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Homer Hoyt

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HOMER HOYT
ASSOCIATE PROFESSOR OF ECONOMICS, UNIVERSITY OF NORTH CAROLINA
MEMBER OF THE DISTRICT OF COLUMBIA BAR

THE SO-CALLED Hardwood Lumber Case[1] has aroused more discussion among business men than any decision of the Supreme Court of the United States within the last two or three years, for the interpretation of the Sherman Law adopted in the case apparently throws into question the legality of the trade association—a type of co-operative business activity that has grown rapidly since the war. In view of the fact that the whole trend of economic evolution in this country is put in issue by this decision, the exact demarcation of the scope of the decision in the Hardwood Case is more than an academic task. Thousands of business men are wondering today whether activities that seem indispensible to the efficient conduct of their business have been outlawed by this case. Until the view of the Supreme Court becomes clear, they are at a loss to know how to proceed. Unless the type of trade association condemmed by the Hardwood Case can be distinguished in form or substance from some 25,000 other trade associations in the United States, the Sherman Act must either be amended to permit the existence of such associations, be enforced so as to destroy the existing business structure of the nation, or be placed in the category of those statutes that are vigorously enforced against violators of their technical form, but which are impotent against subtle and powerful evaders of their substance. In view of the tremendous scope of the possible application of the Hardwood Case, the facts involved deserve careful consideration.

These are simple and undisputed. In 1918, 400 producers of hardwood lumber, comprising 5% of the total number of hardwood mills and producing 30% of the total annual production of hardwood lumber in this country, formed an association. Of these, 365 entered into an "Open Competition Plan" by which each producer agreed to furnish to all the other members of the "Plan" a daily report of sales actually made and monthly reports of production and stocks of lumber on hand. This information was sent to a manager of statistics who acted as a clearing house for receiving and distributing the reports. The manager of statistics did not confine himself merely to the work of disseminating price and production statistics. Had he done so, the case might have been differently decided. He also sent out certain "market letters" advising the hardwood producers to curtail production and to wait for higher prices. These letters, while probably having little effect upon the course of hardwood prices or upon the actual conduct of members of the Hardwood Association, prejudiced the Supreme Court and gave a bad color to transactions that in themselves were

[1] *American Column and Lumber Co.* v. *United States*, 42 Sup. Ct. 114 (1921). For a valuable discussion of the case, see 31 Yale L. J. 643.

probably innocent. At the same time that these reports and letters were being sent out, during 1919, the prices of hardwood lumber advanced from 33.3% in some grades to 343% in other grades.

Acting on the theory that the activities of the members of the "Open Competition Plan" of the Hardwood Association in collecting and distributing price and production statistics were mainly responsible for this rapid advance in hardwood prices, and that the members of the association in this plan were consequently a combination unreasonably restraining trade, the Government asked for and obtained an injunction from the District Court of the United States for the Western District of Tennessee restraining the collection of such statistics. On appeal to the Supreme Court of the United States, the decision of the lower court was affirmed by a vote of six to three, Justices Holmes, Brandeis and McKenna dissenting. In the opinion of the majority of the Court, delivered by Mr. Justice Clarke, the activities of the Hardwood Association were the main legal cause of the advance in hardwood prices. To quote the Court: "While it is true that 1919 was a year of high and increasing prices generally and that wet weather may have restricted production to some extent, we cannot but agree with the members of the "Plan" themselves, as we have quoted them, and with the District Court in the conclusion that the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase."

Upon this sentence rests the pivotal point of the case. Admitting that there was an extraordinary increase in hardwood prices, and that every man in the hardwood business, in common with every other man who ever did business on this earth, desired with all his heart that these prices be as high as possible, the question still remains whether this group of producers had the power to cause such extraordinary price increases or whether they were merely the relatively passive recipients of the benefits of an up-swing of the business cycle caused by a complex group of economic forces over which one group of men had but a trifling control. The dissenting opinions delivered by Justices Holmes and Brandeis pointed out that the acts of the hardwood producers did not in themselves amount to unfair competition, that the sending out of price statistics was a normal method of making competition more vigorous and free, that the combination did not exercise preponderating power and hence could not actually control prices, and that even if prices were raised to some extent this did not necessarily indicate an illegal restraint of trade.

This discussion of the case falls under three main heads. First, were the direct acts of the members of the "Open Competition Plan"—the collection of price and production statistics and even the writing of letters advising the curtailment of production and the holding for higher prices—illegal *per se?* Second, did these acts, if not illegal in themselves, produce a combination with power to raise prices? Third, is a power to raise prices necessarily a restraint of trade that is barred by the Sherman Law?

I. The activities of the members of the "Open Competition Plan" were

clearly not illegal in themselves. To collect and publish the latest information as to actual prices is the most important function of the stock market and the grain exchanges. It prevents the ignorant buyer or seller from being imposed upon and from disposing of his goods at less than the current price. It is true that the members of the "Plan" did not publish their information broadcast to the general public or to the buyers of hardwood lumber. But there was no quick and convenient medium available for publishing this information, and had there been such a medium there was no duty on the part of the sellers of the lumber to disclose their knowledge to the buyers. As Mr. Justice Holmes said in his dissenting opinion, the buyers were probably not less active in their efforts to know the facts. Knowledge of the facts might tend to cause a man in the backward sections to receive more for his lumber than he would have received had he been kept in ignorance of the true conditions of demand and supply, but the same knowledge, because of the competition of other producers, would also prevent another man from getting an artificially high price for his product. In short, knowledge tends to equalize prices but it does not tend to raise their average level. The collection of statistics which tends to stabilize conditions and to prevent both wild periods of inflation on the one hand and long periods of depression on the other hand, is surely not made illegal by the Sherman Law. The Supreme Court, however, held that the writing of letters by the manager of the "Plan," predicting a rise in market prices, when linked up with the innocent gathering of facts, tinged the whole with illegality, and made it a subtle plan for the evasion of the law. But is not every man free to express his opinions as to the course of future prices and are not business men deluged with such opinions based on all degrees of knowledge? The writing of such letters advising curtailment of production and predicting higher prices was not, it is submitted, an illegal act in itself. It was not unfair competition. Its entire legality or illegality depended upon whether it was the cause of an illegal act—the formation of a combination with power and a tendency to raise prices at will.

II. The pivotal point in the principal case is whether the Hardwood Association had the actual power to raise hardwood prices. The Supreme Court held in the case of the *United States* v. *U. S. Steel Corporation*,[2] that a single corporation with a control of 50% of the steel output of the country did not have such power over steel prices. In the Hardwood Case, the members of the "Open Competition Plan" controlled only 30% of the hardwood production. Had they raised their prices higher than market conditions warranted, surely the mills controlling 70% of the hardwood lumber of the country would have poured their lumber into the market in such quantities that the high price of the Association would have been broken. It is possible, of course, that all of the small mills might have tacitly followed the lead of the mills within the Hardwood Association, but if that were true, the Government should have alleged a conspiracy or a

[2] 251 U. S. 417 (1921).

combination among 100% of the hardwood producers instead of among those producing only 30% of the output.

Moreover, for a number of other reasons, it seems impossible that a minority of hardwood mills could have been the actual predominating influence in controlling prices. Hardwood lumber is only one item in a building and when there is a building boom on the one hand and a small production of hardwood lumber on the other hand, the price of the latter would rapidly be bid up because it is the one indispensible link in a chain. The prices of hardwood lumber are part of a tissue of prices consisting of thousands of separate items, and it is ascribing omnipotent power to any one man to say that he alone could have caused one-third of a single industry to raise prices irrespective of economic conditions. Suppose that the manager of the Hardwood Association had written his letters predicting a rise in hardwood prices in the fall of 1920 when the average prices of all commodities were shooting downward at the rate of 10% a month. Would he have been more successful in attempting to stay the Niagara-like down-sweep of world economic forces than King Canute was in his effort to stop the in-rush of the tides? The majority of the Supreme Court were surely prejudiced in this case by the inept letters of the manager of statistical service of the Hardwood Association or they would not have departed from the principle laid down in the *Steel* Case and supported by overwhelming economic authority that a concern, or group of concerns, must have a preponderating position in a trade before it has the power to raise prices. If the Steel Corporation with 50% of the steel business of the nation did not have this power, surely it cannot be said that the Hardwood Association with 30% of the hardwood business did have it. The Court should not have been misled by the accidental coincidence of a runaway market in hardwood prices and in practically all other commodities as well, with the formation of this association, its collection of statistics and the letter-writing of its manager. Business prognosticators have hitherto been regarded at best as no better than the weather man, who has some power to predict the course of future natural events but is without power to control them.

III. Probably the activities of the Hardwood Association did contribute to some minor extent in raising prices. There is no force, however small—even letter writing—which does not have some effect upon the market. But some such incidental effect in raising prices is inseparably connected with thousands of acts of business men that are not illegal. Unless the restraint of trade was brought about by unfair means, some incidental raising of prices should not be regarded as unlawful. Indeed, as Mr. Justice Brandeis suggested, it may well be doubted whether the power to raise prices—a power which every man in business attempts to exercise to the best of his ability—is necessarily a restraint of trade. The laws against monopolies originated when the forestaller and regrater gained control of the market by foul tactics, intimidation and actual fraud; they were never designed to prevent a combination that had come by its strength honestly from putting forth its best efforts. Therefore, since the activi-

ties of the Hardwood Association in distributing information as to prices, production, and stocks of lumber, that were so clearly innocent in their direct effects, did not even indirectly contribute to an illegal result, there seems to be no logical grounds upon which the decision of the Supreme Court in the principal case can be supported.

Thus, on principle, the case of the *American Column and Lumber Co.* v. *United States* muddies waters that seemed to be clearing up. The trend of economic evolution in this country is plainly in the direction of larger and ever larger producing units. The Supreme Court in the *Steel* Case had gone a long way towards holding that any combination that did not possess absolute and complete monopoly was legal provided it did not practice unfair competition. But this latest decision indicates not only that the court regards preponderating size *per se* an evil but that it has greatly lowered its conception of what preponderating size consists of.

The root of the difficulty, of course, lies in the fact that the Sherman Law itself was framed in the days when the small business unit was not only deemed the ideal in a democratic state, but the most efficient unit of production. It was believed that if artificial obstructions to competition were removed, the vigorous struggle of individuals for business supremacy would insure the lowest prices to the customer and would undermine the industrial giants. It was thought that the point of increasing costs was reached far before the point of monopoly size was attained and that consequently a huge monopoly would break down of its own weight. But at present, it is being demonstrated more and more that tremendous economic savings can be made by combinations that standardize their products and produce uniform goods in large volume by machine methods. It is probable that the point of maximum efficiency in the case of industries producing one uniform machine product is not reached short of world monopoly. Hence to break up monopolies whose very efficiency depends upon their size would result in lowering the productive power of this nation.

The trade association is an extremely useful and efficient tool; its destruction by the Sherman Act would involve great economic waste and it might cripple us permanently in our attempts to compete successfully with England, Germany and Japan for the markets of the world. Since the business men of the United States will not quickly give up so serviceable a device, great pressure will be brought to bear to save the trade association from the destructive power of the Sherman Law. There are three possible exits from the present dilemma.

The Sherman Law might be expressly amended to permit the existence of combinations that are founded upon superior efficiency and which are not supported by unfair practices. Such an amendment, however, is unlikely. The Sherman Law has a powerful sentimental following. It appeals to all of our individualistic, liberty-loving instincts. We are not yet ready to face the somewhat unpleasant facts concerning the concentration of power into great industrial centers and the constant growth of gigantic consolidations. We still want