

# THE AMERICAN LAW REGISTER.

DECEMBER, 1891.

## THE LEGALITY OF TRUST COMBINATIONS.

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The word trust has been applied to many different forms of combination, which may be generally classified into three kinds: (1) a partnership between corporations, (2) a corporation controlling other corporations, and (3) a corporation buying out all other corporations in its line of business. All these different kinds of trusts, though of very recent origin, have been repeatedly before the Courts.

### I.

#### CORPORATE PARTNERSHIPS.

The first-named kind of trust combination—a partnership between corporations—is the most common form, and it is the one which has been most frequently passed upon by our Courts. It probably originated in an attempt to induce competing manufacturers to agree on prices and terms of sale. Informal agreements or understandings of this kind having proved too weak to be efficacious, some astute brain devised the trust copartnership.

The *modus operandi* of such a combination may be illustrated by reference to the articles of agreement of the Sugar Refineries Company, popularly known as the Sugar Trust. This combination comprised all the sugar refiners in the State of New York, and, with a few exceptions, in the United States. It rested upon a written agreement by which it was promised that all the shares of the capital stock of all the combining corporations should be transferred to a board consisting of

eleven trustees, to be held by them subject to the purposes set forth in the agreement. This board, which was named "the Sugar Refineries Company," was authorized to make by-laws, to appoint from among its members a president, vice-president, treasurer and committees, and to prescribe their duties and powers. It was to issue, and did issue, "trust certificates," to be divided by the board among the several refineries in due proportion to the values of their respective plants, for distribution among their stockholders in proportion to each stockholder's interest in the corporation. These certificates are in the form of stock certificates, and have indorsed on them the usual blank form of assignment and power of attorney, coupled with a proviso to the effect that the assignee by accepting the transfer assents to the terms of the trust agreement. Each corporation in the combination is bound by a special provision in the trust agreement to pay over to the trust board all the profits arising from its business, and the agreement declares that the aggregate of such profits, or such amounts as may be designated for dividends, shall be proportionately distributed by the board, at such time as it may determine, to the holders of the trust certificates. The trust board was to transfer enough shares of stock in each corporation to different individuals to qualify them to become directors of the corporations. The affairs of each corporation were to be managed by these puppet directors, under the control and direction of the trust board. The full text of this trust agreement is given in the *People v. the North River Sugar Refining Co.* (1890), 121 N. Y. 585.

It is also customary in each document to state the avowed objects of the association; and it is noticeable that these statements never mention the real object of the combination—monopoly. On the other hand, they all give the innocent and even philanthropic reasons for their action. Take for example the statement of the American Cattle Trust:

"The general object contemplated by the parties who unite in the establishment of this trust is to encourage, develop and secure improved methods and economies in the production, transportation, distribution, handling and sale of cattle, sheep, hogs and other animals."

What could be more innocent than this? There is a little more candor, however, in the statement of the American Preservers Trust. The object of this combination was thus stated:

“To consolidate the property and business, and to identify the interests of the respective members of the association to the end that they may secure an economical, profitable and satisfactory conduct of the fruit-preserving business.”

But the real object of such a trust may be stated more accurately in the vigorous language of Judge Hallett, of Colorado, who, in the case of *Gould v. Head* (1889), U. S. Circ. Ct., Dist. Colo., 38 Fed. Repr. 886, speaking of the American Cattle Trust, said :

“The stock was transferred to the trust, not for the purposes of being sold, but to give control of the corporations, to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporations. In other words, the purpose of the association was not to buy and sell corporations in open market, but to manage and control them.”

And a committee of the New York Legislature, in its report on the Sugar Trust, said :

“There has been an enormous speculation in the certificates of the trust and certificates of deposit issued by the central trust company in exchange for the trust certificates. It was plainly one of the chief purposes of this trust to provide for the issue of these certificates, affording thereby an opportunity for great speculation in them, obviously to the advantage of the persons managing the trust, with whom was lodged full and accurate information of its plans and condition, but to the disadvantage of the general public, who were ignorant of the secrets of the trust, its methods and plans, and of the actual value of the certificates in which they dealt. The issue of \$50,000,000 of certificates was amply sufficient for a speculation of many hundreds of millions of dollars.

“It may well be questioned whether the trust was organized more for the purpose of enormous speculations than for the advantages to be obtained by a combination of refineries in the legitimate refining of sugar. That the chief object of the trust was for the purpose of speculation is quite plainly shown by the inflated values placed upon the property of the constituent corporations upon which certificates were issued. Had the aim been solely a more economical and profitable refining of sugar, this result would have been obtained without an increase of the capitalization of the properties of the constituent corporations.”

These opinions, judicial and legislative, of the real objects for which the trusts are formed, may account for the fact that when these philanthropic associations, organized to "secure improved methods and economies," have come into court they have fared rather badly. They have been repeatedly declared illegal. The objections to them are twofold: first, they violate the law of corporations; secondly, they are contrary to public policy.

That a combination like the Sugar Refineries Company is a partnership can admit of no doubt. Bouvier defines a partnership as:

"A relation founded upon a contract between two or more persons to do business as individuals on joint individual account."

That these elements are all found in the Sugar Refineries Company and all similar associations is apparent on the very face of their articles of association.

Now, the reason why a corporation cannot legally enter into copartnership either with an individual or with another corporation is that it cannot lawfully give to its copartners the power which by the law of partnership each partner possesses in regard to the partnership property and over the rights of his copartners, nor can it lawfully assume the liabilities imposed by law upon the members of a copartnership. The very object of forming a corporation for commercial or manufacturing purposes is to escape the liability of a partnership, and the liability is escaped by restricting the powers of the members.

Thus, in a partnership, each partner is, within the scope of the partnership business, the general agent of the firm. A purchase or sale by one partner binds the others.<sup>1</sup>

A release by one partner is a release by all.<sup>2</sup> And it may be said in general that any one partner may do any act in regard to the partnership business that could be done by all the partners together.

On the other hand, it is a fundamental principle of the law of corporations that the affairs of the corporation and the business it carries on shall be managed by its directors, and by them

<sup>1</sup> *Lambert's Case* (1614), Godb. 244; *Hyatt v. Hare* (1619), Comb. 383.

<sup>2</sup> *Pierson v. Hooker* (1808), 3 Johns. 68; *Morse v. Bellows* (1835), 7 N. H. 567; *Noyes v. New Haven, New London and Stonington R. Co.* (1861), 30 Conn. 1.

alone. Thus it was said by Judge Dickinson in the case of *Small v. Minneapolis Electro Matrix Co.*, decided by the Supreme Court of Minnesota, Jan. 6, 1891 :

"In the absence of express provisions to the contrary, it is to be considered as the law concerning business corporations that their affairs are to be managed in the interest of their stockholders, and by directors or agents appointed by them."

So strictly is this principle enforced that it has been held that powers confided to the directors cannot be exercised even by the stockholders who elect the directors and whose representatives the directors are.<sup>1</sup>

The directors, being agents, cannot, under the familiar rule of agency, delegate their powers to others. *Delegatus non potest delegare*. Being trustees in whom personal confidence is reposed, they cannot abdicate their functions so long as they retain the trust.

Since, therefore, the rules of law governing corporations and the rules of law governing partnership are so different that a partnership composed of corporations cannot exist without violating some of those rules, it follows as an inevitable conclusion that such a partnership is illegal and therefore void. This has been adjudged in a multitude of cases, and may now be considered settled law throughout the United States.<sup>2</sup>

It is true that in the case of *Allen v. Woonsocket Co.* (1876), 11 R. I. 288, the Supreme Court of Rhode Island held that a corporation might form with an individual a copartnership at will, since such a partnership might be terminated at any moment by either party, though the Court admits that if the partnership had been for a definite period it might well be argued that the corporation had no right to make such a contract. This case seems at first blush opposed to all the other decisions on the subject; and it is difficult to see the force of the distinction attempted to be drawn in the opinion, since it is a well-recognized principle of partnership law that any partnership may be

<sup>1</sup>*Union Gold Mining Co. v. Rocky Mountain Nat. Bank* (1875), 2 Colo. 575.

<sup>2</sup>*People v. North River Sugar Refining Co.* (1890), 121 N. Y. 1582; *Malloy v. Hanaur Oil Works* (1888), 86 Tenn. 598; *Marine Bank v. Upton* (1858), 10 Gray 582; *New York & Sharon Canal Co. v. Fulton Bank* (1831), 7 Wend 412; *American Preservers Trust v. Taylor Manufac. Co.* (1891), U. S. Circ. Ct., Eastern Dist. Mo., 46 Fed. Repr. 152.

dissolved by any one of the copartners at his pleasure, even though the articles of copartnership provide that the partnership shall continue for a specified time. But it is to be noticed that the corporation referred to in this case had but one stockholder, so that there was no one else within the corporation to be injured by his acts, and also that the corporation, whose business could not be inferred from its name, had been created by special act of the legislature, which did not specify what business was to be carried on by the corporation, so that it was difficult if not impossible for the Court to determine what acts were and what were not within its powers.

In the case of *Butler v. American Toy Co.* (1878), 46 Conn. 136, the Supreme Court of Errors of Connecticut, while recognizing the correctness of the proposition that a corporation could not enter into a partnership unless expressly or impliedly authorized to do so by its charter, held, by a divided Court (two Judges out of five dissenting), that the particular corporation then before the Court was impliedly authorized by the act of the legislature by which it was created to enter into the partnership in question. That was a case of a corporation created for the purpose of carrying on the business of a firm, which business had been heretofore conducted by such firm in copartnership with another firm. This purpose was recognized in the act creating the corporation, and so the Court held that the legislature had impliedly given the corporation power to continue the copartnership with such other firm. It will thus be seen that these two decisions, when considered in connection with the peculiar facts on which they were predicated, need not be considered as opposed to the general rule above stated.

In an able and scholarly article in *Political Science Quarterly* for December, 1888, Prof. Theodore W. Dwight argued that the Sugar Trust was a lawful copartnership, because the corporations were the individual stockholders of the several sugar companies. But since the publication of that article, the New York Court of Appeals has expressly decided that the parties to the combination, the copartners in the trust, were the corporations themselves, and not the individual stockholders of such corporations. So that point may be considered settled: See *People v. North River Sugar Refining Co.*, *supra*.

The objection to this, as well as to the other species of trusts, on the ground of public policy, will be discussed when we come to consider the last species of trust.

## II.

## STOCKHOLDING CORPORATIONS.

The second kind of trust corporation—a corporation which acquires control of other corporations by purchasing their stock—was devised in order to escape the objections made by the Courts to the partnership trusts. A good illustration of this style of trust is the Chicago Gas Trust Company. It was incorporated under the General Corporation Law of Illinois,<sup>1</sup> which provides as follows :

“Corporations may be formed in the manner provided by this act, for any lawful purposes, except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money. . . .

“Corporations formed under this act shall be bodies corporate and politic for the period for which they are organized; may sue and be sued; may have a common seal, which they may alter or renew at pleasure; may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation. They may borrow money at legal rates of interest, and pledge their property, both real and personal, to secure the payment thereof, and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed.”

The objects for which the Chicago Gas Trust Company was organized were thus stated in the certificate of corporation :

“The object for which it is formed is to build, erect, purchase, lease, establish, maintain, enlarge, extend, and operate or demise works in the city of Chicago in the county of Cook and State of Illinois, and in such other place or places in said State of Illinois as said corporation may, by the vote of the majority of its stockholders, elect, for the manufacture, supply, sale and distribution of gas and electricity, or either, for the furnishing of light, heat, fuel and power for any and all purposes for which gas or electricity may now or hereafter be used; and to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good-will, rights and franchises of any gas works or gas company or companies, or

<sup>1</sup> Rev. Ill., C. 32, 1 & 5.

any electric company or electric companies in said city of Chicago or elsewhere in said State as said corporation may by vote of the majority of the stockholders elect; and to purchase, hold, sell, operate, or anywise become interested in coal or other properties productive of material necessary or useful in the supply or manufacture of gas or other agency or medium of light, heat, power or fuel; and to sell, improve, enlarge, extend, maintain, operate and demise any and all property so purchased or leased.”

The company promptly proceeded to obtain control of the four gas companies doing business in the city of Chicago by buying a controlling interest in the stock of each of them. Its power to do this having been questioned by *quo warranto*, the Supreme Court of Illinois held (1) that the company could not lawfully exercise the power to purchase and hold the stock of other gas companies as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas; and (2) that the power to purchase and hold such stock could not be assumed by the company as its main purpose, since such an object, as tending to create a monopoly, was not a “lawful purpose” within the meaning of the statute.<sup>1</sup>

Judge Magruder, in delivering the opinion in this case, used the following language :

“Of what avail is it that any number of gas companies may be formed under the General Incorporation Law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in certain kinds of business, and particularly a business of a public character, is not only opposed to the public policy of the State, but is in contravention of the spirit, if not the letter, of the Constitution. That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly results from the very nature of the power itself. If the privilege of purchasing and holding all the shares of the stock

<sup>1</sup> *People ex rel. Feabody v. Chicago Trust Gas Co.* (1889), 130 Ill. 268.



in all the gas companies of Chicago can be lawfully conferred upon appellee under the General Incorporation Act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was that any number of corporations might be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view—that is to say, for the purpose of purchasing and holding a majority of the shares of the stock of the gas companies in Chicago, there being only four of such companies—what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago is to grant to it a privilege which is exclusive in its character. It is making use of the General Incorporation Law to secure a special privilege, immunity, or franchise; it is obtaining a special charter under the cover and through the machinery of that law, for a purpose forbidden by the Constitution. To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose.'''

The American decisions to the effect that, in the absence of express legislative permission, a corporation cannot purchase stock in other corporations are abundant and harmonious.<sup>1</sup>

A different rule, however, prevails in England, where the later authorities allow a trading corporation to buy stock in other companies without express legislative authority so to do; and the English rule has been adopted in Maryland.<sup>2</sup>

<sup>1</sup> *Valley Railway Co. v. Lake Erie Iron Co.* (1888), 46 Ohio St. 44; *Central Railroad Co. v. Pennsylvania Railroad Co.* (1879), 31 N. J. Eq. 475; *Franklin Bank v. Commercial Bank* (1881), 36 Ohio St. 354; *Millbank v. New York, Lake Erie & W. R. Co.* (1882), 64 How. Pr. 20; *Talmage v. Pel.* (1852), 7 N. Y. 328; *Mechanics' Mut. Sav. Bank v. Meriden Agency Co.* (1855), 24 Conn. 159; *Berry v. Yates* (1857), 24 Barb. 200; *Sumner v. Macy* (1847), 3 Woodb. & M. 105.

<sup>2</sup> *Booth v. Robinson* (1880), 55 Md. 433.

If a corporation may buy some of the stock of another corporation, it may buy a majority of it; if it buys a majority, it may control the election of directors; if it controls the election, it virtually controls the corporation. We would thus have the anomaly of one corporation conducting the business of another corporation. The objection made by Judge Finch in the case of the *People v. North River Sugar Refining Co.*, *supra*, to a partnership trust would apply equally well to this case, that it is an attempt to consolidate two corporations without complying with the statutory requirements through which alone such a consolidation can be lawfully effected.

Of course the legislature might create a corporation authorized to buy and hold the stock of other corporations, and such a corporation might perhaps be organized under a general statute where the language used was different from that of the Illinois act above quoted. Thus, in Texas, under a statute which provided that corporations might be formed for certain purposes therein enumerated and also for any other purpose intended for mutual profit or benefit not inconsistent with the Constitution and laws of the State, it has been held that a corporation might legally be formed for the purpose of dealing in stocks.<sup>1</sup>

It is to be noted, however, that the statute under which this case was decided has been repealed, and that the present trend of legislative action is toward limiting rather than enlarging the powers of corporations.

### III.

#### MONOPOLISTIC CORPORATIONS.

The third most specious form which the trust assumes, and the one that is least open to legal objection, is that of a gigantic corporation which purchases the property, machinery, stock in trade and good-will of all the corporations and firms engaged in a particular line of business, paying therefor with its own stock, and then operates or keeps idle the several factories so purchased as its own property. A notable example of this kind of trust is the Diamond Match Company, which was declared illegal by the Supreme Court of Michigan, in the case of

<sup>1</sup> *National Bank of Jefferson v. Texas Investment Co.* (1889), 74 Texas 421.

*Richardson v. Buhl* (1889), 77 Mich. 632. The decision, however, was rendered in a suit to which the corporation itself was not a party.

The illegality which taints these corporations is one that applies equally to trusts of the first and second kind above described, but which has not been before mentioned in order to avoid needless repetition,—that they are contrary to public policy because they create monopolies.<sup>1</sup>

It is a doctrine as old as the year books that contracts in restraint of trade are illegal; and the law's condemnation of monopolies is of almost equal antiquity.<sup>2</sup>

Arranged logically, the argument read thus: A corporation like the Diamond Match Company or the Chicago Gas Trust Company tends to create a monopoly. A monopoly is in restraint of trade. Agreements in restraint of trade are contrary to public policy. Therefore such a corporation cannot lawfully be organized. This is the reasoning on which the Supreme Court of Michigan pronounced the Diamond Match Company illegal, and the Supreme Court of Illinois dissolved the Chicago Gas Trust.<sup>3</sup>

The New York Court of Appeals, in passing upon the validity of the Sugar Trust, declined to decide the question of public policy, preferring to rest their decision upon the inability of corporations to enter into copartnership; but the Supreme Court of that State, in deciding the same case, fully considered the question of public policy, and expressly decided that the trust was illegal because it restrained trade in an unreasonable manner, and inevitably tended to create a monopoly.<sup>4</sup>

And it has been held in England that an agreement between eighteen cotton-spinners, whereby they bound themselves to carry on their respective mills for one year in conformity to the directions of a majority of them, was void as an illegal restraint of trade.<sup>5</sup>

This doctrine is, however, subject to the limitation that it

<sup>1</sup> *State v. Nebraska Distilling Co.*, decided by the Supreme Court of Nebraska, May 27, 1890.

<sup>2</sup> *Case of the Monopolies* (1602), 11 Coke 85.

<sup>3</sup> See *Richardson v. Buhl*, *supra*; and *People v. Chicago Gas Trust Co.*, *supra*.

<sup>4</sup> *People v. North River Sugar Refining Co.* (1889), 54 Hun. 354.

<sup>5</sup> *Hilton v. Eckersley* (1855), Ellis & B. 47.

only applies to articles of necessity or of such general use that the public is interested in their production. For a private manufacturing company may, when public interests are not involved, sell all its property to another corporation, receiving in payment stocks of the latter corporation.<sup>1</sup>

<sup>2</sup>It is somewhat difficult to determine what are and what are not articles of necessity; and the authorities on this point do not furnish us with any general rule for answering the question. It has been held that coal is an article of necessity within the meaning of this rule: *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 173; and so is gas: *Gibbs v. Baltimore Gas Co.* (1888), 130 U. S. 408; and matches: *Richardson v. Buhl* (1889), 77 Mich. 632; and lumber: *Santa Clara Valley Mill and Lumber Co. v. Hayes* (1888), 76 Cal. 387; and cotton-bagging: *India Bagging Association v. Kock* (1859), 14 La. Ann. 164; and butter: *Chaplin v. Brown*, decided by the Supreme Court of Iowa, June 1, 1891; and grain: *Craft v. McConoughy* (1875), 79 Ill. 346; and salt: *Central Ohio Salt Co. v. Guthrie* (1880), 35 Ohio St. 666; and also whiskey, at least in Nebraska: *State v. Nebraska Distilling Co.*, decided by the Supreme Court of Nebraska, May 27, 1890. But washing-machines are not such articles of necessity that an attempt to monopolize the trade in them is illegal: *Dolph v. Troy Laundry Machinery Co.* (1886), U. S. Circ. Ct., Northern Dist., N. Y., 28 Fed. Repr. 553; nor are patent curtain fixtures: *Central Shade Roller Co. v. Cushman* (1887), 143 Mass. 353; neither, it seems, are sewing machines: *Bi-Spool Sewing Machine Co.*, *supra*, though all these articles are undoubtedly useful.

Another objection to this kind of trust is the inability of the original corporations to sell out to it: *State v. Nebraska Distilling Co.*, *supra*; *Small v. Minneapolis Electro Matrix Co.*,

<sup>1</sup> *Bi-Spool Sewing Machine Co. v. Acme Manuf. Co.*, decided by the Supreme Judicial Court of Massachusetts, Mar. 2, 1891; *Treadwell v. Salisbury Manuf. Co.* (1856), 7 Gray 404; *Ardesco Oil Co. v. North Am. Oil & Mining Co.* (1870), 66 Pa. St. 375; *Holmes and Griggs Man. Co. v. Holmes & Wessell Metal Co.*, decided by the Court of Appeals of New York, June 2, 1891.

<sup>2</sup> *Fietsam v. Hay* (1887), 122 Ill. 293; *Middlesex R. Co. v. Boston & Chelsea R. Co.* (1874), 115 Mass. 347; *Thomas v. Railroad Co.* (1879), 101 U. S. 71; *East Anglian R. R. Co. v. Eastern Counties R. R. Co.* (1851), 11 C. B. 775; *Troy & Boston R. Co. v. Boston Hoosac Tunnel & Wes. Ry. Co.* (1881), 86 N. Y. 107.

*supra*; for, in the absence of express legislative permission, a corporation in whose business the public is interested has no right to transfer all its property to another corporation. It should either use its property and carry on its business as contemplated by its charter or dissolve its corporate existence and divide its property among those entitled thereto, or consolidate in due legal form with other corporation, if such consolidation is provided for by statute.

In the case of *Pennsylvania Railroad Co. v. St. Louis A. and T. H. Railroad Co.* (1885), 118 U. S. 309, Mr. Justice Miller, in delivering the opinion of the Court, says, after an exhaustive review of the authorities, both English and American:

“We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grants of powers in a railroad charter.”

This language was quoted with approval in *Oregon Railway Co. v. Oregonian Railway Co.* (1888), 130 U. S. 23; and the doctrine therein laid down is also fully sustained by the following cases:

A case which it seems impossible to reconcile with the decision above cited is that of *Leathers v. Janney* (1889), 41 La. Ann. 1120. That was a case where three competing steamboat corporations sold their vessels and all their property to a new corporation, which proceeded to monopolize the carrying business formerly carried on by the three companies. The sale was held valid by the Supreme Court of Louisiana, though its avowed object was to do away with competition. But as this decision stands alone, and was made under a code founded on the civil law, it can hardly be regarded as weakening the authority of the multitude of cases which hold such a transaction to be illegal.

If the reasoning of these cases is applicable to other corpora-

tions than railroad companies (as seems to be implied by the language of Judge Magruder in the case of *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.* (1887), 151 Ill. 530), its logical result would be to make such an organization as the Diamond Match Co. or the New York Biscuit Company illegal.

In the case of *Central Transportation Co. v. Pullman Palace Car Co.* (1891), 139 U. S. 50, Mr. Justice Gray, in applying this rule to a corporation organized for the purpose of manufacturing palace cars and transporting passengers therein, remarks that the company was not an ordinary manufacturing corporation such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. This language would seem to limit the rule laid down in *Pennsylvania Railroad Co. v. St. Louis A. & T. H. Railroad Co.*, *supra*, to railroad companies or corporations akin to them. More likely, however, Mr. Justice Gray refers merely to corporations engaged in manufacturing articles, which, not being articles of necessity, do not concern the public, since the rule in question has been applied to a distilling company by the Supreme Court of Nebraska in the case of *State v. Nebraska Distilling Co.*, *supra*, in which the Court says :

"A corporation can exercise no powers except such as are granted to it by the charter under which it exists. It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business. The fact that the corporation has authority to put an end to its existence by a vote of a majority of its stockholders, in which event it may proceed to settle up its affairs, dispose of its property, and divide its capital stock, and surrender its charter to the State, does not authorize it to terminate its existence by a sale and disposal of all its property and rights."

And in the case of *Small v. Minneapolis Electro Matrix Co.*, *supra*, the Supreme Court of Minnesota, in discussing the power of a manufacturing corporation to lease all its property and rights for the term of twenty-five years, said:

"We need not inquire how far, or under what circumstances, consideration of public policy and of the general interests of the State may affect the right of a corporation to discontinue the business for which it was created and to surrender to another corporation its property and the conduct of its business. We do

decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is still to continue in existence, its business may be carried on by another corporation to which transfer is made, would violate the rights of a non-assenting stockholder arising from the contract implied, if not expressed, in the creation of such an organization.''

In leaving this branch of the subject, it is to be remembered that the illegality of such a corporation as the Diamond Match Company has never been judicially declared in a direct proceeding to forfeit its charter, and that it is always difficult to predict what the decision of a Court will be. From an examination of the authorities quoted, it may be inferred that such a corporation, when operations clearly tend to create a monopoly in an article of such general use as to be deemed one of the necessities of life, is illegal, and will be so declared. But the question has not yet been authoritatively settled.

#### IV.

Conceding the invalidity of trust combinations, it remains to consider briefly some of the consequences of attempting to form such a combination, and the rights of the different parties in interest.

That the State has an interest in the matter seems clear from the previous discussion of the subject, since the chief objection to these trusts in all their Protean forms is the fact that they are opposed to public policy. The offenders are corporations, the offence is capital, and the punishment death. Both the trust itself when it is incorporated and the corporations that have entered into it are subject, at the suit of the State, to forfeiture of their franchises, which Blackstone calls the civil death of a corporation. This point has been expressly decided.<sup>1</sup>

In many cases, however, the controversy has been carried on not by the State, but by stockholders in the corporations forming the trust. That such stockholders have an interest in the transaction is obvious; and when they have not assented to the illegal act, and, being in the minority, have been unable to

<sup>1</sup> *People v. North River Refining Co., supra; State v. Nebraska Distilling Co., supra; People v. Chicago Gas Trust Co., supra.*

control the corporate action, they are entitled to an injunction restraining the formation of the trust.<sup>1</sup>

The rights of the corporations forming a trust are governed by two well-known rules of law—first, that an illegal contract is not enforceable at law; and second, that the executed dealings of corporations, even when *ultra vires*, should, when good faith requires it, be allowed to stand. Thus neither a corporation which is a member of a trust combination nor its receiver can recover by suit its share of the profits of the business, since such a suit would be an attempt to enforce an illegal agreement;<sup>2</sup> though a receiver of the trust itself may sue to recover debts due to the trust, since he represents the creditors as well as the certificate-holders; and the corporations themselves are stopped to deny the validity of the combination.<sup>3</sup> And it logically follows that a corporation which has entered into a partnership cannot escape liability for firm debts by alleging the invalidity of the partnership;<sup>4</sup> though, as against its copartners, a corporation which has entered into an invalid trust partnership may rescind the agreement and obtain restitution of its property even after the agreement has been partly executed;<sup>5</sup> and a Court of equity will not enjoin it from violating the term of the trust agreement.<sup>6</sup>

The rights of the holders of trust certificates have been considered in several cases in New York. It has been held that after an unincorporated trust association has been declared illegal, the trustees hold the assets of the trusts for the benefit of the certificate-holders who have a right to have the property and business placed in the hands of a receiver.<sup>7</sup>

It has also been held that where trust certificates are expressly made transferable on the books of the trust upon condition that the holder or any transferee shall be subject to all the provisions of the agreement creating the trust, a Court of

<sup>1</sup> *Small v. Minn. Electro Matrix Co.*, *supra*; *Gen. R. R. Co. v. Collins* (1889), 40 Ga. 582.

<sup>2</sup> *Gray v. Oxnard Bros. & Co.* (1891), 59 Hun. 387.

<sup>3</sup> *Pittsburg Carbon Co. v. McMillin* (1889), 53 Hun. 67.

<sup>4</sup> *Catskill Bank v. Gray* (1851), 14 Barb. 479.

<sup>5</sup> *Molloy and Hanauer Oil Works* (1888), 86 Tenn. 595.

<sup>6</sup> *American Preservers Trust v. Taylor Manuf. Co.* (1891), U. S. Circ. Ct., Eastern Dist. Mo., 46 Fed. Repr. 152.

<sup>7</sup> *Cameron v. Haverneyer*, decided by the Supreme Court of New York, Special Term, Nov. 1, 1890.



equity will not compel the trustees to transfer the shares mentioned in such a certificate to the assignee of the certificate in the absence of any proof as to the compliance with the requirements of the trust agreement, even though it appears that such trust certificates are bought and sold in open market like corporate stock;<sup>1</sup> though it was said in *Cameron v. Haver-meyer, supra*, that trust certificates are transferable without regard to the regulations contained in the trust agreement, and that the transfer has all the rights of an owner, even though the certificates are not transferred to him on the books of the trust.

Where the trust agreement gives the trustees power to acquire hold and dispose of the title to the shares of stock transferred to them by the members of the trust, they may sell and transfer such stock to third persons:<sup>2</sup> but they cannot sell or pledge such stock where the trust agreement merely provides that the shares of stock shall be transferred to the trustees to be held by them and their successors as joint tenants for the purposes set out in the trust agreement.<sup>3</sup>

Contracts between individuals in furtherance of the objects and purposes of an invalid trust agreement, are not binding, since the illegality of the main contract taints all its branches.<sup>4</sup>

## V.

If the case of the *Ontario Salt Co. v. the Merchants' Salt Co.* (1871), 18 Grant, Ch. 540, is an authority, the American rules of law in regard to trusts do not prevail in Canada. That was a case where a large number of salt manufacturers, some of whom were corporations, united under the name of the Canadian Salt Association for the purpose of combined action and mutual protection in their business. Their articles of agreement provided for the appointment of trustees to carry out the terms of the agreement, and each party agreed to sell the salt manufactured by it through the trustees and to sell no salt to anyone else.

The Court held (1) that the agreement did not tend to create a monopoly, since the parties to it, though numerous, did not

<sup>1</sup> *Rice v. Rockefeller* (1890), 56 Hun. 516.

<sup>2</sup> *Gould v. Head* (1890), U. S. Circ. Ct., Dist. Colo., 41 Fed. Repr. 240.

<sup>3</sup> *People v. North River Sugar Refining Co.* (1889), 54 Hun. 354.

<sup>4</sup> *Richardson v. Buhl, supra*; *Chaplin v. Brown, supra*.

include quite all of the salt manufacturers in the province; (2) that it was not in undue restraint of trade, since the restraint was reasonable, was only partial, and was based upon mutual obligations which constituted a sufficient consideration; (3) that though the agreement admittedly constituted a partnership, yet its execution was not beyond the implied powers of the corporations who had entered into it, and (4) that a Court of equity would enjoin a breach of agreement.

It would be difficult to imagine a case which would more flatly contradict all the precedents on the subject of trust combinations. Surely Ontario is the paradise of trusts.

## VI.

Having thus considered the status of trust combinations at common law, it may not be amiss to glance at some of the recent legislation on the subject of trusts.

The Act of Congress, approved July 2, 1890 (26 St. at Large, p. 209, C. 647), declares illegal (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; (2) every attempt to monopolize any part of such trade or commerce, and (3) every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the District of Columbia and in the Territories. It provides punishment, by fine and imprisonment, for any violation of the act, and declares that property in transit under a contract forbidden by the act shall be forfeited to the United States. It also authorizes any person injured in his property or business by any violation of the act to sue and recover treble damages for such injury.

The Illinois Act, approved June 11, 1891 (Session Laws, 1891, p. 206), declares that any corporation, partnership or individual which shall create or enter into any pool, trust, agreement, combination, confederation or understanding 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 the State of Illinois, shall be adjudged guilty of conspiracy to defraud, and be subject to punishment by fine or imprisonment. It also forbids corporations from issuing or owning trust certificates, or from entering into any trust agree-

ment with intent to limit or fix the price or lessen the production and sale of any article of commerce. It declares void all contracts or agreements in violation of the act, and provides that any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the act shall not be liable for the price or payment of such article or commodity.

The Nebraska Act, approved March 29, 1889 (Session Laws, 1889, p. 516), makes it unlawful for any person, partnership, company, association or corporation organized for any purpose whatever, to enter into any contract or combination whereby a common price shall be fixed for any article or product, or whereby the manufacture or sale thereof shall be limited or interfered with, or whereby the profits of the manufacture or sale of any natural or manufactured product shall be made a common fund to be divided among the parties to the combination. It imposes penalties of fine and imprisonment for violations of the act, and provides for the recovery of damages by any person injured thereby. It also declares a violation of the act cause for forfeiting the charter of a corporation.

The New York Act, approved June 7, 1890 (Session Laws, 1890, p. 1069, No. 7), provides that no stock corporation shall combine with any other corporation for the prevention of competition.

These acts are of such recent date that they have not yet been construed by the Courts, but it will be seen that their tendency is to emphasize and strengthen the provisions of the common law, and to provide adequate penalties for their violation. The constitutionality of the Act of Congress, above cited, has been affirmed in the case of the *United States v. the Jellic Mountain Coal and Coke Co.*, decided by the U. S. Circuit Court for the Middle District of Tennessee, June 4, 1891.

## VII.

It will be thus seen that the illegality of trusts has been asserted by our Courts in no uncertain tones, and that our legislatures have been prompt in supplementing the unwritten law by appropriate statutes. But though thus frowned upon by the Courts and outlawed by the legislatures, trust combinations continue to increase on every side, and they probably will continue so to do, as long as the profits to be realized from them