitrust act of July 2, 1890", C. 647, 26 Stat. 209; and so held in regard to a combination of wall paper manufacturers.

[HN7](#)<sup>↑</sup> While a voluntary purchaser of goods at stipulated prices under a collateral independent contract cannot avoid payment merely on the ground that a vendor was an illegal combination [Connolly v. Sewer Pipe Co.](#) 184 U.S. 540 [22 S. Ct. 431; 46 L. Ed. 679], a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense.

[HN8](#)<sup>↑</sup> The court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract; and while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that a court deny its aid to carry out illegal contracts, without regard [\*17] to individual interests or knowledge of the parties.

A refusal of judicial aid to enforce illegal contracts tends to reduce such transactions. A case reported in [Freeman v. Miller](#), 21 Ohio Dec. 766 (9 Ohio N.P. (N.S.) 26), decided by Judge Hoffheimer of the superior court of Cincinnati, is an interesting case. Judge Hoffheimer in that case intimates that the rule which he states might be different in the case of patentees; but the case of [Bauer v. O'Donnell, supra](#), was not decided at that time. The only rights which a patentee has in the manufacture and sale of the articles covered by his patent which are different from the rights of other manufacturers and sellers are derived from the patent law. If immunity be not found in the terms of the patent [\*601] law, then he is amenable to the provisions of the antitrust law, and can no more enforce such a contract than can any other vendor.

In the case of Bauer v. O'Donnell, supra, Justice Harlan in distinguishing the case of Conolly v. Sewer Pipe Co. supra, from the case at bar, says at page 250:

"The present case is plainly distinguishable from the Conolly case. In that case the defendant [\*\*18] who sought to avoid payment for the goods purchased by him under contract had no connection with the general business or operation of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor a part of, nor in execution of any general plan or scheme that the law condemns. \* \* \* The case before us is an entirely different one. The Continental Wall Paper Company seeks in legal effect the aid of the court to enforce a contract for the sale and purchase of goods, which it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme."

Neither the Supreme Court of the United States nor the Supreme Court of Ohio ever decided that a patentee had a right by virtue of his patent to enter into a contract of this character. On the contrary, the Supreme Court of this state in the early case of Jordan v. Overseers, 4 Ohio 294, decided, as did the Supreme [\*\*19] Court of the United States, that HN9↑ the sole object and purpose of the patent law was to enable a patentee to prevent others from using his patented article without his consent, but that his own right of using the patented article was not enlarged by the patent law. And the court further decided in that case that the right of a patentee to the use of his patent was subservient to the paramount claims and interests of society at large, just as the right of any other owner in and to the use of his property is subservient to such paramount rights of the public. That decision has never been overruled in Ohio; [\*602] but on the contrary the same doctrine has been since substantially announced in the cases of State v. Telephone Co. 36 Ohio St. 296 /38 Am. Rep. 583 and Tod v. Wick, 36 Ohio St. 370; the court in the latter case saying that "the right of property in a patented invention or discovery and a right of property in any other article or thing which is the subject of ownership are the same."

The antitrust law of this state had been on the statute books for many years before this contract was entered into, and by the terms of that statute [\*\*20] such contracts were declared to be unlawful in this state, against public policy, and void.

For the reasons stated, I have reached the conclusion that the court cannot lend its aid to the enforcement of this contract. As is said in Wall Paper Co. v. Voight, supra, "The court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract; and while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that the court deny its aid to carry out illegal contracts, without regard to individual interests or knowledge of the parties."

An entry may be drawn in accordance with this finding and judgment.



## Guyton v. Eastern Electric Co.

Supreme Court of Ohio

November 24, 1914, Decided

No. 13916

**Reporter**

91 Ohio St. 106 \*; 110 N.E. 189 \*\*; 1914 Ohio LEXIS 169 \*\*\*

GUYTON v. THE EASTERN ELECTRIC CO.

**Prior History:** [\*\*\*1] ERROR to the Circuit Court of Montgomery county.

**Disposition:** *Judgment reversed.*

### **Core Terms**

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unlawful combination, damages, lamps, cause of action, set-off, counterclaim, anti-trust, parties, appears, claim for damages, plaintiff's claim, injured person, heavy loss, four year, cross-petition, allegations, provisions, connected, entailing, pleaded, twofold, reside, cases

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

#### **HN1[] Public Enforcement, State Civil Actions**

Under the Valentine Anti-Trust Law, Ohio Rev. Code Ann. § 6391 et seq., damages are allowed to a person injured in his business or property by reason of an unlawful combination.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN2[] Public Enforcement, State Civil Actions**

See Ohio Rev. Code Ann. § 6397.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

#### **HN3[] Pleadings, Crossclaims**

See Ohio Rev. Code Ann. § 11317.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

## **HN4** Pleadings, Crossclaims

See Ohio Rev. Code Ann. § 11319.

## **Headnotes/Summary**

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### **Headnotes**

*Unlawful combinations -- Action under Section 6391, General Code -- Counterclaim or set-off by defendant -- Under Section 6397, General Code -- Valentine anti-trust law.*

## **Syllabus**

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[\*106] In an action on an account by a member of an unlawful combination under Section 6391, General Code, for goods sold the price of which is advanced as a result of the unlawful combination, a defendant injured in his business by reason of the advance in price of the goods purchased by him from such member, may set up by way of counterclaim or set-off the damages allowed by Section 6397, General Code.

Defendant in error filed a petition in the court of common pleas of Montgomery county asking judgment against the plaintiff in error in the sum of \$ 189.99 on an account for lamps furnished plaintiff in error by defendant in error.

In the first defense in the amended answer and cross-petition of plaintiff in error, by way of crosspetition, it was alleged that defendant in error, during the time covered by the items in the account attached to the petition and for a long time prior thereto, was a member of a combination of manufacturers of electric lamps operated under the name and style of The National Electric Lamp Association, and that the association as constituted by [\*107] defendant in error and others was a combination formed for the purpose of fixing at an enhanced figure the price of electric lamps as manufactured by the members of said combination among themselves by which dealers and consumers of said lamps should be compelled to purchase the same at such enhanced price and to destroy as between the members of said association all competition in price; that said association, since its formation by defendant in error and others, [\*\*\*2] has so far advanced and maintained the price of lamps and has effected and perfected a monopoly of the sale and distribution of the same; that as a result of such combination the price of lamps to plaintiff in error and other consumers thereof was advanced to the extent of twenty-five per cent., and for a term of four years prior to the filing of said amended answer and cross-petition plaintiff in error had been compelled to purchase of the defendant in error lamps for his trade at such advanced figure, entailing upon plaintiff in error a heavy loss in trade and profit on account thereof; and that during said period plaintiff in error had purchased of defendant in error lamps at a cost aggregating approximately \$ 541.98, of which one-fifth, \$ 108.39 in cost, was due to the illegal combination and which was a damage to plaintiff in error.

It was further alleged that, in accordance with the act of the general assembly of the state of Ohio of April 19, 1898, recorded in volume 93, Ohio Laws, at page 146 (Section 6397, General Code), he was entitled to twofold the amount of damage sustained by him by reason of the premises.

[\*108] Plaintiff in error further averred that there was nothing due [\*\*\*3] to defendant in error on the claim sued on and that he was entitled to recover from defendant in error damages in the sum of \$ 17.78.

In the third defense of the answer, by way of cross-petition, plaintiff in error adopted all the allegations of the first defense and averred further that the account sued upon in the petition was for a portion of the lamps purchased by plaintiff of the defendant subsequently to the advance in price due to said illegal combination. There was a prayer for judgment against the defendant in error in the sum of \$ 17.78.

To these two defenses, as well as to a second defense, a demurrer was filed by defendant in error upon the ground that facts sufficient to constitute a defense were not stated therein. This demurrer was sustained to each of the three defenses and cross-petition, and plaintiff in error not desiring to amend or plead further judgment was rendered against him in the sum of \$ 203.08, with interest from May 28, 1912, together with costs.

Error was prosecuted to the circuit court and the judgment of the court of common pleas affirmed.

Plaintiff in error makes no objection to the sustaining of the demurrer to the second defense, but asks for [\*\*\*4] a reversal of the judgment of the circuit court upon the ground that that court erred in sustaining the demurrer to the first and third defenses and cross-petition.

**Counsel:** *Mr. Lee Warren James*, for plaintiff in error.

*Messrs. VanDeman, Burkhart & Smith*, for defendant in error.

**Judges:** NEWMAN, J. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

**Opinion by:** NEWMAN

## Opinion

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[\*109] [\*\*189] It appears from the allegations of the amended answer and cross-petition that defendant in error was a member of an unlawful combination, as defined by Section 6391 [\*\*\*5] *et seq.*, General Code, known as the Valentine anti-trust law. No claim is made here that plaintiff in error can avoid payment of the account sued on upon the ground that defendant in error was a member of this unlawful combination, although this point was made in the lower courts. It is insisted, however, that plaintiff in error may set up by way of counterclaim the damages he sustained [\*\*190] in the purchase of the lamps mentioned in the account sued on by reason of this unlawful combination and, by way of set-off, the damages he sustained during the four years in which he dealt with defendant in error.

**HN1** Under the Valentine anti-trust law damages are allowed to a person injured in his business or property by reason of an unlawful combination, Section 6397 providing: **HN2** "In addition to the civil and criminal penalties provided in this chapter, the person injured in his business or property by another person, or by a corporation, association or partnership, by reason of anything forbidden or declared to be unlawful in this chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant or his agent resides or is [\*110] found, or where [\*\*\*6] service may be obtained, without respect to the amount in controversy, and recover twofold the damages sustained by him and his costs of suit. When it appears to the court, before which a proceeding under this chapter is pending, that the ends of justice require other parties to be brought before such court, the court may cause them to be made parties defendant and summoned whether they reside in the county where such action is pending, or not."

The contention of counsel for defendant in error is that the action which this statute authorizes must be a direct one.

It appears from the answer and cross-petition that plaintiff in error was compelled to purchase from defendant in error, a member of the unlawful combination, lamps for his trade at an advanced figure, entailing upon him a heavy

loss in trade and profit on account thereof, and that the account sued on is for a portion of the lamps so purchased by him, and a claim is made for damages under the provisions of the Valentine anti-trust law.

**HN3** [↑] The question presented, then, is whether such a claim for damages is a counterclaim under Section 11317, General Code, where it is defined to be "a cause of action existing in favor of a [\*\*\*7] defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

[\*111] The account sued on was for lamps purchased at the advanced price fixed by the unlawful combination. The sale of these lamps at this price gave rise to a cause of action in favor of plaintiff in error and was referable to the transaction had between the parties when the sale was made, and, in the language used in Section 11317, it was "connected with the subject of the action." As we view it, the claim of plaintiff in error answers the statutory requirement of a counterclaim and it was error to sustain the demurrer to the third defense.

As to the first defense, in which plaintiff in error alleges the existence of the unlawful combination -- that by reason thereof the price of lamps to him was advanced and for a term of four years prior to the bringing of the action he was compelled to purchase of defendant in error lamps for his trade at such advanced figure, entailing upon him a heavy loss [\*\*\*8] in trade and profit on account thereof, and that under the provisions of the Valentine antitrust law he is entitled to twofold damages -- the court of common pleas took the view that this claim for damages was upon a liability created by statute and therefore could not be pleaded as a set-off under Section 11319, General Code, which is as follows: **HN4** [↑] "A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

The action of defendant in error, being one on a book account, was founded on contract. It is true [\*112] that the liability of defendant in error to pay damages is fixed by Section 6397, *supra*, but the cause of action in favor of plaintiff in error grows out of his contract of purchase. Had there been no contractual relation between these parties no cause of action would have arisen in favor of defendant in error. This being true, plaintiff in error had the right to plead this cause of action as a set-off to the claim of defendant in error.

In the cases of [\*\*\*9] *Connolly v. Union Sewer Pipe Co.*, 184 U.S., 540, and *Continental Wall Paper Co. v. Voight*, 212 U.S., 228, to which our attention is called, the question we are considering in the present case was not decided. The Ohio statutes relating to counterclaims and set-offs were not before the court in the two federal cases, and the part of the opinion of the court in the Connolly case quoted and relied on by counsel for defendant in error is, therefore, not in point.

*Judgment reversed.*

## United States v. Rockefeller

District Court, S.D. New York

April 16, 1915

No Number in Original

**Reporter**

222 F. 534 \*; 1915 U.S. Dist. LEXIS 1539 \*\*

UNITED STATES v. ROCKEFELLER et al.

### **Core Terms**

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railroad company, stock, acquire

**Opinion by:** [\*\*1] HUNT

### **Opinion**

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[\*534] HUNT, Circuit Judge. The several applications made by the defendants Baker, Milligan, Maxwell, Cuyler, and Vail for a severance are granted. None of the five moving defendants was a director of the New Haven Company prior to May 22, 1908. Defendant Baker was elected a director on February 11, 1910. Defendant Cuyler was elected on October 26, 1910, and defendants Vail, Maxwell, and Milligan on May 18, 1911.

It appears that upon May 22, 1908, the Attorney General of the United States filed a bill in the United States Circuit Court in Massachusetts against the New Haven Company and others, charging violations of the Anti-Trust Law of the United States, and that on June 26, 1909, by direction of the Attorney General, the above referred to suit was discontinued. On June 25, 1909, the Senate of the United [\*535] States passed a resolution, and on the same day the Attorney General made a reply thereto. Copies of such resolution and the reply thereto are referred to by counsel who have presented these motions. The substance of the resolution of the Senate was a direction that the Attorney General inform the Senate whether the legal proceedings against [\*\*2] the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law had been dismissed, and, if any statement had been given out by the Attorney General, that he attach a copy of such statement to his reply to the resolution, and to inform the Senate when such proceedings were begun and instituted. The Attorney General, under date of June 25, 1909, replied that he had directed the United States Attorney for the district of Massachusetts to dismiss the legal proceeding brought by the United States against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law and that he had given out a statement touching the matter, copy of which statement he inclosed with his communication to the Senate. He advised the Senate that the proceedings were begun by the filing of a bill in equity in the Circuit Court for the District of Massachusetts on May 22, 1908.

The copy of statement which accompanied the letter of the Attorney General was dated June 24, 1909. It referred to an act of the Legislature of Massachusetts just theretofore approved, creating the Boston [\*\*3] & Maine Railroad Holding Company, and giving authority to the new corporation to acquire and hold the stock and bonds of the Boston & Maine Railroad Company, and authorizing any railroad corporation theretofore incorporated under the laws of Massachusetts to acquire and hold the stock and bonds of the Boston Holding Company. Further substance of the statement was that the purpose and effect of the Massachusetts statute, as publicly announced

and contemplated by its terms, was to authorize the consolidation of the Boston & Maine and New York, New Haven & Hartford Railroad Company by the Boston Holding Company first acquiring control of the Boston & Maine Railroad Company, and then by the New York, New Haven & Hartford Company acquiring the control of the Boston Holding Company; that the Massachusetts statute also provided that the stock of the Boston & Maine to be acquired by the Holding Company should not afterwards be sold without express authority from the Legislature; that the stock of the Holding Company, if acquired by the New Haven road, should not be sold without authority of the Legislature; that the commonwealth of Massachusetts might, by legislative action, upon one year's [\*\*4] notice, take for its own use, by purchase or otherwise, all the stock and bonds of the Holding Company upon certain terms designed to protect creditors and secure just compensation, the whole plan and purpose being to promote the consolidation of the Boston & Maine with the New Haven Company and to provide for their operation hereafter under one management, with safeguards to protect the interests of the people of Massachusetts; that in view of the fact that the suit of the government then pending against the New Haven and the Boston & Maine Companies for violation of the Anti-Trust Act rested almost [\*536] entirely upon a claim that those companies had already consolidated by means of stock ownership, and since the state of Massachusetts was most directly affected, and since the laws of that state now expressly authorize such consolidation, the Attorney General had determined to dismiss the suit by the government. The statement then went on to say that in the suit brought complaint had been made that the New Haven Railroad had acquired a number of trolley lines in Massachusetts and adjoining states, and that this was a combination in restraint of interstate commerce, but that, [\*\*5] since the suit by the government had been determined upon, the Supreme Court of Massachusetts, in a case involving the right of the New Haven to acquire trolley properties in Massachusetts, had decided that that railroad company had no such power, and that the company had been parting with such trolley properties. The Attorney General in the statement expressed his conviction that, whatever might have been the merit of the claim when the suit was begun, there was not, at the time he made the statement, any such element of competition in interstate commerce by reason of such ownership of trolley lines as would justify a further prosecution of the suit by the government. The statement concluded by saying that the Attorney General had directed that the case of the government against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Company should be dismissed at once.

There is no dispute, at present, at least, of the statements made by counsel for these defendants that each defendant believed that, at the time he entered the board of the New Haven Company, all controversies with the government of the United States, and all questions of violations of the Anti-Trust [\*\*6] Law, had been finally disposed of; and it would seem that no investigation or controversy concerning the subject was pending at that time. Such a situation may well have induced the belief that the board of directors would be, to a great extent, engaged in working through whatsoever complications had arisen in connection with the concerns of the New Haven Company resulting from transactions and causes which had arisen prior to the election of any one of these defendants, and it may be that each of these defendants went upon the board with the purpose of protecting the interests of the stockholders and of the corporation itself. At all events, enough appears to justify the view that the questions to be presented on the trial of these several defendants will probably be materially different from those which will be involved in the trial of the other defendants, with whom they have been jointly charged. Nor is it difficult to foresee possible serious antagonism between the positions of defense to be taken by these defendants and others charged jointly. Indeed, counsel for the United States frankly state that such a situation may arise, and that they do not oppose the severance applied [\*\*7] for.

I therefore think these defendants ought not to be required to go to the inconvenience and expense incidental to the preparation for a long trial, which will probably extend to many matters in no way related to any one of themselves.

## **State ex rel. Barker v. Armour Packing Co.**

Supreme Court of Missouri

May 3, 1915, Decided

No Number in Original

**Reporter**

265 Mo. 121 \*; 176 S.W. 382 \*\*; 1915 Mo. LEXIS 9 \*\*\*

THE STATE ex inf. JOHN T. BARKER, Attorney-General, v. ARMOUR PACKING COMPANY, MORRIS & COMPANY and SWIFT & COMPANY. THE STATE ex inf. JOHN T. BARKER, Attorney-General, v. HAMMOND PACKING COMPANY and ST. LOUIS DRESSED BEEF & PROVISION COMPANY.

**Disposition:** [\*\*\*1] For judgment see post, page 151.

### **Core Terms**

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packing company, cases, products, prices, stock, Beef, properties, quo warranto, pleadings, purchases, Dressed, meats, proceedings, allegations, conspiracy, parties, fine, circuit court, pool, cause of action, livestock, packing, courts, packing house, quantity, subsidiary corporation, restraint of trade, capital stock, lessen, majority opinion

### **LexisNexis® Headnotes**

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Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > General Partnerships > Formation > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Remedies > Writs > General Overview

#### **HN1[] General Partnerships, Management Duties & Liabilities**

Although the sufficiency of an information in a quo warranto proceeding of an antitrust action may generally be measured by the rules applicable to civil cases, courts use in such cases primarily the statute that modifies the general rule in antitrust proceedings. It is as follows: In any suit in which it is charged that any person, corporation, partnership or association of persons has created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding in restraint of trade or competition with any other person, corporation, partnership or association of persons, it shall not be necessary to allege or plead the manner in which, or when or where such pool, trust, agreement, combination, confederation or understanding was made or effected. Mo. Rev. Stat. § 10310 (1909). This statute, the terms of which are unambiguous, simplifies the

information, in dispensing with the necessity of specific allegations in regard to the manner in which, the time when and the place where the pool or trust was effected, and is applicable not only to cases where the offenses charged to have been committed are wrong in themselves, but also to those in which a misuser of a lawful right is charged.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN2** **Public Enforcement, State Civil Actions**

Although the pleadings in an antitrust proceeding viewed by the ordinary rules of procedure are vague, uncertain and indefinite, if, when measured by the terms of the antitrust statutes, they directly charge a violation of same in the language of these statutes, their sufficiency is not questioned, especially when the fact appears that no timely objections were interposed calling the court's attention to the defective pleadings or in any manner preserving such objections for consideration.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN3** **Pleadings, Rule Application & Interpretation**

If a pleading sets forth sufficient facts to constitute a cause of action, plaintiff's right of redress is not prejudiced by the fact that unnecessary statements are added, but they may be disregarded.

Evidence > Inferences & Presumptions > General Overview

## **HN4** **Evidence, Inferences & Presumptions**

Offenses that savor of crime and the judgments sought thereon should be rendered only upon clear and convincing proof.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

## **HN5** **Public Enforcement, State Civil Actions**

Although the separate elements of a scheme may be lawful if found to be bound together by a common intent as parts of an unlawful scheme to effect a monopoly, the plan may make the parts unlawful. The liability of respondents for violations of the statutes in question, if committed in Missouri, will not be affected by the fact that the instrumentality through which they operated in violating the law was a corporation which had been organized for ostensibly legitimate purposes in another state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

265 Mo. 121, \*121 A 76 S.W. 382, \*\*382 A 915 Mo. LEXIS 9, \*\*\*1

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

#### **HN6** **Public Enforcement, State Civil Actions**

The three years' statute of limitations provided in Mo. Rev. Stat. § 1890 (1909) does not apply in an antitrust proceeding where the pleadings allege that at the time they were filed, and the testimony shows that, not only at the time of the institution of a suit but thereafter, that respondents were members of and participated in the unlawful pool, trust and combination.

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Remedies > Writs > General Overview

#### **HN7** **Common Law Writs, Quo Warranto**

Informations in quo warranto are governed by the rules of pleadings in civil cases.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

#### **HN8** **Public Enforcement, State Civil Actions**

Where respondents in an antitrust proceeding are charged not only with the same offenses, but such offenses are alleged to have been joined and to have been committed in an abuse and misuse of their franchises growing out of the connection of their transactions with each other, if guilty the state is entitled to only one satisfaction, if it may be so designated, to-wit: A forfeiture of the corporation's franchises, or in the case of foreign corporations, a revocation of their licenses and such penalties as may be adjudged in addition thereto. Mo. Rev. Stat. 10304 (1909).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

#### **HN9** **Reviewability of Lower Court Decisions, Preservation for Review**

Where in an antitrust proceeding a defense of former acquittal or prior adjudication of the matters involved was urged by counsel for respondents in oral argument, but was in no manner pleaded or otherwise preserved for review, whether the rule in criminal or civil procedure be applied, this question is not for appellate consideration.

## **Headnotes/Summary**

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### **Headnotes**

**1. QUO WARRANTO: Information: Sufficiency: In Language of Statute.** In a *quo warranto* brought against corporations charged with having entered into a combination in restraint of trade, the statute (Sec. 10310, R. S. 1909) dispenses with the necessity of specific allegations in the petition, either as to the time, the manner or the place the trust was effected; and such statute is applicable both to cases wherein the offenses committed were wrong in themselves, and those in which a lawful right has been misused.

*Held*, by WOODSON, C. J., concurring, that the Legislature has the same power to control pleadings and procedure in the Supreme Court that it has to control those of the circuit court, and it is wholly immaterial whether the case be a proceeding in *quo warranto* brought by the Attorney-General *ex officio* in the Supreme Court to oust corporations of their franchises, or a proceeding for other original writs intrusted to the keeping of the Supreme Court.

*Held*, by BOND, J., dissenting, that the Supreme Court, in the exercise of its jurisdiction conferred upon it by the Constitution to issue an original writ in *quo warranto* upon the information of the Attorney-General *ex officio*, acts in virtue of the jurisdiction as conferred, and that jurisdiction cannot be regulated by the Legislature any further than the court sees fit to adopt such regulation as a reasonable rule of procedure; and that the statute (Sec. 10310, R. S. 1909) declaring it shall be unnecessary to "allege or plead the manner in which, or when or where" a combination in restraint of trade "was made or effected," cannot be held to be decisive of the sufficiency of the information in such case.

**2. QUO WARRANTO: Information: Sufficient Specification.** An information charging that defendant corporations entered into a pool, trust and combination among themselves and with other corporations to regulate, fix and control prices of certain products for sale and to be sold in this State; to maintain such prices when so regulated and fixed; to regulate, fix and limit the quantity of such commodities sold and to be offered for sale in this State, etc., is sufficient in its specification of facts showing a violation of the anti-trust statutes, even though the statute making it unnecessary to plead the time, manner and place of such combination be disregarded.

*Held*, by WOODSON, C. J., concurring, that where the information in a *quo warranto* charges that the conspiracy in restraint of trade was formed by defendants for an unlawful purpose, it is unnecessary to state the facts constituting the conspiracy; but where the conspiracy was formed for the purpose of doing a lawful act in an unlawful way then the facts constituting the conspiracy should be pleaded.

*Held*, by BOND, J., dissenting, that an information in *quo warranto* brought by the Attorney-General to oust corporations of their franchises for that they have entered into a combination in restraint of trade in violation of the antitrust statutes, is insufficient unless it definitely and specifically states the facts and circumstances showing guilt under those statutes.

**3. QUO WARRANTO: Information: Sufficient Specification: Answering Over: Waiver.** Answering over by the defendants charged with having entered into a combination in restraint of trade is equivalent to a waiver of objection to the general allegations and lack of specification of facts of the information; and demurrers incorporated in the return or answer, do not call for a ruling thereon, but place defendant in the attitude of having answered over.

*Held*, by BOND, J., dissenting, that an information which charges in general terms a violation of the statute, in the language of the statute, without any specification of the facts which constitute its violation, does not state a cause of action, and is not an imperfect statement of a cause of action, and hence the objection that it totally fails to state a cause of action is open to respondents at all times, with or without demurrer.

**4. QUO WARRANTO: Information: Unnecessary Allegations.** If the information in *quo warranto* sets forth sufficient facts to constitute a cause of action against the defendant corporations, plaintiff's right of redress is not to be prejudiced by the facts that unnecessary statements are added, but they will be regarded as surplusage.

**5. QUO WARRANTO: Information: General Rules of Pleading.** An information in a *quo warranto* against corporations charged with having entered into combination in restraint of trade, is to be governed by the general rules of civil procedure. [BOND, J., dissenting.]

**6. QUO WARRANTO: Information: Sufficiency of Evidence.** The evidence in this case is clear and convincing that three powerful packing companies entered into a combination in restraint of trade, by organizing another company in New Jersey, with a capital stock of fifteen million dollars, organized ostensibly as a packing company, but in fact as a holding company, whose capital stock consisted of eighty per cent of the stock of the three companies and the properties of other competing companies, bought with money borrowed on these properties as security, and, by using said company as their instrumentality, perfected a plan, between themselves and such other subsidiary companies, that resulted in a common management, a community of stock interest, an arbitrary fixing of the purchasing and selling prices of live stock and the dressed products thereof, and the restriction of the quantity of live stock to be bought or sold, all of which resulted in the destruction or lessening of competition in this State between them and the other corporations whose stock were acquired by said New Jersey company.

**7. QUO WARRANTO: Information: Lawful Elements: Combined Into Unlawful Scheme.** Although the separate elements of a scheme may be lawful, if bound together by a common intent as parts of an unlawful scheme to effect a monopoly, the plan will make the parts unlawful. The combination in restraint of trade is not rendered lawful, or its unlawful character affected, by the fact that the articles of association of the holding corporation organized by defendants bore on their face evidence that it was an organization for a lawful purpose, if it was in fact one of the instrumentalities used by them to carry out the unlawful combination and agreements to prevent competition, restrict the quantity of products and fix their prices.

**8. QUO WARRANTO: Information: Limitations.** A *quo warranto* against corporations for penalties and forfeiture is not barred by limitations if brought within three years after the unlawful combination in restraint of trade was formed.

**9. QUO WARRANTO: Information: Misjoinder of Defendants.** It is not a misjoinder of defendants to join in one action of *quo warranto* all corporations, domestic and foreign, licensed to do business in this State, which have misused and abused their franchises by entering into a combination in restraint of trade. If guilty, there is but one satisfaction: a forfeiture of the domestic corporations' franchises, and the revocation of the foreign companies' licenses, and in addition the assessment of appropriate penalties. The rules of civil procedure as to joining of causes of action and of defendants apply, though each respondent has a separate contract with the State.

**10. QUO WARRANTO: Information: Repeal of Statutes.** The Act of 1913 (Laws 1913, pp. 549-555) did not repeal the existing anti-trust statutes, but simply made additions to the acts declared in those statutes to be necessary to constitute an unlawful combination in restraint of trade.

**11. QUO WARRANTO: Information: Res Adjudicata.** A defense of former acquittal or prior adjudication, in either a criminal or civil proceeding, to be available, must be pleaded.

**12. QUO WARRANTO: Information: Statutes Constitutional.** The anti-trust statutes of Missouri violate neither the Federal nor State Constitution.

**Counsel:** John T. Barker, Attorney-General, and Ernest A. Green, Assistant Attorney-General, for relator; Frank H. Farris of counsel.

(1) The information in this cause is sufficient and specifically charges facts which show, if true, that respondents have violated the antitrust statutes of this State. There is no misjoinder of parties respondent. State *ex inf. v. Railroad*, 240 Mo. 35; State *ex rel. v. Grimm*, 220 Mo. 483; State *ex inf. v. Standard Oil Co.*, 218 Mo. 1; Sec. 10310, R. S. 1909. (2) This action is not barred by the Statutes of Limitation. In this State we have no Statute of Limitations against the State instituting suits by the Attorney-General by information, in the nature of *quo warranto*, such as the suit at bar. Besides, at the time of filing this information respondents were still members of and participating in the unlawful pool and combination. *High on Extraordinary Legal Remedies* (3 Ed.), sec. 621; State *ex rel. v. Westport*, 116 Mo. 595; State *ex rel. v. Huff*, 105 Mo. App. 634; State *ex rel. v. Vandalia*, 119 Mo. App. 424; *Commonwealth v. Birchett*, 2 Va. Cas. 51; State *ex rel. v. Turnpike Co.*, 8 R. I. 521. (3) The commissioner who heard [\*\*\*2] the testimony and had the witnesses before him reports that from the evidence adduced the National Packing Company was organized for the express purpose of limiting and destroying free competition, and that respondents have been

and are maintained by the National Packing Company solely in furtherance of that unlawful purpose. Unless the findings of a commissioner appointed by the court to report on the facts are affirmatively and clearly shown to be wrong, the court will accept same as correct. State *ex rel. v. Tobacco Co.*, 177 Mo. 38; State *ex rel. v. Standard Oil Co.*, 194 Mo. 164; *Tufts v. Latshaw*, 172 Mo. 371; *Bank v. Donnell*, 172 Mo. 402. (4) The National Packing Company was organized as a means and instrumentality through which to continue and perpetuate the various methods of combination which existed prior to its organization and through which methods the large packing interests of the United States were brought into an unlawful combine. This being true, various decisions of appellate courts herein cited, condemn respondents herein as being members of an unlawful pool. Sections 10298, 10299, 10300, 10301, 10304, 10322, R. S. 1909; *Harding v. Glucose Co.*, 182 Ill. 551; *Richardson* [\*\*\*3] *v. Buhl*, 77 Mich. 632; *Distillery & Cattle Feed Co. v. People*, 156 Ill. 448; *State v. Distilling Co.*, 29 Neb. 719; *Lead Co. v. Store Co.*, 80 Mo. App. 266; *Eustis v. Edgar*, 207 Mo. 289; *Finck v. Granite Co.*, 187 Mo. 244; *United States v. Tobacco Co.*, 164 Fed. 700; *Biscuit Co. v. Klotz*, 44 Fed. 721; *Strait v. Harrow Co.*, 18 N. Y. Supp. 224; *Harrow Co. v. Hench*, 76 Fed. 667; *Harrow Co. v. Hench*, 83 Fed. 36; *Securities Co. v. Transit Co.*, 166 Fed. 945; *Attorney-General v. A. Booth & Co.*, 143 Mich. 89; *Capsule Co. v. Capsule Co.*, 67 Fed. 414; *Wall Paper Co. v. Lewis Voight Sons & Co.*, 148 Fed. 939; *Cotton Oil Co. v. Texas*, 197 U.S. 129; *Clancey v. Salt Mfg. Co.*, 62 Barb. 395; *United States v. Pipe & Steel Co.*, 85 Fed. 279; *Pittsburg Co. v. McMillin*, 119 N. Y. 46; Noyes on Corporate Relations (2 Ed.), secs. 307, 310; Beach on Monopolies and Industrial Trusts, sec. 159, pp. 505, 507, pr. 167, p. 543, pr. 165, p. 536; 1 Eddy on Trusts and Monopolies, p. 550, prs. 617, 620, 621, 622; State *ex rel. v. Standard Oil Co.*, 49 Oh. St. 137; *People v. Refining Co.*, 54 Hun, 356; *People v. Refining Co.*, 121 N. Y. 582; *Bishop v. Preserves Co.*, 157 Ill. 284; *Dunbar v. Tel. & Tel. Co.*, 224 Ill. 9; *Securities* [\*\*\*4] *Co. v. United States*, 193 U.S. 197; *United States v. Standard Oil Co.*, 173 Fed. 177; State *ex rel. v. Standard Oil Co.*, 218 Mo. 1; 2 Cook on Corporations (6 Ed.), pr. 503a; State *ex rel. v. Ins. Co.*, 152 Mo. 1; State *ex rel. v. Packing Co.*, 173 Mo. 356; *Froelich v. Benefit Assn.*, 93 Mo. App. 383; *Brewing Co. v. Belinder*, 97 Mo. App. 64; *State v. Board of Trade*, 107 Minn. 506; *Railroad v. Closser*, 126 Ind. 348; *Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Joint Traffic Assn. v. U. S.*, 171 U.S. 338; *Clark v. Railroad*, 50 Fed. 346; *Harvester Co. v. Commonwealth*, 99 S. W. 637; *Harvester Co. v. State*, 99 Pac. 603; *Cohen v. Envelope Co.*, 166 N. Y. 298; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Railroad v. Railroad*, 41 La. Ann. 970; *U. S. v. Freight Assn.*, 166 U.S. 290; *Standard Oil Co. v. Missouri*, 224 U.S. 270; State *ex rel. v. Harvester Co.*, 237 Mo. 369. (5) Independent of whether the National Packing Company was organized as a part and in pursuance of a former pool and combine, it was organized for the purpose, or, at least, provides a means through which the Armour Packing interests, the Swift Packing interests, the Morris Packing interests and the various subsidiary [\*\*\*5] concerns, including the respondents, can and do lessen competition. Respondents are therefore guilty of the charges contained in the information. Cases cited under Point 4; *United States v. Tobacco Co.*, 164 Fed. 700; *United States v. Standard Oil Co.*, 173 Fed. 177; *People v. Gas Trust Co.*, 130 Ill. 268; *Securities Co. v. Transit Co.*, 165 Fed. 945; *Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; *Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Strait v. Harvester Co.*, 18 N. Y. Supp. 224; *Biscuit Co. v. Klotz*, 44 Fed. 721; *Lead Co. v. Store Co.*, 80 Mo. App. 266; *Richardson v. Buhl*, 77 Mich. 632; *Froelich v. Mutual Benefit Assn.*, 93 Mo. App. 383; State *ex rel. v. Standard Oil Co.*, 49 Ohio St. 137. (6) Independent of the means which the National Packing Company affords, the Armour interest, the Morris interests, and the Swift interests meeting together with the representatives of respondents and jointly agreeing upon the affairs of these various interests, it is an unlawful combine, to which respondents are parties, in that it effectively destroys all competition and removes all incentive for competition among the various corporations, including the respondents, owned and controlled by the [\*\*\*6] National Packing Company. Cases cited under Points 4 and 5, supra; State *ex rel. v. Jockey Club*, 200 Mo. 32; *Terrett v. Taylor*, 9 Cranch, 51; *Commonwealth v. Bank*, 28 Pa. St. 389; *People v. Refining Co.*, 54 Hun, 354. (7) The various objections of unconstitutionality raised by respondents in their answer to these statutes are untenable, having all been foreclosed by prior decisions of this court and the United States Supreme Court. They are no longer open questions in this State. State *ex inf. v. Ins. Co.*, 150 Mo. 113; State *ex inf. v. Ins. Co.*, 152 Mo. 1; State *ex inf. v. Tobacco Co.*, 177 Mo. 1; *Finck v. Granite Co.*, 187 Mo. 244; State *ex inf. v. Oil Co.*, 218 Mo. 1; *Standard Oil Co. v. Missouri*, 224 U.S. 270.

H. S. Priest, Morton Jourdan and Frank Hagerman for respondents; A. R. Urion, Henry Veeder, M. W. Borders and Ralph Crews of counsel.

(A) The information is in nowise supported by the proofs. (1) Where, as here, quo warranto proceeds against a corporation for a violation of the antitrust law, the information must charge the specific wrong-doing, and the proofs must show that which is thus specifically pleaded. State ex rel. v. Talbot, 123 Mo. 71; State ex rel. v. Grimm, I\*\*\*71 220 Mo. 490; State ex rel. v. Railroad, 240 Mo. 35; State ex rel. v. Railroad, 241 Mo. 11. If the evidence does not show the specific wrong-doing so alleged, there is not simply a variance but a complete failure of proof. Waldhier v. Railroad, 71 Mo. 514; Reed v. Bott, 100 Mo. 62; McManamee v. Railroad, 135 Mo. 440; Huston v. Tyler, 140 Mo. 263; Chitty v. Railroad, 148 Mo. 75; Richardson v. Busch, 198 Mo. 174. (2) If a material fact be pleaded as unknown to the pleader, there is a complete failure of proof if it appear that such fact was either known or could have been discovered by the exercise of reasonable diligence. State v. Stowe, 132 Mo. 208; State v. Thompson, 137 Mo. 623; State v. Moses, 139 Mo. 217; State v. Burke, 151 Mo. 145; State v. Nunley, 185 Mo. 109; Naftzger v. United States, 118 C. C. A., 200 Fed. 501. (3) The specific charge in the information was this: Respondents, not as passive instruments, but as active conspirators, with unknown parties, conspired to take over, own and control all the packing companies in Missouri and the United States, the names of which were unknown, and pursuant to the scheme the National Company acquired the stock and assets of corporations [\*\*\*8] whose names were likewise unknown. Both the proofs and the commissioner's report clearly showed: (a) There was never any purpose of obtaining control of all of such packing houses; (b) the alleged conspirators were Swift & Company, Armour & Company, Morris & Company and the companies actually acquired by the National Company, and (c) the names of these companies were actually disclosed at a preliminary hearing had under the statute (R. S. 1909, secs. 10332-10338) by the Attorney-General to see whether there was any reason for filing the information. Moreover, if such examination did not disclose the facts in every detail, they could have been ascertained by his asking for the production of the officers and directors and the books and papers of the companies doing business in Missouri. (B) The proofs were insufficient to make a case. (1) The commissioner's mere conclusion, in the teeth of findings to the contrary and his statement that there was no direct evidence to that effect, was that respondents were in a combination with Swift & Company, Armour & Company and the National Company. (2) Such a conclusion cannot be warranted by strong suspicions or probabilities, but can only be drawn [\*\*\*9] upon a clear showing of (a) either a criminal intent to violate the law, or (b) a combination of such magnitude as to create a monopoly. State ex inf. v. Tobacco Co., 177 Mo. 37; United States v. Naval Stores Co., 172 Fed. 460; Bigelow v. Mining Co., 167 Fed. 709, 94 C. C. A. 13. (3) Here, both the findings and proofs clearly show there was no monopoly, while the facts do not warrant a finding of bad intent. (4) There not being a monopoly guilt cannot be found from the size of the business unaccompanied by improper acts or oppressive methods towards competitors. United States v. Naval Stores Co., 172 Fed. 458; Standard Oil Co. v. United States, 221 U.S. 1; Tobacco Co. v. United States, 221 U.S. 106; State ex inf. v. Harvester Co., 237 Mo. 394. (5) There was individual ownership of the stock of the National Company by G. F. Swift, J. O. Armour and Edward Morris, heads of Swift & Company, Armour & Company and Morris & Company. The National Company in turn owned the stock of respondents. From this alone the commissioner concluded not that there was any, but that there might be an abuse of the power flowing from such ownership, hence guilt. This was contrary to the law. State ex inf. v. [\*\*\*10] Tobacco Co., 117 Mo. 37; State ex inf. v. Standard Oil Co., 194 Mo. 155, 218 Mo. 403; State ex inf. v. Railroad, 241 Mo. 1, 11; Bigelow v. Mining Co., 167 Fed. 721, 94 C. C. A. 13; U. S. v. Reading Co., 183 Fed. 427. (6) The proposed but abandoned consolidation of 1902 would have controlled not more than fifty-two per cent of the packing business. Its size alone, regardless of its abuse of its power, would not have made it illegal. United States v. Naval Stores Co., 172 Fed. 458; Standard Oil Co. v. United States, 221 U.S. 1; Tobacco Co. v. United States, 221 U.S. 106; State ex inf. v. Harvester Co., 237 Mo. 369, 394. The plan having been abandoned, it was not evidence of a combination thereafter. U. S. v. Reading Co., 183 Fed. 427. (7) The conclusions of the commissioner are not only contrary to the proofs, but they are inconsistent with the specific facts found. (8) The claim of violation of law is too stale to warrant a prosecution. A State, by lapse of time, wholly irrespective of any Statute of Limitation, loses its right to proceed in quo warranto, not only as against municipal (State ex rel. v. Westport, 116 Mo. 582; People ex rel. v. Alturas Co., 6 Idaho, 418; State v. School [\*\*\*11] District, 85 Minn. 230; Cooley, Const. Lim. [5 Ed.] 311), but also private corporations. State v. Carr, 112 C. C. A. 477, 191 Fed. 266; Commonwealth v. Turnpike Co., 153 Pa. St. 47; State v. Water Co., 92 Wis. 496; State v. Railroad, 80 Neb. 333.

**Judges:** WALKER, J. Woodson, C. J., and Brown and Faris, JJ., concur, Woodson, C. J., in separate opinion; Faris, J., dubitante as to what is said concerning section 10310, Revised Statutes 1909; Graves, J., concurs in result of the opinion as to judgment of guilt as found in majority opinion, but thinks that under the peculiar facts in

this case the fines are excessive and dissents as to the amount of the fines; Bond, J., dissents in part and concurs in part in separate opinion; Blair, J., having been of counsel, not sitting.

**Opinion by:** WALKER

## Opinion

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### [\*131] [\*\*383] In Banc

*Quo Warranto.*

WALKER, J. -- In June, 1910, the State of Missouri, upon the information of the Attorney-General, instituted a proceeding in *quo warranto* in the Supreme Court against the Hammond Packing Company, an Illinois corporation doing business under the authority of the laws of this State, at St. Joseph, Missouri, and the St. Louis Dressed Beef & Provision [\*\*\*12] Company, a Missouri corporation engaged in business at the city of St. Louis.

On the same date a like proceeding was commenced in this court by the Attorney-General against the Armour Packing Company, a corporation organized under the laws of the State of New Jersey; Swift & Company, a corporation organized under the laws of the State of Illinois, and Morris & Company, a corporation organized under the laws of the State of Maine, each authorized to do business in this State.

The business of these corporations was the buying, slaughtering and marketing of live stock used for food, and in addition the dealing in cured meats, eggs, poultry, game, butter and other agricultural and dairy products, and the preparation and selling of the various by-products derived from the slaughtering of live stock.

The information in these cases was identical, barring names, dates and formal allegations particularly applicable to the corporations proceeded against, and each charged violations of the antitrust statutes of Missouri (Secs. 10298-10301, R. S. 1909).

Answers were filed in due time, and in January, 1911, an order was made referring the case against the Hammond Packing Company and the St. [\*\*\*13] Louis Dressed Beef & Provision Company to the Hon. Daniel Dillon, as special commissioner, to hear and rule on the competency of all testimony offered, and return same into this court with his findings of facts thereon. An abstract of the voluminous testimony agreed upon by the Attorney-General and respondents' counsel was [\*132] used before the commissioner as the record in these cases, and is filed here as the "Joint Abstract of the Record," and will be referred to in the discussion of the issues submitted.

Although these proceedings were commenced separately, after the testimony had been taken before the commissioner in the suit against the Hammond Packing Company and the St. Louis Dressed Beef & Provision Company, counsel for these parties, as well as for the other corporations named, stipulated that the testimony thus taken, as well as the report of the commissioner, who was limited to a finding of facts, should be taken as the evidence in all of the cases, the stipulation being in these words: "It is hereby stipulated: That this case shall be submitted upon the evidence taken and the report of the commissioner made in case No. 16090, State ex rel. Attorney-General v. Hammond [\*\*\*14] Packing Company et al., herein pending."

The informations are substantially as follows:

That respondents have entered into a pool, trust and combination among themselves and with other corporations and persons to relator unknown, with the purpose and design to (1) regulate, fix and control prices to be paid for beef and beef products, etc., for sale and sold in this State; (2) to maintain such prices when so regulated and fixed; (3) to regulate, fix and limit the amount and quantity of beef and beef products sold and offered for sale in this State; (4) to control and limit the trade in beef and beef products, etc., in this State; and (5) to limit and lessen competition in the purchase and sale of beef and beef products in this State. That by reason of said trust and combination formed as aforesaid respondents have (1) regulated, fixed and limited the amount and quantity of such products

sold and offered for sale; (2) that they have fixed and maintained the price of such products bought and sold in this State; (3) that they have lessened lawful trade and full and free competition in [\*133] the purchase and sale of such products; (4) that they are now unlawfully and illegally [\*\*\*15] fixing the price of said articles in this State; and (5) that they are restraining and limiting full and free competition in the purchase and sale of such products in this State. That there was in September, 1902, up to which time respondents were legitimate competitors of all others in the same business, formed under the laws of [\*\*384] New Jersey the National Packing Company, herein called the "National Company," with power to do a packing business and own and control the stock of other corporations. That the National Company was not organized in good faith for the purpose of engaging in the business authorized by its charter, but as a corporate scheme and device to effect an unlawful arrangement between respondents and others engaged in business in Missouri and the United States, whose names were to the relator unknown, to lessen, restrict and destroy lawful trade and full and free competition, and to regulate, fix and maintain prices, and to control and limit the amount and quantity of things to be sold and offered for sale in Missouri and in the United States; that the scheme was to have the National Company as a holding corporation to acquire the stock and assets of all corporations [\*\*\*16] and the plants of all individuals and partnerships, who, as competitors, did a packing business in Missouri and the United States, so that through the sole control of the National Company it could pursue such policy as would remove all inducement for competition among such parties; that pursuant to the scheme thus concocted the National Company acquired, and has since owned and used, in aid of the said scheme, the stock of respondents, previously engaged in business in Missouri as legitimate competitors, and has since wrongfully operated them ostensibly as separate and competitive companies, whereby the public has been misled and deceived; that it acquired, and has ever since owned, the stock and assets of the corporations, [\*134] whose names were unknown to informant, engaged in the same business in Missouri, and the United States, and used the same to carry out the said scheme; that by this method and scheme, lawful trade and full and free competition was lessened, restricted and destroyed, and the quantity and amount of meat products to be offered for sale was controlled and limited.

The answer admitted the legality of the incorporation of respondents, their authority to do [\*\*\*17] business in this State, and that as alleged in the informations they were at least until 1902 lawfully engaged in a competitive business with every other like concern in Missouri. Every other averment of the information was put in issue. The defenses presented by the answers were: (1) That the informations failed to state facts sufficient to constitute a cause of action; (2) That there was a misjoinder of parties defendant; (3) That the actions were barred by the Statute of Limitations; (4) That the statute creating the offenses charged had been repealed; (5) That the statute for the alleged violation of which forfeiture was sought was violative of the Federal Constitution; (6) That this court in an original proceeding has no jurisdiction to enforce the antitrust statutes. The commissioner being limited under the order of his appointment to a finding of the facts did not consider the above defenses, as they presented only questions of law.

Before the commencement of these proceedings the Attorney-General under the provision of sections 10332-10338, Revised Statutes 1909, caused an inquiry to be made to ascertain whether informations should be filed against respondents. This inquiry [\*\*\*18] was had before the same commissioner who subsequently took the entire testimony but who was then acting under the appointment of this court solely for the purposes of the preliminary inquiry.

[\*135] The testimony taken at this preliminary inquiry and which was thereafter introduced in evidence at the regular hearing before the commissioner, consisted of the articles of incorporation and licenses to do business in this State, of the Armour Packing Company, Armour & Company, Swift & Company, Morris & Company, Schwartzchild & Sulzberger, Cudahy Packing Company, Hammond Packing Company and St. Louis Dressed Beef & Provision Company; a statement showing the total number of cattle, hogs and sheep sold at the Kansas City stockyards in 1909, and the testimony of a number of witnesses interested in or connected in a business way with the respondents.

Much of the testimony taken before the commissioner in regard to matters antedating the formation of the National Company is irrelevant, and its consideration is not necessary to a determination of the issues involved. The record shows that whatever organization existed prior to the formation of the National Company was at its creation

then [\*\*\*19] terminated and the affairs of the preceding organizations closed up in July, 1902. To effectuate the organization of the National Company fifteen million dollars was borrowed by representatives of Swift & Company, Armour & Company and Morris & Company, the contract in regard thereto being signed by J. Ogden Armour, G. F. Swift and Edward Morris, heads of Armour & Company, Swift & Company and Morris & Company respectively. The agreement between these parties upon which was based the organization of the National Company provided that there should be formed a corporation with a bonded indebtedness and preferred and common stock, which should acquire the capital stock, plants, properties and business of Swift & Company, Armour & Company and Morris & Company, G. F. Swift, J. Ogden Armour and Edward Morris each agreeing that he would have conveyed to the new company at least eighty per cent of the capital stock of the [\*136] company of which he was the head. It was provided that the tangible properties of the three companies should be appraised and payments in bonds and stocks made to each company therefor in such proportion as the value of the assets of each company bore to the value [\*\*\*20] of the three.

[\*\*385] Each party was to deposit one million dollars with a trust company to secure the performance of his part of the contract.

Any party thereto might purchase for the new corporation when formed, the capital stock and the properties and assets of other corporations engaged in the packing business upon the joint account of all of the parties, each of whom was to pay to the one making such purchase such proportion of all payments so made as the actual appraised value of the tangible property agreed to be conveyed by his company bore to the aggregate appraised valuation of all property of Armour & Company, Swift & Company and Morris & Company to be conveyed to the new corporation.

Pursuant to said contract purchases were made of the stock of the Omaha Packing Company, Hammond Packing Company, United Dressed Beef Company, Anglo-American Provision Company and its subsidiary companies, and the St. Louis Dressed Beef & Provision Company. These purchases were made at a cost of ten millions of dollars. J. O. Armour, G. F. Swift and Edward Morris borrowed eight million dollars to pay on account of these purchases, securing same by the properties purchased for the proposed [\*\*\*21] consolidation, held by trustees and afterwards conveyed to the National Company. The organized capital of the National Company was fifteen million dollars; the purpose of its organization as declared by its articles of association, was to engage generally in the packing business, but the evidence discloses that it has been operated only as a holding company and as a means of enabling Armour, Swift and Morris to meet together [\*137] weekly and direct the corporations whose stock the National owned, as well as an instrumentality to enable the three packing companies, of which these parties were the heads, to form a substantial union of interests.

The directors of the National Company are all parties interested in or connected with the Armour, Swift and Morris interests. After the organization of the National Company weekly meetings were held by the representatives of Swift, Morris and Armour, in Chicago, and have been continued since the organization of the National Company. The National Company maintained an auditing department with general traveling auditors who were sent out to audit the books of the various subsidiary corporations. These auditors reported regularly to the general [\*\*\*22] auditor of the National Company. It also maintained various forces to look after the respective departments of the packing business, and reports were daily and weekly made by each subsidiary concern to the National Company in relation to all the business transacted by them. Daily reports were made of the amount of purchases of live stock, the prices paid therefor, the prices paid by Armour, Swift and Morris, and the prices they have paid, and also the amount of stock to be on the market during the day.

The National Company had head buyers who went on the market to aid the local buyers of the subsidiary concerns. Information was given each of such concerns as to the amount of purchases to be made by it and the prices at which these purchases should be made; the said concerns made their purchases of finished products through the National Company; they transmitted their wants and orders to it and it placed such orders with whichever company it saw fit. The National Company each day advised them as to prices at which it could purchase for them, and in some instances [\*138] the subsidiary concerns were permitted to buy directly if it was found to their advantage.

A private wire connected [\*\*\*23] all of the subsidiary corporations with the National Company, and daily information and reports relative to market conditions and the packing business were transmitted over this wire. The National Company charged no commissions on purchases made for the various corporations, but placed orders for each subsidiary corporation.

The profits and dividends declared by the National Company were derived from the dividends and profits of the subsidiary corporations, it having no other means of making profits. After the National Company received daily reports as to the purchases made and prices paid by each subsidiary corporation, this information was sent collectively to each of them to inform them what each of the other companies was purchasing and the prices being paid. The National Company also had a system of estimating costs which was substantially the same system adopted by Swift, Morris and Armour. This system and method was largely arbitrary and its basis was seldom changed. The selling price was determined by the estimated cost. The testimony is to the effect that the actual cost was usually less than the estimated cost, and that in St. Louis and at other points the price at which [\*\*\*24] meat was sold by subsidiary concerns of the National and by Armour, Swift and Morris, was substantially the same.

At the weekly meetings of the National Company statistical statements as to all of the subsidiary concerns of the National, as well as those of Armour, Swift and Morris, were submitted. These statements disclosed the number of cattle purchased by each subsidiary company of the National Company, as well as the Armour, Swift and Morris companies, the volume of shipments made by each subsidiary corporation to the various parts of the United States, and the prices at which packing products had been sold, together with the [\*139] working marginal price. After such meetings, the president of the National Company, through its employees in charge of the various departments, communicated with the heads [\*\*386] of the subsidiary corporations, advising them as to the amount of purchases to be made of live stock and the volume of shipments to be made to the various sections of the country. These matters were decided and determined upon at the weekly meeting of the National Company. Representatives of the subsidiary corporations of the National communicated with the representatives [\*\*\*25] of Armour, Swift and Morris relative to market conditions, prices to be paid and prices at which packing products were sold. The affairs of the National Company and its subsidiary corporations were guided and managed by Swift, Armour and Morris. The uniformity of prices at which live stock was purchased and packing products were sold by Armour, Swift and Morris, and the subsidiary corporations of the National Company, discloses the manner in which the affairs of the subsidiary corporations of the National were controlled and the course pursued by the Armour, Morris and Swift interests. These weekly meetings attended by Swift, Morris and Armour afforded the means and constituted the instrumentality by which these parties agreed upon the affairs and directed the business of each of said concerns.

Upon the facts as above set forth the special commissioner found substantially as follows: That there was an agreement and understanding between Swift & Company, Armour & Company and Morris & Company and the National Packing Company and the respondents herein, and the other companies whose properties and assets had been transferred to the National Packing Company, as aforesaid, as to the conduct [\*\*\*26] of their business made and entered into, with a view to lessen, restrict, limit and destroy free competition between said parties to said agreement in the purchase of cattle, [\*140] sheep and hogs, and in the sale of fresh meats and other packing house products in Missouri and in the United States, and that said agreement and understanding was made for the purpose of fixing and maintaining the prices of cattle, sheep and hogs and the prices of fresh meats and other packing house products in the State of Missouri and in the United States, and for the purpose of controlling and limiting the amount and quantity of fresh meats and other packing house products sold and offered for sale in the State of Missouri and in the United States. And that pursuant to said agreement and understanding Swift & Company, Armour & Company and Morris & Company and the National Packing Company, and respondents herein, and said other companies whose stock and properties had been conveyed to the National Packing Company as aforesaid, from the time said National Packing Company was incorporated until after the filing of the information in this case, did regulate and fix and maintain the prices of cattle, [\*\*\*27] sheep and hogs and the prices of fresh meats and other packing house products in the State of Missouri and in the United States, and did control and limit the amount and quantity of fresh meats and other packing house products, sold and offered for sale in the State of Missouri and throughout the United States.

Formal written exceptions to the report of the commissioner were filed, and these cases are for hearing thereon; they will be considered in the order of their presentation by respondents.

I. Respondents contend that the informations are insufficient in not specifically charging facts which show, if true, that respondents have violated the antitrust statutes. Before comparing or contrasting authorities *pro* and *con* on this subject, it is well, as was said by Mr. Webster on a memorable occasion, that we "glance [\*141] at the sun and take our latitude" lest in a general discussion of cases we are diverted from our true course and fail to readily reach the harbor of right conclusions.

**HN1** [↑] Although the sufficiency of an information in a *quo warranto* proceeding of the particular class of these under review may generally be measured by the rules applicable to civil cases, [\*\*\*28] as Brown, J., has clearly said in State *ex rel. v. Railroad*, 240 Mo. 35, our sun, if we may be permitted to continue the figure, in these cases is primarily the statute, which modifies the general rule in antitrust proceedings. It is as follows: "In any suit that is now pending, or which may hereafter be brought, in which it is charged that any person, corporation, partnership or association of persons has created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding in restraint of trade or competition with any other person, corporation, partnership or association of persons, it shall not be necessary to allege or plead the manner in which, or when or where such pool, trust, agreement, combination, confederation or understanding was made or effected." [Sec. 10310, R. S. 1909.] This statute, the terms of which are unambiguous, simplifies the information, in dispensing with the necessity of specific allegations in regard to the manner in which, the time when and the place where the pool or trust was effected, and is applicable not only to cases where the offenses charged to have been committed are wrong in themselves, [\*\*\*29] but also to those in which a misuser of a lawful right is charged. As to the distinction to be made in the pleadings in these two classes of cases, see State *ex rel. v. Railroad*, 240 Mo. 35, and especially the concurring opinion of Woodson, J., therein, I. c. 56, and State ex inf. v. Standard Oil Co., 218 Mo. I. c. 367.

An analysis of the information under review, the material allegations of which have heretofore been set [\*142] forth, will disclose, although we disregard the statute (Section 10310, *supra*) and determine the sufficiency of the pleadings by the rule applicable alike to either of the class of cases above referred [\*\*387] to, viz., those charging acts wrong in themselves or those involving the unlawful exercise of a right, that they are not only sufficient in containing plain and concise statements of the causes of action (Sec. 1794, R. S. 1909) but in specifically alleging all the facts necessary to properly charge violations of the antitrust statutes. The matter of the sufficiency of informations in *quo warranto* proceedings of this character was elaborately and learnedly discussed by Faris, J., in State ex inf. v. *Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. [\*\*\*301] 145, in which it was held that **HN2** [↑] although the pleadings viewed by the ordinary rules of procedure were vague, uncertain and indefinite, if, when measured by the terms of the antitrust statutes, they directly charged a violation of same in the language of these statutes, their sufficiency would not be questioned, especially when the fact appeared, as it did in that case, that no timely objections were interposed calling the court's attention to the defective pleadings or in any manner preserving such objections for consideration. In the cases at bar the demurrs to the informations, if they can be so considered, were incorporated into and made a part of the returns or answers; no rulings were demanded or made thereon and respondents are in the attitude of having answered over, which effects an abandonment of their demurrs. [State *ex rel. v. Bright*, 224 Mo. 514, 135 Am. St. 552.] If, therefore, the informations were not sufficient, measured by the rule applicable to this class of cases, and we disregard the literal terms of the statute (Section 10310, *supra*) which obviates special allegations, they may still be held sufficient under the carefully considered rule announced in the Lumber [\*\*\*31] case, *supra*, especially in view of the fact that here as in that case no objections were made or preserved in such a [\*143] manner as to entitle them to consideration by this court.

In the analysis of these informations to determine their sufficiency we have not overlooked the fact that they contain allegations unnecessary to a proper and precise averment of the offenses complained of; to illustrate: following the allegation that respondents were guilty of entering into and consummating the unlawful combination "among themselves and with each other" it is averred that like offenses were committed by them with "other corporations, partnerships and individuals engaged in the same business (whose names are to informant unknown)." Of this more at length later. It may be said generally, without hypercriticism, that the informations are inartificially drawn and do not as they should, in unnecessary verbiage, point directly and clearly to the material matters in issue; nevertheless,

although obscured with words, they are sufficient to charge the respondents with the creation and consummation of a monopoly, or, in other words, a conspiracy in restraint of trade. This being true, the statements [\*\*\*32] of unnecessary matter above set forth may be treated as surplusage. It was so ruled by this court in *State ex inf. Hadley v. Railroad*, 206 Mo. l. c. 42, which held unnecessary allegations in *quo warranto* proceedings to be surplusage. In passing, it may be pertinently said that the Hadley case, *supra*, in its further ruling in regard to this class of pleadings, announced that they were not governed by the general rules of civil procedure, a doctrine since clearly repudiated in *State ex rel. v. Grimm*, 220 Mo. 483, 119 S.W. 626, as noted by Brown, J., in *State ex rel. v. Railroad*, 240 Mo. l. c. 35. This is relevant only so far as it goes to show that the general rules governing the procedure in civil cases are applicable in *quo warranto* cases, and as a consequence that it was unnecessary to specify in the informations the other corporations or individuals which by reason of the unlawful combination came under [\*144] the control of the National Company, because proof of such fact was not necessary to establish respondent's guilt.

The general rule in civil cases is that [HN3](#)[<sup>↑</sup>] if a pleading sets forth sufficient facts to constitute a cause of action, plaintiff's right of redress is [\*\*\*33] not prejudiced by the fact that unnecessary statements are added, but they may be disregarded. [*Emmons v. Quade*, 176 Mo. 22, 75 S.W. 103; *Dunlap v. Kelly*, 105 Mo. App. 1, 78 S.W. 664; *Sumner v. Tuck*, 10 Mo. App. 269; *Van Raalte v. Epstein*, 202 Mo. 173, 99 S.W. 1077.]

In harmony with the rule announced in the Hadley case, *supra*, in regard to unnecessary allegations being regarded as surplusage, see also, *Murray v. McGarigle*, 69 Wis. l. c. 491; *Swift & Co. v. U. S.*, 196 U.S. l. c. 395; [State v. Thompson](#), 69 Conn. 720, 38 A. 868, and cases cited in 8 Cyc. 663, under note 9.

II. It is not necessary in these cases to enter into a discussion of the character and limitations of the power of the commissioner to take the testimony herein and report his findings thereon. This has been done in *State ex inf. v. Standard Oil Co.*, 194 Mo. l. c. 124, [91 S.W. 1062](#), and the Lumber Company case, *supra*, and the correctness of the conclusions there reached is not questioned. We have, therefore, taken and considered the testimony in these cases as preserved in the joint abstract, as well as the commissioner's findings thereon, regarding the latter as persuasive and to be accepted as correct where same, [\*\*\*34] which we did not find to be the case, was not affirmatively wrong. Without repeating the testimony at length, the relevant parts of which we have set forth in the statement with such succinctness as its prolixity will permit, it is disclosed that the National Company, organized [\*\*388] as shown by its articles as a packing company, but utilized entirely as a holding company to direct, regulate and control other corporations, became after its organization the owner by purchase of the [\*145] stock of the respondents, the Hammond Packing Company, the St. Louis Dressed Beef & Provision Company and of eighty per cent of the Swift, Armour and Morris companies and of the stock of other packing companies not necessary to be further referred to here. The prime purpose of the organization of the National Company was to enable the heads of the great packing companies, to-wit, Swift, Armour and Morris, who were instrumental in its creation, to form a substantial and effective union of interests and thereby control, not only the supply of live stock furnished to packing houses, but its output as a dressed product, as well as its distribution and the prices to be paid for or received for [\*\*\*35] same. In consummation of this scheme note the successive steps taken by the directory of the National Company not only to effectuate a union of interests but to completely control such interest when united: first, we find that the directors of the National Company were all interested in or directly connected with the Swift, Armour and Morris interests. When organized, the National Company, although its directory made no pretense of transacting any business authorized by its charter, held weekly meetings to direct and control the business of the various corporations whose stock it had acquired. At these meetings reports from all of the corporations whose stock was owned by the National were received in relation to all business transactions by them; these reports included daily reports of the amounts of live stock purchased, prices paid for same, prices made for live stock by the Swift, Armour and Morris Companies, and the amount of live stock to be on the market each day. Head buyers went on the markets at the various stockyards and aided the buyers of the various packing industries in purchasing stock for their respective companies. In addition, corrections were regularly given by [\*\*\*36] the National Company to each of the other corporations as to the amount of [\*146] purchases to be made by them respectively and the prices authorized to be paid; they were required to make their purchases of dressed or finished products through the National Company if made on another company, and if such order was not satisfactory to the National it was authorized to place the order elsewhere. Each day the National advised the various other corporations as to prices

to be paid by them for stock, and at times permitted them to buy directly if found to their advantage. A system of telegraphic intercommunication was in operation between the National and the other corporations, by which the former was enabled to know each day exactly what the other companies were doing in a business way. Much of the other testimony consists of a detailed account of the multiform methods adopted and pursued by the management of the National Company, in not only rendering itself at all times familiar with the business of each of the other corporations, but in practically controlling such business by regulating not only the amount of their purchases and the prices paid for stock, but in the sale of their [\*\*\*37] finished product and the price at which it was to be sold.

A careful survey of the foregoing facts amply sustain the finding of the commissioner that the property and assets of respondents were transferred to the National Company to enable it to conduct, and that it did conduct, their business with their approval and co-operation, which they were powerless to prevent after a sale of a majority of their stock, so as to lessen, restrict, limit and destroy free competition between said companies in the purchase of live stock for food and in the distribution and sale of fresh meats and packing house products, and that said transfers and agreements were made for the purpose of fixing and maintaining the prices of live stock used for food and the prices of fresh meats and other packing house products, and for the purpose of controlling and limiting the quantity [\*147] of such meats and other packing house products in the markets sold or offered for sale in this State, and that said respondents, as disclosed by the testimony, from the time said National Company was incorporated and until after the filing of the information in these cases, did regulate, fix and maintain the prices of [\*\*\*38] live stock for food and the prices of fresh meats and other packing house products and did control and limit the amount and quantity of fresh meats and other packing house products sold and offered for sale in this State.

This view of the fulness and force of the said testimony will, in the event of no prejudicial error being found in the proceedings, suffice to authorize an ouster under the statutes prohibiting unlawful combinations (Secs. 10298-10309, supra) and the general statute (Sec. 2635, R. S. 1909) authorizing judgments in cases of this character.

In reaching this conclusion we have not been unmindful of the rulings of this court ( State *ex rel. v. Asso. Press*, 159 Mo. 410, 467, 60 S.W. 91; State *ex inf. v. Cont. Tobac. Co.*, 177 Mo. 1, 37, 75 S.W. 737) that HN4[<sup>14</sup>] offenses such as are here charged, savor of crime and the judgments sought thereon should be rendered only upon clear and convincing proof. In the review of this evidence we have, therefore, considered the intent and purpose of the acts complained of, which if construed most liberally for the respondents, may not show an affirmative purpose to violate the law, but nevertheless the evidence is amply clear and convincing [\*\*\*39] to show not only a specific intent to restrain legitimate competition in [\*389] the articles and products involved and the consequent creation of a monopoly, but that by the creation of such a monopoly, trade was, in fact, unlawfully controlled and restrained. This conclusion is sustained by many authorities here and elsewhere construing the statute invoked as well as others of a similar character. [*Nor. Secu. Co. v. U. S.*, 193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436; State *ex rel. v. Inter. Harv. Co.*, 237 Mo. I. c. 369, 141 S.W. 672; State *ex inf. v. Armour* [\*148] *Pack. Co.*, 173 Mo. 356; State *ex inf. v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595; *People v. Sheldon*, 139 N.Y. 251, 34 N.E. 785; *People v. North Riv. S. R. Co.*, 121 N.Y. 582, 24 N.E. 834; *People v. Gas. Tr. Co.*, 130 Ill. 268, 22 N.E. 798; *Heim Brew. Co. v. Belinder*, 97 Mo. App. 64, 71 S.W. 691.]

The force and effect of this testimony is not weakened by the fact that on their face the articles of incorporation of the National Company, the instrumentality through which respondents affected the unlawful combination and agreement, which prevented competition and restrained trade bore evidence of the organization [\*\*\*40] of said company for legal purposes, if, as we hold it has been shown here, such organization grew out of and was a part of an unlawful conspiracy between respondents to control the output, price and distribution of the articles and products in which they dealt and thus practically render impossible all legitimate competition ( *Finck v. Schneider Gr. Co.*, 187 Mo. I. c. 244, 86 S.W. 213). The general rule in regard to combinations of the character here under review as announced in *Swift & Co. v. United States*, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276, is not inappropriate in this connection; that HN5[<sup>15</sup>] although the separate elements of a scheme may be lawful if found to be bound together by a common intent as parts of an unlawful scheme to effect a monopoly, the plan may make the parts unlawful. The liability of respondents for violations of the statutes in question, if committed in this State, as we hold them to have been, will not be affected by the fact that the instrumentality through which they operated in violating the law

was a corporation which had been organized for ostensibly legitimate purposes in another State. [[Euston v. Edgar, 207 Mo. 287, 105 S.W. 773.](#)]

From all the foregoing [\*\*\*41] we find that the combination of respondents under the direction and management of the National Company resulted in a common management, a community of stock interests, an arbitrary fixing of the purchase and selling prices of live [\*149] stock for food and the dressed product thereof and a limiting at the will of the management of the quantity or amount of live stock to be bought or sold, all of which resulted in the lessening or destruction of competition in this State between respondents and the other corporations whose stock was acquired by the National Company.

III. The contention that these proceedings are barred by the Statute of Limitations might be entitled to serious consideration under the statute (Sec. 1914, R. S. 1909) which subjects actions brought by the State or for its benefit to a like bar to that applicable to actions between private parties; and as these proceedings are for penalties or forfeitures [HN6](#)[<sup>↑</sup>] the three years' Statute of Limitations (Sec. 1890, R. S. 1909) would apply were it not for the fact that the pleadings allege that at the time they were filed, and the testimony shows that, not only at the time of the institution of these suits but thereafter respondents [\*\*\*42] were members of and participated in the unlawful pool, trust and combination. The contention of the bar by limitations or from laches is, therefore, without merit.

IV. Respondents further contend that there is a misjoinder of parties defendant; that one corporation cannot be joined with others in a *quo warranto* proceeding for an abuse or misuse of corporate rights, because such a charge has relation to the individual contract of each of such corporations with the State, and that there is no such joinder of rights or interests as to authorize one proceeding against all. As has been heretofore shown, [HN7](#)[<sup>↑</sup>] informations in *quo warranto* are governed by the rules of pleadings in civil cases. The [HN8](#)[<sup>↑</sup>] respondents are charged not only with the same offenses, but such offenses are alleged to have been joined and to have [\*150] been committed in an abuse and misuse of their franchises growing out of the connection of their transactions with each other. Under this state of facts, if guilty, the State is entitled to only one satisfaction, if it may be so designated, to-wit: A forfeiture of the corporation's franchises, or in the case of foreign corporations, a revocation of their licenses [\*\*\*43] and such penalties as may be adjudged in addition thereto. [Sec. 10304, R. S. 1909.] This being true, the joint proceedings of the State against the respondents, in the two actions, which might well have been brought as one, is in conformity with the Code of Civil Procedure (See Secs. 1734 and 1795, R. S. 1909) prescribing in the one instance who may be joined as defendants, and in the other what causes of action may be united in one petition. The invoking of the authorities of these civil procedure statutes to sustain a joinder in the cases under review, finds confirmation in *State ex inf. v. Standard Oil Co.*, 218 Mo. I. c. 362, where the matter was ruled upon in conformity with the conclusion reached herein, and a number of Missouri cases cited in support thereof.

V. If the contention of respondents as to the repeal of the statutes under which these proceedings were brought was seriously made, it has been abandoned in [\*\*390] their brief and arguments. It will suffice to say that these statutes were repealed and a new act was passed in relation to the entire subject-matter of pools, trusts and discriminations at the session of the Forty-seventh General Assembly (Laws 1913, [\*\*\*44] pp. 549-555), but this act in no manner changed the burden of the offenses necessary to authorize the proceedings herein, but simply made additions to the acts declared in the former statute to be necessary to constitute an unlawful combination in restraint of trade. Respondents [\*151] are, therefore, in nowise materially affected by this legislation and their contention is lacking in merit.

VI. [HN9](#)[<sup>↑</sup>] A defense of former acquittal or prior adjudication of the matters here involved was urged by counsel for respondents in the oral argument, but was in no manner pleaded or otherwise preserved for review. Therefore, whether the rule in criminal or civil procedure be applied, this question is not here for our consideration.

VII. The contention that the antitrust statutes are violative of the Constitution of the United States, urged by respondents in their answer, but seemingly abandoned in their briefs, is so completely foreclosed against respondents' contention by the ruling of this court in *State ex inf. v. Standard Oil Co.*, 218 Mo. I. c. 376, which was affirmed by the Supreme Court of the United States (224 U.S. I. c. 290), that time and space need not be taken in

discussing this question. [\*\*\*45] The validity of these statutes under the Constitution of this State has also been settled. [[Finck v. Schneider Gr. Co., 187 Mo. 244, 271, 86 S.W. 213.](#)]

Finding no error in these proceedings, a judgment of forfeiture of the franchises of the St. Louis Dressed Beef & Provision Company should be entered, dissolving and ousting it from all corporate rights under the laws of this State, and in addition that a fine of twenty-five thousand dollars be imposed against it; and it appearing that the other respondents, to-wit: the Hammond Packing Company, the Armour Packing Company, the Morris Company and Swift & Company are foreign corporations authorized to do business in this State, it is ordered, for the violations of the law aforesaid in their abuse and misuse of the authority conferred on them, that their licenses to do business in [\*152] this State be revoked, and in addition that a fine of twenty-five thousand dollars be imposed against each of said corporations; and that each of said fines so imposed be paid into the State Treasury for the use and benefit of the State of Missouri, on or before the 15th day of June, 1915.

St. Louis Dressed Beef & Provision Company, ouster and [\*\*\*46] a fine of twenty-five thousand dollars;

Hammond Packing Company, revocation of license and a fine of twenty-five thousand dollars;

Armour Packing Company, revocation of license and a fine of twenty-five thousand dollars;

Morris & Company, revocation of license and a fine of twenty-five thousand dollars;

Swift & Company, revocation of license and a fine of twenty-five thousand dollars.

Upon the payment of the fines severally assessed against each of said corporations, within the time above limited, the forfeiture of the franchises of the St. Louis Dressed Beef & Provision Company, and the revocation of the licenses to do business in this State of the other corporations herein named as respondents, will be stayed pending the further order of this court, upon the conditions hereafter to be set forth by this court in its order and judgment in regard hereto. All of which is so ordered.

*Woodson, C. J., and Brown and Faris, JJ., concur, Woodson, C. J., in separate opinion; Faris, J., dubitante as to what is said concerning section 10310, Revised Statutes 1909; Graves, J., concurs in result of the opinion as to judgment of guilt as found in majority opinion, but [\*\*\*47] thinks that under the peculiar facts in this case the fines are excessive and dissents as to the amount of the fines; Bond, J., dissents in part and concurs in part in separate opinion; Blair, J., having been of counsel, not sitting.*

**Concur by:** WOODSON; BOND (In Part)

## Concur

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[\*153] WOODSON, C. J. (concurring). -- In my opinion the Legislature has the power and authority to control all the pleadings and procedure in this court the same as it has in the circuit courts, and it is wholly immaterial whether it pertains to proceedings in *quo warranto*, other original writs, or any other matters intrusted to the keeping of this court by the founders thereof.

The cases cited by Brother Bond on page 10 of his dissenting opinion (p. 168, *post*) do not, in my opinion, announce a contrary doctrine, and therefore, do not support the proposition that the Legislature has no such authority.

No such question was involved, considered or discussed in any of those cases, except by way of illustration, and that was against my learned brother's contention.

The question there decided was whether or not the statutes mentioned in those cases applied to the pleadings and practice in the Supreme [\*\*\*48] Court, and not that the Legislature had no authority to enact laws governing those matters, if in its wisdom it deemed it wise to so do.

In the discussion of this subject, Judge Napton, in the case of State [ex rel. v. Stewart, 32 Mo. 379](#), l. c. 383, by way of *obiter*, expressly declares the law to be contrary to the doctrine announced by my learned associate, Judge Bond. The ruling of this court, as announced in that case by Judge Napton is expressed in the following language:

"There is no doubt that this court is mainly intended by the Constitution as an appellate tribunal. In some instances original jurisdiction has been given to it, but chiefly with a view to enable it to exercise more effectually its superintending control over inferior courts. [\*\*391] Its power in proceedings in *quo warranto* seems to be a departure from the general policy [\*154] evinced in the construction of the court. Whether this jurisdiction was designed to extend to that class of informations which, under the English Statutes, had become essentially civil actions, commenced and conducted in the name of a public officer, but really for the mere ascertainment and settlement of private rights, [\*\*\*49] is a question which might justify some hesitation and consideration, if it were necessary now to determine it. The Legislature, it is certain, has furnished this court with none of the machinery for trying issues in fact, and in practice such trials are altogether without precedent. These informations are attended with all the forms and must progress through all the stages incident to any other writ. There are pleas and demurrers, issues in law and in fact, trials by jury, motions for new trials in arrest of judgment, and writs of error. The issue of fact by the common law must be tried in the county where the franchise is situated. [Tancred, p. 3; Ang. & A. on Corp., p. 870, sec. 762.] If such a proceeding is entertained by this court, it must be conducted solely according to the forms of the common law, for neither the statute of W. & M. nor of Anne is in force here; *nor does our own statute apply to the Supreme Court*, but is exclusively confined to the circuit courts."

This language clearly recognizes the power of the Legislature to control the pleadings and practice of this court in proceedings of this character, should it deem it wise to do so.

The Stewart case just mentioned [\*\*\*50] was cited with approval by this court in the case of State [ex rel. v. Job, 205 Mo. 1, 103 S.W. 493](#), l. c. 25, [103 S.W. 493](#), where the court, in speaking through Fox, P. J., said:

"It is insisted by learned counsel for appellants that the relators were entitled to judgment of ouster by reason of the failure of respondents to answer on October 3, 1903, and it is urged that no sufficient answer or return was made to this proceeding until January [\*155] 25, 1904. In support of this insistence our attention is directed to State ex inf. v. [Vallins, 140 Mo. 523, 41 S.W. 887](#). In response to this contention it is sufficient to say that a complete answer to the contention is found in State ex inf. v. Beechner, 160 Mo. l. c. 78, [60 S.W. 1110](#). That case clearly marks the distinction between informations in the nature of *quo warranto* at the relation of a private person by leave, and proceedings by *quo warranto* instituted by the Attorney-General by virtue of his office. It was there expressly ruled that since 1855 there has been no difference in the rules applicable to filing of amended returns and answers in proceedings of this character in the circuit court, and the right to amend [\*\*\*51] an answer in any kind of a civil suit. In pointing out the distinction it was there said: 'The plaintiffs rely upon State ex *informatione* [Crow, Attorney-General, v. Vallins, 140 Mo. 523, 41 S.W. 887](#), and argue that it was there held that no amendment in a *quo warranto* proceeding was allowable. But the case at bar is very different from the Vallins case. This is a proceeding in the nature of a *quo warranto* at the relation of a private citizen, begun in the circuit court, whereas the Vallins case was a proceeding by *quo warranto* instituted by the Attorney-General *ex officio* in this court. This case could only be filed by leave of court, is controlled by the *quo warranto* statute, and the statute relating to the amendments in civil cases in a circuit court. The Vallins case was filed by the Attorney-General *ex officio* in this court, without leave, as he had a right to do, was a proceeding by *quo warranto*, which this court had a right under the Constitution to issue, was controlled by the common law practice in *ex officio* cases of *quo warranto*, was not affected by the statute in relation to amendments, for as was shown in the Stewart case (State [ex rel. v. Stewart, 32 Mo. 379](#)) that statute applies only to circuit courts and not to this court, and therefore no amendment was permissible in that case.'"

[\*156] The other cases cited in the dissenting opinion, as previously stated, have no application to the proposition in hand.

From these observations it is clearly to be seen that the cases cited do not support the doctrine that the Legislature is powerless to control the pleadings and procedure in this court.

But upon principle, *the mere fact* that this court has authority to issue original writs, as I understand Judge Bond to contend, does not prohibit the Legislature from legislating upon and controlling those matters.

If that is true then by parity of reasoning the Legislature has no authority over the pleadings and practice in the circuit courts, in that or any other regard, for their authority is also derived from the Constitution, sections 1 and 23 of Article 6.

"Section 1. The judicial power of the State, as to matters of law and equity except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county [\*\*\*53] courts and municipal corporation courts."

"Section 23. The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace and all inferior tribunals in each county in their respective circuits."

As previously stated, the cases cited by Judge Bond simply hold that the statutes there cited only applied to the circuit courts and not to the Supreme Court.

Now, if the Constitution contains no inhibition against the authority of the Legislature to control the pleadings and practice in the circuit courts, then how can it be logically contended that it cannot control those matters in this court?

[\*157] The authority of this and those courts to issue such writs is derived from the same authority -- the Constitution -- and the authority of the one is in no manner enlarged over or restricted as compared to the other; nor is the authority of the Legislature restricted in controlling the pleadings in the one any more than in the other.

If there is any difference in that regard, the authority of the circuit courts is broader because the authority conferred upon those courts to issue such writs [\*\*\*54] is granted in general terms, while that of this court and the various courts of appeals is granted in specific or limited terms.

So, in my opinion, the cases cited by Judge Bond, instead of holding that the Legislature has no power to prescribe the rules of pleadings and practice in this court, are, upon the other hand, authorities to the contrary; and upon principle, as I have tried to point out, the Legislature does possess that power and authority, for the reason that this [\*\*392] and those courts stand upon the same bottom and possess exactly the same power and authority in issuing writs of *quo warranto* and all other original writs.

It would be a most dangerous doctrine for this court to announce that the Legislature had no power to control the rules of pleading and practice herein.

While it is true, and it must be conceded, that the Legislature has no power to shear this court of its jurisdiction over the issuance and trial of such writs, yet there is nothing in the letter or spirit of the Constitution even remotely indicating that the Legislature may not, in its wisdom, control the pleading and procedure in this court in such matters.

With these observations in view [\*\*\*55] I now return to the statutes in question. The most casual reading of them will show upon their faces that they apply to this court as well as to the circuit courts, and no sound reason can be advanced for holding they are not binding [\*158] upon this court as well as upon those courts. All are creatures of the Constitution, and derive their authority in that regard from the same instrument.

II. The doctrine in the Williams case, [221 Mo. 227](#), is not sound, and was not followed by this Court in Banc in the case of State ex inf. v. [Arkansas Lumber Co., 260 Mo. 212, 169 S.W. 145](#). The information in that case is in all respects substantially the same as is the information in this case; and also in that of the case of State ex inf. v. [Standard Oil Co., 218 Mo. 1, 116 S.W. 902](#), where the same ruling was had.

In both of those cases it was held that where the information or petition for the writ charged that the conspiracy was formed for an illegal or unlawful purpose, then the facts constituting the conspiracy need not be stated, but upon the

other hand, that where the conspiracy was formed for doing a lawful act in an unlawful manner, then the petition should state the facts constituting [\*\*\*56] the conspiracy. This is elementary and is recognized by all of the courts on both sides of the Atlantic.

In the consideration of this question, this Court in Banc, speaking through Faris, J., in the case of State ex inf. v. Arkansas Lumber Co., 260 Mo. 212, 169 S.W. 145, l. c. 279, 169 S.W. 145, in clear and terse terms stated that rule in the following language:

"It is urged by learned counsel for respondents that the above case is decisive of their contentions upon this question in the instant case. Respondents, however, lose sight of the distinction which ought to be drawn under the law between the Missouri Pacific case, 240 Mo. 35, and the one at bar. In the Missouri Pacific case respondents were charged, in substance, with entering into an unlawful combination to do a lawful act; that is to say, an unlawful combination to fix a rate for carrying passengers not exceeding the statutory [\*159] rate which they were permitted by law to charge. Since by statute they might charge a maximum rate of three cents per mile for carrying a passenger, and since even pursuant to the alleged unlawful conspiracy into which it was charged they had entered, they were not seeking or conspiring [\*\*\*57] to charge a rate beyond the maximum rate allowed by statute, they were endeavoring only *to do a lawful act by an unlawful means*. This distinction is clearly drawn in the Standard Oil case, supra, 218 Mo. l. c. 366."

All pools, trusts and combinations mentioned in the statutes in question, in restraint of trade, etc., are unlawful, both at common law and under the statutes mentioned, and the rules of pleading prescribed in sections 10298 to 10301, Revised Statutes 1909, are in conformity with the common-law rule before stated, as has been held in this State in numerous cases.

III. Since reading the dissenting opinion, I have been convinced thereby that the penalties imposed by the majority opinion upon the respondents are excessive.

As I understand the policy of the State, it is not to unjustly or oppressively penalize the business interests of its citizens, but is to protect and encourage people to come into this State, establish and conduct legitimate business herein. Of course, that does not include business transacted in violation of the laws of the State of Missouri and good morals, whether transacted by citizens of this or any other State.

In the case at bar the record [\*\*\*58] shows that prior to the filing the amended information in this case, the respondents voluntarily dissolved the National Packing Company and ceased to transact business through that medium, which was the heart of the unlawful conspiracy complained of in this case and the means through which that conspiracy was carried into execution. This shows that the respondents had in good [\*160] faith, prior to the filing of the amended informations in these cases, deserted the path of sin and thereby opened up the business avenues to the equal competition of all; and also enabled the consumer of this country to purchase the products of the packing house from the cheapest vendor.

Since these facts appear from the record, and that such institutions are absolutely necessary for the well being of the State and citizens thereof, I can see no valid reason for placing the heavy fines mentioned upon them; and so believing, I am in favor of reducing the fines imposed by the majority opinion to at least one-half of the sums stated therein.

Since the foregoing paragraph III was written, and before the majority opinion was concurred in, the fine in each case of fifty thousand dollars was reduced to [\*\*\*59] twenty-five thousand dollars against each defendant, in accordance with my suggestion. I therefore concur in the majority opinion.

**Dissent by: BOND (In Part)**

## **Dissent**

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I.

BOND, J. (dissenting in part and concurring in part). -- Being unable to agree to all the recitals of facts contained in the majority opinion or to its discussion of the law, I have prepared this statement of my views of both in this case.

The evidence shows that on May 31, 1902, a contract was made between Messrs. Armour, Swift and Morris for the formation of a New Jersey corporation, with a capital stock of ninety millions of dollars, to which should be conveyed [\*\*393] the shares of stock of other corporations then owned or to be acquired by the parties. At the time of entering into this agreement the parties thereto owned or controlled large corporations bearing their respective names and engaged in the packing business. A forfeit of one million dollars was put up by each of them to secure the performance of this contract. [\*161] Shortly thereafter Messrs. Sulzberger and Cudahy, who are also owners of or control large packing corporations, were admitted as parties to such contract on the terms therein specified.

[\*\*\*60] Thereupon certain New York bankers were requested to provide the money for the capital of the proposed corporation. After negotiations to that end these bankers, anticipating the panic of 1903, declined to finance the project, and Sulzberger and Cudahy withdrew from the contract and took down their deposits. In the meantime, the original contracting parties had purchased the stock and assets of certain other corporations engaged in the packing industry, including the Hammond Packing Company and the St. Louis Dressed Beef & Provision Company and borrowing for that purpose eight millions of dollars from a New York bank and expending two millions additional in the making of such purchase.

Upon the debacle of their scheme of mammoth consolidation the purchasers of these properties found themselves involved to the extent of their outlays and in possession of assets which could not be devoted to the purpose had in view when they were acquired. The matter was submitted to their counsel and it was determined to obtain a loan of fifteen millions of dollars by putting up the properties so purchased and other securities as collateral, and to organize a holding and operating company with a capital [\*\*\*61] stock of fifteen millions of dollars, the shares of which should be issued to the co-owners of the properties so purchased, in proportion to their respective interests. This was done by the issuance of the stock of that company into the following proportions, to-wit: Sixty thousand, one hundred and sixty shares to J. O. Armour; seventy thousand and forty-seven shares to G. F. Swift; twenty thousand, seven hundred and eighty-three shares to Edward Morris, and one share each to qualify certain [\*162] directors. The company was duly organized under the corporate name of the National Packing Company under a charter issued in New Jersey in March, 1903.

Neither Armour, Swift nor Morris conveyed to the National Packing Company any of the stock or assets of the large corporations bearing their respective names and which they had contracted to put into the "big merger" which had collapsed. Neither the joint abstract nor the report of the commissioner sustains the recital in the majority opinion, that eighty per cent or any part of the assets of said corporations were conveyed to the National Packing Company. The capital stock and assets of the National Packing Company bore a very inconsiderable [\*\*\*62] relation to the value of the outside properties owned or controlled by Messrs. Armour, Swift and Morris. The total meat and slaughtering business of the National Packing Company done in the year 1909 throughout the United States was seven per cent of the entire business of that kind done during that year. The total business done by the large corporations bearing the names of Armour, Swift and Morris for the same time was about twenty-nine per cent of the entire business carried on in the United States.

The commissioner appointed to take testimony in this case reported that the evidence did not show a monopoly of the meat and packing business if all of that which was done by the Armour, Swift and Morris concerns was added to that done by the National Packing Company.

The facts and the conclusions therefrom of the commissioner as to the formation of the National Packing Company are thus set out in his report:

"G. F. Swift, J. O. Armour and Edward Morris were, respectively, large owners of the stock of their respective companies, each standing at the head of the management of his company. These three men in the summer of 1902 formed a plan to consolidate the [\*163] large packing [\*\*\*63] companies of the country and entered into a written agreement setting out in detail the plan of the proposed consolidation which embraced the formation of a new corporation to which should be transferred the plants and properties of these three companies, thereby showing that these three companies had intended to consolidate themselves into a large corporation even if no other

company joined them. They agreed to buy up other concerns with a view of embracing them in the consolidation, and with that end in view did actually buy the plants and properties and capital stock of the respondents and of the various other companies hereinbefore named. When, owing to the financial panic, it was found impossible to make the consolidation that had been contemplated, these three men organized the National Company and conveyed to it the capital stock and properties of respondents herein and of the other companies which had been bought. These properties were transferred to the National Company in full payment of its \$ 15,000,000 capital stock, and the whole of it was issued to Swift, Armour and Morris in proportion to the interests which each had held in the properties conveyed and turned over to [\*\*\*64] the National Company. The latter owned the capital stock and properties of respondents and said other companies, its entire capital stock was owned by the individuals, Swift, Armour and Morris in certain proportions and large amounts. They stood at the head of Swift & Company, Armour & Company and Morris & Company respectively. What followed after that was what naturally would be expected: Swift, Armour and Morris elected the entire board of directors of the National Company, which was composed of these three and others who are officers and employees of the companies which they headed. That board of directors, of course, controlled the National Company, which established its general offices in Chicago where those of the other three companies were [\*164] located. The directors of the National Company met every week at its offices. At that same time many of these directors were also members of the board of directors of Swift & Company, Armour & Company and Morris & Company. Those who were not such members were connected with and held responsible positions in these same three companies. Of course, there came before the directors of the National Company all important information as [\*\*\*65] to how the company was conducting its [\*\*394] business, what cattle it was purchasing, how its meats and other products were selling, and what prices they were obtaining. This board, of course, from week to week, gave directions as to how the business of the National Company should be conducted in view of conditions which existed from time to time. Reports were sent to the office of the National Company from all of its subsidiaries, and from its branch houses and consignees all over the country, by private wire and otherwise, and among those reports were received statements of the prices at which Swift & Company, Armour & Company and Morris & Company were selling their fresh meats in New York, Boston and other points. These statements were received by the agents of the National Company from the representatives of Swift & Company, Armour & Company and Morris & Company at the selling points, and transmitted by the agents of the National Company to its main offices in Chicago. This condition of things existed harmoniously from the time of the incorporation of the National Company in 1903 until after the filing of the information in this case. It is very hard to believe that the directors [\*\*\*66] of the National Company would so conduct that company as to injure the business of either Swift & Company, Armour & Company or Morris & Company, and it is equally hard to believe that the directors of either of these last three companies would conduct its business so as to injure the business of the National Company. There is no [\*165] direct evidence that either Swift & Company, Armour & Company or Morris & Company had any agreement or understanding of any kind with the National Company as to the conduct and management of business. While some of the witnesses testified that they never knew of any arrangement, agreement or understanding of any kind between any of these companies, yet there is no hesitancy in finding that there was an unlawful agreement and understanding as to the conduct of business between Swift & Company, Armour & Company and Morris & Company and the National Company and the respondents herein and the other companies whose property and assets had been transferred to the National Company."

In addition, the commissioner reported that the Hammond Packing Company and the St. Louis Dressed Beef & Provision Company, who are the only defendants in the *quo warranto* [\*\*\*67] filed by the Attorney-General, No. 16090, were engaged in business in this State, the former as an Illinois corporation under a State license and through a plant established at St. Joseph, Missouri, the latter under a Missouri charter and through a plant established at St. Louis, and had been so engaged since 1891. The second information filed by the same officer at the same time (June 20, 1910) was directed against three foreign corporations bearing the names of "Armour Packing Company," "Swift & Company," and "Morris & Company," and also licensed to do business in this State. That *quo warranto* is number 16089. As originally filed the information therein did not refer to the formation of the National Packing Company. The three defendants in the information were indicted and tried and acquitted in the Federal court at Chicago for an alleged violation of the Federal Antitrust Act. As to what took place at and after that trial the joint abstract shows, to-wit:

"W. E. Weber, called as a witness by the defendants, and being first duly sworn, testified as follows:

[\*166] "I am, and have been for about seven years, general auditor of the National Packing Company, and as such general [\*\*\*68] auditor have had general supervision and control of all branches of the accounting of the National Packing Company and its subsidiary companies.

"On July 17, 1912, the National Packing Company sold and transferred all packing house properties and branch houses owned or controlled by it, and delivered same on that day, for a cash consideration. At the same time, there was likewise sold all of the property of the various companies, the stock of which was held by the National Packing Company. The properties so sold were actually delivered to the purchasers on that date, and since then the National Packing Company has been in actual liquidation, and had done no business whatsoever, except business incident to such liquidation. These sales and these dispositions of its properties, as well as those of the companies the stock of which was owned by it, were made in good faith and for a valuable consideration. The property of the Hammond Packing Company, located at South St. Joseph, Missouri, was sold and delivered to the Armour interests, and the property of the St. Louis Dressed Beef & Provision Company, located at St. Louis, Missouri, was sold and delivered to the Swift interests. Since [\*\*\*69] the sale and delivery of said properties to the Armour and Swift interests, respectively, the National Packing Company has had no interest whatsoever either directly or indirectly, in the operation of the business conducted on said properties, and the same has been owned, managed, controlled and directed solely by the Armour interests with respect to the Hammond Packing Company properties, and by the Swift interests with respect to the St. Louis Dressed Beef & Provision Company properties.

"I was a witness, and in constant attendance, at the trial in the case of the United States v. Swift et al., tried at Chicago, Illinois, in the United States District [\*167] Court, which resulted in an acquittal of defendants and a judgment thereon upon the 26th day of March, 1912. In that case there was charged a violation of the Sherman Antitrust Act in the formation and operation of the National Packing Company and its various alleged subsidiaries, the defendants being officers and directors of that company. Copies of the indictment, verdict and judgment in that case are herewith presented as exhibits.

"The testimony offered by the State here, is a portion of the transcript of the evidence [\*\*\*70] in that case."

About one year after these events, to-wit, on November 6, 1913, the succeeding Attorney-General filed amended *quo warrantos* against the Armour, Swift and Morris Companies, charging them with complicity in the organization of the National Packing Company and making the same allegations with reference to the violations of the antitrust laws of this State, which are contained in the *quo warranto* filed against the Hammond and St. Louis Dressed Beef & Provision Companies.

When this information was filed the testimony had been fully taken by the commissioner, who made a preliminary examination before the proceedings were begun, and who had been reappointed after the filing of the *quo warranto*.

The two causes were submitted on the same joint abstract, after oral arguments by counsel for both parties, upon the evidence taken in No. 16090, and upon the pleadings and report of the commissioner and exceptions thereto filed by the respective respondents.

## II.

When the original informations were filed in this court the respective respondents [\*\*\*395] therein made their returns or answers, in which, first, they challenged the [\*168] sufficiency of the information [\*\*\*71] to charge any offense under the laws of this State; secondly, a general denial; thirdly, a plea of laches; fourthly, a plea that the statutes under which the proceedings purported to have been begun had been repealed.

Upon the presentations of these pleadings the court reappointed the former commissioner to report the facts only, but gave him no power to report or pass upon any question of law. The whole question in this case turns on two propositions: Did the information charge any offense under the antitrust laws of this State? Second, was there any evidence to sustain the report of the commissioner that such laws had been violated?

Taking these in order:

In issuing a *quo warranto* upon the information given to it by the Attorney-General *ex officio*, this court acts in virtue of its original jurisdiction conferred by the Constitution. The exercise of that jurisdiction cannot be controlled by the legislative body, nor can the pleadings in such actions be regulated by statute any further than this court permits or sees fit to adopt such regulation, as a reasonable rule for administering its jurisdiction as a court of the first instance. The Legislature cannot limit the original [\*\*\*72] jurisdiction granted to this court, nor (what would be the same thing) limit the exercise of that jurisdiction. This has been repeatedly ruled in *quo warranto* when brought in this court by the Attorney-General *ex officio* as in the cases under submission. [State *ex rel. v. Stewart*, 32 Mo. 379; State *ex inf. v. Beechner*, 160 Mo. I. c. 78, [60 S.W. 1110](#); State *ex rel. v. Job*, 205 Mo. I. c. 1, [103 S.W. 493](#); State *ex rel. v. Vallins*, 140 Mo. 523, [41 S.W. 887](#); State *ex rel. v. Eby*, 170 Mo. I. c. 497, [71 S.W. 521](#).]

It necessarily follows that the statute, Revised Statutes 1909, sec. 10310, quoted in the majority opinion, [\*169] which dispenses with any pleading of "the manner in which," or when or where such pool, etc., was made or effected, if it applies in civil suits in the circuit court, as also the succeeding statute, Revised Statutes 1909, sec. 10312, dispensing with the same allegations in an indictment for a felony under the antitrust act, if either be valid or constitutional, are not decisive of the information under review, for under the settled law of this State neither of these statutes can control the pleadings in the two cases at bar.

The correct rule as to the [\*\*\*73] allegations in *quo warranto* to forfeit a corporate charter is thus expressed: "In other words, whenever the information in *quo warranto* avers that the respondent has a corporate existence, and the evident purpose of the proceeding is to have its charter forfeited for nonuser, misuser, or usurpation of powers, then the pleader must plead specifically the acts of nonuser, the acts of misuser, or of usurpation relied upon for grounds of forfeiture, so that the corporation may know what it is called upon to meet and defend." [State *ex rel. v. Grimm*, 220 Mo. I. c. 483, [119 S.W. 626](#).]

The above rule was to establish the necessary averments in a proceeding for *quo warranto* brought in the circuit court. It was approved in express terms in a recent case in Banc where it was also ruled that an information filed here by the Attorney-General, charging respondents with making an agreement to "lessen and destroy competition" in the carriage of passengers and freight and to "fix and regulate rates" without specifying what rates had been agreed upon, or the time fixed for their continuance, was insufficient to state a misuse, abuse or perversion of the corporate powers of respondent. [\*\*\*74] The court added: "The allegation by the Attorney-General that the agreement or combination entered into by respondents is an illegal usurpation and an abuse and perversion of corporate power, is merely a conclusion or presumption of law on [\*170] the part of the pleader, and not being predicated upon facts set forth in the information, does not supply the lack of such definite facts as should have been specifically pleaded." [*Schiffman v. Schmidt*, 154 Mo. 204, [55 S.W. 451](#); *Mallinckrodt Chemical Works v. Nernich*, 169 Mo. 388, [69 S.W. 355](#); *Gibson v. Railroad*, 225 Mo. 473; *Lackawanna Coal & Iron Co. v. Long*, 231 Mo. 605, [133 S.W. 35](#).] It was accordingly ruled that the demurrs to the information in question must be sustained and the cause was dismissed. [State *ex rel. v. Railroad*, 240 Mo. I. c. 35 and 50.]

The conclusion above stated is clearly correct, and it is peculiarly pertinent in this case, in view of the fact that the court quoted in its opinion in that case the statute (section 10310, *supra*) so strongly relied upon in the majority opinion, its attention not being called to the fact that the information in the case was one *ex officio* on the part of the Attorney-General [\*\*\*75] in this court, and hence the statute in question was inapplicable.

Under the authority of these two cases in Banc the rule must be considered as settled in this State that an information of the character of the present states no cause of action if it alleges in effect merely a violation of sections 10298 to 10301 inclusive of the present revision without *definitely* and *specifically* stating the facts and circumstances showing guilt under those sections. Such general allegations when made in a pleading, contain no more of the elements of an offense under the antitrust statutes, than would be embodied in a general accusation of violating that statute. In other words, allegations of the information which simply quoted the statutory terms forbidding agreements to lessen competition, fix, regulate and maintain prices or to regulate quantity and amount of output, had no legal efficacy whatever in stating any cause of action against the respondents charged with violating such section, or at least no greater potency in stating a cause of action than if the pleader had named the respondents [\*171] and merely added that they were violating the statutes in question -- [\*396] [\*\*\*76] setting

them out in his pleading. It follows therefore that the objections to such of the causes of action as were attempted to be stated in the informations by *general averments* that the respondents had violated the provisions of the antitrust statutes, must be sustained. These attacks upon the information are explicitly set forth in the returns in proceedings falling within the original jurisdiction of this court. Having power in such cases to prescribe the forms of pleading and judge of the sufficiency of the pleadings, and not having delegated that function to its commissioner, it is the duty of this court to render its judgment in the matter. In so doing, it is fully supported by the recent decision of Faris, J., in State ex rel. v. Arkansas Lumber Co., 260 Mo. I. c. 212, [169 S.W. 145](#), where an imperfect pleading, not a totally defective one, was sustained against an *ore tenus* objection argued after the finding of the commissioner, who in that case, unlike the present, was empowered to pass upon questions of law. In the case at bar, the objection was made *in limine* in the return of respondents; besides the omission of a pleading to state any cause of action whatever [\*\*\*77] may be objected to without any formal pleading and at any time. As to the causes of action stated in the present information by averring in general terms that respondents violated the several antitrust acts, there was a total failure to state any legal cause of action against them. In such cases, the rule is essentially different from that applicable to a pleading which makes an imperfect statement of a cause of action. The latter can only be reached by a seasonable and suitable objection. The former is always open for review with or without a formal pleading.

### III.

After eliminating from the present informations the causes of action based solely on the *defective allegations* [\*172] contained therein, there still remains for consideration so much of the information as may allege any other cause of complaint. The portion of the information relied upon for that purpose states in substance that respondents, the Hammond Packing Company and the St. Louis Dressed Beef Company, organized the National Packing Company as a trust instrumentality and by means of the practices of that corporation in Missouri and in the United States conducted a non-competitive and pooling business through [\*\*\*78] a unified corporate management and user of their assets and corporate powers in aid of the unlawful purpose for which said holding company was created. That previous to the organization of the National Packing Company its subsequently purchased corporations had been "legitimate competitors" in the cattle and meat business in Missouri and in the United States; that to carry out its unlawful purpose said corporation voted the stock, collected the dividends, and made use of the assets of the respondents and other "individuals and partnerships whose names are to informant unknown . . . with a view to lessen, restrict and destroy lawful trade and full and free competition . . . in products dealt in by respondents, and to regulate, fix and manage the prices thereof and to limit the quantity sold in Missouri and the United States . . . and have fixed and regulated such prices and are now from time to time unlawfully so doing," with a prayer for the forfeiture of the charter and license of respondents and the imposition of a fine.

The antitrust acts of Missouri were first enacted in 1889. Shortly thereafter a practical counterpart of them was enacted by the National Congress and known as [\*\*\*79] the Sherman Act. Congress has not amended its first enactment. The Legislature of Missouri has amplified and broadened its *antitrust law* by successive amendments (1891, 1895, 1901, 1907), but without altering [\*173] their essential character and nature in any material respect. One of the earliest cases in this State arose in the St. Louis Court of Appeals in a suit brought by the National Lead Company to collect a bill for sales of its goods made in this State, the defense being that the plaintiff in that case, a holding corporation, was engaged in a violation of the antitrust laws of this State then in force, and therefore amenable to the statute depriving it of the power to collect the price agreed to be paid for its products. The evidence in that case conclusively showed that the plaintiff corporation was created to take over the assets and property in the hands of certain trustees of an unlawful combine with a capitalization of ninety million dollars and engage in the actual violation throughout the United States and in Missouri of the provisions of the Sherman Act and the laws of this State prohibiting agreements, pools, trusts, combines and conspiracies in restraint of trade. [\*\*\*80] The only defense by the plaintiff in that action to these charges was the *fact of its corporate entity*. The first question determined in that case was that the original trust agreement under which the predecessor of the plaintiff was organized, disclosed by its terms and the methods and practices of the parties thereto that it was entered into and carried on "to suppress competition, fix the price of commodities and limit their production and restrain trade." After making this finding the court added: "But the illegality of the organization and operation of the National Lead Trust, does not involve the conclusion that the purchaser of its assets, whether a natural or artificial person, succeeded also to the status of that illegal combination under the laws enacted in this State for the punishment of pools, trusts

and conspiracies. For the mere purchase by one of the assets which another has employed for an illegal purpose, does not of itself imply that they will be used by the purchaser for the purpose of effectuating the objects [\*174] to which they had been devoted by the seller. Such an intent on the part of the purchaser, if inferable, must be gathered from proof of [\*81] all the circumstances [\*397] characterizing the transaction, as well as his subsequent conduct."

The court then found that the original Lead Trust, after assuming its corporate form, engaged in the *same* business in this State and elsewhere which it had carried on before that metamorphosis took place. Hence there was nothing in such change which could exempt its transaction in this State from the application thereto of our antitrust laws, and added: "Hence it must follow that if the stockholders and governing officers of the plaintiff corporation combined with each other to violate any of the provisions of the section under review through the instrumentality of their corporate entity, then the corporation composed by them was a party to such illegal combination within both the letter and the spirit of the above section of the Act of 1891. Or concretely stated, that a combination which is illegal under the **antitrust law**, cannot be operated under the cloak of a corporation by its constituent members of governing bodies." Citing authorities. [National Lead Co. v. Grote Paint Co., 80 Mo. App. I. c. 247 at 267, 270.]

The doctrine of that case has been affirmed in this State [\*82] in the exhaustive opinion in the Standard Oil case, 218 Mo. I. c. 452, and elsewhere. [To the same effect Standard Oil Co. v. United States, 221 U.S. I. c. 75, paragraphs A and B; United States v. Am. Tobacco Co., 221 U.S. I. c. 176.]

While it is true the corporation known as the National Packing Company was not *preceded* by an illegal combination of the corporations whose property it took over, for the informations explicitly stated that prior to the formation of the National Packing Company all the corporations, including respondents, whose assets and stock it acquired, were legitimate competitors, [\*175] and that fact distinguishes it from the facts in judgment in the case of the National Lead Company v. Grote Paint Co., *supra*, yet the allegations of the information do in effect charge that the National Packing Company was contrived and incorporated for the specific purpose of enabling the two respondents and other unknown persons and corporations to enter into a trust or combine in violation of the laws of this State, and they go further and allege that the subsequent operation of the National Packing Company in this State and elsewhere was in contravention of such statutes. [\*83] Under these allegations, showing the unlawful practices of that corporation, to all of which the two respondents were charged to be participants, a case was stated against them under the decisions cited. For if these allegations were shown to be true by the evidence adduced by the commissioner, then a *prima-facie* case was made. I therefore think that the information did state a cause of action against respondents, based on the allegations of the unlawful purpose and practices of the National Packing Company.

#### IV.

As to the sufficiency of the evidence to make a *prima-facie* case against the two respondents, I also think the proof, though not positive nor direct, affords a basis clearly justifying the deductions of the commissioner that there was no competition in this State between the two respondents whose plants were respectively located at St. Louis and St. Joseph, nor between them and any of the agencies representing the three corporations mentioned in the second information, since the three persons who controlled these also owned the National Packing Company. But the evidence wholly fails to show any specific instances of the fixing or regulating of the prices of cattle products, [\*84] meats and other commodities dealt in by the respondents [\*176] in the two informations. And it shows beyond question as found by the commissioner, that there was no actual monopoly obtained by the instrumentality of the National Packing Company, for its business bore a wholly insignificant relation to the mass of slaughtering business done at Kansas City. Neither is there any substantial evidence that the beef, hog and cattle business in this State was limited as to its quantity or the sale of its products by the operations of the National Packing Company, nor is there any evidence in the record that the prices of any of the commodities dealt in by the five respondents to the two informations were enhanced beyond the standard fixed by a fair market, on account of the existence of the National Packing Company and the business done by it in this State, or that the consumer or producer of such products or outside dealers have been injured by the operations of the National Packing Company. The most that can be said of the testimony contained in the joint abstract is that it discloses the basis of a legitimate inference that the five defendants did not compete with one another, and [\*85] that this happened

solely from the existence of the holding corporation owned by Messrs. Armour, Swift and Morris. The unification of a relatively small proportion of their interests in that form, the properties they bought for the abandoned project, and the control thereby exercised over business of the two other defendants, the Hammond Company and the Dressed Beef Company, precluded the possibility of independent competition on the part of the two latter companies in the commodities dealt in by them. I am convinced that the necessary consequence, acts and deeds of the defendants in organizing the National Packing Company and in conducting through it for their joint interest a non-competitive business in this State was to contravene the first of the following sections of the statute in force at the time these informations were filed. Those sections are to-wit:

[\*177] "Sec. 10298. *Combination in Restraint of Trade Declared a Conspiracy.* Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, [\*\*\*86] manufacture, [\*\*398] purchase or sale of any product or commodity in this State; or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. [R. S. 1899, sec. 8965, amended Laws 1907, p. 377.]

"Sec. 10299. *Pool and Trust Agreements Defined.* Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any other person or persons to regulate, control or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or participate in any pool, trust, agreement, contract, combination, confederation or understanding, to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, [\*\*\*87] repair, any product of mining, or any article or thing whatsoever of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, shall be punished as provided for in this article. [Laws 1907, p. 377.]"

[\*178] It has become the settled policy of the country that trade shall be competitive. Whether that is the true ideal of society as a philosophic principle need not be discussed, since all judicial inquiry has been foreclosed by the national and state antitrust laws. To enforce these is the simple duty of the court, and it is no answer to this to say that a particular combination created in contravention of the statute should be exempt from its penalties because its business operations have not been injurious to the consumer of its products. The statute was designed to forbid the making of a combination having the potentiality to injure the public, and denounces such as conspiracies in restraint of trade. Even at common law, an unlawful conspiracy was indictable without proof of any overt act. The statute has embodied [\*\*\*88] that idea in the first section quoted above and the offense thereunder was technically complete when the National Packing Company was put into operation under an agreement of its creators that it should conduct the business of certain corporations owned by them and turned over to it without competition.

These statutes must be given a reasonable interpretation. This method of construing such statutes was established in a great judgment recently delivered, when the Supreme Court of the United States held that similar Federal statutes must be interpreted by the exercise of reason. That decision, when made, met a downpour of rant and was assailed by blasts of flatulent criticism, but, being founded on the *rock of reason*, it withstood both the rain and wind of verbosity, and emerged from the storm, in the serene light of correct thinking, as an enduring canon of legal science.

The judgment of the Chief Justice of the United States in these cases has been quoted and adopted by the Supreme Court of Missouri in the recent case in Banc. [State ex inf. v. International Harvester Co., 237 Mo. l. c. 369, 141 S.W. 672.]

[\*179] In the nature of things there could be no competition [\*\*\*89] between the two subsidiary corporations (respondents in the first information) for their capital stock was owned by the National Packing Company and they were operated by its direction and through its representatives, and this undisputed fact warranted the commissioner in finding that these two respondents under the mask of a holding company were violating the antitrust act (R. S.

1909, sec. 10298) which forbade agreements to lessen competition. But neither this fact nor any other evidence in the record tended to show that the two respondents were *not competing* with other corporations not owned or controlled by the National Packing Company. Nor that absence of competition between the two respondents had affected in any degree the market prices of meat and its products in this State, or regulated its standard, or diminished the output of such products in this State.

Neither was there any evidence in the record that a producer or consumer or a competitive dealer, was injured by the unification of ownership created in the formation of the National Packing Company. The bare fact that a single ownership was in contravention of the letter of a section of the antitrust laws, is all that [\*\*\*90] can be deduced from the evidence in this case. These facts in my opinion are determinative of the proper judgment to be rendered herein.

In considering that question, attention must be given to the further fact that this holding company was voluntarily dissolved and its property sold to purchasers for cash *before* the second information was filed and about two years before the submission of the case. It is therefore apparent that the law will be fully vindicated and the antitrust act wholesomely administered by ordering ouster of the charter of the one and revocation of the licenses of the others. Such orders to be suspended upon a showing by respondents that their present business operations are not conducted [\*180] by non-competitive methods, and will not be so carried on hereafter. Such ouster and revocation to be enforced in the absence of such showing or whenever it may be made to appear in the future that the respondents have violated the antitrust laws of this State, and to enforce such penalty jurisdiction should be retained.

This in substance has been our method of dealing with other cases when the respondents, though acting theretofore in violation of the law, have [\*\*\*91] *after* judgment made such amends. Here the law has been seemingly complied with before judgment and after an acquittal of the officers of the corporation under an indictment for forming such corporation.

When the respondents dissolved the National [\*\*399] Packing Company in advance of the decision of this case, they gave up the only thing upon whose existence any infraction of the laws of this State was predictable in the averments of the information. Necessarily therefore when the National Packing Company ceased, the non-competitive methods of respondents under that agency also ceased.

The informations admit that prior to the National Packing Company *all* of the respondents were "legitimate competitors." Seemingly, therefore, that status has been now regained. At least, there is nothing in this record that shows to the contrary. This record is a transcript of the one made on the trial of the three individuals who incorporated the National Packing Company for violation of the Federal antitrust law. They were acquitted in that proceeding.

The national and State idea on this subject is to foster the growth and expansion of business by normal and fair methods and through honest [\*\*\*92] instrumentalities. It was not designed to check the development of industrialism in any of its forms or departments. Its only object is to prevent by the national and State law on this subject injury to the producer, or to the consumer, [\*181] or a destruction of the rights of independent dealers. It is not the purpose of these acts in any way to limit or control the combinations of capital which are essential to the conduct of enterprises beyond the ability of single projectors. Those ends in my opinion will be completely achieved by the judgment heretofore indicated. For that reason, I dissent to the aggregate fine suggested in the majority opinion of a quarter of a million dollars, believing that the record affords no just basis for such a punishment or for any moneyed judgment beyond a taxation of costs against all the defendants except the Morris Company, of Maine, which had no existence at the date of the conspiracy alleged; hence the proceeding should be dismissed as to it.

## Munter v. Eastman Kodak Co.

Court of Appeal of California, Third Appellate District

October 26, 1915, Decided

Civ. No. 1349

**Reporter**

28 Cal. App. 660 \*; 153 P. 737 \*\*; 1915 Cal. App. LEXIS 389 \*\*\*

HARRY MUNTER, Appellant, v. EASTMAN KODAK COMPANY, (a Corporation), Respondent

**Prior History:** [\*\*\*1] APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

**Disposition:** The judgment is affirmed.

### **Core Terms**

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dealers, articles, prices, retail dealer, retail, commerce, manufacture, anti-trust, terms, purchaser, restrictions, conditions, commodity, trade discount, combinations, customers, selling, coal, tobacco company, coal company, merchandise, wholesale, supplies, damages

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Local Governments > Claims By & Against

#### [HN1](#) [down arrow] **Private Actions, Remedies**

The Cartwright Antitrust Law, 1907 Cal. Acts, pp. 984-987, at § 11, provides that in addition to the criminal and civil penalties herein provided, any person who shall be injured in his person or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > General Overview

**HN2** [down] **Private Actions, Remedies**

In a civil action for damages based upon the Cartwright **Antitrust Law** (Act), 1907 Cal. Acts, pp. 984-987, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property is injured by the very fact of the existence and prosecution of such unlawful trust or combination. To be "injured in business or property," within the contemplation of said Act, is where the injury directly results from the fact of the existence of the trust. That is, where the business or property directly sustains injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. While one whose business or property is injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the Act for double the damages he actually suffers from the injury so inflicted, yet he cannot maintain an action based upon the Act if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, does not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN3** [down] **Public Enforcement, State Civil Actions**

There is no violation of the Cartwright **Antitrust Law**, 1907 Cal. Acts, pp. 984-987 in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity. The control by one person or corporation of a number of other concerns engaged in its line of business can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN4** [down] **Public Enforcement, State Civil Actions**

It is within the legitimate province of a manufacturer and wholesale vendor to select its own customers, and to sell at higher prices to one than to another, provided, that such discrimination in prices is not the result of a combination, agreement, or conspiracy between it and others, the object of which is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public.

## **Headnotes/Summary**

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### **Headnotes**

Cartwright Anti-trust Law--Action for Damages--Refusal to Sell Goods--Pleading--Insufficient Complaint.--A complaint in an action for damages based upon the provisions of section 11 of the Cartwright anti-trust law (Stats. 1907, pp. 984, 987), fails to state a cause of action, where the gist of the charge against the defendant is that it is the owner or in control of a large number of different establishments engaged in the manufacture and sale as a wholesaler of certain articles mentioned in the complaint, and that it has refused to sell any of its goods to plaintiff at the prices at which and upon the conditions upon which it sees fit to sell the same kind of articles or goods to other retail dealers.

Id.--Damage--Essential to Show.--While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is

all that need be proved to support and sustain the charge, yet, in a civil action for damages based upon the Cartwright anti-trust law, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust and combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination.

Id.--Business Combination--When Unlawful--Monopoly.--There is no violation of the statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity, and the control by one person or corporation of a number of other concerns engaged in its line of business can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare.

Id.--Fixing of Prices of Manufactured Goods--Selection of Customers--Right of Manufacturer.--A manufacturer or wholesaler has not only the right to fix the prices for his goods, but he has the right to establish the prices at which such goods shall be sold by retailers, so long as such acts are not the direct effect or result of a combination formed and maintained by him and others to create restrictions in trade or commerce; and he has also the right to select his own customers, and to sell at higher prices to one than to another, provided that such discrimination is not the result of a combination, agreement, or conspiracy between him and others to monopolize or restrict trade or commerce or to prevent legitimate competition.

## Syllabus

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The facts are stated in the opinion of the court.

**Counsel:** James L. Nagle, for Appellant.

Samuel Knight, for Respondent.

**Judges:** HART, J. Chipman, P. J., and Ellison, J., pro tem., concurred.

**Opinion by:** HART

## Opinion

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[\*661] [\*\*738] HART, J. The defendant demurred to the second amended complaint in this action on both general and special grounds and the same was allowed, without leave to amend. Thereupon judgment was entered in favor of the defendant.

From the judgment so entered, the plaintiff prosecutes this appeal.

The action is for damages and purports to be based upon the provisions of section 11 of the so-called Cartwright **antitrust law**. (Stats. 1907, pp. 984, 987.) Said section reads as follows:

**HN1** [↑] "In addition to the criminal and civil penalties herein provided, any person who shall be injured in his person or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where [\*\*\*2] the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not."

The defendant, a corporation, is and had been for some time prior to the commencement of this action engaged, in the city of San Francisco, in the business of wholesale dealing in [\*662] photographic supplies, kodaks, cameras, and the usual or essential equipments thereof.

The plaintiff was for more than two years prior to the seventeenth day of January, 1911, (the alleged time at which the alleged cause of action against the defendant accrued to the plaintiff) engaged at No. 716 Clement Street, in the said city of San Francisco, in the business of selling, exclusively at retail, "kodaks, cameras, photographers' supplies and other articles [\*\*\*3] furnished and supplied exclusively by defendant to the dealers in said goods."

The complaint in substance alleges: That the defendant, as a wholesale dealer, has at all times mentioned in the complaint furnished and "continues to furnish" to the trade in the city of San Francisco and elsewhere the articles above mentioned at a certain trade discount to enable the retail dealers "to carry on the said business and annually issued a circular in which they fixed the price at which various dealers (retail) could sell the said articles"; that (upon information and belief) there are certain retail dealers to whom the defendant will sell said articles "at what the defendant terms 'dealer rates' under and by virtue of an agreement between said defendant and said dealers, and refuses to sell to any other person, although engaged in the business of dealers, unless the said defendant recognizes the said dealer as a dealer and refuses to said dealer the trade discount granted to other dealers in the same general business of dealers in said articles." It is further alleged that the defendant has made and entered into an agreement with dealers to whom it furnishes and sells said articles whereby [\*\*\*4] the latter "bound themselves for one year, commencing on the 1st day of January, 1911, not to sell or dispose of said articles to any person engaged in said business as a retail dealer but the person who was as such dealer recognized by the defendant as a retail purchaser and not as a dealer and did agree and combine to pool and directly and indirectly did unite their said several interests so that the price that they should secure said articles for, and which were to be furnished by said defendant, and the companies, persons and associations under the defendant's control would be cheaper and less so that they could, as dealers, sell to the general public, and in pursuance of said conspiracy and combination the said plaintiff was prevented from obtaining said articles herein alleged on [\*663] dealers' terms and prices"; that the defendant, for the purpose of obtaining the exclusive privilege of supplying the dealers of the city of San Francisco and elsewhere with the said articles and so controlling the market with respect thereto has, "by means of purchase and otherwise, obtained control of a large number of corporations, copartnerships, and other associations engaged in the [\*\*\*5] manufacture of said articles so that persons engaged in the purchase and sale of said articles to the general public cannot obtain the said articles from any other person than defendant, and said dealer, in order to obtain said articles at a trade discount, the same as other dealers, must be first recognized by the said defendant."

It is averred that, up to the seventeenth day of January, 1911, the plaintiff was known to and recognized by the defendant as a retail dealer in kodaks, cameras, and photographers' supplies, and up to said date sold said articles to the plaintiff, as a retail dealer, at a trade discount, "so that he could again sell the same to the general public at the retail price fixed by the said defendant in the aforesaid annual circular"; that up to the time mentioned the plaintiff could as a retail dealer purchase said articles from the defendant or any of the corporations, companies, and manufactories owned and controlled by it; that, on the said seventeenth day of January, 1911, the defendant, "unlawfully, fraudulently, and knowingly, for the purpose of injuring, depriving, cheating and defrauding plaintiff of said business, notified plaintiff that it would refuse [\*\*\*6] to sell, to deal any longer with, or recognize plaintiff as a dealer in the said articles and goods, and refused to sell to him at the prices with a trade discount for which they sell to other dealers in the city of San [\*\*739] Francisco or to recognize plaintiff as a retail dealer in said goods or allow the plaintiff to order from them or purchase at prices for which they sold the same articles to other dealers at retail"; that the plaintiff, since said date, has been unable to purchase as a retail dealer any of the articles or goods mentioned from the defendant; that the defendant has by means of threats "and other acts" prevented other companies it controls from selling the said articles or goods to the plaintiff at the prices at which the defendant and its confederates sell the same goods to the different dealers recognized by them in the city of San Francisco, [\*664] "and has compelled said dealers to aid and assist them in preventing the plaintiff from obtaining or purchasing said articles or goods from any of them under the penalty of refusing to receive any further orders from them as dealers or to recognize or deal with them as dealers or to sell to them at the prices [\*\*\*7] sold to dealers recognized by them."

It is further alleged that the plaintiff, on the seventeenth day of January, 1911, had on hand or in stock and undisposed of a large quantity of the said goods and articles which he had previously purchased from the defendant, the latter then recognizing him as a dealer, and that said stock was of the value of eight hundred dollars, "which in ordinary course of trade would sell at retail for the sum of \$ 1200.00, providing the plaintiff should be treated as a dealer by defendant and permitted thereafter to purchase at a trade discount"; that the plaintiff, having been engaged in the said business for a great number of years, had established a large and lucrative business from which he derived a profit of \$ 3.50 per day, and that in building up said business he had expended a large sum of money and became widely known as a dealer in the goods and articles "of the defendant and its many confederates aforesaid, all of which was well known to the defendant, and the good-will on said day was of the value of \$ 1,200.00." The plaintiff further declares that he would not have engaged in said business of handling the defendant's goods "but for the false [\*\*\*8] and deceitful pretenses of said defendant that it would recognize the plaintiff as theretofore as a dealer and would treat him as such and permit the purchase of said articles and goods as such dealer for the purpose of sale, the same as other dealers."

The complaint proceeds: "That in the terms of sale issued to retail dealers in the defendant's goods and articles, all goods are sold to dealers at dealers' rates, upon the express condition that they may be resold in strict accordance with the conditions set forth in the notice of terms of sale and among the said conditions was that said dealers could not sell to any person for a price less than the retail prices fixed by defendant."

The demurrer was properly sustained.

While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance [\*665] of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, HN2<sup>↑</sup> in a civil action for damages based upon our anti-trust statute, it is incumbent [\*\*\*9] upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in Krigbaum v. Sbarbaro, 23 Cal. App. 427, 433, [138 Pac. 364]: "To be 'injured in business or property,' within the contemplation of said law, as we understand it, is where the injury has *directly* resulted from the fact of the existence of the trust--that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the antitrust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful [\*\*\*10] acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination."

It must at once become manifest, upon reading the complaint in this action, that, boiling its averments down to their simplest statement, the limit of the intendments thereof does not extend beyond the mere assertion of a claim that the defendant, for some reason not divulged by that pleading, refused to recognize the plaintiff as a retail dealer within the purview of the terms and conditions of its annual circular and so has refused to sell to him its goods and wares.

There is, as will readily be noted, no statement in the complaint that a combination has been formed and is being maintained by and between the defendant and its alleged allied companies to create or carry out restrictions in trade or commerce," (Stats. 1907, p. 984, sec. 1, subd. 1); or "to limit or reduce the production, or increase or reduce the price of merchandise [\*666] or of any commodity" (Id., subd. 2); or "to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity" (Id., subd. 3); [\*\*\*11] or "to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in the state" (Id., subd. 4); or to violate any of the provisions of subdivision 5 of section 1 of said act.

There is no averment from which it may be concluded or even inferred that the prices at which the defendant and others connected [\*\*740] with it sell the articles named to retail dealers or the prices at which the defendant requires the retail dealers to sell said goods to the public are in excess of what ought to afford only a fair and reasonable return or profit on the manufacture and retail sale of the same, and consequently there is a failure to disclose that the public is or will be injured by the prices so fixed.

**HN3**[<sup>↑</sup>] There is no violation of the statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity. The control by one person or corporation of a number of other concerns engaged in its line of business [\*\*\*12] can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare. In other words, the statute against predatory trusts or business combinations is violated only where a combination has been formed and is maintained for the purpose and having the effect of creating and fostering restrictions in trade or commerce or preventing legitimate competition in the manufacture and sale or purchase of merchandise, produce, or any commodity. No such combination is charged in the complaint. As before stated, the gist of the charge against the defendant is that it is the owner or in control of a number of different establishments engaged in the manufacture and the sale as a wholesaler of the articles mentioned and that it has refused to sell any of its goods and wares to the plaintiff at the prices at which and upon the conditions upon which it sees fit to sell the same kind of articles or goods to other retail dealers.

[\*667] The defendant not only has the right to fix its own prices as a manufacturer or wholesaler, but also the right to establish the prices at which its goods are to be sold by retail dealers therein [\*\*\*13] to whom it sells such goods for retail sale, so long as those acts are not the direct effect or result of a combination formed and maintained by it and others to create restrictions in trade or commerce, or, in short, to maintain a monopoly of the trade, and, as stated, nowhere does the complaint directly declare that this was the fact here. The defendant has the further right to sell its goods to whomsoever it pleases and to refuse to sell to particular persons. **HN4**[<sup>↑</sup>] In other words, it was and is within its legitimate province as a manufacturer and wholesale vendor to select its own customers, and, moreover, to sell at higher prices to one than to another, provided, of course, that such discrimination in prices is not the result of a combination, agreement, or conspiracy between it and others, the object of which was or is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public, the protection of whose welfare is the first consideration of all anti-trust legislation. (*Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745]; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, [128 Pac. 1041]; [\*\*\*14] *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, [60 C. C. A. 290, 64 L. R. A. 689]; *Union Pacific Coal Co. v. United States*, 173 Fed. 737, [97 C. C. A. 578].)

In *Grogan v. Chaffee*, it is said: "There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained." Again, the court in that case said: "It is not every limitation on absolute freedom of dealing that is prohibited, and it is the tendency of the modern decisions to view with greater liberality contracts claimed to be in restraint of trade."

The Continental Tobacco case, above cited, involved an action wherein the plaintiff sued for damages under the provisions of the federal anti-trust law. It was alleged in the complaint that the defendant, Tobacco Company, and its agent had refused to sell to or supply the plaintiff with the goods of the company at as low a figure as it sold to others and that the result was that he was forced out of business. The [\*668] federal court, affirming the judgment [\*\*\*15] entered upon an order by the court below sustaining a demurrer to the complaint, said: "The tobacco company and its employee sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or *quasi* public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales

of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, [\*\*\*16] by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral."

In the case of Union Pacific Coal Co. v. United States, 173 Fed. 737, [97 C. C. A. 578], the defendant was prosecuted for the violation of the federal anti-trust act, the gist of the indictment being that the defendant with other defendants named in the indictment had combined to force one Sharp, a retail dealer in coal, and a purchaser of that article from the defendant, coal company, out of business by refusing to sell and transport to him any of the coal mined by said company. The court held that the evidence did not show a combination, and, among other things, said: " [\*\*741] The gist of the offense charged in the indictment was not the refusal of the coal company and Moore to sell coal on the purchaser's terms, or of the railroad companies and Buckingham to transport it. It was the combination so to do, and if there was no combination there was no offense. There was no law which forbade the coal company to prescribe the terms on which it would sell its product [\*\*\*17] to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal [\*669] to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and vendors of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not a violation of the Sherman Antitrust Act charged in the indictment. ( Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, [8 Am. Rep. 159]; Whitwell v. Continental Tobacco Co., 125 Fed. 454, 460, 461, 463, [60 C. C. A. 290, 296, 297, 299, 64 L. R. A. 689]; 1 Eddy on Combinations, [\*\*\*18] sec. 292; Allgeyer v. Louisiana, 165 U.S. 578, 589, 17 Sup. Ct. Rep. 427, [41 L. Ed. 832]; In re Greene, [C. C.], 52 Fed. 104, 115; In re Grice, [C. C.], 79 Fed. 627, 644; Walsh v. Dwight, 40 App. Div. 513, [58 N. Y. Supp. 91, 93]; Brown v. Rounsvell, 78 Ill. 589.)"

Thus it is clear that the defendant was entirely within its rights in fixing reasonable terms and conditions upon which alone the retail trade might handle its goods. There is nothing in the complaint which indicates or tends to disclose that the terms and conditions established and published by the defendant were or are unreasonable or, as before stated, that their effect is or will be to create restrictions in trade or commerce or of preventing or in any way circumventing free and unhampered competition to the detriment of the public. And it may with no impropriety be further suggested in this connection that the complaint does not show that the plaintiff was willing or able to accept and abide by those terms and conditions.

It is clear to our minds that the complaint utterly fails to make out a case of injury to [\*\*\*19] property or business under the provisions of the state anti-trust act. In other words, it is plain that the plaintiff has not by the averments of his complaint shown that the defendant by the acts alleged against it has violated the inhibitions against the maintenance of [\*670] trusts or combinations whose object is to restrict trade or commerce or to destroy legitimate competition within the meaning and intent of the so-called Cartwright anti-trust law.

The judgment is affirmed.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

## Frey & Son, Inc. v. Cudahy Packing Co.

District Court, D. Maryland

December 9, 1915

No Number in Original

**Reporter**

228 F. 209 \*; 1915 U.S. Dist. LEXIS 983 \*\*

FREY & SON, Inc., v. CUDAHY PACKING CO.

### Core Terms

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do business, cases, Warehouse, nonresident corporation, transaction of business, customers, Clayton Act, orders

### LexisNexis® Headnotes

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Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

#### HN1 Clayton Act, Jurisdiction

Section 12 of the Clayton Act provides for the bringing of a corporation into the court of any district in which, under that Act, it may be sued, by service of process upon it in any district of which it is an inhabitant, or wherein it may be found.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

#### HN2 Antitrust & Trade Law, Clayton Act

Section 4 of the Clayton Act provides that suit may be brought in the district in which the defendant resides, or is found, or has an agent. Section 12 states that such suit, when against a corporation, may be brought, not only in the judicial district in which it is an inhabitant, but also in any district wherein it may be found or transacts business.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

**HN3** [down arrow] Antitrust & Trade Law, Clayton Act

A corporation may be sued under the Clayton Act where it transacts business. It cannot escape the obligation to respond because no agent of it, of the rank and character qualified to be served for it, can be there found. Suit may be there brought and process may issue to a district in which it cannot deny its liability to service.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

**HN4** [down arrow] In Rem & Personal Jurisdiction, In Personam Actions

Whether a nonresident corporation is doing business specially, so as to subject it to suit at the instance of a particular defendant, may depend in part upon the relation of the things it is doing to the cause of action asserted.

**Opinion by:** [\*\*1] ROSE

## Opinion

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[\*209] ROSE, District Judge. The plaintiff is a Maryland corporation, carrying on business in the city of Baltimore. It claims that the defendant has, by doing a thing forbidden by the anti-trust laws of the United States, injured it in its business. To recover for the damage so brought about this suit was instituted.

The defendant is an Illinois corporation. It appears specially for the sole purpose of moving to quash the marshal's return of service. It says that (1) it is not liable to suit in this district, because it neither resides, is found, transacts business, or has an agent herein; and (2) if liable herein, it cannot be brought into court by service upon the individuals actually served by the marshal.

The first contention alone raises any vital issue. It is true that there are high authorities for the rule that a nonresident corporation can ordinarily be sued only (1) in the district in which it is carrying [\*210] on business; (2) by service upon some agent or officer appointed by and representing it; and (3) in which some state law makes it amenable to suit as a condition of doing business therein. *United States v. American Bell Telephone* [\*\*2] Co. (C.C.) 29 Fed. 17.

The third of these requirements is obviously inapplicable here. This is a suit brought in a federal court, to recover for a wrong done in contravention of a federal law, which law specifies the district in which such suit may be prosecuted.

Nor in this case is the second of much greater real importance. Ordinarily, process either of a state court or of a District Court of the United States cannot be served beyond the territorial limits of the state or of the district, as the case may be. A nonresident corporation may be doing business in a district, and therefore theoretically be liable to suit therein; but if it is not represented therein by an agent, upon whom process against it may be legally served, it cannot, against its will, be brought into court. The framers of the Clayton Act, however, have taken care that suits authorized by it shall not be so obstructed. The twelfth section of that statute **HN1** [up arrow] provides for the bringing of a corporation into the court of any district in which, under that act, it may be sued, by service of process upon it in any district of which it is an inhabitant, or wherein it may be found. If the defendant is properly suable [\*\*3] in this district, the objection to the representative character of the so-called agent, upon whom the process herein was served, would not end the suit here. It could have no other effect than to delay the progress of the case until process could be served upon the defendant in the district of which it is an inhabitant.

The first requirement remains of binding force, except in so far as, if at all, it has been modified by the provisions of the Clayton Act. The fourth section of that act **HN2** [up arrow] provides that such suit as this may be brought in the district in which the defendant resides, or is found, or has an agent, and section 12, that such suit, when against a

corporation, may be brought, not only in the judicial district in which it is an inhabitant, but also in any district wherein it may be found or transacts business.

Plaintiff contends that both these sections are applicable to corporate defendants, although section 12 obviously has nothing to do with noncorporate. Assuming, without deciding, that defendant's contention in this respect is sound, there is nothing in the history of this legislation, or of the needs, or supposed needs, which gave rise to it, to suggest that Congress [\*\*4] intended to say that a defendant corporation could be sued in any district in which an agent of it happened to be on business other than its own. Clearer language than that used would be required to show that Congress intended to change the rule that an officer, agent, or employee of a corporation cannot carry it into any jurisdiction in which he is not acting for it. But, when he is so acting, the corporation is, through him, doing something there, and, if it is through him regularly doing something, it is in the broadest sense, at least, doing business.

The language used, viz. "has an agent residing," does not suggest that the mere casual presence of an agent would be sufficient. It seems as [\*211] if Congress, in using it, had in mind those cases which have held that a corporation is not doing business generally in a district, unless it is there carrying on a fairly continuous series of transactions. Into many of these questions it is not here necessary to go.

Congress doubtless meant to facilitate the redress of wrongs done in violation of the anti-trust acts. It wanted to let a plaintiff sue wherever it was most convenient to him, provided injustice was not thereby [\*\*5] done a defendant. The provision in section 12, for serving process in another district from that in which the suit was instituted, itself took out of a plaintiff's way most, if not all, the purely technical obstacles which had formerly obstructed it. Congress, in designating the district in which the suit against a corporation might be brought, did not materially, if at all, change the rule which had been laid down in a long line of well-considered cases. Probably in the nature of things it could not. The intangible thing, a corporate aggregate, can fairly be supposed to be always found in the state which gave it being. It may, without obvious unfairness, be made suable wherever it chooses to carry on some part of its business. But it cannot be said to be anywhere else. Persons connected with it may be; but, if it is not acting through them at the time, they cannot carry it with them. But, so far as corporate defendants are concerned, does not the act go as far as there is any reason any one should want it to go? [HN3](#) A corporation may be sued under this statute where it transacts business. It cannot escape the obligation to respond because no agent of it, of the rank and character [\*\*6] qualified to be served for it, can be there found. Suit may be there brought and process may issue to a district in which it cannot deny its liability to service.

The act so construed will for practical purposes usually make it unimportant to consider, in connection with liability to suit and to service, any question except whether the defendant is doing or transacting business in a particular district, for, unless it is, it cannot possibly have any agent who, as agent, is therein.

Last May, when this suit was brought, was the defendant doing business in this district? The relevant facts are not in dispute. For some years previous it had a number of customers in this state. Most of these were jobbers, handling wholesale groceries and like goods. They bought defendant's products for the purpose of reselling them to retailers in the ordinary course of business. For some reason or other it preferred to call them "distributing agents." In some instances defendant sold some of its products directly to ultimate consumers. They were usually institutions or owners of large buildings, who bought in fairly considerable quantities. It had drummers, who regularly visited the jobbing [\*\*7] trade, in order to secure orders for its wares.

As is the usual business custom, when these orders were received at one or the other of defendant's principal offices outside of Maryland, reserved to itself the right of accepting or rejecting them. It further stimulated a demand for certain of its products by sending an agent to the retail grocers. It was his business to show how the appearance of the corner grocery could be made more attractive by displaying the advertising matter which the defendant was ready to furnish to those [\*212] who kept its "Old Dutch Cleanser" for sale. If this agent was able to interest the grocer, he would ask him with what jobber he dealt, and if one who handled defendant's goods was named the agent would get an order from the grocer on such jobber for as much of defendant's goods as the grocer could be induced to buy. Whether the order was or was not filled, of course, rested with the jobber. In these ways, in

addition doubtless to the usual advertising through the mails and otherwise, the defendant sought here to create and maintain a demand for its wares.

To facilitate the supply of that demand, when the goods were, as usual, called for [\*\*8] in less than carload lots, and for the purpose of rendering easier the work of its retail demonstrator, it had, some years ago, entered into an arrangement with the Fidelity Warehouse Company. The latter operates several large warehouses in this city. As such arrangement worked out in actual practice, the defendant kept always at such warehouses a stock of its goods, the value of which at any one time might be as much as \$10,000. These goods were shipped in carload lots to the Warehouse Company, which unloaded them from the car and stored them. Upon orders from the defendant, sent from one of its officers outside the district, the Warehouse Company would deliver cases of these goods to persons to whom the defendant, upon the orders in part secured by its drummers, had sold them, or it would, upon like orders, ship portions of them by rail or water in intra or inter state commerce. The Warehouse Company itself made no sales. The contract between it and the defendant provided for the collection in some cases of money due on goods sold C.O.D.; but in point of fact such transactions were so extremely rare as to be almost unknown. It was authorized to deliver goods up to a certain [\*\*9] aggregate quantity to certain named customers of the defendant, upon the request of such customers, and without receiving any specific authority so to do from the defendant. Such customers were, however, seldom or never dealers, but were the large ultimate consumers before mentioned. Moreover, the defendant kept at the warehouses quantities of its advertising matter, which were used by its demonstrator in decorating retail grocery stores.

For its services the Warehouse Company was compensated by certain agreed storage and hauling charges. Under the circumstances, was the defendant doing business in Maryland? Many cases have been referred to by one or the other party. It is believed all have been examined. A great many of them are beside the question here to be passed on. Quite a number turn, not so much upon whether a nonresident corporation or individual is doing business of some kind in a particular state, as upon whether what the state has done, or attempted to do, amounts to a direct burden upon interstate commerce. As, for example, there is no question that, in transporting interstate freight into, out of, or through a state, the carrier transacts business therein; but [\*\*10] it is not business upon which a state can impose a direct burden.

Other cases cited have their origin in state statutes, which prohibit a nonresident corporation doing business in the state, suing in the state [\*213] courts, unless it has complied with certain requirements as to the appointment of agents, etc. Here the courts are disposed to construe the phrase "doing business" in the light of the policy which dictated such enactments.

As the Supreme Court itself has pointed out, it is not possible, in cases in which the sole issue involved is the liability of a nonresident corporation to be sued, to formulate any general rule of universal application. Each of such cases must depend upon its own facts. *International Harvester Co. v. Kentucky*, 234 U.S. 579, 583, 34 Sup. Ct. 944, 58 L. Ed. 1479. HN4<sup>↑</sup> Whether a nonresident corporation is doing business specially, so as to subject it to suit at the instance of a particular defendant, may depend in part upon the relation of the things it is doing to the cause of action asserted. *Mutual Life Insurance Co. v. Spratley*, 172 U.S. 602, 618, 19 Sup. Ct. 308, 43 L. Ed. 569.

In the case at bar the gravamen of the plaintiff's declaration [\*\*11] is that the defendant, in order to coerce it to become a party to an alleged agreement, which was to be carried out chiefly in Maryland, refused to sell to plaintiff its goods; that is to say, refused, for this alleged illegal purpose, to let plaintiff share in any of the facilities, to furnish which was the purpose of the business activities, which, as before set forth, the defendant carried on in Maryland, or caused others to carry on for it. There is no reason under such circumstances to interpret the phrase "doing business" as if it was a term of an art or a mystery. The average man, whether intelligent or unintelligent, would suppose that a concern which kept steadily on hand in Maryland perhaps \$10,000 of goods to facilities their prompt delivery to numerous customers in that and neighboring states, so soon as the company at one of its outside offices had accepted offers which it kept men busy in Maryland soliciting, was doing business in the state. Whatever may sometimes be the case, there is no occasion here to assume that the reason of the law is not a man's natural reason.

It follows that, when this suit was instituted, the defendant was doing business [\*\*12] in this district, within the meaning of the Clayton Act. The defendant says, nevertheless, that the return should be quashed because served upon persons who were not its agents of a character or rank upon whom such service could lawfully be made. Such an issue may often be delicate and difficult. A corporate defendant who is enough in the state or district there to wrong some one should be held to be enough in the state or district to be there answerable for what it has there wrought, provided such holding can be made without giving sanction to practices which in other cases would work injustice. On the other hand, no corporate defendant should be compulsorily brought into court by service upon one who, although connected with it in some sense, bears no such relation to it as to make it fair to presume that either it or any other reasonable and prudent person in like case would care to run the risk of being served by service upon him.

To subject the nonresident to suit in favor of the resident is often, although not always, a result which may justly be thought desirable. [\*214] State legislation and state decisions show how the anxiety to attain that end has led to holding [\*\*13] good the service of process upon so-called agents, who have little connection with, responsibility to, or concern for the absent defendant. On the other hand, to insure, so far as is humanly possible so to do, that no one shall be judged without having a real opportunity to be heard, is perhaps the most fundamental of all the rights involved in due process of law.

In suits under the Clayton Act is there any reason even to attempt a solution of such problems, or to make decisions which in some other cases may lead to injustice? Provided the defendant is suable at all in the district, why not see to it that it shall be summoned in a way to which no possible objections can be made, and which cannot create a dangerous precedent. Whenever upon grounds not obviously frivolous the question is raised as to the authority of the agent upon whom process was served, why cannot the court suspend its answer until the plaintiff has had due process served, as the Clayton Act authorizes, in the home district of the defendant, upon some of its officers whose right to accept service for it cannot be gainsaid. When such service has been made, the question as to whether the earlier one was or was [\*\*14] not good will have become so purely academic that there will seldom be an occasion to answer it at all.

Such course will be allowed in this case, provided plaintiff acts with reasonable diligence in causing process to be served upon the defendant in the district of its residence.

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## **Bogata Mercantile Co. v. Outcault Advertising Co.**

Court of Civil Appeals of Texas, Texarkana

January 13, 1916, Decided

No. 1528.

**Reporter**

184 S.W. 333 \*; 1916 Tex. App. LEXIS 272 \*\*

BOGATA MERCANTILE CO. v. OUTCAULT ADVERTISING CO.

**Prior History:** [\*\*1] Appeal from Red River County Court; George Morrison, Judge.

Action by the Outcault Advertising Company against the Bogata Mercantile Company. Judgment for plaintiff, and defendant appeals.

Appellant, a Texas corporation, carried on its mercantile business at Bogata, in this state. Appellee, an Illinois corporation, carried on its advertising business at Chicago, in that state. September 24, 1913, appellant, through one of appellee's traveling agents in this state, sent it an order as follows:

"Order No. 151.

"To Outcault Advertising Co., 508 S. Dearborn St., Chicago, Ill.:

"Date Sept. 24, 1913.

"Ship us, at our expense, as per samples shown you, Outcault Service De Luxe to cover a period of one year, beginning Oct. 10, 1913. This service to consist of

"40 Outcault Service De Luxe (4 Column) cuts.

"12 Outcault Service De Luxe (6 Column) cuts.

"One font of type. (9 lbs. in font).

"We agree to pay you net cash monthly, at the rate of \$ 3.50 per week, for one year, we to have exclusive right to use the above Outcault Service De Luxe in our city only, and to hold type and cuts subject to your order when this contract expires.

"Failure [\*\*2] to pay any installment when due renders full amount of this contract due.

"This contract cannot be canceled. Ship all at one time if possible.

"Lines of goods we carry,

"Fill in 'Yes' or 'No.'

"Dry Goods, Yes. Millinery, Yes.

"Ladies' Made Wear, Yes.

"White Goods Sale When .

"Fur Sale When? No.

"Anniversary Sale When? Sept.

"Men's Clothing, Yes.

"Men's Shoes, Yes.

"Ladies' Shoes, Yes.

"Furniture, No. Groceries, Yes.

"Rugs, Yes. Carpets, No.

"M. O. Cuts, Yes.

"Bogata Mercantile Co.,

"Per B. C. Peyton.

"[Write plainly.]

"Town, Bogata.

"State, Tex.

"J. M. Wyatt, Salesman."

The order was received and accepted by appellee on September 27, 1913. On that day appellant telegraphed appellee as follows:

"Withhold shipment adv. matter. Will advise by letter"

--and on the same day wrote appellee as follows:

"Bogata, Texas, 9/27, 1913.

"Outcault Adv. Co., Chicago.--Gentlemen: We wired you to-day:

"Withhold shipment of adv. matter. Want to make change.' Which we now confirm.

"Owing to the limited circulation of our little paper here we have decided that [\*\*3] your proposition is too large for us. We realize the importance of advertising, and are now, and intend to contribute to adv., yet your proposition is too large for us. Consequently we would ask that you cancel our order. It is quite probable that we will take up your line for the fall of 1914.

"Yours, Bogata Mercantile Co.,

"Per B. C. Peyton."

The telegram was received by appellee the day it was sent, but, as found by the court, after appellee had received and accepted the order. The letter was not received by appellee until September 29, 1913. Appellant's president, Peyton, testified:

"Mr. Wyatt, salesman for the Outcault Advertising Company, came into the store of his own accord and told me about this advertising. I didn't know what the Outcault Service De Luxe was, but Mr. Wyatt explained that they would furnish special cuts and special advertising matter for our store, and that the cuts would have to be fixed with our name and address, and picture cuts specially designed for us would be furnished each week, 52 of them. I

understand from Mr. Wyatt that this material would have to be specially prepared for our use after our order was accepted by the company. [\*\*4] I don't know how long it would take."

The witness Hadden, who seems to have been the manager of appellee's business at Chicago, testified:

"We kept no record of when the goods in question on this contract were manufactured, and consequently I cannot recall the exact datings and cannot give them and cannot say what of them were manufactured prior to September 27, 1913, and what prior to receipt by our company of letter from the Bogata Mercantile Company dated September 27, 1913."

Part of the material constituting the advertising service appellant contracted for was shipped to it by appellee October 2, 1913, and the remainder thereof October 3, 1913. Appellant declined to receive either shipment, claiming that it had countermanded the order therefor by its telegram and letter of September 27, 1913, and that it therefore was not liable to appellee on the contract, and, further claiming it was not liable because, it alleged: (1) The contract was in violation of the antitrust law of this state, in that it was for an exclusive right to use appellee's advertising "service de luxe"; and (2) was first breached by appellee, in that it entered into a similar contract with the Bogata [\*\*5] Drug Company on or about September 24, 1913. Appellee thereupon commenced this suit in a justice court. On appeal to the county court judgment was rendered in appellee's favor against appellant for \$ 182, the sum sued for, and appellant appealed.

**Disposition:** Affirmed.

## Core Terms

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countermanding, agree to pay, advertising, witness testimony, use of materials, fair inference, prima facie, purposes, telegram, furnish

## LexisNexis® Headnotes

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Transportation Law > Interstate Commerce > Federal Preemption

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

### [HN1](#) [down arrow] **Public Enforcement, State Civil Actions**

Where a transaction evidenced by a contract is interstate commerce, it is not subject to the antitrust laws of the State of Texas.

Contracts Law > Remedies > Damages > Avoidable Consequences

Evidence > Burdens of Proof > General Overview

Contracts Law > Breach > General Overview

### [HN2](#) [down arrow] **Damages, Avoidable Consequences**

In a breach of contract case, the burden is on a defendant to show that when the defendant breached the contract, the plaintiff might have pursued, but did not, a course which would have mitigated the damage it suffered.

## Headnotes/Summary

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### Headnotes

Commerce -- "Interstate Commerce" -- Application of State Laws.

Where a mercantile corporation in Texas signed an order directing an advertising corporation in Chicago to ship certain advertising cuts and type, the transaction was interstate commerce, and not subject to the anti-trust laws of Texas.

Contracts -- Countermanding Order after Acceptance -- Effect.

Where defendant signed an order, directing plaintiff to ship it certain advertising cuts and type, defendant's acceptance of the order completed the contract between the parties, and the subsequent countermanding of the order did not relieve defendant of the legal consequences of its breach of contract.

Contracts -- Breach -- Exclusive Privileges.

Where a contract by which plaintiff agreed to furnish defendant certain advertising service, consisting of certain advertising cuts and type, provided that defendant was to have the exclusive right to use such service in its city, plaintiff did not break the contract by furnishing another party in the same city a different advertising service.

Damages -- Mitigation of Damages -- Burden of Proof.

An order, signed by defendant, for certain advertising cuts and type, provided that defendant was to hold the type and cuts, subject to plaintiff's order, when the contract expired. Defendant countermanded the order, and plaintiff sued for the amount agreed to be paid. There was evidence warranting the inference that the advertising material prepared for defendant could be used only by it, and would have been of no value to any one else, and that it had been fully prepared before plaintiff's receipt of the letter countermanding the order. *Held*, that the contract was not one for the sale of the material, but for its hire to defendant, and it appeared *prima facie* that plaintiff's damage was the sum defendant agreed to pay for the use thereof, and the burden was on defendant to show that plaintiff might have pursued a course which would have mitigated the damages.

**Counsel:** Long & Wortham, of Paris, for appellant.

Austin S. Dodd, of Clarksville, for appellee.

**Judges:** WILLSON, C. J.

**Opinion by:** WILLSON

## Opinion

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[\*334] WILLSON, C. J. (after stating the facts as above). The [HN1](#) transaction between appellant and appellee evidenced by the contract was interstate commerce, and hence not subject to the anti-trust laws of this state. [\*Albertype Co. v. Gust Feist Co.\*, 102 Tex. 219, 114 S.W. 791](#); [\*Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.\*, 55 Tex. Civ. App. 553, 120 S.W. 532](#); [\*Moroney Hardware Co. v. Goodwin Pottery Co.\*, 120 S.W. 1088](#);

McCall Co. v. Stiff Dry Goods Co., 142 S.W. 661; Koch Vegetable Tea Co. v. Malone, 163 S.W. 662, 663.  
Therefore the first and second assignments are overruled.

There was evidence to support the finding [\*335] involved in the judgment that appellee had received and accepted appellant's order at the time it received the latter's telegram of September 27, 1913. [\*\*6] If, therefore, that telegram should be construed as one countermanding the order--and we think it should not be so construed--it did not have the effect appellant claims it had. Appellee's acceptance of the order completed the contract between the parties, and countermanding the order thereafterwards did not relieve appellant of the consequences the law attached to its breach of its contract. Therefore the fourth assignment is overruled.

There was testimony to support a finding that the "little druggist advertising service," which appellee bound itself to furnish to the Bogata Drug Company, was not the same as the "service de luxe," which it bound itself to furnish to appellant. Therefore the fifth assignment, in which appellant complains that it appeared that appellee violated its contract with it by entering into a similar one with the Bogata Drug Company, is overruled.

What has been said disposes of all the assignments except the third, in support of which appellant contends that the measure of appellee's damages was not the sum it agreed to pay for the use of the advertising material, as determined by the court, but was the difference between that sum and the value of the material [\*\*7] in the condition it was in at the time the order for same was countermanded. The fair inference from the testimony of the witness Hadden, set out in the statement above, was that appellee had done all it was to do to prepare the material for the use appellant was to make of same before it received appellant's letter of September 27, 1913, countermanding the order. The fair inference from the testimony of the witness Peyton was that the material as so prepared could have been used only by appellant for advertising purposes, and therefore was of no value for such purposes to any one else. Therefore, it seems to us, it prima facie appeared that appellee was entitled to recover as damages for the breach by appellant of its contract the sum it had agreed to pay for the use of the material. The contract was not one for the sale of the material, as appellant treats it. It was for the hire thereof to appellant for a period of one year. What appellant was entitled to was the use of the material during that period. What appellee was entitled to was the material at the expiration of that period and the sum appellant agreed to pay for its use to that time. As appellee was entitled to the material [\*\*8] after it had been used by appellant during the time agreed upon, it prima facie appeared, we think, that what it lost as a result of appellant's refusal to receive and use the material as agreed upon was the sum appellant undertook by its contract to pay for the use thereof. It so appearing, as we understand the rule, HN2[<sup>1916</sup>] the burden was on appellant to show, and it did not, that, when it breached the contract appellee might have pursued, but did not, a course which would have mitigated the damage it suffered.

Jefferson & N. W. Ry. Co. v. Dresson, 43 Tex. Civ. App. 282, 96 S.W. 63; Porter v. Burkett, 65 Tex. 383.

The judgment is affirmed.

## **Woods v. Am. Brewing Ass'n**

Court of Civil Appeals of Texas, Beaumont

January 20, 1916, Decided

No. 57.

**Reporter**

183 S.W. 127 \*; 1916 Tex. App. LEXIS 144 \*\*

WOODS v. AMERICAN BREWING ASS'N.

**Subsequent History:** [\*\*1] Rehearing Denied February 10, 1916.

**Prior History:** Appeal from District Court, Orange County; A. E. Davis, Judge.

Action by W. C. Woods against the American Brewing Association. From a judgment for defendant, plaintiff appeals.

**Disposition:** Reversed and remanded.

## **Core Terms**

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beer, Brewing, buying, selling, commodity, manufactured, shipped, transportation, parties, association of persons, anti-trust, products, purchasing, territory, tickets, restraint of trade, sell beer, merchandise, preparation, breweries, saloon, sales, void, barrels, dealers, bottle, article of merchandise, handle, firms, conspiracy

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

### **HN1[] Regulated Practices, Price Fixing & Restraints of Trade**

Under Tex. Rev. Civ. Stat. art. 7796, trusts are defined as a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them for any or all of the following purposes: (1) To create or which may tend to create or carry out restrictions of trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state. (2) To fix, maintain, increase, or reduce the prices of merchandise, produce, or commodities or the cost of insurance, or of the preparation of any produce for market or transportation. (3) To prevent or lessen competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities or the business of insurance, or to prevent or lessen competition or aids to commerce or in the preparation of any product for market or transportation.

(4) To fix or maintain any standard or figure whereby the price of any article or commodity, merchandise, produce, or commerce, or the cost of transportation or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled, or established.

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Transportation Law > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview](#)

## **HN2** **Regulated Practices, Price Fixing & Restraints of Trade**

Under Tex. Rev. Civ. Stat. art. 7796, trusts are further defined as (5) To make, enter into, maintain, execute, or carry out any contract, obligation, or agreement, by which the parties thereto bind or have bound themselves not to sell, dispose, or transport or prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall in any manner agree to keep the price of such article or commodity or charge for transportation or insurance, or the cost of preparation of any product for market or transportation at a fixed or graded figure, or by which they in any manner affect or maintain the prices of any commodity or article or the cost of transportation insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale, or the preparation of any product for market or transportation, or by which they shall agree to pool, impede, or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge of transportation or insurance, or charge for the preparation of any product for market or transportation, whereby the price or such charge might be in any manner affected.

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview](#)

## **HN3** **Regulated Practices, Price Fixing & Restraints of Trade**

Under Tex. Rev. Civ. Stat. art. 7796, trusts are further defined (6) To regulate, fix, or limit the output of any article or commodity which may be manufactured, mined, produced, or sold, or the amount of insurance which may be undertaken or the amount of work that may be done in the preparation of any product for market or transportation. (7) To abstain from engaging in or continuing business or from purchasing and selling merchandise, produce, or commerce, partially within the state of Texas or any portion thereof.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation](#)

[Business & Corporate Law > Corporations > Corporate Finance > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

Mergers & Acquisitions Law > General Overview

#### **[HN4](#)[] Conspiracy to Monopolize, State Regulation**

By Tex. Rev. Civ. Stat. Art. 7797 a monopoly is defined as being a combination or consolidation of two or more corporations, when effected in either of the following methods: (1) When a direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing or where such common management or control tends to create a trust, as defined in the first article of this chapter. (2) Where any corporation acquires the shares or certificates of stock or bonds, franchise, or other rights, or the physical property or any part thereof of any other corporation or corporations for the purpose of preventing or lessening, or where the effect of such acquisition tends to effect or lessen competition, whether such acquisition is accomplished direct or through the instrumentality of trustees, or otherwise.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

#### **[HN5](#)[] Regulated Practices, Monopolies & Monopolization**

Under Tex. Rev. Civ. Stat. art. 7797, it has been held that a monopoly is not only an exclusive right granted by the State to a few of something which was before a common right, but embraces a combination, regardless of form; the tendency of which is to prevent competition and control prices, to the detriment of the public. That where neither party to a contract giving an exclusive selling agency in a specified territory was a corporation, and there being no evidence of the combination or consolidation, the agreement is not in violation of this article.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

#### **[HN6](#)[] Regulated Practices, Price Fixing & Restraints of Trade**

Tex. Rev. Civ. Stat. art. 7798 provides that either or any of the following acts shall constitute a conspiracy in the restraint of trade: (1) Where any two or more persons, firms, corporations, or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity. (2) Where any two or more persons, firms, corporations or association of persons shall agree to boycott or threaten to refuse to buy from or to sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

#### **[HN7](#)[] Regulated Practices, Price Fixing & Restraints of Trade**

In order to constitute a trust, within the meaning of the statute, there must be a "combination of capital, skill or acts by two or more." "Combination," as here used, means union or association. If there be no union or association by two or more of their capital, skill, or acts, there can be no combination, and hence no trust. When the purposes for which the combination must be formed are considered, to come within the statute, the essential meaning of the word "combination," and the fact that a punishment is prescribed for each day that the trust continues in existence, it leads to the conclusion that the union or association of capital, skill or acts, denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN8** **Regulated Practices, Price Fixing & Restraints of Trade**

See Tex. Rev. Civ. Stat. art. 7798.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN9** **Regulated Practices, Price Fixing & Restraints of Trade**

The purpose as indicated by the scope of the antitrust statute and the language used is to denounce as illegal, without reference to the intent of the parties and without reference to its actual effect, every agreement or understanding between parties engaged in buying any commodity, whereby they, or either of them, was to refrain from buying such commodity from any one having same for sale.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN10** **Regulated Practices, Price Fixing & Restraints of Trade**

By the statute it is unlawful for two persons to agree that one of them will buy from the other exclusively of a given commodity as it is in like manner unlawful for one of them to agree to sell exclusively to the other a given commodity.

## **Headnotes/Summary**

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### **Headnotes**

Monopolies -- Combinations in Restraint of Trade -- Exclusive Right to Sell Beer -- Statute -- "Monopoly."

A contract whereby a brewing company, in consideration of plaintiff's payment of a \$ 2,400 debt owing to it by its agent, agreed to give plaintiff the exclusive right to sell its beer in Orange county, plaintiff to pay a fixed price, ordering the beer as he sold it and paying storage and selling expenses, there being no limitation upon the price he might charge his customers, not the retail consumer but saloon men, nor any prohibition upon his purchasing and selling the product of other breweries, was not violative, as a conspiracy in restraint of trade, of the Texas Anti-Trust Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 7796, 7797, and 7798), defining trusts, a "monopoly" as a combination or consolidation of two or more corporations, and providing what acts shall constitute a conspiracy in restraint of trade.

Frauds, Statute of -- Agreement Not to be Performed Within One Year -- Agency Contract.

An oral contract whereby a brewing company, in consideration of plaintiff's assumption of a debt to it, agreed to give him the exclusive right to sell its beer in Orange county, there being no express agreement as to the length of time the agreement should run, though for plaintiff to reimburse himself it would have to run for two or three years, was not invalid under the statute of frauds as a contract not to be performed within a year.

**Counsel:** Holland & Holland, of Orange, for appellant.

Fisher, Campbell & Amerman, of Houston, for appellee.

**Judges:** BROOKE, J.

**Opinion by:** BROOKE

## Opinion

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[\*128] BROOKE, J. This is an action for damages for breach of contract brought by appellant against appellee, and the cause has been properly appealed.

Plaintiff's cause of action, as stated in his petition, is as follows:

Plaintiff is a private citizen, residing in Orange county, Tex. Defendant is a corporation incorporated under the laws of Texas, its principal office and place of business being at Houston, Harris county, Tex.

"That heretofore, to wit, on or about March 28, 1908, the defendant was engaged in the business of manufacturing beer in Houston, Harris county, Tex., and as a part of its said business, and for the purpose of conducting and carrying on profitably its said business, it maintained an agency for the sale of its product at Orange, in Orange county, Tex.; that at said time it [\*\*2] made the sales of its product in Orange county, Tex., through its said agent in Orange county, Tex., and for said purpose it had at said place an agent, through whom it conducted its business; that in the conduct of its business at said place, it consigned to its said agent at a certain price, the agent in turn selling said product to dealers at a profit remunerative to said agent, and justifying said agent to engage in said business; that defendant during said time made no sales of its product in Orange county, Tex., except through its duly authorized agent, as hereinbefore shown, and it consigned no portion of its product direct to the consumer, and all sales of its product in Orange county entitled said agent, by virtue of the arrangement between them to a certain profit; that on or about said date the agent of the defendant company, being in arrears with it, to the extent of approximately the sum of \$ 2,400, and being indebted to it in approximately said sum, which indebtedness had extended over a considerable period of time, and the business of defendant suffered on account thereof, and it faced on account thereof financial loss, approached this plaintiff, and made with him the [\*\*3] following verbal agreement, to wit:

"If plaintiff would accept the agency of the sale of defendant's products in Orange county in such manner as to represent the interests of the defendant company, said agent purchasing direct the product of the defendant from the defendant company and making sales thereof himself to the dealers in Orange county, said product to be invoiced to plaintiff by the defendant company at a price then and there agreed upon, and to be sold by the plaintiff to the dealers thereof at a profit, and would pay to the defendant company for such business and agency said amount owing to it by its former agent or its then agent, and amounting approximately to the sum of \$ 2,400, that the defendant company would execute a contract with the plaintiff for the conduct by him of their business in Orange, Tex., and appoint plaintiff its exclusive agent at said place, and would continue permanently to sell him and no other person, except through him, goods of its manufacture or its product, thereby entitling plaintiff to the profits arising from the sale of said product, so long as the defendant conducted its business in Orange, Texas, or held or kept an agent at said place, [\*\*4] all of which was consented to and agreed upon by the plaintiff, and said contract between the parties became mutual and binding, and plaintiff in good faith entered upon the duties of said business and agency.

"That under said agreement and agency plaintiff conducted said business of the defendant company and handled its product in Orange, Texas, for a considerable period of time, both parties recognizing said contract as valid and binding, and as permanent, and as to continue in force so long as the defendant company maintained its said business or agency in said place; that after the conduct of said business by the plaintiff to a period when plaintiff had repaid to the defendant company said full sum of money owing to it, by its former agent, and assumed by plaintiff, and amounting to approximately the sum of \$ 2,400, and on, to wit, about May 1, 1914, the defendant company, ignoring its contract, terminated said business and agency with plaintiff and immediately commenced the sale of its products, through other persons than the plaintiff, and thereby willfully, knowingly, and arbitrarily destroyed the business of plaintiff, which, through a considerable period of time he had built [\*\*5] up and from which, through his exertions, he had earned a sufficient amount to make the defendant whole, and pay to the defendant company the sum of money owing to it by its former agent; that the business of plaintiff and the agency established by the contract hereinbefore referred to was valuable, and was reasonably worth on the market the sum of \$ 10,000, and by the arbitrary acts of the defendant company in destroying said business, and annulling said agency, this plaintiff was without fault on his part deprived of the value thereof, to his damage in said sum of \$ 10,000; that the payment of the \$ 2,400 hereinbefore referred to by the plaintiff to the defendant was obtained by the defendant from plaintiff upon a fraudulent, false, and wrongful agreement that it would maintain permanently so long as it was in business, a local business at Orange with plaintiff as its agent, for the sale of its products, and would through no other channels sell the same at Orange in Orange county, Tex., and upon such agreement said sum of money was so paid by plaintiff to defendant, and the defendant having breached said agreement and violated the same, thereby obtained said sum of money from plaintiff [\*\*6] fraudulently and without warrant in law, and is entitled to repay the same to plaintiff, with legal interest thereon, and thereby has damaged plaintiff in said additional sum of \$ 2,400, with legal interest thereon from the date of its payment."

Defendant company filed its plea of privilege to be sued in the county of its residence, filed general and special demurrers and general denial, and further set up that the contract, as alleged, was within and contrary to the statute of frauds, and further alleged that the contract was not for any definite period of time, and was a contract which the defendant had a legal right to terminate at any time, and further alleged in said answer that if it was shown that the defendant company made any contract with plaintiff, that said contract did not provide that the defendant should sell its product in the city of Orange or Orange county exclusively, with the plaintiff, and with no one else during the continuation of said contract, and that therefore this defendant had a right at any time to sell its products to any other person or persons within the city of Orange, without liability to the plaintiff.

For further answer the defendant company alleged [\*\*7] by its pleadings that if it was shown that any contract was made between it and the plaintiff, that it was necessarily contemplated and implied by said contract that the plaintiff use reasonable diligence in attending to his business and in supplying the produce of defendant to those who were in [\*129] the habit of purchasing, using, and selling such products, but the defendant company says that the plaintiff negligently and willfully failed and refused to attend to his said business, and to use diligence and care in looking after the same, and failed and refused to order and pay for and receive from the railroad company and deliver the product of this defendant to those who desired to purchase the same, and gave orders to plaintiff for the purchase thereof, to the extent that often for several days at a time those persons desiring to purchase were not able to obtain the product of this defendant in using and selling to their customers, greatly to the damage of the defendant company, and by reason of the failure of the plaintiff to use care and diligence, and attention to his said business in selling and delivery of the goods and products of the defendant, and in ordering said [\*\*8] goods from the defendant, he breached and violated the terms and provisions of any contract it may be shown he had with the defendant; therefore defendant was compelled to sell and was justified in selling its product to other persons within the city of Orange and Orange county.

The court, after instructing the jury to find a verdict for the defendant, approved and ordered filed plaintiff's bill of exceptions, as follows, with the following qualification:

"Be it remembered that upon the trial of the above-entitled cause, and after the plaintiff had rested in said trial, the defendant moved the court, by written motion, to instruct the jury to return a verdict in favor of the defendant, which said motion was resisted and objected to by the plaintiff, but the court overruled plaintiff's objection, and sustained

said motion, upon the grounds urged and presented to the court that said contract, as pleaded and proven, was in violation of the anti-trust laws of the state of Texas, and for that reason unenforceable and void, and upon said ground instructed the jury by a written instruction, to return a verdict in favor of the defendant, which instruction was read by the jury, and a verdict [\*\*9] in favor of the defendant, in obedience thereto was returned, to which plaintiff at the time in open court excepted, and now here tenders this, its bill of exception, and prays that the same be allowed and ordered filed, which is accordingly done.

"Holland & Holland,

"Attorneys for Plaintiff.

"The foregoing bill of exceptions hereby approved and ordered filed, this May 17, 1915, with the following qualification: That the proof showed that the contract was in violation of the anti-trust laws of the state of Texas.

"[Signed] A. E. Davis, Judge Presiding."

The testimony was entirely the testimony of the plaintiff, save and except letters that were written by plaintiff to the defendant company, and letters written by the defendant company to the plaintiff. The evidence will be practically set out in full.

Plaintiff testified:

"My name is W. C. Woods. I am acquainted with the American Brewing Association. About January 1, 1911, they were engaged in the business of making and brewing beer at Houston, Tex. They were at that time doing business at Orange through an agent, and were selling beer that they had manufactured. I was their agent here at one time, and Capt. Boland was their [\*\*10] agent before me. This company has been doing business in Orange in that way for about 12 or 14 years. Their manner of doing business was: They would bill the shipment to the agent, and the agent would sell it to the saloons, and that is the way they sold it through Capt. Boland. There was a certain price that they sold it to Capt. Boland for, and then he would sell it for more than that. \* \* \* The American Brewing Association did not sell through any other agency here. As to whether or not at that time I knew Capt. Boland was indebted to them, I will say he was indebted to them about \$ 2,400. I made an agreement with reference to the agency and the payment of this indebtedness. I agreed that, if they would turn the agency over to me, I would pay them the \$ 2,400 that Boland owed them. They were to give me the entire agency that Capt. Boland had. He had the agency of American Brewing Association. \* \* \* I was to get the beer, and sell it to the saloon men, and then collect for it. The agreement was to last as long as they had an agency here, and I was to pay them the \$ 2,400 that Boland owed them, and I did pay them that amount. They shipped me beer according to that agreement for 5 [\*\*11] or 6 years, I guess, on this same agreement. I guess I was 4 or 5 years paying back the \$ 2,400 that Mr. Boland owed them. I paid back the entire amount. I was in no way responsible for that debt, except by this agreement. I would order this beer direct from the American Brewing Association at Houston, Tex., and would purchase the beer at \$ 7 and would sell it at \$ 9 to the saloon men. They recognized this agreement for 4 or 5 years, I guess. They ceased to recognize it about the 28th day of January, 1914. At that time I had some beer consigned to me here in accordance with the contract that I had with them at that time. They turned the beer over to Mr. Seastrunk, and have never shipped me any beer since that time. With reference to further shipments, they told me that they had turned the agency over to Mr. Seastrunk. Mr. Sass, the representative of the brewery, who attended to their business over here, told me that they had canceled their contract with me. They destroyed my agency or business over here, and since that time I have not been able to handle any other beer, and they haven't shipped me any. I think, the year before they ceased to ship me beer, my business or the profit [\*\*12] on my business was about \$ 5,000 for keg and bottle beer together. They handled the American beer; that was the bottle beer. I think it was 30 cars of keg that I have sold and bought under this agreement in 1913. There was some 60-odd of half cars. My profit was \$ 115 per car. I had to pay for help and feed for the horse out of that. The business that I had in 1914, compared to that in 1913, was getting better. The business I had in 1912 was not as good as that in 1913. The year 1913 showed a net profit, not deducting expenses, of about \$ 5,000, and 1914 was a better year than 1913. I don't know how 1915 is up to the present time. There is more beer sold in 1915 than in 1914. It shows a similar increase during this year, and the probability is that the business of 1915 will be better than that of 1913.

The profit was \$ 115 on a barrel, and a barrel is two kegs, which makes a profit of about \$ 115 per car, which amounted, in connection with the bottle beer, to at least a profit of \$ 5,000. The company has not repaid me any part of that \$ 2,400. I did all I could for them."

Upon cross-examination he testified:

"I made this contract with American Brewing Association before January, [\*\*13] 1915. \* \* \* It was about that time, it might have been a year or so before that. \* \* \* I will say it might have been 1908. I did not get with Capt. Boland and discuss the matter before I made the arrangement with the association. The association did not make me a proposition, and I then [\*\*130] made a proposition to Capt. Boland. Capt. Boland owed the American Brewing Association, and he told me that he was up against it, and wanted me to help him get his car out. The agent had an office here, and I was pretty well familiar with his business. I was selling the Schlitz bottle beer at that time to the saloons at Orange. I had been selling Schlitz beer about 9 years before I made the agreement with the American Brewing Association. I had been selling beer at that time about 8 years, and was engaged in that business at the time I made the agreement with the association. I did not make any trade with Capt. Boland before I made the agreement with the association. I was acting as agent for the Magnolia Company, and he for the American, and I helped him get his car out some time. As to whether Capt. Boland would sign an order to the association for such as he wanted shipped to him, I will [\*\*14] say that we got a car together, Capt. Boland and I. I got mine from the Magnolia Company and he got his from the American. I would buy from the Magnolia and he from the American. \* \* \* He owed them the \$ 2,400 for beer that he got years before that. He never got in debt to them after I went in with him. During the time I was connected with him, he would put in his orders for the beer, and they sent the beer to him with draft attached to the bill of lading, and he had to pay for the beer before he got it out, and after he got it out it was his property, and he sold it to the saloon men; that is his part of it. In Capt. Boland's business with the American Brewing Association, he paid for the beer when he received it from the railroad company. I had the agreement with the American Brewing Association at their office in Houston. I had discussed the matter with Capt. Boland before I went to Houston, but not the question of buying his part over. No; I had not talked that part over. He got so he couldn't take out his car, and he told me that I would have to do the best I could, and I went and talked to Mr. Autrey about it. He represented the association. I talked the matter over with Capt. [\*\*15] Boland about taking the car out before I went down to see Mr. Autrey. \* \* \* I did not talk to him about taking the agency before I went to Houston. He said: 'You will have to do the best you can. You will have to go and see them and do the best you can.' And I told him I would go and try to make some arrangement. \* \* \* I already had the Magnolia agency, and I didn't know that Capt. Boland owed them that amount, and they said, if I would pay the \$ 2,400 that he owed them, I could take the agency. They made me the proposition that if I would assume the payment of Capt. Boland's indebtedness of \$ 2,400, they would give me the agency for their beer. It was the understanding that, instead of shipping the beer to Capt. Boland, they would thereafter ship it to me. It was the understanding that I would send in my orders for such beer that I desired. If I wanted keg beer, I would send in my order for so much keg beer; and if I wanted bottle beer, I would send in my order for so much, and they would not send any except what I ordered, and when they would send that they would bill it direct to me. The agreement as to how I would pay for that beer was that they would give me a car's credit on [\*\*16] the start, and I was to pay for the beer as the cars were sent after that. Following that, the understanding was that they were to draw a draft against me with bill of lading attached for each shipment of beer, and I was not to get that beer until I paid for it, until I paid that draft. Then, when I paid that draft, of course, the beer became mine, and I sold it. I got out in town and sold my own beer, and I sold it to whoever I pleased, for cash or credit, and how I pleased. That was the understanding. The agreement that was entered into between me and the American Brewing Association was, as alleged in this pleading here, that if I would accept the agency for the American Brewing Company's products in Orange county in such manner as to represent the interests of the defendant company, said agent purchasing direct the products of the defendant from the defendant company, and making sales thereof myself to the dealers, in Orange county, and said products to be invoiced to me by the defendant company at a price then and there agreed upon, and to be sold by me to the dealers thereof at a profit, and would pay to the defendant company for such business and agency said amount owing to [\*\*17] it by its former agent, Mr. Boland, and amounting approximately to the sum of \$ 2,400, the defendant company would exclusively contract with me for the conduct by me of their business in Orange, Tex., and appoint me its exclusive agent at said place, and, would continue permanently to sell me and no other person, except through me, goods of its manufacture or its products, thereby entitling me to the profits arising from the sale

of said products, so long as the defendant conducted its business in Orange, Tex., or held or kept an agent at said place, all of which was consented to and agreed upon by the plaintiff, and said contract between the parties became mutual and binding. That the payment of \$ 2,400 hereinbefore referred to by the plaintiff to the defendant was obtained by the defendant from plaintiff upon a fraudulent, false, and wrongful agreement. That it would maintain permanently, so long as it was in business, a local business at Orange, Tex., with me as its agent, for the sale of its products, and would, through no other channels, sell the same at Orange, in Orange county, Tex., and upon such agreement said sum of money was so paid, and the defendant having breached said [\*\*18] agreement, and violated same, thereby obtained the said money from me fraudulently and without warrant in law, and is entitled to repay the same to me, with legal interest thereon, and thereby has damaged me in said additional sum of \$ 2,400, with legal interest thereon from the date of its payment. It is my understanding that they did agree to do the things that I there say they did. It was agreed that I should pay them \$ 7 per barrel for the beer, and, after I paid them for it, it became my property, and I sold it to whoever I pleased, and on any terms I pleased. After I got back from Houston, after I made the deal with them, I did not make any arrangements of any kind with Capt. Boland for taking over his business. I had taken the car that was sent to him, and sold it to his customers. I did not submit to Mr. Boland any proposition. I didn't recognize that Mr. Boland had any rights in the matter. I told him of the arrangements I had made with the association, and I told him I had agreed to pay his indebtedness to the association. As to whether or not he agreed to turn over what interest he had to me, I will say that he didn't have any interest in the business. He asked me to buy [\*\*19] his safe and desk. \* \* \* I agreed to pay this \$ 2,400 debt at the rate of \$ 75 per month. I guess I was 4 or 5 years altogether in paying off that indebtedness. I got pretty near out once, and borrowed \$ 600, and then borrowed \$ 400 again. I don't know exactly how long I was in paying off that \$ 2,400. I will say that I paid one or two of the \$ 75 payments, and then I went to paying their cold storage for them. I don't know how much I had paid before February, 1909. \* \* \* I will say that I told Capt. Boland what I had done, and that I had agreed to pay that \$ 2,400, and he said the same was satisfactory to him."

Witness being shown a letter signed "Woods per Boland" to the American Brewing Association, and asked whether it was an order for beer sent to the association, or a letter in reference to beer, replied:

"That is a letter that Mr. Boland wrote to them. He wrote it. It is signed Woods per [\*131] Boland. He wrote that under my direction, and this is the billhead I was using. After I was buying from the American Brewing Association, I was also buying from the Houston Ice & Brewing Company and Pilsener Company. \* \* \* The association did not pay me any salary. The only profit [\*\*20] I got out of the transaction was the difference between what I paid for the beer and what I sold it for. If I sold a bad account, that came out of my profit; and if I lost on the collections, I had to stand the loss. In my agreement to pay the \$ 2,400 of Boland's account, I was induced to pay that or assume that amount by them agreeing to give me the exclusive purchase of their beer, and I couldn't have been induced to pay that indebtedness without them giving me the exclusive sale of their beer. I don't know exactly how long they had been selling beer to one person in Orange, but it was about 10 or 12 years or something like that. It was the understanding between us that this contract that we have been discussing would extend over several years' time. I couldn't hope to pay that \$ 2,400 and make a profit, unless I should continue that contract over 4 or 5 years. It was the understanding that it would extend a sufficient length of time after I had paid this amount that I would get back that money; that I would pay that Boland account out of the profits made in the sale of the beer. It wasn't paid exactly out of that either. I had two more agencies; but I got the assurance that I could [\*\*21] keep the agency long enough to pay it out of the sales of their beer alone, and it would take about 3 or 4 years at least to pay that Boland account. I maintain an office here, and rented a building. I keep one wagon and one horse. I owned the horse and they sent me the wagon. I work one man and paid him a salary. About the latter part of January last, they began to sell beer to Mr. Seastrunk, and turned over a part of a car to him. I don't know exactly how long that car had been on the track here, that was sold to Mr. Seastrunk, but it was about a day or two, I guess. It might have been here 3 or 4 days. I hadn't taken up the bill of lading, but I had beer on hand. I ran out of beer the day they turned it over to Mr. Seastrunk. I have not placed any orders with them since that time."

There were offered in evidence letters from the American Brewing Association to W. C. Woods, on the following dates: April 11, 1911, May 27, 1913, August 6, 1913, and May 17, 1913.

Said witness further testified:

"Beginning with the date of this first letter of April, 1911, and extending on down to and including January, 1914, there were days when my customers couldn't get American beer for several [\*\*22] days at a time, when they couldn't get it from me, and I was the only one that sold American beer here. At these times when they couldn't get this beer from me, and they would demand American beer particularly and I had run out, I would order it from Beaumont. It is a fact that there were times between these dates when I was out of beer, and the people were in the habit of demanding American beer and they were not getting it. I didn't order any beer from Louisiana, but I got some from Beaumont. Since the Brewing Association has quit selling beer to me, I haven't been selling any beer; I do not still handle beer for the Houston Ice & Brewing Association, nor for the Schlitz Company. I haven't sold any beer from anybody, or purchased beer from anybody, manufactured by any beer concern, since the American Brewing Association began selling to Mr. Seastrunk, except that I sold for the Magnolia and Schlitz beer for a month or two--a couple of months, I think. The Magnolia people sold draft beer and bottled beer, and the Schlitz Company sold the bottled beer alone. During 1913 I was handling beer both from the Magnolia Company and the American Brewing Association. The Magnolia Company is [\*\*23] owned by the Houston Ice & Brewing Company--it is the Brewing Association now, I think. When I would order out a car, I would have them ship generally about half a car by the association and half from the Magnolia Company. That was the way that it was shipped out in 1913 and up to the time that they began selling to Mr. Seastrunk. The Houston Ice & Brewing Company agreed that they wouldn't sell to anybody except me; I had the same agreement with them that I had with the American Brewing Association; when I agreed to take that indebtedness over, I took it from both of them. I know something about the Galveston Brewing Company; I have been there, and know that there is a concern that manufactures beer known as the Galveston Brewing Company, and also know that there is a brewery in San Antonio by the name of the Lone Star Brewing Company, and another by the name of the San Antonio Brewing Association that manufactures beer. I have heard of one in Dallas known as the Dallas brewery. I think there are two breweries in New Orleans, and I know there is one. These breweries were all in the business of manufacturing and selling beer during the years 1913 and 1914. It is 200 and some odd miles [\*\*24] from here to New Orleans, and 105 miles from here to Houston; this isn't quite half way from Houston to New Orleans. L. T. Grubbs handles the Houston Ice & Brewing Company's beer here; I am not connected with him in any way. If the American Brewing Association had kept on with me and hadn't begun to sell beer to Mr. Seastrunk, I wouldn't have brought this suit."

"The reason that I didn't order any more beer out from the association, after they had turned the agency over to Mr. Seastrunk, was because they had gotten another agency, and had taken Mr. Seastrunk as their agent, and they had taken the half car that I had ordered, and got the railroad company to release it, and gave it to Mr. Seastrunk. I think it was Mr. Sass that notified me that he had given the agency to Mr. Seastrunk, and the railroad company turned the car over to him; and that was my reason--because the agency was turned over to Mr. Seastrunk. There were several times when I was out of the association beer, Mike Grubbs went to driving for me on the 12th day of May, 1913, and continuously drove the wagon for me up to the time that the agency was taken from me, and it was taken from me on the 28th of January, 1914. [\*\*25] He drove for me from May until the following January. I think it was four or five times that I was out of association beer during that time; I took it down yesterday, and I can tell you for how long in a minute. I can tell you how many times I was out since Grubbs went to work for me. Beginning with May--he went to work on the 12th of May--I was not out of beer any during May, June, July, August, or September; the only day I was out in October was on the 29th; and I was out for two days in November, on the 26th and 27th; none in December; then I was out on Monday, the 19th of January. That is four days and three occasions in which I was out of beer during that time. The cause of me being out of beer on November 26th and 27th was that I had ordered a car of beer on the 21st and the brewery owed me for bottles and freight to the amount of \$ 178.20 for the freight and bottles that I had sent in. There was no dispute about them owing that. I have got their statement now. I wrote them to give me credit for the bottles, and the balance due me on the car. The car was ordered out on the 21st and got here on the 24th; and they notified me they had sent the bill of lading with the car. I phoned [\*\*26] them, and it was on the 26th, I think, [\*132] that they notified the bank to give me credit for the amount and release the car, and on the 27th they sent Mr. Sass over here, and on the 28th it seems that they released the car to me. The car was here at the time I was out, and they sent it out without giving me credit for this amount. At one time the cause of me being out of beer was on account of the Magnolia Company making the mistake, and instead of shipping it over the S. P. they routed it over the Frisco, and made it a day late; that was in October, I think; it was one of those days that I have mentioned. It was not customary for them to ship it that way; they had never done it before. I did not order it shipped that way; it was done through some error of the shipping clerk; and it would have

been here on time if they had shipped it the regular way. These are the only times that I was out during the 10 months. There was no complaint that I know of during that time from my customers of me being out of beer or their wanting beer. Prior to that time I was out of beer sometimes; lots of times it was because when I would send in the order they would be short of cooperage--that [\*\*27] is, short of kegs--it was both of the breweries that didn't have them; and then you take in August they can't get the cars when they ought to be shipped. Part of the time, if not all of the time, my being out of beer was not my fault, and part of it was the fault of the breweries. I can't tell how often it occurred that the shipments were delayed by them being out of cooperage, but it was several times, and several times it was their failing to ship on account of car shortage. I was asked the question if I had made the same kind of a contract with reference to the exclusive agency with the Magnolia people--the Magnolia people complied with their contract with me. From the time that I made the contract for the exclusive agency with the Magnolia people--the Magnolia people complied with their contract with me. From the time that I made the contract for the exclusive agency and sale of beer with the American Brewing Association up to the time that they canceled that agency, they sold to no other person except through me, and up to that time they complied with their agreement. After being shown a letter from me here, I state now that according to that letter the contract that I entered [\*\*28] into must have been on March 28, 1908; that letter was written after I came back from Houston. That is the same contract that I am suing on, and I have never made but one contract with them. I stated that when I was out of beer I would order it from Beaumont, and sometimes I would pay for it, and sometimes they did; I paid the freight and express, or I paid them back if they paid it."

Being asked who paid the loss to the trade, if anybody, when he ordered beer to supply them when he was short, he answered:

"I paid it myself, except to Mr. Futch, and he wouldn't take it. I lost a dollar profit and he would not let me pay the freight. When I ordered beer in this way I lost a dollar profit and 60 cents expressage. I made this loss each and every time that I failed to get the beer from the association when the trade wanted it, whether it was through their fault or mine. I never at any time failed or refused, when short of beer, to try to get it as soon as possible. I couldn't ascertain the number of times that I was short prior to the time that I have a record here."

Article 7796, Vernon's Sayles' Statutes, HN1[<sup>1</sup>] defines trusts as a combination of capital, skill, or acts, by two or more persons, [\*\*29] firms, corporations, or associations of persons, or either two or more of them for any or all of the following purposes:

- (1) To create or which may tend to create or carry out restrictions of trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.
- (2) To fix, maintain, increase, or reduce the prices of merchandise, produce, or commodities or the cost of insurance, or of the preparation of any produce for market or transportation.
- (3) To prevent or lessen competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities or the business of insurance, or to prevent or lessen competition or aids to commerce or in the preparation of any product for market or transportation.
- (4) To fix or maintain any standard or figure whereby the price of any article or commodity, merchandise, produce, or commerce, or the cost of transportation or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled, or established.

[\*\*30] HN2[<sup>1</sup>] (5) To make, enter into, maintain, execute, or carry out any contract, obligation, or agreement, by which the parties thereto bind or have bound themselves not to sell, dispose, or transport or prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall in any manner agree to keep the price of such article or commodity or charge for transportation or insurance, or the cost of preparation of any product for market or transportation at a fixed or graded figure, or by which they in any manner affect or maintain the prices of any commodity or article or the cost of transportation insurance, or the cost of the preparation of any product for market or transportation between them or

themselves and others to preclude a free and unrestricted competition among themselves or others in the sale, or transportation of any such article or commodity, or the business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, impede, or unite any interest they may have in connection with the sale or purchase of any article [\*\*31] or commodity, or charge of transportation or insurance, or charge for the preparation of any product for market or transportation, whereby the price or such charge might be in any manner affected.

([HN3](#)<sup>↑</sup>) 6) To regulate, fix, or limit the output of any article or commodity which may be manufactured, mined, produced, or sold, or the amount of insurance which may be undertaken or the amount of work that may be done in the preparation of any product for market or transportation.

[\*133] (7) To abstain from engaging in or continuing business or from purchasing and selling merchandise, produce, or commerce, partially within the state of Texas or any portion thereof.

It has been held under the above article: That the promise by a merchant to the purchaser of his stock to retire from business in the town for one year does not constitute a trust. [Gates v. Hooper, 90 Tex. 563, 39 S.W. 1079](#). That an agreement not to engage in a particular business for 2 years is not in violation of the trust law, or against trade. [Erwin v. Hayden, 43 S.W. 610](#). That an agreement that if defendant ceased to teach music in plaintiff's school that he would not teach in a certain town, is a binding contract, and [\*\*32] not in violation of the foregoing article. [Patterson v. Crabb, 51 S.W. 870](#). That a contract of the seller on the sale of merchandise and goods to refrain from such business for 20 years within the county in which the sale is made, is not invalid, as an unreasonable restraint of trade. [Tobler v. Austin, 53 S.W. 706](#). That an agreement by a doctor not to practice his profession within 10 miles of a certain town for 10 years is not void as against public policy, and is not in conflict with the law to prevent a combination or restraint of trade. [Wolff v. Hirschfeld, 25 Tex. Civ. App. 670, 57 S.W. 572](#). That an agreement by an owner on the sale of his business and good will not to re-enter said business until a specified time at a specified place, is not void as in restraint of trade. [Comer v. Burton-Lingo Co., 58 S.W. 969](#). That a promise by a partner to a copartner purchasing the business of the firm, not to engage in such business in that town so long as the copartner remained in business in the town, is not void as in restraint of trade. [Crump v. Ligon, 37 Tex. Civ. App. 172, 84 S.W. 250](#). That an agreement by the seller of a cotton gin and gristmill not to engage in that business so long [\*\*33] as the purchaser operated there, was not in violation of this article. [Malakoff Gin Co. v. Riddleberger, 133 S.W. 519](#). That a contract with a railroad company to ship 66 per cent. of the output of salt of a company at as low rate as any other company, was not void as against public policy. [Texas & P. Ry. Co. v. Shortline Ry. Co., 35 Tex. Civ. App. 387, 80 S.W. 567](#). That a contract between a railroad company and a sleeping car company, whereby the former grants to the latter the exclusive right to furnish sleeping cars to be used on a railway company, and on all lines controlled by it, and all roads which it might subsequently acquire or operate, is not in restraint of trade, and does not violate the anti-trust law. [Ft. Worth & D. C. Ry. Co. v. State, 99 Tex. 34, 87 S.W. 336, 70 L. R. A. 950](#). That under this article a petition which alleges that a manufacturer of foreign implements and vehicles entered into a contract with a dealer therein, whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods (italics ours), and that the manufacturer and dealer carried the contract into [\*\*34] execution, to the injury of the people (italics ours), charges a violation. [State v. Racine Sattley Company, 134 S.W. 400](#).

Article 7797 [HN4](#)<sup>↑</sup> defines a monopoly as being a combination or consolidation of two or more corporations, when effected in either of the following methods:

(1) When a direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing or where such common management or control tends to create a trust, as defined in the first article of this chapter.

(2) Where any corporation acquires the shares or certificates of stock or bonds, franchise, or other rights, or the physical property or any part thereof of any other corporation or corporations for the purpose of preventing or lessening, or where the effect of such acquisition tends to effect or lessen competition, whether such acquisition is accomplished direct or through the instrumentality of trustees, or otherwise.

**HN5**[<sup>↑</sup>] Under this article it has been held that a monopoly is not only an exclusive right granted by the state to a few of something which was before a common right, but embraces a combination, regardless of form; the tendency of [\*\*35] which is to prevent competition and control prices, to the detriment of the public. *Jones v. Carter, 45 Tex. Civ. App. 450, 101 S.W. 514*. That where neither party to a contract giving an exclusive selling agency in a specified territory was a corporation, and there being no evidence of the combination or consolidation, the agreement was not in violation of this article. *Nickels v. Prewitt Auto Company, 149 S.W. 1094*.

Article 7798 **HN6**[<sup>↑</sup>] provides that either or any of the following acts shall constitute a conspiracy in the restraint of trade:

- (1) Where any two or more persons, firms, corporations, or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.
- (2) Where any two or more persons, firms, corporations or association of persons shall agree to boycott or threaten to refuse to buy from or to sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

[\*\*36] A brief review of the authorities might be beneficial:

In the case of *Gates v. Hooper*, decided by [\*134] our Supreme Court, and reported in *90 Tex. 563, 39 S.W. page 1080*, the court says:

"This suit was instituted by appellant against appellee on the 2d day of May, A. D. 1896. The allegations in the original petition are as follows: That on the 14th of June, 1895, defendant [appellee], being then a merchant, and doing business as such merchant in the town of Batesville, in said county [Zavalla], entered into an agreement, partly verbal and partly in writing, with plaintiff [appellant], then and there also a merchant, and doing business in said town as such merchant, by which defendant agreed, bound, and obligated himself, for a valuable consideration moving from plaintiff, to retire from the mercantile business in said town of Batesville for the period of 12 months, and further agreed to use every effort to secure for the plaintiff all the patronage and custom that he had himself enjoyed in the trade of merchandise at said place, including his individual patronage and custom. That at said time defendant enjoyed a large and profitable trade in merchandise in and around [\*\*37] Batesville. That at said time defendant did retire from business as he had agreed and covenanted to do. That in consideration therefor this plaintiff did purchase from defendant, at his earnest request, his stock of goods, wares, and merchandise then and there being, and assumed to pay for him outstanding bills for goods, and purchased large amounts of notes and accounts pertaining to defendant's mercantile enterprise, at his urgent request, all upon the faith of defendant's said covenant that he would not engage in any mercantile enterprise or business for the space of time aforesaid in the territory aforesaid. \* \* \* Appellee demurred generally, on the ground that the contract set out in plaintiff's petition was illegal and void, as a restraint on trade, and, second, as preventing competition in the sale and purchase of merchandise. The general demurrer was by the trial court sustained, and, plaintiff declining to amend, the cause was dismissed. \* \* \* It is not contended that the contract would be void if tested by the common law, but that it is a 'trust,' under our statute (Rev. St. 1895, art. 5313), as construed by this court in *Queen Ins. Co. v. State, 86 Tex. 250, 24 S.W. 397* [\*\*38] [*22 L. R. A. 483*]; *Coal Co. v. Lawson, 89 Tex. 394* [*32 S.W. 871*] *34 S.W. 919*; *Welch v. Windmill Co., 89 Tex. 653, 36 S.W. 71*; *Brewing Co. v. Templeman, 90 Tex. 277, 38 S.W. 27*; and *Fuqua v. Brewing Company* [*90 Tex. 298*] *38 S.W. 29, 750* [*35 L. R. A. 241*]. **HNT**[<sup>↑</sup>] In order to constitute a trust, within the meaning of the statute, there must be a 'combination of capital, skill or acts by two or more.' 'Combination,' as here used, means union or association. If there be no union or association by two or more of their 'capital, skill, or acts,' there can be no 'combination,' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed, to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts,' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. In the case stated in the petition there is no [\*\*39] 'combination.'"

In the case of [Vandeweghe v. American Brewing Company, 61 S.W. 526](#), Judge Key says:

"This is a suit on a contract for the sale of beer. The only defense relied on in this court is that the contract violates the anti-trust statute of this state. The only fact relied upon to show a trust is an agreement by the plaintiff not to sell beer to any one else within a certain designated territory, contributory to the defendant's place of business. We think the case is distinguishable from the cases heretofore held to violate the anti-trust law, and within the doctrine announced in [Gates v. Hooper, supra.](#)"

In the case of Norton v. W. H. Thomas & Sons Company, decided by our Supreme Court, reported in [99 Tex. 578, 91 S.W. 780](#), which came up on certified question, Judge Williams, rendering the opinion, said:

"The record on this appeal shows that in 1902, W. H. Thomas & Sons Co., incorporated under the laws of Kentucky, entered into a contract with H. N. Norton, resident of Galveston, Tex., whereby it agreed to sell to Norton 50 barrels of whisky of a named brand and age at a stipulated price per gallon. Under the agreement the corporation was to ship 100 barrels from Germany [\*\*40] to Galveston, the first 50 above named to be a credit sale and Norton to have the option to take the second 50 barrels at the same price for cash. In pursuance of this agreement the whisky was shipped to Galveston and Norton took and \* \* \* paid for the first 50 barrels according to the contract. The president of the corporation being in Galveston sought to induce him to take the other 50 barrels, but Norton declined to exercise his option, giving business reasons. Thereupon the president of the corporation offered the whisky on a credit, the debt to be evidenced by Norton's notes. As a further inducement the company agreed that it would not sell in Galveston, Beaumont, or Houston, \* \* \* any liquor of that brand and age until Norton had closed out his purchase. \* \* \* One of his defenses in the court below was that the contract of sale was within the provisions of the anti-trust law of 1899 and therefore void, and the question has arisen for our decision. 'In view of the holding [said the Court of Civil Appeals of the First District] in [Troy Buggy Company v. Fife & Miller, 74 S.W. 956](#), the soundness of which we doubt, we respectfully certify for your decision: Was the contract void [\*\*41] and the notes uncollectable by reason of the anti-trust law of 1899?'"

The court, after reviewing the sections of the act, among other things, said:

"Section 6, page 248, makes it unlawful for a person engaged in buying or selling articles, etc., [either] to enter into any pool, trust, agreement, etc., \* \* \* 'or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article,' etc."

The court further says:

"The sixth section might apply to the case but for the requirement that the pool, agreement, etc., to limit trade, or competition therein, by refusal to sell to others besides the parties to the arrangement, must be for the reason that such others are not parties to it. By this it is made clear that the offense denounced does not consist simply of an agreement between two that one of them will not sell to others, but of an association which seeks to limit trade or competition in trade in some article by confining the buying and selling thereof to the members of such pool, trust, agreement, etc., and by refusing to sell to or buy from others for the reason that they have not become such members."

In Forrest Photo. Co. v. [\[\\*\\*42\] Hutchinson Grocer Co.](#), reported in [108 S.W. 768](#), the San Antonio court, through its Chief Justice, says:

"Appellant sought to recover the sum of \$ 2,850 from the Hutchinson Grocery Company alleged to have accrued to plaintiff on account of the failure and refusal of defendant to pay said sum to plaintiff under the terms of the following contract: \* \* \* 'In consideration of 15,000 [\*135] photo calendar trading tickets delivered to me by the Forrest Photographic Company, of San Antonio, Tex., each of said trading tickets entitling its holder to a photo art calendar, with his or her picture copied thereon, at the Forrest Photo. Co. studio at San Antonio, Tex., when traded out, and countersigned by me at my place of business, at Houston, Tex., etc., and it is agreed that, in consideration of this, the Forrest Photo. Co. will not sell to any other grocery company, after this date, the above-mentioned photo calendar trading tickets, without our consent. It is further understood that the only merchant grocery companies to

which the Forrest Photo. Co. of San Antonio, Tex., have sold such photo calendar trading tickets to, in the city of Houston, Tex., are as follows: [Naming the parties.]"

[\*\*43] To the petition defendant filed a general demurrer and special demurrer. "The court entered an order sustaining the general demurrer, for the reason that the contract contravenes the statutes prohibiting trusts and combinations in restraint of trade. \* \* \* Appellant's propositions, as regards the contract being in contravention of the statute, are in substance as follows:

"First. The petition does not disclose a combination of capital, skill, or acts of two or more persons, firms, corporations, or association of persons, or either two or more of them, for any of the purposes enumerated in the statute of 1903.

"Second. Appellee under said contract could purchase similar tickets from any firm engaged in the business of selling such tickets, and appellee was not bound to buy tickets exclusively from the appellant.

"Third. Appellant had the right to contract not to deal with any grocery company in Houston, Tex., except appellee, while the latter was disposing of his tickets; the business of no other such photographic company was interfered with.

"This proposition signifies that a corporation has a right to manage its own business to suit its pleasure, and advance its interests, no [\*\*44] other business being interfered with.

"Fourth. Appellee was, in legal effect, appellant's agent."

The court, in passing on the matter, says:

"The question, then, is whether or not it is one which is declared void by the anti-trust statute of 1903, which was in force at the time the contract in question was made. We think not. That act defines trusts, monopolies, and conspiracies in restraint of trade. What would constitute a trust--that is, a 'combination of capital, skill, or acts of two or more persons, firms, corporations, or association of persons, or either two or more of them, for either, any, or all of the following purposes'--is the same in the act of 1903 as it was in the statute of 1895, being the act of 1889, under which latter statute the case of *Gates v. Hooper* arose, [90 Tex. 563, 39 S.W. 1079](#), wherein the Supreme Court held that a transaction of the nature of the one in question was not a union or combination of persons within the meaning of the act. In [Norton v. Thomas & Sons Company, 99 Tex. 578, 91 S.W. 780](#), the Supreme Court points out that contracts such as the one we have here belong to a class usually treated as contracts in restraint of or imposing restrictions [\*\*45] upon trade or competition. The statute of 1903 deals with conspiracies in restraint of trade, defining such to be: 'Where two or more persons, firms, corporations or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity,' or, 'when any two or more persons, firms, corporations or association of persons shall agree to boycott or threaten to refuse to buy from or sell to any other person, firm, corporation or association of persons, \* \* \* any article, merchandise, produce or commodity.' If the transaction in question contravenes any of the provisions just referred to it is the first one, it clearly not falling within the second one. \* \* \* In the first place, aids to commerce are not included, and the tickets issued by plaintiff, together with its obligation, to give to each holder of tickets an art calendar with his photograph upon it, embodies what is, in substance, a mere aid to defendant's business. \* \* \* In the second place we think that [\*\*46] the tickets, and the obligation of plaintiff to give the holders thereof calendars \* \* \* was essentially a contract for service, to be rendered the defendant, rather than the sale of an article of merchandise, produce, or commodity. The transaction does not come within the class defined in the statute as 'monopolies.'"

In the case of *Nickels v. Prewitt Auto Company, 149 S.W. 1094*, Chief Justice Key says:

"The appeal involves but two questions, and these are: First, that the note sued on is part of a contract which contravenes the antitrust statute of this state, and therefore the note is not enforceable, etc. The contract referred to shows that the note sued upon was executed in part payment for certain automobiles; and, among others, it

contains this stipulation: 'And the said Prewitt Auto Company hereby gives the said J. A. Nickels the exclusive and sole right to sell the Moon Motoring Car Company's automobiles and supplies in the counties of Falls, \* \* \* McLennan county, and the trade territory of Mart, and this right shall be in force until the 1st of October, 1911.'

"It is upon that stipulation that appellant bases the proposition that the contract is in conflict with the anti-trust [\*\*47] statute, and therefore not enforceable. We overrule that contention, and hold the stipulation referred to does not require or authorize anything to be done that is prohibited by said statute. It merely conferred upon appellant an exclusive agency, in a restricted territory, and for a short period of time. It did not prohibit the other party from making sales elsewhere, nor did it attempt to fix prices or prohibit appellant from purchasing or selling other articles of the same kind obtained elsewhere [citing authorities]."

"After due consideration," says the court upon motion for rehearing, "we have reached the conclusion that appellant's motion for rehearing in this case should be overruled. However, we are now satisfied that this court fell into error when it held that the stipulation in the contract set out in our former opinion merely 'conferred upon appellant an exclusive agency in a restricted territory and for a short period of time.' We now hold that the stipulation in question attempted to confer upon appellant the sole right to sell the Moon Motoring Car Company's automobiles and supplies in the territory mentioned; and the effect of it was to prohibit the Prewitt Auto [\*\*48] Company, the other party to the contract, from making any sales of such property in that territory within the time prescribed, but we hold that neither appellant's answer, nor the proof submitted thereunder, showed any violation of the anti-trust statute of this state."

After setting out several of the articles, the court says:

**HN8** [↑] "Article 7798. *Conspiracies Against Trade, What Constitutes.* Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"(1) Where any two or more persons, firms, corporations or association of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter [\*136] into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity," etc.

"That the agreement of the Prewitt Auto Company not to sell the Moon autos and supplies in the territory designated did not constitute such a combination of capital, skill, or acts as is necessary to constitute a trust, as defined by the statute referred to, is settled by the decision of our Supreme Court in Gates v. Hooper, 90 Tex. <sup>I</sup>\*\*491 563, 39 S.W. 1079. Both the pleadings and evidence fail to show that either of the parties to the contract was a corporation, and failed to show any combination or consolidation; and therefore it is neither claimed that the defense of monopoly was not sustained, nor did appellant's answer or the proof submitted thereunder show conspiracy against trade, as defined by the statute, because it was not alleged or proved that both or either of the parties to the contract were engaged in buying or selling automobiles, or any other article of merchandise. If it had been alleged and proved that the Prewitt Auto Company and appellant, Nickels, were each and both engaged in the business of buying and selling automobiles, a different question would be presented, and we might hold that the contract was in violation of the first subdivision of article 7798; but no such allegation or proof was made. That is the provision of the statute which appellant seems to contend was violated, but we hold that his pleading and the proof does not go far enough to show such violation. The language 'who are engaged in buying or selling,' etc., was evidently placed in the statute for the purpose of limiting that [\*\*50] provision to merchants and others engaged in some particular business, and therefore, in order to show a violation of that provision, it is necessary to allege and prove that the parties to the alleged illegal contract were engaged in the business of buying or selling such articles as the contract relates to."

The court, in Star Mill & E. Co. v. Ft. Worth Grain & E. Co., says (146 S.W. 604):

**HN9** [↑] "The purpose, we think, as indicated by the scope of the statute and the language used, was to denounce as illegal, without reference to the intent of the parties and without reference to its actual effect, every agreement or

understanding between parties engaged in buying any commodity, whereby they, or either of them, was to refrain from buying such commodity from any one having same for sale."

If we grant this to be the intent of the statute, yet in the instant case there was no such agreement. On the contrary, appellant was buying beer from two other parties at the time, and was selling same commodity to the saloon men of Orange.

In the case of Wood v. Ice & Cold Storage Co., 171 S.W. 497, it was said by the court, after giving the definition of the law in the statute:

"Such being the [\*\*51] literal language of the statute, the contract in question, in our opinion, comes precisely within the statutory definition of the acts denounced thereby, since the declared purpose of the contract is to prevent appellant from buying ice from any other person, firm," etc.

In the instant case, neither party to the contract agreed that appellant would not buy beer from any one else; in fact, as stated heretofore, the appellant was buying and continued to buy beer from two other manufacturers.

The court, continuing in the case last cited, says:

**HN10** [+] "By the statute it is unlawful for two persons to agree that one of them will buy from the other *exclusively of a given commodity* as it is in like manner unlawful for one of them to agree to sell exclusively to the other a given commodity."

No such state of facts exists in the instant case. A multitude of persons and corporations are engaged in the manufacture of beer, the same being a commodity.

In the two cases last cited, the grain and ice cases, the agreement affected both commodities and the parties to the contract, the purchaser and seller. In the present case, the commodity was not affected, and was being sold under various other [\*\*52] brands by appellant and others to the saloon men of Orange, both before and after the making of the contract.

The case of *Nickels v. Prewitt Auto Company, supra*, is very similar to the instant case. The fact is that the stipulation in the contract in that case is almost identical with the one now before us. Upon that stipulation was based the proposition that the contract was in conflict with the anti-trust statute, and therefore not enforceable. As the court said in that case, it did not prohibit the Prewitt Auto Company from making sales elsewhere; neither in the case before us did the contract prohibit the American Brewing Association from making sales of its beer elsewhere. In the Prewitt Case there was no attempt to fix prices or prohibit appellant from purchasing or selling other articles of the same kind obtained elsewhere, and in the instant case the contract did not attempt to fix prices or prohibit the appellant, Woods, from purchasing or selling the commodity of other breweries obtained elsewhere. In fact, appellant was, at that very time, handling beer for the Magnolia Brewery of Houston, and from Pilsener people.

It was held in the Prewitt Case, on motion for rehearing, [\*\*53] that the stipulation in question attempted to confer upon the appellant the sole right to sell the Moon Motoring Car Company's automobiles and supplies in the territory mentioned, and that the effect of it was to prohibit the Prewitt Auto Company, the other party to the contract, from making any sales of such property in that territory within the time prescribed.

In this case Woods, the appellant, according to the undisputed testimony, was not engaged in selling beer to the consumer or at retail, but his business was exclusively with the saloon men, and the terms of the contract were substantially that appellant would pay appellee the \$ 2,400 debt owing to it by Mr. Boland, and that appellant would give to appellee the exclusive right to sell beer manufactured by it in Orange, Tex. The business was conducted between the parties by appellant ordering of appellee such beer as he desired. This beer was consigned to [\*137] appellant to be paid for when received. When received, it was stored in cold storage, which was paid for by appellee, until in the course of sales made thereof by appellant to the various persons, his customers, engaged in the sale of beer in Orange at retail, [\*\*54] the shipment was exhausted. Appellant paid for the beer at \$ 7, and sold it for \$ 9 per barrel; the difference being his profit out of the business.

We do not believe that a contract such as the present is in violation of the state antitrust law. The statutes with reference to trusts are aimed primarily at a protection of the public welfare. We do not believe that such a business arrangement as obtained in this case is inhibited by said statute. Only one of the parties in the present case is a corporation. That party is the manufacturer. It sends its manufactured product to the city of Orange, bill of lading attached, to a party then engaged in selling other articles of like character, manufactured by other persons or corporations, to the saloon men in the city of Orange. There is no price fixed or agreed upon at which the said manufactured article is to be sold to the saloon men of the city of Orange. The only price fixed is the price agreed upon by the parties to be paid by the appellant upon the delivery of the consignment of beer. The facts show that appellee has been making the same contracts, that is with reference to having one person handle its article in the city of Orange, [\*\*55] 10 or 12 years prior to the making of this contract.

We have examined carefully all the authorities presented by appellee, some of which seem to be somewhat similar to the case in hand. We are persuaded to believe that it was not the intention of the Legislature to prohibit the making of such a contract as is shown to have been made in this case, and that the said contract is not in violation of the state anti-trust law, or any section of same. In other words, we can see no fact in this case which would indicate a conspiracy in restraint of trade, but it appears, to our minds, simply a method by which the manufacturer of an article supplies said article to the trade, and is not an effort, in our judgment, to stifle competition.

Appellee contends that inasmuch as the contract was not to be performed within a year, and the same being oral, that it was contrary to the statute of frauds. We do not believe that the contention is sound. Railway Co. v. Wood, 88 Tex. 191, 30 S.W. 859, 28 L. R. A. 526; Warner v. Railway Co., 164 U.S. 418, 17 S. Ct. 147, 41 L. Ed. 495.

It follows from what has been said that in our opinion the lower court was in error in instructing a verdict for appellee, [\*\*56] and we so hold.

The cause is therefore reversed and remanded for a new trial.

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## **Henry Gildehaus Co. v. Busse & Borgman Co.**

Court of Common Pleas of Hamilton County, Ohio

November, 1916, Decided

No Number in Original

**Reporter**

27 Ohio Dec. 111 \*; 1916 Ohio Misc. LEXIS 39 \*\*

HENRY GILDEHAUS CO. v. BUSSE & BORGMAN CO. ET AL.

**Prior History:** [\*\*1] REHEARING.

**Disposition:** Motion overruled. Order modified.

### **Core Terms**

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commerce, union labor, labor organization, interstate trade, anti trust law, carry out, manufacturer, restrictions, circulated, antitrust, boycott, unfair

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

[\*\*HN1\*\*](#) [] **Public Enforcement, State Civil Actions**

See Ohio Gen. Code § 6391(1).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

[\*\*HN2\*\*](#) [] **Public Enforcement, State Civil Actions**

A combination of persons for the purpose of boycotting a person who will not become a member of their organization and a further combination by these persons with a union labor organization in furtherance of this boycott, whereby an attempt is made to have persons refuse to deal with him on account of an alleged unfairness to union labor, is a combination to create or carry out restrictions in trade or commerce within the view of the act known as the Valentine **Antitrust Law** (Ohio).

### **Headnotes/Summary**

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**Headnotes****RESTRAINT OF TRADE.****Acts Constituting Combination in Restraint of Trade.**

A combination of persons formed for the purpose of boycotting those who refuse to become members of their organization and the further combining of such organization with a labor union in furtherance of said boycott, whereby an attempt is made to prevent the public from dealing with nonmembers on account of their alleged unfairness toward union labor, is a combination to create or carry out restrictions in trade or commerce within the meaning of Sec. 6397 G. C., the Valentine antitrust law.

**Counsel:** Sherman T. McPherson, for plaintiff.

Dempsey & Nieberding and Dinsmore & Shohl, for defendants.

**Judges:** GEOGHEGAN, J.

**Opinion by:** GEOGHEGAN

**Opinion**

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**[\*111] GEOGHEGAN, J.**

This matter came on again for a rehearing of the court's ruling striking from the petition herein the averment reading as follows:

"That the defendants circulated and caused to be circulated in Cincinnati, Hamilton county, Ohio, in furtherance of said agreement and conspiracy above set forth that plaintiff was unfair to union labor, knowing the same to be untrue, to the great damage and injury of its business."

The court, at the time of ruling upon said motion, expressed the opinion that the act known in Ohio as the Valentine antitrust law Sec. 6390, *et seq.*, G. C., did not by its terms expressly prohibit the doing of the act complained of in the allegation above set forth, and that as this action was brought to recover the penalty provided for in said act, only such things might be pleaded as were expressly prohibited by said act. At that time the court's attention had not been directed to the various cases decided by the Supreme Court of the United States [<sup>\*\*2</sup>] in which the Sherman antitrust law was discussed and construed, especially [\*112] the case of [Loewe v. Lawlor, 208 U.S. 274, 52 L. Ed. 488, 28 S. Ct. 301](#), wherein the Supreme Court of the United States held as follows:

"A combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other states, to unionize his shops and on his refusal so to do to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce within the meaning of the antitrust act of July 2, 1890, and the manufacturer may maintain an action for three-fold damages under Sec. 7 of that act."

Now, the only theory upon which the combination of labor organizations was held to be a combination within the purview of the Sherman antitrust act was that it was a combination in restraint of interstate trade or interstate commerce.

Section 6391 G. C. provides as follows:

27 Ohio Dec. 111, \*112 | 916 Ohio Misc. LEXIS 39, \*\*2

**HN1** [↑] "A trust is a combination of capital, skill, or acts by two or more persons, firms, [\*\*3] partnerships, corporations or associations of persons for any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce. \* \* \*"

It seems, therefore, that by a parity of reasoning **HN2** [↑] a combination of persons for the purpose of boycotting a person who will not become a member of their organization and a further combination by these persons with a union labor organization in furtherance of this boycott, whereby an attempt is made to have persons refuse to deal with him on account of an alleged unfairness to union labor, is a combination to create or carry out restrictions in trade or commerce within the view of this act.

Therefore, I have reconsidered my opinion heretofore rendered and now hold that in so far as the matter above sought to be stricken out is concerned the motion should be overruled.

An order will therefore be prepared in conformity with this ruling and the ruling heretofore made is modified by this ruling.

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## Orebaugh v. Neu

Court of Appeals of Ohio, Fourth Appellate District, Adams County

January 24, 1917, Decided

No Number in Original

**Reporter**

6 Ohio App. 404 \*; 1917 Ohio App. LEXIS 381 \*\*; 28 Ohio C.A. 161

OREBAUGH v. NEU

**Prior History:** **[\*\*1]** The parties stand in this court as they stood in the court below. The plaintiff filed his amended petition in the court of common pleas alleging that on the 3d day of October, 1913, and for a long time prior thereto, the Ford Motor Company, a corporation duly incorporated under the laws of the state of Michigan, and having its place of business in the city of Detroit, in the state of Michigan, was engaged in the manufacture and sale of a certain line of automobiles, and accessories thereto, known as the Ford automobile, of which it was the sole manufacturer; that the automobiles and accessories were manufactured under letters patent of the United States, of which the Ford Motor Company was the sole and exclusive owner; that on said third day of October, 1913, the plaintiff made application to the said Ford Motor Company to be its agent in the following territory, viz., Winchester, Ohio, and Adams county, all in the state of Ohio; and that said Ford Motor Company accepted said application and entered into a written contract.

A copy of the contract is incorporated in the petition.

On the 9th day of March, 1914, the plaintiff and defendant, having full notice and knowledge of the **[\*\*2]** existence, terms, provisions and conditions of said contract of plaintiff with the Ford Motor Company, entered into a partnership in the business of selling automobiles. The partnership took over and assumed all the rights, powers and privileges contained in the contract between plaintiff and the Ford Motor Company. Prior to said 9th day of March, 1914, plaintiff and defendant, as such partners, ordered and requested a consignment to plaintiff from said Ford Motor Company, under said contract between plaintiff and said Ford Motor Company, of a large number of said Ford automobiles, to be sold under the provisions of said contract, plaintiff and defendant, as such partners, advancing to said Ford Motor Company eighty-five per cent. of the full advertised list price of the consignment. The cars so ordered were duly shipped by the Ford Motor Company.

On the 9th day of March, 1914, while plaintiff and defendant, as such partners, had in their possession a large number of such cars belonging to said Ford Motor Company, they dissolved said partnership and entered into a contract of dissolution. Parts of said contract are as follows:

"W. C. Neu is to have as his share in the division **[\*\*3]** of the property eleven new motor cars in good condition; Orebaugh is to have all the balance of the machines \* \* \*.

"The said W. C. Neu is to sell all his cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh and the said W. H. Orebaugh agrees to sell on the same conditions, and neither of them is to interfere with the other's sales."

Plaintiff says that the defendant, in violation of said written agreement of defendant with plaintiff, and with full knowledge of said contract between plaintiff and the Ford Motor Company, between the 9th day of March, 1914, and the 30th day of September, 1914, and while both contracts were in full force and effect, which defendant well knew, sold a large number of said Ford motor cars so received by defendant under his written agreement with plaintiff, to-wit, six of said new Ford motor cars, outside of the specified territory mentioned in said contract of

limited agency between this plaintiff and the said Ford Motor Company, knowingly selling the same to persons who are, and then were, residents of Scioto county, Ohio. Thereupon said Ford Motor Company, through one W. J. Friel, its limited agent in said **[\*\*4]** Scioto county, called upon the plaintiff, and plaintiff under his said contract with the said Ford Motor Company was compelled to and did pay at the order of the Ford Motor Company to its limited agent at Portsmouth, Ohio, the sum of \$ 400 damages, by reason of such sales so made by defendant in violation of said contract between plaintiff and defendant.

Plaintiff therefore claims a judgment against the defendant for the sum of \$ 400.

To this amended petition the defendant filed a general demurrer on the ground of insufficiency.

The demurrer was sustained in the court of common pleas.

**Disposition:** *Judgment reversed, and cause remanded.*

## Core Terms

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second party, first party, purchaser, machines, bill of sale, patents, dissolution, provisions, territory, selling, list price, consignment, sales, terms

## Headnotes/Summary

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### Headnotes

*Monopoly -- Public policy -- Restraint of trade -- Limited agency contract -- Sherman anti-trust law -- Effect of withholding title -- No violation of law where agent has right only to solicit purchasers.*

## Syllabus

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The Ford Motor Company in its limited-agency contract withholds to itself the title in the machine, and the agent has the right only to solicit purchasers, and no right to give complete title to the purchaser except by bill of sale signed by the Ford Motor Company, and its sales are made through its own agents under the contract, and it **[\*\*5]** is protected in so directly selling by its patents, and its contract is not monopolistic, in restraint of trade, or in violation of the Sherman anti-trust law, or against public policy.

**Counsel:** *Messrs. Blair & Kimble*, for plaintiff in error.

*Mr. Joseph W. Bagby and Mr. C. E. Roebuck*, for defendant in error.

**Judges:** *WALTERS, J. SAYRE and MIDDLETON, JJ.*, concur.

**Opinion by:** *WALTERS*

## Opinion

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**[\*407]** The question raised is whether or not the contract between Orebaugh and the Ford Motor Company is against public policy, monopolistic in its tendencies, and in violation of the Sherman anti-trust law.

The former contract of the Ford Motor Company was under consideration by the district court of the United States for the southern district of Ohio, western division, in cause No. 2174, *Ford Motor Company v. The Union Motor Sales Company et al.*, \* and Judge Hollister held in the opinion that the contract of the Ford Motor Company then existing and under consideration by the court was monopolistic, against public policy, and came within the provisions of the Sherman anti-trust law.

[\*\*6] Whether or not the contract now under consideration, or the contract under consideration by Judge Hollister, is a contract which the Ford Motor [\*408] Company had a right to make with its agents depends upon whether or not the contract provides for the sale of the machines to the agents -- whether or not the title to the machines vests in the agent.

After the above decision the attorneys for the Ford Motor Company drew up another contract, which they attempted to take out of the provisions of the decision of Judge Hollister. As to whether or not they have done so is the principal question in this case.

Judge Hollister held that a patentee, when he sold his machines to a vendee and received the full purchase price therefor as such patentee and manufacturer, could not dictate the price at which his agent or vendee should sell the article; that under the patent laws of the United States when a man receives a patent, the object is to give him a monopoly, he may manufacture and sell direct for such price as he may fix, and is protected by the law and his patents, but that when he sells to an agent or other person and receives the full price he asks for the article and all he expects [\*\*7] to receive, he can not say to the vendee or agent that he must sell it for a certain price. That is the limit of the protection afforded him by the patent laws of the United States.

Mr. Orebaugh's contract was under the new form of contract provided by the Ford Motor Company, and if its terms withhold the title in the Ford Motor Company, and the agent has the right only to solicit purchasers for the Ford Motor Company and has no right to give complete title to the purchaser except by bill of sale signed by the Ford [\*409] Motor Company, it seems to us the Ford Motor Company is selling the machine direct through its agent, that Orebaugh was simply a soliciting agent for the Ford Motor Company, and that no title passed when Orebaugh secured a purchaser for one of the machines, until the Ford Motor Company executed a bill of sale.

Let us examine some of the provisions of this new contract.

The preamble states: "Whereas the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and the first party is willing to appoint second party, with certain limited authority and upon the following [\*\*8] terms and conditions only:" etc.

Condition No. 1 recites: "That first party hereby appoints the second party its 'Limited Agent', with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's products to users only in the methods and upon the terms and within the territory herein specifically set forth."

Condition No. 2 is as follows: "That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred."

Condition No. 3 is as follows: "That first party will consign its Ford automobiles to second party to be sold to users only, and not for re-sale upon bills of sale to be executed by the first party only, as hereinafter provided."

Condition No. 6 states: "Second party shall arrange for sales of Ford automobiles \* \* \*." [\*410] And in condition No. 7 we find the term: "Second party shall arrange all sales \* \* \*."

Condition No. 9 provides: "The first party may change the list price of any of its products at any time it may choose \* \* \*."

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\* 225 F. 373. -- REPORTER.

Condition No. 10 sets forth the second party's lien, stating that he shall advance in cash 85 per cent. of the full list price of cars at the time of the [\*\*9] consignment; and in condition No. 11 the word "consignment" is also used.

Condition No. 13 is as follows: "First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, or one of its factory branch managers, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever."

Condition No. 14 specifically gives the second party a lien on each Ford automobile consigned to him, for the 85 per cent. advanced by him on the sale.

The consignee or limited agent could have no lien upon his own property.

Condition No. 15 states: "Second party will make no arrangements for the sale of a Ford automobile without taking such written signed order \* \* \*."

[\*411] Condition No. 17 is as follows: "The dealings of the second party with a proposed purchaser of [\*\*10] an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, \* \* \*."

Condition No. 19 states: "Second party shall have no authority to make any warranty whatsoever of Ford automobiles \* \* \*."

Warranty is an incident of ownership.

Condition No. 21 provides: "In case of damages to automobiles by carriers in transit to second party collection from the carrier shall be made in the name of the first party as the owner of such automobiles \* \* \*."

In condition No. 23 second party guarantees to save first party harmless from theft and damage of any kind to Ford automobiles while in his possession under consignment.

In condition No. 25 second party agrees to display signs and otherwise advertise as a limited agent for Ford cars, and thus establish himself with the public as being simply an intermediate agent between the seller and buyer, or, in other words, a means of communication.

Condition No. 32 is as follows: "The first party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay to the [\*\*11] second party five per cent (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash. This shall not include sales of parts or accessories, which are otherwise provided for herein."

[\*412] Condition No. 43 again reserves the right in the first party to change the price of the car at any time, and even after requisitions and deposits are accepted.

All of these provisions, and each and every one of them, are made in this contract with the intent on the part of the contracting parties that the first party shall retain the title and ownership of all automobiles until the limited agent has secured a purchaser, and, then, not until the first party executes a bill of sale to the purchaser is the sale complete.

The first party reserves to itself the right to make sales in the territory, and provides that the second party shall not warrant any of the automobiles. If he owned them he could do as he pleased with them. The second party can make all the arrangements he pleases for a sale, but, in the contract, the Ford Motor Company reserves the right to make the sale by executing a bill of sale. The contract speaks [\*\*12] of the second party making arrangements for the sale. Condition No. 13 provides that the Ford Motor Company "shall retain all and complete title to each

automobile until actual bill of sale [is] signed and executed by first party \* \* \*." Condition No. 9 gives the right to the first party to change the list price of any of the products. That is an index of ownership.

We do not decide whether the relation between the automobile company and the limited agent is that of bailor or bailee. But whatever the relation is, as evidenced by this contract, it may be [\*413] termed, as it is in the contract, one of limited agency.

We are constrained to believe that what we have quoted of this new contract steers clear of the objections in the old contract pointed out in the opinion of Judge Hollister, as each of the paragraphs quoted from the new contract shows distinctly that the Ford Motor Company has simply given the right to its limited agents to procure purchasers; in other words, as is said in the contract, to arrange for the sale. The company really makes the sale itself after the agent acts as a solicitor in procuring a purchaser. The Ford Motor Company manufactures these automobiles [\*\*13] under its different patents issued by the United States, and under this contract it sells them directly through an agent. That it has a right to do, and is protected by its patents in fixing whatever price it chooses so long as the title is not vested in the limited agent.

Having concluded the main issue in this case, and having found that the contract is a valid one, is not against public policy, is not monopolistic, and is not within the provisions of the Sherman antitrust law, and that the patentee of these articles was discharging only his own legal rights protected by the patents, we now come to the question of the liability of the defendant to plaintiff under the contract of dissolution between them.

It is stated in the amended petition, and in the language used in the contract of dissolution, that Neu had explicit knowledge of all the clauses in the contract of Orebaugh with the Ford Motor Company, and that he agreed in the contract of dissolution [\*414] that he would sell all cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh. Now neither Orebaugh nor his partner, according to our finding, had any title to any of the [\*\*14] cars. Therefore, Orebaugh could confer no title by selling the cars to Neu, and in fact there was not a sale -- there was a dissolution of the partnership and a division of the assets of the partnership between them upon amicable terms. But Neu, in violation of his contract of dissolution and in violation of the Ford Motor Company contract, of which he knew, as is alleged in the amended petition, sold machines in Scioto county, which he well knew he had no right to do, and he knew at the time that selling machines outside of the territory limited in the Ford Motor Company contract would make Orebaugh liable for \$ 250 for each machine so sold. Orebaugh says he has paid the damages to the agent of Scioto county, through the Ford Motor Company, and he now asks that Neu, for a flagrant violation of his contract, pay to him the damages he has sustained thereby. If this was not fraud on the part of Neu, when he had knowledge of the Ford Motor Company's contract, and its provisions against selling outside of certain territory, and the penalty attached to Orebaugh for so doing, it certainly nearly amounts to fraud. For such a violation of the terms of the partnership contract of dissolution [\*\*15] and the Ford Motor Company's contract, knowing of the damage that would result to Orebaugh, it seems to us that Orebaugh can maintain an action against Neu.

[\*415] The judgment of the court below is reversed, cause remanded, and the court instructed to overrule the demurrer to the amended petition.

*Judgment reversed, and cause remanded.*

## People v. Baff

Court of General Sessions of the Peace, In and for the County of New York

April, 1917

No Number in Original

**Reporter**

99 Misc. 684 \*; 166 N.Y.S. 136 \*\*; 1917 N.Y. Misc. LEXIS 871 \*\*\*

The People of the State of New York, Plaintiff, v. Harry Baff, Louis Warner, Max Sekeleff, Charles S. Frank, Goodman Levy, and Paul Abelson, Defendants

**Prior History:** [\*\*\*1] Motion to set aside indictment.

**Disposition:** Ordered accordingly.

## **Core Terms**

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indictment, poultry, grand jury, forty-one, witnesses, competitors, incompetent

## **LexisNexis® Headnotes**

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Criminal Law & Procedure > ... > Procedures > Return of Indictments > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

### **HN1[] Procedures, Return of Indictments**

Convenience and expedition in the administration of the criminal law suggest not to condemn the course pursued by a grand jury in failing to re-examine the witnesses, particularly where an indictment is filed for the same crime.

Criminal Law & Procedure > ... > Procedures > Return of Indictments > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

### **HN2[] Procedures, Return of Indictments**

There is no substantial reason why the procedure, where a motion to set aside an indictment is granted with leave to resubmit the charge to a grand jury, should not be followed where a demurrer is laid to an indictment with leave to resubmit the charge.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **[HN3](#) [down] Monopolies & Monopolization, Attempts to Monopolize**

The law does not affix the brand of condemnation upon any contract, agreement, or arrangement unless it unreasonably or unduly restricts trade or commerce or unduly or unreasonably restricts competition in the supply or price of an article or commodity of common use or tends to produce such results. In other words, it must be shown that the parties who seek to control or monopolize the avenues of industry, in order to prevent free and unrestricted competition in business pursuits, have sufficient power to control or possess effective means to dominate the particular business in which they are engaged.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Governments > Agriculture & Food > Animal Protection

### **[HN4](#) [down] Monopolies & Monopolization, Attempts to Monopolize**

Mere numbers do not ordinarily affect the quality of an act allegedly attempting to control an industry. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view.

Criminal Law & Procedure > ... > Grand Juries > Evidence Before Grand Jury > General Overview

Criminal Law & Procedure > ... > Procedures > Return of Indictments > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

### **[HN5](#) [down] Grand Juries, Evidence Before Grand Jury**

Where witnesses are accomplices, as a matter of law, it is necessary, therefore, to sustain a grand jury indictment that their testimony should be corroborated by other evidence tending to implicate the defendants.

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Evidence > Authentication > General Overview

Evidence > Types of Evidence > Documentary Evidence > General Overview

### **[HN6](#) [down] Directors & Officers, Scope of Authority**

The testimony of a bookkeeper of the corporation with which the defendants are connected as corporate officers, that he had prepared from books of the corporation a summary showing the volume of business transacted, the expenses of the business, the gross profits, the net profits, and the balance in the treasury of the corporation, is clearly incompetent. Upon no conceivable theory is such testimony admissible against the officers of the corporation, where no proper foundation is laid, establishing that the entries in the books were made with the knowledge of the defendants, or that they authorized or caused such entries to be made, or that they had some connection with the entries therein.

## **Headnotes/Summary**

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## Headnotes

### **Indictment -- when motion to set aside, will be granted -- pleading -- grand jury -- evidence -- criminal law -- General Business Law, §§ 340, 341.**

On granting a motion to set aside an indictment with leave to resubmit the charge to the grand jury the same procedure should be followed as where a demurrer is sustained with like leave.

Where, upon sustaining a demurrer to an indictment under the "Donnelly-Anti-Trust Law" (General Business Law, §§ 340, 341) upon the ground that the acts charged in the indictment to have been committed by defendants did not constitute a crime, an order was entered granting leave for the resubmission of the charge to the same grand jury and a new indictment is returned without the taking of any additional testimony, a motion to set aside the new indictment for failure of the grand jury to examine the witnesses anew before finding the new indictment will be denied.

Where, however, in the record of the proceedings before the grand jury which returned the new indictment, which charged in substance that defendants organized a corporation as a medium to monopolize the sale of live [\*\*\*2] and slaughtered poultry and to fix the prices thereof in certain designated sections of the city of New York, there is an absence of legal evidence to support the allegations that four of the defendants together with other persons mentioned in the indictment controlled seventy-five per cent or upwards of the poultry business in the designated locality or that they had sufficient control therein of such business so as to bring their conduct within the condemnation of the statutes relating to illegal combinations, and the record does not disclose what part of said business was controlled by the defendants and the other persons mentioned in the indictment and although incompetent testimony was received there was no competent evidence before the grand jury to connect defendants with the commission of the crime charged, a motion to set aside the indictment on the grounds that the evidence before the grand jury fails to show that defendants committed the crime charged in the indictment and that incompetent testimony was received in support thereof, will be granted.

**Counsel:** Samuel Markewich, deputy assistant district attorney, for People.

Kohnig, Goldsmith & Sitterfield, for defendants.

**Judges:** [\*\*\*3] Mulqueen, J.

**Opinion by:** MULQUEEN

## Opinion

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[\*685] [\*\*137] On December 5, 1916, the grand jury filed an indictment against the defendants charging them with the crime of making and entering into a contract, agreement and combination whereby a monopoly in the sale in this state of an article and commodity of common use was and might be created, established and maintained, and whereby competition in the supply and price of such article and commodity was and might be established and prevented.

The indictment was drawn under sections 340 and 341 of the General Business Law, popularly known as the Donnelly Anti-Trust Law. In substance it alleged that the five defendants organized a corporation as a medium to monopolize the sale of live and slaughtered poultry and to fix the prices thereof in Harlem and the [\*686] Bronx of the city of New York, and that live and slaughtered poultry was an article and commodity of common use.

A demurrer was filed to this indictment upon the ground that the facts therein stated did not constitute a crime. My learned associate, Judge Nott, in a very able opinion held that the indictment was bad, and sustained the demurrer. People v. Baff, 98 Misc. [\*\*\*4] Rep. 547. Among other things he said:

"It is not alleged that part or a percentage of the trade in poultry was controlled by these defendants. It does appear by the indictment that the business of the defendants, plus the business of the forty-one other individuals and firms not concerned in the commission of the crime, amounted to seventy-five per cent of the total business in poultry sought to be controlled. There is no allegation in the indictment that after the agreement of July 28, 1916, was entered into the defendants took any steps to persuade the other forty-one competitors to submit their business to the corporation or to submit to prices fixed by the defendants, much less that the forty-one other competitors did so agree. There is no allegation in the indictment that the defendants were in any position to influence by persuasion or coercion the forty-one other competitors to assent to the proposed contract. For aught that appears to the contrary, on the face of the indictment, the defendants may have been without any influence in the trade.

"The indictment does not predicate the criminality of the defendants upon their agreement with each other of July 19th, 1916; in [\*\*5] fact the indictment itself shows that the six defendants could not, by an agreement among themselves only, have effected a monopoly or an undue restraint of trade as it appears that they, together with forty-one other competitors, controlled but seventy-five per cent of [\*\*138] the business. Therefore, [\*687] their agreement with each other would not in and of itself be deemed an infraction of the statute within the doctrine laid down by the Supreme Court of the United States, in United States v. Standard Oil Company (221 U.S. 1) and United States v. American Tobacco Company (id. 106). \* \* \*

"There is no allegation contained in the indictment showing, or tending to show, that the defendants had any influence or control whatever over the forty-one competitors whom the defendants agreed should submit their business to them To paraphrase certain language used by the court in United States v. Whiting (212 Fed. Rep. 466), as it does not appear from the indictment that the defendants had any power or control over the poultry trade, they could not create a monopoly or restrain trade within the spirit of the Standard Oil and American Tobacco Company [\*\*\*6] Cases, *supra*."

On January 19, 1917, the very day that the order was entered granting leave to the district attorney to resubmit the charge to the same grand jury, a new indictment meeting the defects pointed out in the opinion of Judge Nott was filed by that body without taking any additional testimony.

The defendants attack the validity of the indictment under review by two separate motions, the first of which is based upon the ground that the same was found without any legal evidence to sustain it, in that the grand jury did not hear any witnesses, but relied upon the testimony given by the witnesses in the first proceeding; the second of which is based upon the grounds, among others:

- A. That the facts are insufficient to constitute a crime;
- B. That the indictment was found upon illegal and incompetent evidence.

[\*688] To sustain the point made in the first motion, counsel rely on the case of State v. Ivey, 100 N. C. 532, which supports their contention. I am, however, not inclined to follow that decision for the reason that it is too technical. It seems to me that it would be an idle ceremony for the same grand jury to rehear the same witnesses where it is [\*\*\*7] of opinion that sufficient evidence was taken in the first proceeding to meet the objections which resulted in a demurrer being allowed to a defective indictment. I do not think it is an invasion of any of the constitutional rights of a defendant to permit the practice which was followed by the grand jury in this case.

My view of the matter is that HN1[<sup>A</sup>] convenience and expedition in the administration of the criminal law suggest not to condemn the course pursued by the grand jury in failing to re-examine the witnesses, particularly where an indictment is filed for the same crime.

HN2[<sup>A</sup>] There is no substantial reason why the procedure, where a motion to set aside an indictment is granted with leave to resubmit the charge to a grand jury, should not be followed where a demurrer is laid to an indictment with leave to resubmit the charge. Commonwealth v. Clune, 162 Mass. 206; Commonwealth v. Woods, 10 Gray, 447; State v. Peterson, 28 L. R. A. 324; Nordlinger v. U. S., 24 App. D. C. 406.

If the minutes disclose that the record is destitute of sufficient proof to sustain the additional allegations of the new indictment or that the indictment was based upon illegal [\*\*\*8] and incompetent testimony, a more serious question is presented.

In support of the second motion, it is urged by defendants that the indictment cannot be upheld for the reason that there is a total [\*\*139] failure of legal proof to sustain the allegation in the indictment that the [\*689] four defendants, above named, exclusive of the defendant Abelson, together with forty-one other individuals and firms mentioned therein, controlled seventy-five per cent and upwards of the poultry bought, slaughtered and sold in Harlem and the Bronx of this city.

It is well settled, by the leading authorities, both federal and state, that [HN3](#)[<sup>A</sup>] the law does not affix the brand of condemnation upon any contract, agreement or arrangement unless it unreasonably or unduly restricts trade or commerce or unduly or unreasonably restricts competition in the supply or price of an article or commodity of common use or tends to produce such results. In other words, it must be shown that the parties who seek to control or monopolize the avenues of industry, in order to prevent free and unrestricted competition in business pursuits, have sufficient power to control or possess effective means to dominate the [\*\*\*9] particular business in which they are engaged. [Standard Oil Company v. U. S., 221 U.S. 1](#); [United States v. American Tobacco Co.](#), Id. 106; [People v. Baff, 98 Misc. Rep. 547](#), opinion by Judge Nott; [United States v. Whiting](#), 212 Fed. Repr. 466; [State v. Eastern Coal Co., 29 R. I. 254](#); [Marienelli v. United Booking Offices of America](#), 227 Fed. Repr. 165; [People v. Dwyer, 160 App. Div. 542](#); affd, [215 N. Y. 46](#); [People v. Sheldon](#), 139 id. 251; [Cummings v. Union Blue Stone Co.](#), 164 id. 401.

I have carefully read the record of the proceedings before the grand jury and I fail to find any legal proof which supports the allegations of the indictment that the persons mentioned therein controlled seventy-five per cent or upwards of the poultry business in the Harlem and The Bronx, or that they had sufficient control of the poultry business in that section of the city so as to bring their conduct within the condemnation of the law in relation to illegal combinations.

[\*690] There is absolutely nothing in the record to show what part of the poultry business was controlled by the defendants and the other persons mentioned [\*\*\*10] in the indictment. The percentage of business controlled by the defendant and the other persons is based upon conjecture and speculation, rather than upon facts.

The testimony of Mr. Morrison, one of the attorneys, who assisted in the organization of the Harlem Live Poultry Association, to the effect that a vast majority of the live poultry dealers in the section of the city hereinbefore referred to joined the association, is no legal proof that these persons controlled the poultry business in this vicinity. He evidently must have referred to a majority in number. As was said in [Nat. Protective Assn. v. Cumming, 170 N. Y. 321](#): [HN4](#)[<sup>A</sup>] "Mere numbers do not ordinarily affect the quality of the act. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view." It is possible that the parties to the present arrangement may have constituted a small proportion of the live poultry business and the minority [\*\*140] who did not join the association may have controlled a greater percentage or proportion of this business.

In [United States v. Whiting, supra](#), the court said: "This indictment charges a conspiracy in restraint [\*\*\*11] of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was brought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been *unimportant factors in each one.*"

[\*691] The testimony of Mr. Gordon, another attorney who assisted in the organization of the association above mentioned, in relation to the magnitude of the business controlled by it, was purely hearsay and should have been rejected by the grand jury, for the reason that Gordon specifically testified in answer to a question propounded by a grand juror as follows: "Now, gentlemen, what I have testified to was with respect to what happened every week. Of course, I don't know of my own knowledge. I am assuming that everything happened in accordance with the

plan laid out. Whether it did or not, I don't know. I don't presume to know personally as to the principles of this operation."

Furthermore, if [\*\*\*12] the acts of the defendants were to constitute a violation of the law, then Gordon and Morrison were clearly accomplices in the commission of a crime. Gordon testified that he conceived the scheme of the organization above mentioned and that he counselled and advised the defendants in their business affairs, and Morrison testified that he co-operated and was associated with him in the plan which brought the association into existence and that he also advised the defendants with reference to the management of their business. Likewise Nathan Neuman was an accomplice, for according to his testimony he became one of the agents of the association and aided and assisted it in carrying out the plan which resulted in the indictment of the defendants.

These three [HN5](#) witnesses, being accomplices, as a matter of law, it is necessary, therefore, to sustain the indictment that their testimony should be corroborated by other evidence tending to implicate the defendants in the unlawful combination.

After a most careful examination of the record, I am forced to the conclusion that there is no competent [\*692] testimony to connect the defendants with the commission of the crime (if any crime was [\*\*\*13] committed). [People v. O'Farrell, 175 N. Y. 323](#); [People v. Becker, 215 id. 126](#).

[HN6](#) The testimony of Altman, a bookkeeper of the corporation with which the defendants were connected, that he had prepared from books of said corporation a summary showing the volume of business transacted, the expenses of the business, the gross profits, the net profits, and the balance in the treasury of the corporation, was clearly incompetent and upon no conceivable theory was such testimony admissible against the defendants who were the officers of the corporation, for the reason that no proper foundation was laid, establishing that the entries in the books were made with the knowledge of the defendants, [\*\*141] or that they authorized or caused such entries to be made, or that they had some connection with the entries therein. [People v. Levis, 96 Misc. Rep. 513](#); [Rudd v. Robinson, 126 N. Y. 113](#); [People v. Burnham, 119 App. Div. 302](#); [People v. Burnham, 120 id. 388](#). It is, therefore, clear that in the absence of proper proof, not only are the book entries of a corporation not evidence against a director or stockholder thereof, but likewise a summary [\*\*\*14] prepared from the books of a corporation is also incompetent evidence against an officer thereof.

For the reasons herein stated the motion to set aside the indictment for failure of the grand jury to examine the witnesses anew before finding the present indictment is denied, but the motion to set aside the indictment upon the grounds that the evidence before the grand jury fails to show that the defendants committed the crime charged therein, and that incompetent testimony was received in support thereof, is granted.

Ordered accordingly.



## United States v. Colgate & Co.

Supreme Court of the United States

Argued March 10, 1919. ; June 2, 1919, Decided

No. 828.

### **Reporter**

250 U.S. 300 \*; 39 S. Ct. 465 \*\*; 63 L. Ed. 992 \*\*\*; 1919 U.S. LEXIS 1748 \*\*\*\*; 7 A.L.R. 443

UNITED STATES v. COLGATE & COMPANY.

**Prior History:** [\*\*\*\*1] ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

The case is stated in the opinion.

**Disposition:** The Court affirmed the trial court's judgment sustaining an objection to petitioner's indictment because the indictment did not charge respondent with violating antitrust law by fixing prices with wholesale and retail dealers.

### **Core Terms**

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prices, products, indictment, manufacturer, dealers, retail dealer, retail, customers, resell, wholesale dealer, wholesale, sales, adherence, commerce

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Civil Procedure > ... > Other Jurisdiction > Direct Appeals & Three Judge Courts > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

### **HN1[] Right to Appeal, Defendants**

Under the Act of March 2, 1907, 34 Stat. 1246, writs of error from the district courts directly to the United States Supreme Court may be taken by the United States from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, construction of the statute upon which the indictment is founded. Upon such a writ, the Court has no authority to revise the mere interpretation of an indictment and is confined to ascertaining whether the court in a case under review erroneously construed the statute. The Court must accept the district court's interpretation of the indictments and confine its review to the question of the construction of the statute involved in its decision.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Scope > General Overview](#)

## **HN2[] Monopolies & Monopolization, Attempts to Monopolize**

In the absence of any purpose to create or maintain a monopoly, the Sherman 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. The trader or manufacturer carries on an entirely private business, and can sell to whom he pleases. A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.

## **Lawyers' Edition Display**

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### **Headnotes**

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Appeal -- by government in criminal case -- scope of review. --

Headnote:

The Federal district court's interpretation of the indictment must be accepted by the Federal Supreme Court on a direct writ of error sued out under the Act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1916, 1704), to review a judgment sustaining a demurrer to the indictment, which is based upon the construction of the statute upon which the indictment is founded. Review in such case is confined to the question of the construction of the statute involved in the decision below.

[For other cases, see Appeal and Error, I. e., in Digest Sup. Ct. 1908.]

Monopoly -- unlawful combination -- maintaining resale prices. --

Headnote:

Conduct of a manufacturer which, as intended, has the effect of procuring adherence on the part of its wholesale and retail customers to resale prices fixed by it, does not offend against the unlawful combination provisions of the Sherman Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, 8820), where there was no agreement which obligated any dealer not to resell except at the fixed prices, his course in this respect 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.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

Monopoly -- combination -- right to select customers. --

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## Headnote:

In the absence of any purpose to create or maintain a monopoly, the Sherman Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, 8820), 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 the parties with whom he will deal, and to announce in advance the circumstances under which he will refuse to sell.

[For other cases, see *Monopoly*, II. b, in Digest Sup. Ct. 1908.]

## Syllabus

On a writ of error under the Criminal Appeals Act, this court must confine itself to the question of the construction of the statute involved in the decision of the District Court, accepting that court's interpretation of the indictment. P. 301.

In the absence of any intent to create or maintain a monopoly, the Sherman Act does not prevent a manufacturer engaged in a private business from announcing in advance the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such prices. P. 307.

As the court interprets the District Court's opinion, the indictment in this case was interpreted as not charging the defendant with selling to dealers under agreements obligating them not to resell at prices other than those fixed by defendant. P. 306. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, distinguished.

253 Fed. Rep. 522, affirmed.

**Counsel:** Mr. Assistant to the Attorney General Todd, with whom Mr. Henry S. Mitchell, Special Assistant to the Attorney General, was on the brief, for the [\*\*\*\*2] United States.

Mr. Charles E. Hughes, with whom Mr. Charles Wesley Dunn and Mr. Mason Trowbridge were on the brief, for defendant in error.

**Opinion by:** McREYNOLDS

Opinion

[\*301] [\*466] [\*\*\*994] MR. JUSTICE McREYNOLDS delivered the opinion of the court.

**HN1** [↑] Writs of error from District Courts directly here may be taken by the United States "From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, construction of the statute upon which the indictment is founded." (Act of March 2, 1907, c. 2564, 34 Stat. 1246.) 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 its [\*302] decision." United States v. Carter, 231 U.S. 492, 493; United States v. Miller, 223 U.S. 599, 602.

Being of opinion that "The indictment should set forth such a state of facts as [\*\*\*995] [\*\*\*\*3] to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law, before it is haled into court to answer the charge of the commission of a crime" and holding that it "fails to charge any offense under the Sherman Act or any other law of the United States, that is to say, as to the substance

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of the indictment and the conduct and acts charged therein" the trial court sustained a demurrer to the one before us. Its reasoning and conclusions are set out in a written opinion. *253 Fed. Rep. 522*.

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.

The indictment 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. After setting out defendant's organization, place and character of business and general methods of selling and distributing products [\*\*\*\*4] through wholesale and retail merchants, it alleges --

"During the aforesaid period of time, within the said eastern district of Virginia and throughout the United States, the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the eastern district of Virginia and throughout the United States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them as aforesaid) to resale prices fixed by the defendant, and of preventing [\*303] such dealers from reselling such products at lower prices, thus suppressing competition amongst such wholesale dealers, and amongst such retail dealers, in restraint of the aforesaid trade and commerce among the several States, in violation of the act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890."

Following this is a summary of things done to carry out the purposes of the combination: Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that [\*\*\*\*5] no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon "suspended lists"; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

[\*\*467] Immediately thereafter comes this paragraph:

"By reason of the foregoing, wholesale dealers in the aforesaid products of the defendant in the eastern district of Virginia and throughout the United States, with few exceptions, resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant, and refused to resell such products at lower prices to retail dealers in the States where the respective wholesale dealers did business and in other States. For the same reason retail dealers in the aforesaid [\*\*\*\*6] products of the defendant in the eastern district of Virginia and throughout the United States resold, at uniform prices fixed by [\*304] the defendant, the aforesaid products, sold to them by the defendant and by the aforesaid wholesale dealers, and refused to sell such products at lower prices to the consuming public in the States where the respective retail dealers did business and in other States. 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 in the eastern district of Virginia and throughout the United States were maintained and enhanced."

In the course of its opinion the trial court said:

"No charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce -- the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure [\*\*\*996] adherence on their part, in the sale of its products sold [\*\*\*\*7] to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public."

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"In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and [\*\*305] declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination [\*\*\*\*8] with others, may be conceded. *Eastern States Lumber Association v. United States, 234 U.S. 600, 614.* But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and, should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person."

\* \* \*

"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 circumstances 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, [\*\*\*9] 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 [\*306] 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."

Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the 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 sundry dealers whereby the latter obligated themselves [\*\*\*\*10] 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.

Considering all said in the opinion (notwithstanding some serious doubts) we are unable to accept the construction placed upon it 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 **["\*\*468"]** 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 **["\*307"]** must conclude that, as interpreted below, the indictment **["\*\*997"]** does not charge Colgate & Company with selling its products to dealers under agreements which **["\*\*\*\*11"]** 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 were 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.

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. [HN2](#) 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

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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. "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases." United States v. Trans-Missouri Freight [\*\*\*\*121] Association, 166 U.S. 290, 320. "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 614. See also Standard Oil Co. v. United States, 221 U.S. 1, 56; United States v. American Tobacco Co., 221 U.S. 106, 180; Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8. In Dr. Miles Medical Co. v. Park & Sons Co., supra, the unlawful [\*308] combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be

Affirmed.

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## **United States v. United States Steel Corp.**

Supreme Court of the United States

Argued March 9, 12-14, 1917; restored to docket for reargument May 21, 1917; reargued October 7-10, 1919 ;  
March 1, 1920

No. 6

### **Reporter**

251 U.S. 417 \*; 40 S. Ct. 293 \*\*; 64 L. Ed. 343 \*\*\*; 1920 U.S. LEXIS 1630 \*\*\*\*; 8 A.L.R. 1121

UNITED STATES v. UNITED STATES STEEL CORPORATION ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

### **Core Terms**

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combinations, Steel, competitors, prices, conditions, monopoly, decree, exerted, organizations, formation, restrain, dissolution, customers, restraint of trade, Sherman Act, illegality, cases, stock, dissolving, monopolize, subsidiary, offending, attained, words, Oil, public interest, foreign trade, instrumentality, manufacturers, effectually

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

#### **HN1** [blue download icon] **Monopolies & Monopolization, Attempts to Monopolize**

Federal antitrust law does not make mere size an offence or the existence of unexerted power an offence. It requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible.

### **Lawyers' Edition Display**

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### **Headnotes**

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Monopoly -- under Anti-trust Act -- dissolution -- past and present corporate powers and acts. --

Headnote:

A court, when asked to dissolve a corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing.

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[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly -- under Anti-trust Act -- expectation or realization. --

Headnote:

The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly -- under Anti-trust Act -- size of corporation -- unexerted powers. --

Headnote:

The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly -- steel trust -- intent -- past practices -- dissolution -- public interest. --

Headnote:

A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act, especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

## **Syllabus**

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That an industrial combination is formed with the expectation of achieving a monopoly is not enough to make it a monopoly within the meaning of the Anti-Trust Act. P. 444.

*Held*, that the power attained by the United States Steel Corporation, much greater than that of any one competitor, but not greater than that possessed by them all, did not constitute it a monopoly. *Id.*

The fact that a corporation, alleged to be an illegal combination, during a long period after its formation persuaded and joined with its competitors in efforts, at times successful and at times not, to fix and maintain prices in violation of the Anti-Trust Act, does not warrant present relief against it, if the illegal practices were transient in purpose and effect, were abandoned before the suit was begun because of their futility and not for fear of prosecution, and have not since been resumed; and if no intention to resume them or dangerous probability of their resumption is shown by the evidence. Pp. 444 *et seq.*

Purpose and effect of the Steel Corporation's acquisition of control of the Tennessee Coal [\*\*\*\*2] & Iron Company, considered, in the light of President Roosevelt's prior approval of the transaction and his testimony concerning it. P. 446.

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Upon the question whether the power possessed by the Steel Corporation operated *per se* as an illegal restraint, *held* that testimony of its officers, its competitors, and hundreds of its customers, to the effect that competition was not restrained and that prices varied or remained constant according to natural conditions, must be accepted as clearly outweighing a generalization advanced by government experts that constancy of prices during certain periods evinced an artificial interference. P. 447.

An industrial combination, short of a monopoly, is not objectionable under the act merely because of its size its capital and power of production -- or merely because of a power to restrain competition, if not exerted. Pp. 447, 450 *et seq.*

The act prohibits overt acts, and trusts to their repression and punishment. P. 451.

The fact that competitors of a combination voluntarily follow its prices does not establish an unlawful restraint; the act does not compel competition. Pp. 449-451.

In commanding the courts to "prevent and [\*\*\*3] restrain violations" of it, the Anti-Trust Law has regard to conditions as they may exist when relief is invoked and to the usual powers of a court of equity to adapt its remedies to those conditions. P. 452.

The act does not expect the courts to enforce abstractions to the subversion of its own purposes, but leaves to them to determine, in each instance, the relief appropriate for the execution of its policy. *Id.*

Therefore, admitting that the Steel Corporation was in origin a combination of competing companies actuated by an unlawful purpose, yet it being proved and found in this case that that purpose, and illegal practices which followed the combination, were abandoned as futile months before this suit was begun, and that the combination, viewed as of today, is not in itself or by its conduct offensive to the statute, the policy of the statute, which respects the public interest as paramount, would be defeated rather than subserved were the court, for retrospective reasons merely, to destroy the combination, or separate some of its subsidiaries as suggested, and thereby destroy or impair the investments invited of the public, and the foreign trade and other large developments [\*\*\*4] made during the ten years that intervened before the Government began any legal attack. Pp. 452 *et seq.* [Standard Oil Co. v. United States, 221 U.S. 1](#); and [United States v. American Tobacco Co., 221 U.S. 106](#), distinguished.

No feasible way of dissolving the combination and yet protecting its foreign trade, under the Webb Act, c. 50, § 2, 40 Stat. 516, or otherwise, has been suggested. P. 453.

[223 Fed. Rep. 55](#), affirmed.

THE case is stated in the opinion.

**Counsel:** *Mr. Assistant to the Attorney General Ames and Mr. Henry E. Colton, Special Assistant to the Attorney General, for the United States:*<sup>1</sup>

In comprehensive terms the substance of the charge is: (1) That between 1898 and 1900 combinations were formed in various branches of the iron and steel trade, not as an incident of normal growth, but with the purpose and effect of unduly restricting competition, and that they still exist, contrary to the Anti-Trust Act of July 2, 1890. (2) That in 1901, by means of a holding company, these several illegal combinations, each dominant in its respective field, and other powerful units, were all brought together in one super-combination of overwhelming power, [\*\*\*5] which, augmented by further acquisitions, still exists, unduly restricting competition in the iron and steel trade as a whole and in practically every important branch thereof, contrary to the same act of Congress.

<sup>1</sup> At the former hearing the case was argued by *Mr. Solicitor General Davis, Mr. Assistant to the Attorney General Todd* and *Mr. Henry E. Colton, Special Assistant to the Attorney General*. *Mr. Attorney General Gregory* and *Mr. Robert Szold* also were on the brief, from which the argument is abstracted.

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The several combinations formed during the period 1898-1900 greatly increased prices in almost every instance, especially the combinations affecting the lighter finished products, such as tubes, wire nails, tin plates, etc. Prices of pig iron, semi-finished products and rails also were increased. But notwithstanding the concentration of control in particular lines resulting from these combinations, competition was still able to make itself felt, taking the industry as [\*\*\*6] a whole, and as the year 1900 drew to a close was threatening to become very active, and, with the revival of active competition, prices, which had been enormously increased, underwent substantial declines. Then was formed the present corporation -- a holding company, which controls the important acts and policies of the constituent combinations, and, among other things, generally determines the prices which they may charge for their finished products. As the proposal for the super-combination began to take form, prices, which had receded with the revival of competition in the latter half of 1900, began to rise again. The upward movement became marked as the organization of the combination was perfected. While some have since fallen, these prices have nevertheless been maintained by the combination at a substantially higher level than prevailed during competitive periods prior to its formation.

Except for the internal alterations and further acquisitions, which increased the control, the several combinations above described and the super-combination in which they were all united have continued down to the present time without change of substance. Their proportion of the trade, [\*\*\*7] whilst not quite so great as at first, is still overwhelmingly preponderant.

Congress was moved to pass the Anti-Trust Act by two main considerations: (1) The desire to preserve the competitive system of industry. (2) The conviction that that system was threatened by the undue concentration of commercial power resulting chiefly from the unrestricted exercise of the right of combination.

Every combination which by its necessary effect or because of the character of the means employed threatens the normal operation of the law of competition, in other words, unduly restricts competition, is therefore within the purview of the act.

It was not intended, however, to set a limit to the enlargement of a business by normal growth, the competitive system being in no danger from that quarter.

The purpose of the parties is important in determining the question of normal growth, but, that out of the way, it is of no further consequence where the necessary effect of the combination is unduly to restrict competition.

Except as throwing light on the purpose of the parties, it is immaterial how the combination is created, whether through simple agreement, through the old form of trust, through [\*\*\*8] a holding company, or through the actual purchase and consolidation of plants.

Competition may be unduly restricted through voluntary combinations of competitive traders and trade units no less than by combinations to exclude one or more such from their right to trade.

Whether restriction of competition through voluntary combinations is undue depends primarily upon the extent of the restriction. Without attempting to draw the exact line, the restriction is certainly undue where the combination embraces units which together occupy a preponderant position in a given industry.

What constitutes a preponderant position must be determined in the light of conditions in the particular branch of trade affected. The principal factors to be considered are (1) the portion of the trade engrossed by the combination as compared with the portion possessed by each of its competitors as well as with the whole, and (2) the extent of the control, if any, acquired by the combination over raw materials or over the agencies of transportation and of distribution or over the reserve supply where the article of trade is one the supply of which is limited by nature.

At the time they were combined under [\*\*\*9] the control of the United States Steel Corporation the American Steel & Wire Company, the American Tin Plate Company, the American Sheet Steel Company, the American Steel Hoop Company, the National Tube Company and the American Bridge Company were severally combinations in restraint of trade, each being a combination of formerly competitive units together occupying an overwhelmingly preponderant position in a distinct branch of the iron and steel trade and each having been organized for the purpose of suppressing competition and increasing prices.

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It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade. Addyston Pipe Co. v. United States, 175 U.S. 211; Swift & Co. v. United States, 196 U.S. 375, 394; Dr. Miles Medical Co. v. Park & Sons Co.; 220 U.S. 273, 408. Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement. United States v. American Tobacco Co. [\*\*\*\*101], 221 U.S. 106, 176, 181. Indeed, where, as here, corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits.

Northern Securities Co. v. United States, 193 U.S. 197, 326, 327; United States v. Reading Co., 226 U.S. 324, 352-363; s.c. 183 Fed. Rep. 427, 470; Patterson v. United States, 222 Fed. Rep. 599, 619, 620 Noyes, Intercorporate Relations, § 354; Eddy, combinations, § 622. Wherefore we submit that the illegality of these combinations is not merely debatable, as the defendants themselves admit as to some, but is conclusive as to all. They were still occupying the illegal position thus acquired in various branches of the steel trade when united under the control of the United States Steel Corporation in 1901.

The Steel Corporation is a combination in restraint of trade, because it is not the result of natural trade growth but is a mere instrumentality for combining competing corporations which together occupy an overwhelmingly preponderant position in trade and [\*\*\*\*11] commerce in iron and steel products generally. The group of independent plants and businesses combined under one control through the corporation included the largest and most powerful competitors in practically every branch of the iron and steel industry in rails; plates; structural shapes; wire rods and wire products; hoops, bands, and cotton ties; skelp; wrought pipe and tubular goods; seamless tubes; bars; billets and sheet bars. And not only were the competitors united under the control of the Corporation the largest and most powerful units in practically every branch of the iron and steel industry, but generally speaking they were splendidly grounded as regards the production of the basic products -- ore, pig iron, ingots. This is sustained by the findings of Woolley and Hunt, JJ., in the court below and by the investigation made by the Bureau of Corporations.

The preponderant position and the dominance of this combination is manifested by its capital as compared with that of competitors; its proportion of the total production; its proportion of the total production as compared with that of each of its principal competitors; its proportion of ore reserves; its control over [\*\*\*\*12] transportation of ore; its effect upon prices; concerted maintenance of prices under its leadership; and opinion evidence as to its power.

Whilst in our view of the law a combination of able competitors occupying an overwhelmingly preponderant position in a given trade, such as the combination embodied in the Corporation, unduly restricts competition by its necessary effect, and therefore is unlawful regardless of purpose, nevertheless it is appropriate to show a wrongful purpose as a matter of aggravation. It is elementary, of course, that the purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances. Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 612; Reilley v. United States, 106 Fed. Rep. 896; United States v. Sacia, 2 Fed. Rep. 754, 757; Regina v. Murphy, 8 C. & P. 397, 404. The considerations going to show that the controlling purpose of this super-combination was not the legitimate development of trade, but suppression of competition and exploitation of the public, are: the form of the combination -- a holding company not itself engaged in trade at [\*\*\*\*13] all; the union of so many competitors controlling so large a proportion of the trade; the general competitive situation, falling prices, etc., immediately before the formation of the combination; increase in prices immediately following formation of the combination; gross overcapitalization of the combination in anticipation of excessive profits; enormous promoters' profits; cancellation by the combination of contracts for extensions, etc., previously entered into by constituent companies; and subsequent acquisitions. (See the findings of Woolley and Hunt, JJ., and of the bureau of Corporations.)

We are dealing here with a combination of competitors in the truest sense and not with the mere purchase by one competitor of the business of another as an incident of normal development. The distinction between a mere purchase of a competing business and a combination of competing businesses clothed in the form of purchases is sharply drawn in Shawnee Compress Co. v. Anderson, 209 U.S. 423. See Noyes, Intercorporate Relations, § 354. If the vast aggregation of competing businesses here involved occupying an overwhelmingly preponderant position in practically every branch of [\*\*\*\*14] the iron and steel industry had been combined by executory agreement or in

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the old form of trust there would be none to dispute the illegality of the transaction. The legal situation is not changed by substituting a holding company as the instrument of combination. The vesting in such a company of the capital stocks of a group of able competitors for the purpose of centralizing control is no more lawful, is no more a normal method of business development, than the similar centralization of control in common trustees under the old form of trust. In such case, indeed, the holding company is but the old trust in corporate form. Northern Securities Co. v. United States, supra; Standard Oil Co. v. United States, 221 U.S. 1; Temple Iron Co. v. United States, 226 U.S. 324; s. c. 183 Fed. Rep. 427. It is literally a case, therefore, of the stockholders of a group of competing corporations transferring the control of each into the hands of a committee of trustees -- a form of combination in restraint of trade which has ever been regarded as peculiarly obnoxious. If competitors controlling half the trade not alone in one product or in two but in an entire series [\*\*\*\*15] of products constituting one of the grand divisions of industry may thus combine through a holding company, to what lengths can the process go without offending the law?? If one-half of the steel industry may be thus combined through one holding company, certainly those controlling the other half would have the right to combine through another holding company. And of course if it be lawful to centralize control of the steel industry in two holding companies it would be equally lawful to centralize control of every other industry in two holding companies. Such undue concentration of control over industry was the very evil which the act was intended to prevent. United States v. Reading Co., 226 Fed. Rep. 229, 272.

The Corporation is also an instrumentality for uniting and enlarging the power of a group of combinations of competitive units in particular branches of the iron and steel trade, each in and of itself unlawful. There is no likeness between this case and United States v. Winslow, 227 U.S. 202, 217. This case presents a parallel to the American Tobacco Case, supra, where there was a combination in restraint of trade not in cigarettes alone, nor in smoking [\*\*\*\*16] tobacco alone, nor in chewing tobacco alone, but in the whole tobacco industry.

This is not a case where the purpose was "integration." Integration consists in combining supplementary, noncompetitive trade units. An illustrative case is United States v. Winslow, supra. If, therefore, we were successful in showing that the corporations combined in this case through the holding company are either competitors themselves or illegal combinations of competitive businesses, the idea of integration is at once excluded. You can not centralize control of an entire industry by first separately combining competitors in the various branches thereof and then uniting them in one super-combination and hope to escape the prohibitions of the law by calling what was done "integration." Moreover, the units combined in 1901 through the Corporation were already, for the most part, highly integrated. No one, of course, denies the advantage of concentrating under one management the various stages of steel manufacture from the ore mine to the finishing mill. This can be done, however, and can be best done, just as economical size can be attained, without setting up in every branch of trade a combination [\*\*\*\*17] of competitors with power to exercise substantial dominance over the rest.

The contention that a combination of such size and power was a necessary means to attain efficiency and to promote foreign trade is irrelevant in law. It is but another way of saying that good intentions can save the combination from illegality. Thomsen v. Cayser, 243 U.S. 66; United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 341; Addyston Pipe Co. v. United States, 175 U.S. 211, 234, 243; Swift & Co. v. United States, 196 U.S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. Bishop, New Criminal Law, § 343; Holmes, The Common Law, p. 52. Applying this principle, this court from the very beginning has held that a contract or combination by its own "inherent nature or effect," without more may "restrain trade within the purview of the statute." Any other construction would require courts to decide not only whether a given combination prevents the existence of effective competition or constitutes a virtual monopoly, but whether in their opinion monopoly would not be, on the [\*\*\*\*18] whole, a better policy than competition -- i.e., would compel them to act on frankly legislative grounds. Park & Sons Co. v. Hartman, 153 Fed. Rep. 24, 46. Congress rightly believed that the advantages of large business units, in so far as they are real and substantial, would inevitably assert themselves by normal growth. It closed the short cut to those advantages -- monopolistic combination -- because danger lies that way. "If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives." National Cotton Oil Co. v. Texas, 197 U.S. 115, 129. "Competition is worth more to society than it costs." Vegelahn v. Guntner, 167 Massachusetts, 92, 106. Furthermore, even if it would have been lawful for the many independent businesses

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combined through this holding company to unite to some extent to develop foreign trade -- by joint selling agencies, for example -- that can not justify the complete and permanent suppression of competition between them in domestic trade. *United States v. Corn Products Refining Co., 234 Fed. Rep. 964, 1016; United States v. Union Pacific* [\*\*\*\*19] *R. R. Co., 226 U.S. 61, 93.*

The contention that such was the purpose is also unfounded in fact.

As for the contention that competition has increased while the combination's proportion of the trade has decreased, it is true that as regards the proportion of the trade in steel products possessed by the combination there has been some decline from the highwater mark reached shortly after its formation, but there has been no such decline as to curtail the power of the combination.

It is rather the usual thing in such cases for the combination to be able to show some relative decline in its proportion of the trade. It was so held with the Standard Oil Company and with the American Tobacco Company. In fact, it is so uniformly the case as to excite the suspicion that combinations of this character, having found they can dominate the trade with a smaller proportion of it than they started with, voluntarily yield a part in the belief that they thereby put themselves in a better position to face the law. But be this as it may, where, as here, the decline still leaves the combination in an overwhelmingly preponderant position, it is of no legal consequence whatever. In such a case [\*\*\*\*20] the original vice persists and the combination is a "continually operating force," restraining trade within the meaning of the first section of the act, *Standard Oil Co. v. United States, supra; United States v. Union Pacific R. R. Co., 226 U.S. 61, 96; United States v. Kissel, 218 U.S. 601;* and a "perennial violation of the second section" prohibiting monopoly, *Standard Oil Co. v. United States, supra, 74; Patterson v. United States, 222 Fed. Rep. 599, 625; United States v. Corn Products Refining Co., 234 Fed. Rep. 964, 1018.*

The present bill charges a combination to suppress competition between the parties to the combination themselves. In such a case the only question is whether the combination embraces competitors in sufficient number and of sufficient importance to make the resulting restriction of competition a substantial or undue restriction. Whether such a combination is also attempting to hinder the competition of those outside the combination is of no weight except as a matter of aggravation.

The contention that the combination is not unlawful because its power though great is yet not great enough to enable it alone to [\*\*\*\*21] fix and maintain prices would require a combination of competitors to amount to a monopoly to fall within the prohibition. This theory was rejected by this court in the first case under the Anti-Trust Act which came before it. *United States v. E. C. Knight Co., 156 U.S. 1, 16.* To the same effect is the language of Mr. Justice Day, then a circuit judge, in *Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. Rep. 610, 624.*

Furthermore, neither the circumstance that the Corporation combined with competitors to maintain the higher prices established by the combinations whose stocks it acquired, nor that in ten years while increasing its trade enormously its relative proportion suffered a small decline, justifies the inference that the Corporation could not have maintained the higher prices by the exertion of its own power alone. It would be a strange result if the combination of competitors embodied in the Corporation should escape condemnation because of their illegal conduct in agreeing upon prices with outside manufacturers.

The contention that the case must fail because the combinations have not increased prices, or limited production, or degraded the [\*\*\*\*22] quality of product, or decreased wages, or decreased the price of raw materials, or oppressed competitors, loses sight of the broader policy of the act, which was, not to wait until the evils enumerated are already upon us, but to prevent their occurrence by striking at their underlying cause -- undue concentration of commercial power through the process of combination. The test of the legality of a combination, therefore, is not its present effect upon prices, wages, etc., nor its present conduct toward the remaining competitors, but its effect upon competition. If its effect is unduly to restrict competition, then it is immaterial that for the time being the combination may exercise its power benevolently. This defense of good conduct has been interposed in many cases of this character, and as many times rejected. Nor is forbearance by a combination from the exercise of its power to drive the remaining competitors from the field, or to prevent new ones from entering, on any different footing from good conduct of any other sort. The cases make no such distinction. Obviously, where a combination takes in so large a proportion of the competitors or competitive units that effective [\*\*\*\*23] competition no longer

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exists, it can be no defense to say that the combination is doing nothing to prevent the restoration of competitive conditions.

This contention is based on a construction of the law impracticable in execution.

*Mr. Richard V. Lindabury, Mr. David A. Reed and Mr. Cordenio A. Severance*, with whom *Mr. Raynal C. Bolling* was on the brief, for United States Steel Corporation et al., appellees, cited and discussed the following, as revealing what the Anti-Trust Act means by "restraint of trade": Senator Hoar, Autobiography of Seventy Years, vol. II, p. 364; United States v. Du Pont De Nemours & Co., 188 Fed. Rep. 127, 150; United States v. Trans-Missouri Freight Assn., 166 U.S. 290; Gibbs v. Baltimore Gas Co., 130 U.S. 396, 408; Northern Securities Co. v. United States, 193 U.S. 197, 337, 361; Standard Oil Co. v. United States, 221 U.S. 1, 58, 60, 61; United States v. American Tobacco Co., 221 U.S. 106, 179; United States v. Terminal Railroad Assn., 224 U.S. 383, 394; Nash v. United States, 229 U.S. 373, 376.

Whether, or to what extent, the *Standard Oil* and *Tobacco Cases* modify the [\*\*\*\*24] rule laid down by Mr. Justice Peckham in the *Freight Association Case* as applicable to public service corporations is not of account in the present case. That they do make a distinction between restraint of competition and restraint of trade in the case of private trading and manufacturing companies, and do hold that as to such companies the restraint of competition in order to amount to restraint of trade must be undue or unreasonable, is entirely clear, and is recognized in the subsequent cases. These cases also hold, as pointed out by Judge Lanning in the *Du Pont Case*, that whether the restraint of competition in the case of such companies amounts to restraint of trade must be determined upon the facts and circumstances of each particular case.

Applying these principles, the direct and necessary effect of the organization of the Steel Corporation was neither to restrain trade nor create a monopoly, viewed either from the standpoint of competition suppressed or from that of the extent of control acquired over production or raw materials. Swift & Co. v. United States, 196 U.S. 375; United States v. Standard Oil Co., 173 Fed. Rep. 177, 183; United States [\*\*\*\*25] v. American Tobacco Co., 164 Fed. Rep. 700, 719; 221 U.S. 157, 182; United States v. Reading Co., 226 U.S. 324, 370.

Notwithstanding the foregoing cases, the Government insists that, as a matter of law, the suppression of competition is undue whenever the combination controls units which together occupy a preponderant position in a given industry, and this without regard to the intentions of those who form it or the after conduct of the combination. We submit that no such test is warranted either by the language of the Anti-Trust Act or by the decisions of this court. Whether restraint is unreasonable, and therefore undue, is declared in United States v. Terminal Railroad Assn., supra, to depend upon three things: (1) the extent of such control; (2) the method by which such control was brought about; and (3) the manner in which such control has been exercised. This is but a formulation of the rule laid down in the *Tobacco Case*. But we submit that *a priori* reasoning as to the direct or necessary effect of the organization of the Steel Corporation or as to the result produced by its preponderant position in the industry, if it has such a position, is uncalled [\*\*\*\*26] for in the present case. When the evidence in the case was closed, thirteen years of the active life of the Corporation had passed. If restraint of trade or monopoly necessarily resulted from its formation or from its so-called preponderant position in the industry, evidence of such restraint or monopoly would appear somewhere in its history; and if such evidence does not appear, it is reasonably safe to conclude that no such result inhered in its organization or position. That the organization did not so result at any time or as to any article of steel production, is, we submit, conclusively shown by the testimony in the case, as pointed out in both opinions of the court below. And not only is this shown by the testimony, but it is also shown that the Corporation never acquired the power either to monopolize or to restrain trade. And this too was found by all the judges of the court below.

No intent to monopolize or to restrain trade is shown by the circumstances which led up to and surrounded the organization of the Corporation. The organization was but a natural and normal development from existing trade and manufacturing conditions and was only notable because of the largeness [\*\*\*\*27] of the conception which underlay it and the courage exhibited in undertaking to carry it out. But ability to think large and courage to execute

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the thought are not condemned by the law. Indeed, the future prosperity of our country must depend in large measure upon the encouragement given to these attributes of the American business man.

Nor is an intent to monopolize or restrain trade evinced by the after-conduct of the Corporation. Throughout its whole career the Corporation has pursued the objects declared by its founders at the time of its formation, decreasing the cost of production, increasing wages, decreasing prices, and greatly extending trade in steel products both at home and abroad. Its treatment of both competitors and consumers has been fair and just; it has neither attempted to oppress the one nor to coerce the other. The few plants which it has purchased were offered to it, and with a single exception they were purchased only because they were needed in the development of the Corporation's business. That exception was the plant of the Tennessee Company, and this was purchased with the approval of the Government for the purpose of preventing the spread of a dangerous [\*\*\*\*28] financial panic. Instead of promoting pools and combinations, the Corporation destroyed them as early as 1904. Although the manufacturers met together from time to time after the breaking up of the pools, they went no further at their meetings than to mutually exchange information and make declarations of purpose which the petition admits they had a lawful right to do. The Gary dinner movement amounted to nothing more than an endeavor to prevent reckless price-cutting and general demoralization at a time of great industrial peril, and this was sought to be accomplished simply by an appeal to reason and the establishment of a relation of mutual respect and confidence, by which it was hoped to secure open and fair dealing and prevent the misunderstandings out of which nearly all the trade wars of the past had grown. Instead of monopolizing the manufacture of steel, the Corporation's percentage of the country's production has steadily decreased; instead of monopolizing the supply of ore, the Corporation has confined its purchases to two or three localities, and in the locality where its holdings are largest it has relatively less than many of its competitors and less than its own [\*\*\*\*29] experts and the experts of its competitors testify that it ought to have. We respectfully submit that by this record the Corporation has proved the *bona fides* of the claim made for it at the time of its organization, that its purpose was the development of a great business along legitimate and permissible lines, and not monopoly or restraint of trade. If, however, the circumstances surrounding the organization left the matter of intent in doubt to be established by the after-conduct of the parties, we now have such after-conduct extending over the long period of thirteen years, and we submit that it completely rebuts any presumption (if any there was) of intent to restrain trade or to acquire a monopoly, and as completely establishes the contrary intent.

Whatever, therefore, may have been the purpose or immediate effect of the organization of the Steel Corporation, it goes for nothing unless it be found that at the time the petition was filed the Corporation was offending or threatening to offend against the Anti-Trust Act. This results from the fact that the action is brought under the third section of that act which authorizes the Attorney General to institute proceedings [\*\*\*\*30] in equity to prevent or restrain violations of the act. The appeal is to the injunctive power of the court which is never exercised to redress alleged wrongs which have been committed already, but only to restrain those which are still existing or are threatened. *High on Injunctions*, § 23; *Pomeroy's Equitable Remedies*, vol. I, § 262.

The Corporation had no monopoly and was not restraining trade when the petition was filed, nor was it threatening to acquire a monopoly or to restrain trade. It has not the power to do either.

We insist that the acquisition of a preponderant position in a trade or manufacture (whether this means size or power) without unlawful intent and without excluding practices, does not constitute restraint of trade or monopoly either at common law or under the Federal Anti-Trust Act when no actual monopoly or actual restraint of trade results therefrom. How could it? Size in itself is nothing as we have already shown. And power to do wrong cannot be confounded with wrongdoing itself without leading to hopeless confusion. We are dealing with a criminal statute. If the acquisition of power to violate a statute is the equivalent of its violation, then [\*\*\*\*31] all men are guilty, for all have acquired the power to violate not one but many statutes. In the opinions in some of the railroad cases ([United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 334](#); [Northern Securities Co. v. United States, 193 U.S. 197, 373](#); [United States v. Union Pacific R.R. Co., 226 U.S. 61, 88](#)) are to be found expressions to the effect that it is the scope of combinations of the kind there under consideration and the power to suppress competition and create monopoly which results therefrom that determines the applicability of the Anti-Trust Act. In those cases, however, the corporations combining were under a duty to compete, and any substantial suppression of competition between them was, therefore, illegal -- the scope of the combinations (i. e., what they embraced)

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alone determining their illegality. No such rule has ever been applied to private trading or manufacturing companies, and this for the obvious reason that such companies are under no duty to compete. [Meredith v. N.J.Zinc & Iron Co., 55 N.J. Eq. 212, 221.](#) In the *Tobacco Case* the combination was condemned because the court thought the conclusion of wrongful [\*\*\*\*32] purposes and illegal combination was overwhelmingly established by the circumstances surrounding the organization and the after-conduct of the company, showing an ever present intent to drive competitors out of the field and to monopolize the tobacco trade. Nothing, we submit, could be more unreasonable than to condemn every corporation, without regard to its purposes or practices, which happens to exceed in size or trade power any other competitor in the field. A rule which would lead to that result, instead of protecting commerce -- which was the object of the Anti-Trust Act -- would tend to throttle and destroy it by driving or keeping out of the competitive field all but the incompetents and inefficients.

[International Harvester Co. v. Missouri, 234 U.S. 199](#), was decided under the Missouri statute which prohibited any combination that lessened or tended to lessen competition.

The elimination of competition between the units combined by the Steel Corporation did not amount to an undue restriction of competition in the steel trade and so produce a restraint thereof.

*Mr. George Welwood Murray for John D. Rockefeller and Jhon D. Rockefeller, Jr., appellees.*

**Judges:** [\*\*\*\*33] White, McKenna, Holmes, Day, Van Devanter, Pitney, Clarke; McReynolds, Brandeis took no part in the consideration or decision of the case

**Opinion by:** McKENNA

## Opinion

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[\*436] [\*\*294] [\*\*\*347] MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act.

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

Special charges of illegality and monopoly are made and special redresses and remedies are prayed, among others, that there be a prohibition of stock ownership and exercise [\*437] of rights under such ownership, and that there shall be such orders and distribution of the stock and other properties as shall be in accordance with equity and good [\*\*\*348] conscience and "shall effectuate the purpose of the Anti-Trust Act." (General relief is also prayed.

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel [\*\*\*34] industry, twelve in number. There are, besides, other corporations and individuals more or less connected with the activities of the other defendants that are alleged to be instruments or accomplices in their activities and offendings; and that these activities and offendings (speaking in general terms) extend from 1901 to 1911, when the bill was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges, and we see at a glance what detail of circumstances may be demanded, and we may find ourselves puzzled to compress them into an opinion that will not be of fatiguing prolixity.

The case was heard in the District Court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. [223 Fed. Rep. 55.](#) One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to

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monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of [\*\*\*\*35] the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions, practically a compulsion from "the metallurgical method of making steel and the physical method of handling it," this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action. And the [\*438] concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed an important purpose of the organization of the corporation was the building up of the export trade in steel and iron which at that time was sporadic, the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation but concentration of efforts with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it were expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry [\*\*\*\*36] from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned and, while conceding that the Steel Corporation, after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion (by Judge Woolley and concurred in by *Judge Hunt, 223 Fed. Rep. 161*) was in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a [\*\*295] sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation [\*439] became "a combination of combinations, [\*\*\*\*37] by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80% or 90% of the entire output of the country, and that its purpose was to secure great profits which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.<sup>1</sup>

<sup>1</sup> As bearing upon the power obtained and what the Corporation did we give other citations from Judge Woolley's opinion as follows:

"The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord."

"Further inquiring whether the corporation inherently possesses monopolistic power attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon This subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent. to 40.9 per cent. and its increase of business during that period was but 40.6 per cent. of its original volume. Its increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors.

"from the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the

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[\*\*\*38] [\*440] The organizers, however (we are still representing the opinion), underestimated [\*\*\*349] the opposing conditions and at the very beginning the Corporation instead of relying upon its own power sought and obtained the assistance and the cooperation of its competitors (the independent companies). In other words the view was expressed that the testimony did "not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in cooperation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary Dinners." The dinners were congregations of producers and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but, their potency being demonstrated, they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and [\*\*\*39] more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn the Corporation's prices were controlled by competition."

The Corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of [\*441] other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees -- whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors -- its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers [\*\*\*40] from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not [\*\*296] different from theirs and was distinguished from theirs "only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up, and it had ceased to offend against the law before this suit was [\*\*\*350] brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, [\*\*\*41] does not adequately represent their ability [\*442] and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed. The opinions indicate that the evidence admits of different deductions as to the genesis of the Corporation and the purpose of its organizers, but only of a single deduction as to the power it attained and could exercise. Both opinions were clear and confident that the power of the Corporation never did and does not now reach to monopoly, and their review of the evidence, and our independent examination of it, enable us to elect between their respective estimates of it, and we concur in the main with that of Judges Woolley and Hunt. And we add no comment except, it may be, that they underestimated the influence of the tendency and movement to integration, the appreciation of the necessity or value of the continuity of manufacture from the ore to the finished product. And there was such a tendency; and though it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. There was, therefore, much to urge it and give incentive to conduct [\*\*\*42] that could accomplish it. From the nature and properties of the industry, the processes of production were something more than the stage and setting of the human activities. They determined to an extent

organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either."

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those activities, furnished their motives, and gave test of their quality -- not, of course, that the activities could get any immunity from size, or resources, or energies, whether exerted in integrated plants or diversified ones.

The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances. But what are such circumstances? We have seen that it was the view of the District Court that size was such a circumstance and had no accusing or excusing influence. The contention of the Government is to the contrary. Its assertion is that the size of the Corporation being the result of a "combination [\*443] of powerful and able competitors" had become "substantially dominant" in the industry and illegal. And that this was determined. The companies combined, is the further assertion, had already reached a high degree of efficiency, and in their independence were factors in production and competition, but ceased [\*\*\*\*43] to be such when brought under the regulating control of the Corporation, which by uniting them offended the law; and that the organizers of the Corporation "had in mind the specific purposes of the restraint of trade and the enormous profits resulting from that restraint."

It is the contention of the Corporation opposing those of the Government and denying the illegal purposes charged against it, that the industry demanded qualities and an enterprise that lesser industries do not demand and must have a corresponding latitude and facility. Indeed, it is insisted that the industry and practically, (to quote the words of Judge Buffington, he quoting those of a witness,) "reached the limit, or very nearly so, at which economies from a metallurgical or mechanical standpoint could be made effective," and "that instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product, and make that product continuously." In other words, that there was a necessity for integration, and rescue from the old conditions -- from their improvidence and waste of effort; and that, in redress of the conditions, the [\*\*\*\*44] Corporation was formed, its purpose and effect being "salvage not monopoly," to quote the words of counsel. It was, is the insistence, the conception of ability, "a vision of a great business which should embrace all lines of steel and all processes of manufacture from the ore to the finished product and which by reason of the economies thus to be effected and the diversity of products it would be able to offer, could successfully compete in all the markets of the world." [\*444] It is urged further that to the discernment of that great possibility was added a courage that dared attempt its accomplishment, and the conception and the courage made the formation of the Corporation notable but did not make it illegal.

We state the contentions, we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the district judges, and we may [\*\*\*351] well despair to supplement the force of their representation of the conditions antecedent to the formation of the Corporation and in what respect and extent its formation changed them. Of course in that representation and its details there is guidance to decision, [\*\*\*\*45] but they must be rightly estimated to judge of what they persuade. Our present purpose is not retrospect for itself, however instructive, but practical decision upon existing conditions, that we may not by their disturbance produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration [\*\*297] should be of not what the Corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced -- whether its dissolution, as the Government prays, or the dismissal of the suit, as the Corporation insists?

The alternatives are perplexing -- involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen that the judges of the District Court unanimously concurred in the view that the Corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed, not against an expectation of it, but against its realization, and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor -- its was not [\*\*\*\*46] greater than that possessed by all of them. Monopoly, therefore, was not achieved, and [\*445] competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the Corporation), until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the

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test for which Swift & Co. v. United States, 196 U.S. 375, 396, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. And we may say in passing that the Government cannot fear their resumption for it did not avail itself [\*\*\*\*47] of the offer of the District Court to retain jurisdiction of the cause in order that if illegal acts should be attempted they could be restrained.

What then can now be urged against the Corporation? Can comparisons in other regards be made with its competitors and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the Corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the District Court unanimously resolved against the existence of that power, and in doing so they but gave effect to the greater weight of the evidence. It is certain that no such power [\*446] was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretence, and the Corporation declined in [\*\*\*\*48] productive powers -- the competitors growing either against or in consequence of the competition. If against the competition we have an instance of movement against what the Government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the Corporation under either illustration is an untenable accusation.

We may pause here for a moment to notice illustrations of the Government of the purpose of the Corporation, instancing its acquisition after its formation of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness [\*\*\*352] in the public welfare he would have approved of nothing that [\*\*\*49] had even a tendency to its detriment. And he testified he was not deceived and that he believed that "the Tennessee Coal and Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it [\*447] would be a guarantee that there was value to it." Such being the emergency it seems like an extreme accusation to say that the Corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards and how? And what was the Corporation to do with the property? Let it decay in desuetude or develop its capabilities and resources? In the development, of course, there would be profit to the Corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard [\*\*\*50] them as violations of law.

From this digression we return to the [\*\*298] consideration of the conduct of the Corporation towards its competitors. Besides the circumstances which we have mentioned there are others of probative strength. The company's officers and, as well, its competitors and customers, testified that its competition was genuine, direct and vigorous, and was reflected in prices and production. No practical witness was produced by the Government in opposition. Its contention is based on the size and asserted dominance of the Corporation -- alleged power for evil, not the exertion of the power in evil. Or as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the Government, the offence against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the Corporation. Competitors, it is said, followed the Corporation's [\*\*\*51] prices because they made money by the imitation. Indeed the imitation is urged as [\*448] an evidence of the Corporation's power. "Universal limitation," counsel

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assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the Corporation -- "its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the Corporation and the independents. Counsel say, "They [the Corporation is made a plural] called a few -- they called 200 witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the Corporation was formed." And "movement of prices" counsel explained "as shown by the published prices . . . they were the ones that the competitors were maintaining all during the interval."

It would seem that "200 witnesses" would be fairly representative. Besides the balance of the "forty thousand customers" was open to the Government to draw upon. Not having done so, [\*\*\*\*52] is it not permissible to infer that none would testify to the existence of the influence that the Government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the [\*449] facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course competition affects [\*\*\*\*53] prices but it is only one among other influences and [\*\*\*353] does not more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers and customers of the Corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power not of weakness; and power exerted not only to suppress competition but to compel testimony, is the necessary inference, shading into perjury to deny its exertion? The situation is indeed singular, and we may wonder at it, wonder that the despotism of the Corporation, so baneful to the world in the representation of the Government, did not produce protesting victims.

But there are other paradoxes. The Government does not hesitate to present contradictions, though only one can be true, such being we were told in our school books the "principle of contradiction." In one competitors (the independents) are represented as oppressed by the superior power of the Corporation; [\*\*\*\*54] in the other they are represented as ascending to opulence by imitating that power's prices which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted. If it were this suit would take on another cast. The competitors would cease to be the victims of the Corporation and would become its accomplices. And there is no other alternative. The suggestion [\*450] that lurks in the Government's contention that the acceptance of the Corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, "the combination embodied in the Corporation unduly restrains competition by its necessary effect, [the italics are the emphasis of the Government] and therefore is unlawful regardless [\*\*299] of purpose." "A wrongful purpose," the Government adds, is "matter of aggravation." [\*\*\*\*55] The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability -- they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

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We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. [\*\*\*56] The regression is extreme, but [\*451] short of it the Government cannot stop. The fallacy it conveys is manifest.

The Corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offence against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted -- though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers -- how can it be worked out of the situation and through what proposition of law? Of course it calls for nothing other than a right application of the law and to repeat what we have said above, shall we declare the law to be that size is an offence even though it minds its own business because what it does is imitated? The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate [\*\*\*57] its influence. But we must adhere to the law and the HN1[↑] law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not [\*\*\*354] compel competition nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the Government, and in connection with them, we recall the distinction we made in the Standard Oil Case (221 U.S. 1, 77) between acts done in violation of the statute and a condition brought about which "in and of itself, is not only a continued attempt to monopolize, but also a monopolization." In such case, we declared, "the duty to enforce the statute" required "the application of broader and more controlling" remedies [\*452] than in the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of "the combination found to exist in violation of the statute" in order to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained" had "brought" and would [\*\*\*58] "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal and became a "continually operating force" with the "possession of power unlawfully obtained."

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies and equally clear in its direction that the courts of the Nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion -- [\*\*\*59] indeed essential function -- that makes its value in our jurisprudence -- value in this case as in others. We do not mean to say that the law is not its own measure and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a [\*453] matter for consideration that there was no legal attack on the Corporation until 1911, ten years after its formation and the commencement of its career. We do not, however speak of the delay simply as to its time -- that there is estoppel in it because of its time -- but on account of what was done during that time -- the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited and are not to be ignored. And what of the foreign [\*300] trade that has been developed and exists? The Government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that [\*\*\*60] under congressional legislation in the Webb Act the foreign trade of the Corporation is reserved to it. And further, it is said, that the Corporation has constructed a company called the Proucts Company which can be "very easily preserved as a

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medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act." [C. 50, § 2, 40 Stat. 516.]

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the Corporation be sustained and its power of control over its subsidiary companies be retained and exercised in the foreign trade and given up in the domestic trade? The Government presents no [\*\*\*\*61] solution of the problem. Counsel realize the difficulty and seem to think that its solution or its evasion is in the suggestion [\*454] that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action [\*\*\*355] under existing laws, not action under conceptions which may never be capable of legal execution. We must now decide and we see no guide to decision in the propositions of the Government.

The Government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business. The companies are enumerated. They are the Carnegie Steel Company (a combination of the old Carnegie Company, the National Steel Company, and the American Steel Company), the Federal Steel Company, the Tennessee Company and the Union Steel Company (a combination of the Union Steel Company of Donora, [\*\*\*\*62] Pa., Sharon Steel Company of Sharon, Pa., and Sharon Tin Plate Company). They are fully integrated, it is said, possess their own supplies, facilities of transportation and distribution. They are subject only to the Steel Corporation is, in effect, the declaration, in nothing but its control of their prices. We may say parenthetically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expedients of the law.

But let us see what guide to a procedure of dissolution of the Corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the Government calls for not only a disruption of present conditions but the restoration of the conditions of twenty years ago, if [\*455] not literally, substantially. Is there guidance to this in the *Standard Oil Case* and the *Tobacco Case* [[221 U.S. 1, 106](#)]? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law [\*\*\*\*63] necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them and this reference to them is enough. And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existance of the intent . . . and . . . impelled the expansion of the New Jersey corporation." It was to this corporation, which represented [\*\*\*\*64] the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how in the case of the New Jersey corporation the original wrong was reflected in and manifested by the acts which followed the organization, as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.], since the [\*456] development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed [\*\*301] and brought under control, the

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system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of [\*\*\*\*65] reasonable contention."

The *Tobacco Case* has the same bad distinctions as the *Standard Oil Case*. The illegality in which it was formed (there were two American Tobacco Companies, but we use the name as designating the new company as representing the combinations of the suit) continued, indeed progressed in intensity and defiance to [\*\*\*356] the moment of decree. And it is the intimation of the opinion if not its direct assertion that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war "inspired by one or more of the minds which brought about and became parties to that combination." In other words the purpose of the combination was signalled to competitors and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven "out of the business." This was the purpose and the achievement, and the processes by which achieved this court enumerated to be the formation of new companies, taking stock in others to obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly [\*\*\*\*66] independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants not to utilize them but to close them; by constantly [\*457] recurring stipulations by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the *Tobacco Case*, therefore, as in the *Standard Oil Case*, the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the *Standard Oil Case* furnishes no example for a decree in this.

In conclusion we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including [\*\*\*67] a material disturbance of, and, it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

*So ordered.*

MR. JUSTICE McREYNOLDS and MR. JUSTICE BRANDEIS took no part in the consideration or decision of the case.

**Dissent by:** DAY

## Dissent

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MR. JUSTICE DAY dissenting.

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act. I am unable to accept the conclusion [\*458] which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

It appears to be thoroughly established that the formation of the corporations, here under consideration, constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. I agree [\*\*\*\*68] with the conclusions of Judges Woolley and Hunt, expressed in the court below ([223 Fed. Rep. 161](#), et. seq.), that the combinations were not submissions to business conditions but were designed to control

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them for illegal purposes, regardless of other consequences, and "were made upon a scale that was huge and in a manner that was wild," and "properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them." Those judges found that the constituent companies of the United States Steel Corporation, nine in number, were themselves combinations of steel manufacturers, and the effect of the organization of these combinations was to give a control over the industry at least equal to that theretofore possessed by the constituent companies and their subsidiaries; that the Steel Corporation was a combination of combinations by which directly or indirectly 180 independent concerns were brought under one control, and in the language of Judge Woolley (p. 167):

"Without referring to the great mass of figures which bears upon this [\*\*\*\*69] aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or their business values, as independent and separate [\*\*\*357] producers, but upon their values in combination; that is, upon their values as manufacturing plants and business [\*459] concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess [\*\*302] of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related, measured by the amount of production, extended in some instances from 80 per cent. to 95 per cent. of the entire output of the country, resulting in the immediate increase in prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.

"The immediate, as well as the normal effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade."

The enormous overcapitalization [\*\*\*\*70] of companies and the appropriation of \$ 100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the profits of the business. This record shows that the power obtained by the corporation brought under its control large competing companies which were of themselves illegal combinations, and succeeded to their power; that some of the organizers of the Steel Corporation were parties to the preceding combinations, participated in their illegality, and by uniting them under a common direction intended to augment and perpetuate their power. It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. Nothing could add to the vivid accuracy with which Judge Woolley, speaking for himself [\*460] and Judge Hunt, has stated the illegality of the organization, and its purpose to combine in one great corporation the previous combinations by [\*\*\*\*71] a direct violation of the purposes and terms of the Sherman Act.

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called "Gary Dinners," where the assembled trade opponents secured cooperation and joint action through the machinery of special committees of competing concerns, and by prudent provision took into account the possibility of defection, and the means of controlling and perpetuating that industrial harmony which arose from the control and maintenance of prices.

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. The power, thus obtained from the combination of resources almost unlimited in the aggregation of competing organizations, had within its control the domination of the trade, and the ability to fix prices and restrain the free flow of commerce upon a scale heretofore unapproached in the history of corporate organization in this country.

These facts established, as it seems to me they are by the record, it follows that, if the Sherman Act is [\*\*\*\*72] to be given efficacy, there must be a decree undoing so far as is possible that which has been achieved in open, notorious, and continued violation of its provisions.

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I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided [\*461] no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create [\*\*\*\*73] monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade [\*\*\*358] in the channels of interstate commerce. [Pearsall v. Great Northern Ry. Co., 161 U.S. 646, 676, 677; Trans-Missouri Freight Assn. Case, 166 U.S. 290, 324; Northern Securities Case, 193 U.S. 197; Addyston Pipe Co. v. United States, 175 U.S. 211, 238; Harriman v. Northern Securities Co., 197 U.S. 244, 291; Union Pacific Case, 226 U.S. 61, 88.](#) While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which from their nature, or effect, have proved effectual to restrain interstate commerce. [Standard Oil Co. v. United States, 221 U.S. 1; United States v. American Tobacco Co., 221 U.S. 106; \\*\\*303 United States v. Reading \[\\*\\*\\*\\*74\] Co., 226 U.S. 324; Straus v. American Publishers' Assn., 231 U.S. 222; Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600.](#)

This statute has been in force for nearly thirty years. It has been frequently before this court for consideration, and the nature and character of the relief to be granted [\*462] against combinations found guilty of violations of it have been the subject of much consideration. Its interpretation has become a part of the law itself, and, if changes are to be made now in its construction or operation, it seems to me that the exertion of such authority rests with Congress and not with the courts.

The fourth section is intended to give to courts of equity of the United States the power to effectively control and restrain violations of the act. In none of the cases which have been before the courts was the character of the relief to be granted, where organizations were found to be within the condemnation of the act, more thoroughly considered than in the Standard Oil and Tobacco Company Cases, reported in 221 U.S. In the former case, considering the measure of relief to be granted in the case of a combination, [\*\*\*\*75] certainly not more obnoxious to the Sherman Act than the court now finds the one under consideration to be, this court declared that it must be two-fold in character ([221 U.S. 78](#)): "1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In the *American Tobacco Company Case* the nature of the relief to be granted was again given consideration, and it was there concluded that the only effectual remedy was to dissolve the combination and the companies comprising it, and for that purpose the cause was remanded to the District Court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which shall be honestly in harmony with and not repugnant to the law." In that [\*463] case the corporations dissolved had long been in existence, [\*\*\*\*76] and the offending companies were organized years before the suit was brought and before the decree of dissolution was finally made. Such facts were considered no valid objection to the dissolution of these powerful organizations as the only effective means of enforcing the purposes of the Sherman Anti-Trust Act. These cases have been frequently followed in this court, and in the lower federal courts, in determining the nature of the relief to be granted, and I see no occasion to depart from them now.

As I understand the conclusions of the court, affirming the decree directing dismissal of the bill, they amount to this: that these combinations, both the holding company and the subsidiaries which comprise it, although organized in

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plain violation and bold defiance of the provisions of the act, nevertheless are immune from a decree effectually ending the combinations and putting it out of their power to attain the unlawful purposes sought, because of some reasons of public policy requiring such conclusion. I know of no public policy which sanctions a violation of the law, nor of any [\*\*\*359] inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, [\*\*\*\*77] which have been able thus to organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself.

There is no mistaking the terms of the act as they have hitherto been interpreted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. The remedy by injunction, at the instance of the Attorney General, was [\*464] given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combinations and contracts, and this court interpreting its provisions has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed. I am unable to see force [\*\*\*\*78] in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of \$ 1,800,000,000; its outstanding capital stock was \$ 868,583,600; its surplus \$ 151,798,428. Its cash on hand ordinarily was \$ 75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and with a single exception, the total capitalization and [\*\*304] surplus of any one of them. That such an organization thus fortified and equipped could if it saw fit dominate the trade and control competition would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past, that is, to effectually dominate and control the steel business [\*\*\*\*79] of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation, [\*465] and when formed to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute and in most cases practicably impossible. As we said in dealing with the Packers' combination in [Swift & Co. v. United States, 196 U.S. 375, 396](#): "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent -- for instance, the monopoly -- but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. [\*\*\*\*80] [Commonwealth v. Peaslee, 177 Massachusetts, 267, 272](#). But when that intent and the consequent dangerous probability exist, this statute [Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

It is affirmed that to grant the Government's request for a remand to the District Court for a decree of dissolution would not result in a change in the conditions of the steel trade. Such is not the theory of the Sherman Act. That act was framed in the belief that attempted or accomplished monopolization, or combinations which suppress free competition, were hurtful to the public interest, and that a restoration of competitive conditions would benefit the public. We have here a combination in control of one-half of the steel business of the country. If the plan were followed, as in the *American Tobacco Case*, of remanding the case to the District Court, a decree might be framed restoring competitive conditions as far as practicable. See [United States v. American Tobacco Co., 191 Fed. Rep. 371](#). In that case the subject of reconstruction so as to restore such conditions [\*\*\*\*81] was elaborated and carefully [\*466] considered. [\*\*\*360] In my judgment the principles there laid down if followed now would make a

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very material difference in the steel industry. Instead of one dominating corporation, with scattered competitors, there would be competitive conditions throughout the whole trade which would carry into effect the policy of the law.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court, should not be dismissed, and the cause should be remanded to the District Court, where a plan of effective and final dissolution of the corporations should be enforced by a decree framed for that purpose.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

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End of Document

## **United States v. American Column & Lumber Co.**

District Court, W.D. Tennessee, W.D.

March 16, 1920

No. 751

**Reporter**

263 F. 147 \*; 1920 U.S. Dist. LEXIS 1241 \*\*

UNITED STATES v. AMERICAN COLUMN & LUMBER CO. and 332 other defendants

### **Core Terms**

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prices, lumber, hardwood, manufacturers, stock, sales, open competition, conspiracy, statistics, interstate commerce, amongst, co-operation, distributed, shortage, suppress, restraint of trade, monthly, meetings, enhance, levels, buyer

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### **HN1[**

U.S. Comp Stat. § 8823 provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN2[**

A combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN3[**

A combination or conspiracy is not necessarily unlawful, but if unlawful, then anything done or said by a party thereto to consummate the unlawful purpose need not in itself be unlawful. So, also, a combination or conspiracy in itself lawful may be made unlawful by acts in furtherance thereof which the themselves unlawful. An unlawful conspiracy, when proven, may be brought under condemnation of law by proof of facts and circumstances done in furtherance thereof which are not in themselves unlawful. So a conspiracy which has for its object the accomplishment of a lawful purpose may be brought into condemnation of the law by doing unlawful things to consummate that purpose.

Antitrust & Trade Law > Sherman Act > General Overview

#### **[HN4](#)[] Antitrust & Trade Law, Sherman Act**

Each case under the Sherman Act must be determined upon its own facts, and if these facts establish the proposition that the combination entered into unreasonably restrains trade in interstate commerce, by suppressing competition in prices, it falls within the condemnation of the act.

**Opinion by:** [\*\*1] McCALL

### **Opinion**

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[\*148] McCALL, District Judge. This is an application for preliminary injunction. The bill of complaint is brought under section 4 of an Act of Congress (26 Stat. 209 [Comp. St. § 8823]), by the United States of America against the American Column & Lumber Company and 332 other manufacturers of hardwood lumber, residents and citizens of some 16 different states, charging the defendants with combining and conspiring together to suppress competition amongst themselves, and to enhance their selling prices for such lumber, in restraint of interstate commerce, in violation of section 1 of said act of Congress (section 8820), which is as follows:

[HN1](#)[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

It is alleged that the defendant companies comprise the most important manufacturers of hardwood lumber in the United States, and have been so engaged for a long time in the states and at the places indicated in the bill of complaint, in cutting down trees of the hardwood varieties and converting them into logs, in moving [\*\*2] such logs to sawmills and lumber factories, in manufacturing them into lumber, and in the selling and shipping of such lumber, in interstate commerce, to manufacturers of sashes, doors, flooring, mill work, etc., and to other manufacturers and to wholesale and retail dealers for the purposes of resale, and that at the beginning of the year 1919 the defendant companies were still demanding for their lumber approximately the same prices that had prevailed before the signing of the armistice in the war with Germany, and that manufacturers and wholesale and [\*149] retail dealers were buying from the defendants only in small quantities, for the purposes of immediate necessities, in the belief that the prices demanded were too high, and they were intending to largely increase their purchases of such lumber from the defendants, in interstate commerce, as soon as the prices should be reduced by competition among the defendants to more reasonable levels.

Under these circumstances, in January, 1919, and continuously thereafter to the present time, it is further alleged that the defendant companies and individual defendants unlawfully combined and conspired together, in restraint of interstate [\*\*3] commerce in hardwood lumber manufactured by them, to maintain the prices demanded in said month of January, 1919, for their lumber and to double and treble the prices, in violation of the said act of Congress and against the public policy of the United States, by suppressing competition in prices amongst the defendants, by substituting therefor co-operation and agreements among themselves having the purpose and effect of maintaining and increasing prices.

The bill then proceeds to state the means resorted to by defendants to accomplish the purpose of the alleged combination and conspiracy, which are in substance as follows (hereinafter referred to as overt acts): By joining together as members of a so-called "open competition plan" under the slogan "Co-operation, not Competition, is the Life of Trade," and by providing and financially supporting at Memphis, Tenn., a suite of offices, clerical force, and the defendant F. R. Gadd as manager of statistics, for the successful operation of said plan; by dividing the members of the plan into four geographical groups, and holding meetings of each group each month; by printing and causing to be distributed amongst the defendants recommendations **[\*\*4]** to make oral agreements at such meetings to eliminate competition amongst these defendants who had been competing, and by this means to suppress "evil practices," meaning thereby the practice of competing in prices so as to secure business, by requiring each member of the plan to make monthly "stock reports" to the manager of statistics, showing the normal stock, the entire actual stock, the unsold stock, of each defendant company, and also to make to said manager "production reports," showing the normal monthly production, the actual monthly production, and the estimated future production of each defendant company, and also "sales reports" showing separately each actual sale of hardwood lumber made by each defendant company, giving the name of the buyer, the kind of lumber sold, the destination, and the selling price; by having these reports tabulated by the manager of statistics and distributed amongst the members of the plan; by distributing amongst the defendants printed recommendations to discuss prices at their monthly meetings, and orally discussing at such monthly meetings said stock reports, production reports, and sales reports, so as to produce at each of such meetings a **[\*\*5]** mutual exchange of oral statements of approval of high prices reported in the sales reports, as assurances that the defendants would further sustain such prices by maintaining prices as high as or higher than such prices; by mutually exchanging each month through the manager of statistics, in connection with the production **[\*150]** reports, written predictions by the several defendants that high prices reported in the sales reports would continue to be maintained and enhanced, so as to thus furnish further assurance that the action of each defendant in maintaining and enhancing such price would be supported by like action on the part of other members of the plan; by having distributed by the manager of statistics amongst the defendants printed expositions of the theory of each defendant, to be observed as a guide to prices reported as received by other defendants, to the effect that knowledge regarding prices actually received is all that is necessary to keep prices at reasonably stable and normal levels, there being no agreement to follow the practices of others, although members do naturally follow their most intelligent competitors, if they know what their competitors have been **[\*\*6]** actually doing, this being the theoretical proposition at the basis of the open competition plan; by having questionnaires sent out by the manager of statistics to each member of the plan, asking for information showing how the theory of the open competition plan worked in practice, and that the manager of statistics edited these answers and caused to be distributed amongst the members such parts of them as tended to show that it was successful in producing a steady advance in the prices of their products; by printing and causing to be distributed among the defendants arguments against low prices, on the ground of shortage of lumber disclosed by the stock reports, and explaining how the disclosure of such shortage in the stock reports prevented prices from being lowered, followed by arguments for still higher prices on the ground of the shortage disclosed; the continued co-operation to secure higher prices on the ground of shortage in stocks, and the elimination of competition; by causing to be reprinted with approval, and distributed amongst themselves, statements emphasizing the advance of prices following the shortage of lumber, and urging the defendants against increasing production **[\*\*7]** by night work, which would in effect "kill the goose that laid the golden eggs" and would be criminal folly, coupled with the suggestion made in the sales report that their combination or association, called the "open competition plan," to maintain and enhance prices would not be prosecuted, that prices would continue to advance so long as the shortage of lumber was maintained, and that the Sherman Law, designed to prevent the restraint of trade, should be repealed.

It is further alleged that similar means are still being employed and are about to be further employed by the defendants, at Memphis and elsewhere, in consummation of their alleged unlawful combination and conspiracy to maintain the prices of hardwood lumber at, and enhance it beyond, the present high levels, in restraint of interstate commerce in such lumber. It is the doing of these things by the defendants, characterized as overt acts, that the court is asked to enjoin.

The defendants file a sworn answer, in which they substantially admit doing the things charged in the bill, characterized as overt acts. They deny that they were wrongful acts, and assert that the defendants were clearly

within their rights under [\*\*8] the law in the course which has been pursued, and especially do they deny every charge or [\*151] intimation in the bill of any unlawful combination or conspiracy, and that the doing of those things did not and does not restrain trade in interstate commerce; but, on the other hand, it is asserted that the open competition plan promotes competition in interstate commerce, and especially among the members of the plan, in that it furnishes them with information by which they can more intelligently and effectively conduct the management of their business as manufacturers of hardwood lumber. They deny that the defendants, by their course of conduct as charged in the bill, curtailed production or suppressed competition in, or maintained and increased prices of, manufactured hardwood lumber.

Much documentary evidence and many affidavits were introduced in support of the contention of the respective parties, all of which were documents coming from the office of the manager of statistics, or affidavits of the defendants themselves, except a certain line of affidavits by parties who were not members of the plan, but who were dealers in hardwood lumber, or furnished supplies to the defendants [\*\*9] for the manufacture thereof. In the view the court has taken of the case these latter affidavits, in so far as they are material to the question to be decided, are but expressions of opinion of the party making the affidavit. It should be said that the affidavits made and filed by the defendants do not controvert the allegations made in the bill of overt acts, but they do deny that affiants were parties to any combination or conspiracy or agreement to restrain trade in interstate commerce in the hardwood manufacturing business, by suppressing competition in prices among themselves or otherwise.

As the court understands this record, there is no conflicting evidence to reconcile, since it comes entirely from the defendants and, whatever the case is for the government, it is made such by the acts and words of the defendants, or some of them, themselves. It therefore remains for the court to determine whether the conclusions drawn from the evidence of the government, as stated in the bill of complaint, are in its judgment warranted.

The first question arising is whether the defendants in associating themselves together under the so-called "open competition plan" thereby formed a [\*\*10] combination or conspiracy. In other words, was there in the minds of two or more of the defendants a design to accomplish by and through the plan a common purpose? If so, there was a combination or conspiracy, HN2[<sup>↑</sup>] since a combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose. Pettibone v. United States, 148 U.S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419; Bouvier's Law Dictionary, vol. 1, p. 621.

HN3[<sup>↑</sup>] A combination or conspiracy is not necessarily unlawful, but if unlawful, then anything done or said by a party thereto to consummate the unlawful purpose need not in itself be unlawful. So, also, a combination or conspiracy in itself lawful may be made unlawful by acts in furtherance thereof which the themselves unlawful. An unlawful conspiracy, when proven, may be brought under condemnation of law by proof of facts and circumstances done in furtherance thereof [\*152] which are not in themselves unlawful. So a conspiracy which has for its object the accomplishment of a lawful purpose may be brought into condemnation of the law by doing unlawful things to consummate that purpose. It cannot be with reason denied, nor [\*\*11] indeed do I understand that it is denied, by the defendants, that they formed an association, a combination, or an agreement, to promote the interests of the members of the plan who were engaged in the manufacture of hardwood lumber.

The second and more difficult question is: Did and does this combination or association restrain trade in interstate commerce, within the meaning of the law? If so, it is unlawful, and any act done or anything said or written by any member of the plan in furtherance of its object was the act of all and the injunction should issue.

The evidence shows that the defendants were members of the American Hardwood Manufacturers' Association (hereinafter called the association), but that all the members of said association are not members of the "open competition plan." Query: What benefits did those members of the association who joined the plan expect to derive from it which were not equally available in the association alone? There must have been some additional advantage contemplated and expected. That purpose, I think, can best be determined from the evidence tending to show what the members of the plan said and did from the time of its formation and [\*12] on up through the months until this suit was filed.

As has been seen, this evidence was created by the defendants themselves, and it is uncontroverted. We come now to consider it. Before doing so, however, it is well to dispose of the insistence by counsel for the defendants that the members of the plan should not be held responsible for what F. R. Gadd, the manager of statistics, did, wrote, or said in conducting the business of the plan. I cannot agree with that contention. Mr. Gadd was employed by the members of the plan; he was furnished quarters and clerical assistance at Memphis, Tenn.; he it was that gathered information from the individual members; he it was that tabulated, it, and, thus tabulated, he it was that sent it back to each of the members; he it was that advised the members or suggested the manner of conducting the business; he advised the members of all that he knew or gathered from the individual members through their monthly reports as to the condition of the trade. The members of the plan thus knew what he was doing. He was the agent employed by them to conduct the business of the plan, and, judging from this record, he did it successfully and to the satisfaction [\*\*13] of its members. His office was the clearing house of the plan's business. Under such circumstances, when the members of the plan are summoned into court to show cause why they should not be enjoined from further prosecuting the business of the plan as perfected and practiced by their agent, Mr. Gadd, for them, the wrongs done should not, either in law, equity, or good conscience, be shifted to the shoulders of Mr. Gadd and those for whom he acted, with their knowledge, consent, and approval, be permitted to go hence without blame.

Recurring now to the evidence: It appears that in the early months of 1919 the stock of hardwood lumber on hand was low, the demand was light, and prices at a comparatively high level. The [\*153] first sales report by Mr. Gadd, as manager of statistics, was issued on January 25, 1919, and issued weekly thereafter. Quoting from the first one we read:

"Co-operation, not competition, is the life of trade. Membership in the plan is not compulsory, but members who enter into the plan and practice the idea of a fair deal for all, eliminating suspicion and acting with good will toward each other, will find that returns come back to them with added [\*\*14] interest in dollars and cents."

February 3:

"Before the organization of this plan, while some of the members knew some of the other members, in a majority of cases they were competing with each other, even when neighbors without a personal acquaintance."

February 8:

"The matter of price is the principal point at issue between the buyer and seller. Buyers who have been looking for a downward revision of prices are going to be disappointed. \* \* \* It is no longer merely a question of who can, or will, hold out the longest -- that condition no longer exists. Buying has been resumed after a period of waiting and uncertainty, and it is confidently expected that the move in this direction will long be continued. The tendency to buy only for current needs is less apparent than at any time since the armistice was signed. \* \* \* Stocks remain below normal. Total stocks on hand in the Southern territory are two million feet less, all grades combined, as compared with last month. \* \* \* Production in the Eastern territory, however, is not more than sixty per cent. of normal at the present time. \* \* \* The car supply is ample. \* \* \* It must be apparent that the outlook on the whole [\*\*15] is favorable for a strong market for all the lumber that can be produced during the coming months."

February 15:

"There's a reason for everything, and the reason of an association is more than good fellowship, though getting to know the other fellow is usually the first step in the direction of correcting trade abuses."

March 1:

"The report of stocks on hand sold and unsold as of February 1, 1919, develops a situation that we believe is unparalleled in hardwood lumber industry. In no single month within our recollection has there been such a large and general decrease in stocks on hand as shown by this report."

"The chief factors contributing to this situation are curtailed production and increased volume of sales. \* \* \* At this rate, it will not be long before there is a famine of hardwood lumber. We hear a great deal about the waiting attitude of the buyer, with the expectation of price recession; but with such conditions as are above recited it is difficult to understand why holders of hardwood lumber need worry as to the future. \* \* \* With stocks low and ill-assorted, and with no prospect for restoring them to even last year's meager quantities, the outlook for strong [\*\*16] prices on all hardwoods could not be better."

March 8, quoting with approval an article from the Southern Lumberman, the report says:

"For instance, at the recent meeting of the open competition plan of the American Hardwood Manufacturers' Association in Memphis, the fact was developed that the production of mills embraced in that group of manufacturers is at the present time only fifty-six per cent. of normal, and that practically [\*154] the same situation exists throughout the hardwood producing territory. \* \* \* Certainly in any other industry the buyers could never expect anything but an advance in price when the supply is below normal, the production is far below normal, and the demand is improving."

March 22:

"It is one thing for men in a meeting to say, one after another, 'My price is so and so,' with the result that after the meeting all their prices prove substantially the same as the figures mentioned.

"It is quite a different thing for the same men to come to a meeting and each report, 'My actual sales for the past month have been so and so, and I have reported the details of each transaction to the Association.'

"In that statement there is no direct or [\*\*17] implied agreement to maintain prices, no obligation of any kind to refrain from cutting.

"The theoretical proposition at the basis of the open competition plan is that *knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.*"

March 29:

"Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman if the facts were better understood; offers of business now at shaded prices would get scant consideration, and there would not only be no good reason to cut prices, but there would be every reason why they should be held at reasonably profit-making levels."

With the low stock of hardwood lumber on hand and the reduced production during the first few months of the year, as indicated by these sales reports, the plan, through its manager of statistics, on April 5th, began a propaganda to encourage home building, for the purpose of creating a greater demand for hardwood lumber. On the first page of the report of that date there appears in bold letters the words "BUILD NOW," from which I quote:

"Start the big idea now, the whole country is thinking and talking home building; the [\*\*18] government is urging it. Call a meeting to-day; ask every man in your community who is interested in building or building material to attend; then --

"Start something!

"Organize!

"Get the editorial support of all newspapers.

"Appoint a publicity committee which will use every avenue of publicity.

"Ask merchants to put a 'Build Now' slip in packages they deliver.

"Do everything possible to get the old town talking 'Build Now.'

"Don't delay -- simply call the men together in your town to do things -- you may be assured they will be interested.

"Don't permit your town to be a slacker in the nation-wide movement."

Thereafter on June 7th, following this propaganda, the weekly sales report begins:

"The open competition plan to the American Hardwood Manufacturers' Association has arrived; it is an unqualified success, and any member or any manufacturer who does not think so is simply overlooking the most important of our several association activities. \* \* \* Read the following excerpts from letters written by members."

I only quote a few:

"We believe we have profited from \$500 to \$1,000 during the past 30 days by being correctly informed relative to the prices stock [\*\*19] is really being sold it."

[\*155] "When a manufacturer situated as ourselves sells stock below the market price, it not only hurts his own business, but it hurts the other fellow who has similar stock to dispose of."

"The very first report which we received under this plan enabled us to increase our price \$6 per thousand on a special item in oak."

"At a recent Memphis meeting it developed our company was carrying an unusually large stock in thoroughly dried gum, and seemed to be the only one among those present who had it. Within two weeks from date of this meeting, where it developed there was a big shortage of red gum items, we found a most unusual at prices we had not hoped for."

"We were a little hard to persuade to come into the plan; now that we are in and have seen the inside workings of it, we do not see how we could get along without it."

"Since we became members we have been selling out lumber at several dollars per thousand more than formerly."

"Any manufacturer who is trying to do without the help of the association is making a wonderful mistake."

"We find the weekly report of sales a very positive index to the trend of the market on all grades of lumber."

[\*\*20] "I consider the report of actual sales of great help in determining the market value of hardwood lumber and believe that the plan is a stabilizing influence, which tends to raise the prices of those who are inclined to cut their prices to the top market prices."

"It is obvious that no one wants to sell his lumber for less than the other fellow is actually getting, and your reports of actual sales enable the manufacturer to see what his neighbors are getting for their lumber, and through this course of education, I might say, all those who have access to your reports bring their prices to the top."

"Our experience has been that the open competition plan has been absolutely accurate, but instead of apparently stabilizing the market, it has caused a runaway market."

"There seems to be a friendly rivalry between members to see who can get the best prices, whereas under the old plan it was cut-throat competition. Now it is a pleasure to sell because we know what we are doing and have information at our finger tips that enables us to know these things before the other fellow does."

There is much other documentary evidence to like effect, but this is enough to indicate the common [\*\*21] note running through it all, and that common note is "increase of prices." It is difficult, if not impossible, on this record, to escape the conclusion that the purpose and intention of the plan was to suppress competition among its members, and create and perpetuate a condition in the hardwood lumber manufacturing business, wherein the production of hardwood lumber was to be kept low enough to maintain prices on an ascending scale, but not so low as to drive

prices to such heights, under the stimulating influence produced by the propaganda to "Build Now," that consumers would be induced to use substitutes. These two objectives mark the margins of the channel through which the members of the plan conducted by its manager of statistics, Mr. Gadd, were to steer interstate commerce in hardwood lumber, and through which it was successfully steered, on up to the filing of this bill, until prices of hardwood lumber had increased from 150 to 250 per cent. within a period of 12 months. I do not doubt that some of the defendants, if not all of them, were advised that the plan was lawful, and that their participation in its operation was lawful; but their conduct must be here considered in [\*\*22] the light of results.

[\*156] It would serve no useful purpose to analyze the evidence, or to enter into a discussion of the decided cases, which have heretofore arisen under the Sherman Act; HN4[<sup>1</sup>] each case must be determined upon its own facts, and if these facts establish the proposition that the combination entered into unreasonably restrains trade in interstate commerce, by suppressing competition in prices, it falls within the condemnation of the act. Competition and co-operation by and with those engaged in the same business is not necessarily inconsistent. Successful business will likely result from a proper balance of the two, but too much of either may lead to disaster. Competition without co-operation means destructive competition. Co-operation without competition means the destruction of competition -- price fixing.<sup>1</sup> The latter is the state of the open competition plan, as disclosed on this record.

It results, from what has been said, that temporary injunction will issue as prayed for in the bill of complaint.

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End of Document

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<sup>1</sup> Hurley's, Awakening of Business.



## **United States v. United Shoe Machinery Co.**

District Court, E.D. Missouri

March 31, 1920

No. 4489

**Reporter**

264 F. 138 \*; 1920 U.S. Dist. LEXIS 1177 \*\*

UNITED STATES v. UNITED SHOE MACHINERY CO. et al.

### **Core Terms**

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machines, leases, patent, manufacturers, contracts, Clayton Act, shoe, lessees, commerce, clauses, cases, monopoly, patentee, Sherman Act, conditions, competitors, invention, rights, exemption, courts, words, parties, lessor, provisions, machinery, unduly, shoe machinery, carrier, decree, rates

### **LexisNexis® Headnotes**

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Patent Law > Infringement Actions > Exclusive Rights > General Overview

#### **HN1[] Infringement Actions, Exclusive Rights**

The patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using, or selling that which he had invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

#### **HN2[] Conveyances, Licenses**

There is nothing in the laws relating to patents which in any wise affects contracts for license, use, sale, or lease of patented articles. They are subject to the same governmental and legislative control as other contracts.

Governments > Legislation > Types of Statutes

Real Property Law > Encumbrances > Limited Use Rights > Licenses

264 F. 138, \*138U.S. Dist. LEXIS 1177, \*\*1177

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Real Property Law > Ownership & Transfer > Public Entities

### **HN3** Legislation, Types of Statutes

The property right of the patentee is, after all, but a property right, and subject, as is all other property, to the general law of the land. Neither the patentee, nor the machine involving his invention, nor a license for use, can be exempted from the liabilities and regulations which, in the public interest, attach to all persons and property under the general law of the land. Neither is the right to make and sell or use a patented invention or process free from the restraints imposed by the police power of the states.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

### **HN4** Congressional Duties & Powers, Commerce Clause

If a business is subject to regulation, the contracts made in its conduct are subject to regulation.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Contracts Law > Types of Contracts > Lease Agreements > General Overview

International Trade Law > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Employee Inventions

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

### **HN5** Interstate Commerce, Prohibition of Commerce

As the Constitution vested in Congress the exclusive power to regulate commerce among the states and grant patents, it possesses what is akin to the police power of the states, the right to regulate acts relating to them, including licenses, sales, contracts, and leases of patented articles, especially when employed in commerce among the states or foreign states.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Governments > Courts > Judicial Precedent

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

#### **HN6** [down] **Preclusion of Judgments, Res Judicata**

Decisions of courts do not create rights which become vested to the extent that they may not be impaired by subsequent legislation, except as they become res judicata between the parties to the action and their privies. They are rules of property which will not, for slight reasons, be changed by later decisions, but even such decisions may and have been overruled frequently.

Governments > Courts > Judicial Precedent

Governments > Police Powers

#### **HN7** [down] **Courts, Judicial Precedent**

No person has a vested right, under the common law or decisions of courts, entitling him to insist that it shall remain unchanged for his benefit, although in the opinion of the legislature it is injurious to the public welfare, and therefore subject to the police power. Of course, this does not apply to vested rights under a statute or contract based on a valuable consideration, and not subject to the police power.

Governments > Legislation > Expiration, Repeal & Suspension

Tax Law > State & Local Taxes > Sales Taxes > Exempt Sales

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Sales Taxes > General Overview

#### **HN8** [down] **Legislation, Expiration, Repeal & Suspension**

A statute addressed to no particular person does not constitute a contract, and therefore creates no vested right, and may be repealed at any time.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

#### **HN9** [down] **Infringement Actions, Exclusive Rights**

The patent laws of the United States are addressed to no one in particular, but dictated by public policy, restrained only by the Constitution, that the patent secure for limited time to inventors the exclusive right to their discovery.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

#### **HN10** [down] **Congressional Duties & Powers, Contracts Clause**

There is nothing in the national Constitution which prohibits Congress or a state from nullifying existing contracts, if, in the opinion of the legislative department, based on substantial grounds, they are injurious to the public. All contracts for a definite period must be taken to have been made subject to a possible change by law, under the police power, if the public welfare demands it, and this is to be determined by the lawmakers.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

### **HN11**[ **Defenses, Demurrs & Objections, Affirmative Defenses**

The essential conditions under which the exception of res judicata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

### **HN12**[ **Estoppel, Collateral Estoppel**

Estoppel by judgment does not extend to matters that were only collaterally involved in the former litigation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN13**[ **Monopolies & Monopolization, Attempts to Monopolize**

There is nothing in the Sherman Act, or any other act of Congress, making the acts enumerated in § 3 of the Clayton Act unlawful, where the effect of them may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **HN14**[ **Monopolies & Monopolization, Attempts to Monopolize**

The second section of the Sherman Act makes it unlawful to monopolize or attempt to monopolize any part of such trade, while the Clayton Act makes every contract, etc., which tend to create a monopoly in any line of commerce, unlawful.

Antitrust & Trade Law > Clayton Act > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

### [\*\*HN15\*\*](#) [blue icon] Antitrust & Trade Law, Clayton Act

The Clayton Act is intended as a preventive act, to arrest the creation of trusts, etc., in their incipiency and before consummation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

### [\*\*HN16\*\*](#) [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

Part of § 3 of the Clayton Act makes unlawful to allow a discount from, or rebate upon, a price, on the condition, agreement, or understanding that the lessee or purchaser shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

### [\*\*HN17\*\*](#) [blue icon] Effect & Operation, Prospective Operation

A legislative act will not be construed as retroactive or retrospective, unless the language clearly shows that this was the intention of the lawmakers, and that no other construction will make the act effective. Even if an act is remedial, the same rule of construction will be adopted, although such acts are always liberally construed. If the statute, by giving it a retrospective construction, will deprive one of a contractual right or interfere with antecedent rights, this rule of strict construction will never be departed from.

Antitrust & Trade Law > Clayton Act > Scope

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

### [\*\*HN18\*\*](#) [blue icon] Antitrust & Trade Law, Clayton Act

Ordinarily the word "shall" indicates that the act is to be prospective, and not retrospective.

Governments > Legislation > Interpretation

### [\*\*HN19\*\*](#) [blue icon] Legislation, Interpretation

The probative value of the rejection of an amendment will be considered by the courts in construing an act, if the language is at all doubtful.

**Opinion by:** [\[\\*\\*1\]](#) TRIEBER

## Opinion

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[\*145] TRIEBER, District Judge. The evidence adduced by the parties is very voluminous. It consists of 26 printed volumes of oral testimony, and in addition thereto 4 large volumes of copies of leases, leases used before as well as since the enactment of the Clayton Act; copies of the record of the former action between the same parties under the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), reported in [222 Fed. 349](#), and 247 U.S. [32, 38 Sup. Ct. 473, 62 L. Ed. 968](#), pleaded as res adjudicata; numerous exhibits of shoes in their various stages of manufacture, some of them made on machines leased from the defendants and others on machines of competitors; duplicate parts for defendants' machines, and many other articles connected with them, which it is needless to mention. Several weeks have been spent in reading the evidence and comparing it with the evidence in the former case between the same parties under the Sherman Act, and it shows but slight differences and warrants the findings made in that case that the defendants have not acted oppressively in the enforcement of the forfeiture clauses complained of; that their machines are of excellent quality; [\*2] that the services rendered by them in the installment of the machines, instructions to operators, promptness in furnishing them when desired by shoe manufacturers, and making repairs and replacements of broken and worn-out parts expeditiously -- these are no doubt of great value to their lessees. It is also shown that, when improvements in any of the leased machines are made, they are furnished in place of the older machines without extra charge. All these claims are satisfactorily established by the evidence, and the court so finds. It is therefore unnecessary to review the testimony or make any further special findings of fact on these issues.

It is also shown that all their machines are protected by patents granted prior to October 15, 1914, and the validity of none of these patents is questioned. The only additional findings of fact necessary to make are that lessees, using machines of competitors in violation of the terms of any of the leases, had their attention called to the forfeiture provisions in the leases, which was understood by many of the lessees as warnings, in the nature of threats, that unless discontinued these covenants of the leases would be enforced. If [\*3] these warnings were not promptly heeded, and machines of competitors discarded, defendants would refuse to supply shoe manufacturers with additional machines, except on the unrestricted or initial payment plans hereinafter more fully referred to, and payment of the full royalties as provided in the leases would be exacted, as if the shoes had been manufactured wholly on defendants' machines. The opinion will therefore be confined to the other issues raised by the pleadings, mostly issues of law.

Before passing on these issues, a motion of defendants to strike certain evidence of witnesses for the plaintiff should be disposed of.

### I. Objections to Testimony.

The testimony objected to was that of several witnesses introduced by the plaintiff, who were officers and salesmen of competitors of [\*146] the defendants in the manufacture of some shoe machinery. Their testimony was to the effect that a number of shoe manufacturers, whom they named, informed them, when solicited to purchase machinery of their principals, that they were anxious to purchase them, but were unable to do so, as they had to use some of the defendants' patented machines, and they had been threatened that [\*4] they would be compelled, and in some instances had been forced, to pay the full royalties stipulated in the defendants' leases for all shoes, on which some operations were made on machines leased from them, although a great deal of the work was performed on machines of competitors; that other shoe manufacturers had previously purchased machines of witnesses' manufacture, but declined to purchase additional ones, although they stated that they found them more economical than those of the defendants. The reasons they gave were that, if they used any machines not leased from the defendants, they could not obtain additional machines from them as they needed them, except upon initial payments under the unrestricted leases; that such payments required large sums of money, and would not reduce the royalties to the same extent as if they used exclusively machines leased from the defendants.

To sustain the objection, counsel for defendants relied on *Buckeye Powder Co. v. Du Pont Powder Co.*, 248 U.S. 55, [39 Sup. Ct. 38, 63 L. Ed. 123](#), while counsel for plaintiff cited *Lawlor v. Loewe*, 235 U.S. 522, [35 Sup. Ct. 170,](#)

59 L. Ed. 341. The conclusions reached make it unnecessary to rule on these **[\*\*5]** objections. Their testimony on that issue is merely cumulative. The same facts were testified to by a number of shoe manufacturers -- Milton Adler, of Julian & Kolenge Company; Fred H. Dow, of the Plant & Butler Shoe Company; Milton S. Florsheim, of the Florsheim Shoe Company; William W. Gates, of the Irving-Drew Company; Joseph E. Groat, of the B. A. Corbin & Sons Company; Fred J. Mayer, of the F. Mayer Boot & Shoe Company; F. C. Rand, of the Interantional Shoe Company; Joseph F. Gardella, of the Wingate Shoe Corporation; Charles H. Jones, of the Commonwealth Shoe & Leather Company; Henry L. Nunn, of the Nunn & Bush Shoe Company; Pearl E. Selby, of the Drew-Selby Company; Emanuel F. Selz, of Selz-Schwab & Company; Thomas H. Shinn, of Curtis, Jones & Co.; John E. Williams, of the Excelsior Shoe Company.

## II. Is the Act Unconstitutional as to Patents Secured Prior Thereto?

It is claimed on behalf of defendants that section 3 of the Clayton Act, so far as it applies to the tying clauses in the leases of machines, which are protected by patents in force at the time of its enactment, is unconstitutional, as it tends to deprive the patentees of a vested right, in violation of **[\*\*6]** the Fifth Amendment to the Constitution. In determining this question it must not be lost sight of that this act was enacted under the commerce clause of the Constitution, and is limited to interstate commerce, as shown by section 1. How broad the powers of Congress under the commerce clause are has **[\*147]** been determined so many times that it will serve no useful purpose to cite authorities, except some few later referred to.

The contention on behalf of defendants is that, prior to and at the time of the enactment of the Clayton Act, it was the law, as had been uniformly held by the courts, including the Supreme Court of the United States, that terms and restrictions such as are contained in the leases and attacked in this action --

"were not offensive to the letter or policy of the law and were entitled to the sanction of the law; \* \* \* that, if construed to apply to leases of machines protected by existing patents, it destroys a large part of the value of the patents, as both patents, leases, and contracts are property, and entitled to the protection of the guarantees of the Constitution."

It is true that patents are property, but it is equally true that --

**HN1** [↑] "the patentee **[\*\*7]** receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using, or selling that which he had invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent." Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 510, 37 Sup. Ct. 416, 418 (61 L. Ed. 871), L.R.A. 1917E, 1187, Ann. Cas. 1918A, 959) and authorities there cited.

**HN2** [↑] There is nothing in the laws relating to patents which in any wise affects contracts for license, use, sale, or lease of patented articles. They are subject to the same governmental and legislative control as other contracts. In United States v. Standard Sanitary Mfg. Co. (C.C.) 191 Fed. 172, 190, it was held:

"A patentee is as much subject to the laws of the land as is any other man. \* \* \* It does not give a right \* \* \* to sell indulgences to violate the law of the land, be it the Sherman Law or another."

Upon appeal this decree was affirmed. 226 U.S. 20, 48, 49, 33 Sup. Ct. 9, 14, 15 (57 L. Ed. 107). Mr. Justice McKenna, who delivered the unanimous opinion of the court, said:

"The agreements **[\*\*8]** clearly, therefore, transcend what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. \* \* \* Rights conferred by patents are indeed very definite and extensive, but they do not give, any more than other rights, a universal license against positive prohibitions. The Sherman Law is a limitation of rights -- Rights which may be pushed to evil consequences, and therefore restrained."

In Boston Store v. American Graphophone Co., 246 U.S. 25, 38 Sup. Ct. 261, 62 L. Ed. 551, Ann. Cas. 1918C, 447, the court said:

"There can be equally no doubt that the power to make it [price fixing after sale] in derogation of the general law was not within the monopoly conferred by the patent law, and that the attempt to enforce its apparent obligations, under the guise of a patent infringement, was not embraced within the remedies given for the protection of the rights which the patent law conferred."

See, also, *Virtue v. Creamery Package Co.*, 227 U.S. [8](#), [32](#), [33 Sup. Ct.](#) 202, [57 L. Ed. 393](#) and *Thomsen v. Cayser*, 243 U.S. 66, 85, [37 Sup. Ct.](#) 353, [61 L. Ed. 597](#), Ann. Cas. 1917D, 322.

[\*148] Mr. Justice Clarke, in the Motion Picture Case, said:

[\*\*9] "In interpreting this language of the statute it will be of service to keep in mind three rules long established by this court, applicable to the patent law and to the construction of patents, viz.:"

"(1) The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute. 'He can claim nothing beyond them.'"

In referring to the *Button Fastener Case*, [77 Fed. 288](#), 25 C.C.A. 267, 35 L.R.A. 728, which applies also to *Henry v. Dick Co.*, 224 U.S. [1](#), [32 Sup. Ct.](#) 364, [56 L. Ed. 645](#), Ann. Cas. 1913D, 880, the learned Justice, on page 514 of the opinion in 243 U.S. ([37 Sup. Ct.](#) 420, [61 L. Ed. 871](#), L.R.A. 1917E, 1187, Ann. Cas. 1918A, 959), said:

"This decision proceeds upon the argument that, since the patentee [<\*\*10] may withhold his patent altogether from public use, he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute, and from failure to distinguish between the rights which are given to the inventor by the patent law, and which he may assert against all the world through an infringement proceeding, and rights which he may create for himself by private contract, which, however, are subject to the rules of general, as distinguished from those of the patent, law."

In *Heaton-Peninsular, etc., Co. v. Eureka Specialty Co. (the Button Fastener Case)*, [77 Fed. 288, 293](#), 25 C.C.A. 267, 272 (35 L.R.A. 728) Judge Lurton, who delivered the opinion of the court, said:

**HN3** [↑] "The property right of the patentee is, after all, but a property right, and subject, as is all other property, to the general law of the land. \* \* \* Neither the patentee, nor the machine involving his invention, nor a license for use, can be exempted from the liabilities and regulations which, in the public interest, attach to all persons and property [<\*\*11] under the general law of the land. Neither is the right to make and sell or use a patented invention or process free from the restraints imposed by the police power of the states."

To the same effect are *State of Missouri v. Bell Telephone Co. (C.C.)* [23 Fed. 539, 540](#), decided by Judge (later Mr. Justice) Brewer; *State of Delaware v. D. & A. Tel. & Tel. Co. (C.C.)* [47 Fed. 633](#), affirmed [50 Fed. 677](#), 2 C.C.A. 1.

Judge Brewer, in the Missouri Case, said:

"The moment he puts that property [the patented] into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions."

In short, individual rights, whether claimed under patents or otherwise, must be subordinated to the public good, and, unless clearly arbitrary and unreasonable, courts will respect the acts of the legislative persons of rights theretofore enjoyed. As abuses, harmful to the public, are found to exist, new laws are enacted to prevent [\*149] them, and they necessarily deprive those who practiced them of the right to continue them.

**HN4** [↑] If a business is subject to regulation, the contracts made in [\*\*12] its conduct are subject to regulation. *Rast v. Van Deman & Lewis*, 240 U.S. 342, 363, 36 Sup. Ct. 370, 60 L. Ed. 679, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455.

Bement v. National Harrow Co., 186 U.S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, relied on by defendants, was an action between a licensor and licensee, and on that ground was distinguished in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 343, 28 Sup. Ct. 722, 52 L. Ed. 1086, as it must be in this action. This also applies to the *Paper Bag Patent Case*, 210 U.S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, cited for defendants. That was an action for infringement of a patent. In response to the claim that the patentee had been guilty of nonuse for the full period of 17 years, the life of the patent, the court held that a patentee may do so without losing the monopoly granted by the patent laws. Its inapplicability is therefore too clear to require comment.

If the act involved herein had attempted to nullify patents or deprive patentees of the exclusive right to own and control them, counsel's contention would find support in the authorities cited, but neither the act, nor the complaint herein, attempt that.

Conceding that the courts [\*\*13] had previously sustained the right to make such leases and contracts as are attacked in this cause, it does not follow that the patentee has a vested right in them of which the Legislature may not deprive him, if in its opinion they are detrimental to the public welfare. While it is true, as claimed by counsel, that by the *Tenth Amendment to the Constitution* the police power is reserved to the states, it is now well settled that, **HNS** [↑] as the Constitution vested in Congress the exclusive power to regulate commerce among the states and grant patents, it possesses what is akin to the police power of the states, the right to regulate acts relating to them, including licenses, sales, contracts, and leases of patented articles, especially when employed in commerce among the states or foreign states. Among the many authorities recognizing that rule of law, the following are cited: *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *The Lottery Cases*, 188 U.S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hippolite Egg Co. v. United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; *Hoke v. United States*, 227 U.S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L.R.A. (N.S.) [\*\*14] 906, Ann. Cas. 1913E, 905; *Selective Draft Law Cases*, 245 U.S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L.R.A. 1918C, 361, Ann. Cas. 1918B, 856; *McKinley v. United States*, 249 U.S. 397, 39 Sup. Ct. 324, 63 L. Ed. 668; *Hamilton v. Kentucky, D. & W. Co.*, 251 U.S. 146, 40 Sup. Ct. 106, 64 L. Ed. (decided December 15, 1919).

In the last-cited case this same claim was made, and Mr. Justice Brandeis, in disposing of it, said:

"That the United States lacks the police power, and that this was reserved to the states by the *Tenth Amendment*, is true. But it is none the less true that, when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise [\*\*150] may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose. \* \* \* But the *Fifth Amendment* imposes in this respect no greater limitation upon the national power than does the *Fourteenth Amendment* upon state power."

So, even if the claim that the former decisions relied on constitute a vested right in the patentee, it would still be subject to regulation [\*\*15] by Congress, under the commerce as well as the patent clauses of the Constitution, and in some matters to the police power of the states. *Patterson v. Kentucky*, 97 U.S. 501, 24 L. Ed. 1115; *Webber v. Virginia*, 103 U.S. 344, 347, 26 L. Ed. 565; *Allen v. Riley*, 203 U.S. 347, 27 Sup. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; *John Woods & Sons v. Carl*, 203 U.S. 358, 27 Sup. Ct. 99, 51 L. Ed. 219; *Ozan Lumber Co. v. Union County National Bank*, 207 U.S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; *Opinions of Justices*, 193 Mass. 605, 609, 611, 81 N.E. 142. In *Webber v. Virginia, supra*, the court said:

"The legislation respecting the articles which the state may adopt after the patents have expired it may equally adopt during their continuance. It is only the right to the invention or discovery -- the incorporeal right -- which the state cannot interfere with. Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are reserved to inventors must be enjoyed in subordination to this general authority of the state over all [\*\*16] property within its limits."

Can it be said that Congress may not do what the states can, in relation to matters expressly granted to it by the Constitution? It is true, as stated by counsel, that the power to regulate, as that of taxation, may result in destruction; but, as stated by Mr. Justice Holmes in *Ft. Smith Lumber Co. v. State of Arkansas*, 251 U.S. 532, 40 Sup. Ct. 304, 64 L. Ed. (opinion filed March 1, 1920):

"If the state of Arkansas wished to discourage, but not forbid, the holding of stock in one corporation by another, and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder."

This was in reply to the contention that the statute was in violation of the *Fourteenth Amendment*. See, also, *Veasie Bank v. Feno*, 75 U.S. (8 Wall.) 533, 19 L. Ed. 482; *Tanner v. Little*, 240 U.S. 369, 386, 36 Sup. Ct. 379, 60 L. Ed. 691.

Besides, **HN6** decisions of courts do not create rights which become vested to the extent that they may not be impaired by subsequent legislation, except as they become res judicata between the parties to the action and their privies. They are **\*\*17** rules of property which will not, for slight reasons, be changed by later decisions, but even such decisions may and have been overruled frequently. *Sauer v. New York*, 206 U.S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176; *Moore-Mansfield Co. v. Electrical Co.*, 234 U.S. 619, 624, 34 Sup. Ct. 941, 58 L. Ed. 1503; *Willoughby v. Chicago*, 235 U.S. 45, 50, 35 Sup. Ct. 23, 59 L. Ed. 123; *Ross v. Oregon*, 227 U.S. 150, 161, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224. In the Motion Picture Case the right upheld in *Henry v. Dick Co.*, 224 U.S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. **[\*151]** Cas. 1913D, 880, was denied, and that case overruled. Can it be said that the Legislature is powerless to do what the courts are frequently doing, when they overrule former decisions?

**HN7** No person has a vested right, under the common law or decisions of courts, entitling him to insist that it shall remain unchanged for his benefit, although in the opinion of the Legislature it is injurious to the public welfare, and therefore subject to the police power. *Munn v. Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77; Second Employers' Liability Cases, 223 U.S. 1, 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L.R.A. (N.S.) **[\*\*181]** 44; *New York Central R.R. v. White*, 243 U.S. 188, 198, 37 Sup. Ct. 247, 61 L. Ed. 667, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629, reaffirmed in *Arizona Employers' Liability Cases*, 250 U.S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, and Chicago, Rock Island, etc., Ry. v. Cole, 251 U.S. 54, 40 Sup. Ct. 68, 64 L. Ed. (opinion filed December 8, 1919).

Of course, this does not apply to vested rights under a statute or contract based on a valuable consideration, and not subject to the police power. In *Satterlee v. Mathewson*, 27 U.S. (2 Pet.) 380, 413 (7 L. Ed. 458), the court said:

"It is true that the Supreme Court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that the principle of law which has been mentioned did not apply to it. But the Legislature afterwards declared, by the act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist and be held effectual, as well in contracts of that description as in those between other citizens of the state. \* \* \* The objection, however, which was most pressed upon the court, and relied **[\*\*19]** upon by the counsel for the plaintiff in error, was that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law, upon this ground, provided its effect be not to impair the obligation of a contract, and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned."

This was reaffirmed in *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 539, 9 L. Ed. 773. In that case it was said:

"It is well settled by the decisions of this court that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the obligation of a contract."

Another ground which makes this claim untenable is that [HN8](#) a statute addressed to no particular person does not constitute a contract, and therefore creates no vested right, and may be repealed at any time. In [Salt Co. v. East Saginaw](#) [\*20] [Co., 80 U.S. \(13 Wall.\) 373, 20 L. Ed. 611](#), the state of Michigan, for the purpose of encouraging the manufacture of salt, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced in the state, and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and could not be repealed without impairing the obligation of the contract. But the court denied this [\*152] claim, and held that the exemption did not constitute a contract, but was nothing more or less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force the state promised the exemption and bounty; but there was no pledge that it should not be repealed at any time. In [Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379, 385, 387, 24 Sup. Ct. 107, 108 \(48 L. Ed. 229\)](#), the court, referring to the Salt Company Case said, "It pointed out the distinction between an exemption in a special charter and a general encouragement to all persons to engage in a certain enterprise," and again held that an exemption addressed to no one in particular [\*21] constitutes a mere announcement of policy, not constituting a contract, and therefore subject to repeal at any time. See, also, [Banning Co. v. California, 240 U.S. 142, 153, 36 Sup. Ct. 338, 60 L. Ed. 569. HN9](#) The patent laws of the United States are addressed to no one in particular, but dictated by public policy, restrained only by the Constitution, that the patent "secure for limited time to inventors the exclusive right to their discovery."

Besides, [HN10](#) there is nothing in the national Constitution which prohibits Congress or a state from nullifying existing contracts, if, in the opinion of the legislative department, based on substantial grounds, they are injurious to the public. All contracts for a definite period must be taken to have been made subject to a possible change by law, under the police power, if the public welfare demands it, and this is to be determined by the lawmakers. [Legal Tender Cases, 79 U.S. \(12 Wall.\) 457, 20 L. Ed. 287](#); [Armour Packing Co. v. United States, 209 U.S. 56, 82, 28 Sup. Ct. 428, 52 L. Ed. 681](#); [Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 478, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L.R.A. \(N.S.\) 671](#); [Mondou v. N.Y., N.H. & H.R.R.R., 223 U.S. \[\\*\\*22\] 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L.R.A. \(N.S.\) 44](#); [Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549, 567, 31 Sup. Ct. 259, 55 L. Ed. 328](#); [Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 74, 35 Sup. Ct. 678, 59 L. Ed. 1204](#); [Union Dry Goods Co. v. Georgia P.S. Corporation, 248 U.S. 372, 376, 39 Sup. Ct. 117, 63 L. Ed. 309](#); [Producers' Transportation Co. v. Railroad Commission, 251 U.S. 228, 40 Sup. Ct. 131, 64 L. Ed. \(opinion filed Jan. 5, 1920\); Manigault v. Ward \(C.C.\) 123 Fed. 707, 719, affirmed \[Manigault v. Springs, 199 U.S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.\]\(#\)](#)

In the Mottley Case it was said:

"It is said, however, that, as the contract of Mottley and wife with the railroad company was originally valid, it cannot be supposed that Congress intended by the act of 1906 to annul or prevent its enforcement. But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality, except in the cases of certain excepted classes, to which Mottley and his wife did not belong, and which exceptions rested upon peculiar grounds."

In the Union Dry Goods Co. Case the court quotes with approval what was said in the Legal Tender Cases, that --

[\*\*23] "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of contract can extend to defeat the legitimate governmental authority."

[\*153] In the McGuire Case it was held:

"The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern."

[McClurg v. Kingsland, 42 U.S. \(1 How.\) 202, 11 L. Ed. 102](#), cited by defendants, fails to sustain their contention; in fact, in the court's opinion, it is against it. One of the exceptions assigned as error in that case was the part of the charge of the trial judge that --

"The facts of the case which were not controverted brought it within the provisions of the seventh section of the act of Congress of March 3, 1839 (5 Stat. 354), by the unmolested, notorious use of the invention before the application for the patent."

When the patent was granted and the action instituted, the acts of February 21, 1793 (1 Stat. 318), and of April 17, 1800 (2 Stat. 37), were in force, but were repealed by section 21 of the act of July 4, 1836 (5 Stat. 125). The seventh section of the act [\*\*24] of March 3, 1839, was in these words:

"That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

The court, after holding that the repeal of the acts of 1793 and 1800 by the act of 1836 could not impair the right of property then existing in the patentee, sustained the construction by the trial judge of the seventh section of the act of 1839, and affirmed the judgment, saying:

"The object of this provision is evidently twofold: First, to protect the person who has [\*\*25] used the thing patented, by having purchased, constructed, or made the machine, etc., to which the invention is applied, from any liability to the patentee or his assignee; second, to protect the rights, granted to the patentee, against any infringement by any other persons. This relieved him from the effects of former laws and their constructions by this court, unless in case of an abandonment of the invention, or a continued prior use for more than two years before the application for a patent, while it puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention, which, if given before the application for a patent, would justify the continued use after it issued without liability."

Choate v. Trapp, 224 U.S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, is another authority relied on by the defendants as conclusive. The part of the act of Congress (Curtis Act June 28, 1898, 30 Stat. 495, 507) which was repealed before the expiration of the time for which the lands of these Indians were exempted from all taxation (Act May 27, 1908, 35 Stat. 312), provided for allotting to them some of the lands owned by the tribe in [\*\*26] severalty, and which, for the period of 21 years, were to be exempted from taxation. It was held that the Indians had [\*154] a vested right in the exemptions for the period specified in the act, of which they could not be divested by later acts. But the reasons given by the court for the conclusion reached show conclusively its inapplicability to the case at bar. The court held that the Indians had an equitable interest in the lands which it was desired to have satisfied and extinguished. The Curtis Act was framed with a view to having these claims satisfactorily settled. The offer by Congress, to make the lands allotted nontaxable upon relinquishment by them to the government of some of their lands, was accepted by them, and this relinquishment was a part of the consideration for the exemption from taxation of the allotted lands. The acceptance of the terms, it was held, was a consideration sufficient to entitle the Indians to enforce whatever rights were conferred. In distinguishing other cases, the court, after referring to the facts in those cases, said:

"There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as [\*\*27] the state chose to concede it; but, as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit. But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than 100 years and has been applied in tax cases."

Other cases cited by defendants are to the effect that a patentee may not be deprived of the exclusive right to the monopoly of his invention by infringers, including the government. Paper Bag Patent Case, 210 U.S. 405, 28 Sup.

Ct. 748, 52 L. Ed. 1122; Cramp & Sons v. Cutris Turbine Co., 246 U.S. 48, 38 Sup. Ct. 271, 62 L. Ed. 560; and other cases cited by defendants. No such issue is involved in this action. Counsel confound the right to the exclusive use of the invention with the right to make contracts for its use.

The conclusion reached is that, while Congress **[\*\*28]** cannot deprive a patentee of the exclusive use of the patent, or reduce the time for which it is granted by existing law, without violating the Fifth Amendment, a patentee has no vested right in conditions of contracts for use, license, or lease of his patented invention, which Congress may not prohibit, if in its judgment they are injurious to the public welfare, though he may have possessed that right under the common or municipal law, as theretofore construed by the courts. A patentee may exclude all others from the use of it; he may withhold it entirely from the public, if he so desires; but, when he enters into contracts for the use of it, his contracts are subject to regulation by legislative act, if deemed necessary for the protection of the public, though subject to judicial review. But this review by the courts is limited to only one matter; i.e., is there any reasonably substantial ground for the regulation, or is it arbitrary and without any substantial reason? The wisdom of the act is beyond the power of the courts to question. No citation of authorities is required to these propositions, as they are firmly established and beyond question.

### [\*155] III. Is the **[\*\*29]** Plea of Res Adjudicata Good?

The plea raises the issue whether the decree in the former action under the Sherman Act, between the same parties, owing to the fact that the provisions in the leases, now sought to have declared void as being in violation of section 3 of the Clayton Act, were in the complaint in that cause set out and relied on in part to obtain the relief asked, is res adjudicata in this action?

The opinions in that case are reported in 222 Fed. 349, and 247 U.S. 32, 38 Sup. Ct. 473, 62 L. Ed. 968. That action was instituted December 12, 1911, nearly three years before the enactment of the Clayton Act, and finally heard before, although decided by the trial court after, the Clayton Act had become a law. Judge Putnam, the presiding judge at the hearing of that case in the District Court, which was heard by three judges under the Expedition Act (Comp. St. §§ 8824, 8825), in referring to the Clayton Act, said (222 Fed. on page 361):

"In this connection we make no special reference, and have come to no conclusions, in regard to the effect on the pending case of the legislation of Congress enacted since this case was submitted to us, nor with reference to the question **[\*\*30]** whether or not the rights of the parties affected by this legislation would require supplemental pleadings."

Judge Brown, another of the judges sitting in that case in the District Court, referring to the leases complained of in this action, said:

"It is also alleged that certain lease and license agreements constitute steps in carrying out such project."

Judge Dodge, another judge sitting in the District Court, in his concurring opinion in that case (222 Fed. 391), referring to the tying clauses in the leases, said:

"The complaints made regarding the leases embodying the clauses [the tying clauses] referred to are not directed against those pertaining to any particular kind or kinds of machines, as more objectionable than others. It is their entire combined effect which is attacked."

Mr. Justice McKenna, who delivered the opinion of the majority of the court, in the beginning of the opinion (247 U.S. 35, 38 Sup. Ct. 474, 62 L. Ed. 968) states the object of the bill to be:

"The charge of the bill is that defendants, not being satisfied with the monopoly of their patents and determined to extend it, conceived the idea of acquiring the ownership or control of all concerns **[\*\*31]** engaged in the manufacture of all kinds of shoe machinery. This purpose was achieved, it is charged, and a monopoly acquired, and commerce, interstate and foreign, restrained by the union of competing companies and the acquisition of others; and that leases were exacted which completed and assured the control and monopoly thus acquired."

What the defendants understood to be the issue in that action is clearly and concisely stated by their counsel in their brief (the same counsel representing them in the case at bar), when the cause was heard in the Supreme Court on reargument. On page 11, under the caption "The Issues in the Present Case," they say:

[\*156] "The issue presented in the District Court was whether the defendants formed a plan, as charged in the petition: (1) To acquire all concerns engaged in manufacturing shoe machinery, or (if the limitation insisted on by the United States be accepted) to acquire all concerns engaged in manufacturing certain specified classes of shoe machinery; and (2) thereupon to refuse to lease any essential machines, unless the shoe manufacturer took practically all his other machines from them; and, if they did form such a plan, whether [\*32] or not such a plan was unlawful, and whether they carried out the plan and thereby acquired an unlawful monopoly."

But it is claimed on behalf of the defendants that, as in the complaint in that case, although an action under the Sherman Act, the tying clauses complained of in the instant case were specifically charged to be unlawful and put in issue, the decree in that action is res adjudicata.

A careful reading of the complaint and the opinions in that case convinces that they were set out solely for the purpose of maintaining the charge that by their use, in connection with the other acts charged, the defendants had conspired in restraint of trade or commerce and monopolized it. The government certainly could not have pleaded in its complaint the invalidity of these clauses in the leases under the Clayton Act, which was not a law at that time.

To obtain the relief in that case the complaint charged that the defendants, by combinations with other shoe machinery manufacturers and the acquisition of the business of competitors, had obtained a monopoly of the foreign trade and commerce in shoe machinery, in restraint of trade, in violation of the Sherman Act, and that they had [\*33] succeeded in that object. Among the numerous alleged unlawful acts charged, which made it possible for them to achieve that object, was the insertion of these tying clauses in the leases. But this was only one of the acts charged, to accomplish the result complained of. This allegation was therefore collateral to the main issue, and could only have been incidentally considered by the court. In this action no attack is made on any of the acts complained of, and which were the basis of the former suit, except the tying clauses. Nor is the object of the suit the same. The only relief now asked is against those acts of the defendants which are claimed to be in violation of section 3 of the Clayton Act. In the complaint it is alleged:

"The bill does not complain of the leases as a whole, but only parts thereof, which are described in the bill as 'tying clauses' and 'discounts and rebates.'"

The object of the former suit was, as appears from the prayer for relief in the complaint, that --

"the defendants be declared a combination in restraint of interstate and foreign trade and commerce, and attempting, in combination and conspiracy with other persons and corporations, to monopolize [\*34] and have monopolized part of the trade and commerce among the several states of the United States and with foreign nations, \* \* \* and that each of them be dissolved and separated into such parts that no one of them will constitute a monopoly, or can become a monopoly, of the shoe machinery business," etc.

When a judgment or decree has the effect of res adjudicata in a later action between the same parties is well settled by numerous decisions of the English and American courts. The principle established [\*157] in the Duchess of Kingston's Case, 20 Howell's State Trials, 355, 538, 2 Smith's Lead. Cases, 424 (decided in 1776), has been generally followed by the American courts, including the Supreme Court of the United States. Leading cases of that court are Washington, A. & G. Co. v. Sickles, 65 U.S. (24 How.) 333, 16 L. Ed. 650; Cromwell v. County of Sac, 95 U.S. 351, 24 L. Ed. 195; Reynolds v. Stockton, 140 U.S. 254, 270, 11 Sup. Ct. 773, 35 L. Ed. 464.

In the Sickles Case it was held:

**HN11** [+] "The essential conditions under which the exception of res judicata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties [\*35] in the character in which they are litigants."

It is equally well settled that [HN12](#)[<sup>1</sup>] estoppel by judgment does not extend to matters which were only collaterally involved in the former litigation. Duchess of Kingston's Case, *supra*; [Hopkins v. Lee, 19 U.S. \(6 Wheat.\) 109, 114, 5 L. Ed. 218](#); [Gaines v. Hennen, 65 U.S. \(24 How.\) 553, 579, 16 L. Ed. 770](#); [Bluefield S.S. Co. v. United Fruit Co., 243 Fed. 1, 11, 155 C.C.A. 531](#); [Smith v. Town of Ontario \(C.C.\) 4 Fed. 386, 390](#); [Cavanaugh v. Buehler, 120 Pa. 441, 14 Atl. 391](#); [Belden v. State, 103 N.Y. 1, 8 N.E. 363](#); [Waterhouse v. Levine, 182 Mass. 407, 65 N.E. 822](#). In the Duchess of Kingston's Case the court, after stating when a former judgment will sustain the plea, said:

"But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In Hopkins v. Lee it was held:

"To points which came only collaterally under consideration, or were only incidentally under cognizance, or could only be inferred by arguing from the decree, it is admitted [\*\*36] that the rule does not apply."

[Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, 506, 508, 27 Sup. Ct. 762, 51 L. Ed. 1155](#), is much in point. There was a plea of res adjudicata based on the decree affirmed in [202 U.S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253](#). The issues involved in that action are set out in [206 U.S. 506, 507, 27 Sup. Ct. 762, 51 L. Ed. 1155](#). The court, in disposing of the plea, said:

"But a decree must be read in the light of the issues involved in the pleadings and the relief sought, and we are of the opinion that the matters now litigated were not involved in or disposed of in the former case, and that, when properly construed, the decree does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect and long after the bill was filed in the case."

This was reaffirmed in [Vicksburg v. Henson, 231 U.S. 259, 273, 34 Sup. Ct. 95, 100 \(58 L. Ed. 209\)](#), where it was said:

"The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it, or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and [\*\*37] intended to be submitted, and what the decree was really designed to accomplish. We cannot agree with the court below, or with the majority of the Circuit [<sup>158</sup>] Court of Appeals, that the effect of the former adjudication was to preclude the rights of the parties in the present controversy."

All that was and could be determined on the pleadings in the former action under the Sherman Act, was that, applying the rule laid down in the Standard Oil Co. Case, 221 U.S. 1, [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. \(N.S.\) 834](#), Ann. Cas. 1912D, 734, and [American Tobacco Co. Case, 221 U.S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663](#), for the construction of the Sherman Act, the evidence failed to sustain the charge that the Shoe Machinery Company had violated that act, and therefore the alleged combination should not be dissolved.

The plea cannot be sustained.

#### IV. Were the Defendants, in Making the Leases Attacked, Engaged in Interstate Commerce?

That leases may constitute interstate commerce was determined by this court on the motion to dismiss the complaint. [234 Fed. 127, 143, 144](#). Of course, this does not apply to leases of machines in the state of Massachusetts, when the machines [\*\*38] were made and delivered in that state. Witherell & Dobbins Co. v. United Shoe Machinery Co. (First Circuit, opinion filed June 18, 1919, not published, as motion for rehearing granted). As to leases made with manufacturers in states other than the state of Massachusetts, the claim of defendants that they are not in the course of interstate trade is sought to be sustained upon the ground that all leases, made prior to the enactment of the Clayton Act, were only presented to the lessee for signature and executed by him after the machines had been set up and were in operation, regardless of the fact from what state the defendants shipped them. The custom then prevailing was: The shoe manufacturer would notify the local representative of the defendants that he desired to lease certain machines, whereupon a blank printed order,

prepared and furnished by the defendants, would be handed to him. He would then insert in a blank left for that purpose the kind of machine or machines he desired and sign the application. The order is:

"Please deliver to the undersigned, upon the terms and conditions hereinafter stated, for use in the factory of the undersigned at (insert St. Louis, Mo., or [\*\*39] wherever the factory is located) the machines," etc.

It also contains an obligation that he will hold the machines at his sole risk from injury, loss, or destruction by fire or otherwise, pay all taxes assessed and levied on them, will render full and accurate reports of the use of the machines, pay the rental and royalty established by the defendants, and pay all shipping and transportation charges, both to and from the factory of the Machinery Company. The order would then be sent to the home office of the defendant Maine company in the state of Massachusetts, and, if accepted, the machines would be shipped from Massachusetts, consigned to itself. Upon their arrival at the destination, they would be taken from the carrier by defendants' agent and installed in the shoe factory, and, when set up and put in operation, the lease would be executed. This, it is claimed, makes the transaction intrastate, and therefore not subject [\*159] to the Clayton Act. The court is unable to sustain this contention, as it has been uniformly held that acts of this nature constitute interstate commerce. [Brennan v. Titusville](#), 153 U.S. 289, [14 Sup. Ct.](#) 829, [38 L. Ed.](#) 719; [Caldwell v. North Carolina](#), 187 U.S. 622, [23 Sup. Ct.](#) 229, [47 L. Ed.](#) 336; [Rearick v. Pennsylvania](#), 203 U.S. 507, [27 Sup. Ct.](#) 159, [51 L. Ed.](#) 295; [Dozier v. Alabama](#), 218 U.S. 124, [30 Sup. Ct.](#) 649, [54 L. Ed.](#) 965, 28 L.R.A. (N.S.) 264; [Crenshaw v. Arkansas](#), 227 U.S. 389, [33 Sup. Ct.](#) 294, [57 L. Ed.](#) 565; [Western Oil Refining Co. v. Lipscomb](#), 244 U.S. 346, [37 Sup. Ct.](#) 623, [61 L. Ed.](#) 1181.

The cases cited and relied on by the defendants are clearly inapplicable. [Banker Bros. v. Pennsylvania](#), 222 U.S. 210, [32 Sup. Ct.](#) 38, [56 L. Ed.](#) 168, was an action involving the right of the state to tax the defendants on sales of automobiles made in Pittsburgh, Pa. The facts were that the defendants kept no machiens in stock, but would obtain them from the manufacturers in another state. A purchaser would order the machine from the defendants in Pennsylvania; the order being addressed to the defendants, the manufacturer's name (the Pierce Company) not appearing on the order. The defendants would forward the order to the Pierce Company, who would ship it to the defendants, at Pittsburgh, Pa., with draft on defendants attached to the bill of lading, less the commission. On paying the draft, the Banker Bros. would take [\*41] up the bill of lading, receive the car from the carrier, and then deliver it to the buyer on his paying the balance of the purchase money. It was held that the Banker Bros. had the title and the shipment had become at rest in the state of Pennsylvania, though shipped in interstate commerce, and therefore subject to the tax imposed by the state. The court said:

"This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But as between Banker Bros. Company and the Pittsburgh purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him and under the duty of paying to the state a tax on the sale. The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms, he would have had a cause of action against the Banker Bros. Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce Company would have no [\*42] right to sue him on the contract."

In [Browning v. Waycross](#), 233 U.S. 16, [34 Sup. Ct.](#) 578, [58 L. Ed.](#) 828, it was held that a city or state may impose an occupation tax on lightning rod agents, not for taking orders to be filled in another state and delivered in the state where the order was taken, but "on persons engaged in putting up or erecting lightning rods." In [Bacon v. Illinois](#), 227 U.S. 504, [33 Sup. Ct.](#) 299, [57 L. Ed.](#) 615, what the court held was:

"Property brought from another state, and withdrawn from the carrier, and held by the owner with full power of disposition, becomes subject to the local taxing power, notwithstanding the owner may intend to ultimately forward it to" another state.

[\*160] Mr. Justice Hughes, who delivered the opinion of the court, said:

"The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois, or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended [\*\*43] to forward the grain after it had been inspected, graded, etc.; but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation, which was made in the usual way, without discrimination."

Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974, is clearly against defendants' contention, reaffirming Crenshaw v. Arkansas, 227 U.S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565. Without reviewing the other authorities cited, it is sufficient to say that none is applicable to the facts in the instant case.

The mode of operation since the enactment of the Clayton Act differs from that pursued theretofore. The blank forms furnished by the defendants to shoe manufacturers desiring to lease machines from them are headed: "Order and Temporary Loan Agreement." The applicant for the lease applies to the company, [\*\*44] by inserting in a blank left for that purpose in the order blank furnished by the defendants, the machines wanted. The application contains all the conditions upon which the machines are to be leased, and is signed by the applicant. Below the signature of the applicant is the following:

"We accept your order as above, and are shipping to you the machines designated in the above schedule of machines, in accordance with and subject to the foregoing terms and conditions.

"[Signed] United Shoe Machinery Company, By ."

This would indicate that the machines are shipped from the state of Massachusetts direct to the shoe manufacturer; but the evidence shows that the machines are not consigned to the applicant, but are shipped in the same manner as under the former leases, and the acceptance of the application is only delivered, when they are set up and ready for operation. Construing the leases as they are printed they are clearly contracts in commerce among the states. Mobile County v. Kimball, 102 U.S. 691, 702, 26 L. Ed. 238, and authorities cited supra.

But the evidence also established that when the machines reach the place of destination they are not stored or held [\*\*45] subject to the defendants' order or disposal, but are immediately taken to the applicant's factory and there installed. Whether the installation is a part of the interstate transaction is not in issue in this action but see Swift v. United States, 196 U.S. 375, 395, 396, 398, 25 Sup. Ct. 276, 49 L. Ed. 518; Loewe v. Lawlor, 208 U.S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Boyle v. United States, 259 Fed. 803, 806, C.C.A. .

The conclusion of the court is that the leases, except when made with manufacturers located in the state of Massachusetts and [\*161] delivered there, are in commerce or trade among the states. The exception also applies to machines taken from one lessee and delivered to another in the same state, which the evidence shows is occasionally done, when a lessee refuses a machine and another manufacturer in that city or state leases it.

#### V. The Distinction Between the Sherman and Clayton Acts.

The first and second sections of the Sherman Act were construed by Mr. Chief Justice White in Standard Oil Co. v. United States, 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D, 734. Without quoting [\*\*46] from the opinion, reference is made to what is said in that opinion on pages 50, 51, 59, 60, 62-64 of 221 U.S., on pages 512, 515-517 of 31 Sup. Ct. (55 L. Ed. 619, 34 L.R.A. [N.S.] 834), Ann. Cas. 1912D, 734). The same construction was given to that act in United States v. American Tobacco Co., 221 U.S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663. In Nash v. United States, 229 U.S. 373, 376, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232) referring to these cases, it is said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

Again in [United States v. Colgate Co., 250 U.S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992](#), it is said:

"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 wish to engage, in trade and commerce -- in a word, the right of freedom to trade."

**HN13** [↑] There is nothing in the Sherman Act, or any other act of Congress, [\*\*47] making the acts enumerated in section 3 of the Clayton Act unlawful, "where the effect" of them "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [Section 1](#) of the Sherman Act (Comp. St. § 8820) makes unlawful "contract \* \* \* in restraint of trade or commerce," and as construed by the Supreme Court in the above-cited cases, they mean "contracts which *unduly* restrain trade and commerce." This language differs materially from the language used in section 3 of the Clayton Act. That contracts or leases may substantially lessen competition was not sufficient to make them unlawful under the Sherman Act, if not unduly or oppressively enforced, as was held in the cases hereinbefore cited.

**HN14** [↑] The second section of the Sherman Act makes it unlawful to monopolize or attempt to monopolize any part of such trade, while the Clayton Act makes every contract, etc., which "tend to create a monopoly in any line of commerce," unlawful.

The bill for the Clayton Act was introduced in Congress some time after the opinions in the Standard Oil Company and American Tobacco Company Cases had been announced, and Congress, therefore, was familiar with the [\*\*48] construction of the Sherman Act by the Supreme Court. As stated in the former opinion of this court ([234 Fed. 127](#)):

[\*162] "Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so."

The same conclusion was reached by the Circuit Court of Appeals for the First Circuit, in [Standard Fashion Co. v. Magrane & Houston Co., 259 Fed. 793, 796](#), C.C.A. . The reports of the House and Senate Committees, when reporting the act to their respective bodies, show that the object of this section of the act was to make unlawful acts not included in the Sherman Act. In the report of the Senate committee the purpose of this section is stated to be:

"Briefly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and [\*\*49] before consummation."

If it was not intended to change the law from what it was under the then existing act, its enactment was meaningless and a vain thing, a presumption courts will not indulge in when construing legislative acts. [Wisconsin Central R.R. v. United States, 164 U.S. 190, 202, 17 Sup. Ct. 45, 41 L. Ed. 399](#).

**HN15** [↑] The Clayton Act, as the court construes it, is intended as a preventive act, to arrest the creation of trusts, etc., in their incipiency and before consummation, as expressed in the President's message of January 20, 1914, urging the enactment of supplemental anti-trust legislation, and the report of the Senate Committee on the bill, while the Sherman Act, as construed, only makes unlawful, "acts, contracts and combinations, which unduly or injuriously restrain competition, or unduly or injuriously create monopolies in trade." Under that act it has been held by the Supreme Court that --

"applying the rule of reason, \* \* \* the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which

operated to the prejudice of the public interests **[\*\*50]** by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrain trade, that the words as used in the statute were designed to have and did have but a like significance." [221 U.S. 179](#), [31 Sup. Ct. 648](#), [55 L. Ed. 663](#).

That the acts, etc., if not unduly or injuriously exercised, may tend to have that effect, was not sufficient to make them violations of the Sherman act; or, in other words, a violation of that act depended on the manner in which it was exercised, whether unduly and injuriously or nonprejudicially.

It is therefore unnecessary to determine whether the defendants, by the tying clauses and the discounts and rebates, have succeeded in unduly monopolizing or attempted to monopolize unduly any part of the trade or commerce among the several states, or have unduly restrained competition in that part of commerce. The question to be decided is: Do the clauses complained of, or any of them, put it in their power, or have the effect, or tend, if enforced, as the defendants **[\*163]** would have the right to do, if they are not **[\*\*51]** unlawful under the Clayton Act -- and that is their intention -- "to substantially lessen competition" or "establish a monopoly in trade"?

In the opinion of the court there can be no doubt that the enforcement of some of the provisions hereinafter mentioned will have that effect. If shoe manufacturers are not permitted to use machines manufactured by competitors without being penalized, such prohibition tends to lessen competition, and eventually will result in giving the defendants a monopoly in that part of trade or commerce. Who will invest the millions necessary to establish such manufacturing plants, and the evidence convinces that it will require these large sums to establish them, when the produce cannot be sold, or at best can find but a very limited market. It is true, there are some competitors; but they are few, and they manufacture only some of the machines required. Some have been obliged to go out of business for lack of trade, caused by these tying clauses, and eventually all will have to discontinue, if shoe manufacturers are prevented from purchasing, leasing, or using their machines, by reason of a strict enforcement of the tying clauses and the rebates and **[\*\*52]** discounts, or those which, in the opinion of the court, are in violation of the Clayton Act. To what extent the defendants had obtained control of the business of shoe machinery at the time the former action was instituted is shown by the tabulation made by Mr. Justice Clarke in his dissenting opinion (247 U.S. 89, [38 Sup. Ct. 473](#), [62 L. Ed. 968](#)). At the present time their control is much greater as will be seen from the following statement made from the evidence:

	By Defendants	By All
	Others.	
Clicking machines	5,595	17
Eyeleting machines	4,431	659
Pulling-over machines	2,441	
Lasting machines	8,499	48
Standard screw machines	280	
Pegging machines	23	1
Tacking machines	7,937	11
McKay sewing machines	711	326
Welt sewing machines	2,609	135
Outsole stitching machines	2,906	689
Loose nailing machines	2,026	6
Heeling machines	2,086	110
Slugging machines	1,718	12

From this it is established that the defendants now control more than 95 per cent. of the entire business of shoe machinery in the United States.

#### VI. Choice of Independent or Unrestricted Leases.

It is next claimed that lessees have the choice of independent or [\*\*53] unrestricted leases, which do not contain the tying clauses complained of. But lessees under these leases, in addition to the fact that lessees are not relieved of royalties and are not entitled to rebates on some of the leased machines and material, as lessees under the restricted leases, nor to the benefit of the same discounts, are also required [\*164] to make initial payments on each machine leased. Many of these initial payments are over 100 per cent. greater than the payments required under the restricted leases. The schedule of these initial payments, furnished the court by counsel for the defendants, shows that the average increase is about 50 per cent., although on some machines it is over 200 per cent., while on others it is less than 50 per cent., thereby reducing the average to that percentage.

In addition, lessees under the unrestricted leases are required to make the payments when the machines are furnished, while under the restricted leases they are not required to make payments until the expiration of the leases and the return of the machines. The amounts required to be paid by such lessees amount to tens of thousands of dollars, and for some factories hundreds [\*\*54] of thousands. The statement furnished the court by counsel for defendants shows that the initial payments for a complete group of machines necessary to operate a factory amount to \$9,810 for every 1,000 pairs of shoes to be made daily. Many factories manufacture over 10,000 pairs daily. The Plant Shoe Company has in one factory a capacity of 12,000 pairs daily; another, the International Shoe Company, of 52,000 pairs daily, which would require over a half million dollars as initial payments. From this it will be readily seen that to lease all the machines on the initial payment or unrestricted plan would require an outlay which is practically prohibitive, and of course no manufacturer ever chooses the unrestricted leases.

The choice is limited to paying, not only royalties of which, under the restricted leases, the lessee is to some extent relieved, but large sums as initial payments. The loss of the use of the money required for the initial payments for a period of 17 years, the life of the leases, is an item of no small consideration, as the interest would exceed by far the principal, if calculated at 6 per cent. annually compounded. This cannot be termed "freedom of choice." [\*\*55] United States v. Colgate & Co., 250 U.S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, relied on by the defendants is clearly inapplicable to this case. See United States v. A. Schrader's Son (opinion filed March 1, 1920) 251 U.S. 85, 40 Sup. Ct. 251, 64 L. Ed. .

## VII. Wholesale and Group Rates.

It is claimed that the lower rates offered to manufacturers, who lease all machines used by them from the defendants, and the discounts allowed to them, are wholesale rates, permissible by section 2 of the Clayton Act (Comp. St. § 8835b). If it be assumed that section 2 applies to section 3, which latter is the only section in controversy in this action, this claim would still be untenable. There are no wholesale or retail transactions. Each department, it is claimed by the defendants, is separate and distinct from the others. But, even if this claim were true, although denied by the plaintiff, still the provision in the leases set out in Exhibit 8 to the complaint:

"But if any breach or default shall be made in the observance of any one or more of the conditions herein contained, or contained in any other lease or license agreement, \* \* \* the lessor shall have the right by notice [\*\*56] in [\*165] writing to the lessee to terminate forthwith any and all leases or licenses \* \* \* then in force between the lessor and lessee"

applies to all leased machines, and not only to those in one department.

In the opinion of the court, section 2 of the act is limited to sales, and not leases, and therefore does not apply to any of the acts prohibited by section 3.

But it is claimed that it is an economic advantage to shoe manufacturers to operate defendants' machines in teams. The preponderance of the evidence tends to support this contention. But if manufacturers are convinced that this is true, they will lease them in teams or groups without the restrictions in the leases. On the other hand, if any of them believe that they can manufacture more economically and obtain the same or better results at less expense by the use of competitors' machines, although mistakenly, these negative covenants, with the penalties attached, tend to deprive them of freedom of choice, based on their own judgment. It is hardly to be supposed that shoe manufacturers are less anxious to use the best and most economical machines than other manufacturers, or that

they will use machines [\*\*57] which will result in inferior products and less profitable results. Quoting from the opinion of Mr. Justice McKenna in the former case, referring to patents (247 U.S. 65, 38 Sup. Ct. 485, 62 L. Ed. 968):

"If the world buy it or use it, the world will do so upon a voluntary judgment of its utility, demonstrated, it may be, at great cost to the patentee. If its price is too high, whether in dollars or conditions, the world will refuse it; if it be worth the price, whether of dollars or conditions, the world will seek it."

To enable manufacturers to use their own judgment, and exercise their choice based on that judgment, was beyond doubt one reason for the enactment of section 3 of the Clayton Act.

#### VIII. Clauses Never Enforced.

That no leases of machines have ever been declared forfeited by defendants for a breach of any of these clauses is not conclusive that they never will be. If it is not intended to enforce them, why insert them? The fact that they are inserted places it in their power, whenever they see proper to do so, and that fact is sufficient to deter lessees from violating them, as is fully established by the evidence. Although the forfeiture clauses have never [\*\*58] been enforced, except in some few instances, and then for good cause, lessees, who have violated them, have had their attention called to these provisions in the leases, which in itself was in the nature of a threat to enforce them, if the violations are continued; at least, it was so understood by them. Some have been penalized by the refusal of the defendants to lease them additional machines, except on the initial payment plan. Full royalties have been exacted for shoes made in part on machines other than those leased from defendants, as if wholly made on their leased machines. Witherell & Dobbins Co. v. United Shoe Machinery Co., *supra*, was an action to recover such royalties. The evidence also shows a number of other instances of such demands by defendants.

[\*166] For these reasons this claim cannot be sustained in an action under the Clayton Act, although in a proceeding under the Sherman Act the conclusion may be otherwise.

#### IX. Leases Since the Clayton Act.

The leases required to be executed since the enactment of the Clayton Act do not contain the tying clauses complained of, but they are only "temporary leases," as is printed in large letters at the top of [\*\*59] every lease made by the defendants since then. These leases contain the following clause:

"At any time prior to the redelivery by the licensee to the United Company as hereinafter provided of all of said machinery, the United Company may present to the licensee a lease and license agreement setting forth the terms and conditions upon which the United Company is willing that the said machinery may continue to be held and used by the licensee, and within a period of ten (10) days after such presentation the licensee shall either (a) execute such agreement in duplicate, and deliver the same to the United Company, making such payment, if any, as may be provided by such new agreement to be made upon the execution thereof, or (b) within said period of ten (10) days, pay to the United Company in respect to each machine the amount set opposite the name thereof in said column II, and within twenty (20) days thereafter surrender and redeliver the said machines to the United Company as hereinafter provided, whereupon the lease thereof shall terminate."

In addition to this provision in the leases, lessees are required to enter into an "additional agreement," which, after reciting the pendency [\*\*60] of this action, contains the following provision:

"Now, therefore, in addition to and independently of all agreements and obligations set forth in said order and temporary loan agreement, the licensee hereby agrees that, in case his said order shall be accepted and the machines referred to in said order and temporary agreement be supplied to the licensee, the United Company shall have the right at any time or times thereafter to present to the licensee a new or additional agreement or agreements for execution by the licensee, establishing the terms and conditions upon which said machines shall thereafter be held, used and paid for by him, and containing such provisions, in substitution for and in addition to those set forth in the attached order and temporary loan agreement, as the United Company may decide upon as necessary or desirable, for the proper protection of its property, interests, and rights, and the assurance to it of a

proper return of the use of its property during the further continuance of the use thereof by the licensees; and, if not, when such new and additional agreement or agreements are presented, the licensee agrees that within five days after the presentation [\*\*61] thereof he will either execute the same (in which case the machinery referred to in the order and temporary loan agreement hereto attached shall thereafter be held by the licensee in accordance with the terms of said new agreement or agreements), or if he does not so execute will within said period of five days exercise his right as provided in article 13 of said order and temporary loan agreement to terminate the same on 30 days' notice, and will return the machinery therein named within said 30 days, all as provided in said article 13, and in such case failure so to exercise his right of terminating said order and temporary loan agreement, or to return the machines therein referred to, shall constitute a default for which, under the provisions of article 14 of said order and temporary loan agreement, the United Company shall be entitled to exercise its right of terminating the same as therein provided."

This establishes beyond question that these leases are intended for temporary use, to avoid the prohibitions of section 3 of the Clayton Act, pending the litigation affecting their legality. But, should the contention [\*167] of the defendants be sustained that these conditions [\*\*62] are not unlawful, the right reserved would no doubt be promptly exercised, and new leases containing these clauses demanded; at least, the power to do so is reserved. To prevent this a court of equity is justified in extending its protecting arm, so far as, in its opinion, any of the clauses are unlawful under this statute.

#### X. Invalidity of Clauses.

The clauses set out in Exhibits 2 and 7 to the complaint are not obnoxious, for reasons stated in the former opinion. [234 Fed. 127.](#)

Exhibit 4 contains two distinct covenants. The first is:

"The lessee shall obtain from the lessor exclusively, and shall pay therefor at the regular prices from time to time established by the lessor, all duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing, or renewing the leased machinery, and the same shall form part of the leased machinery, and the lessee shall not otherwise make or allow to be made any addition, subtraction, or alteration to, from, or in the leased machinery without the consent in writing of the lessor, nor interfere with the proper operation of the same."

In the opinion of the court there is nothing unreasonable in this provision. [\*\*63] The evidence shows that most, if not all, parts of these machines, are very delicate, and unless perfectly adjusted will, if not entirely, at least very seriously, prevent the proper operations of the machine, and in some instances prove ruinous, necessitating costly repairs, thus depriving the lessee of a full output, and the lessor of royalties. They may also cause dissatisfaction with the machines, owing to the decreased and unsatisfactory output. The parts furnished by the defendants are all standardized and fit perfectly, so that by replacing broken or worn-out parts with the parts made by defendants, the machines will perform the work in as satisfactory manner as a new machine. As testified by a witness:

"Many of the machines are necessarily of a very complicated nature. Many of them have very many moving parts, which must be so made, arranged, correlated, and adjusted that they will not interfere with each other in the operation of the machine. Many of the machines operate at very high speed, so that the size of the parts and the adjustments must be accurate to the finest degree. The parts must be made of proper materials, with proper attention to temper, hardness, wearing [\*\*64] qualities, as well as made with the utmost accuracy as to fit. The parts, when placed in the machine, become constituent parts of the machine itself, which is the United Company's own property."

The evidence also establishes that all repairs of leased machines are made by the defendants' skilled mechanics, which, of course, would only be done if the parts to be replaced are purchased from them.

The second part of this clause is:

"The lessee shall also purchase from the lessor exclusively, at the prices from time to time established by the lessor, all supplies, including string nail, tack strips, and other fastening material used in connection with the leased machinery."

This part is objectionable as tending to substantially lessen competition and create a monopoly in these articles. It is true the evidence establishes that the prices charged for them by defendants are reasonable; [\*168] that they have not been advanced in years, not even since the outbreak of the European War, although the prices of similar articles, manufactured by competitors, have been advanced materially since then; and that at the present time the defendants offer them at lower prices than any of [\*\*65] their competitors in that line. But by this part of the clause they reserve the right to raise the prices at any time, and the lessees would be compelled by the terms of the leases to purchase them from the defendants "at the prices from time to time established by the lessor." This places it in the power of the lessor to substantially lessen competition in these lines of trade, and therefore is obnoxious to the statute. As said in [Patterson v. United States, 222 Fed. 599, 620, 138 C.C.A. 123, 144:](#)

"But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a sale, if he can persuade him to buy. For one competitor to exclude all, or substantially all, other competitors from such opportunity -- i.e., drive them from the field of freely offering their goods, so as to have that field to himself -- is to monopolize, according to the legal and accurate sense of the word."

This also applies to the condition in Exhibit 12.

The clause set out in Exhibit 8, so far as it relates to the 17-year term of the leases, is not prohibited by the statute, nor is there [\*\*66] any reason for the courts to interfere with the freedom of contract by the parties, in the absence of a statute forbidding it, assuming that the Legislature has that power, which it is unnecessary to determine in this action.

Aside from this, the leases contain a provision that --

"The lessee or lessor may terminate the contract at any time upon 60 days' notice to the other party."

The part of this clause which gives the lessor the right to terminate the lease for the breach of any of the conditions contained in the lease is also proper, provided the conditions found by the court to be unlawful are eliminated. There is no reason why a lessor may not stipulate for the forfeiture of a lease for a breach of lawful conditions. There are few leases made which do not contain such a provision. As the decree in this cause will enjoin the enforcement of the provisions found to be unlawful, and also from inserting them in new leases, this clause will be unobjectionable. The other provisions in that exhibit, relating to forfeitures of leases, are clearly in violation of the statute.

The provisions in Exhibit 10 are unobjectionable, except the proviso, which is in the nature of [\*\*67] a rebate. This proviso and the last clause, beginning with the words, "In respect to all footwear," should be eliminated, as being objectionable to that [HN16](#) part of section 3 of the act which makes unlawful to allow --

"a discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller." [Commonwealth v. Strauss, 191 Mass. 545, 78 N.E. 136, 11 L.R.A. \(N.S.\) 968, 6 Ann. Cas. 842.](#)

[\*169] The part of the clause set out in Exhibit 9 to the complaint, which states the schedule of payments for shoes welted "in whole or in part, or the soles of which shall have been in whole or in part attached to welts by the use of any welting or stitching or sewing machinery \* \* \* in respect to each pair of 'turned' boots, shoes, or other footwear, or portions thereof, manufactured or prepared by or for the lessee, the soles of which shall have been sewed or attached to their uppers in whole or in part by the use of any sewing or stitching machinery," can only be sustained [\*\*68] after striking out the words "in whole or in part" and the word "any," wherever they occur in this clause, as in the opinion of the court they are in violation of the statute.

Counsel for defendants claimed that the object of these provisions is to enable them to collect from the lessors all the royalties to which they are entitled, and without them dishonest lessees may defraud them by claiming that other machines were used for part of the manufacture. But unlawful conditions may not be imposed to prevent probable unlawful or fraudulent acts. The law is ample to protect parties against them, without resorting to unlawful means.

That part of the clause set out in Exhibit 11 to the complaint, which requires the payments set out in the schedule of payments, "whether performed by the machinery of the United Company or by other machines," is unlawful, and should be eliminated.

This also applies to the rebate provided in that exhibit as an exception.

The conditions set out in Exhibit 1, 3, 5, and 6 are all in violation of the statute, and therefore should be enjoined.

#### XI. Is Section 3 of the Clayton Act to be Given a Retrospective Construction, so as to Effect Leases and Contracts Entered into Before Its Enactment?

[\*\*69] That Congress may enact a statute having a retrospective effect is undoubted, but the question is, has it done so? The general rule is well established that [HN17](#) a legislative act will not be construed as retroactive or retrospective, unless the language clearly shows that this was the intention of the lawmakers, and that no other construction will make the act effective. [United States v. Heth, 7 U.S. \(3 Cranch\) 399, 413, 2 L. Ed. 479; Twenty Per Cent. Cases, 87 U.S. \(20 Wall.\) 179, 187, 22 L. Ed. 339; Chew Heong v. United States, 112 U.S. 536, 559, 5 Sup. Ct. 255, 28 L. Ed. 770;](#) United States v. Burr, 159 U.S. 78, [15 Sup. Ct. 1002, 40 L. Ed. 82; United States v. American Sugar Co., 202 U.S. 563, 573, 26 Sup. Ct. 717, 50 L. Ed. 1149; Union Pacific R.R. v. Laramie Stock Yards, 231 U.S. 190, 199, 34 Sup. Ct. 101, 58 L. Ed. 179; Holt v. Henley, 232 U.S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767; Waugh v. Mississippi University, 237 U.S. 589, 595, 35 Sup. Ct. 720, 59 L. Ed. 1131.](#) In the Heth Case the court said:

"Words in a statute ought not be have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can [\*\*70] be annexed to them, or unless the intention of the Legislature cannot otherwise be satisfied."

[\*170] This is quoted and followed in [Chew Heong v. United States, supra](#); the court adding:

"And such is the settled doctrine of this court."

Even if an act is remedial, the same rule of construction will be adopted, although such acts are always liberally construed. [Winfree v. Northern Pacific Ry., 173 Fed. 65](#), 97 C.C.A. 392, 44 L.R.A. (N.S.) 841, affirmed [227 U.S. 296, 301, 33 Sup. Ct. 273, 57 L. Ed. 518](#). If the statute, by giving it a retrospective construction, will deprive one of a contractual right or interfere with antecedent rights, this rule of strict construction will never be departed from. [Twenty Per Cent. Cases, supra; Chew Heong v. United States, 112 U.S. 536, 559, 5 Sup. Ct. 255, 28 L. Ed. 770; City Railway v. Citizens' street R.R., 166 U.S. 557, 565, 17 Sup. Ct. 653, 41 L. Ed. 1114; Knights Templar Indemnity Co. v. Jarman, 187 U.S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139; Union Pacific R.R. v. Laramie Stockyards, 231 U.S. 190, 199, 34 Sup. Ct. 101, 58 L. Ed. 179; Atoka Coal Mining Co. v. Adams, 104 Fed. 471, 473, 43 C.C.A. 651.](#) The reasoning of the court in this [\*\*71] case was adopted in [Southwestern Coal Co. v. McBride, 185 U.S. 499, 503, 22 Sup. Ct. 763, 46 L. Ed. 1010](#), and [Jaedicke v. United States, 85 Fed. 372, 375, 29 C.C.A. 199.](#)

Does the language of section 3 of the Clayton Act require a retroactive construction under these well-established rules of law? Four national courts of high standing, one of them a Circuit Court of Appeals, have held that this section should be given the retrospective construction claimed on behalf of the government. [Elliott Machine Co. v. Center \(D.C.\) 227 Fed. 124](#), decided by Judge Sessions. It was so construed by Judge Dyer in the instant case, when the application for a temporary injunction was heard by him. [227 Fed. 507](#). In Motion Pictures Patent Co. v. Universal Film Mfg. Co. the same conclusion was reached at nisi prius, and this ruling was expressly affirmed by the Circuit Court of Appeals for the Second Circuit. [235 Fed. 398, 148 C.C.A. 660](#). This case was affirmed by the

Supreme Court, without passing upon this question, or the effect of the [Clayton Act \(243 U.S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871\)](#), L.R.A. 1917E, 1187, Ann. Cas. 1918A, 959), the court saying:

"Our conclusion renders it unnecessary [\*\*72] to make the application of the statute [referring to the Clayton Act] to the case at bar which the Circuit Court of Appeals made of it, but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us."

In Elliott Machine Co. v. Center it was unnecessary to pass on that question, and what is there said may well be treated as obiter, and but for the other authorities cited would be so treated. The court bases this conclusion on the fact that the motion of defendants to dismiss was denied on the ground that to sustain it would result in injustice to the plaintiff, regardless of the provisions in section 3 of the Clayton Act, and it was unnecessary to determine the effect of the Clayton Act.

[\*171] The authorities relied on by the learned judges in all these cases are Armour Packing Co. v. United States, 209 U.S. 56, [28 Sup. Ct. 428, 52 L. Ed. 681; Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L.R.A. \(N.S.\) 671](#), and kindred cases arising under the Interstate Commerce Act; [Philadelphia, etc., R.R. v. Schubert, 224 U.S. 603, 32 Sup. Ct. 589, 56 L. Ed 911](#), and [\*\*73] others arising under the Employers' Liability Act; and [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136](#), involving the Sherman Act. In the last-cited case no question of retrospective construction of the act was involved. The unlawful combinations charged by the government in that action were begun on December 28, 1894, more than four years after the passage of the Sherman Act. It is therefore inapplicable to this issue.

A comparison of the provisions of those acts with that now under consideration will show how materially the language in the Clayton Act differs from that employed in those acts. [Section 5](#) of the Employers' Liability Act (Comp. St. § 8661), the section construed in the Schubert Case, declares:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

The Supreme Court, construing this provision of the act, held the language to be sufficiently comprehensive to nullify all such contracts, saying:

"But that the provisions of [section 5](#) were intended to apply as well [\*\*74] to existing as to future contracts and regulations of the described character cannot be doubted. The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

Section 3 of the Clayton Act does not declare "any contracts and leases [prohibited by that section] to be void," but that "it shall be unlawful for any person," etc., "to make such contracts," etc. [HN18](#) Ordinarily the word "shall" indicates that the act is to be prospective, and not retrospective. In [United States v. Burr, 159 U.S. 78, 87, 15 Sup. Ct. 1002, 1006 \(40 L. Ed. 82\)](#), the court, in construing a tariff act, said:

"The language of [section 1](#) was that on and after the 1st of August there *shall* be levied, and of the second [\*\*75] section, that on and after the 1st day of August certain enumerated articles, when imported, *shall* be exempt from duty. In our judgment, the word 'shall' spoke for the future, and was not intended to apply to transactions *completed* when the act became a law."

In the Armour Packing Company Case Act March 2, 1889, c. 382 (25 Stat. 857) was under consideration. That act makes it unlawful "to charge, demand, collect, or receive \* \* \* a greater or less compensation," [\*172] etc., "than is specified in the schedule filed" with the Interstate Commerce Commission, and then in force. The court said:

"There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may [\*\*76] depart."

In the Mottley Case the question before the court was whether a contract made by the railroad company and the Mottleys in 1871, in compromise of claims for damages for injuries sustained by them, while passengers on one of the railroad's trains, caused by its negligence whereby the railroad company obligated itself to issue annually free passes to them on its railroad and branches during the lives of either of them, was enforceable after the Hepburn Act of June 29, 1906 (chapter 3591, 34 Stat. 584, 586), became a law. The sections of the act construed were sections 1 and 2 (Comp. St. §§ 8563, 8569); the latter amending section 6 of the Interstate Commerce Act. The court, after referring to the original Interstate Commerce Act of 1887 (24 Stat. 379), said:

"But the act of June 29, 1906, made a material addition to the words of the act of 1887; for it expressly prohibited any carrier, unless otherwise provided, to demand, collect or receive 'a greater or less or different compensation' for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. We [\*\*77] cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115, 25 L. Ed. 782. The history of the acts relating to commerce shows that Congress, when introducing into the act of 1906 the word 'different,' had in mind the purpose of curing a defect in the law and of suppressing evil practices under it, by prohibiting the carrier from charging or receiving compensation, except as indicated in its published tariff. 11 Ann. Rep. Interstate Com. Com. 141; 19 Id. 78, 15; 40 Cong. Rec. pt. 7, p. 6608; Id. 6617; Id. 7428, 7434; Rept. of Confer. Com. 40 Cong. Rec. 9522; 42 Cong. Rec. pt. 2, p. 1746.

"In our opinion, after the passage of the Commerce Act, the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in [\*\*78] money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedules, and to keep them open to public inspection. No change could be made in the rates embraced by the schedules, except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail, and would not ordinarily be of any practical value, if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier."

[\*173] In disposing of the contention that the contract, being originally valid, is not affected by the act of 1906, the court said:

"It solved the question when, without making any exceptions of existing contracts, it forbade [\*\*79] by broad, explicit words any carrier to charge, demand, collect, or receive a 'greater or less or different compensation,' for any services in connection with the transportation of passengers or property, than was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception. *Yturbide v. United States*, 22 How. 290, 293 [16 L. Ed. 342]. The words of the act, therefore, must be taken to mean that a carrier, engaged in interstate commerce, cannot charge, collect, or receive for transportation on its road anything but money."

Had Congress, when enacting the Clayton Act, intended to apply the prohibitions in section 3 to existing contracts, it would have used language similar to that found in the Hepburn Act of 1906 or the Employers' Liability Act (Comp. St. §§ 8657-8665).

In *Peters v. Veasey*, 251 U.S. 121, 40 Sup. Ct. 65, 64 L. Ed. (opinion filed December 8, 1919), the effect of the amendments of October 6, 1917 (chapter 97, 40 Stat. 395 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991(3)]), to clause 3 of section 24 and clause 3 of section 256 of the Judicial Code (Comp. [\*\*80] St. § 1233), was before the court. The facts in that case were:

In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900 (opinion filed May 21, 1917), it had been decided that one sustaining an injury while engaged in work, maritime in its nature, is not entitled to the benefits of the Workmen's Compensation Laws of the state where the injury was sustained. Almost immediately thereafter the bill to remedy this was introduced in Congress, to amend these sections of the Judicial Code by adding to each, after the words "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state," and promptly enacted as a law. The interstate of the plaintiff had been employed by the defendants, as a longshoreman, on board of a ship at the port of New Orleans, in the state of Louisiana, and while engaged in that work, on August 6, 1915, accidentally fell through a hatchway; death resulting therefrom. At the time of his injury and death the Compensation Law of the state of Louisiana [\*\*81] (Act No. 20 of 1914) was in force. The administratrix of the deceased instituted an action in a court of that state, claiming compensation under that statute, and recovered a judgment, after the amendatory act of 1917 had become a law. This judgment was affirmed by the Supreme Court of Louisiana. 142 La. 1012, 77 South. 948. On error to that court the Supreme Court reversed this judgment. Mr. Justice McReynolds, who delivered the unanimous opinion of the court, said:

"The court below erroneously concluded that this act [Act Oct. 6, 1917] should be given retroactive effect and applied in the present controversy. There is nothing in the language employed, nor is there any circumstance known to us, which indicates a purpose to make the act applicable when the [\*174] cause of action arose before its passage, and we think it must not be so construed."

In *Missouri, Kansas & Texas Ry. v. Sealy*, 248 U.S. 363, 365, 39 Sup. Ct. 97, 63 L. Ed. 296, it was held that the Carmack Amendment to the Interstate, Commerce Act (Comp. St. §§ 8604a, 8604aa) was not retroactive, and does not apply to causes of action which arose before the passage of that act.

If there is room for doubt as [\*\*82] to the intention of Congress, it is removed by reference to the proceedings in Congress when the bill was pending in the Senate. Senator Lee moved to amend the section, which, in the bill as passed by the House of Representatives, was section 4, and in the act as finally passed is section 3, the section under consideration, by inserting, after the word "condition," the words "whether heretofore or hereafter made," so that the clause would read as follows:

"And any such conditions whether heretofore or hereafter made shall be null and void, as being in restraint of trade and contrary to public policy."

The amendment was defeated. Cong. Record, Aug. 26, 1914, pp. 15575, 15576. Senator White offered an amendment:

"And that any agreement embracing any such requirement or prohibition is hereby declared illegal."

This was also rejected. Cong. Record, Sept. 2, 1914, pp. 15959, 15961.

Nor were either of these amendments, or words of similar import, inserted in the bill, when reported from the conference committee of the two houses and as finally enacted.

That HN19 the probative value of the rejection of an amendment will be considered by the courts in construing an act, if the language [\*\*83] is at all doubtful, has been frequently decided. *Lapina v. Williams*, 232 U.S. 78, 89,

34 Sup. Ct. 196, 58 L. Ed. 515; Pennsylvania R.R. Co. v. International Coal Co., 230 U.S. 184, 198, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Carey v. Donohue, 240 U.S. 430, 437, 36 Sup. Ct. 386, 60 L. Ed. 726, L.R.A. 1917A, 295; United States v. St. Paul, etc., Ry. Co., 247 U.S. 310, 318, 38 Sup. Ct. 525, 62 L. Ed. 1130; McDonald & Johnson v. Southern Express Co. (C.C.) 134 Fed. 282, 288, and inferentially in Boyd v. Thayer, 143 U.S. 135, 167, 12 Sup. Ct. 375, 36 L. Ed. 103. In the Pennsylvania R.R. Co. Case the court said:

"The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes, not the report of the conference committee, but a statement made by a member of the conference committee, to support the present argument that section 8 means the same thing as the omitted clause."

In Carey v. Donohue, the court, speaking of the effect of an amendment striking out a part, said:

"We cannot but regard [\*\*84] the action of Congress as a deliberate refusal to conform the requirements of section 60 to those of section 3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

[\*175] In United States v. St. Paul, etc., by Ry. Co., the latest expression on that subject, it was said:

"It is not our purpose to relax the rule that debates in Congress are not appropriate, or even reliable, guides to the meaning of the language of an enactment. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 [17 Sup. Ct. 540, 41 L. Ed. 1007]. But the reports to a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications."

The conclusion of the court is that the act should not be given a retroactive construction, declaring these clauses in leases made before its enactment void.

This result has not been reached without the most careful consideration of the opinions of the learned judges in the cases hereinbefore referred to. If this [\*\*85] court were at all in doubt as to the construction of the act on this question, it would consider it its duty to follow the decisions of the learned judges in construing the act as retroactive, upon the ground that courts should always lean toward uniformity of decisions. But in the absence of a decision by a court, whose judgment is authoritative on the court trying the case, every judge must exercise his best judgment, and decide legal questions submitted to him in accordance with his own views, when, after a most careful consideration of the law, he reaches the conclusion that to follow such precedents would result in misconstruction of the law and a miscarriage of justice.

A decree in conformity with the views expressed may be prepared, and, if counsel are unable to agree on any provisions, the court will hear them and determine what the decree shall be.



## **United States v. Reading Co.**

Supreme Court of the United States

Argued October 10, 11, 1916; restored to docket for reargument May 21, 1917; reargued November 20, 21, 1917;  
restored to docket for reargument June 10, 1918; reargued October 7, 1919 ; April 26, 1920

Nos. 3, 4

### **Reporter**

253 U.S. 26 \*; 40 S. Ct. 425 \*\*; 64 L. Ed. 760 \*\*\*; 1920 U.S. LEXIS 1488 \*\*\*\*; 3 A.F.T.R. (P-H) 3067

UNITED STATES v. READING COMPANY ET AL.; READING COMPANY ET AL. v. UNITED STATES

**Prior History:** [\*\*\*\*1] APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

### **Core Terms**

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coal, coal company, railroad company, holding company, Railroad, Railway, transportation, stock, carriers, interstate commerce, anthracite, anthracite coal, capital stock, decree, leased, bonds, commodities, ship, combined, covenant, interstate, producing, commerce, lines, reorganization, monopolize, properties, tidewater, carrying, suppress

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

#### **HN1[] Antitrust & Trade Law, Sherman Act**

A dominating power, not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management but by deliberate, calculated purchase for control, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

#### **HN2[] Antitrust & Trade Law, Sherman Act**

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While the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require.

## **Lawyers' Edition Display**

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### **Headnotes**

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Monopoly -- unlawful combination -- lease of railroad -- lessor's covenant as to shipments. --

Headnote:

A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage-producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

Injunction -- against enforcement of monopolistic contract -- covenant in lease of coal lands. --

Headnote:

Attempts to enforce a covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the mining and transportation of coal.

[For other cases, see Injunction, I. c, in Digest Sup. Ct. 1908.]

Appeal -- judgment -- dismissal without prejudice. --

Headnote:

Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

Monopoly -- unlawful combination -- carriers and coal companies -- dissolution. --

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Headnote:

An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, results from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Carriers -- association with commodity carried -- stock ownership. --

Headnote:

The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Carriers -- association with commodity carried -- stock ownership. --

Headnote:

While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under the commodities clause of the Act of June 29, 1906, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Judgment -- dissolution -- monopoly -- extent of relief. --

Headnote:

A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, free from stock or other control.

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[For other cases, see Judgment, II. in Digest Sup. Ct. 1908.]

## Syllabus

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Regardless of the use made of it, a power resulting, not from normal expansion and legitimate business enterprise, but from deliberate calculated purchase for control, which enables a holding company to dominate two great competing interstate railroad carriers and two great competing coal companies, engaged extensively in mining and selling anthracite coal that must be transported to interstate markets over those railroads, is a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act. P. 57.

By a scheme of reorganization executed after the enactment of the Sherman Anti-Trust Act, all the property of the Philadelphia & Reading Coal & Iron Company, a large producer of anthracite coal controlling about two-fifths of the supply in the largest of the three fields in Pennsylvania where substantially all of the anthracite of the country is found, and all the property of the Philadelphia & Reading Railroad Company, owner of all the capital stock of the Coal Company and of an extensive railroad system over which that company's large output found [\*\*\*\*2] its way to interstate markets, was delivered into the complete control of the Reading Company. That company became the owner of all the stock of the Coal Company, with additional control over it through fiscal provisions of the reorganization; of all the stock of a new railroad company, the Philadelphia & Reading Railway Company, to which the main railroad was transferred; of all the equipment for operating the railroad, and of ships, terminals, short lines and other property which formed part of the railroad system. Besides entering into two schemes with other carriers and coal companies for suppressing competition, which were declared violations of the Anti-Trust Act in United States v. Reading Co., 226 U.S. 324 (see *infra*, p. 49), the Reading Company purchased a controlling interest in the capital stock of the Central Railroad Company of New Jersey -- a large carrier of anthracite in competition with the Philadelphia & Reading Railway Company, and owner of over eleven-twelfths of the capital stock of the defendant Lehigh & Wilkes-Barre Coal Company, which in turn owned or had leased a very large acreage in another of the Pennsylvania anthracite fields, and was a competitor [\*\*\*\*3] of the Philadelphia & Reading Coal & Iron Company; and thereby, and through common officers and directors, the Reading Company acquired and exercised active dominating control over the last two-mentioned companies, its power thus including two of the principal competing producers and two of the principal competing initial carriers, of anthracite, in interstate commerce. There was evidence also of its combining with other carriers to fix excessive flat rates to tidewater, and of special privileges extended by it to the Philadelphia & Reading Coal & Iron Company in the way of financial assistance and forbearance, and of similar dealing between the Central Railroad and Wilkes-Barre Companies.

*Held*, that the combination both before and after the induction of the Central Railroad Company of New Jersey violated the Sherman Anti-Trust Act, and that the relations between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company and the Central Railroad Company of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of any of the others. Pp. 43-59.

[\*\*\*\*4] The combination between the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company through the Reading Company must also be dissolved, because the transportation thereunder by the Railway of the coal produced by the Coal Company, violates the commodities clause of the Act of June 29, 1906. P. 60.

While the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. P. 62.

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Applying this rule, *held*, that the [\*\*\*\*5] relation between the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company, with the former owning over eleven-twelfths of the capital stock of the latter and using the latter as the coal mining department of its organization, violates the commodities clause, and for that reason must be dissolved. *Id.*

In 1871, the Lehigh Coal & Navigation Company, owner of extensive coal-producing properties and of the Lehigh & Susquehanna Railroad, leased the railroad for a rental of one-third of its gross earnings to the Central Railroad Company of New Jersey, the line leased and the line of the lessee not being in competition but the one forming a natural extension of the other into the coal fields. *Held*, that a covenant in the lease, assumed to require the lessor to ship to market over the leased line three-fourths of all the coal which it should produce in the future, was not designed to suppress interstate commerce, did not have that effect, and does not violate the Anti-Trust Act. P. 54.

Covenants in leases of coal lands by the Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company, obliging the lessees to ship all coal mined [\*\*\*\*6] by rail routes designated or to be designated, are *held* unlawful as part of the scheme to control the mining and transportation of coal herein condemned, and their enforcement is enjoined. P. 55.

As to other charges against the Lehigh Coal & Navigation Company, and as respects the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, the Lehigh & New England Railroad Company, and the surviving individual defendants, the bill is dismissed without prejudice. *Id.*

226 Fed. Rep. 229, affirmed in part, reversed in part.

THE case is stated in the opinion. Motions to modify the decree were made and denied at this term. *Post*, 478.

**Counsel:** *The Solicitor General*, with whom *The Attorney General* and *Mr. A. F. Myers* were on the brief, for the United States.<sup>1</sup>

[\*\*\*\*7] *Mr. Jackson E. Reynolds*, with whom *Mr. Charles Heebner* and *Mr. John G. Johnson* were on the brief, for Reading Company, Philadelphia & Reading Railway Company, and the Philadelphia & Reading Coal & Iron Company.<sup>2</sup>

*Mr. Robert W. De Forest*, with whom *Mr. Charles E. Miller* was on the brief, for Central Railroad Company of New Jersey.

*Mr. Henry S. Drinker, Jr.*, and *Mr. Abraham M. Beittler* filed a brief on behalf of the Lehigh Coal & Navigation Company.

*Mr. John J. Beattie* filed a brief on behalf of the Lehigh & Hudson River Railway Company.

*Mr. Wm. Jay Turner* filed a brief on behalf of the Lehigh & New England Railroad Company.

The following is a summary of the oral argument for the Reading Company et al.

<sup>1</sup> At the first and second hearings the case was argued by *Mr. Solicitor General Davis* and *Mr. Assistant to the Attorney General Todd*. *Mr. Attorney General Gregory* and *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, also were on the brief.

<sup>2</sup> At the first hearing *Mr. John G. Johnson* argued the case for the Philadelphia & Reading Coal & Iron Company.

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The appellees are not accused of fixing prices by contract with competitors, bringing about any deterioration in product, acquiring additional [\*\*\*\*8] coal deposits since 1890, dismantling or abandoning properties, limiting output, exclusive or price controlling sales contracts, monopolization of local dealers, espionage over the business of competitors, partitioning the country into non-competitive districts, discriminating in prices to destroy competitors, adopting unfair business policies, exacting unreasonable prices, deriving excessive profits from the coal business, unfair treatment of employees, or unfair treatment of competitors. Their prices for transportation and for coal have been reasonable, not excessive, "monopoly" prices.

There are in the case three charges: alleged violation of the commodities clause; alleged monopoly in the Schuylkill region; alleged combination in restraint of trade resulting in the Reading's purchase of control of the Jersey Central.

The tests to be applied to determine whether the Reading Railway Company is violating the commodities clause in transporting coal owned by the Philadelphia & Reading Coal & Iron Company at the time of transportation are those laid down in *United States v. Lehigh Valley R.R. Co., 220 U.S. 257*, and *United States v. Delaware, Lackawanna & Western R.R. [\*\*\*91] Co., 238 U.S. 516*. These tests are also buttressed by the court's declaration of the general object of the statute to have been to put an end to the carrier's "opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered." *Delaware, Lackawanna & Western R.R. Co. v. United States, 231 U.S. 363*.

The court is not concerned with the question of who ultimately receives the profit from the sale of the commodity, because it has repeatedly held that the carrier might legally own all of the stock of the corporation which owned the commodity at the time of transportation and thereby receive all the profits from the sale of the same. *United States v. Delaware & Hudson Co., 213 U.S. 366, 413, 414.*

Furthermore, this court, recognizing the fact that in the legislative progress of the commodities clause in the Senate, where it originated, an amendment in specific terms providing that the enactment should embrace common ownership of stock in railroad companies and coal companies by the same stockholders, was rejected (40 Cong. Rec., pt. 7, pp. 7011-7014), has also unequivocally held that [\*\*\*\*10] such common ownership "cannot be used as a test by which to determine the legality of the transportation of such [a coal] company's coal by the interstate carrier." *United States v. Delaware, Lackawanna & Western R.R. Co.*, 238 U.S. 516, 526.

The Reading Companies were in existence long prior to the time the commodities clause went into effect -- two of them for 37 years and the third for 12 years. The Reading Railway has never had any title to coal lands, has never undertaken any mining operations and has never been engaged in merchandising coal; and the Reading Railway and the Reading Coal Company have never been parties to any sales agency contract of the kind condemned in the *Lackawanna Case*. These factors, which are the converse of those presented in the *Lackawanna Case*, differentiate the two cases completely.

The present state of the law places upon the Government the burden of showing, by a preponderance of the proof, that the affairs of the Railway Company and the Coal Company have been so commingled and the distinctions between them so obliterated, as to disregard the fact that they were separate juridical beings; cause them to be one and inseparable, [\*\*\*\*11] making their affairs indistinguishable; destroy the entity of the Coal Company; and make it a mere puppet subject to the control of the Railway Company and a mere department thereof.

The origin of the holding of the capital stocks of the Coal Company and the Railway Company by the Reading Company cannot be treated as a "mere subterfuge and sham to defeat the commodities clause." The lower court was correct in finding that the reorganization was carried out with scrupulous regard for the law, in entire good faith, and without subterfuge or sham. It was right in its conclusion that the validity of the charter powers of the Reading Companies cannot be impeached; that their right to exist cannot be denied; that complete legislative authority to do the acts they have done cannot be gainsaid, and never has been questioned by the Commonwealth of Pennsylvania, and that the charters of the three companies gave the undoubted right to issue the securities and make the conveyances described.

The ownership of railroad equipment by the Reading Company and the lease thereof to the Railway Company have not been shown to have resulted in giving the latter as a corporation, for its own corporate [\*\*\*\*12] purposes,

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"complete power over the affairs of the Coal Company, as if the Coal Company were a mere department of the railroad."

The purchase money mortgage of the Railway Company scrupulously observes the fact that the Railway Company and the Reading Company are separate juridical beings and in no manner commingles the affairs of the Railway and Coal Companies so as to cause both such corporations to be one for all purposes.

The general mortgage of the Reading Company does not obliterate the distinctions between the Railway Company and the Coal Company and cause them to be one and inseparable.

The Government's evidence and arguments on the extent to which the Coal Company and the Railway Company have officers and offices in common are largely iteration in the past tense of conditions existing more than a decade ago, not only prior to this court's illuminating decision in 1911 in [United States v. Lehigh Valley R.R. Co., 220 U.S. 257](#), but even before the commodities clause itself went into effect on May 1, 1908. That evidence is clearly immaterial and irrelevant as to conditions now existing. Equitable decrees normally speak in the present tense and are applied to remedy [\*\*\*\*13] existing evils and not to characterize or condemn past wrongs. Even in an action under the Sherman Act an opportunity might well be afforded for a *locus poenitentiae*. [United States v. Lehigh Valley R.R. Co., 225 Fed. Rep. 399, 403, 404.](#)

The foregoing facts fully justified the court below in finding that there was a *bona fide* separate administration of the affairs of the Coal Company. [United States v. Lehigh Valley R.R. Co., 220 U.S. 257, 274.](#)

Attention is directed to the fact that the two companies employ the same counsel and treasurer, and also have the majority of directors in common. Probably no two employees of modern industrial organizations could do less toward the commingling of the administrative and other affairs of two corporations than the counsel and the treasurer. These incidents are of minor importance and do not affect the question of whether the businesses of the companies are rendered indistinguishable. That was an issue of fact and the record conclusively establishes that no such result has followed from the joint employment of these two individuals. It is repeatedly shown that the funds and accounts of the two companies are scrupulously [\*\*\*\*14] kept distinct, and there is no evidence whatever of a commingling of the affairs of the two corporations by their counsel.

The proof of the complete autonomy of the Coal Company and the Railway Company was uncontested, and conclusive. An excellent summary of the salient features of the testimony appears in Judge McPherson's opinion below.

In view of the entire autonomy of the three Reading Companies, there is no ground for the contention that the Railway Company is transporting in interstate commerce anthracite coal mined or produced by it, or under its authority, or which it owns in whole or in part, or in which it has any interest, direct, or indirect.

As to the alleged monopoly in the Schuylkill Region:

The Government does not raise the issue as to whether the Coal Company in and of itself is a combination in restraint of interstate commerce or a monopolization thereof. That company was created May 18, 1871, and by its charter it was lawful for any railroad company existing under the laws of the State to subscribe for or purchase its stock, or to purchase or guarantee its bonds. The corporation then owning the Reading Railroad properties immediately purchased all the [\*\*\*\*15] stock of the Coal Company. The latter then immediately set about the purchase and lease of coal lands, acquiring 80,000 acres before the end of 1872. By the year 1881 the Coal Company controlled 98,500 acres of coal land (or slightly in excess of the acreage alleged in the petition). Shortly afterwards, in 1885, the stockholders deliberately adopted a policy opposed to all further acquisition. Thus on the government theory the close relations alleged to exist between the mining and transportation properties and their owners have existed for almost half a century (or 20 years before the passage of the Anti-Trust Act); and the Coal Company's title to its present holdings of coal lands was vested in it almost 40 years ago, or 9 years antecedent to the passage of that act. The mining and marketing of coal on the one hand and its transportation on the other are not competitive businesses. The court below, with these factors before it, dismissed the petition in respect of this branch of the case, and this court, on its precedents, we believe, will affirm this action because it holds "the disintegration aimed at by the statute does not extend to reducing all manufacture to isolated [\*\*\*\*16] units of the

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lowest degree. The combination was not unlawful so far as it did no more than put the different groups of non-competing [enterprises] into one control." [United States v. Winslow, 227 U.S. 202, 217, 218.](#)

The Government does not contend that the Coal Company is an unlawful combination or a monopoly, and it cannot be contended that the transportation is competitive with the mining and marketing; the transportation is intermediate between the two and supplements them.

This court, like the court below, will be repelled by the consequences of holding with the Government's contentions. [United States v. United Shoe Machinery Co., 247 U.S. 32, 45, 46.](#)

There was no secrecy indicating a guilty plan or conspiracy. It was all done pursuant to notices to investors all over the world, in the open, and to meet the financial exigencies of the situation. The plan was adopted by Edward M. Paxson, the receiver, who had just resigned as Chief Justice of the Supreme Court of Pennsylvania and the writer of that court's decision in [Commonwealth v. New York, Lake Erie & Western R.R. Co., 132 Pa. St. 591.](#) The resulting reorganization was declared valid by the [\*\*\*\*17] Attorney General of the Commonwealth, January 2, 1897. The legality of the plan was approved by eleven eminent counsel. The Commonwealth of Pennsylvania, by its statutory policy from 1818, had declared to be normal, and affirmatively encouraged, the close inter-relation of mining, transporting and selling anthracite coal. (Const. 1874, Art. XVII, § 5, adopted in convention, of which Judge Dallas was a member.) It was approved by Judge Dallas and Judge Acheson, of the Circuit Court for the Eastern District of Pennsylvania, contemporaneously with the reorganization. It was regarded as entirely legal by Judges Gray, Lanning and Buffington ten years later. [United States v. Reading Co., 183 Fed. Rep. 427, 457, 459, 490.](#) It was declared to be lawful by Judges McPherson, Hunt and Buffington twenty years later. [United States v. Reading Co., 226 Fed. Rep. 229, 266-276.](#)

The facts do not indicate monopoly or combination in restraint of trade. The Coal Company is not charged with such guilt. It produces less than 15 per cent. of tonnage. In the Schuylkill region it has 35 operations and one-half the tonnage. Other producers have 53. On the Reading Railway it does [\*\*\*\*18] not monopolize production or sales. Of production it has only 65 per cent. In sales it must compete with 116 other shippers on 8 other railroads and 60,000,000 tons of competitive tonnage because the Pennsylvania Railroad reaches every community reached by the Reading Railway and makes joint rates with every other anthracite railroad. At tidewater and all distant points it meets the competition of the entire production. The court below unanimously supports the foregoing conclusion. 226 Fed. Rep. 270-271.

The Reading Railway cannot be treated as a monopoly. Its transportation status in the Schuylkill region has been practically the same for 50 years. The Government alleges no acquisition of other carriers there since 1870. Its share of total anthracite transportation is less than 19 per cent; the Lehigh Valley Railroad's is greater. It does not monopolize the Schuylkill region. It serves 63 collieries, 11,500,000 tons; other railroads serve 34 collieries, 7,000,000 tons. It does not monopolize the collieries it serves. Built in 1833, it has the natural advantages of a pioneer -- occupation of passes, and possession of best grades. It serves the region admirably. It encounters [\*\*\*\*19] the competition of the total tonnage in all markets as does the Coal Company.

The Reading Company is not a monopoly or combination in restraint of trade. It merely coordinates and integrates the non-competitive and complementary businesses of mining, transporting and merchandising anthracite coal, thereby promoting and stimulating interstate trade and commerce. No vice exists in including transportation, because its chief competitors enjoy a like advantage, and government regulations preclude abuse in employing transportation facilities.

There is no basis for the decree requested by the Government, tearing down an investment of \$ 300,000,000, made originally 50 years ago, when the titles vested, and upon the stability of which investors have justifiably relied for a generation, -- authorized by state statutes, approved by state officers and courts, reorganized under supervision of federal courts 23 years ago, and approved unanimously by circuit judges in 1915.

The purchase of the Jersey Central stock was a normal industrial development -- a defensive measure with no intent to unduly suppress competition.

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The railroads combined were not competing in the sense of Mr. Justice [\*\*\*\*20] Day's definition in the *Union Pacific* Case. One was never striving for traffic which the other was seeking to gain. 226 U.S. 87. They did not render service to the same shipper, id. 87, nor cater to demands of identical patrons. Id. 88. They were not engaged in the same carrying trade from the same point of origin to the same destination. Id. 99. They were, on the contrary, complementary and supplementary, one to the other, in the sense described in this court's opinion respecting the form of decree permitting the combination of the Union Pacific and Central Pacific. If, as a fact, they are thus supplementary the Government concedes the propriety of their combination.

Even if the Government's theory, that the two roads are competitive because both transport anthracite, be indulged; nevertheless their unification was valid because "the extent of the control thereby secured over instrumentalities which commerce is under compulsion to use," under the tests laid down in United States v. St. Louis Terminal, 224 U.S. 383, 394, 395, "left the competitive conditions in the coal carrying business very slightly affected by the elimination of competition between [\*\*\*\*21] the Central and the Philadelphia and Reading." 183 Fed. Rep. 488, 490.

The Government's theory of competition is unsound. It makes all carriers competitive, and is contrary to the settlement in the *Union Pacific* Case. Its theory of competition is impossible of application. No court can discover the necessary directness of relationship of cause and effect to enable it to say that the abatement of competition of such an intangible character necessarily results in a case of unlawful restraint. This impossibility arises from the factors of uncertainty, speculation and remoteness, illustrated by the extent of competition of anthracite coal with other fuels; by the situation in the New England market, where 70,000,000 tons are in potential competition, and there are numerous uncontrolled rail and water routes, the Reading handling only 3 1/2 per cent. of the potential supply; and by similar conditions at New York and elsewhere -- even on the Reading Railway itself.

But even according to the government theory, competition was unaffected. The Central did not reach the Reading territory, and competition was continued by eight other lines in close proximity to the Central and Reading. [\*\*\*\*22] See 183 Fed. Rep. 457, 488, 490. The vital question is not the amount of competition suppressed, but the amount remaining. If, as here, the competitors remaining are numerous, large, and powerful the restriction of competition cannot be deemed undue. The issue is one of fact and not of law and must be decided on the evidence, not on theory or speculation. The evidence covering the period since 1901 when this combination was formed shows the facts to be that the Reading's powerful competitors have increased their anthracite traffic by much greater percentages than has the Reading; that any diminution of the Reading's service to the public or attempted restraint on interstate trade would be frustrated immediately by the preponderant competitive power of its eight powerful rivals; that the public has been benefited for any loss of competition resulting from the combination by the more than compensating advantage derived from the upbuilding of the half dozen through routes for freight and passenger traffic competing with the Pennsylvania Railroad. This court would not be justified in destroying these routes and their advantage to the public merely to guard against a speculative possibility [\*\*\*\*23] of injury which the evidence shows cannot ensue. In view of its decision in the *St. Louis Terminal Case*, this court should hold the lower court's view of the evidence, -- considering the lessons of the war as to what restrains trade, the joint operation of railroads, and the provisions of impending railroad legislation.

As for the Coal Companies, the Reading Company's influence over the Wilkes-Barre Company was only incidental and negligible. There is no evidence of a motive to control production. Competition was practically unaffected, and the management of the two companies was not amalgamated.

The Reading Company did not create a monopoly or combination in restraint of the anthracite trade in 1901. The trade as a whole has expanded; the number of employees, their employment and earnings have increased; and production has kept pace with population.

The Reading did not acquire in 1901 sufficient power to monopolize or restrain the trade had it sought to do so. The combined business of the two coal companies was then only one-fourth of the total business, and in the interim has shrunk until now it is only one-fifth. It does not now possess the power to monopolize or [\*\*\*\*24] restrain the trade even if it wished to do so.

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If the Government's most extravagant contention had been sustained by proof, their criticism of the coal land holdings makes no case presently calling for the interposition of the action of this court. It will be time enough to destroy such a monopoly when it appears and when it has gained power to injure the public. Now the court should deal only with the present actualities. By the time that such a monopoly arises, if it ever does, it may be that the public policy will foster it, or we may have a nationalization of all mines.

Finally, the Government's contentions now are inconsistent with its attitude in the *Harvester Case*. On November 2, 1918, the Department of Justice consented to a decree in that case in and by which, in order to "restore competitive conditions and bring about a situation in harmony with law," the company was only required to sell such of its lines of harvesting machines as would leave it at least 66 per cent. of the industry.

**Judges:** White. McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke

**Opinion by:** CLARKE

## Opinion

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[\*40] [\*\*426] [\*\*\*772] Mr. JUSTICE CLARKE delivered the opinion [\*\*\*\*25] of the court.

These are appeals from a decree entered in a suit instituted by the Government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they [\*41] constitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce in violation of the first and second sections of the Anti-Trust Act of Congress of July 2, 1890, c. 647, 26 Stat. 209; and also for the alleged reason that the defendants, Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey are violating the commodities clause of the Act of Congress of June 29, 1906, c. 3591, 34 Stat. 585, by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

[\*\*427] It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as the Holding Company; Philadelphia & Reading Railway Company, as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal [\*\*\*\*26] Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company, as Wilkes-Barre Company; Lehigh Coal & Navigation Company, as Navigation Company.

Practically all of the anthracite coal in this country is found in northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes these coal areas are designated: the most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal; the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles, and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles, and Philadelphia, distant [\*42] about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and to some extent, through [\*\*\*\*27] the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York Harbor, viz: The Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadelphia and New York, viz: The Reading and the Pennsylvania [\*\*\*773] Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

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This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.<sup>1</sup>

[\*\*\*\*28] The essential claims of the Government in the case have become narrowed to these, viz:

First: That the ownership by the Holding Company of controlling interests in the shares of the capital stocks of the Reading *Railway* Company, of the Reading Coal Company and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce and an attempt to monopolize and a monopolization of a part of the same in violation of the Anti-Trust Act of July 2, 1890.

Second: That the Holding Company in itself constitutes a like violation of the act.

Third: That certain covenants and agreements between the Central Railroad Company and the Navigation Company [\*43] contained in a lease, by the latter to the former, of the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth: That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the Act of June 25, 1910, c. 428, 36 Stat. 854, [\*\*\*\*29] the case was heard by three Circuit Judges of the Third Circuit, who while holding against the contention of the Government on many of the prayers for relief in the bill, some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal and that their union through the Holding Company and the Central Company constituted a combination in restraint of trade within the Anti-Trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds and other securities of the Wilkes-Barre Coal Company owned by it and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads, named or to be designated, were unlawful and void.

The case has been appealed by both parties and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by [\*\*\*\*30] the Holding Company will be of value for the assistance it will be in determining the intent and purpose [\*44] with which the combinations here assailed were formed. *Standard Oil Co. v. United States, 221 U.S. 1, 46, 76.*

The Philadelphia & Reading *Railroad* Company was chartered by special act of the Pennsylvania General Assembly in 1833, and it conducted the business of a [\*428] railroad carrier prosperously for about thirty years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the Company for 1871 contains the following:

"Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired and will be held by an auxiliary company, known as the Philadelphia and Reading Coal and Iron Company, of which the Philadelphia and Reading Railroad Company is the only stockholder. The result of this action has been to secure --

<sup>1</sup> *United States v. Reading Co., 183 Fed. Rep. 427; United States v. Reading Co., 226 Fed. Rep. 229; United States v. Delaware & Hudson Co., 213 U.S. 366; United States v. Lehigh Valley R.R. Co., 220 U.S. 257; United States v. Delaware, Lackawanna & Western R.R. Co., 238 U.S. 516; United States v. Reading Co., 226 U.S. 324.*

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and attach to the company's railroad -- a body of coal land capable of supplying all the coal-tonnage that can possibly be transported over the [\*\*\*31] road for centuries."

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company, and the only doubt in the past about the permanency of the earning power of the company as a transporter was due to the fear that rival companies [\*\*\*774] would tap the Schuylkill region, and divert the coal tonnage to their own lines. This danger was happily averted by the purchase of the coal lands."

And this from the report of 1881:

"The coal estates of the Philadelphia and Reading Company . . . consist of 91,149 acres (142 square miles) of coal lands, which is sixty per cent of all the anthracite lands in the Schuylkill district, and thirty per cent of all in Pennsylvania."

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

[\*45] "The coal lands comprise in extent about 33 per cent of the entire anthracite coal fields of the State, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions which has been going on for many years, it must be conceded that [\*\*\*32] we have at least 50 per cent of the entire deposit remaining unmined."

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthracite carriers, competing with the Reading and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds and receivers were appointed who operated both properties until 1896 when they were sold to representatives [\*\*\*33] of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

1st. To the Reading Railway Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of [\*46] the equipment) which had been owned or leased by the former Reading Railroad Company. The capital stock of this company was fixed at \$ 20,000,000 and it issued \$ 20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at \$ 90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite, -- more than one-fifth of the then total production of the country. But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars and ships, owned by the former Railroad Company, and its tidewater terminals at Philadelphia [\*\*\*34] and on New York Harbor, were allotted to the Holding Company.

2nd. By the decree of sale the Reading Coal and Iron Company was released from its former obligations and to it thus freed the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition, that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for \$ 135,000,000

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on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased, -- almost two-thirds of the entire acreage of the Schuylkill coal field, -- stocks and bonds in other coal companies, coal in storage and other property, all of the estimated value of \$ 95,000,000.

3rd. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the General Assembly of Pennsylvania, but unused for twenty years, was utilized. This charter was of the class denominated "omnibus" by the Supreme Court of Pennsylvania, [\*47] and in terms it authorized the company to engage in, [\*\*\*35] or control, almost any business other than that of a bank of issue, -- this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed [\*429] to "Reading Company," its capital stock was increased from \$ 100,000 to \$ 140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned by the Reading Railroad Company, together with stocks which gave [\*\*\*775] it control of more than thirty short line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading Railway Company and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading Railroad Company and the Reading Coal and Iron Company, was that the Holding Company without any outlay -- solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies [\*\*\*36] -- became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of \$ 34,400,000; plus all of the capital stock and bonds of the new Railway Company, \$ 40,000,000; plus all of the capital stock of the Coal Company, \$ 8,000,000, and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds and mortgages owned by the former Railroad Company of the estimated value of over \$ 38,000,000, -- making a total value, as represented at the time to the New York Stock Exchange, of \$193,613,000.

Thus, this scheme of reorganization, adopted and executed [\*48] six years after the enactment of the Anti-Trust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost one thousand miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost [\*\*\*37] of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. [United States v. Union Pacific R.R. Co., 226 U.S. 61.](#)

Obviously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company -- the mining and transportation departments of its business -- for producing, purchasing, and selling coal and for transporting it to market. The Reading Railway Company and the Reading Coal Company each had thereafter but one stockholder, -- the Holding Company -- and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating \$ 28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of \$ 135,000,000 and its capital stock of \$ 140,000,000. The Holding Company thus served to pool the property, the activities and the profits of the three companies. Northern [\*\*\*38] [Securities Co. v. United States, 193 U.S. 197, 327, 362.](#)

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

[\*49] In 1898 this Holding Company entered into a combination with five other anthracite carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater, which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders for the purpose of providing \$ 5,000,000 with which the properties of the chief independent operators, Simpson and Watkins, were purchased and thereby the new railroad project was defeated. The president of the

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Holding Company was active in the enterprise and that company, although only one of six, became responsible for thirty per cent. of the required financing. In *United States v. Reading Co., 226 U.S. 324, 351*, this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms: [\*\*\*\*39]

"The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at p. 355:

"We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite [\*\*\*776] carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated or which might thereafter be opened and operated," and to pay [\*\*430] therefor [\*50] 65% of the average price of coal prevailing at tidewater points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: that they were made for the purpose of eliminating the competition [\*\*\*\*40] of independent operators from the markets and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed"; that before these contracts, there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants, but that after the contracts were made "such competition was impracticable"; that the case fell well within not only the *Standard Oil* and *Tobacco Cases, 221 U.S. 1, 106*, but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally that the defendants had combined, by and through the instrumentality of the 65% contracts with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within two years and again within four years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and of corporate agency, for the purpose of violating, in a flagrant manner, the Anti-Trust Act of 1890.

Almost [\*\*\*\*41] immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite, -- almost one-half of its total freight traffic. Its capital stock was then \$ 27,436,000 and its funded debt was \$ 46,881,000.

This Central Company owned, at the time, in excess of [\*51] eleven-twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over \$ 9,000,000 and a funded debt of about \$ 17,000,000. And that company owned or had leased in excess of 14,000 acres of coal bearing lands -- 13,000 acres in the Wyoming field -- and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over \$ 20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, [\*\*\*\*42] after the commencement of this suit, and from one-third to one-half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

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It is argued that the Central Railroad, thus acquired, and the Reading system were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

"Q. You are president of the defendants, the Reading Company, Philadelphia and Reading Railway Company, Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey, the Lehigh and Wilkes-Barre Coal Company and the Temple Iron Company?"

"A. I am. . . ."

"Q. What do you regard as the competitors of the Philadelphia and Reading now in New York Harbor, as to anthracite coal? . . .

"A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware and Lackawanna, the Delaware and Hudson, [\*52] the Erie, Ontario and Western. I guess [\*\*\*\*43] those are all the roads leading to New York directly or indirectly. [He did not name the Central Company because it was a part of the Reading system when he testified.]"

"Q. Those roads are all carrying anthracite coal to the New York harbor?

"A. Yes, sir."

"Q. And you regard them as competitors [\*\*\*777] who must be considered in fixing rates?

"A. Yes, sir; unquestionably." Mr. Harris testified:

"Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

"A. We came in competition with all the roads that were carrying coal from Pennsylvania."

"Q. Name the principal ones in reference to carrying coal from the coal mines to New York harbor.

"A. The Reading, the Lehigh Valley, the Central Railroad of New Jersey, the Delaware, Lackawanna and Western, the Erie, and the Pennsylvania Railroad."

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer pur this also beyond dispute by testifying:

"Q. Prior to 1901 [\*\*\*\*44] were the Philadelphia and Reading Coal and Iron Company and the Lehigh and Wilkes-Barre Company competitors as sellers of coal in New York harbor?"

"A. Yes; and they are today."

"Q. And generally throughout the eastern territory they were competitors at that time?"

"A. Yes, sir; through that northern territory. Not in this territory, nor in the southern."

[\*\*431] Thus, by this purchase, the Reading Holding Company [\*53] acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies, in the country. The anthracite tonnage of the Central and Reading Railway Companies thus combined, exceeded, at the time, 18,000,000 tons, -- over one-third of the then total production of the country, -- and the revenue derived from it was more than one-third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "Rates, practices, rules and regulations governing the transportation of anthracite coal," which had been in progress for three years. The eleven initial anthracite carriers which have lines [\*\*\*45] penetrating the coal producing region were required to furnish

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special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the Commission found: that since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of cooperation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading companies. The Commission also found, and this appears in the record of this case, that the Reading Coal Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding \$ 68,000,000 for advances of capital made by the Reading Railroad Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short [\*\*\*46] by more than \$ 30,000,000 of equaling 4% per [\*54] annum on the indebtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted save as to some findings of the Interstate Commerce Commission, we must proceed to judgment, and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the [\*\*\*47] Government [\*\*\*778] claims requires the Navigation Company to ship to market over the leased line three-fourths of all of the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-Trust Act.

It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the [\*55] Government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh and Susquehanna Railroad was about 100 miles in length and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal producing properties [\*\*\*48] and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh and Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage producing coal districts. The rental to be paid was one-third of the gross earnings of the railroad and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained and the decree of the District Court with respect to it will be affirmed and the bill, as to it, dismissed.

In many leases for the operation of coal producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned [\*\*432] as unlawful in this [\*\*\*49] opinion, the decree of the

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District Court enjoining the lessors and the other defendants herein from attempting to enforce such covenants will be affirmed.

The other charges against the Lehigh Coal and Navigation [\*56] Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company are substantially abandoned in the Government's brief and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the District Court as to all but the Wilmington and Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without [\*\*\*\*50] prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading companies, the Central Railroad Company of New Jersey and the Wilkes-Barre Coal Company.

Before the reorganization of 1896 the gathering of more than two-thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation and sale of the anthracite coal of the largest of the three sources of supply.

When in 1896 the problem was presented of reorganizing the financial affairs of the two companies, it was not solved, as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the [\*57] contrary, and very obviously for the purpose of evading the provision of the constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over [\*\*\*51] its lines (Constitution of Pennsylvania, 1874, Art. 17, § 5), and also of evading [\*\*\*779] the provisions of the Federal Anti-Trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with the power, inherent in that from of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when in 1901 a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal carrying system, with its extensive coal owning and mining subsidiary. This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate [\*\*\*52] lines of railway.

Again, and obviously, HN1[ this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court.

[\*58] Thus, in *Northern Securities Co. v. United States, 193 U.S. 197, 327*, when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act -- 'combination in the form of a trust or otherwise . . . in restraint of commerce among the several States or with foreign nations,' -- or could more effectively

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and certainly suppress free competition between the constituent companies. . . . *The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and [\*\*\*\*53] which the public is entitled to have protected."*

And again, in [United States v. Union Pacific R.R. Co., 226 U.S. 61, 88](#), decided nine years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. . . . Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after [\*\*433] the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when discussing a similar state Anti-Trust Act in [International Harvester Co. v. Missouri, 234 U.S. 199, 209](#), it was said:

"The specification under this head is that the Supreme Court [of \*\*\*\*54] Missouri found, it is contended, benefit -- not [\*59] injury -- to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intention and has had some good effect.* . . . The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-Trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time, successfully until this court condemned the 65% contracts as illegal, to suppress the last prospect of competition [\*\*\*\*55] in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced [\*\*\*780] this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. It is difficult to imagine a clearer case and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by [United States v. Union Pacific R.R. Co., supra.](#)

For flagrant violation of the first and second sections of the Anti-Trust Act, the relations between the Reading [\*60] Company, the Reading Railway Company and the Reading Coal Company and between these companies and the Central Railroad Company of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of either of the other corporations.

With respect to the contention that the commodities clause of the Act of June 29, 1906, [\*\*\*\*56] 34 Stat. 584, 585, is being violated by the Reading Railway Company and the Central Railroad Company:

The Circuit Judges centering their attention: upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operative and separate accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of [United States v. Delaware & Hudson Co., 213 U.S. 366, 413](#), that the evidence did not justify holding that in transporting the products of the Reading Coal Company's mines to market

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the Reading Railway Company was carrying a commodity "mined, or produced by it, or under its authority" or which it owned "in whole, or in part," or in which it had "any interest direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question [\*\*\*\*57] is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was to put an [\*61] end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury, -- any discriminating practice which would harm the general shipper would profit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful [\*\*\*\*58] for any railroad company to transport in interstate commerce "any article or commodity . . . mined, or produced by it, or under its authority, or which it may [\*\*434] own in whole, or in part, or in which it may have any interest direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other -- as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire [\*62] conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal [\*\*\*\*59] mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines. [\*\*\*781] The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-Trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven-twelfths of the stock of the Coal Company, and therefore the holding in 213 U.S. 366, supra, is especially pressed in argument, -- that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in United States v. Lehigh Valley R.R. Co., 220 U.S. 257, 272, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the [\*\*\*\*60] affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in United States v. Delaware, Lackawanna & Western R.R. Co., 238 U.S. 516, 529. It results that it may confidently be stated that the law upon this subject now is, that HN2[<sup>↑</sup>] while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for [\*63] the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. United States v.

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Lehigh Valley R.R. Co., 220 U.S. 257, [\*\*\*\*61] 272, 273; United States v. Delaware, Lackawanna & Western R.R. Co., 238 U.S. 516, 529; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association, 247 U.S. 490, 501.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven-twelfths of the capital stock of the latter and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal and Navigation Company, the Lehigh and New England Railroad Company, the Lehigh and Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia and Reading Coal and Iron Company and the Lehigh and Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington and Northern Railroad Company and as to [\*\*\*\*62] the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company and the [\*64] Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company, existing and maintained through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property [\*\*435] of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and form each other, of the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks [\*\*\*\*63] and bonds of the Lehigh and Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

[\*\*\*782] *Affirmed in part; reversed in part, and remanded with direction to enter a decree in conformity with this opinion.*

**Dissent by:** WHITE

## Dissent

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MR. CHIEF JUSTICE WHITE, MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER, dissenting.

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States brought to sever the existing relations [\*65] between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade in violation of the Sherman Act and gave [\*\*\*\*64] rise to a disregard of the commodities clause of the act of Congress.

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed and virtually the full relief prayed by the Government is therefore granted. We are unable to concur in this conclusion because in our opinion neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view because the court

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below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took and also demonstrates the error involved in the decree of this court reversing its action. *United States v. Reading Co.*, 226 Fed. Rep. 229. To that opinion we therefore refer as stating the reasons for our dissent.

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## **McMaster v. Ford Motor Co.**

Supreme Court of South Carolina

May 19, 1920, Decided

19267

**Reporter**

114 S.C. 100 \*; 103 S.E. 87 \*\*; 1920 S.C. LEXIS 90 \*\*\*

MCMASTER v. FORD MOTOR COMPANY ET AL.

**Prior History:** [\*\*\*1] Before MEMMINGER, J., Richland, Spring term, 1918. Reversed.

Action by Samuel B. McMaster against the Ford Motor Company and others. From an order overruling a demurrer to plaintiff's complaint, defendants appeal.

**Disposition:** Reversed.

### **Core Terms**

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cause of action, gauge, invention

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Legislation > Statutory Remedies & Rights

Governments > Federal Government > US Congress

#### **HN1[] Subject Matter Jurisdiction, Jurisdiction Over Actions**

The State Courts have no jurisdiction of an original action brought under the act of Congress to obtain the relief therein provided for. No binding decision directly in point is cited, but the conclusion stated is in harmony with the general principles that where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Legislation > Statutory Remedies & Rights

## [HN2](#) [blue square icon] Jurisdiction, Exclusive Jurisdiction

The Antitrust Act of Congress, U. S. Comp. St., §§ 8820-8823, 8827-8830, provides for the administration of the remedies therein prescribed by the Federal Courts. While there are no words expressly excluding the jurisdiction of the State Courts, such exclusion is implied, on the principle of, "expressio unius est exclusio alterius." The reasoning of the United States Supreme Court strongly favors the exclusive jurisdiction of the Federal Courts to administer the remedies provided by the statute. It does not mean that the State Courts would not have jurisdiction to give effect to the statute in some circumstances, as where the validity of contracts in violation thereof is drawn in question in actions of which they have jurisdiction to give relief other than that provided by the statute.

## **Headnotes/Summary**

## **Headnotes**

1. MONOPOLIES -- ACTS OF AUTOMOBILE COMPANY AND AGENTS IN ATTEMPTING TO RESTRICT USE OF DEVICE HELD NOT ACTIONABLE UNDER **ANTITRUST LAW**. -- A complaint against an automobile manufacturing company alleging that plaintiff had invented a device to increase the axle distance between wheels of narrow gauge motor vehicles, that the company had forbidden its agents, who were plaintiff's natural customers, to handle plaintiff's device on pain of forfeiting their agency, and that the agents had agreed to comply with such requirement and had advised their customers not to use the device, and had threatened the guaranty under which their cars were sold if plaintiff's device should be attached thereto, *held* insufficient to show a cause of action under the Federal **Antitrust Law** (U. S. Comp. St., secs. 8820-8823, 8827-8830); the restraint of commerce being an incidental, and not the dominant, purpose of defendants' actions.

2. COURTS -- STATE COURTS HAVE NO JURISDICTION OF ACTION UNDER FEDERAL ANTITRUST LAW. -- State Courts have no jurisdiction of an original action under the Federal Antitrust Law (U. S. Comp. St., secs. 8820-8823, 8827-8830) to obtain the relief therein provided for under the rule, "*expressio unius est exclusio alterius.*"

**Counsel:** Messrs. Wm. Elliott, W. C. McLain and C. S. Monteith, for appellants, submit: The complaint herein states a cause of action entirely within the purview of the act of Congress of July 2, known as the [Sherman Act: 208 U.S. 274; 131 F. 82; 193 U.S. 38; 175 U.S. 211; 226 U.S. 20; 120 U.S. 120; 187 U.S. 622; 106 F. 38; 221 U.S. 418; 226 U.S. 525; 234 U.S. 500; 241 U.S. 257; 76 S.E. 513; 218 U.S. 601; 166 F. 251; 221 U.S. 1; 226 U.S. 61; 108 F. 909.](#) A cause of action arising under, or entirely within the purview of, the act of Congress of July 2, 1890, is within the exclusive jurisdiction of the [United States Courts: 130 F. 633; 221 U.S. 1; 82 Federalist 4 Wall. \(U. S.\) 535; 93 U.S. 136; 204 U.S. 426; 202 U.S. 243; 215 U.S. 481; 222 U.S. 506; 222 U.S. 424; 164 N.Y. S. 626](#), and cases cited; [236 U.S. 165; 73 Ala. 390; 51 L. R. A. 151; 12 L. R. A. 725.](#)

Messrs. E. L. Craig, H. N. Edmunds and Mendel L. Smith, for respondent. Mr. Craig submits: The unlawful [\*\*\*2] interference with the business of another is actionable at common law: 43 L. R. A. 801 (Ill. Sup. Ct.); 175 U.S. 241; 208 U.S., pp. 294-6; 8 Cyc., p. 650; 176 Ill. 608, 614; 8 Cyc., p. 651; 10 L. R. A. 184; 31 Neb. 411; 75 N.Y. App. Div. 145; 8 Cyc., p. 652; 25 S.W. 428; 8 Cyc. 653; (N. J.) 10 L. R. A. 184; 25 Cyc., p. 558; (Cal.) 13 L. R. A. 707. The Sherman Act did not supersede the common law, but supplemented it: 208 U.S. 294; 123 Minn. 47; L. R. A.

1915b, 1182 (Syllabus). The Sherman Act has not the remotest applicability to the case at bar: 171 U.S. 518; 213 L. Ed. 290; 19 S. Ct. 40; 200 U.S. 179; 175 U.S. 211; 44 L. Ed. 136; 20 Supt. Ct. Rep. 25.

Mr. Edmunds submits: The action is a common law action: 162 F. 803, 817-20; 83 F. 912; 176 Ill. 608; 68 Am. Stat. Rep. 213; 52 N. J. Law 284; 10 L. R. A. 184; 111 U.S. 762; 165 U.S. 589; 221 U.S. 1-52-56. The Federal statute does not take from one rights which he has at common law or under the statute law of the several States: 221 U.S. 106; 87 S.C. 18. The statute is in aid of common law: Endlich on Interpretation of Statutes, secs. 3141-2 (Edition 1888). Plaintiff did not invoke the benefits of the Sherman Act: 152 U.S. 454; [\*\*\*3] 155 U.S. 102; 155 U.S. 482; 155 U.S. 488; 16 L. R. A. 593. As to the right of respondent to maintain this action: 241 257; 177 Mass. 485, 487; 528 L. R. A. 115; 83 Am. St. Rep. 28; 59 N.E. 125. Where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, then an action lies in all cases: Addison on Torts, sec. 22 (Wood's Edition).

Messrs. Craig, Edmunds and M. L. Smith, submit (on the motion for a rehearing, or a modification of the opinion filed): That the opinion of the Court should be confined to the question raised by the appeal, and the decision limited to the question raised by the exceptions: [90 S.C. 222](#); [110 S.C. 122](#). The plaintiff would have the right to apply for leave to amend his complaint at any time before trial, to remedy any deficit in his pleading: [81 S.C. 574](#); [80 S.C. 1](#); [80 S.C. 213](#); [82 S.C. 1](#); [85 S.C. 259](#); [90 S.C. 229](#); [91 S.C. 51](#); [101 S.C. 86](#).

**Judges:** MR. JUSTICE HYDRICK.

**Opinion by: HYDRICK**

Opinion

[\*\*87] [\*\*102] The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Defendants appeal from an order overruling their demurer to plaintiff's complaint. Plaintiff attempted to set up two causes of action for damages: [\*\*\*4] In the first he alleges a [\*103] conspiracy to deprive him of his right to trade with the customary tradesmen (the agents of Ford Motor Company) for the marketing of his patented device for use on Ford cars. In the second he charges defendants with slandering said device. The complaint is too long and prolix in statement and contains too much unnecessary repetition to be reported. We state the substance of it sufficiently to elucidate the points decided.

The action is against Ford Motor Company, a corporation of the State of Michigan, engaged in manufacturing and selling Ford cars throughout the United States, by and through its agents, each of whom is given exclusive rights in certain territory, and four of its agents so engaged in their respective States, to wit, Cuthbert Motor Company, a corporation of the State of Georgia; Universal Auto Company, a corporation of the State of North Carolina, and DuPre Auto Company, a corporation, and Shifley & Frith, a copartnership of this State.

Plaintiff alleges that he invented and patented a device by which the axle distance **[\*\*88]** between the wheels of narrow gauge motor vehicles, which is 56 inches, can be increased so as to make **[\*\*\*5]** it the same as that of broad gauge vehicles, which is 60 inches, and make the wheels of the former track in the ruts made in the roads by the latter, and thereby save much strain on the steering gears and machinery of cars to which it is attached, without interfering with any part thereof, and add much to the safety and comfort of the driver and occupants thereof; that it is especially valuable and useful to the owners of narrow gauge cars in this and nine other Southern States named, in which the vehicles most used are broad gauge, and where, therefore, the ruts made by them in the roads are too wide apart for narrow gauge vehicles to follow in them; that Ford Motor Company manufactures narrow gauge cars exclusively, and sells a great number of them in this and the nine other States **[\*104]** named, by and through its agents, who are the natural and customary dealers to whom the owners of such cars apply for parts and devices suitable thereto, and, therefore, these agents afford the natural and practically the exclusive market for the sale of his invention, which is peculiarly suitable to Ford cars, and is known to the trade as "McMaster's broad gauge attachment for Ford cars;" **[\*\*\*6]** that Ford Motor Company and the other defendants combined and conspired to

deprive him of that market for his device, and did so, by the company requiring its agents to agree not to buy, sell, handle, or install his device on any of its cars, on pain of forfeiting their agencies, and by the agents agreeing to and complying with such requirement, and by their advising their customers against the use of it and condemning it, by threatening to cancel the guaranty under which said cars are sold if his device should be attached thereto.

The gist of the second cause of action that defendants combined and conspired to deprive plaintiff of the right to sell his invention to the individual owners of Ford cars who would have purchased it and accomplished that purpose by advising the purchasers of Ford cars not to install it thereon, and by threatening to cancel the warranty of said cars if it should be installed thereon; that they thereby condemned his invention as unfit for the purpose for which it was designed, and held him out as the manufacturer of a thing unfit for the purpose for which it was intended, which amounted to a slander of his invention and of himself as the manufacturer thereof; [\*\*\*7] that all this was done with the malicious intent to injure him.

Defendants demurred on two grounds: First, that the complaint fails to state facts sufficient to constitute a cause of action under the Antitrust Act of Congress (U. S. Comp. St., secs. 8820-8823, 8827-8830) or at common law; and, second, because, if any cause of action is stated, it is [\*105] one solely under the act of Congress of which the State Courts have no jurisdiction.

The Court held that sufficient facts are alleged to constitute a cause of action under the Federal statute, and also at common law, and that the State Courts have jurisdiction of an action brought under the Federal statute, and overruled the demurrer.

The defendants' exceptions question only so much of the decision as holds that the facts alleged are sufficient to constitute a cause of action under the Federal statute, and that the State Courts have jurisdiction of such an action.

On hearing the appeal, we considered and decided all the grounds made by the demurrer. But the plaintiff filed a petition for a rehearing, or a modification of the opinion filed, on the ground that the question whether the complaint is sufficient to make out a [\*\*\*8] cause of action at common law was not before us. That position is well taken, and our decision must be limited to the questions made by the exceptions. Therefore we have stricken out all of it, except so much as disposes of the two questions raised by the exceptions.

The facts alleged do not constitute a cause of action under the Federal statute. The contracts and combinations alleged and the conduct of defendants in pursuance thereof may remotely and indirectly interfere with, and incidentally result in restraining, plaintiff's trade in interstate commerce to some extent, but they do not come within the purview of the act of Congress, because such restraint is not the dominant purpose thereof, nor is it direct and substantial, nor is it unreasonable in law, since it is merely an incidental result of contracts and conduct which appear from the allegations of the complaint to be outside the scope of the act. We cite only a few of many cases in point. *Hopkins v. United States*, 171 U.S. 578, 19 S. Ct. 40, 43 L. Ed. 290; *Bement v. National Harrow Co.*, <sup>1</sup>\*1061 186 U.S. 70, 22 S. Ct. 747, 46 L. Ed. 1058; *Cincinnati Packing Co. v. Bay*, 200 U.S. 179, 26 S. Ct. 208, 50 L. Ed. 428; [\*\*\*9] *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912d, 734; *Virtue v. Creamery Package Co.*, 227 U.S. 8, 33 S. Ct. 202, 57 L. Ed. 393; *Whitwell v. Continental Tobacco Co.*, 125 F. 454, 60 C. C. A. 290, 64 L. R. A. 689.

**HN1** [↑] The State Courts have no jurisdiction of an original action brought under the act of Congress to obtain the relief therein provided for. No binding decision directly in point has been cited, but the conclusion stated is in harmony with the general principles that "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute [\*\*89] prescribes." *Farmers' & Mechanics' Bank v. Dearing*, 91 U.S. 29, 35, 23 L. Ed. 196.

**HN2** [↑] The act provides for the administration of the remedies therein prescribed by the Federal Courts. While there are no words expressly excluding the jurisdiction of the State Courts, such exclusion is implied, on the principle of, "*expressio unius est exclusio alterius.*" In *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174, 35 S. Ct. 398, 59 L. Ed. 520, [\*\*\*10] Ann. Cas. 1916a, 118, the reasoning of the Court strongly favors the exclusive jurisdiction of the Federal Courts to administer the remedies provided by the statute. We do not mean that the State

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Courts would not have jurisdiction to give effect to the statute in some circumstances, as where the validity of contracts in violation thereof is drawn in question in actions of which they have jurisdiction to give relief other than that provided by the statute.

The judgment of this Court is that so much of the order appealed from as holding that the facts alleged in the complaint [\*107] are sufficient to constitute a cause of action under the Federal statute and that the State Courts have jurisdiction of such an action be reversed. The order staying the remittitur is revoked.

Reversed.

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## Coca-Cola Co. v. Vivian Ice, Light & Water Co.

Supreme Court of Louisiana

May 31, 1920, Decided

No. 22686

**Reporter**

150 La. 445 \*; 90 So. 755 \*\*; 1920 La. LEXIS 1875 \*\*\*

COCA-COLA CO. et al. v. VIVIAN ICE, LIGHT & WATER CO.

**Subsequent History:** [\*\*\*1] On Rehearing, January 30, 1922

**Prior History:** Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the Coca-Cola Company and others against the Vivian Ice, Light & Water Company in damages and for an injunction to restrain illegal use of trademark. Judgment for plaintiffs, and defendant appeals.

**Disposition:** Modified and affirmed on rehearing.

### **Core Terms**

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trade-mark, syrup, bottling, beverage, manufacturer, contracts, damages, injunction, fountains, packages, patented, monopoly, purposes, bottler, selling, drink

### **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Civil Actions > Remedies > Injunctions

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Trademark Law > Conveyances > General Overview

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Registration Procedures > State Registration

Trademark Law > ... > Counterfeiting > Trademark Counterfeiting Act > General Overview

Trademark Law > ... > Civil Actions > Remedies > General Overview

**HN1** [] Civil Actions, Injunctions

1898 La. Acts 49, § 3, after providing for the registration of a trademark and the description of the merchandise to be covered by it, provides that no other person, etc., has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive. 1898 La. Acts 49, § 5 provides that every such person (the owner) may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof, and the courts shall have the right to grant injunctions restraining such use, etc.

Trademark Law > ... > Counterfeiting > Trademark Counterfeiting Act > General Overview

## [HN2](#) Counterfeiting, Trademark Counterfeiting Act

A trademark is designed, not only for the protection of the owner of same, but as well for the protection of the purchasing public; it is a guaranty that the buyer is getting the very article signified by the trademark; it is a guaranty by the manufacturer himself that the receptacle contains the very contents intended to be covered by that trademark.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

## [HN3](#) Antitrust & Trade Law, Sherman Act

The owner of a trademark has the right to maintain the integrity of his product by controlling the use of his basic ingredient, to the extent of granting exclusive licenses and maintaining a system of inspection of the final product as sold to the consumer, and such contracts were not in violation of the Sherman Law or the Clayton Law, 26 Stat. 209; 38 Stat. 730.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Commercial Use > Affixation Required

Trademark Law > ... > Counterfeiting > Trademark Counterfeiting Act > General Overview

## [HN4](#) Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

When a manufacturer of an article of food or drink sells it in bulk, and also puts it up in bottles bearing a distinctive trademark, the purchaser of the article in bulk cannot legally bottle it and affix the manufacturer's label to the bottle.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

150 La. 445, \*445La. So. 755, \*\*755La. 920 La. LEXIS 1875, \*\*\*1

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Trademark Law > Conveyances > General Overview

## **HN5** Ownership & Transfer of Rights, Assignments

The invalidity, under Sherman Anti-Trust, Act July 2, 1890, c. 647; 26 Stat. 209; Comp. St. 1913, §§ 8820-8830, of contracts by which the owner of a trademark covering both a syrup and the beverage made therefrom granted the exclusive right to bottle the beverage, does not affect the owner's right to prevent the sale of the beverage under the trademark by one who bottled it without consent.

Trademark Law > Trademark Cancellation & Establishment > General Overview

## **HN6** Trademark Law, Trademark Cancellation & Establishment

A trademark gives the owner of it something in the nature of a monopoly; a monopoly not in the article sold under the trademark, perhaps, but a monopoly of that article as sold under the trademark. It does not give such a monopoly as does a patent, but it is a monopoly nevertheless, and one that cannot be taken away by any anti-trust law.

Trademark Law > ... > Remedies > Equitable Relief > General Overview

## **HN7** Remedies, Equitable Relief

See 1898 La. Acts 49, § 5.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Trademark Law > ... > Remedies > Damages > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > ... > Infringement Actions > Remedies > General Overview

## **HN8** Judges, Discretionary Powers

The exact extent of the damages in a trademark infringement case is hard to ascertain, and it is the evident purpose of the legislature to allow a reasonable amount of discretion to the court in determining the amount to be awarded.

**Counsel:** Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant.

Blanchard, Goldstein & Walker, of Shreveport, and Candler, Thompson & Hirsch, of Atlanta, Ga., for appellees.

**Judges:** DAWKINS, J. O'NIELL, J. dissents.

**Opinion by:** DAWKINS

## **Opinion**

[\*446] [\*\*755] DAWKINS, J. This is an action in damages and for injunction to restrain the alleged illegal use of a trade-mark.

Defendant admits substantially the allegations of fact charged against it, but denies the conclusions of law drawn therefrom by the plaintiff.

There was judgment below in favor of plaintiff for the sum of \$ 1,000, under the trade-mark statute of this state, enjoining the defendant from using the trade-name of the plaintiff, ordering it to account to the plaintiffs for the profits derived from the same, and that it deliver up to plaintiffs, or some [\*\*\*2] one designated by them, "any and all bottles, crowns, labels, boxes, or advertising matter in its possession upon which appears the name 'Coco-Cola,' or in association with any other words, and also all of the products in a form sufficiently similar to the product of the plaintiffs to cause deception," and that plaintiffs be decreed to have the sole and exclusive use of the trade mark or name "Coca-Cola," in connection with any drink or beverage.

Defendant prosecutes this appeal.

[\*\*756] Opinion.

The plaintiffs are the Coca-Cola Company, a Georgia corporation, the Coca-Cola Bottling Company, incorporated under the laws of [\*447] Tennessee, and the Star Bottling Works, Limited, a Louisiana corporation. The Georgia corporation is what might be termed the parent company, owner and possessor of the trade-mark "Coca-Cola," and under which it manufactures two kinds of syrup bearing that name; one to be used in the preparation of a soft drink of the same name by soda fountains, which is sold to the trade generally, and the other to be used in putting up the beverage for distribution in bottles. The second syrup is distributed exclusively through the Tennessee corporation, which [\*\*\*3] is required to make definite and specific contracts with those to whom the syrup is sold for bottling purposes, and under which certain well-defined restrictions are imposed as to the quantity and proportions of the syrup to be used, and as to the right of inspection by representatives of the Coca-Cola Company, in order to determine the sanitary conditions under which the bottled drink is to be made; the purpose being, it is alleged, to maintain a particular standard of purity and cleanliness to sustain the reputation of the beverage.

The formula for making the syrup is a secret one, but the record discloses that the kind furnished to soda fountains is not as strong as that intended for bottling purposes; the proportions of ingredients used being considerably dissimilar.

Defendant purchased a considerable quantity of the syrup intended for use at fountains, and by the use of a larger proportion than that intended for bottling, and adding some caramel syrup for coloring purposes, had been and was manufacturing, putting up, and selling in bottles to the trade generally a beverage with the name "Coca-Cola" stamped on the caps and blown into the bottles, and with the name Vivian Ice [\*\*\*4] Company stamped thereon as the manufacturer or bottler.

The lower court has covered the case so [\*448] admirably in its written opinion that we adopt and quote from the same at length as follows:

"There can be no dispute about plaintiffs being the owners of this trade-mark, both under the laws of the United States and of the state of Louisiana. Under the United States registration, it covered, not only the syrup, but the beverage or drink to be made from the syrup.

"Section 3 of Act 49 of 1898, [HN1](#)[] after providing for the registration of the trade-mark and the description of the merchandise to be covered by it, provides that 'No other person,' etc., 'has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive.' Section 5 of this same act provides that 'Every such person [the owner] may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof,' and the courts shall have the right to grant injunctions restraining such use, etc.

150 La. 445, \*448L<sup>90</sup> So. 755, \*\*756L<sup>920</sup> La. LEXIS 1875, \*\*\*4

"Defendant has undoubtedly used the trade-mark of plaintiffs without their consent, and under this act we do not think it makes any difference [\*\*\*5] whether the article contained in the bottle was genuine Coca-Cola or not.

"But, irrespective of this state law, we shall discuss the case from the standpoint of the federal law.

**HN2**[] "A trade-mark is designed, not only for the protection of the owner of same, but as well for the protection of the purchasing public; it is a guaranty that the buyer is getting the very article signified by the trade-mark; it is a guaranty by the manufacturer himself that the receptacle contains the very contents intended to be covered by that trade-mark.

"We shall first take up for discussion the authorities cited by counsel for defendant, which authorities, it is contended, bear out the contention that these contracts are in violation of the anti-trust laws, and the equitable writ of injunction does not lie to maintain them.

"The first case is that of [Adams v. Burke, 84 U.S. 453, 17 Wall. 453, 21 L. Ed. 700](#). All that was held in that case was that when a patented article was once sold the purchaser of same had the right to use it wherever he pleased, and that the right of use stood on a different footing from the right to make and sell.

"The next case is that of [Keeler v. Folding Bed Co., 157 U.S. 659, \[\\*\\*\\*6\] 15 S. Ct. 738, 39 L. Ed. 848](#), in which the court said: 'One who buys patented articles of manufacture from one authorized to sell them within the territory of [\*449] the purchase becomes possessed of an absolute property in such articles, unrestricted in time or place, and may sell them in other territory of other assignees of the patent, although he purchased them for the purpose of selling them in such other territory.' We do not think this case has any bearing; if the defendant had been selling the syrup in the original package under the original trade-mark, having purchased same and becoming the absolute owner thereof, then there would be some similarity of cases, and the defendant would have the right to so sell.

"The next case is that of [Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 S. Ct. 722, 52 L. Ed. 1086](#). In that case the plaintiff was attempting to fix the price of the copyrighted book by contract with the retailer, and the court held the same to be in restraint of trade: there was no question involved in that case of trade-mark, or the protection of the integrity of the goods represented by that trade-mark, but merely a price-fixing scheme, something that is not [\*\*\*7] attempted in this case.

"The case of [Miles Medicine Co. v. Park, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502](#), was also nothing but a price-fixing scheme, which was held to be in restraint of trade.

"In the case of Park v. Hartman, 153 Feb. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, known as the Peruna Case, the question of infringement of a trade-mark or unfair competition did not arise; it was merely another attempt to fix prices for retailers by means of contracts with the retailers.

"In the [Appollinaris Case \(C. C.\) 23 Blatchf. 459, 27 F. 18](#), it was the genuine 'Hunyadi-Janos' water as [\*\*757] put out by the original bottler and owner of the trade-mark, and as bottled by the owner of the trade-mark.

"The case of Motion Picture Patents Co. v. Universal Film Mfg. Co. (decided by the Supreme Court of the United States on April 9, 1917) [243 U.S. 502, 37 S. Ct. 416, 61 L. Ed. 871](#), L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, the attempt was made by way of a licensed patented machine, and notices stamped thereon, to limit the use of such machine to a certain class of pictures, and no other. The court held such contracts to be in restraint of trade. While that case shows the trend [\*\*\*8] of the court, the case did not involve the vital principle involved in the present case.

"Practically the same principle in the last-quoted case was also involved in the case of [Straus v. Victor Talking Machine Co., 243 U.S. 490, 37 S. Ct. 412, 61 L. Ed. 866](#), L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, also decided on April 9, 1917.

"Counsel for defendant also quotes the case [\*450] of [Coca-Cola Co. v. Bennett \(D. C.\) 225 F. 429](#), refusing an injunction on the ground that these contracts were in restraint of trade; counsel saying in the brief filed herein: "This

contention as to the right to confine the sale to licensees for purposes of inspection, etc., was exploded by the federal court in the Bennett Case refusing injunction, which virtually denied the proposition dismissing the Coca-Cola claim, in which decree the Coca-Cola Company virtually agreed and took no appeal therefrom.<sup>1</sup> We shall discuss this case later on, but counsel is mistaken about the appeal, for an appeal was taken to the United States Court of Appeals, and the case reversed; the case on appeal being [238 F. 513](#), 151 C. C. A. 449.

"In the case of [Krauss v. Peebles \(D. C.\) 58 F. 585](#), Judge Taft used the following [\*\*\*9] significant and almost prophetic language: 'It is doubtful whether the sale of merchandise in bulk under a trade-mark of the maker carries with it as incident thereto the right in the vendee to use the same trade-mark as a trade-mark on smaller and retail packages. It is true that the vendee cannot be prevented from stating the truth in reference to his wares, and that he may place upon his packages the statement that their contents were made by the real maker, and that they were sold by him under his trade-mark, but it seems to me that it is a different thing for the vendee to use the trade-mark as such. Such use might be characterized as the use of the maker's sign manual to guarantee that the contents of the smaller packages are his manufacture, whereas the truth of the assertion depends wholly on the good faith of the vendee.' In this case the goods put out in the smaller packages were not exactly the same as the original goods, and not exactly the same as the smaller packages put out by the owner of the trade-mark, and it was held that the owner of the trade-mark had the right to protect the integrity of his goods, and that it made no difference whether the other goods were better [\*\*\*10] or worse than those put out by the owner of the trade-mark, that it was a violation of the trade-mark and could be enjoined. See, also, the case of [Hires v. Xepapas \(C. C.\) 180 F. 952](#), which was also a case of two syrups, one intended for bottling and one for fountain use, and the infringer attempted to use the fountain syrup for bottling, and it was held that the owner of the trade-mark had the right to protect the integrity of his goods.

"In the case of [Coca-Cola Co. v. Butler \(D. C.\) 229 F. 224](#), exactly the same defense was made as in this case, and it was held that [HN3](#)<sup>1</sup> the owner of the trade-mark had the right to maintain [\*451] the integrity of his product by controlling the use of his basic ingredient, to the extent of granting exclusive licenses and maintaining a system of inspection of the final product as sold to the consumer, and that such contracts were not in violation of the Sherman Law or the Clayton Law (26 Stat. 209; 38 Stat. 730). This decision was handed down by a United States District Judge, and so far as we can find, was never appealed, but it was quoted with approval by the United States Court of Appeals in the Bennett Case.

"In the Bennett Case, as it was [\*\*\*11] decided by the lower court, it was the genuine bottler's syrup used, and this syrup was sold to Bennett for the very purpose for which he was using it. His right to bottle being revoked as regular licensed bottler (the company) took up the territory. Further, as the lower court stated, there was no question presented of the right of plaintiff to protect its business against unfair competition in the palming off by defendants of a spurious or inferior article for the goods manufactured from plaintiff's product, and there was, furthermore, no contention in that case as to the proper syrup for bottling purposes.

"In the same case on appeal ([238 F. 513](#), 151 C. C. A. 449), the syllabus is as follows:

"A manufacturer of a syrup used with carbonated water to produce a beverage which was sold either at soda fountains or in bottles, whose registered trade-mark covered both the syrup and the beverages, but who bottled none of the beverage, having contracted with others therefor under contracts requiring the purchase of syrup from the manufacturer and its preparation under regulations to protect the quality, can prevent one who has not the manufacturer's consent from bottling the syrup with [\*\*\*12] carbonated water, even in accordance with the regulations, and selling it under the trade-mark, since otherwise the manufacturer would have no means of protecting the quality of the goods sold under his trade-mark.

[HN4](#)<sup>1</sup> "When a manufacturer of an article of food or drink sells it in bulk, and also puts it up in bottles bearing a distinctive trade-mark, the purchaser of the article in bulk cannot legally bottle it and affix the manufacturer's label to the bottle.

[HN5](#)<sup>1</sup> "The invalidity, under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820-8830), of contracts by which the owner of a trade-mark covering both a syrup and the beverage made therefrom

150 La. 445, \*451 La. So. 755, \*\*757 La. 920 La. LEXIS 1875, \*\*\*12

granted the exclusive right to bottle the beverage, does not affect the owner's right to prevent [\*452] the sale of the beverage under the trade-mark by one who bottled it without consent.' \* \* \*

"If the owner of a trade-mark covering both the syrup and the beverages made from the syrup can prevent the purchaser of the syrup in bulk from making a beverage out of the syrup and putting it on the market under the distinctive trade-mark of the seller, then we can see no good reason why any distinctive system of [\*\*\*13] inspection between the owner of [\*\*758] the trade-mark and the bottler of the syrup as a beverage, the same to be placed on the market under the distinctive trade-mark, would be invalid as in violation of the anti-trust laws, and likewise any reasonable contract to that effect, and other reasonable stipulations to protect the integrity of that trade-mark.

**HN6** "A trade-mark gives the owner of same something in the nature of a monopoly; a monopoly not in the article sold under the trade-mark, perhaps, but a monopoly of that article as sold under the trade-mark. It does not give such a monopoly as does a patent, but it is a monopoly nevertheless, and one that cannot be taken away by any anti-trust law."

See, also, *American Tobacco Co. v. Polacsek (C. C.) 170 F. 117; Bulte v. Igleheart, 137 F. 492*, 70 C. C. A. 76; *Menendez v. Holt, 128 U.S. 514, 9 S. Ct. 143, 32 L. Ed. 526; Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (D. C.) 224 F. 566.*

The lower court also found that, while defendant was putting out as good a quality of goods as its knowledge of the matter would permit, the difference between its product and that produced by the duly authorized representatives of the Coca-Cola [\*\*\*14] Company was marked, and we think this finding is amply supported by the record. However, under the manner and form in which the beverage was put to the trade, the difference from the standpoint of appearance could not be easily detected by the consumer, and the case falls clearly within the doctrine announced in *Cusimano & Co. v. Olive Oil Importing Co., Ltd., 114 La. 312, 38 So. 200.*

Defendant complains that the court below allowed the plaintiffs to recover the sum of \$ 1,000 damages, and also ordered defendant to account for the profits which had been [\*453] realized on the sales of the beverage; it being contended that there was no prayer to support such a recovery, in the first place, nor any provision of law under which it could be allowed, if claimed. However, paragraph C of the prayer is as follows:

"That the damages sustained by your petitioners, and each of them, by reason of the defendant's aforesaid unlawful acts, be ascertained, and that your petitioners, and each of them, have judgment therefor against the defendant, and that the said defendant be decreed to pay over to your petitioners, and each of them, the amount of said profits, together with all damages sustained."

[\*\*\*15] The statute provides that --

**HN7** "All courts of competent jurisdiction shall grant injunctions \* \* \* and may award the complaint in any such suit damages resulting from such manufacture, use, sale or display as may be by the said court deemed just and reasonable, and shall require the defendants to pay to such person \* \* \* all profits derived," etc. Act No. 49 of 1898, § 5.

As stated in the case of *Cusimano & Co. v. Olive Oil Importing Co., Ltd., supra, HN8* the exact extent of the damages in such cases is hard to ascertain, and it was the evident purpose of the Legislature to allow a reasonable amount of discretion to the court in determining the amount to be awarded. In view of the facts and circumstances of the present case, we do not think that authority has been abused.

For the reasons assigned, the judgment appealed from is affirmed, at the cost of the appellant.

O'NIELL, J., dissents from the decree allowing damages, and otherwise concurs.

## Washington Cranberry Growers Ass'n v. Moore

Supreme Court of Washington, Department Two

November 5, 1921

No. 16418

**Reporter**

117 Wash. 430 \*; 201 P. 773 \*\*; 1921 Wash. LEXIS 881 \*\*\*; 25 A.L.R. 1077

Washington Cranberry Growers Association, Respondent, v. A. B. Moore, Appellant

**Prior History:** [\*\*\*1] Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered December 18, 1920, in favor of the plaintiff, in an action for an injunction, tried to the court.

**Disposition:** Affirmed.

### **Core Terms**

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grower, Cranberry, berries, parties, injunction, damages, void, associations, selling, fruit, restrain, agrees, cases, circumstances, contracts, marketing, specific performance, accomplish, notice

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

#### **HN1[] Regulated Practices, Price Fixing & Restraints of Trade**

Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Governments > Courts > Common Law

#### **HN2[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

In determining the validity at common law of a combination claiming to be in restraint of trade, the true test is whether they afford fair and just protection to the parties thereto or whether they are so broad as to interfere with the interests of the public.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Governments > Courts > Common Law

### **HN3** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Considering whether the restraint is such only as a broad and fair protection of the interests of the public in favor of whom it is given and not so large as to interfere with the interests of the party. Whatever restraint is larger than the necessary protection of the public requires can be of no benefit to either. It can only be oppressive which is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Remedies > Equitable Relief > Injunctions

Contracts Law > Remedies > Specific Performance

### **HN4** Types of Damages, Compensatory Damages

If a contract, by its terms, shows an intent to rely upon damages, or if there is an adequate remedy at law, injunctive relief cannot be had.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Remedies > Equitable Relief > Injunctions

### **HN5** Injunctions, Permanent Injunctions

The fact that a contract is one which cannot be specifically enforced in a court of equity by reason of the fact that it requires the performance of continuous duties does not prevent the court from entering an injunction restraining its breach, which indirectly accomplishes the same result.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

## **HN6** [down arrow] **Types of Contracts, Covenants**

The fact that a contract provides that, in case of breach, the damage shall be as there admitted, does not of itself conclusively establish that the parties contemplate that, upon the breach thereof, damages would be an adequate remedy. It is a question of intention in each case, to be deduced from the whole instrument and the circumstances, and if it appear that the performance of the covenant is intended, and not merely the payment of damages in case of breach, the contract will be enforced.

## **Headnotes/Summary**

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### **Headnotes**

#### **WASHINGTON OFFICIAL REPORTS HEADNOTES**

**Contracts (45) -- Monopolies -- Validity -- Restraint of Trade -- Controlling Production and Price of Commodity.** A contract requiring a grower of cranberries to ship all the crop grown by him to an association for the purpose of marketing and sale with the object of enabling the growers to obtain a uniform price for their product, but which does not operate to limit production or control the price in any particular locality, is not void as against public policy, nor as [contravening art. 12, § 22](#), of the state constitution against monopolies, nor the Federal anti-trust act.

**Injunction (24) -- Contracts -- Restraining Breach -- Damages as Adequate Remedy.** Injunction will lie to restrain the breach of a contract, thereby indirectly effecting its specific performance, where the intent was to rely on performance and the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous [\*\*\*2] duties.

**Same(24).** A breach of a contract may be properly restrained, where it provides for damages in case of a grower's failure to deliver his crops to an association for marketing, merely as an estimate, but recites it is impossible to fix the actual damages sustained in case of a grower's failure to abide by the agreement, and the purport of the whole contract shows that the parties intended to rely upon the performance of the covenant and not merely on the payment of damages for the breach thereof.

**Counsel:** *Welsh & Welsh*, for appellant.

*John J. Langenbach*, for respondent.

**Judges:** Main, J. Parker, C.J., Mitchell, Tolman, and Bridges, JJ., concur.

**Opinion by:** MAIN

## **Opinion**

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[\*430] [\*\*773] The purpose of this action was to restrain the breach of a contract. The trial resulted in a permanent injunction, from which the defendant appeals.

[\*431] The Washington Cranberry Association is a corporation organized under the laws of this state and is engaged in the business of marketing cranberries for those with whom it has contracts, and in some instances for independent growers. The appellant had entered into a contract with the corporation by which he agreed to deliver [\*\*\*3] to it all the cranberries grown by him in Pacific county on land owned by him. The contract provides as follows:

"Witnesseth: That the grower, for and in consideration of one dollar paid him by the association, receipt of which is hereby acknowledged, and of the covenants and agreements herein contained, hereby nominates, appoints and agrees to employ the association as exclusive sales agents for the purpose of selling and marketing the entire crop of cranberries now growing or which shall be grown for shipment by the grower or for him, or in which he may have any interest as landlord or tenant, upon all those certain tracts of land situated in Pacific county, Washington, described as follows: Metes and bounds in section 27, township 16, north of range 11, west of Willamette Meridian, during the year 1916 and every year thereafter continually, provided, however that the grower may cancel this contract on the 15th day of January in any year by giving notice in writing to the association in writing at least 15 days prior to that date. Upon giving notice the grower shall, prior to said 15th day of January, pay any and all indebtedness due from him to the association and deliver his [\*\*\*4] copy of the said contract to the manager of the association, and the same shall thereupon be cancelled.

"[\*\*774] The grower agrees at his own expense to cultivate, care for and harvest said crops. All fruit to be delivered by the grower at the warehouse of packing station of the association, at such place and at such time and in such manner as may be designated by the said association, which shall give notice to the grower for such delivery.

[\*432] "In the event that grower shall fail to fulfill any or all of the requirements set forth in the foregoing paragraph, the association through its manager shall give to the grower written notice setting forth the default of the grower, and in event the default so specified shall not have been overcome or corrected within ten (10) days following delivery of such written notice to grower, it is mutually agreed that the association may consider this contract as cancelled, and shall be relieved from further responsibility with regard to marketing the grower's fruit hereunder.

"The grower fully understands that the purpose, among others, of this agreement, is to maintain and increase to its greatest efficiency the association as well [\*\*\*5] as the Central Selling Agency with which it is now or hereafter may be affiliated, and to accomplish this purpose it is necessary that he shall strictly and fully comply with and perform the stipulations and agreements on his part agreed herein to be performed, and therefore he hereby stipulates and agrees that he will not sell or otherwise dispose his said fruit to any other firm, person or corporation other than the aforesaid association; and it is hereby further mutually agreed that inasmuch as it is impossible at this time to fix and estimate the actual damage which will be sustained by the association in the event that the grower shall fail to abide by his agreement to market his said fruit through the association, such damages are hereby estimated and agreed upon as one dollar per box for each box of cranberries grown or sold by the grower, which sum shall be allowed in any action brought by the second party to recover damages for the breach of this agreement by the grower should the association elect, as it may elect, to bring such action.

"In consideration of its appointment as exclusive sales agent of growers' fruit crop, as above set forth, and in further consideration of [\*\*\*6] the agreements made by the grower with the association as hereinbefore set forth, the association agrees to receive, ship and sell all of said fruit to the best possible advantage. To promptly remit returns therefor, less its regular charge for aforesaid services and for any other deduction, [\*433] including money, due for advances for supplies furnished by the association to the grower, which indebtedness grower agrees may be treated by the association as a first lien on the proceeds from his fruit, and payment therefor to be deducted accordingly.

"In witness whereof the association has caused this contract to be signed and sealed in its name and behalf by its president and its secretary, and all other parties have hereto affixed their individual signatures. Washington Cranberry Growers' Association, C. K. Cooper, President. Attest: W. M. Rounds, Secretary. A. B. Moore."

The Columbia River Cranberry Association is a corporation engaged in the same business as that of the Washington Cranberry Association, as is also the Oregon Cranberry Association, a corporation. After the contract above referred to was made, the three corporations named entered into a contract whereby [\*\*\*7] there was created what is referred to as the Pacific Cranberry Exchange, and appointed one L. S. Martin as the exclusive agent for the sale of all berries controlled by the three corporations. The cranberry exchange was composed of three members, a representative of each of the corporations. In the contract they are referred to as "the

associations." It is provided that the cranberries shall be delivered f. o. b. cars at points designated by Martin, and that he agrees that

"he will immediately upon acceptance by his representative of cranberries, upon surrender of bill of lading, advance to the Pacific Cranberry Exchange, the agent of said associations, the sum of \$ 2.00 per box of the size heretofore indicated, said bill of lading hereinabove mentioned shall be forwarded by said Pacific Cranberry Exchange, with draft attached to the Bank of California, of Portland, Oregon.

"The representatives of the said L. S. Martin shall have access to the warehouses of the associations and to the warehouses or store-rooms of the individual [\*434] members of the associations, to determine the quantity, conditions and quality of berries available at any given time. A representative of [\*\*\*8] the Pacific Cranberry Exchange may at any reasonable time, have access to the books of the said L. S. Martin, at his offices in Portland, Oregon, for the purpose of checking sales and returns made by the said L. S. Martin.

"All returns shall be made to the Pacific Cranberry Exchange, the agent of said associations, on or before thirty days after the expiration of the month in which the berries are shipped to the said L. S. Martin.

"The associations agree that the said L. S. Martin shall receive a five per cent commission on all gross sales of all berries sold by it to jobbers in the states of Oregon and Washington, and six and one-half per cent on all other berries sold by the said L. S. Martin and the said L. S. Martin hereby agrees to accept said commissions in full settlement for his services in the sale of said berries.

"The said L. S. Martin shall only be liable for actual negligence on his part, and no liability shall be attached to him by reason of damages caused to the associations or to individual members thereof, by strikes, embargo, shortage of equipment, or any other cause beyond the control of said L. S. Martin by use of reasonable diligence.

"It is understood and [\*\*\*9] agreed that the fullest cooperation of the associations and of the Pacific Cranberry Exchange will be extended to the said L. S. Martin in the handling and marketing of said berries.

"All sales shall be made at the market price, or at a price to be mutually agreed upon by said L. S. Martin and the Pacific Cranberry Exchange."

[\*\*775] In Pacific county there were approximately eighty cranberry growers, and sixty of these had contracts with the respondent similar to the one set out. After the contract was entered into and during the year 1920, the appellant produced 1,300 boxes of cranberries, and five hundred of these were sold to parties other than the contract provided. As above stated, [\*435] this action was brought to restrain the appellant from selling cranberries to parties other than the respondent. The appellant makes three principal contentions. First, that the contract is void at common law as against public policy; second, that it is contrary to art. 12, § 22, of the constitution of this state, which is a section covering the matter of monopolies and trusts; and third, that the contract is void as being in contravention of the Sherman Anti-Trust Act passed [\*\*\*10] by the Federal Congress on July 2, 1890 (U.S. Stat. at Large, vol. 26, p. 209, ch. 647).

To determine whether the contract is void for any of the reasons stated it is necessary to read the contract in connection with the procedure under it and the result which was produced thereby. The appellant contends that a monopoly is created, trade restrained, the output of cranberries limited and prices are controlled. It may be admitted that, if this is the effect of the contract and the business transacted under it, it would be void and unenforceable. The contract required the appellant to deliver all cranberries grown by him to the respondent for marketing until it should be terminated in accordance with the terms therein stated. The purposes of the contract, among others as stated therein, are to maintain to its greatest efficiency the association, as well as the central selling agency with which it is now or may be hereafter affiliated. The corporation is made the exclusive sales agent for the growers' fruit crop. The evidence shows that the purpose of entering into the contracts, of which the one above set out is one, was as follows:

Before the corporation was organized, certain [\*\*\*11] growers at times put upon the market cranberries of an inferior grade and this caused merchants to refuse to buy berries from Pacific county. In order to [\*436] avoid this

situation it was necessary to enter upon an advertising campaign to stimulate the use of berries and to cause berries of uniform grade to be placed upon the market. Another purpose was to secure a uniform price and avoid flooding any one market, as would be done if a large quantity of berries was shipped to a particular point at one time. Under the selling agency, the quantity of berries going to any one market was regulated, and in this way tended to maintain, or "hold up," as the evidence shows, the price. It was also for the purpose of enabling all growers to receive for their berries a uniform price. There is nothing in the contract or the operation under it that limits the production or controls the price in any particular locality. While the selling agency was located in Portland, the berries handled through the cranberry exchange representing the three corporations came in direct competition with eastern berries as well as with the berries of independent growers. The cranberry association controlled [\*\*\*12] about two per cent of the berries produced in the United States, the independent growers, thirty-two per cent, and the American Cranberry Exchange, which was an organization operating in New York and Chicago, sixty-five per cent. The berries sold through the selling agency in Portland created by the three corporations sold at the market price and the berries were shipped by the corporations to such points as Martin, the selling agent, designated. The evidence is that the price of the berries in the various markets was fixed and controlled by the American Cranberry Exchange. If the Pacific berries could not be sold for the same price as the eastern berries the selling agent, after conferring with the members of the exchange, would sell for a lesser price. The contract and the delivery of berries [\*437] under it not resulting in limiting the production, controlling or fixing of the price in any particular market, cannot be said to be void as against public policy, or under the constitutional provision above referred to, or under the anti-trust act.

The question as to when a contract is a restraint of trade was fully discussed in *Fisher Flouring Mills Co. v. Swanson*, 76 [\*\*\*13] Wash. 649, 137 Pac. 144, 51 L.R.A. (N.S.) 522. It was there recognized that it was difficult to state the rule which would cover all cases, and that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered in determining the validity of a contract. It was there said:

"The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare must be considered, and that of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: HN1[<sup>1</sup>] Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests [\*\*\*14] of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and [\*776] fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy."

In Finck v. Schneider Granite Co., 187 Mo. 244, 86 S.W. 213, 106 Am. St. 452, it was stated that, HN2[<sup>1</sup>] in determining [\*438] the validity at common law of a combination claiming to be in restraint of trade, the true test is "whether they afford fair and just protection to the parties thereto or whether they are so broad as to interfere with the interests of the public." In United States v. Addyston Pipe & Steel Co., 85 F. 271, in determining whether a contract was void at common law or under the anti-trust act, the test applied was whether there was a reasonable restraint of trade,

"HN3[<sup>1</sup>] considering whether the restraint is such only as a broad and fair protection of the interests of the public in favor of whom it is given and not so large as to interfere with the interests of the party. Whatever restraint is larger than [\*\*\*15] the necessary protection of the public requires can be of no benefit to either. It can only be oppressive which is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

A large number of cases are cited in the briefs where contracts have been held void as being a restraint of trade, but it does not seem necessary to review these in detail. So far as we are informed, no case holds that a contract is void which does not limit the production or control or fix the price in a particular market. As above pointed out, the

contract here under consideration, considered in connection with the evidence showing the operation under it, neither limits the production or fixes the price. The cases of Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 P. 391, 9 Am. St. 211, and Cravens v. Carter-Crume Co., 92 F. 479, are cases where the combinations there in question limited the production and increased the price, and are therefore not in point in this case.

The next question which arises is whether the respondent is entitled to injunctive relief. The appellant contends that there should be recourse [\*\*\*16] only for damages. [\*439] The purpose of the action was not to enforce specific performance directly, but to accomplish that indirect result by restraining the appellant from selling berries to any other person than the respondent. It will be admitted that HN4[<sup>1</sup>] if the contract, by its terms, shows an intent to rely upon damages, or if there is an adequate remedy at law, injunctive relief cannot be had. The contract provides that, to accomplish its purpose, it is necessary that the appellant strictly and fully comply with and perform the stipulations and agreements on his part. While the contract provides for damages, it also recites that it is impossible to fix and estimate the actual damage sustained in event the grower shall fail to abide by the agreement, and the damages are only estimated. The contract, we think, fails to show an intent of the parties that, in the event of breach, the only recourse would be an action for damages. There was not an adequate remedy at law because an action for damages would not be sufficient to protect the respondent and the other growers which it represented in accomplishing the purposes of the undertaking. Those purposes are fully set out above [\*\*\*17] and need not here be repeated. HN5[<sup>1</sup>] The fact that the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties does not prevent the court from entering an injunction restraining its breach, which indirectly accomplishes the same result. Western Union Telegraph Co. v. Union Pacific R. Co., 1 McCrary's Cir. Ct. Rpts 558, 3 Fed. 423; Chicago & Alton R. Co. v. New York, L. E. & W.R. Co., 24 Fed. 516; American Electrical Works v. Varley Duplex Marget Co., 26 R.I. 295, 58 Atl. 977. In the case last cited, upon this question it was said:

"The respondent, however, contends that the injunction should not be granted, because it would result [\*440] in compelling indirectly a specific performance of the contract in the case, where the court would not directly order such performance.

"We do not think that this contention is in accord with the best and most modern authorities. The following cases, amongst others which might be cited, sustain the complainant's position. (Citing numerous authorities.)

"A very clear and well-considered statement of the law upon the question under [\*\*\*18] consideration according to the most modern authorities is to be found in the opinion of Judge Lowell in *Singer Sewing Machine Co. v. Union But. & Em. Co., supra*, in which he says: 'The two points of law are not without difficulty. The relief asked is specific performance and injunction. It is argued with great ability by the defendants, that the complainant is not entitled to specific performance, and that, therefore, it can not have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the conclusion. If the court can not order a contract for the making of button-hole machines to be specifically performed by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract unless the contract were of such a character that the court could fully enforce the performance of it on both sides.' Judge Lowell here examines the authorities and the development of the modern rule, and then proceeds: 'I think the fair result of the later cases may be thus [\*\*\*19] expressed: If the case is one in which the negative remedy of injunction will do substantial justice between [\*\*777] the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.'"

[\*441] HN6[<sup>1</sup>] The fact that the contract provides that, in case of breach, the damage shall be as there admitted, does not of itself conclusively establish that the parties contemplated that, upon the breach thereof, damages would be an adequate remedy. It is a question of intention in each case, to be deduced from the whole instrument and the circumstances, and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of breach, the contract will be enforced. Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E.

117 Wash. 430, \*441 P.2d 773, \*\*777 P.2d 921 Wash. LEXIS 881, \*\*\*19

419, 60 Am. Rep. 464; Harris v. Theus, 149 Ala. 133, 43 So. 131, 123 Am. St. 17, 10 L.R.A. (N.S.) 204; Wilkinson v. Colley, 164 Pa. 35, 30 A. 286, 26 L.R.A. 114; [\*\*\*20] Heinz v. Roberts, 135 Iowa 748, 110 N.W. 1034; Ropes v. Upton, 125 Mass. 258; Zimmermann v. Gerzog, 13 A.D. 210, 43 N.Y.S. 339.

Considering the terms of the contract and all the attendant circumstances, we are of the opinion that it was not intended by the parties thereto that the damages claimed therein should be the only price of the appellant's breach of the agreement, and that the remedy at law would not be adequate.

The judgment will be affirmed.

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End of Document

## Griffin v. Palatine Ins. Co.

Court of Appeals of Texas

March 8, 1922, Decided

No. 187-3232.

**Reporter**

238 S.W. 637 \*; 1922 Tex. App. LEXIS 440 \*\*

GRIFFIN v. PALATINE INS. CO. et al. \*

**Prior History:** [\*\*1] Error to Court of Civil Appeals of Seventh Supreme Judicial District.

On rehearing. Former opinion [235 S.W. 202](#) set aside.

See, also, [202 S.W. 1014](#).

**Disposition:** Judgment of Court of Civil Appeals affirmed, and cause remanded to the district court for new trial.

## **Core Terms**

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commerce, transportation, combinations, commodity, insurance company, preparation, insurance business, Subdivision, insure, merchandise, anti-trust, prohibits

## **LexisNexis® Headnotes**

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Civil Procedure > Appeals > Standards of Review > General Overview

### [\*\*HN1\*\*](#) Appeals, Standards of Review

It is the province of a court of civil appeals to pass finally upon the facts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Readjustments > Formation > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Readjustments > General Overview

### [\*\*HN2\*\*](#) Public Enforcement, State Civil Actions

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\* Rehearing denied April 12, 1922.

1903 Tex. Gen. Laws 94, § 1(1)-(4), Tex. Rev. Civ. Stat. art. 7796, provides in part that a "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes: 1) to create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of the State of Texas; 2) to fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation; 3) to prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation; and 4) to fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Transportation Law > General Overview

### **[HN3](#) [down] Public Enforcement, State Civil Actions**

1903 Tex. Gen. Laws 94, § 1(5), Tex. Rev. Civ. Stat. art. 7796, provides in part that to execute any contract or obligation by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity or to make any insurance contract at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall in any manner affect the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude free competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation, whereby its price or such charge may be in any manner affected.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

### **[HN4](#) [down] Public Enforcement, State Civil Actions**

An agreement or combination among insurance companies not to write insurance for any individual or class of individuals comes both within the letter and the spirit of Tex. Rev. Civ. Stat. art. 7796.

## **Headnotes/Summary**

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### **Headnotes**

**Monopolies -- Agreement of insurance companies not to write insurance for persons held illegal.**

Under Rev. St. arts. 7796-7809, and Pen. Code 1911, arts. 1454-1479, subds. 1, 3, 5, prohibiting combinations to create restrictions in trade or commerce, and making such acts illegal, the refusal of insurance companies to write insurance for an individual is illegal.

**Counsel:** W. H. Kimbrough, of Amarillo, for plaintiff in error.

Andrews, Streetman, Burns & Logue, of Houston, and Thompson, Knight, Baker & Harris, of Dallas, for defendants in error.

**Judges:** McCLENDON, P. J. CURETON, C. J.

**Opinion by:** McCLENDON; CURETON

## Opinion

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[\*637] McCLENDON, P. J. The Court of Civil Appeals, after a general statement of the case, concluded that a combination or agreement not to have business dealings with another was not an unlawful or actionable conspiracy unless others not party to the agreement were actively induced not to deal with such person, or false statements were circulated concerning him in furtherance of such combination. The court then held that the evidence was insufficient to warrant a finding of conspiracy. Our construction of that finding was that it related, not to an agreement not to insure plaintiff but to an actionable conspiracy as defined by that court, and therefore that there was no finding [\*\*2] by that court inconsistent with the judgment of the trial court upon our holding upon the law of the case. A more mature study of the opinion of the Court of Civil Appeals has led us to conclude that that opinion must be construed as a finding of fact against the existence of any agreement among defendants not to insure plaintiff. Regardless of our holding upon the law of the case, [HN1↑](#) it is the province of the Court of Civil Appeals to pass finally upon the facts, and, in view of this construction of the findings of that court, it follows that under the previous holdings of the Supreme Court the case must be remanded to the trial court for a new trial.

Under the holding in our former opinion that the judgment of the trial court should be affirmed, it was unnecessary to pass upon certain questions therein specified. Since, however, the case is to be remanded, we think those questions become material as a guide to the trial court.

The holding of the Court of Civil Appeals that there was no evidence to go to the jury upon the issues of whether defendants had actively induced or persuaded other insurance companies not to deal with plaintiff or had circulated false reports concerning him [\*\*3] is, in our opinion, erroneous. The evidence in this regard is in large measure circumstantial, as is usually true in cases of this character. It would not be proper for us to discuss the evidence in detail. It is sufficient to say that in our opinion there is ample support in the evidence upon both of those issues, as well as upon the issue of agreement among defendants not to insure plaintiff.

The other question which we think becomes material in view of a new trial, is whether an agreement between two or more insurance companies not to insure plaintiff comes within the inhibitions of our antitrust law. The original anti-trust act passed in 1889 (Acts 1889, c. 117) did not mention insurance or aids to commerce, and in [Queen Insurance Co. v. State, 86 Tex. 250, 24 S.W. 397, 22 L. R. A. 483](#), it was held that that act did not relate to the business of insurance. The combination sought to be held illegal in that case was an agreement among insurance companies fixing rates. It was also held that such agreement was not criminal under the common law. In reaching these conclusions the Supreme Court held that, while insurance was a very material aid to commerce, it was not the business of [\*\*4] "commerce" as that term is commonly understood. It was further held that, if the first subdivision of the first section of that act, which prohibits combinations "to create or carry out restrictions in trade," should be construed as broad enough in its language to include insurance, that provision was inoperative as not sufficiently definite to support a prosecution under the criminal law. That decision was rendered in December, 1893. At the regular session of the Legislature in 1895 (Acts 24th Leg. c. 83) the act was amended so as to include aids to commerce. Insurance was not specifically mentioned in that act. In 1902, in the case of [State v. Shippers'](#)

Compress Co., 95 Tex. 603, 69 S.W. 58, the Supreme Court, following the Supreme Court of the United States in Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S. Ct. 431, 46 L. Ed. 679, held that the 1895 act was, except in certain limited respects, violative of the Fourteenth Amendment to the Constitution of the United States because it exempted from its operation agricultural products, etc., in the hands of the producers.

The act of 1903 (Acts 1903, c. 94), which is now chapter 1 of title 130 of the Revised **[\*638]** Civil **[\*\*5]** Statutes, and chapter 6 of title 18 of the Penal Code, recites in its emergency clause the fact that the 1895 act had been held unconstitutional. There are a number of material differences between the 1895 and 1903 acts. The former has but one section (section 1) which defines illegal combinations. This section is divided into five subdivisions. The act of 1903 has three sections which deal with illegal combinations. These are section 1, article 7796), which defines trusts and corresponds to section 1 of the 1895 act, and which has seven subdivisions; section 2 (article 7797), which defines monopoly; and section 3 (article 7798), which defines conspiracies against trade.

The holding of the Court of Civil Appeals that the acts complained of in this case are not prohibited by the 1903 act are based upon the conclusion that article 7796 deals with those combinations in which the public are interested, and article 7798 alone deals with those combinations which affect the individual, and not the public, and that, since that article does not mention insurance or aids to commerce, and since article 7796 does not specifically prohibit agreements among insurance companies not to insure, and **[\*\*6]** since the public are not interested in a combination of this sort which affects only the individual, the acts here complained of are not within the inhibitions of that act. For convenience we copy the first section of the acts of 1895 and 1903, omitting subdivisions 5 and 6 of the latter act. The words in ordinary type appear in both acts; those in parentheses appear only in the 1895 act; and those underscored appear only in the 1903 act:

**HN2**<sup>↑</sup> "That a 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"1. To create, *or which may tend to create*, or carry out restrictions in trade or commerce or aids to commerce *or in the preparation of any product for market or transportation*, or to create or carry out restrictions in the (full and) free pursuit of any business authorized or permitted by the laws of this State.

"2. To fix, *maintain*, increase or reduce the price of merchandise, produce or commodities, *or the cost of insurance, or of the preparation of any product for market or transportation*.

"3. To prevent *or lessen* **[\*\*7]** competition in *the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance*, or to prevent *or lessen* competition in aids to commerce, *or in the preparation of any product for market or transportation*.

"4. To fix *or maintain* (at) any standard or figure (,) whereby *the (its) price (to the public) of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation*, shall be in any manner *affected*, controlled or established, (any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state)."

**HN3**<sup>↑</sup> "5. To make (or) enter into, *maintain* (or) execute or carry out any contract, obligation, or agreement (of any kind or description) by which (they) *the parties thereto* (shall) bind, or have bound themselves not to sell, dispose of, (or) transport *or to prepare for market or transportation* any article or commodity (or article of trade, use, merchandise, commerce or consumption) *or to make any contract of insurance at a price below a common* **[\*\*8]** *standard or figure*, or by which they shall agree in any manner to keep the price of such article (,) *or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation*, at a fixed or graded figure, or by which they shall in any manner *affect or maintain* (establish or settle) the price of any *commodity or article (or commodity) or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation* between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, *or business of transportation or insurance, or the preparation of any product for market or transportation*, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or *purchase of any article or*

*commodity, or charge for transportation or insurance or charge for the preparation of any (such article or commodity that) product for market or transportation, whereby its price or such charge might be in [\*\*9] any manner (be) affected."*

If we concede that article 7798 does not embrace insurance, still we think there can be no serious question but that HN4[<sup>1</sup>] an agreement or combination among insurance companies not to write insurance for any individual or class of individuals does come both within the letter and the spirit of article 7796. It was clearly the purpose of the Legislature in passing the 1895 act to bring the business of insurance, in so far as it affects trade and commerce, as much within the provisions of the anti-trust law as any other business or trade. There is nothing in that act which limits its effect to any particular character of combination such as rate making as applied to aids to commerce, and there can be no question, we think, that the language in section 3 of that act, which prohibits combinations "to prevent competition in aids to commerce," was intended to embrace the business of insurance in so far as it affects commerce. Any other construction of that act would render it entirely ineffective as to insurance or other aids to commerce. That act was passed at the next session of the Legislature after the Queen Insurance Co. Case was decided. Its emergency clause recites [\*\*10] that the people of Texas are without an adequate remedy against trusts, and the Legislature must necessarily have had in mind the Queen Insurance Co. Case, and [<sup>1</sup>\*639] must have intended to place insurance within the purview of the anti-trust act.

If we take the view that subdivision 1 of the 1903 act should be given the same construction with reference to the generality of the language used that was given in the Queen Insurance Co. Case to the first subdivision of the act of 1889, still we think that a combination of insurance companies not to write a particular individual or set of individuals clearly comes with the inhibitions of subdivisions 3 and 5 of the 1903 act. Subdivision 3, stripped of impertinent matter, prohibits combinations "to prevent or lessen competition in \* \* \* the business of insurance, or to prevent or lessen competition in aids to commerce." Subdivision 5 prevents combinations "to preclude a free and unrestricted competition among themselves or others in the \* \* \* business \* \* \* of insurance." The statute nowhere says that article 7796 inhibits only such combinations as affect the public generally. Subdivision 4 of the 1895 act used the language "price to [\*\*11] the public," but that language was eliminated in the 1903 act. That act defines what a trust is, and article 7799 prohibits and declares illegal all trusts. But, even conceding that the combinations which are declared to be trusts under article 7796 do fall within the class in which the public generally are interested, it cannot be said that a combination among insurance companies not to write an individual or set of individuals is a matter in which the public have no concern. Under modern business methods commerce and trade would be very materially hampered and restricted but for the business of insurance. Credits are largely extended in view of the security afforded by it, and the hazards of business enterprises without its protection would be too great to warrant engaging therein by large classes of capital, especially the smaller capital of private individuals who could not afford to carry their own risks. If two or more insurance companies may lawfully combine to prevent competition among themselves in insuring a particular individual, then they may make such combination with reference to a number of individuals or class of individuals. If the 1903 act does not cover the case [\*\*12] of Griffin, a grocery merchant in Amarillo, who refused to abide by the judgment of an insurance adjuster as to the amount of his loss, but threatened to take the matter into the courts, then it would be perfectly lawful for any number of or all insurance companies doing business in Texas to prescribe a rule by which any individual in any business who should refuse to accept the judgment of their adjusters as to amount of loss should be blacklisted by them. Subdivision 5 of article 7796 specifically prohibits agreements which preclude a free and unrestricted competition among the parties to such agreement in the business of insurance. There can be no question but that an agreement between defendants not to write Griffin precluded any competition between themselves in regard to Griffin's business as an applicant for insurance. The purpose of this agreement, if plaintiff's theory of the case is correct, was to put Griffin out of business by making it impossible for him to get insurance. The jury found that the combination was effective as injuring Griffin's business to the extent of \$ 7,500 actual damages. If the 1903 act is to be construed away in so far as Griffin or any other particular [\*\*13] individual is concerned, then it would be competent for the insurance companies to force adjustments of losses in accordance with their own views or desires as outlined above. We are unable to give the statute this construction. We think clearly that the combination, if the jury upon another trial should find that it existed, was in violation both of the spirit and letter of the anti-trust act of 1903.

We therefore conclude that the former judgment of the Supreme Court (235 S.W. 202) adopting our recommendation that the judgment of the Court of Civil Appeals be reversed, and that of the district court affirmed, should be set aside, that judgment should be entered affirming the judgment of the Court of Civil Appeals, and that the cause be remanded to the district court for a new trial in accordance with the views expressed in our original opinion and in this opinion.

CURETON, C. J. Judgment of November 30, 1921, set aside. Judgment of the Court of Civil Appeals affirmed, and cause remanded to the district court for new trial.

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## Overland Publishing Co. v. Union Lithograph Co.

Court of Appeal of California, First Appellate District, Division Two

April 18, 1922, Decided

Civ. No. 4127

**Reporter**

57 Cal. App. 366 \*; 207 P. 412 \*\*; 1922 Cal. App. LEXIS 329 \*\*\*

OVERLAND PUBLISHING COMPANY (a Corporation), Appellant, v. UNION LITHOGRAPH COMPANY (a Corporation), et al., Respondents

**Subsequent History:** [\*\*\*1] A Petition to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on June 15, 1922.

**Prior History:** APPEAL from a judgment of the Superior Court of the City and County of San Francisco. H. M. Owens, Judge.

**Disposition:** Affirmed.

## Core Terms

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Printers', printing, allegations, damages, contracts, practices, city and county, do business, restrictions, commerce, compose, dollars, join

## LexisNexis® Headnotes

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

### HN1 [down arrow] **Public Enforcement, State Civil Actions**

The Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of the Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

### HN2 [down arrow] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. These rights may be exercised in association with others so long as they have no unlawful object in view. Thus, where building contractors and a group of workmen make an agreement which restricts the opportunities of a contractor not a party thereto, though the business of the third party is interfered with, a court can

give no relief, since the law can only make it possible for the complainant to do business in the way he chooses by compelling a defendants to do business in the way they does not choose. When equal rights clash, the law cannot interfere.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

### **HN3** **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. A laborer as well as a builder, trader, or manufacturer has the right to conduct his affairs in any lawful manner even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy although it may necessarily work injury to other persons. The damage to such persons may be serious, it may even extend to their ruin, but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

### **HN4** **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action. In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, a court will not inquire into the motives of the strikers, their acts being entirely lawful, their motives are immaterial.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN5** **Public Enforcement, State Civil Actions**

An action by a private corporation, and, as such, is governed by the provisions of § 11 of the Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594. In § 11, it is provided that an action may be brought by any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden in the Act.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN6** **US Department of Justice Actions, Criminal Actions**

While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. While one whose business or property is injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he can not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, does not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN7\*\*](#) [] **Public Enforcement, State Civil Actions**

Section 11 of the Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594 gives no right to injunctive relief to a private person in a case of violation of the provisions of the Act, but such a person is merely given a right to recover double damages.

## **Headnotes/Summary**

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### **Headnotes**

#### **CALIFORNIA OFFICIAL REPORTS HEADNOTES**

##### [\*\*CA\(1\)\*\*](#) [] (1)

##### **Labor Unions — Agreement to Sell Labor Only to Special Class—Validity of.**

--An agreement between an employers' association and a labor union whereby the latter agrees to sell the labor of its members only to members of such employers' association is legal and involves no restraint of trade.

##### [\*\*CA\(2\)\*\*](#) [] (2)

##### **Id.—Exercise of Right to Work.**

--It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor; and these rights may be exercised in association with others so long as they have no unlawful object in view.

##### [\*\*CA\(3\)\*\*](#) [] (3)

##### **Id.—Boycott of Employer—Inability to Secure Union Labor—Damages—Injunction.**

--The fact that a publishing house, because of its refusal to become a member of an employers' association, is prevented from securing union labor to continue its business does not entitle it to either injunctive relief or damages.

**CA(4) [ ] (4)****Monopolies—Violation of Cartwright Act—Action by Private Person—Damage—Pleading.**

--A private corporation cannot maintain an action against an association of employers because of alleged price-fixing practices engaged in by the latter, under section 11 of the Cartwright Act, without pleading and proving special damage to its business or property by reason thereof.

**CA(5) [ ] (5)****Id. — Relief Accorded by Act to Private Persons.**

-- Under the Cartwright Act, a private person is given no right to injunctive relief in case of a violation of the provisions of the act, but such a person is merely given a right to recover double damages.

**Counsel:** Hoefler, Cook & Snyder for Appellant.

Harry G. McKannay and Heidelberg & Murasky for Respondents.

**Judges:** LANGDON, P. J. Nourse, J., and Sturtevant, J., concurred.

**Opinion by:** LANGDON

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**Opinion**

[\*367] [\*\*413] LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it entered after general demurrers to the complaint had been sustained. The complaint asks for injunctive relief and for damages; its allegations are lengthy and complex. In substance, they are as follows:

Plaintiff is a corporation doing business under the laws of California. Certain named defendants and some two hundred others, whose names are unknown to plaintiff, composed an organization known as the "Printers' Board of Trade." Said association is formed for the purpose, among others (as set forth in its by-laws) "to investigate and check injurious trade practices, and encourage the opposite" in the business of printing and publishing, [\*\*\*2] which is the business carried on by the several members of the association. Certain of the named defendants, together with about thirteen hundred others whose names are unknown to plaintiff, composed an association known as [\*368] "S. F. Typographical Union No. 21." Certain named defendants and five hundred other persons whose names are unknown to plaintiff compose an association of persons engaged in the business of printing pressmen and assistants known as the "S. F. Printing Pressmen & Assistants Union No. 24." Certain named defendants, with numerous other persons whose names are unknown to plaintiff, compose an association of persons engaged in the printing trades in the city and county of San Francisco under the name of "Franklin Printing Trades Association." The executive officers of each of these associations are also joined as defendants.

The complaint continues with allegations, in effect, as follows: That on or about March 1, 1920, plaintiff was engaged in the city and county of San Francisco in carrying on and doing business as a printer and publisher in said city and county and had invested in its business capital in excess of twenty-five thousand dollars and had [\*\*\*3] built up an established trade and employed on the average more than twenty-five persons in said business; that in the month of March, 1920, the said association known as "Printers' Board of Trade of San Francisco" caused an agent or representative of said association to approach the managing officers of plaintiff and to demand that plaintiff become a member of said Board of Trade; that plaintiff, for its own good reasons, declined to join said Board of Trade. On January 17, 1921, plaintiff received from said Board of Trade a written communication signed by the secretary thereof, inviting plaintiff to become a member of said Board of Trade and

reciting that the monthly dues of members would amount to two dollars, plus one dollar for each employee in plaintiff's composing-room and press-room. Plaintiff again advised the said Board of Trade that it did not desire to become a member thereof.

It is alleged that on November 23, 1920, a written agreement was entered into by and between the defendant association, "Franklin Printing Trades Association," and the association known as the "Printers' Board of Trade" (in said agreement referred to as the "Employers' Association") and the association [\*\*\*4] known as the "S. F. Typographical Union No. 21." Said agreement is referred to [\*369] as the "Typographical Agreement" and it is alleged that it provides, in paragraph fifth thereof, as follows:

"In order that the Union may secure the adoption and carrying out by all commercial printing concerns within its jurisdiction of the scale of wages and working conditions herein specified, and have the responsibility of the Employers for their observance and performance, the Union requests and the Employers hereby agree that the Employers will admit to membership in their association all reputable printing concerns; and in consideration hereof, and of the assumption of the responsibility by the Employers for any and all violations of said scale of wages and working conditions by every member of the Employers, the Union agrees that its members will work only for such printing concerns as are members of the Employers, provided that the Employers shall not arbitrarily, or for any but good cause, refuse admission to or deny retention of membership in the Employers' Association."

The complaint sets forth that during the years 1919 and 1920, the representatives of the Printers' Board of Trade [\*\*\*5] sought to induce plaintiff to join said Board of Trade and threatened to enforce the provisions of said Typographical Agreement above set forth and compel the members of said unions who were working for plaintiff to leave such employment. Plaintiff was also visited by representatives of the union involved, who stated that if plaintiff did not join the association known as Printers' Board of Trade of San Francisco, the said two union associations would be compelled and would, in pursuance of paragraph V of said Typographical Agreement, order the withdrawal from the employ of plaintiff of all members of said two union associations.

Plaintiff refused to join the Printers' Board of Trade and the union employees left plaintiff's employ.

It is alleged that if plaintiff persists in its refusal to become a member of the Printers' Board of Trade, the persons alleged to have quitted its employ will "refuse to resume work and refuse to longer continue in the employ of plaintiff"; "that without the co-operation of the aforesaid quitting members of said S. F. Typographical Union No. 21, it will be impossible, within a period of three or four days, for plaintiff to continue its printing [\*370] [\*\*\*6] and publishing operations." It is then alleged that plaintiff has on hand important large contracts for printing and is under written contract to publish certain magazines and periodicals and that time is of the essence of such contracts, and that [\*\*414] by reason of the acts and things charged against the defendants, plaintiff will be prevented from carrying out said contracts and will become liable in damages thereon.

There are also allegations to the effect that the unions involved here are members of the American Federation of Labor Unions, which controls a magazine with a wide circulation among its members and affords "a ready, convenient, powerful and effective vehicle for the dissemination of information as to persons, products and manufacturers boycotted or to be boycotted"; that "if the defendants . . . continue in the course which they have consummated and threatened of boycotting this plaintiff and advising others to boycott plaintiff, it will result in the very great injury of plaintiff."

**CA(1)** (1) We shall pause here in our enumeration of the allegations of the complaint so as to consider the effect of those already set forth. The Typographical Agreement, in so far as it is set forth [\*\*\*7] in the complaint, is one which is perfectly legal and involves no restraint of trade. Provisions substantially the same as those pleaded herein were considered in the case of *People v. Epstein*, 102 Misc. 476 [170 N.Y.S. 68, 70]. The agreement in that case was between the Photo-Engravers' Board of Trade of New York and members of a Photo-Engravers' Union. The reasoning of the court in that case is applicable in considering the portion of the Typographical Agreement before this court in the present case. **HN1** The so-called Cartwright Act (Stats. 1907, p. 984, as amended by Stats. 1909, p. 594), upon which plaintiff relies in bringing this action, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of this act. The portion of the Typographical Agreement pleaded

by plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class.

**CA(2)[<sup>↑</sup>] (2) HN2[<sup>↑</sup>]** It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal [\*371] with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without [\*\*\*8] being held in any way accountable therefor. ( [Parkinson v. Building Trades, 154 Cal. 581, 599 \[16 Ann. Cas. 1165, 21 L.R.A. \(N.S.\) 550, 98 P. 1027\]](#); [Pierce v. Stablemen's Union, 156 Cal. 70, 75 \[103 P. 324\]](#).) These rights may be exercised in association with others so long as they have no unlawful object in view. ( [Parkinson v. Building Trades, supra, at p. 599](#).) Thus, where building contractors and a group of workmen made an agreement which restricted the opportunities of a contractor not a party thereto, it was said, that though the business of the third party was interfered with, the courts could give no relief, since "the law could only make it possible for the complainant to do business in the way he chooses by compelling the defendants to do business in the way they did not choose. When equal rights clash, the law cannot interfere." ( [National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259 \[26 L.R.A. \(N.S.\) 148\]](#), 94 C. C. A. 535].)

In the case of [Pierce v. Stablemen's Union, 156 Cal. 70 \[103 P. 324\]](#), it was said: "We think that to-day no court would question the right of an organized union of employees, by concerted [\*\*\*9] action, to cease their employment (no contractual obligation standing in the way) and this action constitutes a 'strike.' We think, moreover, that no court questions the right of these men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence constitutes the primary boycott."

**HN3[<sup>↑</sup>]** "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. . . . A laborer as well as a builder, trader, or manufacturer has the right to conduct his affairs in any lawful manner even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, [\*372] the object not unlawful, nor oppressive and the means [\*\*\*10] neither deceitful nor fraudulent, the result is not a conspiracy although it may necessarily work injury to other persons. The damage to such persons may be serious -- it may even extend to their ruin -- but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*." ( [National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259, 265 \[26 L.R.A. \(N.S.\) 148\]](#), 94 C. C. A. 535].)

**HN4[<sup>↑</sup>]** "An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." ( [Bossert v. Dhuy, 221 N.Y. 342, 359](#) [Ann. Cas. 1918D, 661, [117 N.E. 582](#)].)

In this state, the doctrine has been announced even more broadly. In the case of [Parkinson Co. v. Building Trades Council, 154 Cal. 581, at page \[\\*\\*\\*11\]](#) [599 \[16 Ann. Cas. 1165, 21 L.R.A. \(N.S.\) 550, 98 P. 1027, 1034\]](#), it is said: "In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strikers -- their [\*415] acts being entirely lawful, their motives would be held immaterial."

**CA(3)[<sup>↑</sup>] (3)** In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

But the complaint continues, in another section thereof, with allegations concerning the practices of the Printers' Board of Trade. There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the Printers' Board of Trade. The latter are made upon information and belief and are, substantially, as follows: That said board now is, and for more than three years last past has been, engaged in "a combined [\*373] scheme and effort to violate the laws of

the State of California and of the United States of [\*\*\*12] America in such case made and provided, by causing the prices of articles and services made and furnished by various members of the said Printers' Board of Trade of San Francisco, to be fixed grossly in excess of an amount that would yield to the persons making the charge and collecting said prices, a fair and reasonable profit"; that in pursuance of said scheme and effort various members composing the said Printers' Board of Trade meet daily in the office of the said Printers' Board of Trade in the city and county of San Francisco and said Board of Trade requires that all of the new contracts and proposals for business involving an amount in excess of fifteen dollars, then under submission to members of said Printers' Board of Trade of San Francisco, be reported and submitted at such meetings, and that thereupon, by lot or agreement, tentative prices are fixed upon said new contracts, and it is likewise determined which member of the Printers' Board of Trade shall perform the services or furnish the materials contemplated by such proposals or contracts; that, thereupon, all of the members, other than the member so decided upon, refrain from bidding for the doing of said work or the [\*\*\*13] furnishing of said material except in an amount above the amount so fixed. It is alleged that by reason of these facts a person seeking to have work done or materials furnished is compelled to pay the price fixed as aforesaid by said members of said Printers' Board of Trade; that said price so fixed is arrived at through corrupt, unjust, and illegal methods as aforesaid, practiced by said Printers' Board of Trade of San Francisco, and the person desiring the work or materials believes that the price so fixed is obtained as a result of competitive bidding; that as the result of said unjust and illegal practices aforesaid, competition *between the members* of said Printers' Board of Trade of San Francisco (which board embraces practically ninety-five per cent of the concerns engaged in the printing trade in the city and county of San Francisco) is destroyed and rendered impossible, and that said acts constitute an unjust, discriminating, and unlawful restraint upon trade and commerce, both intrastate and interstate.

Appellant contends that these allegations, if proven, constitute the Printers' Board of Trade a trust within the meaning [\*374] of the so-called Cartwright Act. (Act [\*\*\*14] 4166, General Laws of California [1915] Deering; Stats. 1907, p. 984, as amended by Stats. 1909, p. 594.) Conceding, for the purposes of this opinion, that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the attorney-general or the district attorney. (Sec. 2, Stats. 1907, p. 984.) But this is not such a proceeding. This is [HN5](#) [↑] an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by "any person who shall be *injured in his business or property* by any other person or corporation . . . by reason of anything forbidden" in said act.

In the present case the plaintiff makes no allegations of any such injury or damage. The general allegation of its complaint: "That by means of each and all of said acts done and threatened by the defendants aforesaid, respectively, as hereinbefore set forth, the trade and commerce of the plaintiff with its patrons and customers . . . has been and will continue to be forcibly suspended and unless the relief hereinafter [\*\*\*15] prayed shall be granted . . . plaintiff will lose valuable copyrights because of its inability to continue its usual operations; and that plaintiff by reason of the premises has suffered, and will suffer in an increasing degree, damages . . . in excess of seventy-five thousand dollars," is insufficient. There is no allegation of the particulars in which the plaintiff has been or will be damaged by the restraint of competition among the members of the Printers' Board of Trade. The only damage to plaintiff which is alleged, i. e., the loss of contracts, copyrights, etc., arises from the alleged inability of plaintiff to continue its operations, due to the fact that it cannot secure union labor. This matter we have disposed of in the first part of this opinion. We consider it *damnum absque injuria*. There is no allegation of loss to plaintiff arising because of the alleged practices of the Printers' Board of Trade in restricting competition *among its own members*. On the contrary, it is perfectly apparent that plaintiff's business could not be injured by such practice, but must be benefited thereby. If, as plaintiff alleges, ninety-five per cent of the persons engaged in the printing [\*\*\*16] business voluntarily form an association and restrain themselves [\*375] [\*\*416] from competing with one another, plaintiff, being free from such restraint, has the fewer competitors with whom to contend. Indeed, plaintiff does not complain of loss or damage because of the want of competition among the members of the Printers' Board of Trade, of which plaintiff is not a member. If plaintiff could secure union labor and continue to operate its business, the activities of the Printers' Board of Trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. It is the withdrawal of the union labor and the

consequent inability of plaintiff to operate its business in competition with the members of the Printers' Board of Trade which is its real complaint.

**CA(4)[]** (4) Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damage to his business or property by reason thereof. There are no facts alleged in the complaint showing [\*\*\*17] damage to plaintiff because of said defendant's methods of doing business.

In the case of [Munter v. Eastman Kodak Co., 28 Cal. App. 660, at page 664 \[153 P. 737, 739\]](#), it is said: **HN6[]** "While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in [Krigbaum v. Sbarbaro, 23 Cal. App. 427, 433 \[138 P. 364\]](#): 'To be 'injured in business or property,' within the contemplation of said law, as we understand it, is where the injury has directly resulted from the fact of the existence of the trust [\*\*\*18] -- that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce [\*376] which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.'"

**CA(5)[]** (5) Furthermore, **HN7[]** the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. (Sec. 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See, also, [National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259 \[26 L.R.A. \(N.S.\) 148, 94 C. C. A. 525\]](#).)

[\*\*\*19] The demurrers were properly sustained; the judgment is affirmed.

Nourse, J., and Sturtevant, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 15, 1922.

All the Justices concurred, except Shurtleff, J., and Waste, J., who were absent.



## Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs

Supreme Court of the United States

Argued April 19, 1922. ; May 29, 1922, Decided

No. 204.

### **Reporter**

259 U.S. 200 \*; 42 S. Ct. 465 \*\*; 66 L. Ed. 898 \*\*\*; 1922 U.S. LEXIS 2475 \*\*\*\*; 26 A.L.R. 357

FEDERAL BASEBALL CLUB OF BALTIMORE, INC. v. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, ET AL.

**Prior History:** [\*\*\*\*1] ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

ERROR to a judgment of the Court of Appeals of the District of Columbia reversing a judgment for triple damages under the Anti-Trust Acts recovered by the plaintiff in error in the Supreme Court of the District and directing that judgment be entered for the defendants.

### **Core Terms**

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commerce, ball club, exhibitions, lecture, repeat, state line, organizations, elaborate, transport, composed, arrange, pennant, sending, induce, powers, ball, won

### **LexisNexis® Headnotes**

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Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

#### **HN1[] Constitutional Law, State Sovereign Immunity**

The business of giving exhibitions of baseball is purely a state affair. The fact that in order to give the exhibitions the baseball leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

#### **HN2[] Antitrust & Trade Law, Sherman Act**

Personal effort, not related to production, is not a subject of commerce.

# Lawyers' Edition Display

## **Headnotes**

Monopolies -- organized baseball -- not interstate commerce. --

## Headnote:

The organized business of giving exhibitions of baseball between clubs representing different cities, for the most part in different states, is not interstate commerce within the meaning of the Anti-trust Acts of July 2, 1890, and October 15, 1914, although the scheme requires constantly repeated interstate traveling on the part of the clubs.

[For other cases, see *Monopoly*, II. a; *Commerce*, I. b, in Digest Sup. Ct. 1908.]

# Syllabus

1. The business of providing public baseball games for profit between clubs of professional baseball players in a league and between clubs of rival leagues, although necessarily involving the constantly repeated traveling of the players from one State to another, provided for, controlled and disciplined by the organizations employing them, is not interstate commerce. P. 208.
  2. Held that an action for triple damages under the Anti-Trust Acts could not be maintained by a baseball club against baseball leagues and their constituent clubs, joined with individuals, for an alleged conspiracy to monopolize the baseball business resulting injuriously to the plaintiff. P. 209.

*269 Fed. 681; 50 App. D.C. 165, affirmed.*

**Counsel:** Mr. Charles A. Douglas and Mr. William L. Marbury, with whom Mr. L. Edwin Goldman and Mr. William L. Rawls were on the briefs, for [\*\*\*2] plaintiff in error.

Defendants are voluntary associations and corporations engaged upon a vast scale, involving the investment of millions of dollars, in the business of providing, by the transportation from State to State of baseball teams and their necessary attendants and equipment, exhibitions of professional baseball. The court is not concerned with whether the mere playing of baseball, that is the act of the individual player, upon a baseball field in a particular city, is by itself interstate commerce. That act, it is true, is related to the business of the defendants, but it can no more be said to be the business than can any other single act in any other business forming a part of interstate commerce.

The question with which the court is here concerned is whether the business in which the defendants were engaged when the wrongs complained of occurred, taken as an entirety, was interstate commerce, or more accurately, whether the monopoly which they had established or attempted to establish was a monopoly of any part of interstate commerce.

At the foundation of the business of one of these leagues -- in its primary conception -- is a circuit embracing seven different [\*\*\*\*3] States. No single club in that circuit could operate without the other members of the circuit, and accordingly in the very beginning of its business the matter of interstate relationship is not only important but predominant and indispensable.

Each game symbolizes a contest of skill between the two cities that have been brought together by means of interstate communication and travel. Each team of each club in the league carries with it, and it is essential to the profit of the enterprise that it should carry with it, its representative character; it symbolizes the great city that it represents to those assembled to witness the contest.

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In addition to this representative city and state aspect, there is also the element of intersectional rivalry. Experience has shown that the game is most largely patronized when clubs are so located as to provide a contest for supremacy between the Eastern and Western sections of the country.

It is necessary to distinguish between baseball as a sport, that is, where it is played merely as a means of physical exercise and diversion, and this business of providing exhibitions of professional baseball. The business of Organized Baseball represents [\*\*\*\*4] and has represented for many years, an investment of colossal wealth. Defendants who dominate Organized Baseball are not engaged in a sport. They are engaged in a money-making business enterprise in which all of the features of any large commercial undertaking are to be found. When the teams of the National or American Leagues or of any other league are sent around the circuit of the league, they go at the direction of employers whose business it is to send them, and whose profits are made as a result of that business operation.

When the profit-making aspect of the business is examined, it will be found that the interstate element is still further magnified. The vast investment of capital which has been made in it is required, among other things, in order to provide a place at which the teams in the league may play their contests. Each club has a ball park, with stands erected upon them, sometimes, as in the case of a major league club, costing several millions of dollars. Every club in the league earns its profit not only by the drawing capacity of its team at home, but also by that of the teams of the clubs which its team visits in the various cities in the league. The gate [\*\*\*\*5] receipts in all of the cities in which the clubs are located are divided according to a definite proportion, fixed by agreement between the club of the city in which the game is played and the club employing the visiting team.

In no other business that can now be recalled is there such a close interrelationship and interdependence between persons in one State and persons in another. The personality, so to speak, of each club in a league is actually projected over state lines and becomes mingled with that of the clubs in all the other States. The continuous interstate activity of each is essential to all the others. The clubs of each league constitute a business unit embracing territorially a number of different States. While each club has, of course, a local legal habitat, yet from a practical business standpoint it is primarily an ambulatory organization.

It is difficult to perceive the relevancy of any discussion about an article of commerce in this case. Commerce may be carried on in one of its forms by traffic in articles of merchandise, but there are countless forms in which it may be carried on without traffic in such articles. *Gibbons v. Ogden*, 9 Wheat. 189.

It is [\*\*\*\*6] also difficult to discern the relevancy of the contention that personal effort is not an article of commerce. Personal effort, while it may not be an article of commerce, is often commerce itself, but we are not concerned with any such question here. It may be passed by saying that it has been adjudicated by this court in the *Hoke Case*, 227 U.S. 308, that interstate commerce may be created by the mere act of a person in allowing himself to be transported from one State to another, without any personal effort; and further that it is very difficult to see how *International Textbook Co. v. Pigg*, 217 U.S. 91, could have been decided as it was, except upon the principle that the mere exchange of instruction and information, which is about as purely a matter of personal effort as anything that can be imagined, may be a subject of interstate commerce.

If transactions in interstate commerce were to be judged by their isolated ultimate results, as the defendants seek to separate the act of a player in throwing a ball upon a ball field from all the steps which are taken to bring the ball player in the due course of business from other States, of course their interstate character could be [\*\*\*\*7] plausibly argued away. By such a process of reasoning the American Tobacco Company, for instance, might have removed its gigantic monopoly from the operation of the Sherman Act. See *United States v. American Tobacco Co.*, 221 U.S. 106, 184; *Standard Oil Co. v. United States*, 221 U.S. 1, 68; *Swift & Co v. United States*, 196 U.S. 375.

In the business now under consideration throughout the playing season the ball teams, their attendants and paraphernalia, are in constant revolution around a preestablished circuit. Their movement is only interrupted to the extent of permitting exhibitions of baseball to be given in the various cities. When exhibitions in one city are completed the clubs resume, according to the agreement made, and plan of business long established, their course of travel on to another city, and thus on and on until the schedule of exhibitions is completed. The interruption in

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interstate movement is nothing like as great as that in the Swift Case, *supra*. The constant movement of the teams from State to State during a period of over five months each year, is under a single direction and control and in pursuance of one object.

See *Champion v. Ames*, 188 U.S. 321; *Pensacola [\*\*\*\*8] Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1; *United States v. Patten*, 226 U.S. 525; *Loewe v. Lawlor*, 208 U.S. 274; *Western Union Telegraph Co. v. Foster*, 247 U.S. 105. See particularly *Marienelli v. United Booking Offices*, 227 Fed. 165, where the question was presented as to whether a company engaged in booking vaudeville performers for a circuit embracing theatres in cities in different States was engaged in interstate commerce within the *Sherman Act*. Also, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 235 Fed. 401.

It is common knowledge that baseball is the preeminent American sport. Millions of people follow the daily reports of the results of the games in the press, and in the large cities gather in the afternoons around the newspaper offices to see the bulletin reports of the scores. Not only so, but vast numbers of people travel from one city to another for the purpose of witnessing the games. Telegraph facilities are installed at all the ball parks in the Major Leagues, and in those of the more important Minor Leagues, where reports of the games are sent out and are received throughout the country.

Each league contracts for a uniform type of baseball, [\*\*\*\*9] which is used in tremendous numbers and shipped by the manufacturer from time to time as they are needed by the various clubs.

These incidents, while in themselves not determinative of the question of whether or not the business is interstate in character, yet, when considered in connection with its main features, emphasize the truth of what has before been said, that there is scarcely any business which can be named in which the element of interstate commerce is as predominant as that in which defendants are engaged.

The agreement and combination entered into and maintained by defendants whereby the entire business in the United States of providing exhibitions of professional baseball was brought under the control of defendants and their confederates in Organized Baseball, amounted in law to a conspiracy in restraint of trade among the several States and a monopoly or an attempt to monopolize a part of commerce among the several States within the meaning of the Sherman Act.

There is no testimony in this case legally sufficient to show that the plaintiff has waived its right to recover damages under the Sherman Act.

Mr. George Wharton Pepper, with whom Mr. Benjamin S. Minor [\*\*\*\*10] and Mr. Samuel M. Clement, Jr., were on the brief, for defendants in error.

Organized Baseball is not interstate commerce and does not constitute an attempt to monopolize within the Sherman Act.

Personal effort, not related to production, is not a subject of commerce; and the attempt to secure all the skilled service needed for professional baseball contests is not an attempt to monopolize commerce or any part of it. Clayton Act, § 6; *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U.S. 648; *Metropolitan Opera Co. v. Hammerstein*, 147 N.Y.S. 532; *In re Duff*, 4 Fed. 519; *In re Oriental Society*, 104 Fed. 975; *People v. Klaw*, 106 N.Y.S. 341. The Department of Justice has ruled that the business conducted by Organized Baseball was not in violation of the Sherman Act; and also that the business of presenting theatrical entertainments is not commerce. *Distinguishing: International Textbook Co. v. Pigg*, 217 U.S. 91; and *Marienelli v. United Booking Offices*, 227 Fed. 165. The only case in which the question whether Organized Baseball is within the Sherman Act has been directly passed upon is that of *American Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6; in which the court [\*\*\*\*11] answered the question in the negative.

Congress has not imposed a penalty upon the transportation of players for baseball purposes, and therefore *Hoke v. United States*, 227 U.S. 308, is not point. While Congress may regulate the movement of persons in interstate commerce, when it has not regulated movement as such, the doing of an act essentially local is not converted into an interstate act merely because people came from another State to do it.

**Opinion by:** HOLMES

## Opinion

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[\*207] [\*\*465] [\*\*\*899] MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit for threefold damages brought by the plaintiff in error under the Anti-Trust Acts of July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, and of October 15, 1914, c. 323, § 4, 38 Stat. 730, 731. The defendants are The National League of Professional Base Ball Clubs and The American League of Professional Base Ball Clubs, unincorporated associations, composed respectively of groups of eight incorporated base ball clubs, joined as defendants; the presidents of the two Leagues and a third person, constituting what is known as the National Commission, having considerable powers in carrying out an agreement between the two [\*\*\*\*12] Leagues; and three other persons having powers in the Federal League of Professional Base Ball Clubs, the relation of which to this case will be explained. It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.

The plaintiff is a base ball club incorporated in Maryland, and with seven other corporations was a member of the Federal League of Professional Base Ball Clubs, a corporation under the laws of Indiana, that attempted to compete with the combined defendants. It alleges that the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy. Great damage to the plaintiff is alleged. The [\*208] plaintiff obtained a verdict for \$80,000 in the Supreme Court and a judgment for treble the amount was entered, but the Court of Appeals, after an elaborate discussion, [\*\*\*\*13] held that the defendants were not within the Sherman Act. The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants. 50 App. D.C. 165; 269 Fed. 681, 688. It is not argued that the plaintiff waived any [\*\*\*900] rights by its course. *Thomsen v. Cayser, 243 U.S. 66.*

The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition [\*\*\*\*14] for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means [\*\*466] commerce among the States. But we are of opinion that the Court of Appeals was right.

**HN1** [↑] The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order [\*209] to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California, 155 U.S. 648, 655,* the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, **HN2** [↑] personal effort, nor related to production, is [\*\*\*\*15] not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqual lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

GI JÁMÌÈGÉCÉRÉLÀ GÀJÉDÀ ÌÍ ÈÈ ÌÌ LÀÌ ASÉDÀ JÌ ÈÈÈÈLÀJOGGÀÈSÓYÓQÀ ÌÍ ÈÈÈÈ

If we are right the plaintiff's business is to be described in the same way ant the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

Judgment affirmed.

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## Federal Trade Com. v. P. Lorillard Co.

District Court, S.D. New York

October 3, 1922

No Number in Original

**Reporter**

283 F. 999 \*; 1922 U.S. Dist. LEXIS 1386 \*\*

FEDERAL TRADE COMMISSION v. P. LORILLARD CO.; SAME v. AMERICAN TOBACCO CO., Inc.

### **Core Terms**

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papers, commerce, investigate, inspection, tobacco, correspondence, unlimited, interstate commerce, interstate, documentary evidence, copies, powers, unreasonable search and seizure, anti-trust, intrastate, purposes, letters, jobber

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Federal Trade Commission Act > General Overview

**HN1[] Antitrust & Trade Law, Federal Trade Commission Act**

See § 9 of the Federal Trade Commission Act, Comp. St. § 8836i.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

**HN2[] Investigations, Federal Trade Commission Act**

See [§ 6](#) of the Federal Trade Commission Act, Comp. St. § 8836f.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

International Law > Authority to Regulate > General Overview

International Trade Law > Authority to Regulate > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

283 F. 999, \*999L<sup>1922 U.S. Dist. LEXIS 1386, \*\*1386</sup>

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Transportation Law > Interstate Commerce > Federal Powers

### **HN3** Interstate Commerce, Prohibition of Commerce

The *U.S. Const. art. 1, § 8, cl. 3* provides that congress shall have power to regulate commerce with foreign nations and among the several states.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Transportation Law > Intrastate Commerce

### **HN4** Congressional Duties & Powers, Commerce Clause

The *commerce clause of the United States Constitution* granting power to the congress to legislate as to commerce permits only of legislation which has to do with interstate commerce.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

### **HN5** Antitrust & Trade Law, Federal Trade Commission Act

The Federal Trade Act forbids unfair practices in reference to commerce of an interstate character only.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

### **HN6** Interstate Commerce, Prohibition of Commerce

The *commerce clause of the United States Constitution* vested in the congress a full and complete power to regulate commerce among the several states, for the strong arm of the national government may be put forth to brush away all obstacles to interstate commerce.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Stimulation of Commerce

Governments > Legislation > Enactment

Transportation Law > Interstate Commerce > Federal Powers

283 F. 999, \*999L<sup>1922 U.S. Dist. LEXIS 1386, \*\*1386</sup>

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

#### [\*\*HN7\*\*](#) [down] **Interstate Commerce, Stimulation of Commerce**

The power of congress to legislate embraces power not only to regulate and control that which is wholly interstate, but also that which even though intrastate affects the free flow of interstate commerce.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

#### [\*\*HN8\*\*](#) [down] **Separation of Powers, Legislative Controls**

The United States Constitution, having granted to the congress plenary power to regulate or control commerce among the states, congress may delegate such duties to investigate and learn conditions to a permanent administrative body.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

#### [\*\*HN9\*\*](#) [down] **Antitrust & Trade Law, Federal Trade Commission Act**

Section 9 of the Federal Trade Commission (FTC) Act (Act), Comp. St. § 8836i, wherein jurisdiction is granted to the district courts of the United States, provides authority to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the FTC made in pursuance thereof.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

#### [\*\*HN10\*\*](#) [down] **Antitrust & Trade Law, Federal Trade Commission Act**

Under [§ 6](#) of the Federal Trade Commission (FTC) Act, Comp. St. § 8836f, power is conferred upon the FTC upon the direction of the President or either house of congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation, but the language of the statute makes it necessary for one of the houses of congress to adopt a resolution for a direction to investigate, and the reporting of such investigation must be for alleged violations of the antitrust acts.

283 F. 999, \*999L<sup>A</sup> 1922 U.S. Dist. LEXIS 1386, \*\*1386

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

#### **HN11** [blue icon] Antitrust & Trade Law, Federal Trade Commission Act

The power of the Federal Trade Commission cannot be broader than what congress did or could delegate.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Evidence > Types of Evidence > Documentary Evidence > General Overview

#### **HN12** [blue icon] Antitrust & Trade Law, Federal Trade Commission Act

Any person may be compelled to appear and depose and produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence, before the Federal Trade Commission (FTC). The FTC is required to make findings in proceedings before them and the findings must be based upon the testimony given.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

#### **HN13** [blue icon] Investigations, Federal Trade Commission Act

The right to procure information in its investigations under the provisions of [section 6](#) of the Federal Trade Commission Act, Comp. St. § 8836f, would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

#### **HN14** [blue icon] Search & Seizure, Scope of Protection

Reading together sections 5, 6, and 9 of the Federal Trade Commission Act, Comp. St. §§ 8836e, 8836f, 8836i, the court does not think that congress intended, at the time of the enactment of the law, to go beyond the well recognized principles of limitations with reference to searches and seizures guarded against by the [U.S. Const. amend. IV](#). It is better extracted by the procedure long established in the courts in conformity with the constitutional guaranty against unlawful and unreasonable searches and seizures and the right of people to be secure in their papers and effects to deduce the intention that information should only be therefrom.

283 F. 999, \*999 1922 U.S. Dist. LEXIS 1386, \*\*1386

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > General Overview

## [HN15](#) [blue icon] **Search & Seizure, Scope of Protection**

See [U.S. Const. amend. IV.](#)

Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Federal Trade Commission Act

Criminal Law & Procedure > Search & Seizure > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

Governments > Federal Government > US Congress

## [HN16](#) [blue icon] **Constitutional Rights, Search & Seizure**

This command of the United States Constitution, properly interpreted, is a prohibition against congress granting powers to the Federal Trade Commission (FTC) for unlimited searches and seizures of letters and documents. The FTC Act makes plain the duty of the FTC to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within restrictions of the [U.S. Const. amend. IV.](#) Neither branch of the legislative department, still less any merely administrative body, established by the congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

## [HN17](#) [blue icon] **Search & Seizure, Scope of Protection**

There is no doubt that congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters.

Governments > Legislation > Interpretation

## [HN18](#) [blue icon] **Legislation, Interpretation**

It is the duty of the court to so construe an act as to save the statute from constitutional infirmity.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

### **HN19** [blue icon] Antitrust & Trade Law, Federal Trade Commission Act

Section 6(b) of the Federal Trade Commission (FTC) Act, Comp. St. § 8836f, grants the FTC the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the FTC such information as it may require. And subdivision (a) of section 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the FTC is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. There must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

### **HN20** [blue icon] Search & Seizure, Scope of Protection

A corporation is entitled to invoke the guarantees of the *U.S. Const. amend. IV* against unreasonable searches and seizures in as full a measure as would a person or partnership.

**Opinion by:** [\*\*1] MANTON

## **Opinion**

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[\*1000] MANTON, Circuit Judge. These case were argued together and will be considered in one opinion.

The petitioner in each of the above-named proceedings was granted an alternative writ of mandamus commanding the respondent to show cause why a peremptory writ should not issue directing that immediately it forthwith deliver into possession of the Federal Trade Commission the accounts, books, records, documents, memoranda, papers, and correspondence of the respondent for inspection and examination and for the purpose of making copies thereof. The petition upon which the alternative writ was granted sets forth that on the 16th Of September, 1921, a complaint was filed with the Federal Trade Commission against the respondent. The complaint alleged that the respondent in the conduct of its interstate commerce was indulging in practices which were in violation of the provisions of the Act of Congress of September 26, 1914 (38 Stat. 717 [Comp. St. §§ 8836a-8836k]), in that the respondent was using certain methods of business [\*1001] practices resulting in unfair competition, in that it was regulating and fixing or attempting to regulate and fix the prices [\*\*2] at which the commodities sold by it should be resold by those to whom it had sold them, and was co-operating, aiding, and abetting others to successfully formulate and carry out a scheme or combination pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products or commodities. Further, that the Senate of the Congress of the United States by a resolution directed the Federal Trade Commission to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to the market price to producers of tobacco and the market price for manufacturing tobacco

and the price of leaf tobacco exported, and to report to the Senate as soon as possible the result of such investigation. Petitioner then sets forth that at various times between September 29, 1921, and November 5, 1921, authorized agents of the petitioner, in its behalf, demanded of the respondent to produce and furnish to them at respondent's offices certain specified documentary evidence or written data, correspondence, and other paper writings which were then and there in the possession, **[\*\*3]** custody and control of the respondent so that copies thereof or parts thereof might be made. And the respondent, complying with the demands and pursuant to its duty, under the provisions of the Federal Trade Act, did produce for inspection and examination of petitioner's agents certain of the data commanded; but, in violation of provisions of the Federal Trade Act, it refused to produce for inspection and examination "certain documentary evidence, records, correspondence, and writings herein specified which were then and there in respondent's possession, custody, and control, and it refused to permit copies thereof to be made by petitioner." And it sets forth that it in necessary in the prosecution of its duty that such inspection and examination be granted to the petitioner's agents and that it is hindered in the performance of its duty and in the exercise of its power by the refusal of the respondent to grant such examination and inspection. Its prayer for relief is that "all papers and telegrams received by the American Tobacco Company (or P. Lorillard Company) from all of its jobber customers located at different points throughout the United States and also copies of all letters **[\*\*4]** and telegrams sent by the American Tobacco Company (or P. Lorillard Company) to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive," be turned over for examination and inspection. Each respondent resists the application for a peremptory writ contending that the Federal Trade Commission is asserting authority which it does not possess in seeking to make an unlimited and unrestricted inspection with the right to copy all of the correspondence with its jobber customers, and that the Senate resolution directing the Federal Trade Commission to make the investigation referred to grants no authority for unlimited and unrestricted search with the right to copy the correspondence. It further contends that sections 5, 6, and 9 of the Federal Trade Commission Act (Comp. St. §§ 8836e, 8836f, 8836i) give no such authority of unlimited and unrestricted search and examination, and it is said that any **[\*1002]** such construction or interpretation of the Federal Trade Commission Act would be in contravention of the *Fourth Amendment of the Constitution* guaranteeing the right of the people to be secure in their papers and effects against unreasonable searches and **[\*\*5]** seizures, and that no warrant shall issue but upon probable cause supported by oath or affirmation. Thus the question is presented whether Congress can delegate visitorial powers under the *commerce clause of the Constitution* over private corporations engaged in interstate commerce to the extent of granting unlimited and unrestricted examination and inspection with the right to copy.

By the Act of Congress of September 26, 1914, the Federal Trade Commission was created a body corporate. Its purposes were defined by the statute creating it, and its duties and powers and administration are referred to in sections 5, 6, and 9. It is provided by section 9 of the act (Comp. St. § 8836i) that --

**HN1** **[↑]** "For the purposes of this act, the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against."

And section 6 of the act (section 8836f) provides:

**HN2** **[↑]** "That the Commission shall also have power -- (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, **[\*\*6]** practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

**HN3** **[↑]** The Constitution provides (article 1, § 8, cl. 3) that Congress shall have power to regulate commerce with foreign nations and among the several states.

Each respondent is conceded to be a private corporation engaged in selling tobacco and its products and is engaged in interstate and intrastate commerce. This investigation was commenced "for the purpose of ascertaining the facts relating to respondent's business." The business of each of the respondents is very extensive; its letters, papers, and other documents making it a business of thousands of letters per month. The affidavits submitted by the respondents set forth a mass of correspondence and other documentary evidence which, if the petitioner prevails in its alleged right to "full and complete access to any and all documentary evidence in the possession and

control of the respondent," would, it is alleged, handicap the respondent in its business and entail considerable expense and difficulties. [\*\*7] Much of the correspondence relates to transactions bearing upon intrastate commerce only. As to such of the correspondence as bears upon intrastate commerce, the petitioner is not entitled to examination, inspection, or copying any part thereof. [HN4](#)[<sup>↑</sup>] The [commerce clause of the Constitution](#) granting power to the Congress to legislate as to the commerce permits only of legislation which has to do with interstate commerce. [HN5](#)[<sup>↑</sup>] The Federal Trade Act forbids unfair practices in reference to the commerce of an interstate character only. [Ward Baking Co. v. Federal Trade Comm. \(C.C.A.\) 264 Fed. 330.](#) [HN6](#)[<sup>↑</sup>] The [commerce clause of the Constitution](#) [\*1003] vested in the Congress "a full and complete power to regulate commerce among the several states, for the strong arm of the national government may be put forth to brush away all obstacles to interstate commerce." [In re Debs, 158 U.S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.](#) And "constitutional privileges do not change but their operation extends to new matters as modes of business and the habits of life of the peoples very with each succeeding generation. The power is the same put it operates to-day upon modes of interstate commerce unknown to the [\*\*8] fathers and will operate with equal force upon any new modes of such commerce which the future may develop." [Gibbons v. Ogden, 9 Wheat. \(22 U.S.\) 1, 6 L. Ed. 23.](#) [HN7](#)[<sup>↑</sup>] The power of Congress to legislate embraces power not only to regulate and control that which is wholly interstate, but also that which even though intrastate affects the free flow of interstate commerce. [Minn. Rate Cases, 230 U.S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L.R.A. \(N.S.\) 1151,](#) Ann. Cas. 1916A, 18. To regulate is the power to enact legislation directly affecting interstate commerce. [United States v. Adair \(D.C.\) 152 Fed. 737.](#) [HN8](#)[<sup>↑</sup>] The Constitution having granted to the Congress plenary power to regulate or control commerce among the states, Congress may delegate such duties to investigate and learn conditions to a permanent administrative body.

The validity of the Interstate Commerce Commission Act granting to that Commission that power to investigate facts relating to interstate transportation was considered in [Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.](#) It has been held that the visitorial power of the federal government provided for in the act, over private corporations, [\*\*9] must be restricted to activities of an interstate commerce character. [Hale v. Henkel, 201 U.S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652;](#) [Interstate Commerce Comm. v. Goodrich Co., 224 U.S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729;](#) [United States v. Basic Products Co. \(D.C.\) 260 Fed. 472.](#) We must presume that the Congress did not intend by this legislation to invade the field reserved under the Constitution to the several states by interfering with transactions in intrastate commerce. "The statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." [United States v. Jin Fuey Moy, 241 U.S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061,](#) Ann. Cas. 1917D, 854. See, also, [United States v. D. & H. Co., 213 U.S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.](#)

The resolution of the Senate provided that --

"The Federal Trade Commission be and is hereby directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference to the market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the [\*\*10] Senate as soon as possible the result of such investigation."

This resolution has not the mandatory effect of statutory enactment with reference to the [commerce clause of the Constitution](#), and the present application for the writ must rest upon the command of [HN9](#)[<sup>↑</sup>] section 9 of the Federal Trade Commission Act (Comp. St. § 8836i), wherein [\*1004] jurisdiction is granted to the District Courts of the United States "to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the Commission made in pursuance thereof." The resolution of the Senate does not come within the terms of the authority conferred by the statute in question. [HN10](#)[<sup>↑</sup>] Under [section 6](#) (section 8836f), power is conferred upon the Commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation," but the language of this statute makes it necessary for one of the Houses of Congress to adopt a resolution for a direction to investigate, and the reporting of such investigation must be for alleged violations of the anti-trust acts. The quotation [\*\*11] from the resolution of the Senate fails to indicate that it is founded upon any violation or alleged violation of the [antitrust law](#) (Comp. St. § 8820 et seq.). It does not indicate that the Senate intended that any anti-trust law violation should be investigated by the Commission. If so, and apt expression to that effect could have

been used. It cannot, therefore, be concluded that it was intended, in the language used, to investigate any violations of the anti-trust acts by any corporation. In any case, [HN11](#)[] the power of the Federal Trade Commission cannot be broader than what Congress did or could delegate. The analogy of the cases arising under the powers of the Interstate Commerce Commission with that of the Federal Trade Commission's powers is pertinent. This was referred to an [\*Beechnut Packing Co. v. Federal Trade Comm. \(C.C.A.\) 264 Fed. 885.\*](#) A comparison of the statutes particularly setting forth the procedure under the two acts shows the similarity. in [HN12](#)[] each any person may be compelled to appear and depose and produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission. Both Commissions [\*\*12] are required to make findings in proceedings before them and the findings must be based upon the testimony given.

In the [\*Harriman Case, 211 U.S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253,\*](#) Justice Holmes said:

"The Commission \* \* \* is given power to require the testimony of witnesses 'for the purposes of this act.' The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of carriers is conducted, as required by section 12; that another is that it shall recommend additional legislation \* \* \* and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of the opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. As we have already implied the main purpose [\*\*13] of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English speaking countries at least, to the only [[\\*1005](#)] cases where the sacrifice of privacy is necessary -- those where the investigations concern a specific breach of the law. \* \* \*

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits."

The Interstate Commerce Commission deals with quasi public corporations. But the phrase of the Federal Trade Commission Act considered, in view of the language in the Harriman Case, would indicate that [HN13](#)[] the right to procure information in its investigations under the provisions of [\*section 6\*](#) would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality [\*\*14] to that complaint of the particular correspondence and papers sought to be obtained.

[HN14](#)[] Reading sections 5, 6, and 9, I do not think that Congress intended, at the time of the enactment of this law, to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the [\*Fourth Amendment of the Constitution\*](#). It is better extracted by the procedure long established in the courts in conformity with the constitutional guaranty against unlawful and unreasonable searches and seizures and the right of people to be secure in their papers and effects to deduce the intention that information should only be therefrom. The [\*Fourth Amendment\*](#) provides:

[HN15](#)[] "The right of the people to be secure in their \* \* \* papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[HN16](#)[] This command of the Constitution properly interpreted, is a prohibition against Congress granting powers to the Commission for unlimited searches and seizures of letters and documents. [\*\*15] The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of

visitorial power over private corporations must keep within restrictions of the [Fourth Amendment](#). "Neither branch of the legislative department, still less any merely administrative body, established by the Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen." [Interstate Commerce Comm. v. Brimson](#), 154 U.S. 478, 14 Sup. Ct. 1134, [38 L. Ed. 1047](#).

As was said by Mr. Justice Brewer in [Re Pacific Ry. Comm. \(C.C.\) 32 Fed. 241](#):

[HN17](#) [↑] "There is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. \* \* \* But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters."

[HN18](#) [↑] It is the duty of the court to so construe the act as to save the statute from constitutional infirmity. [Knights Templars' \[\\*161 & Masons' Life \[\\*1006\] Indemnity Co. v. Jarman](#), 187 U.S. 197, 23 Sup. Ct. 108, [47 L. Ed. 139](#); [U.S. v. D. & H. Co.](#), 213 U.S. 407, 29 Sup. Ct. 527, [53 L. Ed. 836](#); [Harriman v. Interstate Commerce Comm.](#), 211 U.S. 407, 29 Sup. Ct. 115, [53 L. Ed. 253](#).

[HN19](#) [↑] [Section 6\(b\)](#) grants to the Commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the Commission such information as it may require. And subdivision (a) of [section 6](#) calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the Commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of [section 6](#) would effectuate the intent [\[\\*\\*17\]](#) of Congress and the procedure can be kept within constitutional limits. [United States v. L. & N.R. Co.](#), 236 U.S. 318, 35 Sup. Ct. 363, [59 L. Ed. 598](#); [Veeder v. United States](#), 252 Fed. 414, 164 C.C.A. 338. Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. See 51 Congressional Records, pt. 13, 63d Cong., Second Session, pp. 12747, 12800, 12806-11, 12918, 12927. It was not intended to grant an unlimited power of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.

[HN20](#) [↑] It is now well established that a corporation is entitled to invoke the guaranties of the [Fourth Amendment](#) against unreasonable searches and seizures in as full a measure as would a person or partnership. [Silverthorne Lumber Co. v. United States](#), 251 U.S. 385, 40 Sup. Ct. 182, [64 L. Ed. 319](#); [Coastwise Lumber Co. v. United States](#), 259 Fed. 847, 170 C.C.A. 647.

In the papers submitted on this application, there is no showing of the existence of probable cause. The relief prayed for is in general terms and [\[\\*\\*18\]](#) includes all papers and telegrams received by each respondent from its jobber customers located in different points throughout the United States and copies of all letters and telegrams sent by each respondent to such jobbers during the period from January 1, 1921, to December 31, 1921, inclusive. Such general demands made in other warrants of law, such as a subpoena duces tecum, have been condemned as not giving a reasonably accurate description of the papers wanted, either by date, title, substance, or subject to which they relate. [Ex parte Brown](#), 72 Mo. 83, 37 Am. Rep. 426; [Carson v. Hawley](#), 82 Minn. 204, 84 N.W. 746.

In [Boyd v. United States](#), 116 U.S. 616, 6 Sup. Ct. 524, [29 L. Ed. 746](#), the court quoted with approval Judge Camden's language in Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials, 1029, wherein he said:

[\[\\*1007\]](#) "Papers are the owner's goods and chattels; they are his dearest property; and are far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot be the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will [\[\\*\\*19\]](#) be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law

that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

To grant the relief prayed for by the petitioner would be to permit an unreasonable search and seizure of papers in violation of the Fourth Amendment. It was not the intention of Congress to grant such unlimited examination and inspection by the legislation in question, nor, indeed, did Congress have authority to do so under the commerce clause of the Constitution. It would be unreasonable and unjust to accede to the demands of the petitioner, and the application for the peremptory writ of mandamus against the respondents American Tobacco Company and P. Lorillard Company is denied.

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## Columbus Packing Co. v. State

Supreme Court of Ohio

December 29, 1922, Decided

No. 17445

**Reporter**

106 Ohio St. 469 \*; 140 N.E. 376 \*\*; 1922 Ohio LEXIS 235 \*\*\*; 1 Ohio L. Abs. 100; 37 A.L.R. 1525

THE COLUMBUS PACKING CO. v. THE STATE, EX REL. SCHLESINGER, PROS. ATTY., ET AL.

**Prior History:** [\*\*\*1] ERROR to the Court of Appeals of Franklin county.

**Disposition:** *Judgment reversed.*

### **Core Terms**

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Storage, pork, loins, provisional, injunction, trial court, joined, seized

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

#### **HN1[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

The Cold Storage Act, Ohio Gen. Code § 1155-1 et seq., 107 Ohio Laws 594, and the Valentine Anti-trust Law Act, 93 Ohio Laws 143, are not in pari materia.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

#### **HN2[] Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The Cold Storage Act was a health statute, pure and simple, as an examination of that act in its entirety discloses. This is evidenced by the different periods of time various food products were allowed to remain in storage before sale.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

### **HN3** [down] Procedural Matters, Jurisdiction

The purpose of the Valentine Anti-trust Law is to prevent hoarding, and restraint of trade, evincing that purpose in its title, and to provide for the punishment of persons restraining free competition in commerce and all classes of business in the state. The remedies employed by the Valentine Act did not contemplate their use for the violation of the Storage Act. The Valentine Act, specifically, in §6400, Ohio Gen. Code, confines the operation of its civil remedy to violations of any provision of this chapter. Furthermore, § 6400, Ohio Gen. Code, provides for drastic action against corporations that violate the act, all of which tends to show that the specific remedies provided in the Valentine Act are to control solely the violations of that act.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

### **HN4** [down] Pleadings, Amendment of Pleadings

Ohio's code provides a time when answers and replies shall be filed, and the issues joined. In the ordinary course of procedure, either party has a right to amend his pleading. Litigants are entitled to a trial, which § 11376, Ohio Gen. Code, defines as a judicial examination of the issues, whether of law or of fact. Section 11378, Ohio Gen. Code, requires the issues to be made by the pleadings.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

### **HN5** [down] Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Section 1155-13, Ohio Gen. Code, relates only to those who shall sell, or offer, or expose for sale, the product held in cold storage for a period of more than six months.

## **Headnotes/Summary**

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### **Headnotes**

*Cold storage law -- Section 1155-1, General Code (107 O. L., 594) -- Storing foods not violation per se, when -- Valentine antitrust law -- Distinguished, and not in pari materia -- Facts necessary to prove violation -- Power to seize and sell property stored.*

## **Syllabus**

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[\*469] 1. The mere storage of pork loins by a storage company for a period of more than six months, under the provisions of the cold-storage act, Sections 1155-1 to 1155-19, General Code (107 O. L., 594), is not *per se* a violation of Section 13 of that act.

2. The cold-storage act and the Valentine anti-trust law, Section 6390 *et seq.*, General Code, are distinct in purpose, employ different remedies and provide different penalties for offenses committed. They should not be so construed *in pari materia* as to employ the remedies of one for the prosecution of the other. The storage of food products by a cold-storage company for a period of six months does not *ipso facto* violate the Valentine act, without other proof of some combination or acts or unlawful agreement entered into by two or more. (*Columbus Packing Co. v. State, ex rel. Schlesinger, Pros. Atty., 100 Ohio St., 285*, overruled.)

[\*470] 3. Under the facts presented, where the action and controversy involved the *res*, or right of property, it was error for the court, on application of the plaintiff and before trial on the merits, to order the seizure and sale of such property by provisional orders, where such seizure and sale would render ineffectual a judgment thereafter obtained after trial.

The present case is a sequel to the case of *Columbus Packing Co. v. State, ex rel. Schlesinger, Pros. Atty.*, reported in *100 Ohio St., 285*. In that case the question arose upon the rights of property, and the violation of law in respect thereto, adjudicated by the lower courts before the parties went to final trial upon the issues joined upon the merits of the action. Many of the facts relating to that disposition are found in the reported opinion. However, the following facts appear in the record, all of which were not disclosed in the opinion in the former case. The original action was brought by the state of Ohio through the prosecuting attorney of Franklin county, asking for an injunction, the appointment of a receiver and other relief. The petition was filed in the court of common pleas on August 6, 1919. Summons was issued, returnable August 18, 1919, answer day being September 6 following.

On the day the petition was filed, application was made for an injunction and the appointment of a receiver, all without notice to the two parties defendant; also, without notice, a receiver was appointed the same day, and on [\*471] further application to the court counsel was appointed for the receiver. On the next day, August 7, the receiver filed his application to sell the pork loins in controversy. On the following day, August 8, the Columbus Packing Company and the Fairmount Creamery Company, having answered, moved the court to dissolve the injunction and discharge the receiver. The application of the receiver to sell and the motions to dissolve were heard by the trial court at the same time, and on August 9 that court overruled the motion to dissolve and sustained the application of the receiver to sell the property without delay "at such place or places, and in a manner and at a price conducive to the benefit of the general public."

The only evidence offered by the plaintiff in support of the application to sell the property was the petition, verified, and on file. The defendants in support of their motion to dissolve offered in evidence their answers then on file, together with the affidavits of five persons. One, Fuhrer, managing agent of the Creamery Company, made affidavit that his company never did business with the Packing Company prior to this time, but had solicited this storage in the usual [\*472] course of business and held the same subject to the orders of the owners, and that it, the Creamery Company, had been at all times ready to release such property from storage upon payment of charges; that it had no other agreement with the Packing Company than one to provide the desired temperature for the goods stored, which might be removed by the owner upon request at any time. The affidavits specifically denied the allegation in the petition to the effect that "said companies entered into an illegal or corrupt agreement as more fully stated in the petition."

[\*472] Lamb, secretary of the Packing Company, tendered an affidavit in connection with the answer of that company, wherein he stated that on January 22, 1919, he had tendered to the United States Food Administration all the frozen pork loins in cold storage at that time, which included the pork loins in the hands of the receiver, but that the United States Food Administration did not accept the tender and refused to order any portion thereof. Three other affidavits were offered by the defendants to the effect that on the 8th or 9th day of July, 1919, the several affiants had entered into a contract with the Packing Company for [\*473] various amounts of frozen pork loins, and that in said contract the pork loins were to be delivered in quantities as needed by the purchasers. The answers of both defendants denied that either had ever entered into any agreement for the purposes and objects set forth in

the petition, especially denying that they had entered into any agreement that created any restrictions in trade or commerce.

In this situation of direct conflict appearing in the pleadings and affidavits offered, on August 9, 1919, the trial court ordered all the property in controversy to be sold as aforesaid, and within a week, on August 14, 1919, the court of appeals had disposed of the case by final judgment, which was reviewed and affirmed by us in Packing Co. v. State, supra. The case not having been tried upon the merits assumed the second phase which is now being considered by this court. In the meantime the receiver had sold the product, he and counsel had been awarded fees to the amount of \$ 6,500, and the receiver had been discharged.

[\*473] On October 16, 1920, the Creamery Company filed its amended answer, containing two defenses. In its first defense, as in the former answer, it admitted the delivery [\*\*5] at its cold storage warehouse of the pork loins, which were received and stored for hire, and that they were in the possession of the Creamery Company in the warehouse at the time of the filing of the petition, and that unless restrained it would have delivered the product to the Columbus Packing Company upon its order and upon the payment of storage charges. Every other allegation in the petition was denied. As a second defense, it is specifically alleged that it was operating a coldstorage warehouse in pursuance of an act of congress, approved April [August] 10, 1917 (40 Stat. at L., 276; Section 10186, Barnes' Fed. Code); that it was licensed as a cold-storage warehouseman by the United States government, under an act known as the United States Food Administration Act; and that at all the times in controversy the coldstorage business of the defendant "was conducted under and pursuant to the rules, directions and orders" of such department of food administration, which regulates and permits the storage in its cold-storage warehouse for a period of twelve months of the product described in the petition.

Plaintiff in its reply to the amended answer of the Creamery Company denied [\*\*\*6] every allegation contained in the second defense. The pleadings before the trial court at the time of its final judgment, on August 30, 1921, consisted of the petition of the plaintiff, the answer of the Packing Company, the amended answer of the Creamery Company, and the reply of the plaintiff, which was a general denial. [\*474] Thereupon, on August 30, 1921, the plaintiff, relator, moved for judgment in its favor on the pleadings. The trial court sustained the motion and rendered judgment on the pleadings in favor of the relator, which judgment was affirmed by the court of appeals. Whereupon plaintiff in error instituted proceedings in this court to reverse the judgments below.

**Counsel:** Messrs. Bennett, Westfall & Bennett, for plaintiff in error.

Mr. John R. King, prosecuting attorney; Mr. [\*\*\*8] Wilbur E. Benoy, assistant prosecuting attorney; Mr. Oscar W. Newman; Mr. T. S. Hogan and Messrs. Wilson & Rector, for defendants in error.

**Judges:** JONES, J. MARSHALL, C. J., HOUGH, ROBINSON and CLARK, JJ., concur. WANAMAKER, J., dissents.

**Opinion by:** JONES

## Opinion

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[\*\*378] We are confronted, at the outset, with the decision of this court upon important features of this controversy, reported in Columbus Packing Co. v. State, ex rel. Schlesinger, 100 Ohio St. 285. The judgment in that case was based upon the conclusion that Section 1155-1 *et seq.*, General Code (107 O. L., 594), commonly called the Cold Storage Act, should be read *in pari materia* with what is known as the Valentine Anti-trust Law, Section 6390 *et seq.*, General Code (93 O. L., 143), and that the state might avail itself of equitable remedies therein implied in order to uphold the former judgment of the trial court in seizing upon and selling the pork loins in controversy before a final hearing upon the merits.

HN1[] The Storage Act and the Valentine Act are not *in pari materia*. They were not enacted at the same time and each had a separate and distinct purpose [\*475] in view, [\*\*\*9] as shown by their several titles when enacted. HN2[] The storage act was a health statute, pure and simple, as an examination of that act in its entirety discloses. This is evidenced by the different periods of time various food products were allowed to remain in storage before sale. HN3[] The purpose of the Valentine Law is to prevent hoarding, and restraint of trade, evincing that purpose in its title, and to provide for the punishment of persons restraining "free competition in commerce and all classes of business in the state." The remedies employed by the Valentine Act did not contemplate their use for the violation of the Storage Act. The Valentine Act, specifically, in Section 6400, General Code, confines the operation of its civil remedy to violations of "any provision of this chapter." Furthermore, Section 6400, General Code, provides for drastic action against corporations that violate the act, all of which tends to show that the specific remedies provided in the Valentine Act are to control solely the violations of that act. However, were this not so, the judgments of the lower courts should be reversed for the obvious reason that the defendants in the trial court did not have [\*\*\*10] their rights determined by *due course of law*. Orderly procedure lies at the foundation of our state jurisprudence. Developments at the former hearing disclose that the defendant Packing Company's property was seized by the court through the instrumentality of a receiver on the same day the petition was filed, and without notice to its owner. The record discloses that counsel was appointed on the same day, and without notice, the appointment entailing the sum of \$ 6500 in counsel fees. Three days after the [\*476] filing of the petition a hearing was had upon the affidavits and pleadings filed, and an order made by the trial court to sell the property in controversy, before the issues were finally determined by the court. While the action was nominally one *in personam* it was actually a proceeding *in rem* against the property seized and finally disposed of. The effect of the judgment below was to determine the rights of property in a preliminary hearing, leaving the contested issues made by the pleadings to be later determined. The query naturally arises, what boots it should the defendants win on the issues finally joined if in the meantime the *res* in controversy [\*\*\*11] before the court has been seized by judicial process and ordered to be sold, during which process costs and fees would inevitably attach? We are of the opinion that such a judgment is a deprivation of property without the due process guaranteed by Section 16, Article I, of our Constitution, and conserved by our laws of procedure. HN4[] Our code provides a time when answers and replies shall be filed, and the issues joined. In the ordinary course of procedure, either party has a right to amend his pleading. The litigants were entitled to a trial, which Section 11376, General Code, defines as a "judicial examination of the issues, whether of law or of fact." Section 11378, General Code, requires the issues to be made by the pleadings. The original or preliminary judgment did not purport to rest upon the merits, but was a disposition of the property before that stage was reached. That judgment was a provisional judgment, of which Williams, J., in *Trustees v. McClannahan*, 53 Ohio St., 403, 409, says: "The proper office of the provisional [\*477] injunction is to prevent threatened irreparable injury, which should be averted, until opportunity is afforded for a full and deliberate [\*\*\*12] investigation of the case at the trial, and, to preserve until that time, as far as possible, the [\*379] condition of things existing when the injunction is obtained, to the end that the rights of the parties as established by the final judgment rendered on the trial, may be secured to them by the enforcement of the judgment. \* \* \* The hearing upon the motion is not the mode provided by law for the trial of the issues joined in the action, and neither party can be deprived of the lawful mode of trial by the decision on the motion, whatever it may be. \* \* \* A hearing upon a motion was not designed to take the place of a trial. It may be had upon affidavits taken without opportunity for cross-examination, and is not in any proper sense a trial. Therefore, upon the overruling of a motion to vacate a provisional injunction, the court is not authorized, without a trial of the issues, to enter final judgment for the plaintiff; nor can the petition be properly dismissed, without such trial, upon the dissolution of the injunction."

No opportunity was given to the defendants to rest their case upon the issues which should finally determine the case. This is evident from the fact [\*\*\*13] that long after the case was determined in the preliminary proceeding, on August 9, 1919, one of the defendants, the Creamery Company, filed its amended answer, containing a new and distinct defense, which the trial court did not have before it for consideration, and the validity of which was not determined by it. This defense alleged that the Creamery Company was at all the times mentioned [\*478] in the petition, and when its storage products were seized by the receiver, acting in pursuance of the rules and regulations of the United States Food Administration, which permitted it to hold the pork product in storage for a period of twelve months. In our opinion the litigants should obtain the judgment of the lower courts upon the legal phase of the controversy.

In the reported case, *supra*, this court seems to have attached considerable importance to the fact that the pork loins had been in storage for a period exceeding six months. It is true that the answer of the Packing Company admitted, in effect, that this was so, but alleged that the product had been sold prior to that time to purchasers to be delivered in quantities as needed. However, there is no proof of the violation [\*\*\*14] of the Storage Act by the Creamery Company. [HN5](#) [Section 1155-13, General Code, relates only to those who "shall sell, or offer, or expose for sale," the pork loins held in cold storage for a period of more than six months. There is no proof that the Creamery Company offended against the act, even though it be conceded that the Packing Company did so by delivering after the six months had expired. Mere storing of pork loins for a period of six months was not *per se* a violation of the Storage Act; that is violated only by one who "shall sell, or offer, or expose for sale" pork loins held longer than six months. Neither was the mere storing for more than six months, *ipso facto*, a violation of the Valentine Act. In a proper case the length of the storage may be considered in connection with other acts, or proof showing "combination of capital, skill or acts by two or more" (Section 6391, General Code) [\*479] for the purposes indicated by the act. Therefore the prior judgment against the defendants was evidently erroneous, unless proof was offered that they had entered into an unlawful agreement within the purview of the Valentine Law. The only proof offered in that respect [\*\*\*15] was the petition on file in the case. However, the answer of both defendants, the Packing Company and the Creamery Company, explicitly denied any such purpose or agreement, so that upon that phase of the case there was a lack of proper proof sustaining it. That feature of the controversy being out of the case, for lack of proof, the only civil remedy available prior to final hearing would be obtaining a provisional injunction to prevent the further threatened violation of the Storage Act.

If defendants were threatening to sell, since the Storage Act does not provide for seizure and sale of the food products, the only civil remedy available prior to a final hearing would be a provisional injunction authorized by Section 11876, General Code, restraining the defendants from committing an act, which, if committed, would make the final judgment ineffectual; or, upon proper showing, a provisional order for a receiver might be obtained under sanction of Section 11894, General Code, as auxiliary to the main action.

No pretense was made that these pork loins deposited in the cold-storage warehouse were of such perishable character as to depreciate in value, or would become so contaminated [\*\*\*16] as to be unsalable. In fact the court ordered the same pork loins to be sold "at such place or places as the receiver shall deem proper." It may be assumed that such a judicial [\*480] order would not have been made had not the product been fit for public consumption. Were it shown to the court that these pork loins were of such a nature as to become in the immediate future perishable or so contaminated as to be unfit for public consumption, no doubt, in that event, and in the exercise of judicial discretion, the court would order a sale thereof.

In our judgment, prior to the action of the court upon the issues joined between the parties, as shown by this record, the only ancillary relief plaintiff was entitled to was that of a provisional injunction should it be shown that the Packing Company proposed to sell its product in violation of state and federal law. So far as [\*Packing Co. v. State, supra\*](#), conflicts with the conclusions here announced, that case is overruled.

The judgment of the trial court against defendants upon the pleadings was erroneous, as was the judgment of the court of appeals in its affirmance. However, since the [\*\*380] parties have not had [\*\*\*17] a trial upon the issues as they may be finally joined, we content ourselves with reversing the judgments of the lower courts and remanding the cause to the court of common pleas for further proceedings according to law.

*Judgment reversed.*

## People v. Apostolos

Supreme Court of Colorado

March 5, 1923, Decided

No. 10,289, No. 10,290.

**Reporter**

73 Colo. 71 \*; 213 P. 331 \*\*; 1923 Colo. LEXIS 293 \*\*\*

THE PEOPLE v. APOSTOLOS, ET AL., THE PEOPLE v. CRISSEY & FOWLER LUMBER COMPANY, ET AL.

**Prior History:** [\*\*\*1] Error by the people to review a ruling of the trial court quashing a criminal information.

*Granting of the Motion to Quash, Held Error.*

*Error to the District Court of El Paso County, Hon. Arthur Cornforth, Judge.*

## **Core Terms**

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commodities, indictment, reasonable profit, combinations, merchandise, provisions, repairing, marketed, provisos, shoe

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

**HN1**  **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

See 1913 Colo. Sess. Laws ch. 161.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

**HN2**  **Accusatory Instruments, Indictments**

An indictment is good if from it the nature of the crime may be readily understood by the jury. Provisos are not a part of the definition of the crime, but exceptions thereto, and it is not necessary to notice them in the indictment.

**Counsel:** Mr. VICTOR E. KEYES, attorney general, Mr. SAMUEL CHUTKOW, assistant, Mr. JOHN A. CARRUTHERS, Mr. T. C. TURNER, Mr. WILLIS L. STRACHAN, for the people.

No appearance for defendants in error.

**Judges:** Before MR. JUSTICE DENISON. MR. CHIEF JUSTICE TELLER, MR. JUSTICE CAMPBELL and MR. JUSTICE SHEAFOR, not participating.

**Opinion by:** DENISON

## Opinion

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En Banc

[\*72] [\*\*331] MR. JUSTICE DENISON delivered the opinion of the court.

CERTAIN persons were indicted under the so-called antitrust act, chapter 161, S.L. 1913. A motion to quash was sustained and the people bring the case here for review under R.S. 1908, § 1997. It will suffice to consider one count of one indictment. It alleges that the accused,

"Did then and there wilfully and unlawfully combine to increase the price of certain merchandise and commodities in the city of Colorado Springs, to-wit, the price of shoe repairs, sole leather and other commodities used in the making and repairing of shoes." \* \* [\*\*\*2] \*

The statute provides that [HN1](#) "a trust is a combination \* \* \* to increase or reduce the price of merchandise \* \* \* or commodities," or to do any of certain other defined acts, and then proceeds as follows:

"And all such combinations are hereby declared to be against public policy, unlawful and void; *provided* that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable [\*73] profit or to market at a reasonable profit those products which cannot otherwise be so marketed; *provided further* that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or [\*\*332] own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act."

The objection to the indictment according to the brief [\*\*\*3] before us was that it did not negative the provisos. The Attorney General's brief is not answered, so we are compelled to conjecture what other objection there might have been, but we perceive no other that would be valid. Nor is that objection sound. [HN2](#) An indictment is good if from it the nature of the crime may be readily understood by the jury. [Campbell v. People, 72 Colo. 213, 210 Pac. 841](#), [Johnson v. People, 72 Colo. 218, 210 Pac. 843](#), [Tracy v. People, 65 Colo. 226, 176 Pac. 280](#), and cases there cited. The provisos are not a part of the definition of the crime, but exceptions thereto, and it is not necessary to notice them in the indictment. [Packer v. People, 26 Colo. 306, 57 Pac. 1087](#); [Hill v. People, 1 Colo. 453](#); [Kent v. People, 8 Colo. 563, 583-4, 9 Pac. 852](#); [Harding v. People, 10 Colo. 387, 394, 15 Pac. 727](#); [Smith v. People, 51 Colo. 270, 277, 117 Pac. 612, 36 L.R.A. \(N.S.\) 158](#); [Stoltz v. People, 59 Colo. 342, 148 Pac. 865](#).

The granting of the motion to quash was error.

MR. CHIEF JUSTICE TELLER, MR. JUSTICE CAMPBELL and [\*\*\*4] MR. JUSTICE SHEAFOR, not participating.



## Hurt v. Brandt

Supreme Court of Idaho

May 24, 1923, Decided

No Number in Original

### **Reporter**

37 Idaho 186 \*; 215 P. 842 \*\*; 1923 Ida. LEXIS 124 \*\*\*

BRADFORD HURT, Appellant, v. H. H. A. BRANDT et al., Respondents.

**Prior History:** [\*\*\*1] APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Appeal from a judgment of dismissal. Affirmed.

**Disposition:** Judgment affirmed. Costs to respondents.

## **Core Terms**

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stock, anti-trust, motion to strike, cause of action, second amended complaint, amended complaint, allegations, pooling, restraint of trade, declaration, forbidden

## **Headnotes/Summary**

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### **Headnotes**

ANTI-TRUST LAW--THREEFOLD DAMAGES--COMPLAINT--SUFFICIENCY OF.

In an action to recover threefold damages sustained by him for a violation of the anti-trust law, plaintiff must not only allege sufficient facts to show a violation of the law by the defendants, but it must appear that, by reason of such violation of the law by the defendants, plaintiff has been injured in his business or property.

**Counsel:** S. T. Schreiber, for Appellant.

Pending the trial of an action, the court has power, upon such terms as may be just, to permit a second amended complaint to be filed, which embodies substantially the same allegations as the original complaint. ( [Riverside Land Co. v. Jensen, 73 Cal. 550, 15 P. 131.](#))

Where the facts stated in the complaint constitute a sufficient cause of action, other unnecessary matter may be stricken, but an entire pleading cannot be stricken out as irrelevant or redundant. ( Benedict v. Dake, 6 How. Pr. (N. Y.) 352; [Jackson v. Lebar, 53 Cal. 255.](#))

C.S., secs. 2531 and 2532, describe the scope of the act, and this action being for damages to the plaintiff by reason of the violation of the act by the defendant, it is only necessary to support an action under the act that complainant's business or property has in some way been injured by reason of defendant's illegal scheme. ( [Monarch Tobacco Co. v. American Tobacco Co., 165 F. 774.](#))

37 Idaho 186, \*186 L 215 P. 842, \*\*842 L 1923 Ida. LEXIS 124, \*\*\*1

Plaintiff [\*\*\*2] must be given liberal latitude under the act. ( [Ware Kreamer Tobacco Co. v. American Tobacco Co., 178 F. 117; Buckeye Powder Co. v. Dupont Powder Co., 196 F. 514.](#))

The contracts, combinations, etc., in restraint of trade or commerce which are declared to be illegal by the act, include all contracts, etc., operating to restrain trade or commerce whether legal or illegal at common law or whether the restraint is reasonable or unreasonable. ( [United States v. Trans-Missouri F. Assn., 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007](#), and note; [United States v. United States Steel Co., 223 F. 55.](#))

The system and scheme established and put in force by the defendants controlled the entire issue of stock in the Monumental Mercury Mining Company, and is necessarily a general restraint of trade in the stock of said corporation and therefore illegal. ( [Oliver v. Gidmore, 52 F. 562; Miles Medical Co. v. John Parks & Son, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502.](#))

The second amended complaint stated a cause of action under the law and the court had no right to strike it from the files by reason of any pleading, motion or suggestions made by the respondents. They not having filed a demurrer, [\*\*\*3] the complaint to be had must be wholly insufficient; if to any extent, on any reasonable theory, it presents facts sufficient to justify a recovery, it will be sustained. (21 R. C. L. 466.)

S. L. Tipton and Gustave Kroeger, for Respondents.

The pooling of stock is not unlawful. ( [Weber v. Della Mountain Mining Co., 14 Idaho 404, 94 P. 441.](#))

Under the anti-trust act it is not sufficient to frame the declaration in the words of the statute, but it is essential that the substance of the contract in restraint of trade or the substantial facts which constitute the attempt to monopolize should be set forth therein. ( [Cilley v. United Shoe Machine Co., 152 F. 726.](#))

Under the statute, in order to recover damages, a plaintiff must have been injured in his person or property and the injury sustained must be charged in the complaint by proper averment. ( [Meeker v. Lehigh Valley R. Co., 162 F. 354; Rice v. Standard Oil Co., 134 F. 464; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241.](#))

**Judges:** WM. E. LEE, J. Budge, C. J., and Dunn, J., concur.

**Opinion by:** WM. E. LEE

## **Opinion**

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[\*188] [\*\*842] WM. E. LEE, J.--This action was commenced [\*\*\*4] in the district court for Ada county, in December, 1920. Plaintiff alleged conversion of certain mining stock, and also attempted to allege certain violations of the state anti-trust law. (C. S., c. 116.) The allegations concerning the alleged violation of the anti-trust law were so mingled with the allegations regarding conversion as to make it very difficult to separate them. Respondents filed a general demurrer and motion to [\*\*843] require appellant to separately state his causes of action. The court overruled the demurrer and motion, but [\*189] indicated that a proper motion should be filed. Thereafter, respondents served and filed a motion to strike from the complaint the matters relating to the alleged violation of the anti-trust law. Appellant served and filed a motion to strike respondents' motion to strike, which motion was denied; the court sustained respondent's motion to strike, and gave appellant certain time within which to file an amended complaint. Appellant thereafter served and filed a motion "for rehearing of motion to strike certain allegations from the complaint." This motion was denied. Appellant there after filed his first amended complaint. The first [\*\*\*5] amended complaint contains a substantial restatement of the allegations of the original complaint, stated in somewhat different order and in somewhat different language.

To the first amended complaint, respondents interposed a general demurrer and a motion to strike a paragraph relating to the alleged violations of the anti-trust law which had been ordered stricken from the original complaint.

The court again ordered said paragraph stricken, and further ordered the entire amended complaint stricken "unless the plaintiff, within five days, filed an amended complaint in harmony with the former ruling of the court." Thereafter, appellant filed a second amended complaint. This was almost word for word a copy of the first amended complaint. Respondents thereupon moved that the second amended complaint be stricken, and that the action be dismissed "on the ground that the second amended complaint is not in accordance with the ruling of the court." The court sustained the motion to strike the second amended complaint and denied the motion to dismiss the action. The plaintiff, thereafter, refusing to plead further, judgment of dismissal was entered.

From the judgment of dismissal, the plaintiff [\*\*\*6] has appealed to this court, and assigns as error the striking of the complaint and the dismissal of the action.

The court was not justified in striking the second amended complaint if it stated a cause of action. And since the motion to strike was directed at the entire pleading, rather [\*190] than specified parts thereof, inasmuch as appellant bases his whole argument on the theory that the complaint states a cause of action, the motion to strike the second amended complaint will be considered in the nature of a general demurrer. Appellant was attempting in his three complaints to state a cause of action for treble damages for a violation by respondents of the anti-trust law; and, if the second amended complaint stated a cause of action, it was for the violation of that law. Appellant, in his brief, repudiates any suggestion that his cause of action was in conversion. In his brief he says:

"It is very patent that the defendants-respondents were aiming, by their motions to strike, to disarm plaintiff-appellant, of his real cause of action, and the gist of his entire case. It may be urged as it was in the court below, that it is the conversion of the stock that appellant is contending [\*\*\*7] for--this is not the cause here. That was the cause in the suit against the corporation, but this is decidedly different."

The question for our determination, therefore, is whether appellant has alleged sufficient facts, in the first place, to show a violation of C. S., sec. 2531; and, in the second place, to show that he has been injured in his business or property on account of any act declared illegal in said section 2531.

Among other things, chapter 116 of the Compiled Statutes provides:

"Sec. 2531: Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared illegal. . . ."

"Sec. 2544: Any person who shall be injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this chapter may sue therefor . . . and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

The following is a brief summary of the second amended complaint, hereafter referred to as the complaint:

[\*191] That plaintiff was engaged in the business of mining; that he, together with [\*\*\*8] the defendants, became the owners of an interest in a mining property; that they organized a corporation that took over the ownership of the property, that each of the incorporators was entitled, under their agreement, to certain shares of stock, plaintiff being entitled to 60,000 shares; that, for the purpose of defrauding plaintiff and injuring him in his business, defendants conspired, etc., to and did violate the anti-trust law of this state, by entering into a pooling agreement, pooling the stock of the company, including that belonging to plaintiff without his knowledge or consent; that defendants issued and distributed printed matter, made fictitious prices, and deceived the public; that they prevented plaintiff from engaging in trade and selling his stock, to his loss and damage in the sum of \$ 5,170, the par and market value of his stock; and that plaintiff was prevented from selling his stock in the open market. Plaintiff claims that he was further damaged in a sum of "over \$ 400 resulting from his failure to deliver stock he had contracted to sell and because of the expenditure of sums of money in his efforts to procure the stock for delivery to his purchasers."

Plaintiff [\*\*\*9] did not allege the things forbidden and declared by said section 2531 to be unlawful. He alleged the ultimate conclusions. [\*\*844] The allegations are of the most general character. For instance: "That the defendants . . . the exact time unknown to plaintiff, acting in concert together jointly contriving, conspiring and confederating to

do an unlawful act, consisting of a violation of the law and statute so made and provided in the state of Idaho and for the purpose of defrauding the plaintiff and injuring him in his business entered into a pooling agreement, pooling certain stock of said mining corporation . . . and including the stock, of plaintiff without his knowledge or consent, but of which defendants were in full and absolute control. . . ." The forgoing is a fair sample of the material allegations. Under our very liberal rules of pleading, the complaint is too indefinite. It is clearly insufficient.

[\*192] It is settled in this state by statute that a complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language. In other words, the plaintiff should set forth his cause of action by alleging the facts as distinguished [\*\*\*10] from alleging mere conclusions. As tested by the foregoing, it is apparent that the complaint consists of conclusions instead of facts. Nothing is alleged in ordinary and concise language. The allegations do not apprise respondents of what they are charged with having done; and they would not be expected to know what proof they would have to meet.

The federal courts have frequently passed upon the question of the sufficiency of a complaint under the federal anti-trust law, which is practically identical with the foregoing quoted portions of our anti-trust law. As tested by such federal decisions, the complaint is manifestly in sufficient.

In the case of [Buckeye Powder Co. v. Dupont Powder Co., 196 F. 514](#), it is said:

"In the pleading, plaintiff must declare the forbidden acts and consequent injuries in such clear and unambiguous language, and with such reasonable certainty, that the defendants and the court may be apprised of the alleged cause of action, that it may be apprised of the alleged cause of action, that it may be known by the former how to answer and prepare for trial, and by the latter what is the nature of the issue, and, if it be one of fact, to control [\*\*\*11] the character of the proofs offered at the trial, and to pronounce and enforce a judgment that will settle the rights involved in such issues."

In [Cilley v. United Shoe Mach. Co., 152 F. 726](#), it is said:

"Under the act of July 2, 1890, it is not sufficient to frame the declaration in the words of the statute. The statute does not set forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the states or with foreign countries, and attempts to monopolize such trade or commerce, which are not within the statute. These circumstances make it imperative [\*193] that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration.

"These principles are well settled by the authorities."

"The petition or declaration in an action for threefold damages need not state the facts showing a right of action with all the fullness and particularity required in an indictment, but the sufficiency of such pleading must be tested by the local practice obtaining in civil actions. It must, however, describe with definiteness [\*\*\*12] and certainty the alleged combination or conspiracy entered into by the defendant, and the acts done in pursuance thereof, which resulted in damage to the business or property of the plaintiff. It is not sufficient to frame the declaration in the words of the statute, but the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopoly, must be set forth." (19 R. C. L., p. 87.)

In such an action, under the anti-trust law of this state, it is necessary that plaintiff not only allege sufficient facts to show a violation of the law by the defendants, but it must also appear that, *by reason of such violation of the law by the defendants*, plaintiff has been injured in his business or property. It is not sufficient to allege facts showing a mere injury to his business or property by the defendants, but it must appear from the complaint that plaintiff was *injured in his business or property by reason of the violation of the law by the defendants*. From the complaint, we gather that upon the creation of the corporation plaintiff became and was "entitled to the immediate delivery of the 60,000 shares . . .". The defendants did not [\*\*\*13] deliver the stock to him, but, in the language of the plaintiff, they "entered into a pooling agreement and combination, pooling certain stock of said mining corporation . . . and

including said stock of plaintiff without his knowledge or consent . . . ." and plaintiff says he "had expended and been compelled to pay out "upward of \$ 400 in his efforts to procure the stock . . . , " etc.

[\*194] According to the complaint, if plaintiff was damaged, it was not because defendants violated the provision of the anti-trust law, but it was because defendants had plaintiff's stock and would not let him have it. They took plaintiff's stock, exercised a certain dominion and control over it, which, according to the complaint, was both wrongful and illegal, but which did not constitute a violation of the antitrust law. It was not the pooling that injured plaintiff; it was the taking of the stock into defendants' control and their failure to deliver it to plaintiff that injured him. ([Noyes v. Parsons, 245 F. 689](#), 158 C. C. A. 91.)

On page 21 of appellant's brief appears the following: "*It cannot be questioned that appellant was injured when his property was absolutely [\*\*\*14] and deliberately taken by respondents.*" [\*\*845] If appellant has suffered an injury, it arose from the "taking" of "his property." But the "taking," referred to by appellant, is not prohibited or declared unlawful by the anti-trust law. The following is made illegal by that law: "Every contract, combination in the form of a trust or otherwise, or conspiracy is restraint of trade or commerce, within this state . . . ." (C. S., sec. 2531.)

Plaintiff's complaint is not only too indefinite and uncertain to comply with our very liberal rules of pleading, but his complaint is insufficient in that it is not alleged that he was "injured in his business or property by any other person or persons (the defendants) by reason of anything forbidden or declared to be unlawful by" the anti-trust law of this state.

Judgment affirmed. Costs to respondents.

Budge, C. J., and Dunn, J., concur.

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## **State v. P. Lorillard Co.**

Supreme Court of Wisconsin

April 6, 1923, Argued ; October 16, 1923, Decided

No Number in Original

**Reporter**

181 Wis. 347 \*; 193 N.W. 613 \*\*; 1923 Wisc. LEXIS 168 \*\*\*

STATE, Respondent, v. P. LORILLARD COMPANY and others, Appellants.

**Prior History:** [\*\*\*1] APPEALS from an order of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. Reversed.

**Disposition:** Order reversed and cause remanded.

## **Core Terms**

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cause of action, tobacco, attorney general, sub-jobbers, licenses, conspiracy, charters, restraint of trade, combinations, jobbers, prices, primary right, restrain, cigarettes, do business, manufacturers, provisions, commerce, demurrer, sections, parties, cancel, cases, retailers, misjoinder of causes, injunction, proceedings, forfeiture, Wholesale, bring an action

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN1** [down arrow] **Public Enforcement, State Civil Actions**

See Wis. Stat. § 1747e (1921).

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

**HN2** [down arrow] **Pleading & Practice, Joinder of Claims & Remedies**

See Wis. Stat. § 2647.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Foreign Corporations > General Overview

Governments > State & Territorial Governments > Licenses

### **HN3** [blue download icon] Public Enforcement, State Civil Actions

Wis. Stat. § 1791j and Wis. Stat. § 1791i make provision for annulment of charters of domestic corporations where they are found to have united into such conspiracies as are described in the complaint in this action. Wis. Stat. § 1770g and Wis. Stat. § 1770i make similar provision for revoking the licenses for doing business in the state of foreign corporations.

Business & Corporate Law > Foreign Corporations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

### **HN4** [blue download icon] Business & Corporate Law, Foreign Corporations

When actions are brought to prevent such combinations, the consequences to different defendants, for example foreign and domestic corporations, are different in some respects. Does it follow from this that in order to enforce the provisions of the act a separate suit must be brought against every individual and every corporation joining in the conspiracy for penalties, and that a separate suit must be brought against every member of the combination if a cancellation of its license or charter is contemplated? The appellate court does not think so. The appellate court is disposed to the view that the primary right of the state is to prevent the continued violation of the statute by means of the combination alleged to be unlawful. This is a matter of far greater importance than the collection of the penalties.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN5** [blue download icon] Public Enforcement, State Civil Actions

See Wis. Stat. § 1747f.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Employees & Officials

Governments > Legislation > Interpretation

### **HN6** [blue download icon] Public Enforcement, State Civil Actions

Wis. Stat. § 1747e(2) declares it to be the duty of the attorney general to enforce the provisions of the act. It is further declared to be his duty to bring an action for the recovery of the forfeitures whenever complaint shall be made to him and evidence produced which shall satisfy him that there has been any violation thereof. The statute then proceeds to require district attorneys on the advice of the attorney general, as in Wis. Stat. § 1747f, to institute actions to recover forfeitures for violation of the act. The statute seems to show the legislative intent that there shall be no failure to institute proceedings for the violation of the act. It is first made the duty of the attorney general to

enforce its provisions. If he should neglect that duty, the appellate court sees no reason why he could not be compelled by a proper legal proceeding to perform it.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Licenses

#### **HN7** [down arrow] **Public Enforcement, State Civil Actions**

Wis. Stat. § 1791j and Wis. Stat. § 1770g deals respectively with such corporations and provide that, if they enter into any combination or conspiracy to restrain trade and competition or fix prices of articles in common use in the state, their charter shall be revoked or their license to do business in the state shall be canceled.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Licenses

#### **HN8** [down arrow] **Public Enforcement, State Civil Actions**

Wis. Stat. § 1791l and Wis. Stat. § 1770i relate to the mode of bringing proceedings for forfeiture of charters or cancellation of licenses. In substantially the same language they provide that on complaint being made to the attorney general and evidence produced to him which shall satisfy him that the corporation has violated any of the conditions specified in the several sections, he shall forthwith bring an action in the name of the state to have the charter revoked or the license canceled as the case may be.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN9** [down arrow] **Public Enforcement, State Civil Actions**

Wis. Stat. § 1791k makes it the duty of the attorney general under the conditions specified to make inquiry of domestic corporations as to facts which may have a bearing on the question whether there has been a violation of the anti-trust laws.

Evidence > Judicial Notice > General Overview

Governments > Legislation > Enactment

#### **HN10** [down arrow] **Evidence, Judicial Notice**

The court may take judicial notice of the journals of the legislature to determine whether the requirements for the enactment of statutes have been complied with.

Governments > Legislation > Enactment

#### **HN11** [down arrow] **Legislation, Enactment**

See [Wis. Stat. § 13.06.](#)

Governments > Legislation > Enactment

#### **HN12** [down] **Legislation, Enactment**

See [Wis. Const. art. VIII, § 8.](#)

Governments > Legislation > Interpretation

#### **HN13** [down] **Legislation, Interpretation**

The court should give effect to the intent when that is clear rather than to the letter of the act; that the intent is to be gathered from the whole statute taken together, and not from words and phrases separate from the context. In arriving at the intent the object and purpose of the statute are to be considered.

Governments > Legislation > Interpretation

#### **HN14** [down] **Legislation, Interpretation**

When a statute contains provisions which are void the entire statute may be declared illegal if the valid and the void portions are so connected or interwoven that they cannot be separated and it is plain that the objectionable parts of the statute were an inducement to the legislature to enact the other parts of the same statute.

## **Headnotes/Summary**

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### **Headnotes**

*Monopolies: Statutes relating to trusts and conspiracies: Constitutionality: Action: To enjoin conspiracy and to obtain incidental relief: Misjoinder: Authority of attorney general to bring action: Statutes: Presumption of validity: Complaint: Failure to allege continuance of unlawful acts: Amendment.*

1. There is no misjoinder of causes of action in a complaint by the state to restrain the formation or execution of contracts in restraint of trade by all of the defendants, to recover of each the forfeiture imposed by statute, to cancel the charters of the defendant state corporations for the violation of sec. 1791j, Stats., and the licenses of the defendant foreign corporations for the violation of sec. 1770g, there being but one cause of action; the primary right of the state being to prevent the continued violation of sec. 1747e, and it being immaterial that as incidental to it there may be different forms of relief as against different defendants.

2. That an action to restrain a combination in restraint of trade, in violation of sec. 1747e, Stats., was brought by the district attorney "on the advice of the attorney general, who may appear as counsel," as provided by sec. 1747f, sufficiently appears by the summons and complaint being signed by both, though the name of the attorney general appeared first and was not followed by the words "of counsel."

3. Under secs. 1791j and 1770g, Stats. (dealing respectively with domestic and foreign corporations, and providing that, if they enter into a combination to restrain trade, the charters of the former shall be revoked and the licenses of the latter to do business in the state be canceled), secs. 1771i and 1791l (providing that, on complaint to the attorney general and evidence produced to him satisfying him that they had so combined, he shall bring an action in

the name of the state for revocation of charter or cancellation of license, as the case may be), and sec. 1791k (making it his duty, under specified conditions, to make inquiry of domestic corporations as to violation of the anti-trust laws), he may, of his own motion, on obtaining knowledge from any source of such a violation, bring such an action; and the mere fact of his doing so and charging such a violation in the complaint is all that is necessary, and is of itself sufficient evidence of his being satisfied there was a violation, without any allegation in the complaint to that effect.

4. Judicial notice may be taken of the journals of the legislature to determine whether there has been a compliance with the requirements for the enactment of a statute.

5. Sec. 13.06, Stats., providing that bills introduced in either house for the appropriation of money shall be referred to the committee on finance before being passed or allowed, does not require a reference by each house to such committee (which is a joint committee composed of members of both houses) before final vote is taken by it.

6. Ch. 458 of the Laws of 1921 (sec. 1747e, Stats.), entitled "An act to protect trade and commerce against unlawful trusts and monopolies," considered as a whole and in view of the presumption of its constitutionality, does not prohibit any legitimate contract, but only those tainted by an unlawful combination tending to the public detriment.

7. The rule that a statute will be held void as a whole where it contains void portions so connected or interwoven with the valid parts that they cannot be separated, and it is plain that the objectionable parts were an inducement to the enacting of the valid parts, has no application to ch. 458, Laws 1921, declaring invalid every contract or combination in the nature of a trust or conspiracy in restraint of trade, even if secs. 1747h, 1747h-1, 1747h-3, and 1747h-4, declaring certain exemptions from the anti-trust laws, are unconstitutional, those sections having been enacted in previous years and not being re-enacted or referred to by the Laws of 1921.

8. A complaint states no cause of action for injunctive relief by way of prevention against an unlawful combination in restraint of trade where it is not alleged that defendants are continuing or threatening to continue such combination, all its allegations being in the past tense and relating to completed transactions.

9. A complaint which, proceeding on the theory that an equitable cause of action for injunction against a combination in restraint of trade is stated, prays that the court retain jurisdiction to annul the charters and licenses of defendants and grant a judgment for money forfeitures against them, fails to state a cause of action for injunction because its allegations are only as to the past; it is, however, subject to amendment.

ROSENBERRY, J., dissents. ESCHWEILER, J., dissents in part.

**Counsel:** For the appellant P. Lorillard Company there were briefs by Olin, Butler, Thomas, Stebbins & Stroud of Madison, and oral argument by Byron H. Stebbins.

For the appellant American Tobacco Company there were briefs by Olwell, Durant & Brady and James T. Drought, all of Milwaukee, and oral argument by Mr. Lawrence A. Olwell and Mr. Drought.

George E. Ballhorn, attorney, and George H. Katz, of counsel, both of Milwaukee, for appellants other than the P. Lorillard Company, American Tobacco Company, and M. L. Annenberg.

For the appellant Annenberg there was a brief by Theodore Kronshage, Jr., and Otto Dorner, both of Milwaukee.

For the respondent there was a brief by the Attorney General, Daniel H. Grady of Portage, special counsel, and George A. Shaughnessy, district attorney of Milwaukee county, and oral argument by Mr. Grady.

**Judges:** BURR W. JONES, J. MARVIN B. ROSENBERRY, J., dissented. FRANZ C. ESCHWEILER, J., dissents in part.

**Opinion by:** JONES

## Opinion

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[\*350] [\*\*615] The following opinions were filed May 1, 1923:

JONES, J. This is [\*\*\*2] an appeal from an order overruling defendants' demurrers to the complaint. The complaint alleged:

"1. That the *American Tobacco Company* is a duly organized corporation existing under and by virtue of the laws of the state of New Jersey, and that on the 18th day of May, 1912, said corporation was duly licensed to do business in the state of Wisconsin, which license is still in effect; that since the 18th day of May, 1912, it has been and now is doing business in the state of Wisconsin and maintains a factory and warehouses in the city of Milwaukee, Milwaukee county, Wisconsin, having agents and salesmen within the state of Wisconsin.

"2. That the *P. Lorillard Company* is a duly organized corporation existing under and by virtue of the laws of the state of New Jersey, and that on the 14th day of December, 1911, the said *P. Lorillard Company* was duly licensed to do business in the state of Wisconsin, which license is still in effect; that since the 14th day of December, 1911, the said *P. Lorillard Company* has been and is now doing business in the state of Wisconsin, maintaining a warehouse at Madison, Wisconsin, and having agents and salesmen in this state."

3-7. That [\*\*\*3] the *Schneider Tobacco Company*, *Badger Tobacco Company*, *A. S. Goodrich Company*, *Lewis-Leidersdorf Company*, and *Peckarsky Brothers Company* are duly organized Wisconsin corporations existing under and by virtue of the laws of the state of Wisconsin, engaged in the wholesale jobbing business in cigarettes and tobacco, having their principal place of business in Milwaukee, Milwaukee county, Wisconsin.

8-13. That certain persons are engaged in the wholesale jobbing business in cigarettes and tobacco in Milwaukee and surrounding territory, either as individuals or members of copartnerships.

"14. That the *Association of Wholesale Tobacconists* is a corporation purporting to be organized under the laws of [\*351] the state of Wisconsin, for which articles of incorporation were issued on the 17th day of May, 1920, which organization will be more particularly referred to herein.

"15. That the said *P. Lorillard Company* and the *American Tobacco Company* were formerly members of a combination in restraint of trade which attempted to monopolize the tobacco business of the United States and which was dissolved by a decree of the federal court; that the said *P. Lorillard* [\*\*\*4] *Company* and the *American Tobacco Company* manufacture about seventy per cent. of the tobacco products sold in the state of Wisconsin; that each of said companies has published a certain list price for their products, which list price does not purport to be the price at which the said respective companies shall sell their products, but is a price sought by said companies to be maintained after their products are in other hands in the course of trade.

"16. That the tobacco-distribution business and the sale of tobacco, other than by manufacturers, is in the hands of jobbers, sub-jobbers, and retailers; that the jobbers consist of wholesalers who are placed upon an accredited list of the manufacturers and are permitted to buy direct from the manufacturers; that the sub-jobbers are wholesalers who are not placed upon the accredited lists of the manufacturers, nor are they permitted by said manufacturers to buy direct from the manufacturers, nor to receive jobbers' discounts; that the retailers, in turn, who sell to the consuming public, are permitted only to buy from said sub-jobbers or jobbers.

"17. That the transactions hereinafter referred to relate solely to intrastate commerce, [\*\*\*5] consisting of sales by jobbers to sub-jobbers and sales by jobbers to retailers, or sub-jobbers to retailers, entirely within the limits of the state of Wisconsin.

"18. That the tobacco and cigarettes referred to herein are commodities and articles in general use in this state, and sold generally to the public.

"19. That between the 6th day of July, 1921, and the 20th day of October, 1921, in the city of Milwaukee, Milwaukee county, Wisconsin, the defendants above named unlawfully conspired, combined, and agreed to prevent competition in the supply and price of tobacco and cigarettes, which articles are in general use in this state and were intended to be sold herein as a subject of commerce or trade; that said combination and conspiracy did control and fix [\*352] the price of said articles and commodities and did illegally restrain commerce and trade within the state of Wisconsin, contrary to the provisions of chapter 458, Laws of 1921.

"20. That for the purpose of more easily accomplishing their aims and purposes, the defendants organized and created an association among said defendants for the purpose of regulating prices and controlling competition, establishing rules and [\*\*\*6] regulations; that said association at first was not incorporated, but consisted of a trade association among the wholesale jobbers, but for the purpose of more easily accomplishing their designs the said jobbers incorporated and formed the *Association of Wholesale Tobacconists*.

"21. That said defendants, conspiring, combining, and agreeing among themselves with the intention of restraining trade and preventing competition, with the purpose of driving out of business the sub-jobbers in the city of Milwaukee and the surrounding territory in the state of Wisconsin, did restrain commerce and prevent competition and did control the price of the articles hereinbefore mentioned (a) by refusing to sell to sub-jobbers other than were on the jobbers list; (b) by agreeing not to increase the number of the sub-jobbers who might buy from the jobbers at sub-jobbers' rates; (c) by systematically increasing the price at which said sub-jobbers might purchase tobacco and cigarettes from the jobbers to such an extent that it would be impossible for said sub-jobbers to do business; (d) by preventing said sub-jobbers from becoming jobbers and buying supplies from manufacturers direct; (e) by systematically [\*\*\*7] cutting off the supply of tobacco and cigarettes which said sub-jobbers might purchase, unless the sub-jobbers became parties to price-fixing and maintenance agreements; (f) by limiting and attempting to limit the persons with which said sub-jobbers might deal; (g) by collectively threatening the said sub-jobbers with cutting off their entire supply of tobacco and cigarettes; (h) by collectively threatening to drive the sub-jobbers out of [\*\*616] business unless they agreed to the demands of the said jobbing association.

"22. That said defendants further restrained trade and controlled prices by agreeing to fix the price at which tobacco would be sold by members of the jobbing association to retailers outside of the city of Milwaukee and in the state of Wisconsin, and on or about the 1st day of September, 1921, [\*353] increased the price by collectively refusing discounts at which said tobacco and cigarettes were formerly sold by said jobbers to retailers.

"23. That said defendants further fixed prices and controlled the sale of the commodities hereinbefore referred to and restrained trade by meeting every two weeks at either the Wisconsin Hotel or the Chamber of Commerce [\*\*\*8] building, at which meetings trade arrangements and understandings were had and made affecting competition and prices, and knowledge communicated to members of the association, with the idea and purpose of eliminating competition between the various members of the association.

"24. That said defendants further controlled prices and restrained trade, as hereinbefore alleged, by collectively urging and coercing retailers in the maintenance of certain prices, to the detriment of the consuming public.

"25. That said defendants further restrained trade, controlled the price, and eliminated competition by collectively agreeing and fixing the price at which retailers in the city of Milwaukee might purchase tobacco from said jobbers or sub-jobbers.

"26. That said defendants further restrained trade and competition by threatening sub-jobbers with the false statement that Liggett & Myers Company and R. J. Reynolds Company would join with these defendants in cutting off the supply of said sub-jobbers unless they became parties to this price-fixing combination and agreement and would maintain the price agreed upon.

"27. That each of the defendants, respectively, became indebted to the state [\*\*\*9] of Wisconsin, and on the 20th day of October, 1921, were indebted to the state of Wisconsin in the amount of \$ 5,000, whereby an action accrues according to the provisions of chapter 458, Laws of 1921.

"Wherefore the state of Wisconsin demands judgment against each of said defendants in the sum of \$ 5,000, and for such relief as the state may be entitled to in the premises."

The *P. Lorillard Company* demurred to the complaint:

"1. For the reason that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action.

"2. And for the reason that it appears upon the face [\*354] thereof that several causes of action have been improperly united."

A like demurrer was filed by the *American Tobacco Company*.

Defendant *Schneider Tobacco Company* demurred to the complaint on the following grounds:

"That the court has no jurisdiction of the person of the defendant and has no jurisdiction of the subject of said action.

"That several causes of action have been improperly united.

"That the complaint does not state facts sufficient to constitute a cause of action."

The demurrers of the remaining defendants are like that of [\*\*\*10] the *Schneider Tobacco Company*.

On December 16, 1921, there was filed an amendment to the complaint, and motion was made to strike out that part of the original complaint demanding judgment against each of the defendants in the sum of \$ 5,000, and to substitute therefor the following:

"I. That the defendants in the above described combination and conspiracy, and servants, employees, agents, and all persons acting in their behalf be perpetually enjoined, restrained, and prohibited from combining, agreeing, or conspiring to restrain trade or competition in the sale of tobacco or cigarettes in the state of Wisconsin, and more particularly that they be enjoined and restrained from collectively agreeing to fixing or establishing in any manner whatsoever by agreement, understanding, or otherwise among themselves the prices at which tobacco or cigarettes may be sold by said defendants to jobbers, retailers, or other members of the consuming public, and further from maintaining, using, or continuing to use collectively minimum prices or minimum discounts by said defendants in the sale of cigarettes and tobacco or agreeing among themselves to establish or adopt terms, conditions, and policies [\*355] [\*\*\*11] which would tend to fix prices at which cigarettes or tobacco should be sold by said defendants or their customers; from collectively agreeing upon the maintenance of resale prices by either retailers or wholesalers.

"(1) From collectively threatening sub-jobbers with cutting off their supply of tobacco or threatening them in any manner for the purpose of compelling said sub-jobbers or retailers to sell tobacco and cigarettes at prices fixed or suggested by said defendants.

"(2) From aiding, abetting, or assisting individually or collectively others to do all or any of the matters herein set forth in this complaint.

"II. Demands further that the court retain jurisdiction herein, and that upon such jurisdiction so retained the state have judgment (a) annulling and canceling the corporate charters of the *Schneider Tobacco Company*, the *Badger Tobacco Company*, the *A. S. Goodrich Tobacco Company*, the *Lewis-Leidersdorf Company*, *Peckarsky Brothers Company*, and the *Association of Wholesale Tobacconists*, all domestic Wisconsin corporations; and (b) annulling and canceling the authority and license to do business in the state of Wisconsin of the *P. Lorillard* [\*\*\*12] *Company*, a foreign corporation organized under the laws of New Jersey, as hereinbefore alleged, and the license and authority of the *American Tobacco Company*, licensed to do business in the state of Wisconsin, as hereinbefore alleged.

"III. That the court retain jurisdiction herein, and upon such jurisdiction the state of Wisconsin demands judgment further against each of said defendants in the sum of \$ 5,000, and for such other relief, legal or equitable, as the state may be entitled to in the premises and as may seem just and equitable to the court.

[\*\*617] "IV. And for its costs and disbursements in this action."

It was stipulated that the demurrs to the original complaint should stand as and for the demurrs to the amended complaint.

The trial court overruled the demurrs, to which order appropriate exceptions were taken.

Among other statutes relied on by the state is ch. 458, [\*356] Laws of 1921, now numbered sec. 1747e, Stats., which is as follows:

**HN1[]** "1. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended [\*\*\*13] to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than one hundred dollars nor more than five thousand dollars. Any such person, [\*\*\*14] corporation, copartnership, trustee or association shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section.

"2. It shall be the duty of the attorney general to enforce the provisions of this act and to bring an action for the recovery of the forfeiture herein provided for, whenever complaint shall be made to him and evidence produced which shall satisfy him that there has been any violation thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings as he shall deem necessary to recover any forfeiture incurred on account of the violation of any of the provisions of this act."

**[\*357] *The demurrer as to misjoinder of causes of action.***

It is contended by the defendants that the complaint sets forth four different kinds of causes of action, each created by a separate statute as follows:

1. A cause of action, involving all the defendants, to prevent or restrain the formation of contracts in restraint of trade, or the execution of the purposes thereof.

[\*\*\*15] 2. Causes of action, involving the five Wisconsin corporations only, to cancel their charters for violation of sec. 1791j, Stats.

3. Causes of action involving the two foreign corporations only, to cancel their licenses to do business in this state for violation of sec. 1770g, Stats.

4. Causes of action, involving each defendant separately, to recover the forfeiture of \$ 100 to \$ 5,000 imposed for violation of sec. 1747e, Stats.

It is argued that the complaint states no single primary right constituting a single cause of action, and that the test whether there is more than one cause of action stated is whether there is more than one primary right sought to be enforced.

Counsel for defendants place great reliance on the case of [Hawarden v. Youghiogheny & L. C. Co. 111 Wis. 545, 87 N.W. 472](#). In this action plaintiff was a coal dealer. The complaint was in two counts. The first was a cause of action at law to recover damages against defendants by reason of a malicious destruction of his business resulting from an alleged conspiracy on the part of the defendants. The second was a cause of action in equity by the plaintiff on his own behalf and on behalf [\*\*\*16] of many others similarly situated to restrain the further enforcement of the conspiracy.

It was held that since it was alleged in the first count that there was a conspiracy and a combination to drive the plaintiff [\*358] out of business, which was an unlawful purpose constituting malice in contemplation of law, and injury resulted, there was a good cause of action. It was also held that there was a cause of action stated in the second count, since courts of equity have jurisdiction to restrain such conspiracies when irreparable injury will result and legal remedies will prove inadequate or a multiplicity of suits will be necessary. But the court held that the two causes were improperly united, using the following language:

"The statute provides that causes of action, in order to be united in one complaint, 'must affect all the parties to the action.' Stats. 1898, sec. 2647. It is clear that this limitation would be violated if the two causes of action in this complaint are allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action, whatever it be. [\*\*\*17] But the second cause of action is a cause of action in favor of a large number of persons, constituting a class represented by the plaintiff. Potentially all of the class are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to [\*\*618] make them capable of being joined." [Hawarden v. Youghiogheny & L. C. Co. 111 Wis. 545, 552, 87 N.W. 472](#).

Undoubtedly this case gives stronger support to the contention made by defendants on this ground of demurrer than any other which has been cited. But we think it may be distinguished from the instant case. In that case in one cause of action plaintiff was suing alone merely for damages to himself in which no other person had any interest. In the other there was a large number of persons and the remedy prayed was injunction only. In that case no one but the plaintiff had any interest in the judgment for damages, [\*\*\*18] if secured, and no other of the plaintiffs to be joined would be in any way affected by that judgment.

[\*359] In the case at bar there is only one plaintiff, and if the plaintiff should prevail every defendant would be directly affected by the injunction, although as to the other questions involved each might be affected in a different manner.

Counsel also cite on this point the following decisions of this court: [Grand Rapids W. P. Co. v. Bensley, 75 Wis. 399, 44 N.W. 640](#); [Younkin v. Milwaukee L., H. & T. Co. 112 Wis. 15, 87 N.W. 861](#); [Draper v. Brown, 115 Wis. 361, 91 N.W. 1001](#); [Boyd v. Mutual Fire Asso. 116 Wis. 155, 90 N.W. 1086, 94 N.W. 171](#); [Luther v. C. J. Luther Co. 118 Wis. 112, 94 N.W. 69](#); [Barnes v. Beloit, 19 Wis. 93](#); [Shanahan v. Madison, 57 Wis. 276, 15 N.W. 154](#); [Midland T. C. Co. v. Edward Schuster & Co., 163 Wis. 190, 157 N.W. 785](#).

For the most part they are cases brought by several plaintiffs or against several defendants having a common interest where injunction and damages were sought, and where it was held that there was a misjoinder [\*\*\*19] of causes of action. This was in accordance with the rule early declared by Chancellor WALWORTH in [Murray v. Hay, 1 Barb. Ch. 59](#):

"There is no inflexible rule as to joinder of parties in the court of chancery. Yet, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each. Nor can a single complainant, having distinct and independent claims to relief against two or

more defendants severally, join them in the same bill. But there are many exceptions to this rule; and the court exercises a sound discretion in determining whether there is a misjoinder of parties under the particular circumstances of each case."

In none of these cases does the bill or complaint base the claim for relief on any such concert of action or conspiracy as is set forth in the present complaint, and they are not inconsistent with cases which will be later referred to in this opinion where different kinds of relief were granted against various defendants.

[\*360] Counsel argue that several different statutes are relied on by the plaintiff to sustain the action; that several different [\*\*\*20] causes of action are stated in reliance on these different statutes; and that for this reason there is misjoinder. To this proposition the following cases are cited: State ex rel. Mylrea v. Janesville W. Co. 92 Wis. 496, 66 N.W. 512; Superior v. Douglas Co. Tel. Co. 141 Wis. 363, 122 N.W. 1023; Knapp v. Deer Creek, 162 Wis. 168, 155 N.W. 940.

The first of these cases was an application under sec. 3241, Stats., for leave to forfeit the charter of the defendant, and it was expressly held that the proceeding was not in the nature of a bill in equity. The second case was an action by the city of Superior to enjoin the defendant from removing from the city and library buildings, telephones installed under a special contract made prior to the passage of the public utility law. The state railroad commission was joined as a defendant, and the complaint prayed for nullification of its order requiring discontinuance of the service. It was held by a majority of the court:

"That the statutory action created to enable a party aggrieved by an order of the railroad commission, by action against such commission to challenge the validity of such [\*\*\*21] order, is not joinable with another action of primary import against some other party, to prevent the latter from complying with such order." Superior v. Douglas Co. Tel. Co. 141 Wis. 363, 372, 122 N.W. 1023.

Mr. Justice MARSHALL and Mr. Justice BARNES dissented and Mr. Chief Justice WINSLOW took no part in the decision.

The third of these cases was for an injunction to compel the construction of ditches as required by sec. 1388b, Stats. It was held that the statute gave a new right to adjacent landowners against municipalities and prescribed the remedy: a remedy at law for damages, and excluded the right to resort to equity.

[\*361] It is the claim of counsel for the state that the action is brought by the state for the invasion of one primary right, namely, that of the state to have trade and commerce free from the unlawful combination alleged. There is no doubt that such combinations as are described in the complaint, to fix prices, restrain trade, prevent competition, and create monopolies, are illegal. They were unlawful at common law, and would be unlawful in this state even if there were no statute on the subject. They were held illegal in this state [\*\*\*22] before sec. 1747e was enacted. They have been declared illegal in many of the states, and by Congress so far as relates to interstate commerce. Nor is there any doubt that the state is charged with the [\*619] right and duty to protect the public from the burden of excessive prices when caused by such combinations.

There is much discussion in the briefs of the meaning of the terms "cause of action" and "primary right" and "subject of the action." In two very elaborate opinions, one by Mr. Justice MARSHALL and the other by Mr. Chief Justice WINSLOW, there was a very full discussion of the meaning of these terms ( Emerson v. Nash, 124 Wis. 369, 102 N.W. 921; McArthur v. Moffet, 143 Wis. 564, 128 N.W. 445); and it would serve no useful purpose to attempt to make clear a subject which confessedly is involved in much confusion. There are a few propositions relevant to the present discussion which are generally recognized as sustained by the authorities. One of these propositions is thus stated by Mr. Pomeroy:

"Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary [\*\*\*23] duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict; and finally the remedy or relief itself. Every action, however

complicated or however simple, must contain these essential elements. Of [\*362] these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states."

"From one cause of action, that is, from one primary right and one delict being a breach thereof, it is possible, and not at all uncommon, that two or more remedial rights may arise, and therefore two or more different kinds of relief answering to these separate remedial rights." Pomeroy, Code Remedies (4th ed.) pp. 460, 461, 464.

It is another rule that in determining whether a complaint states more than one cause of action the whole pleading is to be examined to ascertain when there is more than one primary right sought to be established, and this is the test to be applied.

Observing this test, [\*\*\*24] there may be in equitable actions many kinds of relief prayed for without causing a misjoinder of causes of action. There is not necessarily a misjoinder of causes of action although the rights of some of the parties in respect to the general subject of the action may be different from those of others. Again, there is the very familiar rule thus stated by Mr. Pomeroy:

"The rule has already been stated, as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law." 1 Pomeroy, Eq. Jur. (3d ed.) § 231.

A very good illustration of some of the rules above stated will be found in the case of [Zinc C. Co. v. First Nat. Bank, 103 Wis. 125, 79 N.W. 229](#). The complaint alleged an elaborate scheme by some of the officers of the bank and others to defraud the plaintiff. Different kinds of relief were prayed for against the different defendants, and [\*\*\*25] among other forms of relief was the prayer to set aside a judgment [\*363] fraudulently obtained by the bank against the plaintiff. In discussing the question of misjoinder, in the opinion of Mr. Justice MARSHALL it was said (p. 139):

"There is but one subject of action--the conspiracy to defraud and its consummation to the damage of plaintiff. All the allegations of fact are parts of the presentation of that one subject. The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication."

In [Gager v. Marsden, 101 Wis. 598, 77 N.W. 922](#), in a winding-up proceeding to settle the affairs of a bank, creditors appeared as plaintiffs; many fraudulent practices on the part of directors were alleged, and the officers and stockholders were made parties. It was urged by counsel who demurred for misjoinder that five different causes of action were joined, viz.: one to enforce stockholders' and directors' liability as to stock dividends; [\*\*\*26] one against the directors for paying dividends before the stock was paid up; one for publishing false reports; one for various neglects of officers and directors; and one for winding up of the affairs of the bank.

It was held that there was but one cause of action--the closing up of the business of the bank; that the other matters were germane to that cause and necessary incidents of it. The following are among the decisions of this court which further illustrate the rules above stated: [Level Land Co. v. Sivyer, 112 Wis. 442, 88 N.W. 317](#); [Blake v. Van Tilborg, 21 Wis. 672](#); [Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909](#); [Ellis v. Northern Pac. R. Co. 77 Wis. 114, 45 N.W. 811](#); [Cole v. Getzinger, 96 Wis. 559, 71 N.W. 75](#); [Draper v. Brown, 115 Wis. 361, 91 N.W. 1001](#); [St. Croix T. Co. v. Joseph, 142 Wis. 55, 124 N.W. 1049](#).

The cases we have cited indicate that when a primary [\*364] right has been invaded the complaint may relate to many minor subjects, [\*\*620] and facts may be stated constituting independent grounds for relief differing as to different defendants [\*\*\*27] and still the complaint may not be subject to objection for misjoinder of causes of action.

Sec. 2647, Stats., provides:

**HN2** [↑] "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both."

"But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately."

No objection is made that the action for injunctive relief requires different places of trial for the several defendants and it is very clear that it affects all the parties to the action. But it is claimed that since a penalty is demanded of each defendant, no other defendant is affected by such claim and that every one of such demands is a separate cause of action.

Sec. 1747e, enacted in 1921, prohibited combinations of the character described in the complaint and provides for forfeitures for violation of the statute. It does not prescribe the methods of procedure in actions to be brought, but does declare in very broad terms that it shall be the duty of the attorney general "to enforce the provisions of this act and to bring an action for the recovery of [\*\*\*28] the forfeiture herein provided for." It was unnecessary to include the procedure for enforcing the provisions of the statute by injunction because statutes then existing made such provision.

It is argued by counsel for defendants that the prayer for relief as to the annulment of charters of domestic corporations and the revocation of licenses of foreign corporations to do business in this state indicates that separate causes of action are united; that such proceedings are authorized by different statutes in which the modes of procedure are prescribed; that those methods must be followed; and that there [\*365] cannot be granted in a single action injunctive relief and the revocation of charters and licenses.

Secs. 1791j and 1791l, Stats., **HN3** [↑] make provision for annulment of charters of domestic corporations where they are found to have united into such conspiracies as are described in the complaint in this action. Secs. 1770g and 1770i make similar provision for revoking the licenses for doing business in this state of foreign corporations. These sections as to domestic and foreign companies have been in substantially their present form since 1907.

No precedent has [\*\*\*29] been cited where, in the same action, relief has been sought to enjoin an illegal combination of this character and to recover penalties and revoke and cancel charters and licenses of the offending corporations. In this respect this seems to be a case of first impression.

It is undoubtedly true as argued that all of the defendants are not affected alike. Some of them would not be affected by the revocation of charters and licenses of other defendants. All would be affected if forfeitures are enforced. It is important that the statute already quoted does not require that all defendants shall be affected in the same manner, and the cases referred to show that this is wholly unnecessary. Undoubtedly all the defendants are affected by the charge that they have successfully conspired and combined to violate the statute.

We have then this situation: A statute declares illegal such combinations as are described in the complaint, provides penalties for its violation, and requires the attorney general to enforce the provisions of the act. Another statute, sec. 1747f, makes provision for restraining by injunctions violations of the law forbidding unlawful combinations of the character [\*\*\*30] described in the complaint. Other statutes provide for the cancellation of charters and licenses of offending corporations which conspire and combine to prevent competition, or control prices of articles in general use.

[\*366] **HN4** [↑] When actions are brought to prevent such combinations, the consequences to different defendants, for example foreign and domestic corporations, are different in some respects. Does it follow from this that in order to enforce the provisions of the act a separate suit must be brought against every individual and every corporation joining in the conspiracy for penalties, and that a separate suit must be brought against every member of the combination if a cancellation of its license or charter is contemplated? We do not think so. We are disposed to the view that the primary right of the state is to prevent the continued violation of the statute by means of the combination alleged to be unlawful. This is a matter of far greater importance than the collection of the penalties.

The delict of the defendants is the conspiracy alleged and their acts in its execution. The primary right and duty of the state and the wrong of the defendants constitute the cause of [\*\*\*31] action, and we regard it as one cause of action, although as incidental to it there may be different forms of relief as against the different defendants.

Hence it is our conclusion that there is no misjoinder of causes of action.

*Was the commencement of the action duly authorized?*

It is contended by counsel for defendants that the complaint is defective in failing to show that the attorney general has authority to bring the action; that his powers are limited by statute; and that he must find authority in the statute when he brings an action in the name of the state. Several decisions of this court are cited to this proposition. [\[\\*\\*621\] State v. Milwaukee E. R. & L. Co.](#) 136 Wis. 179, 116 N.W. 900; [State ex rel. Haven v. Sayle](#), 168 Wis. 159, 169 N.W. 310; [State v. Industrial Com.](#), 172 Wis. 415, 179 N.W. 579.

There is no allegation in the complaint that the action is brought pursuant to a request of the governor or either branch of the legislature pursuant to sec. 14.53 of the [\[\\*367\] Statutes](#). It is argued that the statute authorizing actions against illegal combinations for injunctive relief has not been complied [\[\\*\\*\\*32\]](#) with. That statute, so far as material, is as follows:

[HN5](#) "The several circuit courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings as he shall deem necessary to prevent or restrain a violation of the provisions of the preceding section, which shall be begun by way of information or complaint as in ordinary actions, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall be enjoined or otherwise prohibited." Sec. 1747f, Stats.

The action was brought in Milwaukee county and the summons and complaint were signed by the attorney general, the special assistant attorney general, and by the district attorney of that county. The argument is that this shows that the action was not brought by the district attorney on the advice of the attorney general but by the attorney general.

It is clear that under the express language of the statute, on the advice [\[\\*\\*\\*33\]](#) of the attorney general, the district attorney had the right to institute the action and that the attorney general had the right to appear as counsel. We attach little importance to the order in which the attorneys for the state signed the complaint and summons or to the fact that the attorney general omitted to sign his name as "of counsel." We find no difficulty in coming to the conclusion that the statute was complied with; that the suit was instituted by the proper officers with the sanction and advice of the attorney general.

In the same way objection is made to the complaint on the ground of failure to show authority of the attorney [\[\\*368\]](#) general to institute any proceeding for the collection of penalties incurred. Sub. 2, sec. 1747e, quoted in the early part of this opinion, [HN6](#) declares it to be the duty of the attorney general to enforce the provisions of the act. It is further declared to be his duty to bring an action for the recovery of the forfeitures "whenever complaint shall be made to him and evidence produced which shall satisfy him that there has been any violation thereof." The statute then proceeds to require district attorneys on the advice of the attorney [\[\\*\\*\\*34\]](#) general, as in sec. 1747f, to institute actions to recover forfeitures for violation of the act.

The statute seems to show the legislative intent that there shall be no failure to institute proceedings for the violation of the act. It is first made the duty of the attorney general to enforce its provisions. If he should neglect that duty, we see no reason why he could not be compelled by a proper legal proceeding to perform it.

Then there is the same provision for bringing the action by district attorneys for injunctive relief which has already been discussed, and the same reasoning applies.

The objection is further made that there is no statute authorizing the attorney general to institute any proceeding for the purpose of revoking or canceling the charters and licenses of domestic and foreign corporations. Secs. 1791*j* and 1770*g* HNT<sup>↑</sup> deal respectively with such corporations and provide that, if they enter into any combination or conspiracy to restrain trade and competition or fix prices of articles in common use in this state, their charter shall be revoked or their license to do business in this state shall be canceled.

Secs. 1791*i* and 1770*i* HN8<sup>↑</sup> relate to the mode [\*\*\*35] of bringing proceedings for forfeiture of charters or cancellation of licenses. In substantially the same language they provide that on complaint being made to the attorney general and evidence produced to him which shall satisfy him that the [\*369] corporation has violated any of the conditions specified in the several sections, he shall forthwith bring an action in the name of the state to have the charter revoked or the license canceled as the case may be. The complaint does not state that complaint was made to the attorney general or evidence produced to him, and this is urged as a necessary allegation.

Another section, 1791*k*, HN9<sup>↑</sup> makes it the duty of the attorney general under the conditions specified to make inquiry of domestic corporations as to facts which may have a bearing on the question whether there has been a violation of the anti-trust laws. The following paragraph in the elaborate and very able opinion of the trial judge expresses the view we take as to the construction of these statutes:

"I think what the legislature intended was that any person having knowledge of the violation of these sections might make complaint, either written or oral, to the attorney [\*\*\*36] general, and produce evidence before him for the purpose of having him act, but if the attorney general obtains knowledge from any source whatsoever without any complaint having been made to him he may, upon his own motion, act under sec. 1791*i*, and the mere fact of his charging a violation of these sections in his complaint and instituting the action is all that is necessary, as that of itself is sufficient evidence of his being satisfied that such corporation has violated the conditions of these sections."

[\*\*622] We believe that it was the intention of the legislature to confer power on the attorney general to institute proceedings to revoke charters or licenses for violation of these statutes; that the various modes provided for obtaining information were for the benefit of the state and not for that of offenders. The clause in the statutes that the attorney general should act upon complaint made to him and evidence produced which satisfied him that an offense had been committed gave notice to the public of the manner in which proceedings could be commenced. It may have been the intent [\*370] that if the attorney general failed to institute proceedings he could be [\*\*\*37] compelled by *mandamus* to perform the duty which was commanded.

We are convinced that the statutes we have referred to authorized the commencement of the action in the manner in which it was brought.

There is very elaborate argument in the various briefs on other phases of this subject. It is claimed by counsel for the state that sec. 1747*e* gave the attorney general absolute power in his own discretion to bring the action; that the right is also conferred by sec. 3236, Stats.; that when public interests are involved and positive duties are imposed there is the implied power. All of these subjects have been carefully and ably argued by the respective counsel, but in view of the conclusion we have reached it seems unnecessary to discuss the questions thus raised.

*As to the mode of enactment of ch. 458, Laws 1921 (secs. 1747*e*, 1747*f*, Stats.).*

Sub. 3 of this act made an appropriation "to the attorney general a sum sufficient to carry out the provisions of this act, not exceeding the sum of \$ 10,000 annually."

Counsel for defendants argue that this statute, containing an appropriation, was not legally passed because it was not referred by the assembly to the joint finance [\*\*\*38] committee before the final vote was taken.

No authority need be cited to the familiar rule that HN10<sup>↑</sup> the court may take judicial notice of the journals of the legislature to determine whether the requirements for the enactment of statutes have been complied with. The bill in question had passed the usual pilgrimages as to introduction, references, hearings in committee, reports of committees, but although it was referred to the joint finance committee by the senate it was not so referred by the

assembly, and the passage of the bill by that body preceded reference to the [**\*371**] finance committee by the senate. Sec. 13.06 of the Statutes provides:

**HN11**[] "All bills introduced in either house for the appropriation of money by the legislature; all accounts or claims presented in either house; and all bills provided for revenue or relating to taxation, shall be referred to the committee on finance before being passed or allowed."

Sec. 8, art. VIII, of the constitution provides:

**HN12**[] "On the passage in either house of the legislature of any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an appropriation of public or trust money, or releases, [**\*\*\*39**] discharges or commutes a claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three fifths of all the members elected to such house shall in all such cases be required to constitute a quorum therein."

Counsel for defendants argue that sec. 13.06 of the Statutes means that a bill calling for the appropriation of money must be referred by each house to the finance committee before the final vote is taken by that house; that this is necessary to prevent hasty and inconsiderate action. It is contended that since this is the proper construction of the act the requirement cannot be disregarded until the statute is changed, and that ignoring the statute by the legislature does not amount to a repeal.

Counsel for the state argue that the section in question is a mere rule of procedure provided by the legislature, which it may dispense with or disregard. It is also argued that since the journals were silent as to any such reference, compliance with the statute will be presumed until the contrary appears, and that even if the statute was not complied with the appropriation clause was not an inducement for the passage of [**\*\*\*40**] other sections and they were not thereby invalidated.

Many cases are cited by the respective counsel on these [**\*372**] propositions which it becomes not necessary to discuss in view of the conclusion we have reached. There is no constitutional requirement involved. The committee referred to in the statute is a joint committee composed of members of both houses. In the senate the bill was referred to that committee.

It will be observed that sec. 13.06 does not state that the bill shall be referred to the finance committee by each house before final passage. The language is that it "shall be referred to the committee on finance before being passed or allowed."

It may be that it would be desirable, as argued by defendants' counsel, that each house should refer bills for the appropriation of money to the finance committee before it takes final action, but as we construe the statute it does not make any such requirement. This is a question of policy for legislative, not judicial, determination.

*As to the constitutionality of ch. 458, Laws 1921 (sec. 1747e, Stats.).*

A very elaborate and ingenious argument is made by defendants' counsel urging that the legal effect of the [**\*\*\*41**] act is to declare unlawful every contract for the manufacture or sale of any commodity if such contract provides for a fixed price or fixes the amount or quantity of the commodity to be [**\*\*623**] manufactured or sold.

For the purpose of the argument counsel separate sec. 1747e into different paragraphs; discuss the several paragraphs; and arrive at the conclusion that there are two classes of contracts declared unlawful by the act: (1) those *intended* to restrain competition, and (2) those which in any manner control or fix prices or limit or fix the amount or quantity to be manufactured or sold, or fix or control the price to the public. It is contended that the acts prohibited in the second group cannot be qualified by any words of limitation found in the clause describing the first group.

[\*373] It is hardly necessary to cite authorities for the familiar rule for construing statutes that [HN13](#) [↑] the court should give effect to the intent when that is clear rather than to the letter of the act; that the intent is to be gathered from the whole statute taken together, and not from words and phrases separate from the context. In arriving at the intent the object and purpose of [\*374] the statute are to be considered.

Here we have a statute entitled "An act to protect trade and commerce against unlawful trusts and monopolies." The argument of counsel disconnects that part of the statute which relates to controlling and fixing the price and limiting the quantity, and fixing the standard, from the preceding language. It also disconnects the preceding portions from the words near the middle of the section, "to the public."

Counsel also lay great stress on the fact that the word "or" precedes the words "fix any standard," etc., as separating the final prohibitory clause from the other parts of the section. In our opinion the attempt to separate the different clauses, giving to each a meaning apart from what precedes and follows, does not greatly help in arriving at the true meaning of the statute.

In the beginning of the statute, combinations and conspiracies intended to restrain or prevent competition in the supply or price of articles in general use in the state are named as the subject of the legislation. In the same sentence the acts of the conspiracy or combination which constitute a restraint of trade are briefly described or defined. In the closing part of [\*374] the sentence the "price to the public" is connected with what precedes.

It seems very clear to us that the whole object of the statute was to prohibit combinations and conspiracies from illegally restraining trade and commerce. This may be accomplished by conspiring to prevent competition, by conspiring to control, or fix or limit the amount to be produced. We do not think this section can be fairly construed as prohibiting any legitimate contracts, but only those which [\*374] are tainted by an unlawful combination tending to the public detriment.

Applying the rule that in determining the meaning of the section of a statute it should be considered as a whole and not in piecemeal, and the other rule that in passing on the constitutionality of a statute we must presume in favor of its validity until the violation is shown beyond reasonable doubt, we hold that this objection is not well taken.

The constitutionality of the statute is attacked on another ground. Counsel for defendants invoke the well known rule that [HN14](#) [↑] when a statute contains provisions which are void the entire statute may be declared illegal if the valid and the void portions are so connected or interwoven that they [\*374] cannot be separated and it is plain that the objectionable parts of the statute were an inducement to the legislature to enact the other parts of the same statute.

In making this argument they claim that secs. 1747h, 1747h-1, 1747h-3, and 1747h-4 are unconstitutional, and that in considering the validity of the act of 1921 the court should apply the test of constitutionality as if the anti-trust laws as they now exist had been originally enacted in their present form.

These sections were enacted at different times. They relate to exemptions from the provisions of the anti-trust laws, under certain conditions, of labor unions or other associations of laborers, associations of farmers, and those engaged in like employment, and they permit collective bargaining by associations of producers of agricultural products, and employees, when done for their individual benefit. The latest of these sections as they now appear in the Wisconsin Statutes was enacted in 1919.

Secs. 1747e and 1747f were enacted as ch. 458, Laws of 1921. That statute makes no reference to any other and contains none of the exceptions objected to. The exemption statutes above referred to [\*375] were collected by the revisers of the Statutes and placed in the same chapter of the Statutes [\*375] of 1921 as secs. 1747e and 1747f, but were not enacted or re-enacted by the legislature of that year.

This raises the question whether we would be justified in holding that these sections, enacted, some of them, in substance many years ago, were, even if void, the inducement for the enactment of the statute of 1921. To so hold would seem to be an extension of the rule above referred to, and no authority is cited for such a ruling. We are

inclined to the view that the statute under consideration should not be condemned as unconstitutional on this ground and that we are not called upon to decide whether the various sections objected to are constitutional or not.

An examination of the complaint will show that it contains no averments that the defendants are continuing the alleged unlawful combination, or that they threaten to continue it in the future. All the allegations are in the past tense and relate to transactions which were completed. The objection [\*\*624] was made in the oral argument and in the briefs that for this reason the complaint stated no cause of action [\*\*\*46] for injunctive or equitable relief.

The objection has been but little discussed in the oral argument or the briefs, possibly because the defendants may have thought that the defect could be easily remedied by amendment. Nevertheless the objection is squarely presented and we cannot disregard it.

It is the basis of plaintiff's claim that the action is in equity to prevent an unlawful combination from continuing wrongful acts to the detriment of the public, and that the other relief is incidental to their purpose. Proceeding on the theory that an equitable cause of action is stated, it is prayed that the court retain jurisdiction to annul and cancel certain charters and licenses and grant judgment for money damages against the defendants. The relief prayed is not mandatory in its nature, but preventive.

It is elementary that in such cases there should be allegations of threatened wrong doing, or at least that the defendants [\*376] are continuing the mischief sought to be remedied. 1 Joyce, Injunctions, §§ 40, 41a; 1 High, Injunctions (3d ed.) § 628; 22 Cyc. 927; 10 Ency. of Pl. & Pr. 947, 948; [Diedrichs v. N.W. U. R. Co.](#) [33 Wis. 219](#); [Church v. Joint School Dist.](#) [55 Wis. 399, 13 N.W. 272](#); [\*\*\*47] 2 Beach, Eq. Jur. § 645.

We regard the rule as so well settled that injunctive relief of the kind here sought cannot be given in the absence of such allegations as have been pointed out that we must hold that the complaint fails to state a cause of action for injunctive relief. To hold otherwise would reverse former decisions of this court and set a precedent we are unwilling to establish. If the facts which are necessary to supply the defect exist, they could be stated in a single short paragraph and the complaint amended if counsel for the plaintiff so elect.

It might be urged that although the complaint fails to state a cause of action in equity it does state causes of action at law and therefore is not subject to a general demurrer. If the demurrer were to be overruled on this theory it would be necessary to sustain it on the ground of misjoinder of causes of action, since it is only on the ground that the action is equitable in its nature, stating a single cause of action, that we hold that there is no misjoinder of causes of action.

Including reply briefs, six different briefs have been filed, for the most part relating to other objections than the one last discussed. Under [\*\*\*48] all the circumstances it has seemed best to consider these other objections so that if the litigation should be continued it would not be unnecessarily delayed.

The result of the decision is that there is no misjoinder of causes of action; that the action was brought under proper authority; that the statute in question was legally enacted; that it is constitutional; that for the reasons stated the complaint fails to state a cause of action for injunctive relief, but is subject to amendment.

*By the Court.*--The order appealed from is reversed, and [\*377] cause remanded with directions to sustain the demurrer and for further proceedings according to law.

**Dissent by:** ROSENBERY

## **Dissent**

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ROSENBERY, J. (*dissenting*). I cannot concur in the view that there is no misjoinder of causes of action. It is my opinion that secs. 1791j to 1791m, Stats., inclusive, create a new right and prescribe the remedy therefor. By a long line of decisions it is held that where a new right is created and the statute creating the right prescribes the remedy,

the remedy so prescribed is exclusive. *Chicago & N.W. R. Co. v. Railroad Comm.* 162 Wis. 91, 155 N.W. 941; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N.W. 964, \*\*\*49] and cases cited.

Conceding, as the court holds, that the plaintiff's main primary right is that created by sec. 1747e, and that in an action to restrain the continuation of an unlawful combination as defined in that section the court may award judgment visiting upon the guilty parties the legal consequences of their guilt as defined in that section and provided in succeeding sections, the right to forfeit the charter of a Wisconsin corporation does not arise under sec. 1747e or the succeeding sections, but under secs. 1791j to 1791m, inclusive, so that while a single unlawful act may give rise to two distinct causes of action arising under different laws, it does not warrant the joinder of those causes of action. If the provisions relating to ouster contained in secs. 1791j to 1791m, inclusive, were included in secs. 1747e and 1747f, a different result might follow, but the legislature has seen fit not to include these provisions in a single act and it has seen fit to prescribe a specific remedy for the right created by secs. 1797j to 1797m, inclusive.

ESCHWEILER, J. (*dissenting in part*). Because the complaint sets forth facts and relies \*\*\*50 upon statutory provisions upon which are sought several, distinct, and separate forms of relief such as would support and require separate and independent [\*378] causes of action, I am convinced that the demurrer on the ground of improper joinder of several causes of action should have been sustained.

A motion for a rehearing was denied, with \$ 25 costs, on October 16, 1923.

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End of Document



## *State ex rel. Thompson v. Nashville R. & L. Co.*

Supreme Court of Tennessee, Nashville

December, 1924, Decided

No Number in Original

**Reporter**

151 Tenn. 77 \*; 268 S.W. 120 \*\*; 1924 Tenn. LEXIS 46 \*\*\*; 24 Thompson 77

STATE ex rel. THOMPSON, ATTY. GEN., v. NASHVILLE RY. & LIGHT CO. et al. \*

**Prior History:** [\*\*\*1] Appeal from the Chancery Court of Davidson County.--HON. JAMES B. NEWMAN, Chancellor.

**Disposition:** Affirmed.

### **Core Terms**

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electricity, plant, power company, Railway, public utility, manufacture, contracts, domestic, Railroad, raw material, regulation, lines, common law, combinations, franchises, consumers, River, steam, consolidation, distribute, monopoly, lessen, street railway, Anti-Trust, demurrer, public service corporation, public policy, authorizes, articles, abandon

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

International Trade Law > Forfeitures & Penalties > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### **HN1[] Monopolies & Monopolization, Actual Monopolization**

1903 Tenn. Acts 140, which is constitutional, provides that all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen or which tend to lessen full and free competition in the importation or sale of articles imported into Tennessee or in the manufacture or sale of articles of domestic growth or of domestic raw material and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful, and void.

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\* Headnote. Monopolies, 27 Cyc., p. 902 (1926 Anno).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

**HN2[] Monopolies & Monopolization, Actual Monopolization**

1903 Tenn. Acts 140 forbids combinations that lessen or tend to lessen competition in the importation or sale of articles brought into Tennessee or in the manufacture or sale of articles of domestic growth or domestic raw material, and all arrangements tending to control or reduce the cost to the producer or consumer of any such product or article are declared to be void.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

**HN3[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

1887 Tenn. Acts 198 confers power on corporations other than competing railroads to lease and dispose of their property and franchises to others engaged in the same general business and to make any contract for the use, enjoyment, and operation of their property and franchises or any part thereof with any such other corporation of Tennessee or any other state on such terms and conditions as may be agreed on between the contracting corporations.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

**HN4[] Antitrust & Trade Law, Exemptions & Immunities**

1907 Tenn. Acts 437 empowers corporations to sell and convey their property and franchises to other corporations engaged in the same general business.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Transportation Law > Public Transportation

**HN5[] Antitrust & Trade Law, Exemptions & Immunities**

1895 Tenn. Acts 29, § 2 authorizes street-railway companies to purchase the capital stock and bonds of other street railways and to dispose of the same.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

**HN6[] Regulated Industries, Energy & Utilities**

151 Tenn. 77, \*77L<sup>2</sup>68 S.W. 120, \*\*120L<sup>1</sup>924 Tenn. LEXIS 46, \*\*\*1

1903 Tenn. Acts 406, § 1 empowers railroads and street railway companies to manufacture and distribute electricity from their own plants and from plants acquired by lease or other lawful contract.

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview](#)

## **HN7** **Regulated Industries, Energy & Utilities**

1909 Tenn. Acts 127 authorizes the incorporation of hydroelectric power plants to produce electricity, and § 4 of ch. 127 empowers them to contract with cities and villages, persons, firms, or corporations for supplying them with water, light, heat, electricity, electrical and mechanical power, and any other article or thing that it may produce or handle.

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Railroad Commissions](#)

[Civil Rights Law > Protection of Rights > Contractual Relations & Housing > General Overview](#)

[Energy & Utilities Law > Utility Companies > Rates > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Communications Law > Regulators > US Federal Communications Commission > Jurisdiction](#)

[Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview](#)

[Energy & Utilities Law > Utility Companies > General Overview](#)

[Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs](#)

## **HN8** **Railroads & Rail Transportation, Railroad Commissions**

1919 Tenn. Acts 49 enlarges the powers of the Railroad Commission and changes the name to Railroad and Public Utilities Commission. This amendatory act gives the commission general supervision and regulation of, jurisdiction, and control over, all public utilities and also over their property, property rights, facilities, and franchises including the power to fix just and reasonable individual rates, joint rates, tolls, fares, charges, or schedules thereof as well as commutation, mileage, and other special rates that are imposed, observed, and followed thereafter by any public utility as defined in ch. 49 whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential howsoever the same may have heretofore been fixed or established. 1919 Tenn. Acts 49 §§ 3, 4.

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Contracts Law > Types of Contracts > Lease Agreements > General Overview](#)

## **HN9** **Regulated Industries, Energy & Utilities**

By the terms of 1919 Tenn. Acts 49 no public service corporation can lease its property, rights, and franchises or merge or consolidate with any other utility without the approval of the Public Utilities Commission.

[Bankruptcy Law > Procedural Matters > State Insolvency Laws](#)

[Energy & Utilities Law > Pipelines & Transportation > Certification & Licenses](#)

[Real Property Law > ... > Transfer Not By Deed > Dedication > Elements](#)

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Governments > State & Territorial Governments > Licenses](#)

[Real Property Law > ... > Transfer Not By Deed > Dedication > General Overview](#)

#### **HN10[] Procedural Matters, State Insolvency Laws**

1919 Tenn. Acts 49, § 3 declares that the term "public utility" is hereby defined to include every individual, copartnership, association, corporation, or joint-stock company, their lessees, trustees, or receivers appointed by any court whatsoever that now or may hereafter own, operate, manage, or control within Tennessee any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any other like system, plant, or equipment affected by and dedicated to the public use under privileges, franchises, licenses, or agreements heretofore granted or hereafter to be granted by Tennessee or by any political subdivision of it.

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Energy & Utilities Law > Utility Companies > Rates > General Overview](#)

#### **HN11[] Regulated Industries, Energy & Utilities**

1919 Tenn. Acts 49, § 6 provides that no public utility as herein defined shall (a) make, impose, or exact any unjust or unreasonable unjustly discriminatory or unduly preferential individual or joint rate or special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within Tennessee, (b) adopt or impose any unjust or unreasonable classification in the making, or as the basis of, any rate, toll, charge, fare or schedule for any product or service rendered by it within Tennessee, (c) adopt, maintain, or enforce any regulation, practice, or measurement that is unjust, unreasonable, unduly preferential, or discriminatory, and no public utility as herein defined shall provide or maintain any service that is unsafe, improper, or inadequate or withhold or refuse any service that can reasonably be demanded and furnished when ordered by said Commission.

[Governments > Public Improvements > General Overview](#)

[Torts > Transportation Torts > Rail Transportation > General Overview](#)

[Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > Issuance](#)

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > General Overview](#)

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Railroad Commissions

## [\*\*HN12\*\*](#) [+] Governments, Public Improvements

1923 Tenn. Acts 87 enacts that no public utility shall henceforth establish or begin the construction of, or thereafter operate, any line, plant, or system or route in or into a municipality or other territory already receiving a like service from another public utility or establish service therein without first having obtained from the Railroad Commission or the Railroad and Public Utilities Commission or such other commission or board as may be invested with the general powers and duties now exercised by the Railroad and Public Utilities Commission after written application and hearing a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person, firm, or corporation not at the time a public utility shall henceforth commence the construction of any plant, line, system, or route to be operated as a public utility or the operation of which would constitute the same or the owner or operator thereof a public utility as defined by law without having first obtained in like manner a similar certificate.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Contracts Law > Remedies > Ratification

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

## [\*\*HN13\*\*](#) [+] Regulated Industries, Energy & Utilities

1923 Tenn. Acts 87, § 2 provides that the said Commission shall not grant a certificate for a proposed route, plant, line or system or extension thereof which will be in competition with any other route, plant, line, or system unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable, or has refused or neglected after reasonable opportunity after notice, to make such additions and extensions thereto as may reasonably be required pursuant to the provisions of 1923 Tenn. Acts 87.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

## [\*\*HN14\*\*](#) [+] Regulated Industries, Energy & Utilities

Water companies organized to distribute water through pipes to consumers, telephone and telegraph companies, which disseminate messages among the people, transportation lines such as railways and trolley lines, which carry passengers, gas companies, electric power companies, and all like concerns do not fall within the purview of the Anti-Trust Act, 1903 Tenn. Acts 140, relating to the production and distribution of articles made from domestic raw material.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Estate, Gift & Trust Law > Trusts > Constructive Trusts

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Utility Companies > General Overview

Estate, Gift & Trust Law > Trusts > Resulting Trusts

## **HN15** [+] **Public Utility Commissions, Authorities & Powers**

The Anti-Trust Act, 1903 Tenn. Acts 140, does not apply to service rendered by public utilities operating under franchises held in implied trust for the benefit of the community at large pursuant to a grant from the State subject to the power of regulation and control.

## **Headnotes/Summary**

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### **Headnotes**

#### **MONOPOLIES. Anti-Trust Act held inapplicable to public utility companies.**

Anti-Trust Act (Acts 1903, chapter 140) *held* inapplicable to public utilities such as electric power companies, in view of Acts 1887, chapter 198, Acts 1895, chapter 29, Acts 1903, chapter 406, Acts 1907, chapter 437, and Acts 1909, chapter 127, relating to and specifying powers of corporations, and Pub. Acts 1919, chapter 49, sections 3, 6, authorizing consolidation of such public utilities companies with approval of the Public Utilities Commission.

Acts cited and construed: Acts 1903, chs. 140, 406; Acts 1887, ch. 198; Acts 1895, ch. 29; Acts 1907, ch. 437; Acts 1897, ch. 10; Acts 1909, ch. 127; Acts 1919, ch. 49, secs. 3, 6.

Cases cited and approved: Standard Oil Co. v. State, 117 Tenn. 620; State v. Standard Oil Co., 120 Tenn. 86; Coal Creek, etc., Co. v. Tenn. Coal, etc., Co., 106 Tenn. 651; Knapp v. Golden Cross, 121 Tenn. 212.

Constitution cited and construed: Art. 1, sec. 8; Art. 11, sec. 8.

**Counsel:** F. M. THOMPSON and JOE V. WILLIAMS, for the State.

BROWN & SPURLOCK, J. M. ANDERSON, W. E. NOWELL, JR., PERCY H. CLARK and J. A. FOWLER, for Power Co.

**Judges:** MR. JUSTICE COOK, delivered the opinion of the Court.

**Opinion by:** COOK

## **Opinion**

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[\*\*120] [\*78] MR. JUSTICE COOK delivered the opinion of the Court.

This action is prosecuted by the attorney general on behalf of the State to annul contracts and arrangements of the corporations hereinafter named, upon the charge that they constitute a monopoly in the production, distribution, and sale of commercial electricity contrary to public policy, the common law and the Anti-Trust Act, Chapter 140, Acts of 1903.

The bill seeks a forfeiture of the charters of the defendants who are domestic corporations, and the expulsion from the State of the foreign corporations, because of their conduct. It appears that in 1912 the plan was initiated, which culminated in the monopoly alleged to be in violation of law. About that time the Chattanooga Railway & Light Company, a Tennessee corporation, operating in and about Chattanooga, owned a steam plant [\*\*\*2] from which it distributed current to consumers, and produced power to operate its street railway system.

Tennessee Power Company, a Tennessee [\*\*121] corporation, constructed hydroelectric power plants, and an auxiliary steam power plant for use in emergency, on the Ocoee river, and a hydroelectric plant on the Caney Fork river [\*79] at Rock Island. This company ran its lines into Chattanooga, and was competing with Chattanooga Railway & Light Company.

The Tennessee Railway Light & Power Company, a Maine corporation, was organized as a holding company by persons interested in the two companies named above, and was given control by lodgement of a majority of their voting stock, and by this means the management of both became united under one control, although each maintained a separate identity. The Chattanooga Railway & Light Company then entered into contracts with the Tennessee Power Company to abandon the use of its steam power plant and use power supplied by the Tennessee Power Company. It is charged that the Chattanooga Railway & Light Company abandoned its powers and functions as a public service corporation in respect to its generating plants, when it agreed to abandon [\*\*\*3] the use of its power plant and let the Tennessee Power Company produce the electricity, and the power company abandoned in part its functions when it agreed that the Chattanooga Railway & Light Company should be left to the exclusive distribution of electricity.

It is further charged that this arrangement eliminated competition in the Chattanooga territory until the construction of a power plant at Hale's Bar, by the Chattanooga & Tennessee River Power Company, a Tennessee corporation. The Hale's Bar plant was completed in 1913, and the Chattanooga & Tennessee River Power Company was engaged in the erection of power lines into Chattanooga when, it is alleged, that for the purpose of suppressing competition, Tennessee Power Company leased the Hale's Bar plant at an annual rental [\*80] of \$ 600,000, on April 1, 1914. It is charged that in order to present an appearance of competition it was agreed that Chattanooga & Tennessee River Power Company should sell and distribute electricity to consumers in its own name, the Tennessee Power Company agreeing to pay operating expenses incurred by the Chattanooga & Tennessee River Power Company.

The Tennessee Power Company constructed lines [\*\*\*4] into middle Tennessee, and, on February 1, 1915, Nashville Railway & Light Company, a Tennessee corporation, which owned a steam power plant at Nashville from which energy was distributed to its street railway system, and for lights and power to consumers, agreed to buy electricity from Tennessee Power Company. The Nashville Railway & Light Company agreed to abandon the use of its steam plant, which was to be kept in condition and used as an auxiliary plant under direction of the Tennessee Power Company.

It is charged that this left the distribution of power in exclusive control of the Nashville Railway & Light Company at Nashville under the arrangement to use power supplied from the hydroelectric plants of the Tennessee Power Company for the operation of the street railway and the interurban lines out of Nashville, and for the distribution of current to customers wanting lights and power within this territory; and that the Tennessee Power Company, under these arrangements, was given exclusive control over the production of electricity thereby removing the Nashville Railway & Light Company as a competitor.

Tennessee Railway Light & Power Company, which had voting control of the Chattanooga [\*\*\*5] Railway & Light Company, [\*81] acquired a majority of the stock in the Nashville Railway & Light Company, so that, through the holding company, common interests controlled Tennessee Power Company (which owned the plants on the Ocoee, and the plant on the Caney Fork) and controlled the Chattanooga Railway & Light Company (which owned the Street Railway Lighting & Power System in Chattanooga), and the Nashville Railway & Light Company (which owned the system about Nashville), and, by the lease to the Tennessee Power Company of the Hale's Bar plant, controlled that plant.

In 1922 a new holding company, the Tennessee Electric Power Company of Maryland, was organized, and arrangements were made for it to take over the voting stock or control of Tennessee Power Company, Chattanooga Railway & Light Company, Chattanooga & Tennessee River Power Company, and Nashville Railway & Light Company for the purpose of uniting them under one control. This arrangement gave to the consolidated companies exclusive control over the distribution of electricity in all the cities, towns, and villages within the area covered by their transmission lines. The bill was filed to restrain the consummation of [\*\*\*6] the plan.

It is insisted on behalf of the State that electricity generated by steam and water power is an article manufactured of domestic raw material, within the terms of chapter 140, Acts of 1903, and that the foregoing arrangements constitute a monopoly in violation of the statute and the common law.

Demurrers were filed by the defendants named above, which challenge the sufficiency of the bill, upon the grounds that the matters therein set forth do not constitute [\*82] a violation of either the statute or common law relating to combinations in restraint of trade; that the anti-trust statutes of the State do not relate to public utilities which render service to the public; that no illegal act or agreement of the defendants is shown; that [\*\*122] no reason is given for the long delay in bringing the suit; and that chapter 140, Acts of 1903, is unconstitutional, because violative of article 1, section 8, and article 11, section 8 of the constitution of Tennessee, and the Fourteenth Amendment and other provisions of the federal constitution. Answers coupled with demurrers were filed, proof was taken, and the cause was heard upon a stipulation that the questions raised [\*\*\*7] by the demurrers should be disposed of first.

The chancellor sustained two grounds of demurrer holding that: (1) The contracts and arrangements set forth in the bill do not constitute a violation of either the statutes or common law of the State relating to monopolies and trusts; (2) that our antitrust laws do not embrace public utilities such as the defendants are shown in the bill to be, and dismissed the bill. The entire record was brought up on appeal. A discussion of all the grounds of demurrer would serve no purpose. The inquiry may well be limited to questions presented by the assignments of error that the chancellor erred:

"(1) In construing Acts of Tennessee for 1903, chapter 140, as not applicable to contracts and combinations entered into for the purpose of and having the effect of, suppressing or lessening competition in the manufacture and sale of electricity generated by steam and water power.

[\*83] "(2) In holding (a) that electricity, the manufacture of which requires the consumption of a large amount of coal, is not an article manufactured from domestic raw materials within the terms of chapter 140, Acts of 1903; and (b) that electricity, the manufacture of [\*\*\*8] which requires the use of water, is not an article manufactured from raw materials within the terms of said statute.

"(3) In holding that Acts Tennessee, 1903, chapter 140, does not apply to public utilities engaged in the manufacture, distribution and sale of electricity manufactured from steam and water power.

"(4) In not holding that on the facts shown of record the contracts arrangements and combinations entered into between the defendants had for their purpose or effect the suppressing or lessening of competition (a) in violation of Acts Tennessee, 1903, chapter 140; (b) the common law of Tennessee; and (c) the declared public policy of Tennessee.

"(5) In holding (a) that the contracts, arrangements, and combinations assailed in the bill were legally approved by the Railroad and Public Utilities Commission of Tennessee, and (b) that said Commission could legally approve said acts, all of which violated said chapter 140, Act of 1903.

"(6) In holding that approval by the Railroad and Public Utilities Commission, even if validly given, would legalize the contracts, arrangements, and combinations assailed in the bill.

"(7) In failing and refusing to decree the forfeiture of the [\*\*\*9] corporate charters of defendants Tennessee Power Company, Chattanooga Railway & Light Company, Chattanooga [\*84] and Tennessee River Power Company, and Nashville Railway & Light Company, and to revoke the right of defendants Tennessee Railway, Light & Power

Company and Tennessee Electric Power Company to do business in Tennessee for their several violations of the Acts of Tennessee, 1903, chapter 140, and the common law and public policy of Tennessee."

The assignments of error present the inquiry of whether electricity and energy distributed in the form of service to the public is an article manufactured of domestic raw material within the meaning of chapter 140, Acts of 1903, and whether the act of 1903 embraces within its terms public service corporations.

Unquestionably the result of the contracts and arrangements above referred to was unity of control in the distribution of electricity within the territory covered by the lines of the Tennessee Power Company, which tended to lessen free competition. [HN1](#)<sup>↑</sup> Chapter 140, Acts of 1903, which was sustained against attacks upon its constitutionality in [Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705, 10 L.R.A.\(N.S.\) 1015](#); [\[\\*\\*\\*10\] State v. Standard Oil Co., 120 Tenn. 86, 110 S.W. 565, Id., 217 U.S. 413, 30 S.Ct. 543, 54 L.Ed. 817](#) provides:

"All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, [\*85] or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful, and void."

This act [HN2](#)<sup>↑</sup> forbids combinations which lessen or tend to lessen competition in the importation or sale of articles brought into the State or in the manufacture or sale of articles of domestic growth, or domestic raw material, and all arrangements tending to control or reduce the cost to the producer or consumer of any such product or article are declared to be void.

The chancellor was of opinion [\[\\*\\*\\*11\]](#) that electricity was not an article of domestic growth, nor an article of domestic raw material such as is contemplated by the act. If it is an article manufactured from domestic raw material the inquiry is presented of whether or not the act of 1903 relates to public utilities; that is, public service corporations or persons engaged in the production and distribution of electricity or other public service. In relation to the matter of public utilities the legislature has declared a policy which does not forbid consolidation of their enterprises, but, on the contrary, authorizes consolidation under strict regulation [\[\\*\\*123\]](#) and control. This purpose is evinced by chapter 198, Acts of 1887, chapter 29, Acts of 1895, chapter 406, Acts of 1903, chapter 437, Acts of 1907, chapter 127, Acts of 1909, and the acts hereafter referred to establishing the Railroad and Public Utilities Commission.

[HN3](#)<sup>↑</sup> Chapter 198, Acts of 1887, confers power upon corporations, other than competing railroads, to lease and dispose of their property and franchises to others engaged [\[\\*86\]](#) in the same general business, and to make any contract for the use, enjoyment, and operation of their property and franchises, [\[\\*\\*\\*12\]](#) or any part thereof, with any such other corporation of this or any other State, on such terms and conditions as may be agreed upon between the contracting corporations. [Coal Creek, etc., Co. v. Tennessee Coal, etc., Co., 106 Tenn. 651, 62 S.W. 162](#); [Knapp v. Golden Cross, 121 Tenn. 212, 118 S.W. 390](#).

[HN4](#)<sup>↑</sup> Chapter 437, Acts of 1907, empowers corporations to sell and convey their property and franchises to other corporations engaged in the same general business.

[HN5](#)<sup>↑</sup> Chapter 29, section 2, Acts of 1895, authorizes street railway companies to purchase the capital stock and bonds of other street railways and to dispose of the same.

[HN6](#)<sup>↑</sup> Chapter 406 of the Acts of 1903, section 1, empowers railroads and street railway companies to manufacture and distribute electricity from their own plants and from plants acquired by lease or other lawful contract.

[HN7](#)<sup>↑</sup> Chapter 127, Acts of 1909, authorizes the incorporation of hydroelectric power plants to produce electricity, and section 4 of the act empowers them to contract with cities and villages, persons, firms, or corporations, for

supplying them with water, light, heat, electricity, electrical and mechanical power, and [\*\*\*13] any other article or thing which it may produce or handle.

When the Anti-Trust Act of 1903 was enacted, public service corporations distributing electric energy, gas, water supply, or those rendering any other public service where a municipality was interested, were subject to some measure of regulation under franchise ordinances of such municipalities. The first now existing legislation [\*87] tending toward State regulation and control of a public utility was chapter 10, Acts of 1897, creating the Railroad Commission with power to prohibit unjust discrimination by railroads for service in carrying freight and passengers.

**HN8** Chapter 49 of the Acts of 1919 enlarged the powers of the Railroad Commission and changed the name to Railroad and Public Utilities Commission. This amendatory act gave the Public Utilities Commission general supervision and regulation of, jurisdiction, and control over, all public utilities, and also over their property, property rights, facilities, and franchises, including the power to fix just and reasonable individual rates, joint rates, tolls, fares, charges, or schedules thereof, as well as commutation, mileage, and other special rates which shall be [\*\*\*14] imposed, observed, and followed thereafter by any public utility as herein defined, whenever the Commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. Sections 3, 4.

**HN9** By the terms of the act no public service corporation can lease its property, rights, and franchises, or merge or consolidate with any other utility, without the approval of the Commission.

**HN10** Section 3 of the act declares: "The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation, or joint-stock company, their lessees, trustees, or receivers, appointed by [\*88] any court whatsoever, that now or may hereafter own, operate, manage or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any other like system, plant, or equipment, affected by and dedicated [\*\*\*15] to the public use, under privileges, franchises, licenses, or agreements, heretofore granted, or hereafter to be granted, by the State of Tennessee or by any political subdivision thereof."

**HN11** Section 6 provides: "That no public utility as herein defined shall:

"(a) Make, impose, or exact any unjust or unreasonable unjustly discriminatory or unduly preferential individual or joint rate, or special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this State.

"(b) Adopt or impose any unjust or unreasonable classification in the making or as the basis of any rate, toll, charge, fare, or schedule for any product or service rendered by it within this State.

"(c) Adopt, maintain, or enforce any regulation, practice or measurement which shall be unjust, unreasonable, unduly preferential, or discriminatory, nor shall any public utility as herein defined provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said Commission."

It will be observed that the public policy of the State in so far as it may be ascertained from legislative [\*\*\*16] declaration, [\*89] has been to permit unity of control subject to regulation by the State. This regulation extends to such details as approving contracts and arrangements for the consolidation of public utilities engaged in the same general business.

**HN12** Chapter 87 of the Acts of 1923 enacts:

[\*\*124] "That no public utility shall henceforth establish or begin the construction of, or thereafter operate any line, plant, or system or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein without first having obtained from the Railroad Commission or the Railroad and Public Utilities Commission, or such other commission or board as may be invested with the general powers

and duties now exercised by the Railroad and Public Utilities Commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment and operation, and no person, firm or corporation not at the time a public utility shall henceforth commence the construction of any plant, line, system or route to be operated as a public [\*\*\*17] utility, or the operation of which would constitute the same, or the owner or operator, thereof, a public utility as defined by law, without having first obtained; in like manner, a similar certificate."

HN13[<sup>18</sup>] Section 2 of the act provides:

"That the said Commission shall not grant a certificate for a proposed route, plant, line or system or extension thereof which will be in competition with any other route, plant, line or system, unless it shall first [\*90] determine that the facilities of the existing route, plant, line or system are inadequate to meet the reasonable needs of the public or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions thereto as may reasonably be required under the provisions of this act."

The record shows that the recent arrangements and agreements assailed by the bill were approved and ratified by the Public Utilities Commission in conformity with section 6, chapter 49, Acts 1919. It is insisted by the appellant that the Public Utilities Commission had no authority to approve the consolidation of these companies, and that [\*\*\*18] the chancellor erroneously held that the Commission could, by such approval, authorize the violation of the Anti-Trust Law of 1903, and the common law which forbids monopoly.

In determining this and the other questions presented by the assignments of error we must look to the provisions of chapter 140, Acts of 1903, enacted to prevent monopolies in the production and distribution of articles which pass through processes of barter and trade to the consuming public; and we must consider the legislative declaration relating to persons and corporations engaged in rendering service to the public. HN14[<sup>19</sup>] Water companies, organized to distribute water through pipes to consumers, telephone and telegraph companies which disseminate messages among the people, transportation lines such as railways and trolley lines, which carry passengers, gas companies, electric power companies, and all like concerns do not fall within the purview of the [\*91] Anti-Trust Act, chapter 140, Acts of 1903, relating to the production and distribution of articles made from domestic raw material.

It is unnecessary to discuss the question of whether or not electricity is an article of manufacture within the meaning [\*\*\*19] of a taxing law, or otherwise, when we consider that it is also a power devoted to public service, and that defendants who generate and distribute it are public utilities. It is impossible to reconcile chapter 140, Acts of 1903, which forbids monopolies in articles manufactured from domestic raw material, with those statutes which authorize public utility companies to consolidate their activities under regulation by the State. These divergent lines of legislation cannot be brought together so as to bring the contracts and arrangements of the defendant public utility companies assailed by the bill within the prohibition of chapter 140, Acts of 1903.

Chapter 140, Acts of 1903, comprehends the commonlaw offenses of "forestalling" and "engrossing" directed against conduct that unfairly raises the price of commodities that pass in the channels of commerce to the consuming public. HN15[<sup>20</sup>] It does not apply to service rendered by public utilities operating under franchises held in implied trust for the benefit of the community at large, under grant from the State, subject to the power of regulation and control. The general assembly has committed to the Public Utilities Commission absolute power [\*\*\*20] of regulation and control over all public utilities such as the companies involved, and, by the express and implied provisions of the statutes above referred to, any principle of the common law that might have otherwise been [\*92] invoked is superseded by these legislative declarations.

We find no error in the action of the Chancellor sustaining the two grounds of demurrer set forth above and in dismissing the bill upon the answer of the Nashville Trust Company.

Affirmed.

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## ***State ex rel. Griffith v. Anthony Wholesale Grocery Co.***

Supreme Court of Kansas

January, 1925, Decided ; April 11, 1925, Filed

No. 23,098.

### **Reporter**

118 Kan. 394 \*; 234 P. 992 \*\*; 1925 Kan. LEXIS 194 \*\*\*

THE STATE OF KANSAS, ex rel. CHARLES B. GRIFFITH (substituted for Richard J. Hopkins), Attorney-general, Plaintiff, v. THE ANTHONY WHOLESALE GROCERY COMPANY et al., including THE H. D. LEE MERCANTILE COMPANY, and THE SAMUEL E. LUX, JR., MERCANTILE COMPANY, and THE PITTSBURG WHOLESALE GROCERY COMPANY, Defendants.

**Prior History:** [\*\*\*1] Original proceeding in quo warranto; JOHN A. HALL. commissioner. Opinion filed April 11, 1925. Finding for plaintiff; judgment reserved.

**Disposition:** Judgment reversed.

### **Core Terms**

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bulletins, prices, wholesale, groceries, attended, meetings, purposes, jobbers, sugar, discounts, percent, salary, member of the association, carrying, selling, grocers, harmony, bonus, food, grocery business, manufacturers, outstanding, customer, letters, prevail, handle, houses, plans, restraint of trade, competitors

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Federal Government > Claims By & Against

Governments > Federal Government > Employees & Officials

#### **HN1[] Regulated Practices, Price Fixing & Restraints of Trade**

Good motives, or that some good resulted from the action of a combination, do not serve to exonerate parties who do acts prohibited by the statute.

### **Syllabus**

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SYLLABUS BY THE COURT.

MONOPOLIES--Combinations in Restraint of Trade--Evidence. In a proceeding in quo warranto in which the state alleged that certain wholesale grocery companies had entered into and promoted an unlawful combination to fix and maintain prices of merchandise, restrain trade and prevent competition, evidence was taken before a commissioner, who, after hearings, made findings of fact and conclusions of law to the effect that the charges made by the state had been sustained. On exceptions of defendants that the evidence does not sustain the findings and conclusions made and upon an examination of the evidence, it is determined that defendants entered into an unlawful combination and that their acts in furtherance of the purposes of the combination amounted to a violation of the antitrust statute, which renders them subject to the penalties of the statute.

**Counsel:** Charles B. Griffith, attorney-general, and John G. Egan, assistant attorney-general, for the plaintiff.

D. R. Hite, T. M. Lillard, Bruce C. Hurd, [\*\*\*2] O. B. Eidson, John S. Dean, Harry W. Colmery, all of Topeka, Thomas L. Bond, of Salina, and C. O. Pingry, of Pittsburg, for the defendants.

**Judges:** Johnston, C. J. Burch, J. dissenting. Hopkins, J., not sitting.

**Opinion by:** JOHNSTON

## Opinion

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[\*394] [\*\*992] The opinion of the court was delivered by

JOHNSTON, C. J.: This was an original proceeding in quo warranto brought in the name of the state by the attorney-general, in which he alleged that the Anthony Wholesale Grocery Company and 37 other corporations and partnerships engaged in the [\*\*993] wholesale grocery business in Kansas have maintained and are maintaining an unlawful trust and combination to prevent competition and control the prices, terms and conditions for the sale of groceries in violation of the laws of the state, and asking that each be ousted and prevented from carrying on such unlawful business, and for the imposition of appropriate penalties. Upon an agreement as to the payment of penalties, a judgment has been rendered against thirty-five of the corporations and firms sued, but the H. D. Lee Mercantile [\*395] Company, the Samuel E. Lux, Jr., Mercantile Company and the Pittsburg Wholesale Grocery Company, still [\*\*\*3] contending with the state, the action has been continued as to them. Hon. John A. Hall was appointed as a commissioner of the court to hear evidence on the issues formed by the pleadings and make findings of fact and conclusions of law. Evidence was taken and the commissioner has filed his report, in which he finds that the contesting defendants and each of them had joined in forming and maintaining an illegal combination of capital, skill, and of doing acts alleged by plaintiff which are condemned by the antitrust statute, and hence each is subject to penalties to be determined by this court. Each of the defendants excepts to the findings and conclusions of the commissioner, insisting that the evidence does not warrant the findings of fact or the conclusions of law. Much of the testimony offered to sustain the charges of wrongdoing by the defendants centered about an organization designated as the Missouri and Kansas Wholesale Grocery Association, organized about May 20, 1913. This association included in its membership and supporters the thirty-eight defendants sued, and a few others whose places of business were outside of the state and who were not sued because summons could not [\*\*\*4] be served upon them within the state. The association had no constitution or by-laws, but had a secretary and treasurer, Harry E. Sloan, who was directly in control of the organization. The expense of maintaining the organization with its various activities was met by assessments upon its members and those deriving benefit from its existence and operations. The secretary gathered information from the members of the business done and methods employed, he issued many bulletins and circulated them among the members and contributors, wrote letters to them giving advice as to cooperation, customs, practices and prices, and kept the members in touch with each other. With other officers, he called meetings of the association, where these subjects were discussed and courses of action determined. The ostensible purposes of the association were:

"First. To foster and promote a feeling of fellowship and good will among its members and on broad and equitable lines to advance the welfare of the wholesale grocery trade of the United States.

"Second. To oppose improper methods and illegitimate practices inimical to the right conduct of business that honest and open competition may prevail.

[\*\*5] "Third. To promote harmonious relations among manufacturers, wholesalers and retailers in order that food products may be placed in the hands of consumers at the lowest possible cost.

[\*396] "Fourth. To assist in the enactment and enforcement of federal and state pure-food laws that in their operation shall deal justly with the rights of consumers and the trade, and of effective weights and measures statutes for the protection of the public.

"Fifth. To promote the adoption and enforcement throughout the United States of uniform laws upon commercial subjects.

"Sixth. To disseminate useful information and maintain high standards of education among members with respect to the scientific and practical features of their business.

"Seventh. To have business conducted upon lawful and proper lines, and to correct evils, including 'schemes,' 'deals,' 'lotteries,' 'premiums,' and the subsidizing of jobbers' salesmen.

"Provided, That in the efforts of the association to accomplish these ends, no action shall be taken that will tend in any manner whatsoever to fix or regulate prices or in any way operate in restraint of trade."

The avowed purposes of the association [\*\*6] were unobjectionable. They included purposes to foster and promote a feeling of fellowship and good will among its members; to oppose improper methods and illegitimate practices inimical to the right conduct of business, in order that honest and open competition may prevail and that food products may be placed in the hands of consumers at the lowest possible cost; to assist in the enforcement of federal and state pure-food laws, disseminate useful information and maintain high standards of education among members with respect to the scientific features of their business, and also added, as we have seen:

"That in the efforts of the association to accomplish these ends no action shall be taken that will tend in any manner whatsoever to fix or regulate prices or in any way operate in restraint of trade."

The testimony which related mainly to transactions and practices occurring in 1918 and afterwards, to and including 1920, covered a wide range of activities, including bulletins, letters, speeches, discussions, reports, and from it all the commissioner concluded that the three defendants during a named period in 1920 were in a trust and composed a combination of capital, skill and acts [\*\*7] for the following purposes:

"1. To create and carry out restrictions in trade and commerce within the state of Kansas.

"2. To carry out restrictions in the full and free pursuit of the business of buying and selling groceries within the state of Kansas.

[\*\*994] "3. To increase the price of groceries and merchandise to the public within the state of Kansas.

"4. To prevent competition among the members of the Missouri-Kansas Wholesale Grocers Association and the H. D. Lee Mercantile Company in [\*397] the purchase and sale of groceries and merchandise within the state of Kansas.

"5. To fix standards and figures whereby the price to the public should be controlled and established as to groceries and merchandise within the state of Kansas.

"6. To make, enter into, execute and carry out obligations through meetings, reports and bulletins to preclude a free and unrestricted competition among themselves in the sale of groceries and merchandise within the state of Kansas."

These findings were followed by others with reference to the connection of the defendants with the association, the contributions made by them towards its maintenance and the conduct and participation of each.

[\*\*\*8] We will first consider the purposes of the association as an organization as shown by bulletins, letters, statements and the conduct of officers, and those taking a more or less active part in promoting its plans and purposes. The bulletins of Secretary Sloan were sent to members and contributors at irregular intervals of from one to three weeks. These covered a great variety of subjects, including market conditions; necessity for harmony and cooperation among the members; suggestions of prices to be charged for several articles; admonitions as to keeping prices up so as to secure profits and against the cutting of prices; excoriations of the actions of the food administration and fair-price committees acting for the federal government; calls for and reports of meetings of the association; appreciation of his advance of salary from \$ 7,500 per year to \$ 12,500, with a bonus of \$ 5,000 for the preceding year, designed to be collected by increased assessments of members and contributors to the association. A few of the excerpts from his bulletins, letters and reports, as well as statements of other participants, follow. In a call for a meeting he said:

"I think this is a very important [\*\*\*9] meeting, and I think that all of the jobbers of Missouri and Kansas should attend it. We are not calling a general meeting, because it is by nature a zone meeting of those who are interested in general conditions as pertain to the Missouri river. I think that everybody should attend. Somebody must establish a life-saving station for the wholesale grocer. It goes without saying that some have been disposed to unload canned tomatoes, canned salmon, and even canned corn, and are urging sales upon free deals, freight allowance, and following the gamut of general demoralization."

In another bulletin reference is made to the sale of tobacco, and of salesmen whose strength lies in price alone, and he follows:

"Now it is an obvious fact that one man's Star tobacco is as good as another's, and price will take the business. It is also equally obvious that no [\*398] house or salesman can make a sou markee in net profit by selling listed goods at a cut price. Therefore the salesman who is building for the future will doubtless face the time when he will be compelled to yield a certain volume of business to be the cutter. It has been so in the past and will be so in the future."

In another [\*\*\*10] he said:

"Milk fever is accompanied with severe pains and throbbing in the head, flushing in the face, thirst, heat and dryness of skin. There seems to be an epidemic of it among the wholesale grocers in Kansas City. The severe pains are caused chiefly by the matter of price. Carnation milk, for instance, is being sold at \$ 7 per case. That causes the pains to prevail both among those who have it and those who are liable to catch it, because it is very contagious. The flushing of the face occurs when you ask a sufferer wotenell he does it for. Thirst prevails because there isn't anything any more to quench it with except a little water. The pulse is full (lucky pulse), the tongue furred, bowels costive, and light and sound are painful. It is indeed true that the sound of the price is extremely painful. The best treatment consists in cooling saline purgatives and good ventilation."

A member of the association asked the secretary to send certain classifications showing what items should be one per cent and what ones two per cent. The secretary responded, saying:

"Complying with your request of the 19th, I am sending you twenty-five copies of the latest classification, and upon which [\*\*\*11] all jobbers in this territory are working."

Speaking of sugar and a resentment of the actions of federal attorneys and fair-price committees in telling them how to run their business, as to sugar he said:

"The only well-established market cost which seems at this writing to prevail is that of the cane refiner's; namely, \$ 15 f. o. b. refinery. On this basis granulated sugar is sold to the retail trade at \$ 16.75 f. o. b. It would be easy to get 20c. for it, but it is sold on a 'reasonable' basis. The retailer is selling it at 19c. to 20c. to the consumer. Where

jobbers were driven in desperation to pay 16c., 17c. and 18c. for sugar, they have simply added a fair profit to the cost."

In another part of the bulletin he said:

"Based upon the cost to-day of granulated sugars, actual sales of which are booked by refiners at \$ 15 f. o. b., the market is as follows: Based on granulated \$ 16.75 Missouri river, the difference in freight rates figures as follows: Salina, Arkansas City, Emporia, Fredonia, Hutchinson, Junction City, Manhattan, McPherson, Topeka, Wichita, Winfield and all points taking a rate of 65.8--granulated, \$ 16.85. Missouri river points and all markets taking a rate [\*\*\*12] of 57.3--granulated, \$ 16.75. Dodge City--granulated, \$ 17.00. Concordia--granulated, \$ 16.90. [\*\*995] This price is based upon the margins set by the [\*399] fair-price committee. Straggling lots of southern and other higher-cost sugars must be figured on their own basis."

He further tells the members that a certain company has pinched off the jobber's profit on Jello and advises them that they do not allow this to pass without protest.

As to Cream of Wheat he suggested:

"You can lead a horse to water, but you can't make him drink. You can suggest, but your suggestions may fail to carry conviction. An article which may be designed to be forced through your hands on a margin less than the cost of handling is apt to meet a barrier. A manufacturer must feel ashamed of his brand if he doesn't feel that it should pay its fair proportion of the cost of distribution. Either that or he is afraid of it in competition. Cream of Wheat costs \$ 8.10. The least it should bring is \$ 9.25. Suggestions seem to be in order."

In another bulletin reference is made to canned goods and the sixty-day guaranty against swells. He tells them that the sixty-day limit should be enforced, and that:

[\*\*\*13] "Nothing which was ever adopted has served so well its purpose as the sixty-day limit, and if you have any inclination toward cold feet or carelessness on this proposition, I advise you to tighten up and make the rule rigid. Use the sticker."

In the sticker it is stated that no credits will be given after the expiration of sixty days, and no goods returned without written authority from the dealer.

In reference to the action of the federal authorities he calls attention to a cartoon in the *Saturday Evening Post*, in which he says that:

"Honest business' is there represented by a splendid milk cow stampeded and bawling in terror while pursued in frenzy by demagogues, red agitators, tax collectors, radical press and parlor Bolshevik relentlessly driving her as she plunged over the hill to certain doom and destruction, while the cunning fox representing the 'profiteering business' lies snug behind a protecting rock slyly winking his eye as he feasts on a big fat goose. I hope the head price-fixer and all the little price-fixers, as well as all the pallbearers who are restlessly wandering around with corpse of the Lever act to instill fear in the hearts of honest business and break [\*\*\*14] down the morals of the commercial world, will see that cartoon and profit thereby."

In a call for a meeting the secretary stated:

"You will find enclosed a blank for return of your outstanding accounts for January business. I would consider it a personal compliment if every house receiving this request would comply. Please pass the blank on to your credit department with instructions to fill it out and mail it to this office. Our *Monthly Financial Bulletin*, under the caption of 'Dry Figures,' we find is [\*400] eagerly sought and carefully read, and each house can make it more complete and of greater value by sending in their figures. Comment and suggestions are also solicited. I am asking, further, on this blank, for your stock turnover during the year of 1919. I hope to hear from all."

One of the defendants responded, stating that--

"Enclosed you will find financial report as per your request."

That company was written by the secretary, stating:

"Last month you failed to send a report of your outstanding accounts. Would it be asking too much to have you fill out the enclosed blank and mail it to me, covering January business? You understand that I am not trying to mix [\*\*\*15] in your private affairs, and I don't think you think so, but I do find these comparative reports are of great interest all over the country and I am anxious to have a report 100 per cent pure on January."

In reply the company stated in a letter:

"This is in reply to your letter of February 3 asking for our report. Now, I sent you this report yesterday and wish to say that we are always willing to cooperate with you. We are taking a great deal of interest in this and want to tell you that we will be at the meeting February 12 and get better acquainted."

In a report of an address made by the secretary of a meeting, the method of dealing with outstanding accounts was treated. It was said:

"The method we pursue in our credit men's meetings is to take up the names of offending customers who are chronic infringers on the discount limit. If we find that some house is selling a certain customer we are having trouble with, we bring up the name of that customer, find out who are selling him. If we find three or four houses selling him we will stop this customer from taking excess discount or excess time."

With reference to the method of allowing discounts, the speaker further said:

"After [\*\*\*16] talking the matter over it was considered best to bring this before the general meeting and to ask of you a reaffirmation of the principles with regard to the terms and discounts that had been previously adopted by this association, to the end that if there had been any slipping that we should go back to our sane basis."

In respect to the price fixing of federal authorities, the president remarked at a meeting:

"It seems to me, gentlemen, we can't get any definite basis on this sugar proposition. The best thing to do is to do what we have been doing--go along and do the best we can--let each one interpret these rules for himself. If anybody has more sugar than he can handle at a profit his neighbor will doubtless be willing to take it off his hands."

[\*401] In respect to handling corn products, reference was made by a speaker to the fact that the jobbers in the states of Texas, Arkansas [\*\*996] and Oklahoma sold without restrictions when they came into Kansas. The reply of the secretary was:

The Oklahoma jobbers tell me they handle corn products which they buy on the old scale list and they don't realize over 7 per cent profit on it. The line between Arkansas and Oklahoma, [\*\*\*17] and Missouri and Kansas divides two selling departments of the corn products company; one is handled by one man, one handled by the other. The system is different. In this northern territory we buy on the zone system. We buy at a list price. Jobbers up in this territory take the profit that is allowed on the list; that makes 10 per cent and 3 1/2 per cent where you are making 7. This is one thing I have up in correspondence now, suggesting that if it is good for the North it must be good for the South.

"MR. CRANE: Are Missouri and Kansas satisfied?

"THE SECRETARY: Absolutely."

In another bulletin the members were told:

"Cane sugar cannot be sold at less than a 15c. cost basis, and your Eastern sugars must of course be sold on 16c. cost basis. Ain't it L? Each jobber, therefore, at the present time must figure out his selling price and see that he

makes a reasonable profit. Uniformity cannot prevail when the situation changes with the arrival of each car of sugar."

In reference to sugar, a bulletin referred to a zone meeting to be held which members were invited to attend. In it the secretary stated:

"That in case you were unable to attend, I will issue a bulletin following the [\*\*\*18] meeting which you will understand will give an outline of the decision arrived at there. I thought I would advise you of this so that if anything may come to you the latter part of the week you will understand it is based upon this conference, although of course it would be better if you could personally attend."

Smithmeyer, president of the association, was president of the Theo. Poehler Mercantile Company, and in a letter addressed to the managers of branch houses of the Theo. Poehler Mercantile Company at Emporia and Topeka he referred to a meeting which had been held the day before, in which he said:

"So many different prices from various sections were reported that it was impossible to satisfy everybody in regard to selling prices. So it was deemed best to try and make a uniform price, at least in this particular zone, of \$ 18 per bag, f. o. b. Missouri river basis, and we believe that most of the jobbers interested in this particular territory will be billing sugar on this basis. . . . In this mail we are inclosing copies of suggested selling prices on canned fruits and vegetables; also on a few dried fruit and bean items. You will note that [\*402] we will have to change [\*\*\*19] a few items on which we are either too high or too low, and we expect to go over our books to-day and to-morrow and make the necessary changes in order to be in line with our competitors."

The president stated in another letter, in respect to the secretary's salary, that:

"In view of the fact that this past year Harry has enabled us, through his efforts and advice, to realize some handsome profits on several important items, it seems to, me that we should show our appreciation by giving him a bonus, for the current year, of \$ 5,000. I also believe that for next year he should be put on a salary basis of \$ 15,000 per year."

In a letter to another grocer the president stated in relation to the compensation of the secretary:

"I am quite sure that you know enough about association work to understand that if we are working in harmony and everything is going along nicely that all of us will be much better off than if the opinions are divided. I cannot help but think that the assessments for association expense are, after all, but a slight matter. As long as we are able to work together we can accomplish a good deal."

In the same letter he stated:

"While one or two of the larger houses [\*\*\*20] at Kansas City have not enrolled as members, I find that they are all contributing toward the expense of the association. In fact, I know positively that two of them pay regularly \$ 50 every time that there is an assessment made. So I thought I would tell you this so that you may know all of the Kansas City houses that amount to anything are affiliated anyway with our Missouri-Kansas Association."

In another letter the president, speaking of the increase of salary for the secretary, said:

"There is no denying the fact that through his efforts and advice we have been able to secure a much better margin on quite a number of items--and the principal one of which, of course, is sugar--than we would have if he had not almost insisted on our asking a profit over replacement values. Of course you know all about this, and there is no need of my going into this matter with you in a letter. . . . Now, Brad., you know what we must strive for and try to maintain is harmony in our organization, for, after all, the salary proposition and possibly a few extra assessments during the year do not amount to much. As long as we can maintain a good and harmonious feeling among all of our members and [\*\*\*21] also have our secretary feeling that he is appreciated, we can accomplish something. So I feel quite sure that unless you object very strongly that we will have no trouble in convincing them that they are

getting this association service on a mighty cheap basis. The expense will not amount to 1c. per bag on sugar, and I do not anticipate great objections from anyone regarding a few extra assessments."

In a letter by one of the managers of the Theo. Poehler Mercantile [**\*403**] Company to another manager of a branch house of the same [**\*\*997**] company, with reference to putting new prices into effect, he wrote:

"Don't you think we are making a mistake, however, in not getting our pineapple prices in line with what our competitors are getting? Fred will recall that we practically promised these other fellows at the time that we would line up with these pineapple prices, and it looks to the writer that we are apt to get in bad with these friendly competitors if we break faith with them by not lining up. There were some other items also on which we agreed at the Kansas City meeting to put up our prices, but on which it seems Lawrence decided afterwards not to raise its prices."

[**\*\*\*22**] In another letter of the same writer, with reference to a meeting which had been attended by him and the president, he stated:

"At that time we had occasion to 'compare notes' with some of these other jobbers, and we found that our prices on pineapple were way too low as compared with those being quoted by our competitors. Mr. Smithmeyer and the writer made a note of these differences and decided to raise our prices in line with those shown by the new Topeka price-book pages."

In a bulletin of the secretary, reference is made to a pancake flour and the discounts to be allowed on it. Reference was made to a letter which expresses appreciation for the discount of 15 per cent to be deducted at the time the invoice was paid:

"All pancake manufacturers are allowing 2 per cent with the exception of the manufacturers of 'Aunt Jemima.' . . . If you recede from your former discount terms it will simply mean that every institution will do likewise, and the wholesale grocery trade will be penalized the exact difference in discount terms."

There was also in the bulletin a statement with reference to price cutters. It was said:

"The customer who is unreasonable in his views is of course an [**\*\*\*23**] undesirable one. The sooner he is eliminated from the calling list of the salesman the better. Those making unjust claims, abusing their credit, or those who are not fair in their purchases, continually playing one jobber against another, are all undesirable. While there will always be some jobbers willing to gamble a little on these, yet as time goes on their numbers will grow less."

The president stated, in a meeting, that the secretary had succeeded in cutting down the percentage of outstandings very materially. He said:

"The monthly reports are a great help and ought to be an inspiration to all of us to do still better in way of prompt collections. The retailers will be benefited if they are advised to settle two or three times each month and take advantage of discounts. In former years some of the houses have allowed so-called 'harvest terms.' I think this practice tends to demoralization [**\*404**] and should not be started this season. You will all sell just as many goods on regular terms."

In a report of a meeting, resolutions passed, among other things, declared:

"That this association records itself in favor of the following allowances:

No. 2 labels	\$ 2.00 per M.
No. 2 1/2 and No. 3 labels	2.50 per M.
No. 10 short length labels	2.50 per M.
No. 10 full length labels	4.50 per M."

[**\*\*\*24**] At a meeting held, one of the speakers, it is reported, stated with reference to tobacco:

"Just now there is a scourge of the tobacco bug. Why it is so the most eminent doctors of business disagree. No sovereign remedy has as yet been discovered, and it continues to blight and kill the profit account. Those who contract this disease suffer fearfully, and the more so because it is in a measure self-inflicted. While there seems to be no permanent cure, yet there is a sure preventive. That preventive is to simply stick to list. Those who adopt it are happy, healthy, wealthy and wise. There was one little thing which came into universal favor the past year and which I have been told saved a great deal in time and trouble and money. I refer to the little sticker 'Guarantee Against Swells,' which has done so much to curb the return of outlawed canned goods and limited liability to sixty days."

In another report reference was made to the monthly comparison of outstandings published. It was said:

"It is a feature well worthy your support, and I hope that every house will respond to the call and fill out the necessary blank each month. These reports and the bulletins carrying them are widely [\*\*\*25] read throughout the country, and the local associations of many states are engaged in exactly similar work as are we. Thus it brings to bear an enormous country-wide pressure on the wholesale grocery business to establish its transactions and terms of payment closer and closer to a cash basis, and as time goes on this feature of your association work will prove to be of recognized value to you all."

In a bulletin report was made of an annual meeting at which upwards of 85 per cent of the membership was present, and where it was unanimously voted--

"That as a testimonial of his services the past year, a cash bonus of \$ 5,000 be given to our secretary, Harry E. Sloan, and that his salary for the present fiscal year be increased to \$ 12,500."

It was further ordered that a distinct assessment be made upon each member for the purpose of raising the bonus.

Some effort was apparently made to conceal any action which might be considered as a violation of the antitrust law. The president [\*405] asked one of the speakers in respect to taking individual action in communications that passed between the different jobbers. The speaker responded:

"One man can't conspire, and two can. Two [\*\*\*26] or more people together asking a certain manufacturer for anything might be considered in restraint of trade and as coercion. Individually [\*\*998] you can do anything you want to, collectively you can't."

The president responded:

"It seems to me, then, to be a clear case of doing the necessary thing at the proper time, and unnecessary as well as unwise to pass a resolution or take any concerted action. We ought to all understand the matter sufficiently now to take proper action at the proper time."

In a bulletin relating to sugar and of the action taken at a meeting it was said:

"The future looks none too bright to me, although I am not as well posted as others. The full discussion we deem best not to reproduce, nor take up your time or the space in this report. Most of you heard it and the balance have good imagination."

In another report made by the secretary of an annual meeting he said:

"Policies are launched and ideas are reduced to concrete form. Individual action for the benefit of the whole is crystallized into harmony simply from the fact that men grow to understand each other. . . . There is still some important aftermath which will be passed on to you in due time, [\*\*\*27] and of course those who were deprived of the privilege of personal presence will understand that there was much discussion which could not be covered in this report, and I would suggest to those that they take the opportunity of interviewing their neighbors who did attend."

The president, in writing a letter relating to the action of the association, stated:

"I do not care to go into details in a letter, and of course you will understand my reasons for not doing so, but I suggest that you refer this matter to your son Lee. I suggest doing this, inasmuch as Lee has attended a number of the meetings and is probably more familiar with what has occurred during the last six or eight months in the way of the activities of our association."

In a letter to another the president, after discussing what had been accomplished through the effort and advice of the secretary, said:

"Of course you know all about this and there is no need of my going into this manner with you in a letter."

[\*406] At a meeting the president stated:

"Any further questions? If not, we will now go into executive session, and I would request that all nonmembers retire for the time being."

Among other things, [\*\*\*28] it was shown that the association took concerted action to drive five packing companies out of the grocery business. It appears that an action was brought by the United States in the supreme court of the District of Columbia against these companies to enjoin them from doing a number of things, including the carrying on of the wholesale grocery business. By consent of the parties, a decree was entered which recited that the defendants asserted innocence of any violation of the law, but not desiring to be in a position of antagonism to the government, stipulated that the decree might be entered enjoining the carrying on of the wholesale grocery business on condition that their consent should not be considered as an adjudication that the defendants had in fact violated any law of the United States. After the rendition of the consent decree the packing companies withdrew from the wholesale grocery business. While steps taken to eliminate competitors and limit competition generally should be regarded as contrary to law, not much can be built on this feature of the case, since the judgment enjoining the companies from selling groceries has been rendered. To some extent it carries the implication [\*\*\*29] that they were wrongfully engaged in that business and that the association should not be condemned for opposing a wrong, even though it might result in benefit to its members. Its efforts in that behalf did tend to show concerted action among the members of the association. There was considerable more evidence of like import to that stated, but enough has been quoted to show beyond cavil that the association was a combination, that its plan and purpose was designed to and did operate to restrict trade, it did operate to fix and maintain prices of merchandise, and prevent competition, to the prejudice of the public interest and in violation of the antitrust statute. (R. S. 50-101 and succeeding sections.) The validity of this statute has been considered and upheld. ([The State v. Smiley, 65 Kan. 240, 69 P. 199; The State v. Wilson, 73 Kan. 334, 80 P. 639, 84 P. 737.](#))

It is argued that some of the purposes of the association, as well as those advocated in the bulletins, were wholesome and useful. It is said that the association aided the government food administration, [\*407] in that its rulings were given publicity and were promulgated through the bulletins of the secretary, [\*\*\*30] and that this aid so given was acknowledged by federal officers. The avowed purposes of the association were legitimate, and doubtless some of its plans and practices tended to correct trade abuses and in others the members may have been actuated by good motives. However, [HN1](#) good motives, or that some good resulted from the action of the combination, do not serve to exonerate parties who do acts prohibited by the statute. In [International Harvester Co. v. Missouri, 234 U.S. 199, 58 L. Ed. 1276, 34 S. Ct. 859,](#) it was said:

"It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect." (p. 209. [\*\*999] See, also, [Armour Packing Co. v. U. S., 209 U.S. 56, 52 L. Ed. 681, 28 S. Ct. 428;](#) [Standard Sanitary Mfg. Co. v. U. S., 226 U.S. 20, 57 L. Ed. 107, 33 S. Ct. 9;](#) [Thomsen v. Cayser, 243 U.S. 66, 61 L. Ed. 597, 37 S. Ct. 353.](#))

In regard to cooperation with and help rendered to the United States food administration, the commissioner has found, and not without evidence, that activities of the association were not in harmony with the federal authorities [\*\*\*31] nor designed to aid in enforcing their regulations or to assist in the protection of the public; but, on the other hand, they constituted concerted unlawful action on the part of those supporting the association,

including the three defendants, to circumvent the plans of the United States food administration and defeat the aims of the fair-price committees.

There remains the question whether the three contesting defendants were so connected with the association or participated in the unlawful combination and acts to such an extent as to subject them to the penalties of the statute. The commissioner found that the letters of the president, Smithmyer, relating to salary and bonus of the secretary of the association, and also the correspondence between officers and managers of the defendant houses maintained by the Theo. Poehler Mercantile Company, did not come into the possession of the defendants, and that they had no actual knowledge of the letters.

First, as to the Samuel E. Lux, Jr., Mercantile Company: It appears to have been a member of the association, paid the assessments for maintaining it, the president attended meetings, took and read the bulletins of the secretary, as well [\*\*\*32] as the reports made of the meetings. It appears further that President Lux wrote to secretary Sloan for two dozen of the percentage classifications made [\*408] by the association, and on the following day the secretary forwarded them to him, saying that they were the latest and the ones upon which all the jobbers in the territory were working. Upon request of the secretary, the president of the company sent to the association a financial report as to the condition of his company. When checked up by the secretary for not sending a report of his out-standings for a certain month, President Lux wrote that he had sent it yesterday, and he also assured the secretary that his company was always willing to cooperate. Through the bulletins, the action taken in meetings of the association which the president of the company attended, and the published reports of action taken at meetings he did not attend, the company was informed as to the purposes of the association and the scope of its operations. It combined with other members in carrying out the illegal purposes of the association and contributed money to further its plans and policies. The commissioner's findings as to the liability [\*\*\*33] of that defendant is approved.

The Pittsburg Wholesale Grocery Company was a member of the association for more than two years, and during that time paid assessments for its maintenance, making payments which aggregated \$ 286. It appears that the president of the company attended a number of meetings of the association and received bulletins sent out by Secretary Sloan. He knew of the increase of the salary awarded to the secretary in consideration of the benefits that he had secured for the members, and the company paid it knowing the purpose for which it was being raised. The president of the Pittsburg company denied knowledge of the bonus awarded the secretary for past services and denied combining or conspiring with anyone to restrain or monopolize trade. His company was a member of the association from the beginning, and the evidence shows that he and other officers of his company must have known of the illegal purposes of the association and that they knowingly aided in carrying out those purposes contrary to public welfare and in violation of the statute.

The case of the H. D. Lee Mercantile Company differs from that of the other defendants, as it did not formally become a [\*\*\*34] member of the association. It received the bulletins of the association and necessarily learned of its plans and to some extent of the scope of its operations. Assessments were paid by the company from time to time for a period of more than two years ending April 27, 1920, [\*409] and these amounted in all to \$ 375. The payments were made at or about the time that assessments were paid by wholesale grocers that were regularly enrolled as members of the association. It is evident from the amounts paid that the Lee company did not pay assessments on the basis of the business done, and the amounts were not proportionate with those paid by some other grocers. A vice president and manager of the company attended one of the meetings of the association, and the testimony is that no representative of the company attended any other meeting. The vice president stated that he attended the meeting because he desired to hear a report that was to be made there by an officer of the federal food administration. In his testimony H. D. Lee said that he took the bulletins and paid for them, the same as he purchased and paid for other bulletins which conveyed information as to the state of the market, [\*\*\*35] the conditions of business, and also because they contained information about the rulings of the federal authorities. He expressly denied that his company had intended to or in fact had ever joined with anyone in fixing a uniform standard of prices or the terms and conditions of sales [\*\*1000] of grocers or had done any act tending to restrain trade. He further stated that he did not receive the reports of meetings, but the bulletins contained reports of some of the meetings and also contained notices of future meetings, which indicated the business to be considered at such meetings. These bulletins revealed the purposes and operations of the association, and one reading them

would be blind, indeed, that did not see that the design was to procure concert of action as to maintaining standard prices, obtaining certain discounts from manufacturers, fix uniform rates of discounts for cash on sales of groceries to retailers, and to stifle competition. With this knowledge the Lee company contributed money for the maintenance of the association and the carrying out of these purposes. The means for maintaining the association and promoting its purposes were derived from the assessments [\*\*\*36] paid. Although the company did not subscribe its name on the membership roll or formally become a member, it actually became a part of the combination by its contribution and the help it rendered in furthering the plans of the combination. There is a claim that the contributions were personal to Secretary Sloan and were merely paid for the editorials contained in the bulletins; but it appears that when the association voted a bonus to the secretary and made a large increase in his salary, the Lee company increased [\*410] the amounts of its assessment as did the members and other supporters of the combination. The assessment paid by the Lee company at that time was double the amounts which it had previously paid. The fact that one of the unlawful combination which took part in the wrongful acts was not as active in furthering the unlawful scheme as others in the combination does not relieve that one from the consequences of the violation of the statute, nor will the fact that the combination did not effect a complete monopoly excuse the conspirators if that which was done tends to restrain trade and deprive the public of the benefits of free competition. ( [The State v. Smiley, \[\\*\\*\\*37\] supra; The State v. Aikins, 83 Kan. 792, 112 P. 605.](#))

Upon the testimony we conclude that while the H. D. Lee Mercantile Company did not enroll as a member of the association, it did form a part of the unlawful combination and substantially aided in furthering the prohibited acts which constitute a violation of the statute. No findings or conclusions were made by the commissioner as to the relative responsibilities of the several defendants or the penalties to be imposed and judgment to be rendered against these defendants, nor was any consideration given to this feature of the case in the briefs of counsel. It is now determined that the findings of the commissioner that each defendant acted in violation of the antitrust statute are approved, and the case is reserved for later consideration after the views of counsel have been presented as to what the ultimate judgment fixing the liabilities of the several defendants shall be.

**Dissent by:** BURCH

## **Dissent**

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BURCH, J. (dissenting): I dissent from the findings so far as they affect the H. D. Lee Mercantile Company and the Pittsburg Wholesale Grocery Company.

HOPKINS, J., not sitting.

## A. B. Small Co. v. Lamborn & Co.

Supreme Court of the United States

October 21, 22, 1924, Argued ; March 2, 1925, Decided

No. 100

**Reporter**

267 U.S. 248 \*; 45 S. Ct. 300 \*\*; 69 L. Ed. 597 \*\*\*; 1925 U.S. LEXIS 371 \*\*\*\*

A. B. SMALL COMPANY v. LAMBORN & COMPANY

**Prior History:** [\*\*\*\*1] ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

ERROR to a judgment of the District Court in favor of the plaintiff, Lamborn & Co., in an action brought to recover the difference between the contract price of sugar sold by plaintiff to defendant, and the amount obtained by the plaintiff on resale, the defendant having refused to accept delivery.

**Disposition:** Affirmed.

### **Core Terms**

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seller, buyer, delivery, sugar, contracts, resales, quantities, refinery, dealers, pounds, resold

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Transportation Law > Intrastate Commerce

#### **HN1[] Monopolies & Monopolization, Actual Monopolization**

The Anti-Trust Act of July 2, 1890, 26 Stat. 209, prohibits restraints and monopolies in interstate and foreign commerce.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### **HN2[] Monopolies & Monopolization, Actual Monopolization**

There is nothing in the Anti-Trust Act of July 2, 1890, 26 Stat. 209, which invalidates a collateral contract or relieves the buyer from his obligation under it. It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the Act provides for violations of it are exclusive.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

### [HN3](#) Trials, Judgment as Matter of Law

The rule for testing the direction of a verdict is that where the evidence is undisputed, or of such conclusive character that if a verdict is returned for one party, whether plaintiff or defendant, it will have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in Georgia, as in many other jurisdictions.

## Lawyers' Edition Display

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### Headnotes

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Contract -- mutuality -- terms subject to seller's approval. --

Headnote:

A provision in a contract for sale of sugar, "Terms and withdrawal subject to the approval of seller's credit department," does not destroy mutuality of the contract, where it follows provisions that buyer might require deliveries or withdrawals prior to the time fixed by the contract, if seller was in a position reasonably to make them, and payment was to be cash before delivery, or cash in seven days, with a discount in either case.

Contract -- mutuality -- provision for interruption by war. --

Headnote:

A provision in a contract for sale of sugar that if the supply of raw material to the refinery manufacturing the sugar should be interrupted by war conditions, embargoes, strikes, or other like causes, and if delivery was thereby prevented, seller should not be responsible, does not make delivery optional with seller, so as to destroy the mutuality of the contract.

Monopoly -- application of Anti-trust Act to intrastate transaction. --

Headnote:

The Federal Anti-trust Act does not apply to transactions between contracting parties located in the same state, which required shipment from and delivery to points so located.

Monopoly -- effect of purchase from one violating Anti-trust Act. --

Headnote:

That a seller of sugar is a member of a combination to raise the price of such commodity in interstate commerce does not render invalid a purchase from him at the fixed price by one not a party to the combination, nor other than a stranger to it.

Evidence -- sales of sugar -- effect on fairness of resale. --

G ī ÁNĘĘĘG İ FĘG İ LÁ ÁUĘĘĘDĘĘĘHÉEELA J ÁSĘĘĘA JÍ FĘĘĘ JÍ LAFJG ÁNĘĘĘSÓYQAHÍ FĘĘĘ

## Headnote:

In an action to hold a buyer of sugar who breached his contract liable for the difference between the contract and resale prices, evidence is not admissible of particular sales effected about the time of the resale, which were in relatively small quantities, and have no bearing on the fairness of the resale.

Trial -- when verdict directed. --

## Headnote:

When the evidence is undisputed, or of such conclusive character that, if a verdict was returned for one party, it would have to be set aside, in the exercise of a sound judicial discretion, the court should direct a verdict for the other party.

Sale -- reasonableness of time for resale. --

## Headnote:

A delay of eleven and thirty-three days before effecting resales of 300 barrels of sugar upon buyer's refusal to accept them is reasonable as matter of law, where the market was unsettled, with few buyers, and diligent efforts were made to effect sales, while the buyer, although notified, failed to afford assistance.

## Syllabus

1. Contracts for the sale of sugar considered and *held* free from the objection that they made delivery optional with the seller and therefore lacked mutuality. P. 250.
  2. In an action by the seller on an intrastate contract for the sale and delivery of goods owned by the seller and title to which passed to the buyer unrestricted under the contract, the buyer can not defend upon the ground that the seller was party to a combination to manipulate interstate trade in goods of that kind in violation of the Anti-Trust Act and made the contract during the life of the combination and in conformity with standards sanctioned by it. It is only when the invalidity is inherent in the contract itself that the Act may be interposed as a defense to it. P. 251.
  3. Defenses based on §§ 4, 5 and 6 of the Lever Act, *held* insufficient on grounds stated in *Small Co. v. Am. Sugar Co.* ante, 233. P. 252.
  4. The duty of a seller of goods, in reselling on account of the buyer, is to sell fairly in a reasonably diligent effort to obtain a good price; the test is not whether he got the highest possible [\*\*\*\*2] price or as much as others got in particular instances. P. 253.
  5. Evidence of particular sales held rightly rejected in the circumstances. *Id.*
  6. Where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict should be directed for the other party. P. 254.
  7. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval by this Court and by many others. *Id.*
  8. Evidence *held* to establish conclusively that resales of goods, made by the vendor, were made fairly and within a reasonable time. P. 254.

GUÍ ÁMEÉG Í FÉG Í LÁÍ ÁUÉDÁHEÉHÉLÁ JASÓAÉ JÍ FÉH JÍ LAFJGÍ ÁMEÉSÓYÓÁÍ FÉH

**Counsel:** Mr. Edgar Watkins, with whom [\*\*\*3] Mr. Frederick T. Saussy, Mr. Mac Asbill and Mr. Horace Russell were on the brief, for plaintiff in error.

Mr. Orville A. Park, with whom Mr. Archibald B. Lovett was on the brief, for defendant in error.

**Judges:** Taft, Holmes, Van Devanter, Brandeis, Sutherland, Butler, Sanford

**Opinion by:** VAN DEVANTER

## Opinion

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[\*249] [\*\*301] [\*\*\*598] MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

On April 30 and May 7, 1920, the parties to this case entered into contracts for the sale by one and purchase by the other of 450 barrels of refined sugar, to be shipped by the seller from a refinery at Port Wentworth, Georgia, to the buyer at Macon, in the same State, between July 15 and October 1. Late in July, 150 barrels were shipped, accepted and paid for. About that time the market price began to decline and continued downward for the rest of the year. Late in August the seller shipped 150 barrels more, but when it reached Macon the buyer refused to accept it, suggested that it be stored "for the benefit of whom it may concern," which was done, and notified the seller that any further shipment would be similarly refused. Correspondence followed in which the seller sought to persuade the buyer to adhere to [\*\*\*4] the contracts. Late in September, before the expiration of the time for completing delivery, the seller notified the buyer that, if [\*250] [\*\*\*599] the refusal to conform to the contracts was continued, the remaining 300 barrels, which included the 150 stored at Macon, would be resold for the account of the buyer and the latter would be held for the difference between the contract price and what was realized on the resale. The buyer persisted in the refusal and the sugar was resold.

This action was brought by the seller to recover from the buyer the difference between the contract price and the amount obtained on the resale. In the District Court a verdict and judgment were given to the seller; and the buyer brought the case here on direct writ of error, a constitutional question being involved.

One defense interposed by the answer was that the contracts were wanting in mutuality and therefore void. A demurrer to the defense was sustained, and this is assigned as error. Two clauses in the contracts are cited as making delivery optional with the seller, and therefore showing a want of mutuality. But in our opinion the clauses are not open to that construction. The contracts, signed [\*\*\*5] by both parties, evidenced an agreement by the seller to deliver the sugar within a designated period at a fixed price, as well as an agreement by the buyer to take the sugar and to pay the price. They contemplated that the buyer might be accorded the privilege of calling for special deliveries, known as "withdrawals," during the prescribed period, if the seller was in a position reasonably to make them. And they contained alternative "terms" of payment -- "Cash before delivery less 2%, or cash in seven days less 2%." The clauses in question then followed. One was, "Terms and withdrawal subject to the approval of the seller's credit department." Read in the light of established practices in the sugar trade, this clause meant that, when a shipment was made, the seller's credit department was to elect which of the alternative terms of payment should apply, and also that, if the buyer called for special deliveries, known as "withdrawals," [\*251] that department was to determine whether such deliveries reasonably could be made and was to approve or disapprove them accordingly. The clause was essentially subsidiary and entirely consistent with the seller's definite agreement to [\*\*\*6] make delivery within the period prescribed. The other clause was to the effect that, "if the supply of raw material of the refinery manufacturing the sugar" should [\*\*302] be interrupted by war conditions, embargoes, strikes, or other like cause, and if delivery was thereby prevented, the seller should "not be responsible." There is nothing in this clause which affords any basis for saying that delivery was to be optional with the seller. On the contrary, it recognizes that he was obligating himself to make delivery. Its evident and only purpose was to relieve him from liability in the event that performance of the obligation was prevented by particular circumstances, in their nature beyond his control. It is idle to suggest, as was done in argument, that the clause would permit him to avoid delivery by merely selecting a refinery which by reason of war conditions, embargoes or strikes was already cut off

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from a supply of raw material. That would not be within either the letter or the spirit of the clause, but would be a palpable fraud and unavailing. [Slater v. Savannah Sugar Refining Corporation, 28 Ga. App. 280, 284.](#)

The answer set up a special defense based on [HN1](#) the Anti-Trust [\*\*\*\*7] Act of July 2, 1890, c. 647, 26 Stat. 209, prohibiting restraints and monopolies in interstate and foreign commerce. A demurrer to the defense was sustained and the ruling is assigned as error. But it was plainly right. In the first place, the contracts pertained only to intrastate commerce. They were negotiated in Georgia; the sugar was to be delivered from a refinery at Port Wentworth and shipped to Macon, both in Georgia; and no facts were alleged showing that interstate or foreign commerce was [\*252] affected. In the next place, and independently of the character of commerce involved, it was not shown that the contracts were in themselves invalid under the Anti-Trust Act, but only that they were collateral to a combination prohibited by it. In substance, the defense was that the seller and others had entered into a combination to manipulate interstate trade in refined sugar with a view to increasing the price; that the contracts were made during the life of the combination; and that the seller conformed the terms of sale to standards sanctioned by the combination. There was no allegation that it was not the owner of the sugar; nor any allegation that the buyer was a [\*\*\*\*8] party to the combination or other than a stranger to it. The contracts disclosed the full transaction between the [\*\*\*600] seller and buyer and contemplated that the sale should pass the title without any restriction on the right of the buyer to resell as it might choose. As has been pointed out in prior cases, [HN2](#) there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his obligation under it. [Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 550-552;](#) [Continental Wall Paper Co. v. Voight, 212 U.S. 227, 257-259;](#) [Wilder Manufacturing Co. v. Corn Products Co., 236 U.S. 165, 177.](#) It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the Act provides for violations of it are exclusive. [Wilder Manufacturing Co. v. Corn Products Co., supra, 172, 175;](#) [Paine Lumber Co. v. Neal, 244 U.S. 459, 471;](#) [Geddes v. Anaconda Mining Co., 254 U.S. 590, 593.](#)

The answer also interposed a number of special defenses based on sections 4, 5 and 6 of the Lever Act, c. 53, 40 Stat. 276; c. 80, 41 Stat. 297, and on particular orders [\*\*\*\*9] and regulations issued under it. These defenses were held insufficient on demurrer -- some on the ground that a part of the Lever Act was in conflict with the due [\*253] process of law clause of the [Fifth Amendment](#). Some of the defenses were like those considered and rejected in [Small Co. v. American Sugar Refining Company](#), just decided, *ante*, p. 233; and what was said of them there suffices to dispose of them here. The want of merit in the others is so obvious that they do not call for special notice. While the ruling on them is assigned as error, no attempt to support them is made in the brief.

The sugar which was resold by the seller for the account of the buyer consisted of 105,000 pounds -- the 52,500 pounds stored at Macon and a like quantity remaining at the refinery. The market at that time was unsettled. Wholesale dealers had an oversupply, and retail dealers were buying cautiously and in small quantities. Nevertheless the prices realized on the resales equaled the full market price for that general region for quantities such as were resold. The 52,500 pounds stored at Macon was resold October 11th and that at the refinery November 3d. In both instances [\*\*\*\*10] the defendant was advised of the price offered by the intending purchaser and was given an opportunity to secure a purchaser at a better price, but none was brought in. A resale of the 52,500 pounds at the refinery was negotiated October 15th, but through some delay in transportation it was not consummated. Another sale was then negotiated and was completed November 3d at a little higher price.

The defendant offered to prove by wholesale dealers in Macon the prices received by them on particular sales to retail dealers about the time of the resales; but the testimony was rejected, and we are asked to say that this was error. We think the ruling was right. The particular sales were in relatively small quantities, many of them under 300 pounds, and had no probative bearing [\*303] on the fairness of the resales. The real question, as stated in [Small Co. v. American Sugar Refining Company, supra](#), was whether the resales were fairly made in a reasonably [\*254] diligent effort to obtain a good price, and not whether the plaintiff got the best possible price, or as much as others got in particular instances. The unsettled state of the market and the difference between selling [\*\*\*\*11] small quantities to retail dealers to satisfy immediate needs and selling large quantities to wholesale dealers who had an oversupply made is necessary to confine the evidence to the real question.

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On the conclusion of the evidence the court directed a verdict for the plaintiff; and the remaining question is whether this was error. The defendant insists that it was, because it took from the jury the question whether the resales were made within a reasonable time. The period for delivery under the contracts expired September 30th, and the court ruled that the duty to resell within a reasonable time arose at that time, which was practically conceded. One of the resales was made October 11th. Another was negotiated October 15th but fell through, and an effective one was made November 3d.

**HN3** [↑] The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict [\*\*\*601] were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum [\*\*\*12] of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. *Improvement Company v. Munson*, 14 Wall. 442, 448; *Pleasants v. Fant*, 22 Wall. 116, 122; *Bowditch v. Boston*, 101 U.S. 16, 18; *Anderson County Commissioners v. Beal*, 113 U.S. 227, 241; *Delaware, etc. R. R. Co. v. Converse*, 139 U.S. 469, 472.

We are of opinion that the evidence as set forth in the record conclusively established that the resales were [\*255] made within a reasonable time. The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the need for care. The witnesses for the plaintiff described with much detail the efforts which were made, and the evidence as a whole reasonably admitted of no other conclusion than that the efforts were timely, well directed and persistent. Many bids were received, but almost all were so low that their acceptance would have meant a great sacrifice. The defendant was notified of the purpose to resell, [\*\*\*13] but made no effort to advance it in point of time or to bring in a purchaser at an acceptable price. Considering the state of the market, the outcome appears to have justified both the time and care taken by the plaintiff.

*Judgment affirmed.*

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## Vandell v. United States

Circuit Court of Appeals, Second Circuit

March 2, 1925

No. 100

**Reporter**

6 F.2d 188 \*; 1925 U.S. App. LEXIS 1989 \*\*

VANDELL et al. v. UNITED STATES

**Prior History:** [\*\*1] In Error to the District Court of the United States for the Western District of New York.

### **Core Terms**

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conspiracy, dynamite, passengers, explosion, commerce, railway company, indictment, interstate, tracks, transportation, warned

### **LexisNexis® Headnotes**

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Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Attachment Jeopardy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

#### **HN1[] Procedural Due Process, Double Jeopardy**

It often happens that a defendant can be punished in both the United States and the state courts, and a conviction in one is not a bar to prosecution in another.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN2[] Regulated Industries, Transportation**

A conspiracy under the Act of July 2, 1890, c. 647, 26 Stat. 209, remains a conspiracy punishable under the laws of the United States, without regard to the position or status of the offenders. A conspiracy by striking employees becomes a federal offense under the law, whenever that conspiracy necessarily and directly impedes the channels of interstate commerce. The Sherman Act, [15 U.S.C.S. § 1](#), makes the conspiracy an offense against the national law.

**Opinion by:** MANTON

## Opinion

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[\*189] Before HOUGH, MANTON, and HAND, Circuit Judges.

MANTON, Circuit Judge. The indictment charged that the International Railway Company was engaged in interstate commerce in its operation of an electric railway between the city of Buffalo, state of New York and the city of Niagara Falls, in the province of Ontario, Dominion of Canada, and that it was engaged in carrying freight and passengers in such interstate and foreign commerce. It set forth that the plaintiffs in error, with others, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209 [Comp. St. § 8820 et seq.]) did willfully and feloniously engage in a conspiracy in restraint of trade and commerce among the several states and with foreign nations, to unreasonably obstruct, retard, restrain and impede, and interfere with and stop transportation in interstate and foreign commerce of such freight and passenger service. It alleges that it was part of the conspiracy to, on the 17th of August, 1922, obstruct, wreck, and destroy the track, roadbed, and [\*2] roadway of the said International Railway Company at the village of Elwood, county of Erie, N.Y., by means of exploding dynamite, whereby the electric trains thus employed in transporting passengers and baggage traveling from states of the United States to the province of Ontario, Dominion of Canada, was interfered with, because the tracks were damaged and demolished. It was further alleged that it was part of the conspiracy to intimidate employees of the said International Railway Company, so that by intimidation and coercion they would not continue working for the railway company, and thereby prevent them from performing their duties to this common carrier so engaged in interstate and foreign commerce.

Six overt acts were set forth, the principal among them being the theft of dynamite from an arsenal in the city of Lockport; the storing and keeping of it in the city of Buffalo; placing it upon the tracks of the railway company in the village of Elwood and causing the explosion. In support of the indictment, there was evidence sufficient for the jury's consideration and supporting the verdict of guilty, showing that in the months of June, July, and August, 1922, excursionists from [\*3] various states of New York, New Jersey, Pennsylvania, Delaware, Virginia, Washington, and Maryland passed over this railway, going to Niagara Falls, N.Y., and into the Dominion of Canada, upon through tickets. At this time there was a strike of the railroad employees. In August, 1922, 20 boxes of dynamite, of 50 pounds each, were stolen by a defendant (who was not on trial) and transported by Reilley from the city of Lockport to the city of Buffalo, N.Y., and Reilley and Breese placed the dynamite upon the tracks in the village of Elwood. On August 17, 1922, passengers boarded the cars of the International Railway Company at Buffalo on their way to Niagara Falls, and when passing through Elwood, N.Y., the cars were derailed by reason of an explosion of the dynamite, which had taken place on the tracks on which the cars were running. The evidence shows that Reilley, Smith, Vandell, and others were parties to the theft of this dynamite; that it was transported in automobiles by them and other defendants named in the indictment, who were not on trial, to the scene of this explosion. After the dynamiting, Reilley, in the presence of Breese, stated to witnesses that they had just dynamited [\*4] the High Speed Line, saying: "We pulled off a job and we pretty near got caught. The motorcycle cop got after us."

There is evidence that an officer did pursue the plaintiffs in error, who were in an automobile, after leaving the scene of this explosion, having placed the dynamite on the tracks. Breese admitted to a witness that he took part in this dynamiting, and said that the strikers could win if the people were kept from riding on the cars and they had "a few more blow-ups like the one on the High Speed Line." When told that people were hurt on the night of the explosion, he replied: "Yes; there were. They were warned before they got on those cars, and if they had all been

killed it would have served them right." It appears that, at the time some of the passengers boarded the cars, unidentified persons passed among the passengers and warned them against riding on the cars. There was testimony that in July, 1923, Reilley and Breese were passing the scene of the explosion in an automobile, and when one of the passengers remarked that "there is where the accident happened," Reilley replied, "Yes," and the speaker said, "What was your idea for doing it?" to which Reilley replied, [\*\*5] "They had no proof that I done it;" and further, "Why, didn't you realize that human bodies was on that car? Did you figure your own folks being on it, your own mother?" to which Reilley replied, "I didn't give a God damn." There was sufficient to circumstantially establish a conspiracy as charged and the overt acts in carrying [\*190] out its purposes. The theft of the dynamite, its transportation to Buffalo, its concealment, the explosion, flight on the part of the defendants from the scene of the explosion, and the various admissions referred to, fully warranted the trial court in submitting this question to the jury. Each of the defendants who stand convicted are sufficiently connected by the proofs with the commission of the crime.

Various errors are assigned. We shall note those which have been argued. The International Railway Company is a common carrier and engaged in interstate commerce. International R. C3. v. [Davidson, 257 U.S. 506, 42 S. Ct. 179, 66 L. Ed. 341; International R. Co. v. United States, 238 F. 317](#), 151 C.C.A. 333. It is argued, however, that the indictment sets forth a substantive offense, which, by the laws of the state of New York, is a felony, [\*\*6] and that the lesser offense of conspiracy is merged in the greater, and it is submitted that therefore the indictment is bad, because the offense of conspiracy is merged in the felony as set forth in the overt acts of the indictment, and that there may be no prosecution in the national courts. This argument may not prevail. The defense of conspiracy to violate the federal statute is in no way affected by the fact that what was done in furtherance of that conspiracy was an offense against the state sovereignty. Conspiracy may be a crime in one jurisdiction and a complete offense in another. The District Court of the United States is not ousted of jurisdiction because the defendants may also have violated a law of the state of New York. [HN1](#)[↑] It often happens that a defendant can be punished in both the United States and the state courts, and a conviction in one not a bar to prosecution in another. [United States v. Lanza, 260 U.S. 377, 43 S. Ct. 141, 67 L. Ed. 314.](#)

It is next argued that there is not sufficient set forth in the indictment to constitute a violation of the statute. But the provisions of the Act of July 2, 1890, c. 647, 26 Stat. 209, apply to all classes without exception. [\*\*7] It is intended to punish alike monopolies of capital and acts of labor, whenever interstate trade is thereby directly restrained. [HN2](#)[↑] A conspiracy under the act remains a conspiracy punishable under the laws of the United States, without regard to the position or status of the offenders. [Gompers v. Buck's Stove Co., 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A. \(N.S.\) 874; Duplex Printing Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196; United States v. Railway Employees' etc. \(D.C.\) 283 F. 479.](#) A conspiracy by striking employees becomes a federal offense under the law, whenever that conspiracy necessarily and directly impedes the channels of interstate commerce. [In re Debs, 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092; United States v. Cassidy \(D.C.\) 67 F. 698; United States v. Elliott \(C.C.\) 64 F. 27.](#) Indeed, the Sherman Act makes the conspiracy an offense against the national law. [Knauer v. United States, 237 F. 8, 150 C.C.A. 210; Ryan v. United States, 216 F. 13, 132 C.C.A. 257.](#)

Two witnesses testified that, before the train started, they saw a man walking around among the passengers, and heard him say something would happen to the train, and warned [\*\*8] passengers not to board the cars. This testimony was admitted, subject to connection. It was subsequently connected sufficiently by the testimony of a witness who said that the plaintiff in error Breese stated: "They were warned before they got on those cars, and if they had all been killed it would have served them right." It thus appears that this plaintiff in error had knowledge of the giving of the warning, and that made the circumstance of its having been given competent evidence in the establishing of the conspiracy. The order of proof was discretionary with the trial court. [Spencer v. Read, 217 F. 508, 133 C.C.A. 360.](#)

Complaint is made of the latitude given to counsel for the government in his examination. One of the witnesses was permitted to testify on his cross-examination whether he had ever heard the union officials advise violence, and on redirect examination he was asked if he had ever heard the same officials condemn this explosion after it had taken place. In view of the question asked on cross-examination, it was proper to permit this question on redirect. [Mahoning Ore Co. v. Blomfelt, 163 F. 827, 91 C.C.A. 390.](#)

6 F.2d 188, \*190LÁ925 U.S. App. LEXIS 1989, \*\*8

A careful examination of this record satisfies **[\*\*9]** us that, of all the errors assigned, there is none warranting our reversing the judgment of conviction.

Judgment affirmed.

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## *Mission v. Richards*

Court of Appeals of Texas

June 10, 1925, Decided

No. 7379

**Reporter**

274 S.W. 269 \*; 1925 Tex. App. LEXIS 604 \*\*

CITY OF MISSION v. RICHARDS.

**Subsequent History:** [\*\*1] Writ of error dismissed for want of jurisdiction November 11, 1925.

Writ of error dismissed for want of jurisdiction

## **Core Terms**

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rent, rental contract, city hall, purposes, premises, moving picture, rental, lease, fire equipment, monthly installments, ultra vires

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

### [HN1](#) Exemptions & Immunities, Exempt Cartels & Joint Ventures

In order to constitute a trust, within the meaning of the antitrust statute, there must be a combination of capital, skill or acts by two or more.

**Counsel:** Miss Zac Drummond and Dawson, Henry & Walker, all of Mission, for appellant.

McDaniel & Bounds, of McAllen, for appellee.

**Judges:** COBBS, J.

## **Opinion**

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[\*269] Appellee sued appellant, in the district court of Hidalgo county, to recover the balance due on a rental contract. The cause of action was based upon an alleged rental contract claimed to have been entered into by and between appellee, Richards, and appellant, city of Mission, acting through its mayor, H. F. Bishop, on or about the 2d day of July, A. D. 1921., and to begin on the 18th day of July, A. D. 1921, and to continue in force up to and including July 17, A. D. 1923, for a certain building then owned by appellee, Richards, and used by him as a moving picture theater, and located on lot No. 6 and the east 5 feet of lot No. 5, all in block 159, as per map of the city of Mission. Said alleged rental contract further stipulated that, as consideration for the rental of said building, the city

of Mission should pay to the appellee, Richards, the sum of \$ 2,400, payable in 24 monthly installments of \$ 100 each, on the 18th day of each month, from [\*\*2] July, A. D. 1921, to July, A. D. 1923.

Appellee, Richards, admitted that all monthly installments provided in said alleged rental contract had been paid up to and including the installment due and payable on the 18th day of April, A. D. 1922, but alleged that on the 18th day of May, A. D. 1922, appellant, city of Mission, breached said alleged rental contract by refusing to pay the remaining monthly installments, aggregating the sum of \$ 1,400, and appellee in this suit sought to recover of appellant this sum.

Appellant, city of Mission, answered by general demurrer, special exceptions, and general denial, and especially answered that said alleged rental contract was void by reason of being onerous, burdensome, unreasonable, and unilateral; was an attempt on the part of the city of Mission to lend its credit to private individuals for private purposes, and in behalf of private enterprise; that it was an attempt on the part of the city of Mission [\*270] to appropriate from the funds of said city and expend said funds in the interest of private persons and on behalf of private enterprise; that it is in conflict with the antitrust laws of this state, in that it is a contract [\*\*3] in restraint of trade; and that said alleged rental contract is ultra vires, in that the city of Mission, by and under its charter powers, had no authority to expend the moneys from the treasury of the city for the purpose of owning or the renting of a moving picture theater or show, or other place of amusement, as provided by the terms of said alleged rental contract.

The cause was tried before the court without the aid of a jury, and on the 10th day of November, A. D. 1924, judgment was rendered by the court in favor of appellee, Richards, and against the appellant, city of Mission, for the sum of \$ 1,268.34, with interest at the rate of 6 per cent. thereon from date of judgment until paid, and for all costs of suit.

At the request of appellant the court made and filed the following findings of fact and conclusions of law:

"I find as a fact:

"(1) That on the 2d day of July, A. D. 1921, E. G. Richards, plaintiff in this cause, and the city of Mission, a municipal corporation, defendant, entered into a valid rental contract for the rental of all of lot 6 and the east 5 feet of lot No. 5 in block No. 159, city of Mission, Hidalgo county, Tex., excepting two certain dressing [\*\*4] rooms reserved by E. G. Richards for storage, and the building thereon. That said rental contract was for the lease of said premises by the said E. G. Richards to the city of Mission for a period of time from July 18, 1921, to July 17, 1923. That by the terms of said contract the city of Mission agreed to pay the said E. G. Richards, as rental for said premises, \$ 2,400 in 24 monthly installments of \$ 100 each.

"(2) That said premises were suitable for and were rented by the city of Mission for the purpose of a city hall and the storage of its fire equipment, and that same were used by the said city of Mission for said purposes until the same were abandoned by it.

"(3) That the city of Mission abandoned the said premises on May 18, 1922, having paid 10 monthly installments of the rental therefor up to said time, and thereafter failed to pay any further installments upon said premises, and that it failed to pay 14 of said installments, amounting to \$ 1,400.

"(4) That the city of Mission notified the said E. G. Richards that it would not use said premises further, and by reasonable diligence the said E. G. Richards afterwards received \$ 251.05 as rental upon said premises.

"(5) That [\*\*5] \$ 2,400 for said period was a reasonable rental for said premises.

"(6) That said city of Mission did not rent said premises for moving picture show purposes, but that it did rent same for a city hall and to store its fire equipment.

"(7) That the consideration for said contract between the city of Mission and the plaintiff, E. G. Richards, was not that the said E. G. Richards would not enter the moving picture show business.

"Conclusions of Law.

"The plaintiff, E. G. Richards, ought to recover of the defendant, city of Mission, \$ 1,400, as same matured in monthly installments on June 18, 1922, and each month thereafter up to July 18, 1923, together with interest on each installment from maturity thereof to the date of judgment at the rate of 6 per cent. per annum, and that there should be deducted and credited thereon the sum of \$ 251.05, together with interest thereon from May 18, 1922, to date of judgment at the rate of 6 per cent. per annum; that the said city of Mission had full power to make said contract, and that same was for a valuable consideration and valid in every particular."

There was no further request made or bill of exceptions filed attacking same. It [\*\*6] will be presumed that appellant is satisfied with the truth of the findings made.

The contract having provided for a 2 years' lease, with the payment of \$ 100 per month by the city, it was not error for the court to hold under the evidence that the \$ 2,400, provided for in the written contract for the entire period, was a reasonable rent. We overrule the proposition.

If the city had the right to lease the property for its city hall, municipal and other governmental purposes, the benefits to arise therefrom were a matter for its determination. It was proper for the city, if it saw proper and in its interest, to sublet parts to other tenants for private business purposes which in no way interfered with the orderly and free and independent use thereof in the administration of its affairs, and no one can be heard to complain. The finding of the court, that the city of Mission rented said property for a city hall and to store its fire equipment and other things in a part thereof, and not to engage in the moving picture show business, will not be disturbed because it is justified by the evidence.

It would not affect the question in the least that the property had been theretofore used [\*\*7] for exhibiting moving pictures, because the effect was to stop one movie show and permit another to go ahead with its shows without any competition. If, as claimed, the mayor would not have rented the property for municipal purposes at all, had it not been his purpose to cut down competition in the movie business by getting rid of all but one competitor for the time being, still that would not of itself render the contract illegal. This is a simple rental contract for the city's necessary use of property for governmental purposes, and the city, just like any person, could sublet the property for a revenue, with the consent of the lessor, for lawful purposes. Suppose it was the purpose of the city in renting the property, to put one movie show out of business, it would not follow that a trust was created thereby.

While there are several parties and several [\*271] matters contained in the one contract with appellee and Smith, it in no way affected appellant's rights based upon separate consideration from that of the city of Mission and Richards, the contract between Richards and Smith related to certain matters pertaining to the moving picture show business; while the part [\*\*8] relating to the city of Mission and Richards was merely in respect to a contract for the rental of a building to the city of Mission.

It was understood at the time the lease was made that the city of Mission intended to lease a part of the building to Nick D. Polemanakos, and that Nick D. Polemanakos would pay to the city of Mission the sum of \$ 50 per month. The testimony of Mr. Bishop, former mayor, was that they did enter into a contract with Mr. Polemanakos. He was shown a contract or some paper by the attorney for the city of Mission, and he recognized it as the contract that the city of Mission entered into with Polemanakos on the same day. Mr. Bishop also testified that he did not, and it was not their intention, to spend any of the city's money for the benefit of some private enterprise or for the benefit of Polemanakos or H. E. Smith. Bishop also testified that this property was rented for the purpose of having a city hall and fire house for the city of Mission.

It is not ultra vires for the city of Mission to rent a city hall and place to store its fire equipment; it is not ultra vires for the city of Mission, for the purpose of securing such hall, to rent a building, [\*\*9] although said building might be larger than was necessary for said purpose; and it is not ultra vires for said city of Mission to sublet a part of same; and it is not ultra vires for the city of Mission to have in contemplation at the time of such lease that it would sublet a part of same, for the reason that all those things were done for the legitimate and proper purpose of enabling the city to secure a proper and desirable city hall and place to store its fire equipment. The city is not shown to have

paid anything with reference to the moving picture show business. It did not lease any moving picture equipment. That was all excepted from the lease. It did not operate a moving picture show nor contemplate doing so.

The city of Mission had a very undesirable place in a tin shop for its city hall and needed a better place. H. E. Smith and others seem to have, according to the contract, gone out and suggested to the city of Mission that it could get this building for a city hall and a place to store its fire equipment, and it seems that the said Smith must have made some agreement with the city of Mission, not with the appellee (and it is not shown that the appellee was connected [\*\*10] therewith), that, if the city of Mission would rent this building, a contract would be entered into whereby Polemanakos or H. E. Smith would pay the city of Mission \$ 50 per month, and such contract was entered into, that all being done. The city of Mission was already paying \$ 35 per month for city hall and fire equipment, and had a very undesirable place. By the increase of \$ 15 per month they got a desirable place, and this court must presume that they made a good contract with their subtenant, who was to pay them \$ 50 per month, according to the testimony.

Such an agreement violates no antitrust law of this state. [Gates v. Hooper, 90 Tex. 563, 39 S.W. 1079](#):

**HN1** [↑] "In order to constitute a trust, within the meaning of the statute, there must be a "combination of capital, skill or acts by two or more.' 'Combination,' as here used, means union or association. If there be no union or association by two or more of their "capital, skill or acts,' there can be no "combination,' and hence no "trust.' When we consider the purposes for which the "combination' must be formed, to come within the statute, the essential meaning of the word "combination,' and the fact that a punishment is prescribed [\*\*11] for each day that the trust continues in existence, we are led to the conclusion that the union or association of "capital, skill or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes."

See [Dannel v. Sherman Transfer Co. \(Tex. Civ. App.\) 211 S.W. 297](#).

The obligation of the city to pay rental is not within the inhibition of [article 11, §§5 and 7, of the Constitution of Texas](#), because it is an ordinary current expense. [Dallas Electric Co. v. City of Dallas et al., 23 Tex. Civ. App. 323, 58 S.W. 153; City of Tyler v. Jester & Co., 97 Tex. 344, 78 S.W. 1058](#).

We cannot agree with counsel for appellant that the city was acting beyond the scope of its authority or that it comes within the rule of ultra vires. Nor do we see any element therein that makes it violate the anti-trust laws.

Seeing no reversible error assigned, the judgment is affirmed.

## McConnon & Co. v. Ralston

Court of Appeals of Texas

June 18, 1925, Decided

No. 3098

**Reporter**

275 S.W. 165 \*; 1925 Tex. App. LEXIS 677 \*\*

MCCONNON & CO. v. RALSTON ET AL.

### **Core Terms**

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territory, dealer, products, trial court, anti-trust, outright, belongs, selling, prices, agency contract, good will, privileged, encroach, depends, sales, words

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Contracts Law > Contract Interpretation > General Overview

Business & Corporate Law > ... > Authority to Act > Business Transactions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

#### **HN1[] Price Fixing & Restraints of Trade, Vertical Restraints**

Whether a contract establishes a sales or agency contract, not violative of the Texas antitrust statutes, Tex. Rev. Civ. Stat. art. 7796 et seq., depends largely upon the circumstances of the case and, therefore, becomes one of fact to be decided by the trial court.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants not to Compete

#### **HN2[] Price Fixing & Restraints of Trade, Vertical Restraints**

The elimination of competition in a given territory in the sale of goods sold outright to a dealer results in a violation of the Texas antitrust statutes, Tex. Rev. Civ. Stat. art. 7796 et seq.

Business & Corporate Law > ... > Establishment > Elements > General Overview

### **HN3** [↓] Establishment, Elements

If an agreement is a naked sale outright of products, then is negated any intention of a mere agency agreement.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Law > ... > Establishment > Elements > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

### **HN4** [↓] Contracts, Sales of Goods

Whether a contract violates the Texas antitrust statutes, Tex. Rev. Civ. Stat. art. 7796 et seq., depends upon the special circumstances of the case; and where a given case shows a mere agency to sell goods, the giving of exclusive territory for selling at the prices fixed by the principal is not a violation of the Texas antitrust law, Tex. Rev. Civ. Stat. art. 7796 et seq.

**Counsel:** [\*\*1] Bulloch, Ramey & Story, of Tyler, for appellant.

Allen, Sellers & Beasley, of Sulphur Springs, and Clark & Clark, of Greenville, for appellees.

**Judges:** LEVY, J.

## Opinion

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[\*165] R. Q. Ralston was sued as principal debtor, and the other appellees as guarantors of the payment, in the sum of \$ 915.80 on account of the shipment and delivery of certain goods by virtue of an agreement between the parties. The defendants opposed recovery on the ground that the transaction was in contravention of the anti-trust statutes (Rev. St. art. 7796 et seq.). The trial court decided that the defense should prevail, being sustained by the evidence.

[\*166] The question presented is: Do the facts establish a sales or agency contract, not violative of the anti-trust act? It is believed that HN1 [↑] the question depends largely upon the circumstances of the case, and therefore became one fact, to be decided by the trial court. We cannot say as a pure matter of law, in view of the evidence, that the court erred. The evidence warrants the conclusion of the trial court, as we must assume, in support of the judgment, that Ralston agreed, expressly or impliedly, to do two things in order to get the goods [\*\*2] or products. One was to pay the purchase price, and the other to sell the products so purchased only in an allotted territory at retail prices listed to him. Further, the company was not to sell similar products to any other person in that territory while Ralston occupied it.

The effect of such findings, as the trial court was authorized to say, was HN2 [↑] to eliminate competition in a given territory in the sale of goods sold outright to a dealer. In such finding there results a violation of the anti-trust statute. Whisenant v. Shores-Mueller Co. (Tex. Civ. App.) 194 S.W. 1175; W. T. Rawleigh Medical Co. v. Fitzpatrick (Tex. Civ. App.) 184 S.W. 549. The evidence, considered as a whole, does not show that the agreement was a mere sales or agency contract. While it is true Ralston was privileged to cancel "the agreement" and "to return the goods,

and received credit for them at the same prices which were paid for them," yet in the further facts, the products being sold outright to him, he was privileged to have that method of paying for them, not as an agent or employee, but as "an independent merchant." As affirmatively shown by the letter of appellant to appellee Ralston:

"You are [\*\*3] undertaking the sale of our line for yourself, not for us. In other words, you are not our employee or agent. You are a dealer, very much like a grocer or general storekeeper. We sell our goods at certain prices, and the goods we ship to you belong to you, and not to us. You make on the goods the difference between the price you pay us and the price at which you sell them. In other words, we do not share in the profits on your goods. When you have paid us the price at which we bill the goods, that is all we ask you-all we are entitled to. Likewise we do not share any losses with you."

Further:

"We sell our goods only through our regular dealers. We, of course, ask him not to encroach upon the territory of other dealers, just as we ask other dealers not to encroach upon his territory. We assign each dealer to a certain territory, usually about one county, dependent on size and population. \* \* \* After the dealer has worked up the business in a territory, this territory in a measure belongs to him, and the "good will" of the territory is often valuable, and sells from \$ 500 up, dependent on the income it is producing. The good will belongs to the dealer."

HN3[] If the agreement was [\*\*4] a naked sale outright of the products, then is negatived any intention of a mere agency agreement. The facts distinguished the case from McConnon & Co. v Powell (Tex. Civ. App.) 248 S.W. 428. The evidence there authorized the conclusion, and the case turned upon that point, that Powell was merely to do personal service for the company in the selling of its products for it in that locality, receiving one-half of the selling price of the products as his pay. He was merely a sales agent. HN4[] Each case depends upon the special circumstances of the case; and where the given case shows a mere agency to sell goods, the giving of exclusive territory for selling at the prices fixed by the principal is not a violation of the anti-trust law. Brenard Mfg. Co. v. Crowley Mercantile Co. (Tex. Civ. App.) 260 S.W. 246; Falls Rubber Co. v. La Fon (Tex. Com. App.) 256 S.W. 577.

We have considered all the assignments of error, and find no reversible error. The judgment is therefore affirmed.

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## Gano v. Delmas

Supreme Court of Mississippi, Division B

October 19, 1925, Decided

No. 25035.

**Reporter**

140 Miss. 323 \*; 105 So. 535 \*\*; 1925 Miss. LEXIS 265 \*\*\*

GANO v. DELMAS. \*

**Prior History:** [\*\*\*1] APPEAL from circuit court of Jackson county.

HON. D. M. GRAHAM, Judge.

Action by Claude Delmas against S. A. Gano. Judgment for plaintiff, and defendant appeals. Affirmed.

**Disposition:** Affirmed.

## Core Terms

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cement, restraint of trade, market price, barrels, dealer, manufacturer, anti-trust, evidence show, territory, dollars, per barrel, parties

## LexisNexis® Headnotes

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

### [HN1](#) [] Public Enforcement, State Civil Actions

All contracts and agreements in restraint of trade are not violative of the Mississippi anti-trust statute; it is only those which are inimical to the public welfare.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### [HN2](#) [] Sherman Act, Scope

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\* Headnotes 1. Contracts, 13 C. J., Section 427; 2. Sales, 35 Cyc., p. 600.

In the absence of any purpose to create a monopoly the Sherman Anti-trust Act does not restrict the long-recognized right of a trader or a manufacturer engaged in private business freely to exercise his own independent discretion as to parties with whom he would deal, and to announce in advance the circumstances under which he would refuse to sell.

## **Headnotes/Summary**

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### **Headnotes**

1. MONOPOLIES. *Provision in contract that, if buyer sold cement purchased, or used any part of it in work other than that described, seller could decline to make further deliveries, held not to violate anti-trust statute.*

Plaintiff sold defendant thirty thousand barrels of a certain brand of cement to be used by defendant in performing a public road construction contract, which contract provided, among other things, that the cement "is sold and delivered for use in the work described, and if buyer shall sell or otherwise dispose of any portion of said cement, or use any portion thereof in any work other than that described," the seller should have the right to decline further deliveries of cement. Defendant claimed that the contract was unenforceable, because its operation was to restrain trade in violation of anti-trust statute (sections 5002, 5003, Code of 1906; sections 3281-3285 inclusive, Hemingway's Code). *Held:* That the contract was not violative of the statute, because its effect was not to unduly and unreasonably restrain trade; that its enforcement was not inimical to the public welfare.

2. SALES. *Evidence held to sustain directed verdict for seller of cement suing for breach of contract to buy cement.*

Evidence examined, and *held*, that there was no error in the trial court directing a verdict for plaintiff.

**Counsel:** Denny & Heidelberg and Harry Gamble, for appellant.

The question raised is whether the contract as sued on was "In violation of the provisions of chapter 88 and chapter 119 of the Laws of Mississippi, 1908, on trusts and combines, and particularly in violation of sections 3281-3283, Hemingway's Code as contrary to the public policy of the state of Mississippi."

I. The appellant's contention is that the contract here sued on is in violation of the provisions of the Anti-Trust Statutes, as shown by the terms of said contract, and expressed in the following language: "The quantity of 'Royal Cement' mentioned on the reverse side hereof is sold and delivered for use in the work described, and if buyer shall sell or otherwise dispose of any portion of said cement, or use any portion thereof in any work other than that described, or assign this contract or any part thereof, or fail to comply with the terms of payment, or any of the conditions and limitations of this contract, or if the [\*\*\*2] buyer's credit becomes impaired, then in any such event or events, seller may, at his option, decline to make further deliveries hereunder, buyer remaining liable for all unpaid accounts."

If such a contract as this is not in restraint of trade; if it does not hinder and prevent the selling and exchanging of personal property, or an article or commodity of trade that is in every day use, and in this day a necessary and indispensable article of commerce, we are at a loss to understand what kind of an agreement or contract would be in restraint of trade. If said contract, we submit in candor and frankness, is not for the fixing, maintaining and restricting of prices unlawfully and arbitrarily, we cannot conceive of one that would be. 24 R. C. L., sec. 655, page 364; [McCall v. Pearson-May-Pberschmidt Co., 107 Miss. 865, 66 So. 274](#); [McCall v. Hughes, 102 Miss. 375, 59 So. 794, 42 L. R. A. \(N. S.\) 63.](#)

So far as we have been able to find there is an unbroken line of decisions from Coke, cited above, to this day, both in England and this country, that any attempted restriction as to the use of personal property bought and paid for, will not be recognized by the court, unless it [\*\*\*3] be with reference to some particular item or article of personal property of which the intrinsic value thereof is not the real consideration, but refers specifically to heirlooms and articles akin to them. [Elijah & Winne v. Mottinger, 142 N.W. 1030, 161 Iowa 361;](#) [Brown v. Staple Cotton Co-Op.](#)

Association, 96 So. 849; Kosciusko Oil Mill Co. v. Wilson Cotton Oil Co., 43 So. 435; Y. & M. V. R. R. Co. v. Scales, 85 Miss. 528, 37 So. 942.

Under the common law and the expressed terms of the statute and under the decisions cited above, as to the construction and applicability, it is manifest that the contract here sued on is within the rule as announced by the common law, and in violation of the anti-trust statute. It is in violation of each of the sub-divisions of the statute enumerated in the demurrer. It is in restraint of trade in that it requires the public work to be constructed with but one specified brand of cement, furnished by a specified person and from a specified manufacturer, and prohibits the appellant from procuring cement of equal quality from other sources than through the buyer, the appellee herein, even though the shipper, the Dixie-Portland Cement Company, could [\*\*\*4] not supply same according to the requirements of appellant, whereby the public work would suffer and the business of the county and the appellant. As further authorities on this point, see Universal Film Co. v. Copperman, 218 F. 577, and Waltham Watch Co. v. Keene, 212 F. 225.

II. It is stipulated in the contract that the cement should be furnished by the Dixie Portland Cement Company, subject to contingencies of manufacturing and shipping and other causes beyond control of shipper and seller, and cement to be delivered as nearly as practicable to meet the necessities of the work upon reasonable notice of time for deliveries; and that shipments are to be at "the market price of Royal cement at the date of shipment." "But not higher than the price named therein;" that prices quoted are "based on freight rates in effect on date of quotation and are subject to revision if freight rates are changed."

In Hart v. Gardner, 74 Miss. 153, 20 So. 877, it is stated that the purpose of all rules of construction is to effect the intention of the parties to the instrument. In Wall v. DeJet, 76 Miss. 104, 23 So. 437, it is held that it is the duty of the court in construing a contract to [\*\*\*5] place itself in the situation of the parties at the time the contract was made, and to ascertain their intention from the contract, in the light of the situation and looking also to the subject-matter. See also Pratt v. Canton Cotton Oil Co., 51 Miss. 470; Tufts v. Greenwald, 66 Miss. 360, 6 So. 156.

Manifestly the intention of the parties was that the market price of the cement to be shipped under the contract would be such as would prevail at the plant of the Dixie Portland Cement Company, the point of shipment, plus freight to the point of delivery. It is in the testimony and undisputed that the price of Royal Cement in New Orleans, La., at the time that appellant refused to accept cement from the appellee, was two dollars and eighty-two cents per barrel, and that said cement was shipped from the point of manufacture, a point near Chattanooga, Tenn., to New Orleans, by way of the Louisville & Nashville R. R. Co., through the very points or by the very stations where three dollars and thirty cents and later three dollars and twenty cents per barrel was demanded.

It is further shown by the undisputed testimony of the appellant that he did go into the open market and buy [\*\*\*6] cement of a quality and grade equal to the Royal Cement for the price of two dollars and eighty-two cents per barrel, delivered at the points called for in the contract, and that the price of two dollars and eighty-two cents which the appellant paid for the cement delivered to him at points mentioned in the contract here sued on was the same price that prevailed at New Orleans, for the cement. 16 Cyc. 1143. See Paxton v. Myer, Weis & Company, 58 Miss. 445.

If, however, we should be in error in our contention that "market price" in this case is price at the manufactory plus freight to the point of delivery, then we earnestly beg to submit that the determination of "market price" of Royal Cement at points of delivery is not to be settled by the arbitrary fiat of the Dixie Portland Cement Company to its exclusive dealer, Delmas, but by what was its market value. That is to say, when "market price" is not discoverable by proof of free sales of the commodity in the open market, then its "market value," if discoverable, becomes its "market price." See especially McGarry v. Superior Portland Cement Company, et al. (1917), 95 Wash. 412, 163 P. 928, American and English Annotated Cases, [\*\*\*7] Vo. 1918A, p. 578 and note. This case holds that justice can be done only by interpreting the phrase. in this contract, "market price," by its true meaning, which is "market value," the facts of the case considered.

It is our contention, therefore, that the term "market price" used in the Delmas-Gano contract was not in the intention of the parties and cannot be held in law, a price such as the manufacturers chose to maintain at the points

mentioned in the contract, under a contract already made by his exclusive dealer, and with which the manufacturer was familiar; but was intended by the parties, and will be held in law, to be the price such as that quality of cement could actually be purchased and delivered for. This view is fully sustained by a note to the foregoing case, in Ann. Cas. 1918 A at 575.

We now sum up our contentions, as follows: The demurrer should have been sustained, holding that the contract was in restraint of trade in violation of the statutes of Mississippi and the Sherman Anti-Trust Law; or the contract had been breached by the plaintiff in that he refused to reduce the price of Royal Cement to keep pace with the reduction of cements of similar quality. [\*\*\*8] Wherefore, we submit that the judgment of the lower court should be reversed, and this case dismissed.

White & Ford, for appellee.

The question presented is whether Delmas is entitled to recover profits he would have made had the contract been carried out. The proof fixed it at ten cents per barrel. The authorities generally hold that profits may be recovered where definite. [Delta, etc., v. Yazoo, etc., 105 Miss. 861](#); [Ice Company v. Holliday, 106 Miss. 714](#); [Stevenson v. Morris, 69 Miss. 234](#).

While our friends on the other side have cited no case holding or tending to hold that Delmas' contract with Gano would have been met by his furnishing cement other than Royal, yet that was one of the principal contentions in the court below, and out of an abundance of precaution, we cite a few cases showing the fallacy of this contention.

[Shackelford v. Sloss Iron & Steel Co., 36 So. 1005, 140 Ala. 329](#); [Daggy v. Cox, 19 Ind. 142](#); [Hiatt v. Harris, 28 Ind. 379](#); [King v. City of Rochester, 38 A. 256, 67 N. H. 310](#); [Lowry v. Cooper, 21 Ind. 269](#); [Clark v. Wright, 5 Phila. 432](#).

Looking at the contract to get the intention of the parties as to what market price was contemplated, manifestly [\*\*\*9] market price at points of delivery was intended. There is nothing whatever in the contract to warrant the conclusion that New Orleans price was thought of. Furthermore, Gano knew how and where Delmas was to get his supply of cement, because the contract between them gave notice that Delmas had a contract with the Dixie Portland Cement Company for the furnishing of the contract supply, and this contract is also in evidence. The law on market price in a case of this sort is clear, and the following may be noted: [Gray Harbor v. Turnbull, 163 Ill. App. 231](#); [Pugh v. Porter & Co., 50 P. 772](#); [Parish & Co. v. Y. & M. V. R. R. Co., 103 Miss. 288](#).

Applying the reasoning of the above cases to the facts here, we find that in the testimony of Delmas that Royal cement was sold at Pascagoula to other persons other than Gano at the same price that Gano was charged, and, furthermore, that this commodity was largely used at Pascagoula, other cements having been sold there, as well as Royal. Manifestly, the New Orleans price was not thought of, as it is not mentioned in the contract. Even if Delmas had sought to obtain his supply of Royal cement in New Orleans, the proof is that it would have cost [\*\*\*10] him about two dollars and eighty-two cents plus forty cents freight to Pascagoula, and this would have been in line with the price that Gano charged. It follows from the foregoing, we submit, that Delmas' right to recover was abundantly clear. The contract must be enforced as the parties made it.

Defendant complains of what he conceives to be monopolistic or trust features of the contract. While there has been much loose talk about the provisions of the state and federal anti-trust laws, fortunately the courts have set at rest some of the leading phases of the subject. The authorities generally hold that a contract is not invalidated, which is in reasonable restraint of trade. In [Houck v. Wright, 77 Miss. 476](#), this court held that a wholesaler can confine his sale of goods to one dealer in any given territory, and not thereby violate the **antitrust law**. The Dixie Portland Cement Company had the right to select Delmas as its exclusive dealer in Jackson county territory, according to that decision. In [Telephone Co. v. State, 100 Miss. 102](#), the court held: "That contracts in reasonable restraint of trade are valid, and are not void unless unreasonable and inimical to public welfare. [\*\*\*11]"

The same is held in [Brown v. Staple Cotton Oil Co., 132 Miss. 859](#). The supreme court of the United States has frequently passed on this anti-trust question. While authorities might be multiplied, the following cases dispose of the contentions made by appellant in this regard: [United States v. Colgate & Co., 63 L. Ed. 993](#); [United States v. Schrader, 64 L. Ed. 471](#); [R. R. v. Pullman Car Co., 35 L. Ed. 97](#), 139 U.S. Sup. Court Rep. 79.

In *Cotton Oil Co. v. State, 121 Miss. 615*, the court held that it was not unlawful for a ginning company to attempt to destroy competition by putting the price of ginning cotton below the actual cost. There is nothing invalid about the contract here.

**Judges:** ANDERSON, J.

**Opinion by:** ANDERSON

## Opinion

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[\*330] [\*\*536] ANDERSON, J., delivered the opinion of the court.

Appellee, Claude Delmas, brought this action in the circuit court of Jackson county against appellant, S. A. Gano, for damages claimed to have been suffered by appellee, because of an alleged breach of contract of purchase by appellant from appellee of about thirty thousand barrels of Royal cement, and recovered a judgment for two thousand five hundred and thirty-three [\*331] dollars [\*\*\*12] and sixteen cents, from which appellant prosecutes this appeal.

There was no real conflict in the material evidence. The case, therefore, was one for a directed verdict for one party or the other. Appellee was a dealer in cement, having his residence and place of business in the city of Pascagoula. Appellant was a road contractor. He had a contract with the state highway commission and Jackson county to construct a concrete road along a part of the "Old Spanish Trail," that part between Moss Point in this state, and the Alabama state line. The construction of the road required the use of a large quantity of cement. Appellee handled Royal cement, and perhaps other brands. This cement was manufactured by the Dixie Portland Cement Company of Chattanooga, Tenn. Appellant and appellee entered into a written contract covering the sale and purchase of the required cement for said road project. The material provisions in the contract, so far as the rights of the parties to this cause are concerned, are substantially as follows.

Appellant agreed to purchase from appellee thirty thousand barrels of Royal cement, or so much thereof as might be necessary in the construction of said road. Appellee [\*\*\*13] was the sole dealer in that territory on the products of the Dixie Portland Cement Company of Chattanooga, Tenn. One of these products was Royal cement, the brand purchased by appellant. The price fixed in the contract was three dollars and thirty-two cents per barrel, which carried a profit, as the evidence shows, of ten cents per barrel to the appellee as dealer. The contract provided that three dollars and thirty-two cents should be the maximum price, and that appellant, during the process of the construction of the road as he needed the cement, should have the advantage of any decline in the market price of Royal cement. After appellee had delivered the appellant something like five thousand barrels of Royal cement, appellant claimed that there had been a decline in the market price of that brand of [\*332] cement, and called upon appellee to give him the benefit of this alleged reduction. After some negotiations, a reduction of twelve cents per barrel was made, but appellant declined to take any more cement, claiming that the market price was only two dollars and eighty-two cents per barrel, at which price the evidence showed it was selling at that time in the city of New [\*\*\*14] Orleans.

The contract provides further:

"The quality of Royal cement mentioned on the reverse side thereof is sold and delivered for use in the work described, and if buyer shall sell or otherwise dispose of any portion of said cement or use any portion thereof in any work other than that described," appellee at his option shall have the right to decline further deliveries, etc.

It is this provision in the contract which is the basis of the main contest between the parties. By this suit, appellee sought to enforce that contract. Appellant urges upon the court that the contract is not enforceable, because it violates our anti-trust statute (sections 5002 and 5003, Code of 1906; sections 3281 to 3285, inclusive, Hemingway's Code). Appellant raised this question, first, by demurrer to appellee's declaration which was overruled, again during the trial by objecting to the introduction of the contract by appellee, and then again at the

conclusion of the evidence by asking the court to direct a verdict in his favor. In fact both parties requested directed verdicts at the conclusion of the evidence, and the request of appellee was granted.

The principal ground, upon which appellant urges [\*\*\*15] that the contract is void, is because he contends it is in restraint of trade; that the provision therein which bound appellant not to sell or otherwise dispose of any portion of the cement bought by him from appellee, or use any portion thereof in work other than the "Spanish Trail" road project, is violative of our anti-trust statute. To sustain his position, appellant cites the following from 24 R. C. L., p. 364, section 655:

[\*333] "At common law, it was established at an early date, and has since been generally recognized, that a general restraint on the alienation of chattels, except when a very special kind of property is involved, such as a slave or an heirloom, is void. 'If a man,' says Coke, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is [\*\*537] against the trade and traffic and bargaining and contracting between man and man.'"

It will be observed from the terms of the contract that the amount [\*\*\*16] of cement purchased by appellant was limited to the requirements of this particular road project, estimated to be about thirty thousand barrels. The question is whether or not the provision in the contract, by which appellant agreed not to sell or otherwise dispose of any portion of the cement so bought, or use any portion thereof on any other work than the "Spanish Trail" project, was such a restraint of trade as is violative of our anti-trust statute. Certainly it was a partial restraint of trade. The contract, if carried out, would operate to restrain trade to some extent. But that is not the criterion. It was held in [Telephone Co. v. State, 100 Miss. 102, 54 So. 670, 39 L. R. A. \(N. S.\) 277](#); [Sivley v. Cramer, 105 Miss. 13, 61 So. 653](#), and [Pearson v. Harry Price and wife](#), the opinion in which latter case is handed down with this opinion, that [HN1](#) all contracts and agreements in restraint of trade are not violative of our anti-trust statute; that it is only those which are inimical to the public welfare. Conceding that the contract involved is in restraint of trade, the question therefore is whether it is such a restraint of trade as [\*\*\*17] is inimical to the public welfare.

It was held in [Houck v. Wright, 77 Miss. 476, 27 So. 616](#), that a wholesale merchant could confine his sale of [\*334] goods to one dealer in a given territory, without violating our anti-trust statute. The supreme court of the United States, whose construction of the federal Anti-trust Act is substantially the same as that given our statute by this court, held in [U. S. v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443](#), that [HN2](#) in the absence of any purpose to create a monopoly the Sherman Anti-trust Act did not restrict the long-recognized right of a trader or a manufacturer engaged in private business freely to exercise his own independent discretion as to parties with whom he would deal, and to announce in advance the circumstances under which he would refuse to sell. In [Railroad Co. v. Pullman Southern Car Co., 139 U.S. 79, 11 S. Ct. 490, 35 L. Ed. 97](#), it was held that an agreement that the Pullman Southern Car Co. should have exclusive right for fifteen years to furnish drawing rooms and sleeping cars for the use of a railroad company, and that the railroad [\*\*\*18] company should not, during that period, contract for cars of that kind with any other party or parties, was not void as against public policy or in restraint of trade.

The restraint of trade involved under this contract consisted simply in this. That appellant should take the thirty thousand barrels of Royal cement, the estimated requirements for the construction of the road project he had under contract, and use it exclusively on that road construction; that he would use no other cement, and would not dispose of any part of the cement so purchased by him to any other person or for use on any other work. To begin with, appellant had all the cement dealers in the country to purchase from. After he refused further deliveries from appellee, he went out into the open market and bought another brand of cement with which to finish his contract. The same markets were open to him before he contracted with appellee. We are of opinion that the restraint of trade resulting from this contract was reasonable, and therefore not inimical to the public welfare.

[\*335] Another question in the case is, whether or not appellant was entitled to a directed verdict, because of an alleged violation [\*\*\*19] of the contract by appellee in refusing to give appellant the benefit of the decline in the market price of Royal cement, which appellant contends took place as the road work progressed. As stated above, there was no conflict as to the material facts. The facts out of which this question arises, in addition to what has

been stated, were as follows: Appellee had no authority or power as a dealer in Royal cement, to fix the market price; he was not the manufacturer of it; the manufacturer was the Royal Portland Cement Company of Chattanooga, Tenn. Appellee was a mere dealer in their product, in Pascagoula, and added to the market price in that territory enough to net him ten cents a barrel for each barrel handled. Appellant's evidence showed, it is true, that Royal cement was sold in New Orleans at the time this road was being constructed, at two dollars and eighty-two cents per barrel, but it showed further, that the manufacturer fixed that price to meet the price of cement in the New Orleans territory fixed by foreign importers. The manufacturer, not appellee, refused to reduced the price in the territory in which appellee handled Royal cement. And the evidence showed without conflict, [\*\*\*20] that appellee could not have gotten Royal cement in New Orleans or elsewhere in the country, for less than the price at which he offered it to appellant; that if he had bought it in New Orleans, for illustration, from the dealer there at two dollars and eighty-two cents a barrel the freight from New Orleans to Pascagoula would have made the same price exactly in the latter city as that appellee made appellant. There is no evidence whatever tending to show that appellee entered into conspiracy or understanding with the manufacturers of Royal cement by which the price was fixed. On the contrary, the evidence showed, as stated, that appellee had nothing whatever to do with the fixing of the price of Royal cement in his territory or elsewhere. Furthermore, [\*336] the evidence showed either directly or by necessary inference, that the market price contemplated in the contract [\*\*538] was the market price delivered at Pascagoula.

We find no merit in the other questions argued.

We are of the opinion that the court committed no error in directing a verdict for appellee for the amount sued for, there being no controversy as to the amount.

*Affirmed.*

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## United States v. GE Co.

Supreme Court of the United States

October 13, 1926, Argued ; November 23, 1926, Decided

No. 113

### **Reporter**

272 U.S. 476 \*; 47 S. Ct. 192 \*\*; 71 L. Ed. 362 \*\*\*; 1926 U.S. LEXIS 974 \*\*\*\*

UNITED STATES v. GENERAL ELECTRIC COMPANY ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

APPEAL from a decree of the District Court dismissing, for want of equity, a bill brought by the United States to enjoin the General Electric Company, Westinghouse Electric and Manufacturing Company, and Westinghouse Lamp Company, appellees herein, from prosecuting a plan for the distribution and sale of patented electric lamps, which was alleged to be a restraint and monopoly of interstate commerce.

**Disposition:** [15 F.2d 715](#), affirmed.

## **Core Terms**

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lamps, patent, Electric, license, purchasers, manufactured, patentee, prices, sales, licensee, machine, stock, consigned, patented article, consumers, monopoly, selling, so-called, contracts, articles, delivery, vend, fasteners, dealers, jobbers, Harrow, ink, agency contract, resale price, infringement

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

### [\*\*HN1\*\*](#) **Ownership & Transfer of Rights, Assignments**

Under the Antitrust Act of July 2, 1890, 26 Stat. 209, c. 647, the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the Act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent, and the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his method. As long as he makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## **HN2** [] **Monopolies & Monopolization, Actual Monopolization**

The owner of movables cannot sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. The power to make the limitation as to price for the future cannot be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the **Antitrust law**.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

## **HN3** [] **Intellectual Property, Misuse of Rights**

There is nothing as a matter of principle, or in the authorities, which requires the Supreme Court to hold that genuine contracts of agency, however comprehensive as a mass or whole in their effect, are violations of the Antitrust Act of July 2, 1890, 26 Stat. 209, c. 647. The owner of an article, patented or otherwise, is not violating the common law, or the **Antitrust law**, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

## **HN4** [] **Conveyances, Licenses**

The owner of a patent may assign it to another and convey, (1) the exclusive right to make, use and vend the invention throughout the United States, or, (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and through a specific part of the United States. But any assignment or transfer short of one of these is a license, giving the licensee no title in the patent and no right to sue at law in his own name for an infringement. Conveying less than title to the patent, or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. Where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights.

[Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview](#)

[Patent Law > Ownership > General Overview](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

[Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses](#)

#### **HN5 Contracts, Sales of Goods**

A patentee does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell.

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments](#)

[Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses](#)

[Patent Law > Ownership > Patents as Property](#)

[Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview](#)

[Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses](#)

[Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct](#)

#### **HN6 Ownership & Transfer of Rights, Assignments**

Any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

[Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments](#)

[Patent Law > Ownership > General Overview](#)

[Patent Law > Ownership > Conveyances > General Overview](#)

#### **HN7 Conveyances, Assignments**

The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

[Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview](#)

[Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct](#)

**HN8** Intellectual Property, Misuse of Rights

The price at which a patented article sells is certainly a circumstance having a more direct relation, and is more germane to the rights of the patentee, than the unpatented material with which the patented article may be used. Price-fixing is usually the essence of that which secures proper reward to the patentee.

**Lawyers' Edition Display****Headnotes**

Monopoly -- appointing agent for sale of goods at fixed prices -- validity. --

Headnote:

An arrangement between a manufacturer of a patented article and merchants by which the latter become agents for the sale of his goods at prices fixed by him, under which the title is retained by him until the goods are sold and the sales are under his control, is not invalid under the Anti-trust Acts, notwithstanding the system of distribution extends over the entire country, embraces a large number of agents who are required to guarantee the accounts when sales are made, are made responsible for all stock lost, missing, or damaged, and agree to pay the expenses of storage, cartage, local transportation, handling, sale, and distribution.

Monopoly -- fixing price to consumer. --

Headnote:

A manufacturer does not violate the common law or the Anti-trust Acts by seeking to dispose of his product directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.

Patent -- scope of assignment. --

Headnote:

The owner of a patent may assign it to another and convey the exclusive right to make, use, and vend the invention throughout the United States, or any undivided part or share of that exclusive right, or the exclusive right under the patent within and through a specified part of the United States.

Patents -- license -- construction. --

Headnote:

Conveying less than title to the patent, or part of it, a patentee may grant a license to make, use, and vend articles under the specifications of the patent, for any royalty, or upon any condition the performance of which is reasonably within the reward which the patentee by grant of the patent is entitled to secure.

Patent -- right to exercise control over purchaser. --

Headnote:

After a patentee sells the patented article he can exercise no further control over what the purchaser may wish to do with the article.

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Patent -- right to limit sales by licensee. --

Headnote:

A patentee in granting a license to another to make and sell the patented article may limit the method of sale and the price, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.

## Syllabus

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1. Through a system of contracts between a company, which owned the patents for electric lamps with tungsten filaments and manufactured most of those sold, and a large number of wholesale and retail dealers in electrical supplies, the dealers were appointed agents of the company to sell, on commission, the lamps, which were to be consigned to them by the company, transportation prepaid; the sales were to be at prices fixed by the company; the dealers to pay all expenses except the original transportation, and to account to the company periodically for the amount, less commission, [\*\*\*\*2] of all sales, cash or credit; and all the stock entrusted to the dealers was to remain the property of the company until sold, and to be accounted for by the dealers.

*Held*, that the dealers were genuine agents, not purchasers in disguise; and that the plan was not a device to fix prices after sale and to restrain trade and exercise monopoly in the lamps, in violation of the Anti-Trust Act. P. 484.

2. The circumstance that the agents were in their regular business merchants and under a prior arrangement had bought the lamps and sold them as their own, did not prevent this change in their relation to the company. P. 484.

3. Nor did the size and comprehensiveness of the scheme bring it within the Anti-Trust Law. P. 485.

4. As a patentee has a statutory monopoly of the right to make, use, and sell the patented articles, the comprehensiveness of his control of the business of selling is not necessarily an evidence of illegality in method. P. 485.

5. As long as a patentee makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. P. 485.

6. The owner of articles, [\*\*\*\*3] patented or otherwise, is not violating the common law or the Anti-Trust law by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. P. 488.

7. A patentee, in licensing another person to make, use, and vend, may lawfully impose the condition that sales by the licensee shall be at prices fixed by the licensor and subject to change at his discretion. P. 488.

**Counsel:** Mr. James A. Fowler, Special Assistant to the Attorney General, with whom Solicitor General Mitchell, Assistant to the Attorney General Donovan, and Mr. Abram F. Myers, Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Charles Neave, with whom Messrs. Frederick P. Fish, Newton D. Baker, Charles W. Appleton, and Howard A. Couse were on the brief, for the General Electric Company.

Mr. Frederick H. Wood, with whom Messrs. Paul D. Cravath, F. Harold Smith, and Donald C. Swatland were on the brief, for the Westinghouse Electric & Manufacturing Company.

**Judges:** Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

**Opinion by:** TAFT

## Opinion

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[\*478] [\*\*192] [\*\*\*\*4] [\*\*\*366] MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a bill in equity brought by the United States in the District Court for the Northern District of Ohio to enjoin the General Electric Company, the Westinghouse Electric and Manufacturing Company, and the Westinghouse Lamp Company from further violation of the Anti-Trust Act of July 2, 1890. 26 Stat. 209, c. 647. The bill made two charges, one that the General Electric Company in its business of making and selling incandescent electric lights had devised and was carrying out a plan for their distribution throughout [\*\*193] the United States by a number of so-called agents, exceeding 21,000, to restrain interstate trade in such lamps and to exercise a monopoly of the sale thereof; and, second, that it was achieving the same illegal purpose through a contract of license with the defendants, the Westinghouse Electric and Manufacturing Company and the Westinghouse Lamp Company. As the Westinghouse Lamp Company is a corporation all of whose stock is owned by the Westinghouse Electric and Manufacturing Company, and is but its selling agent, we may treat the two as one, and reference hereafter will be only [\*\*\*\*5] to the defendants the General Electric [\*479] Company, which we shall call the Electric Company, and the Westinghouse Company.

The Government alleged that the system of distribution adopted was merely a device to enable the Electric Company to fix the resale prices of lamps in the hands of purchasers, that the so-called agents were in fact wholesale and retail merchants, and the lamps passed through the ordinary channels of commerce in the ordinary way, and that the restraint was the same and just as unlawful as if the so-called agents were avowed purchasers handling the lamps under resale price agreements. The Electric Company answered that its distributors were *bona fide* agents, that it had the legal right to market its lamps and pass them directly to the consumer by such agents, and at prices and by a system prescribed by it and agreed upon between it and its agents, there being no limitation sought as to resale prices upon those who purchased from such agents.

The second question in the case involves the validity of a license granted March 1, 1912, by the Electric Company to the Westinghouse Company to make, use and sell lamps under the patents owned by the former. [\*\*\*\*6] It was charged that the license in effect provided that the Westinghouse Company would follow prices and terms of sales from time to time fixed by the Electric Company and observed by it, and that the Westinghouse Company would, with regard to lamps manufactured by it under the license, adopt and maintain the same conditions of sale as observed by the Electric Company in the distribution of lamps manufactured by it.

The District Court upon a full hearing dismissed the bill for want of equity and this is an appeal under § 2 of the Act of February 11, 1903, known as the Expediting Act. 32 Stat. 823, c. 544, § 2.

There had been a prior litigation between the United States and the three defendants and thirty-two other corporations, [\*480] in which the Government sued to dissolve an illegal combination in restraint of interstate commerce in electric lamps, in violation of the Anti-Trust Act, and to enjoin further violation. A consent decree was entered in that cause by which the combination was dissolved, the subsidiary corporations surrendered their charters, and their properties were taken over by the General Electric Company. The defendants were all enjoined from fixing [\*\*\*\*7] resale prices for purchasers, except that the owner of the patents was permitted to fix the prices at which a licensee should sell lamps manufactured by it under the patent. After the decree was entered, a new sales plan, which was the one here complained of, was submitted to the Attorney General. The Attorney General declined to express an opinion as to its legality. The plan was adopted and has been in operation since 1912.

The Government insists that these circumstances tend to support the Government's view that the new plan was a mere evasion of the restrictions of the decree and was intended to carry out the same evil result that had been condemned in the prior litigation. There is really no conflict of testimony, in the sense of a variation as to the facts, but only a difference as to the inference to be drawn therefrom. The evidence is all included in a stipulation as to certain facts, as to what certain witnesses for the defendants would testify, and as to the written contracts of license and [\*\*\*367] agency made by the Electric Company and the Westinghouse Company.

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The Electric Company is the owner of three patents -- one of 1912 to Just & Hanaman, the basic patent [\*\*\*\*8] for the use of Tungsten filaments in the manufacture of electric lamps; the Coolidge patent of 1913, covering a process of manufacturing tungsten filaments by which their tensile strength and endurance are greatly increased; and, third, the Langmuir patent of 1916, which is for the use of gas in the bulb by which the intensity of the [\*481] light is substantially heightened. These three patents cover completely the making of the modern electric lights with the tungsten filaments, and secure to the Electric Company the monopoly of their making, using and vending.

The total business in electric lights for the year 1921 was \$ 68,300,000, and the relative percentages of business done by the companies were, Electric 69 per cent., Westinghouse, 16 per cent., other licensees, 8 per cent., and manufacturers not licensed, 7 per cent. The plan of distribution by the Electric Company divides the trade into three classes. The first class is that of sales to large consumers readily reached by the Electric Company, negotiated by its own salaried employees and the deliveries made from its own factories and warehouses. The second class is of sales to large consumers under contracts with [\*\*\*\*9] the Electric Company, negotiated by agents, the deliveries being made from stock in the custody of the agents; and [\*194] the third is of the sales to general consumers by agents under similar contracts. The agents under the second class are called B agents, and the agents under the third class are called A agents. Each B agent is appointed by the Electric Company by the execution and delivery of a contract for the appointment, which lasts a year from a stated date, unless sooner terminated. It provides that the company is to maintain on consignment in the custody of the agent a stock of lamps, the sizes, types, classes and quantity of which, and the length of time which they are to remain in stock, to be determined by the company. The lamps consigned to the agents are to be kept in their respective places of business where they may be readily inspected and identified by the company. The consigned stock or any part of it is to be returned to the company as it may direct. The agent is to keep account books and records giving the complete information as to his dealings for the inspection [\*482] of the company. All of the lamps in such consigned stock are to be and remain [\*\*\*\*10] the property of the company until the lamps are sold, and the proceeds of all lamps are to be held in trust for the benefit and for the account of the company until fully accounted for. The B agent is authorized to deal with the lamps on consignment with him in three ways -- first to distribute the lamps to the company's A agents as authorized by the company; second, to sell lamps from the stock to any consumer to the extent of his requirements for immediate delivery at prices specified by the company; third, to deliver lamps from the stock to any purchaser under written contract with the company to whom the B agent may be authorized by the company to deliver lamps at the prices and on the terms stated in the contract. The B agent has no authority to dispose of any of the lamps except as above provided and is not to control or attempt to control prices at which any purchaser shall sell any of such lamps. The agent is to pay all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps, and all expenses incident thereto and to the accounting therefor and to the collection of accounts created. This transportation does not include the freight for the [\*\*\*\*11] lamps in the consignment from the company to the agent. The agent guarantees the return to the company of all unsold lamps in the custody of the agent within a certain time after the termination of his agency. The agent is to pay over to the company, not later than the 15th of each month, an amount equal to the total sales value, less the agent's compensation, of all of the company's lamps sold by him, -- that is, first, of the collections that have been made, second of those customers' accounts which are past due. This is to comply with the guaranty of the agent of due and prompt payment for all lamps sold by him from his stock. Third, the agent is to pay to the company the value of all of the company's [\*483] lamps lost or missing from or damaged in the stock in his custody. There is a basic rate of commission payable to the agent, and there are certain special supplemental and additional compensations for prompt and efficient service. If the agent becomes insolvent, or fails to make reports and remittances, or fails in any of his obligations, the appointment may be terminated; and, when terminated, either at the end of the year or otherwise, [\*\*\*368] the consigned [\*\*\*\*12] lamps remaining unsold are to be delivered to the manufacturer. It appears in the evidence that since 1915, although there is no specific agreement to this effect, the company has assumed all risk of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents, and pays whatever taxes are assessed. This is relevant as a circumstance to confirm the view that the so-called relation of agent to the company is the real one. There are 400 of the B agents, the large distributors. They recommend to the company efficient and reliable distributors, in the localities with which they are respectively familiar, to act as A agents whom the company appoints. There are 21,000 or more of the A agents. They are usually retail electrical supply dealers in smaller places. The only sales which the A agent is authorized to make are to consumers for immediate delivery and to purchasers under written contract with the manufacturer, just as in

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the case of the B agents. The plan was of course devised for the purpose of enabling the company to deal directly with consumers and purchasers, and doubtless was intended to avoid [\*\*\*\*13] selling the lamps owned by the company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices. The question is whether, in view of the arrangements, made by the company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public, -- such persons [\*484] are to be treated as agents, or as owners of the lamps consigned to them under such contracts. If they are to be regarded really as purchasers, then the restriction as to the prices at which the sales are to be made is a restraint of trade and a violation of the Anti-Trust law.

We find nothing in the form of the contracts and the practice under them which makes the so-called B and A agents anything more than genuine agents of the company, or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such. He is not obliged to pay over money for the stock held by him until it is sold. As he [\*\*195] guarantees the account when made, he must turn over what should have been paid whether he gets it or not. This term occurs in a frequent form of pure agency known as sale [\*\*\*\*14] by *del credere* commission. There is no conflict in the agent's obligation to account for all lamps lost, missing or damaged in the stock. It is only a reasonable provision to secure his careful handling of the goods entrusted to him. We find nothing in his agreement to pay the expense of storage, cartage, transportation (except the freight on the original consignment), handling and the sale and distribution of the lamps, inconsistent with his relation as agent. The expense of this is of course covered in the amount of his fixed commission. The agent has no power to deal with the lamps in any way inconsistent with the ownership of the lamps retained by the company. When they are delivered by him to the purchasers, the title passes directly from the company to those purchasers. There is no evidence that any purchaser from the company, or any of its agents, is put under any obligation to sell at any price or to deal with the lamps purchased except as an independent owner. The circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior arrangement had bought the lamps, and sold them as [\*485] their owners, did not prevent [\*\*\*\*15] a change in their relation to the company. We find no reason in this record to hold that the change in this case was not in good faith and actually maintained.

But it is said that the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust law. We do not question that in a suit [HN1](#) under the Anti-Trust Act the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the Act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent, and the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his method. As long as he makes [\*\*\*\*16] no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. It is only when he adopts a combination with others, by which he steps out of the scope of his patent rights and seeks to [\*\*\*369] control and restrain those to whom he has sold his patented articles in their subsequent disposition of what is theirs, that he comes within the operation of the Anti-Trust Act. The validity of the Electric Company's scheme of distribution of its electric lamps turns, therefore, on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. The distinction in law and fact between an agency and a sale is clear. For the reasons already stated, we find no [\*486] ground for inference that the contracts made between the company and its agents are, or were intended to be, other than what their language makes them.

The Government relies in its contention for a different conclusion on the case of [Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U.S. 373](#). [\*\*\*\*17] That case was a bill in equity brought by the Miles Medical Company to enjoin Park & Sons Company from continuing an alleged conspiracy with a number of wholesale and retail dealers in proprietary medicines, to induce the persons who had entered into certain agency contracts, to the number of 21,000 through the country, to break their contracts of agency with the Medical Company, to the great injury of that company. The agency concerned the sale of proprietary medicines prepared by secret methods and formulas and identified by distinctive packages and trade-marks. The company had an extensive trade throughout

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the United States and certain foreign countries. It had been its practice to sell its medicines to jobbers and wholesale druggists, who in turn sold to retail druggists for sale to the customer. It had fixed not only the price of its own sales to jobbers and wholesale dealers but also the prices of jobbers and small dealers. The defendants had inaugurated a cut-rate or cut-price system which had caused great damage to the complainant's business, injuriously affected its reputation and depleted the sales of its remedies. The bill was demurred to, on the ground that the methods [\*\*\*\*18] set forth in the bill, by which attempt was made to control the sales or prices to consumers, was illegal both at common law and under the Anti-Trust Act, and deprived the bill of any equity. This was the issue considered by the Court.

The plan of distribution of the Miles Medical Company resembled in many details the plan of distribution in the present case, except that the subject matter there was medicine by a secret formula, and not a patented article. [\*487] But there were certain vital differences. These led the *Circuit Court of Appeals (164 Fed. 803)* to declare that the language of the so-called contracts of agency was false in its purport, and merely used to conceal what were really sales to the so-called agents. This conclusion was sustained by certain allegations in [\*\*196] the bill inconsistent with the contracts of agency, to the effect that the Medical Company did sell to these so-called agents the medical packages consigned. This Court, however, without reference to these telltale allegations of the bill, found in the contracts themselves and their operation plain provision for purchases by the so-called agents, which necessarily made the contracts, [\*\*\*\*19] as to an indefinite amount of the consignments to them, contracts of sale rather than of agency. The Court therefore held that the showing made was of an attempt by the Miles Medical Company, through its plan of distribution, to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them. This is the whole effect of the *Miles Medical* case. That such it was is made plain in the case of *Boston Store v. American Graphophone Company, 246 U.S. 8, 21*, in which then Chief Justice White reviewed the various cases on this general subject and spoke of the *Miles Medical* case as follows:

"In *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S., 373, it was decided that under the general law HN2[] the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project [\*\*\*\*20] the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. [\*488] It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law."

[\*\*\*370] Nor does the case of the *Standard Sanitary Manufacturing Company v. United States, 226 U.S. 20*, sustain the contention of the Government on the first question. There a number of manufacturers, one of whom owned a patent for enameled iron ware for plumbing fixtures, made a combination to accept licenses to make the patented commodities and to sell them in interstate trade to jobbers, and to refuse to sell to jobbers who would not agree to maintain fixed prices in sales to plumbers. This was an attempt just like that in the *Miles Medical Company* case, to control the trade in the articles sold and fasten upon purchasers, who had bought at full price and were complete owners, an obligation [\*\*\*\*21] to maintain resale prices.

We are of opinion, therefore, that HN3[] there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. The first charge in the bill can not be sustained.

Second. Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion? The contention is also made that the license required the Westinghouse Company not only to conform in the matter [\*489] of the prices at which [\*\*\*\*22] it might vend the patented articles, but also to follow the same plan as that which we have already explained the Electric Company adopted in its distribution. It does not appear that this

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provision was express in the license, because no such plan was set out therein; but even if the construction urged by the Government is correct, we think the result must be the same.

**HN4** [↑] The owner of a patent may assign it to another and convey, (1) the exclusive right to make, use and vend the invention throughout the United States, or, (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and through a specific part of the United States. But any assignment or transfer short of one of these is a license, giving the licensee no title in the patent and no right to sue at law in his own name for an infringement. *Waterman v. Mackenzie*, 138 U.S. 252, 255; *Gayler v. Wilder*, 10 How. 477, 494, 495; *Moore v. Marsh*, 7 Wall. 515, and *Crown Company v. Nye Tool Works*, 261 U.S. 24, 30. [\*\*\*\*23] Conveying less than title to the patent, or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. It is well settled, as already said, that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights. *Adams v. Burke*, 17 Wall. 453; *Bloomer v. McQuewan*, 14 How. 539; *Mitchell v. Hawley*, 16 Wall. 544; *Hobbie v. Jennison*, 149 U.S. 355; *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659. [\*\*197] But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the [\*490] exercise of the right to sell. The patentee may make and grant a license to another to make and use the [\*\*\*\*24] patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them, he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains [\*\*\*371] the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I [\*\*\*\*25] wish to obtain by making them and selling them myself." **HN5** [↑] He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell.

This question was considered by this Court in the case of *Bement v. National Harrow Company*, 186 U.S. 70. A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, or on more favorable terms of payment and delivery to purchasers, than were set forth [**\*491**] in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. It was objected that this made for a monopoly. The Court, speaking by Mr. Justice Peckham, said (p. 91):

"The very object of these laws is monopoly, and the rule is, with few exceptions, that [\*\*\*\*26] [HNC](#) any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Speaking of the contract, he said (p. 93):

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. [HN7](#) The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such [\*\*\*\*27] article."

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The question which the Court had before it in that case came to it on a writ of error to the Court of Appeals of New York, and raised the federal issue whether a contract of license of this kind, having a wide operation in the sales of the harrows, was invalid because a violation of the Anti-Trust law. This Court held that it was not.

It is argued, however, that *Bement v. National Harrow Company* has been in effect overruled. The claim is based on the fact that one of the cases cited by Mr. Justice Peckham in that case was [Heaton-Peninsula Button-Fastener Company v. Eureka Specialty Company, 77 Fed. 288.](#) [\*492] This was a decision by the Circuit Court of Appeals of the Sixth Circuit, the opinion being written by Circuit Judge Lurton, afterwards a Justice of this Court. The question there considered was whether the owner of a patent for a machine for fastening buttons to shoes with metallic fasteners might sell such machines subject to the condition that they should be used only with fasteners manufactured by the seller, the patented machine to revert on the breach of the condition. The purchaser of the machine was held to be a licensee [\*\*\*\*28] and the use by him of the unpatented fasteners contrary to the condition to be a breach of contract of the license and an infringement of the patent monopoly.

A similar case came before this Court and is reported in [Henry v. Dick Company, 224 U.S. 1](#), the opinion in which was also delivered by Mr. Justice Lurton. In that case, a complainant sold his patented machine embodying his invention. It was called the "Rotary Mimeograph." The claims of the patent did not embrace ink or other materials used in working it. Upon the machine, however, was inscribed a notice, styled a License Restriction, reciting that the machine might be used only with the stencil paper, ink and other supplies made by the A. B. Dick Company. The Henry Company, dealers in ink, [\*\*198] sold to the purchaser, for use in working her machine, ink not made by the Dick Company. This Court held by a majority that the use of such ink by the purchaser was a prohibited use and rendered her liable to an action under the patent law for infringement, and that the seller of the ink was liable as a contributory infringer.

[\*\*\*372] The case was overruled by this Court in the [Motion Picture Patents Company v. Universal Film Company, 243 U.S. 502.](#) [\*\*\*29] The patent in that case covered a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform and accurate movement, so as not to expose [\*493] the film to excessive strain or wear. The license agreement contained a covenant on the part of the licensee, that every machine sold by it should be sold under the restriction and condition that such exhibiting or projecting machines should be used solely for exhibiting or projecting motion pictures of the Motion Picture Patents Company. The overruling of the *Dick* case was based on the ground that the grant of the patent was of the exclusive right to use the mechanism and produce the result with any appropriate material, and that the materials or pictures upon which the machine was operated were no part of the patented machine, or of the combination which produced the patented result.

The overruling of the *Dick* case and the disapproval of the *Button-Fastener* case by the *Motion Picture Film* case did not carry with it the overruling of *Bement v. Harrow Company*. The *Button-Fastener* case was cited in the case of *Bement v. Harrow Company* [\*\*\*30] to sustain the decision there by what was an *a fortiori* argument. The ruling in the former case was much broader than was needed for the decision in the latter. [HNS↑](#) The price at which a patented article sells is certainly a circumstance having a more direct relation, and is more germane to the rights of the patentee, than the unpatented material with which the patented article may be used. Indeed, as already said, price fixing is usually the essence of that which secures proper reward to the patentee.

Nor do we think that the decisions of this Court holding restrictions as to price of patented articles invalid, apply to a contract of license like the one in this case. Those cases are: [Boston Store v. American Graphophone Company, 246 U.S. 8;](#) [Straus v. Victor Talking Machine Company, 243 U.S. 490;](#) [Bauer v. O'Donnell, 229 U.S. 1;](#) [Standard Sanitary Manufacturing Company v. United States, 226 U.S. 20;](#) [Bobbs-Merrill Company v. Straus, 210 U.S. 339.](#)

These cases really are only instances [\*\*\*31] of [\*494] the application of the principle of [Adams v. Burke, 17 Wall. 453, 456,](#) already referred to, that a patentee may not attach to the article made by him, or with his consent, a condition running with the article in the hands of purchasers, limiting the price at which one who becomes its owner for full consideration shall part with it. They do not consider or condemn a restriction put by a patentee upon his licensee as to the prices at which the latter shall sell articles which he makes and only can make legally under the license. The authority of *Bement v. Harrow Company* has not been shaken by the cases we have reviewed.

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For the reasons given, we sustain the validity of the license granted by the Electric Company to the Westinghouse Company. The decree of the District Court dismissing the bill is

*Affirmed.*

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