University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 62 DECEMBER, 1913. NUMBER 2

THE FEDERAL ANTI-TRUST ACT OF 1890.[1]

The questions involved in the decision of a case arising under the Act of Congress of July 2, 1890,[2] commonly, although perhaps erroneously, referred to as the Sherman Anti-Trust Law,[3] seem to be as follows: (1) Has Congress the constitutional power to enact the statute in question? (2) Is the act a proper exercise of the constitutional power vested in Congress? These two questions have, after much discussion, been answered in the affirmative on the ground that Congress has power, under the Constitution, to regulate interstate commerce, and that the Act of 1890 is, on its face, a regulation of that commerce.[4] (3) Does the case at bar come within the regulation prescribed by Congress? The answer to this question involves these several con-

[1] The decisions on the act (1890 to 1912) have been reprinted in four volumes by the United States Government, and as they furnish a most convenient access to the authorities, parallel citations to this publication have been added under the abbreviation "Fed. A. T. Dec."

[2] C. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[3] Mr. Wm. B. Hornblower, in 11 COL. LAW REV., at p. 701, points out that the designation of the law as the Sherman Act is a misnomer, as Mr. Sherman apparently had nothing whatever to do with framing it, referring to Senator Hoar's Autobiography, Vol. II, p. 363.

[4] For arguments in favor of the constitutionality of the act, see Northern Securities Co. v. U. S. (1904) 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338; Harlan, J., dissenting in U. S. v. E. C. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, 1 Fed. A. T. Dec. 379; U. S. v. Joint Traffic Asso. (1898) 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259, 1 Fed. A. T. Dec. 869. For the arguments against its constitutionality,

siderations: (a) the text of the statute, (b) what is interstate commerce, (c) the law as it stood before the act was passed, (d) the evil to be remedied, (e) the facts of the case, (f) the remedy to be applied or penalty inflicted. We have already discussed (c) and (d) of question 3,[5] and we shall now concern ourselves with (a), (e) and (f), with certain subsidiary topics which will be indicated from time to time, excluded from lack of space. Thus we shall not consider the question of the extra-territorial[6] effect of the act or discuss questions of practice and pleading.[7] So also as the conception of interstate commerce is a somewhat technical notion peculiar to American constitutional law, upon which there is an immense mass of authority, we shall refer to it only incidentally in discussing the question of direct and indirect restraints.

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see White, J., dissenting in Northern Securities Co. v. U. S. (1904) 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338; Wm. D. Guthrie, 11 HARV. LAW REV. 80 (1897); Victor Morawetz, 17 HARV. LAW REV. 533 (1904). Mr. W. L Royall, in 73 Cent. Law Jour. 59, *et seq.*, is of the opinion that the constitutionality of the act is not yet settled.

See U. S. v. N. Y., N. H. & H. R. R. Co. (1908) 165 Fed. 742, 3 Fed. A. T. Dec. 524, as to constitutionality of the provision of the Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951.), authorizing the expediting of certain cases and a hearing before not less than three judges of the Circuit Court.

[5] 12 COLUMBIA LAW REVIEW, 97-133, 220 to 251, see especially 246-251.

[6] For a discussion of this subject, see article by Mr. Warren B. Hunt in 6 ILL. LAW REV. 34, in which he examines the case of American Banana Co. v. United Fruit Co. (1909) 213 U. S. 347, 29 Sup. Ct. Rep. 511, 53 L. Ed. 826, 3 Fed. A. T. Dec. 648, affirming 166 Fed. 261, 3 Fed. A. T. Dec. 563, which affirmed 160 Fed. 184, 3 Fed. A. T. Dec. 372; 153 Fed. 943 3 Fed. A. T. Dec. 262; *Cf.* Thomsen v. Union Castle Mail S. S. Co. (1908) 166 Fed. 251, 3 Fed. A. T. Dec. 548, reversing (1907) 149 Fed. 933, 3 Fed. A. T. Dec. 108; U. S. v. Hamburg-American Line, et al. (1911), 4 Fed. A. T. Dec. 440, apparently omitted from the Federal Reporter.

[7] NOTE ON PRACTICE AND PLEADING.

For convenience of reference, some of the principal decisions on questions of practice and pleading have been collected as follows:

Proceedings in equity by the U. S. under §4. U. S. only can proceed in equity under §4; Metcalf v. American School Furn. Co. (1903) 122 Fed. 115, 2 Fed. A. T. Dec. 234, see 108 Fed. 909, 2 Fed. A. T. Dec. 75, 113 Fed. 1020, 2 Fed. A. T. Dec. 111; Pidcock v. Harrington (1894) 64 Fed. 821, 1 Fed. A. T. Dec. 377, bill dismissed; Leonard v. Abner-Drury Brewing Co. (1905) 25 Appeal (D. C.) Cases 161, 3 Fed. A. T. Dec. 1; Blindell v. Hagan (1893) 54 Fed. 40, 1 Fed. A. T. Dec. 106, 56 Fed. 690, 1 Fed. A. T. Dec. 182; Greer, Mills & Co. v. Stoller, *et al.* (1896), 77 Fed. 1, 1 Fed. A. T. Dec. 620; Gulf C. & S. F. Ry. Co., *et al.*, v. Miami S. S. Co. (1898) 86 Fed. 407, 1 Fed. A. T. Dec. 823; Southern Ind. Ex. Co. v. U. S. Ex. Co., *et al.* (1898), 88 Fed. 659, 1 Fed. A. T. Dec. 862, 92 Fed. 1022, 1 Fed. A. T. Dec. 992; Minnesota v. Northern Securities Co. (1904), 194 U. S. 48, 24 Sup. Ct. Rep. 598, 48 L. Ed. 870, 2 Fed.

A. T. Dec. 533, reversing 123 Fed. 692, 2 Fed. A. T. Dec. 246; a state cannot proceed in equity under the statute for an injunction to dissolve an unlawful combination. U. S. v. Terminal Assn. (1912) 197 Fed. 446, where the question was raised as to the right of one judge to direct a decree after reversal by the Supreme Court. As to parties defendant in proceeding against an unincorporated association, see U. S. v. Coal Dealers' Asso. (1898) 85 Fed. 252, 1 Fed. A. T. Dec. 749.

Miscellaneous:

As to production of documents on *subpoena duces tecum* and immunity of witness, U. S. v. Terminal R. Assn., *et al.* (1906), 148 Fed. 486, 3 Fed. A. T. Dec. 34, and (1907) 154 Fed. 268, 3 Fed. A. T. Dec. 265; Hale v. Henkel (1906) 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. Ed. 652, 2 Fed. A. T. Dec. 874, affirming (1905). *In re* Hale, 139 Fed. 496, 2 Fed. A. T. Dec. 804; McAllister v. Henkel (1906), 201 U. S. 90, 26 Sup. Ct. Rep. 385, 50 L. Ed. 671, 2 Fed. A. T. Dec. 919; Nelson v. U. S. (1906) 201 U. S. 92, 26 Sup. Ct. Rep. 358, 50 L. Ed. 673, 2 Fed. A. T. Dec. 920; Alexander v. U. S. (1906) 201 U. S. 117, 26 Sup. Ct. Rep. 356, 50 L. Ed. 686, 2 Fed. A. T. Dec. 945; U. S. v. Standard Sanitary Mfg. Co., *et al.* (1911), 187 Fed. 232, 4 Fed. A. T. Dec. 255.

As to jurisdictional amount on appeal to Supreme Court of U. S., see U. S. v. Trans-Missouri Freight Assn. (1897) 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648.

As to practice in taking testimony before a master or examiner, see U. S. v. Standard Sanitary Mfg. Co., *et al.* (1911), 187 Fed. 232, 4 Fed. A. T. Dec. 255.

As to argument that the jurisdiction conferred by this section is an unwarrantable invasion of the right of trial by jury, see Woods, J., in U. S. v. Debs (1894) 64 Fed. 724 at 753, 1 Fed. A. T. Dec. 322 at 359.

As to injunction against persons not named in the bill, see U. S. v. Elliott (1894) 64 Fed. 27, 1 Fed. A. T. Dec. 311; U. S. v. Agler (1894) 62 Fed. 824, 1 Fed. A. T. Dec. 294.

As to evidence admissible to prove the combination, see U. S. v. Workingman's Amalg. Council of New Orleans, *et al.* (1893), 54 Fed. 994, 1 Fed. A. T. Dec. 110.

As to Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp., 1907, p. 951) authorizing the expediting of proceedings and hearing in the Circuit Court, see U. S. v. N. Y., N. H. & H. R. R. Co. (1908) 165 Fed. 742, 3 Fed. A. T. Dec. 524.

Preliminary injunction will not be granted where defendant denies the material allegations of the plaintiff's bill because the United States is not required to give bond, U. S. v. Jellico Mtn. Coal & Coke Co. (1890) 43 Fed. 898, 1 Fed. A. T. Dec. 1; but see U. S. v. Coal Dealers' Assn. (1898) 85 Fed. 252, 1 Fed. A. T. Dec. 749.

For practice as to joining non-resident defendants, see U. S. v. Standard Oil Co. (1907) 152 Fed. 290, 3 Fed. A. T. Dec. 173.

For practice of Circuit Court interfering with an order granting or continuing a temporary injunction, see Workingmen's Amalg. Council v. U. S. (1893) 57 Fed. 85, 1 Fed. A. T. Dec. 184. A valuable collection of the decrees which have been entered in proceedings by the United States will be found among the exhibits filed in the case of U. S. v. Union Pac. Ry. (1913) 226 U. S. 470, 33 Sup. Ct. Rep. 162, 57 L. Ed. 162. For this reference the writer is indebted to his learned friend, Luther E. Hewitt, Esq., of the Philadelphia Bar Association Library.

Proceedings at Law Under Section 7. (*a*) As to pleading:

Declaration held bad for indefiniteness and uncertainty in Rice v. Standard Oil Co. (1905) 134 Fed. 464, 2 Fed. A. T. Dec. 633.

As to irrelevant and redundant matter in complaint, see Ware-Kramer Tobacco Co., *et al.*, v. American Tobacco Co. (1910) 178 Fed. 117, 3 Fed. A. T. Dec. 766.

For discussion as to sufficiency of complaint, see Ware-Kramer Tobacco Co., et al., v. American Tobacco Co., et al. (1910), 180 Fed. 160, 3 Fed. A. T. Dec. 780.

Not sufficient to frame declaration in words of the statute, must set forth elements of the offense, demurrer sustained, Cilley v. United Shoe Machinery Co. (1907) 152 Fed. 726, 3 Fed. A. T. Dec. 203 (1913); 207 Fed. 598; Strout v. United Shoe Machinery Co., *et al.* (1913), 202 Fed. 602.

Bill setting up claim for damages under §7 and for an injunction restraining defendant from using complainant's trade-mark is multifarious, Block v. Standard Distilling & Distributing Co. (1899) 95 Fed. 978, 1 Fed. A. T. Dec. 993; Metcalf v. American School Furn. Co. (1901) 108 Fed. 909, 2 Fed. A. T. Dec. 75.

As to allegation of interstate commerce or diverse citizenship, see Bishop v. American Preservers Co., *et al.* (1892), 51 Fed. 272, 1 Fed. A. T. Dec. 49; see also Loewe v. Lawlor (1905) 142 Fed. 216, 2 Fed. A. T. Dec. 854; Buckeye Powder Co. v. E. I. duPont de Nemours Powder Co., *et al.* (1912), 196 Fed. 514.

As to ordering bill of particulars, see Locker v. American Tobacco Co. (1912) 194 Fed. 232. See Buckeye Powder Co. v. Hazard Powder Co. (1913) 205 Fed. 287, where a motion to compel witness to answer was granted.

Action under §7 must be for acts completed when suit begun, consequently plaintiff cannot bring in corporations organized after action brought; Locker v. American Tobacco Co. (1912) 197 Fed. 494.

(*b*) As to damages:

Loder v. Jayne, *et al.* (1906), 142 Fed. 1010, 2 Fed. A. T. Dec. 976, judgment reversed in Jayne v. Loder (1906) 149 Fed. 21, 3 Fed. A. T. Dec. 65; see latter decision particularly as to this point; Chattanooga Fdy. & Pipe Works v. Atlanta (1906) 203 U. S. 390, 27 Sup. Ct. Rep. 65, 51 L. Ed. 241, 3 Fed. A. T. Dec. 113, affirming 127 Fed. 23, 2 Fed. A. T. Dec. 299, which reversed 101 Fed. 900, 2 Fed. A. T. Dec. 11; Meeker v. Lehigh Valley R. R. Co. (1910) 183 Fed. 548, 3 Fed. A. T. Dec. 969, reversing 162 Fed. 354, 2 Fed. A. T. Dec. 380 see 175 Fed. 320; Monarch Tobacco Works v. American Tobacco Co. (1908) 165 Fed. 774, 3 Fed. A. T. Dec. 534; Gibbs v. McNeeley, *et al.* (1900), 102 Fed. 594, 2 Fed. A. T. Dec. 25; see 107 Fed. 210, 2 Fed. A. T. Dec. 71, 118 Fed. 120, 2 Fed. A. T. Dec. 194. In Central Coal & Coke Co. v. Hartman (1901) 111 Fed. 96, 2 Fed. A. T. Dec. 94, the case was discussed solely on the ground that there was no proof of any reasonable damage. The only damages claimed were the loss of expected profits in business.

(*c*) Jurisdiction:

As to district in which suit may be brought, see Ware-Kramer Tobacco Co., *et al.*, v. American Tobacco Co., *et al.* (1910), 180 Fed. 160, 3 Fed. A. T. Dec. 780.

As to plaintiff bringing suit in the district of his residence against foreign corporation doing business in that district, Michigan Aluminum Fdy. Co. v. Aluminum Castings Co. (1911) 190 Fed. 879; Southern Pacific Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101. See also Dueber Watch Case Mfg. Co. v. E. Howard Watch and Clock Co., *et al.* (1895), 66 Fed. 637, 1 Fed. A. T. Dec. 421, affirming 55 Fed. 851, 1 Fed. A. T. Dec. 178. Strout v. United Shoe Machinery Co. (1912) 195 Fed. 313.

As to attorney's fee, see Montague Co. v. Lowry (1904) 193 U. S. 38, 24 Sup. Ct. Rep. 307, 48 L. Ed. 608, 2 Fed. A. T. Dec. 327.

(*d*) As to parties:

Action cannot be maintained against state officials because state itself is an essential party, Lowenstein v. Evans (1895) 69 Fed. 908, 1 Fed. A. T. Dec. 598.

Where the business injured is that of a corporation, the right of action is in the corporation, and a stockholder or creditor cannot sue, Ames v. American Tel. & Tel. Co. (1909) 166 Fed. 820, 3 Fed. A. T. Dec. 586; Breed

The text of the statute is given in full in a note for convenience of reference.[8] It is important to bear in mind that trade may be restrained by (1) a monopoly which may be of several kinds, (2) a combination which may appear in several forms, (3) the performance of a contract.

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v. American Tel. & Tel. Co. (1909) 166 Fed. 825, 3 Fed. A. T. Dec. 593; Loeb v. Eastman Kodak Co. (1910) 183 Fed. 704, 3 Fed. A. T. Dec. 975. *Dictum contra* of Knappen, J., in Bigelow v. Calumet & Hecla Mining Co. (1907) 155 Fed. 869 at 879, 3 Fed. A. T. Dec. 293 at 309, may be disregarded. For the proper practice, see Penna. Sugar Ref. Co. v. American Sugar Refining Co., *et al.* (1908), 160 Fed. 144, 3 Fed. A. T. Dec. 369, where complaint was dismissed on other grounds reversed in 166 Fed. 254, 3 Fed. A. T. Dec. 552.

(*e*) Miscellaneous:

Pendency of a suit in a state court cannot be pleaded in abatement of an action in U. S. Court to recover damages under §7, Lowe v. Lawlor (1904) 130 Fed. 633, 2 Fed. A. T. Dec. 563.

As to application of statute to combinations formed before the passage of the act, see Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., *et al.* (1895) 66 Fed. 637, 1 Fed. A. T. Dec. 421, affirming 55 Fed. 851, 1 Fed. A. T. Dec. 178.

Municipal corporation may sue, every member of the combination is liable *ipso facto*, and state statute of limitations applies, Chattanooga Foundry & Pipe Works v. City of Atlanta (1906) 203 U. S. 390, 27 Sup. Ct. Rep. 65, 51 L. Ed. 241, 3 Fed. A. T. Dec. 113. Statute of limitations runs from the time the plaintiff discovers the existence of the combination and the cause of action. American Tobacco Co. v. Peoples Tobacco Co. (1913) 204 Fed. 58.

As to compulsory production of documents by defendant, see American Banana Co. v. United Fruit Co. (1907) 153 Fed. 943, 3 Fed. A. T. Dec. 262.

Settlement of the suit in a state court an accord and satisfaction of proceedings under §7 for treble damages, Clabaugh v. Southern W. Grocers Assn. (1910) 181 Fed. 706, 3 Fed. A. T. Dec. 812.

Plaintiff must show that the business in question is interstate commerce, Dueber Watch Case Mfg. Co. v. Howard Watch & Clock Co. (1893) 66 Fed. 637, 1 Fed. A. T. Dec. 421, 55 Fed. 851, 1 Fed. A. T. Dec. 178.

Burden of proof on plaintiff, see Loder v. Jayne (1906) 142 Fed. 1010, 2 Fed. A. T. Dec. 976.

Recovery of treble damages can only be had by direct action and not by way of set-off in an action for price of goods sold by a company violating the act, Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. Ed. 679, 2 Fed. A. T. Dec. 118, affirming 99 Fed. 354, 2 Fed. A. T. Dec. 1.

[8] AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES.

Be it enacted, etc., 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 fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Monopolies and combinations are states of facts, dramatic circumstances which may be brought about in several different ways, whereas the performance of a contract is a single act which may or may not produce a combination or monopoly. A so-called contract in restraint of trade may appear by itself simply as one contract or as the foundation or part of the foundation of a combination, in which latter case the aspect of the contract as a contract is lost sight of in the combination. A distinction must therefore be drawn between single contracts in restraint of trade, and combinations in restraint of trade. In the former case, the common law rule as to the validity of the restraint was determined by considerations personal to the covenantor and covenantee as well as considerations depending on the control of the market, whereas in the case of the combination the only consideration was the effect of the combination on the market.

Two views have obtained as to the construction of the statute: (1) that it should be literally interpreted, and every case coming within the description of the words used should be visited with the penalties prescribed, irrespective of any rule of the common law; (2) that the general words of the statute are to be confined by the law as it existed when it was passed, and that the test of what is unlawful is furnished by the principles of the com-

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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 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.

Sec. 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 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.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in

mon law. While, logically speaking, the first view may be sustainable, it is not the view of legislation which has been taken by English speaking courts. The courts of England and of this country have for hundreds of years treated the enactments of the legislative branch of the government with considerable care and tenderness. It requires but a short glance at the decisions of the English courts and the decisions of the courts of several states in this country, and of the Supreme Court itself in other cases, to convince one that these courts have all habitually taken the view that a statute must be reasonably interpreted, and where its provisions are too drastic, words may be introduced into it or constructions adopted which will bring about the result demanded by the interests of the community. This is particularly true when the statute in question has to do with, or as drawn comes in conflict with, the economic life of the community. The most conspicuous instances of this are the Statute of Uses, the Statute of Frauds and the Statute of Wills, all of which have been subjected to judicial interpretation sometimes almost annulling the

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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 violation 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.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, 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.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

plain words of the statute. The reason is plain. Legislatures are human, and as such they endeavor to solve the problems which come before them in a necessarily human and imperfect manner. The characteristic faults of parliamentary legislation have been clearly pointed out by a learned author,[9] and the Anti-Trust Act which we are discussing is no better in these respects than the average legislation of Parliament, of the state legislatures and other acts of Congress.[10]

We need not spend much time on this point because in fact the statute has not yet been applied by the Supreme Court of the United States to a contract, combination or monopoly which would not have been equally invalid in a proper proceeding under the rules of the common law. The only practical addition, therefore, to the law made by the statute is the remedy given the United States, to obtain an injunction restraining violations of the act, and the right of an individual to recover treble damages in an action at law for a violation of its provisions.

The act enumerates a conspiracy in restraint of interstate

Sec. 8. That the word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

[9] "Parliamentary legislation, in short, if it is sometimes rapid and thorough-going, exhibits in this instance (the married women's property acts), as in others, characteristic faults. It is the work of legislators who are much influenced by the immediate opinion of the moment, who make laws with little regard either to general principles or to logical consistency, and who are deficient in the knowledge and skill of experts." The relation between law and public opinion in England during the Nineteenth Century, A. V. Dicey, London, 1905, pp. 395, 396. "Only in exceptional cases and under the pressure of some crisis can English legislators be induced to carry out a broad principle at one stroke to its logical and necessary consequences." *Ibid*, p. 28.

[10] The vigorous dissent of Mr. Justice Harlan in Standard Oil Co. v. U. S. (1911) 221 U. S. 1, 31, S. C. 502, 55 L. Ed. 619, 4 Fed. A. T. Dec. 79, cannot be passed by without some comment. It must be confessed, however, on careful reflection that the learned judge somewhat overshot the mark. No intellect has yet been acute enough to define any of the executive, legislative or judicial functions of the government to the exclusion of any of the others, or clearly point out where one begins and the other ends. This difficulty is inseparable from the construction of a written constitution such as ours. The question of how far the court may go in construing a statute is more one of practical expediency than of logical reasoning. There is, however, serious objection to adopting a particular construction when the legislature has, after the enactment of the statute, refused to amend the act in that particular, and the *dictum* of Mr. Chief Justice White in this case is therefore open to grave criticism on this ground, particularly as the learned judge failed to take any account of this objection in reaching the conclusion he did.

trade as unlawful. No case has been found turning on any distinction between a conspiracy and a combination. We shall therefore discuss the statute as if the word conspiracy had been omitted, thereby evading the difficulties of the law on this subject which would require an article by itself.

A tabular analysis of the first, second and eighth sections is appended in a note.[11]

TITLE OF THE ACT.

The act is entitled "An act to protect trade and commerce against unlawful restraints and monopolies," therein embodying two misconceptions: (1) the idea that a restraint of trade is unlawful when it has the effect of reducing the volume of trade. A restraint of trade which is obnoxious to the common law may exist with an increase in the volume of trade or *vice versa*. The two have no connection whatever.[12] (2) The idea that trade is a concrete state of affairs which can be restrained. Trade is only a generic name for the abstract conception covering the multitude of individual acts of trading, and interstate trade is

[11] TABULAR ANALYSIS OF THE FIRST, SECOND AND EIGHTH SECTIONS.

Section 1.

Every { Contract / Combination in the form of trust or otherwise / Conspiracy } { in restraint of interstate *etc.*, trade } { is illegal.

Every person engaging in such contract, *etc.*, shall be guilty, *etc.*

Section 2.

Every { Person / Corporation (by §8) } { who shall } { Monopolize / Attempt to monopolize / Combine or conspire with any other person or corporation to monopolize } { any part of interstate trade, *etc.* } { shall be guilty, *etc.*

[12] This misconception sometimes appears in the cases. The argument was advanced in U. S. v. Northern Securities Co., 120 Fed. 721 at 730, 2 Fed. A. T. Dec. 215 at 228, that the combination attacked by the government was valid because it would increase the volume of interstate traffic and thus benefit the public, which notion was repudiated by the court. See Adams, J., in Arkansas Brokerage Co. v. Dunn and Powell, Inc. (1909), 173 Fed. 899 at 901, 3 Fed. A. T. Dec. 752 at 756.

only an artificial mental picture of the sum total of individual dealings in interstate trade. The only restraint of trade which can exist in point of fact, and therefore the only restraint of which the law can take any notice, is a restraint on some act or acts of trading. The real point, therefore, is the freedom of specific trading, and the title would be more accurately worded thus: "An act to secure the freedom of engaging in interstate trade." The statute nowhere defines the things it condemns as illegal, and it has, therefore,[13] been frequently argued in aid of a liberal construction of the act, that the use of the word unlawful in the title indicates an intention, in view of the general language of the body, to condemn only those things unlawful *de hors* the act. That is, unlawful by the common law.[14] On the other hand, it has been said that the title indicates the comprehensive scope of the statute, the title being intended to refer to those restraints and monopolies made unlawful by the body of the act.[15] This argument is in aid of a strict construction of the act.

Any Part of Interstate Trade.[16]

(1) By confining the phrase "interstate" to any particular trade, as, for instance, the petroleum trade, the phrase means any part of that trade, and consequently a combination of an insignificant number of dealers in a certain line having no effect on the trade, must fall within the condemnation of the act, and yet the combination will have no effect at all on the course of inter-

[13] This lack of definition has been frequently commented on: J. C. Carter, *arguendo*, in U. S. v. Joint Traffic Assn. (1898) 171 U. S. 505 at 513, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259, 1 Fed. A. T. Dec. 869 at 878. Sanborn, J., in U. S. v. Trans. Mo. Freight Assn. (1893) 58 Fed. 58 at 67, 1 Fed. A. T. Dec. 186 at 197; American Biscuit Co. v. Klotz (1891) 44 Fed. 721 at 726, 1 Fed. A. T. Dec. 2 at 8.

[14] Brewer, J., in Northern Securities Co. v. U. S. (1904) 193 U. S. 197 at 361, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679, 2 Fed. A. T. Dec. 338 at 488. White, J., in U. S. v. Freight Assn. (1897) 166 U. S. 290 at 352, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 705.

[15] Peckham, J., in U. S. v. Freight Assn. (1897) 166 U. S. 290 at 327, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 682. Morrow, J., in U. S. v. Coal Dealers' Assn. (1898) 85 Fed. 252 at 261, 1 Fed. A. T. Dec. 749 at 762.

[16] The doubt as to the meaning of the phrase "Any part of interstate trade," does not seem to have raised any questions of particular importance. It only appears in §2 in conjunction with "monopolize."

state trade as a whole. This meaning is not consistent with a liberal interpretation of the statute.

(2) By giving the phrase "interstate trade" the meaning of applying to interstate trade as a whole, as a body of trade which is under the jurisdiction of the Federal government extending throughout the United States, the phrase "any part thereof" may mean any part of that volume of trade, and therefore, in its narrowest meaning, to be confined to a particular line of business and not to a fractional part of any line of business.[17]

As to Remedy.

The act, in addition to declaring certain acts unlawful, affords four distinct remedies. It authorizes the United States Government (1) by Section 4 to obtain an injunction restraining violations of the act, (2) by Section 6 to obtain a declaration of forfeiture of the property involved, (3) by Section 3 to enforce its provisions by criminal proceedings. By Section 7, private parties are authorized to sue at law and recover treble damages for violation of the act. No case has arisen as to the remedy under Section 6,[18] and a discussion of criminal proceedings will be omitted from lack of space.[19]

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[17] Mr. C. J. White, in Standard Oil Co. v. U. S. (1911) 221 U. S. 1 at 61, 31 Sup. Ct. Rep. 502, 53 L. Ed. 619, 4 Fed. A. T. Dec. 79 at 130, said: "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 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." No other reference to the subject has been found in the cases.

[18] As to §6, see remarks of Peckham, J., in U. S. v. Trans-Mo. Freight Assn. (1897) 166 U. S. 290 at 313, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 668.

[19] Citations to some of the criminal cases are appended for convenience of reference in case the learned reader should desire to pursue the matter further. U. S. v. Greenhut (1892) 50 Fed. 469, 1 Fed. A. T. Dec. 30; *In re* Corning (1892) 51 Fed. 205, 1 Fed. A. T. Dec. 33; *In re* Terrell (1892) 51 Fed. 213, 1 Fed. A. T. Dec. 46; *In re* Greene (1892) 52 Fed. 104, 1 Fed. A. T. Dec. 54; U. S. v. Nelson (1892) 52 Fed. 646, 1 Fed. A. T. Dec. 77; U. S. v. Patterson (1893) 55 Fed. 605, 1 Fed. A. T. Dec. 133, s. c. 59 Fed. 280, 1 Fed. A. T. Dec. 244; *In re* Grand Jury (1894) 62 Fed. 840, 1 Fed. A. T. Dec. 301; U. S. v. Cassidy (1895) 67 Fed. 698, 1 Fed. A. T. Dec. 449; U. S. v. Armour Co. (1906) 142 Fed. 808, 2 Fed. A. T. Dec. 951; Moore v. U. S. (1898) 85 Fed. 465, 1 Fed. A. T. Dec. 815; U. S. v. McAndrews & Forbes (1906) 149 Fed. 823, 3 Fed. A. T. Dec. 81, 149 Fed. 836, 3 Fed. A. T. Dec. 100; *In re* Charge to Grand Jury (1907) 151 Fed. 834, 3 Fed. A. T. Dec. 156;

The criminal provisions should be inserted in a separate statute so the construction of the civil and penal provisos can go on independently. Each now hampers the other, the court being under the necessity of attempting to follow the same rule in each case.

It is well settled that the United States cannot proceed at law under Section 7, nor can an individual proceed in equity under Section 4.[20]

In all cases where the Federal courts have jurisdiction independently of the act, as in the case of diverse citizenship, and the validity of a contract or combination in restraint of trade or a monopoly is drawn into question, the courts will proceed as before. In proceedings in equity the relief will conform to the equitable remedies which would have been applied before the act was passed, such as the retransfer of property, setting aside of a conveyance, *etc.*,[21] but will not extend to a dissolution of the

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Tribolet v. U. S. (1908) 95 Pac. Rep. 85, 3 Fed. A T. Dec. 316; U. S. v. Virginia-Carolina Chemical Co., *et al.* (1908), 163 Fed. 395, 3 Fed. A. T. Dec. 395; Union Pacific Coal Co. v. U. S. (1909) 173 Fed. 737, 3 Fed. A. T. Dec. 731; U. S. v. Kissel (1910) 218 U. S. 601, 31 Sup. Ct. Rep. 124, 54 L. Ed. 1168, 3 Fed. A. T. Dec. 816, reversing 173 Fed. 823, 3 Fed. A. T. Dec. 744; U. S. v. American Naval Stores Co., *et al.* (1909), 186 Fed. 592, 4 Fed. A. T. Dec. 48, 172 Fed. 455, 3 Fed. A. T. Dec. 679; U. S. v. Swift, *et al.* (1911), 186 Fed. 1002, 4 Fed. A. T. Dec. 53; U. S. v. Standard Sanitary Mfg. Co., *et al.* (1911), 187 Fed. 229, 4 Fed. A. T. Dec. 251; U. S. v. Patten (1911) 226 U. S. 525, 33 Sup. Ct. Rep. 141, 57 L. Ed. 141, reversing 187 Fed. 664, 4 Fed. A. T. Dec. 274; U. S. v. Swift (1911) 188 Fed. 92, 4 Fed. A. T. Dec. 288; Steers v. U. S. (1911) 192 Fed. 1, 4 Fed. A. T. Dec. 427; *In re* Kittel (1911) 180 Fed. 946, 3 Fed. A. T. Dec. 803; U. S. v. Heike (1910) 175 Fed. 852, U. S. v. John Reardon Sons Co. (1911) 191 Fed. 454. Some of the contempt cases are: U. S. v. Agler (1894) 62 Fed. 824, 1 Fed. A. T. Dec. 294; *In re* Debs (1895) 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. Ed. 1092, 1 Fed. A. T. Dec. 565, affirming 62 Fed. 724, 1 Fed. A. T. Dec. 322; U. S. v. Atchison, T. & S. F. Ry. Co. (1905) 142 Fed. 176, 2 Fed. A. T. Dec. 831. Witnesses—Contempt in refusing to answer; Foot v. Buchanan (1902) 113 Fed. 156, 2 Fed. A. T. Dec. 103; Hale v. Henkel (1906) 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. Ed. 652, 2 Fed. A. T. Dec. 874, affirming *In re* Hale, 139 Fed. 496, 2 Fed. A. T. Dec. 804; McAllister v. Henkel (1906) 201 U. S. 90, 26 Sup. Ct. Rep. 385, 50 L. Ed. 671, 2 Fed. A. T. Dec. 919; Nelson v. U. S., 201 U. S. 92, 26 Sup. Ct. Rep. 358, 50 L. Ed. 673, 2 Fed. A. T. Dec. 920; Alexander v. U. S. (1906) 201 U. S. 117, 26 Sup. Ct. Rep. 356, 50 L. Ed. 686, 2 Fed. A. T. Dec. 945; U. S. v. Winslow (1912) 227 U. S. 202, 33 Sup. Ct. Rep. 253, 57 L. Ed. 253, affirming 195 Fed. 578; U. S. v. Patterson (1912) 201 Fed. 697, 205 Fed. 29; Nash v. U. S. (1913) 229 U. S. 373, 33 Sup. Ct. Rep. 780, 57 L. Ed. 780, reversing 186 Fed. 489; U. S. v. New Departure Mfg. Co. (1913) 204 Fed. 107; U. S. v. Pacific & Arctic Rwy. Co. (1913) 228 U. S. 87, 33 Sup. Ct. Rep. 443, 57 L. Ed. 443.

[20] See note 7, *ante*, and note 23, *post*.

[21] Bigelow v. Calumet and Heckla Mining Co. (1907) 155 Fed. 869, 3 Fed. A. T. Dec. 293, reversed on other grounds in 167 Fed. 704, 3 Fed. A. T.

combination,[22] although there is a recent ambiguous case where the court seemed to recognize the right of the plaintiff to bring a suit in equity based solely on injury to the plaintiff by alleged violation of the act.[23]

So also in a suit on a covenant in restraint of trade,[24] or in a proceeding by one member of a combination against another member to enforce its terms, either party may set up the illegality of the covenant just as at common law.[25]

Mr. Justice Brewer, in a dissenting opinion in *Continental Wall Paper Co.* v. *Voight & Sons Co.*,[26] took the position that the three remedies prescribed in the act are exclusive, and that therefore in a suit on a contract, one of the parties cannot set up in defence the illegality of the agreement under the act. This *dictum*, however, may be disregarded in view of the overwhelm-

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Dec. 593, which was affirmed in (1909) 167 Fed. 721, 3 Fed. A. T. Dec. 618; bill by minority stockholder to enjoin stock control by a competing corporation. Steele v. United Fruit Co. (1911) 190 Fed. 631, 4 Fed. A. T. Dec. 386; Shawnee Compress Co. v. Anderson (1908) 209 U. S. 423, 28 Sup. Ct. Rep. 572, 52 L. Ed. 865, 3 Fed. A. T. Dec. 357, affirming 87 Pac. Rep. 315, 3 Fed. A. T. Dec. 122; bill by stockholder to set aside a lease made by the corporation in violation of the act. Clarke v. Central R. R. and Banking Co. of Georgia (1892) 50 Fed. 338, 1 Fed. A. T. Dec. 17; question arose on a motion to modify an interlocutory decree relating to the voting of stock in the corporation. Blindell, *et al.*, v. Hagen, *et al.* (1893), 54 Fed. 40, 1 Fed. A. T. Dec. 106, 56 Fed. 696, 1 Fed. A. T. Dec. 182; injunction issued restraining the defendants, probably members of a labor union, from preventing the plaintiffs from shipping a crew for their vessel, rested on grounds apart from the Act of 1890. Metcalf v. American School Furniture Co. (1901) 108 Fed. 909, 2 Fed. A. T. Dec. 75, 113 Fed. 1020, 2 Fed. A. T. Dec. 111, 122 Fed. 115, 2 Fed. A. T. Dec. 234. Field v. Barber Asphalt Co. (1902) 194 U. S. 618, 24 Sup. Ct. Rep. 784, 48 L. Ed. 1142, 2 Fed. A. T. Dec. 555, affirming as to this point 117 Fed. 925, 2 Fed. A. T. Dec. 192. National Harrow Co. v. Hench (1897) 83 Fed. 36, 1 Fed. A. T. Dec. 742, affirming 76 Fed. 667, 1 Fed. A. T. Dec. 610, see 84 Fed. 226, 1 Fed. A. T. Dec. 746; injunction to restrain breach refused. American Biscuit Mfg. Co. v. Klotz (1891) 44 Fed. 721, 1 Fed. A. T. Dec. 2; court refused to appoint a receiver.

[22] Leonard v. Abner-Drury Brewing Co. (1905) 25 Appeal (D. C.) Cases, 161, 3 Fed. A. T. Dec. 1.

[23] Mannington v. Hocking Valley Ry. Co. (1910) 183 Fed. 133, 3 Fed. A. T. Dec. 825; in Dobson v. Farbenfabriken of Elberfeld Co. (1913), 206 Fed. 125, proceedings in equity were brought under §7, and the case arose on a motion to set aside service. No attention was paid to the form of action.

[24] Cravens v. Carter-Crume Co. (1899) 92 Fed. 479, 1 Fed. A. T. Dec. 983.

[25] Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (1906) 142 Fed. 531, 2 Fed. A. T. Dec. 855, reversed on other grounds in 154 Fed. 358, 3 Fed. A. T. Dec. 272.

[26] (1909) 212 U. S. 227 at 273, 29 Sup. Ct. Rep. 280, 53 L. Ed. 486, 3 Fed. A. T. Dec. 480 at 523.

ing weight of authority to the contrary. But a party to the contract will not be refused relief where he is innocent because the other party is guilty of an illegal attempt to control the market,[27] and the plaintiff cannot recover for goods delivered under and in pursuance of the terms of the illegal combination,[28] yet the circumstance that a plaintiff is a member of an illegal combination or a corporation organized and existing in violation of the law does not prevent it from enforcing contracts it may have made with the persons not members of the combination.[29]

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[27] See cases cited note 48, *post*.

[28] Continental Wall Paper Co. v. Voight & Sons Co. (1909) 212 U. S. 227, 29 Sup. Ct. Rep. 280, 53 L. Ed. 486, 3 Fed. A. T. Dec. 480. Defendant was coerced into entering into the contract. Strong dissent here by Holmes, J., and there is considerable doubt as to whether the case was correctly decided. The proper elucidation of this point however, involves a question in the illegality of contracts. Was not the parol sale of the goods independent of the general combination agreement and therefore unaffected by the illegality of the latter, s. c. 78 C. C. 567, 204 U. S. 673. See, however, note 22 HARV. LAW REV., p. 435.

[29] Strait, *et al.*, v. Nat. Harrow Co. (1892) 51 Fed. 819. 1 Fed. A. T. Dec. 52; infringer of a patent may not maintain a bill to restrain defendant from bringing infringement suits on the ground that defendant company is an illegal combination under the Act of 1890. General Elec. Co. v. Wise (1903), 119 Fed. 922, 2 Fed. A. T. Dec. 205; corporation patentee may restrain infringement notwithstanding membership in an illegal combination with third parties. Otis Elevator Co. v. Geiger, *et al.* (1901), 107 Fed. 131, 2 Fed. A. T. Dec. 66, *semble;* pleading of the defendant in the answer too vague. Nat. Folding Box & Paper Co. v. Robertson, *et al.* (1900), 99 Fed. 985, 2 Fed. A. T. Dec. 4, plaintiff may recover, notwithstanding the patent was assigned to it in pursuance of the illegal combination. See also U. S. Fire Escape, *etc.*, Co. v. Halstead Co. (1912) 195 Fed. 295; Motion Picture Patents Co. v. Laemmle, *et al.* (1910), 178 Fed. 104, 3 Fed. A. T. Dec. 764; Motion Picture Patents Co. v. Ullman, *et al.* (1910), 186 Fed. 174, 4 Fed. A. T. Dec. 46, defendant not helped by allegation in the answer that the suit is not brought in good faith to prevent infringement, but for the purpose of making the illegal combination, *etc.*, effective. *Cf.*, Virtue v. Creamery Package Mfg. Co. (1912) 227 U. S. 8, 33 Sup. Ct. Rep. 202, 57 L. Ed. 202 (1910), 179 Fed. 115, 3 Fed. A. T. Dec. 794, *semble, accord.* The Charles E. Wiswell (1896) 74 Fed. 802, 1 Fed. A. T. Dec. 608; no defense to a bill for towage that the plaintiff tug owners are members of an association illegal under the act, affirmed in 86 Fed. 671, 1 Fed. A. T. Dec. 850, on the additional ground that the association was legal. Connolly v. Union Sewer Pipe Co. (1902), 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. Ed. 679, 2 Fed. A. T. Dec. 118, affirming 99 Fed. 354, 2 Fed. A. T. Dec. 1; purchaser of a commodity cannot refuse to pay the price due on the ground that the seller is subject to the provisions of the act. Chicago Wall Paper Mills Co. v. General Paper Co. (1906) 147 Fed. 491, 2 Fed. A. T. Dec. 1027; Hadley Dean P. G. Co. v. Highland G. Co. (1906) 143 Fed. 242, 2 Fed. A. T. Dec. 994; Northwestern Consol. Milling Co. v. Callum & Son (1910), 177 Fed. 786, 3 Fed. A. T. Dec. 759, *semble.* International Harvester Co. of America v. Oliver (1911) 192 Fed. 59. The *dictum contra* in Nat. Harrow Co. v. Quick (1895) 67 Fed. 130, 3 Fed. A. T. Dec. 443, may be disregarded; s. c. on other grounds, 74 Fed. 236, 1 Fed. A. T. Dec. 608; Coca-Cola Co. v. American Druggists Syndicate (1912) 200 Fed. 107.

A court of equity will sometimes, however, in a case where the granting of relief is a matter of grace, refuse assistance to a plaintiff who is subject to the condemnation of the statute.[30]

Contracts in Restraint of Trade.

Almost the entire law of restraints on trade turned on the validity of so-called contracts in restraint of trade and it is perhaps natural that the judges in discussing the subject in modern times should approach it from that point of view. This is unfortunate, however, and has caused great confusion.

We have already pointed out[31] that covenants in restraint of trade are objectionable in modern times only when a combination, by taking such covenants, eliminates competitors and obtains control of the market, or when a number of persons, by entering into such a contract, form a combination obnoxious to the law. The old principles of the law have disappeared with changed conditions. The law no longer has any concern about the party restrained being deprived of the means of a livelihood, and there is no danger, under the enlarged conditions of business in modern times, of an individual obtaining control of the market by taking such covenants. The Act of 1890, however, took no account of the law in this particular, and blindly condemned every contract in restraint of trade and subjected every person who entered into such a contract or who achieved or attempted to achieve a monopoly by entering into such a contract, to the penalties of the act. It may perhaps be assumed that Congress did not intend such a result.

The circumstance that language so widely varying from the probable real intention was used is another reason why the rule of liberal construction should be adopted. Covenants in restraint of trade may be taken by an individual or by a combination or form part of a combination. The last case is discussed under the heading of combination.

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[30] Delaware, L. & W. R. Co. v. Frank, *et al.* (1901), 110 Fed. 689, 2 Fed. A. T. Dec. 81; railroad company, member of an illegal trunk line association, refused an injunction to restrain ticket brokers against dealing in tickets issued under the terms of the association.

[31] 12 Columbia Law Review, 97-133, 220-251, especially 246-251.

The question as to the validity of a contract in restraint of trade may come up in several ways: (1) where the United States files a bill in equity under Section 4; (2) where an individual proceeds at law for treble damages under Section 7. In each of these cases the contract must affect interstate commerce; (3) proceedings independently of the act in the Federal courts on other grounds of jurisdiction, such as diverse citizenship, where the validity of a covenant in restraint of trade is drawn into question. Here the trade restrained need not be interstate trade. If it is, the provisions of the act are to be applied; if not, the common law or the principles of the act by way of analogy, and in each case the facts may present a covenant by one party to restrain trade or a covenant by both parties to restrain trade.

We shall first discuss cases of proceedings independently of the act.

Contracts of Sale in Restraint of Trade.

Cases still frequently occur where the vendor of property or the goodwill of a business enters into a covenant with the vendee in restraint of his, the vendor's, trade, and the question arises, how far in a suit between the parties is the Act of 1890 to be applied? Although there are some expressions in the reports to the effect that the act does not apply[32] to cases of this kind the decisions seem to point to a contrary conclusion.

In *Cincinnati Packet Co.* v. *Bay*,[33] there was a sale of certain river steam boats, with a covenant by the sellers not to engage in competition for five years, and upon suit being brought by the sellers for a portion of the purchase price, the buyer set up in defence the illegality of the contract, which defence was overruled. Holmes, J., said that the circumstance that the contract related

[32] Swan, J., in A. Booth & Co. v. Davis, 127 Fed. 875 at 877, 878, 2 Fed. A. T. Dec. 318 at 322, 323; Cincinnati Packet Co. v. Bay, Holmes, J. (1906), 200 U. S. 179; 26 Sup. Ct. Rep. 208, 50 L. Ed. 428, 2 Fed. A. T. Dec. 867; Severns, J., dissenting in Darius Cole Transportation Co. v. White Star Line (1911), 186 Fed. 63 at 68, 4 Fed. A. T. Dec. 36 at 43.

[33] (1906) 200 U. S. 179, 26 Sup. Ct. Rep. 208, 50 L. Ed. 428, 2 Fed. A. T. Dec. 867.

to interstate commerce, although not clear, would be assumed, although the boat line seemed to run almost exclusively between Ohio ports, but even on this supposition that it was manifest that interference with such commerce was insignificant and incidental and not the dominant purpose of the contract, if it was actually thought of at all. He also said that the buyers obviously purchased that freedom from competition as part of their bargain, and that such a covenant not made as a device to control commerce did not fall within the act, and that it had been repeatedly suggested that such a contract is not within the letter or spirit of the statute, apparently making the test the intent to control on the part of the covenantee and not the reasonableness of the restraint. There was also a covenant on the part of the purchaser to maintain rates, the invalidity of which, under the act, was not passed on by the court, it being deemed an entirely subordinate undertaking of the buyer.

In *Robinson* v. *Suburban Brick Co.*,[34] there was a sale of a manufacturing business, with a covenant not to engage in the same business within fifty miles for ten years, which was enforced in equity in a suit by the covenantee against the covenantor on the ground, *inter alia*, although the parties lived in different states, that the covenant related to manufacture within a state, and was not, therefore, subject to the provision of the Act of 1890. It did not appear whether the fifty miles would extend over a state line.

In *American Brake Beam Co.* v. *Pungs*,[35] there was a sale of a patent with a covenant by the vendor not to compete during the life of the patent, and in a suit by a vendor for the consideration, it was held that the covenant was valid and a verdict for the plaintiff was affirmed without reference to the Act of 1890. Grosscup, J., curiously enough, said that the covenant was not in restraint of trade, merely binding the vendor to stay out. The covenant was, of course, in restraint of vendor's trade and might restrain the trade of others. The vendor, by the terms of the contract, could re-enter the trade upon paying back the considera-

[34] (1904) 127 Fed. 804, 2 Fed. A. T. Dec. 312.
[35] (1905) 141 Fed. 923, 2 Fed. A. T. Dec. 826.

tion, and the court said "At most it is an agreement merely that if the vendor renews his connection with the trade, he shall return the consideration received." The covenant apparently related to interstate business, but that point was not raised.

In *A. Booth & Co.* v. *Davis, et al.*,[36] there was a sale of a fish business by a corporation, and a covenant was entered into by the stockholders not to engage in the same business for ten years. A preliminary injunction was issued to enforce performance in a suit by the covenantee against the covenantors. The court said the covenant was reasonable and not subject to the provisions of the Act of 1890. On appeal the decision was affirmed on the ground that there was no direct interference with interstate commerce.

In *Darius Cole Transportation Co.* v. *White Star Line*,[37] there was a suit in admiralty for the recovery of two instalments of rent due on a steamer running between ports in different states. The lessor had agreed not to compete during the term of the lease, and it was held that there could be no recovery of rent, the covenant being void, as the evidence (particularly the circumstance that the rent received was more than the steamer would have earned if operated independently) showed a dominant intention of the parties to maintain a monopoly.[38]

In *McConnell* v. *Camors McConnell Co.*,[39] the vendee of a business was not permitted to enforce in equity a covenant not to compete entered into by the vendor, it appearing that the contract and covenant were made in order to assist the plaintiff in stifling competition and acquiring a monopoly. The case was heard on bill and answer, which latter averred that the plaintiff was acquiring a monopoly. The court placed the decision on the ground that a refusal to enforce would tend to minimize the number of such transactions.

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[36] (1904) 127 Fed. 875, 2 Fed. A. T. Dec. 318, affirmed in 131 Fed. 31, 2 Fed. A. T. Dec. 566.

[37] (1911) 186 Fed. 63, 4 Fed. A. T. Dec. 36.

[38] See also Phillips v. Iola Portland Cement Co. (1903) 125 Fed. 593, 2 Fed. A. T. Dec. 284, where a covenant by the vendee not to resell in competition with a vendor was held valid.

[39] (1907) 152 Fed. 321, 3 Fed. A. T. Dec. 185, reversing 140 Fed. 412, 2 Fed. A. T. Dec. 817, see 140 Fed. 987, 2 Fed. A. T. Dec. 825.

In *Shawnee Compress Co.* v. *Anderson*,[40] there was a lease by a corporation to another corporation with a covenant by the lessor not to compete. On bill filed by a minority stockholder of the lessor corporation, the lease was set aside and its execution and performance enjoined, it appearing that the covenant was greater than the protection of the lessee required. It was not necessary, the court said, the case coming from a territory, to decide whether the covenant was void under the common law, the Oklahoma statute, or the Act of 1890.

The common law principle, that the validity of a covenant in restraint of trade is determined by the reasonableness of the restraint imposed, has been introduced by the Federal courts into the discussion of the subject in a most unfortunate and confusing way. We have already noticed the argument that the absence of any definition in the act, and the use of the word unlawful in the title point to the conclusion that the validity of a covenant in restraint of trade is, since the act, to be determined by common law principles.

It is said that the term "contracts in restraint of trade at common law" included all contracts which in effect restrained trade, some of which were void as unreasonable and others valid as reasonable; that therefore the statute, when it used the words "every contract" included all and condemned the reasonable and unreasonable, and that no exception or limitation can be added without putting in the act words which were not inserted by Congress.[41]

On the other hand, it has been said that the term "contracts in restraint of trade" at common law only referred to and embraced those contracts which were void as unreasonable, and that therefore the statute does not apply to the contracts which are valid because reasonable.

Mr. Chief Justice White appears to be responsible for this idea, and his reasoning in support of it is open to several serious

[40] (1908) 209 U. S. 423, 28 Sup. Ct. Rep. 572, 52 L. Ed. 865, 3 Fed. A. T. Dec. 357, affirming 87 Pac. Rep. 315, 3 Fed. A. T. Dec. 122.

[41] Peckham, J., in U. S. v. Trans-Mo. Freight Assn. (1897) 166 U. S. 290 at 328, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 682, 683.

objections. He says, in his dissenting opinion in *United States* v. *Freight Assn.*,[42]

> "Is it correct to say that at common law the words 'restraint of trade' had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words 'every contract in restraint of trade'? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words 'restraint of trade' embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, 'restrain trade,' are not within the meaning of the words."

Now he starts out in his opinion with these words:[43]

> "It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which it produces be unreasonable."

In this statement he expressly recognizes the correct use of the word "reasonable" which is in its application to the restraint and not to the contract. He starts out with the fallacy that if the act of Congress prohibits reasonable contracts it is unreasonable, forgetting in this assumption that the test of a reasonable restraint of trade is determined by law, and when the law is changed by statute, that which was before reasonable may become unreasonable, or *vice versa*. The authority which changes the standard of reasoning cannot be condemned as unreasonable by the standard which it changes. True, the statute may not agree with the notions of justice, sound policy or proper economic legislation which may be entertained by the various judges of the court, and may be considered as unreasonable from that point of view. The use of the word "unreasonable," however, in that connection is entirely different from the use of the word "reasonable" or "unreasonable" as applied to a restraint of

[42] (1897) 166 U. S. 290 at 346, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007, 1 Fed. A. T. Dec. 648 at 699.

[43] On pp. 343 of the U. S. Report and 696 of the Fed. A. T. Dec.

trade. He then examines a number of decisions and text books, and comes to the conclusion that the English and American authorities warrant the statement that a contract in reasonable restraint of trade is not a contract in restraint of trade. In reaching this conclusion, he uses the words "contract in restraint of trade" in its loose and erroneous sense, and entirely overlooks the accurate use of the English judges in which they speak of the covenant as being in restraint of trade.

This is illustrated by his misconception of the decision in the House of Lords in the case of *Nordenfelt* v. *The Maxim Nordenfeldt Guns & Ammunition Co.*[44] He states that decision as holding that if a contract was reasonable it was not a contract in restraint of trade, and if unreasonable, it was. The language of the learned lords in that case may be scanned in vain for any such statement of the law. All of them speak of the covenant as being in restraint of trade, and use the word "reasonable" as qualifying either that or the restraint and do not in any case speak of a reasonable contract. Lord Chancellor Herschell[45] states that the question is whether the covenant entered into between the parties is void as in restraint of trade, and then points out that it is contained in a certain agreement and recites the agreement.

Mr. Chief Justice White, therefore, cites no authority for his conclusion and he is entirely opposed to the highest and best English authority. Every text writer, almost without exception, uses the phrase in the sense in which he says it should not be used and he misapprehends the effect of the English decisions. His reasoning in the Standard Oil case is further an amplification of the same fallacy, contains no further contribution to the subject, and refers to no other authorities in support of his conclusion.

We have already pointed out that the term "contracts in restraint of trade" is entirely inaccurate and contrary to the best usage of the English judges, who nearly always use the more accurate phrase[46] "covenants in restraint of trade." The term

[44] (1894) App. Cases 535.

[45] At p. 538 of the report.

[46] 12 COLUMBIA LAW REVIEW, 97-133, 220-251, see especially 246, 251.

"contract in restraint of trade" is, at its best, a loose term of the text writers and judges, and when we look beneath the surface as we must, and reason exactly, we at once perceive that the contract does not restrain the trade at all, but the performance of a covenant in a contract may or may not restrain trade.

A covenant in restraint of trade, when performed, restrains the trade of the covenantor directly, and may or may not restrain the trade of third parties, and if it does restrain them does so indirectly. It is the indirect restraint on the trade of third parties with which the law is probably solely concerned today. If this is so, we may say with some accuracy that a contract in restraint of trade is a contract containing a covenant the performance of which unduly restrains the trade of third parties, and unless it does produce that restraint is valid at common law. The language of Mr. Chief Justice White, however, is so involved, that it is almost impossible to ascertain his meaning. It is probable, however, from some expressions in the opinion, that he had in mind the indirect restraint on trade arising out of the direct restraint imposed by the covenantor on himself by the performance of the covenant, and then only when it unduly or unreasonably restrained the trade of third parties.[47]

Contracts of Exclusive Sale.

An individual may unquestionably make an exclusive contract of sale of his product or the commodity he is dealing in for a term of years, and such a contract was valid at common law unless the purchaser was, by the taking of a sufficient number of such contracts, acquiring a control of the market, and even in that case the covenantor could enforce the contract and recover the consideration unless he was a party to the unlawful scheme of the buyer. A liberal construction of the Act of 1890 leads to the same conclusion, and such seems to be the purport of the decisions. Where a manufacturer sells the entire product of his plant, and brings suit to recover an amount due under the contract, the defence that the covenant is illegal because the pur-

[47] For a discussion of what is an undue or unreasonable restraint of trade, see *infra*.

chaser is endeavoring to obtain control of the market will not prevail against the plaintiff, who is ignorant of the scheme of the defendant and of similar contracts, the contract sued on being valid in itself.[48]

Where all the parties to the contract are concerned in the scheme to control the buying or selling, the case becomes one of a combination and loses its peculiarity as a covenant in restraint of trade.

In *Cravens* v. *Carter-Crume Co.*,[49] a combination of woodenware manufacturers was effected, and a contract made in pursuance of such combination by which the manufacturer was guaranteed a certain sum as dividends on his stock in the central company in consideration of the closing up of his factory for a year. The contract was held void, and the plaintiff was unable to recover the amount due under the contract.

There have only been two cases of proceedings by the United States to enjoin the performance of contracts of exclusive sale. The first was *Chesapeake & Ohio Fuel Co.* v. *United States*,[50] in which case a contract by the Company with fourteen producers of coal, by which the Company agreed to take the entire product of the mines for five years intended for the western market, was held void and its performance restrained and the contracts ordered dissolved. It was a clear case of a corporation obtaining by a number of covenants control of the market.

The second case is that of *United States* v. *Reading Co., et al.*[51] In this case a number of railroad companies running between tidewater and the anthracite coal mines, entered into contracts with the various mine owners tributary to their lines, by which they purchased the entire output of the mines forever, and agreed to pay them 65 per cent. of the selling price at tidewater, retaining the balance for themselves for freight and selling expenses. The court below held, with only one dissent (Buffington, J.),

[48] Carter-Crume Co. v. Perrung (1898) 86 Fed. 439, 1 Fed. A. T. Dec. 844.

[49] (1899) 92 Fed. 479, 1 Fed. A. T. Dec. 983.

[50] (1902) 115 Fed. 610, 2 Fed. A. T. Dec. 151, affirming 105 Fed. 93, 2 Fed. A. T. Dec. 34.

[51] (1912) 226 U. S. 324, 33 Sup. Ct. Rep. 90, 57 L. Ed. 90 (1910), reversing, as to this point, 183 Fed. 427, 3 Fed. A. T. Dec. 866.

that these contracts were not in restraint of trade. It appeared that the defendants controlled 70 per cent. to 75 per cent. of the annual supply of anthracite coal. The court dwelt on the fact that the arrangement made by the carrying companies was made in view of the history and condition of the coal trade, and that it was an advantageous and highly commendable arrangement, and although it affected interstate trade, did not violate the act. On appeal, the Supreme Court reversed on the ground that the contracts, although possibly valid considered singly, plainly violated the law because the covenantee, by taking these contracts, acquired such a control of the market as to violate the provisions of the act. This case represents the clearest apprehension by the Supreme Court of the principle that too great a control of the market by the combination is the evil aimed at by the act. While this case relates to a natural monopoly, it does not appear that as to the 65 per cent. contracts the court was influenced by that fact. The only bearing of that circumstance is that the combination, because it was a case of natural monopoly, more easily acquired a control of the market, and a similar arrangement as to other commodities might not result in such control.[52]

Direct and Indirect Restraints.

While the distinction between that which is direct and that which is indirect seems tolerably clear in its application to ordinary affairs, so far as the law of restraints on trade is concerned, no guiding principle can be gathered from the authorities. While there is no authority for the distinction, it seems clear that a covenant in restraint of trade directly restrains the trade of the covenantor, and if the performance of that covenant has any effect on the selling or buying of the particular commodity, then the trade of the parties engaged in that selling or buying is only indirectly restrained. Successful competition restrains the trade of those competed against. Whether that restraint is direct or

[52] The bill in this case charged a combination in restraint of trade, and the Supreme Court said that the defendants did, *inter alia*, combine by and through the instrumentality of the sixty-five per cent. contracts for the purpose and design of controlling the sale of the independent output at tidewater.

indirect is open to debate. It may perhaps be classified as a direct restraint. A monopoly or combination directly restrains the trade of the members of the monopoly or combination in the same manner that the performance of a covenant restrains the trade of the covenantor, and indirectly restrains the trade of the buying or selling of the commodity embraced by the combination or monopoly. The successful competition of the combination or monopoly is the same kind of restraint on the persons competed against as any other successful competition.

Further complication arises in considering the subject under discussion from the circumstance that we have to bear in mind the distinction between trade in general and interstate trade. The conception of interstate commerce is a technical and artificial notion arising entirely out of the necessities of our constitutional law. The learning on the subject is immense and furnishes ample material for a volume by itself.[53]

[53] It will be impossible to discuss the question of what is interstate commerce within the limits of this article. A few words in passing may not be out of place. Commerce is made up of a number of separate exchanges of one thing for another, sometimes by a direct exchange, generally through the medium of a contract. Where there is a direct exchange, as in the case of a cash sale with immediate delivery to the purchaser, there is little difficulty. Here there is no interstate exchange or commerce unless the dividing line between two states comes between the parties. Where there is a contract, the problem is of greater difficulty. If the parties in the formation of the contract are in different states, the case seems plainly to be one of interstate commerce. If they are both in one state, and the contract is to be performed by one in another state, the law is not so plain. In the case of a carrier at least the case is one of interstate commerce. The carrier has sold transportation to another state to the shipper, and the contract must be performed in part in another state. A number of other cases may arise. Suppose the contract is made between parties in one state and performed by both in another state. Is the case the same as where they are in different states when the contract is formed? A few cases which have arisen under the act as to the question of interstate commerce are added. In Chesapeake & Ohio Fuel Company v. U. S. (1902) 115 Fed. 610; 2 Fed. A. T. Dec. 151, affirming 105 Fed. 93; 2 Fed. A. T. Dec. 34, a number of coal miners situated in West Virginia agreed to sell the entire product of their mines to a certain fuel company, all coal to be shipped West at the price *f. o. b.* mines, which was held to be restraint on interstate commerce. In Gibbs v. McNeeley (1902) 118 Fed. 120, 2 Fed. A. T. Dec. 194, 107 Fed. 210, 2 Fed. A. T. Dec. 71, 102 Fed. 594, 2 Fed. A. T. Dec. 25; an association of manufacturers and dealers in shingles, in one state, formed for the purpose of controlling the production and the price of the shingles, made only in that state, was held to affect interstate commerce, because it necessarily affected sales in other states, the case arising in an action under §7, by a dealer in the same state. This case illustrates the proposition that a contract need not in terms refer to interstate commerce, if its purpose and effect are to restrain interstate com-

The chief difficulty is that the Federal courts have failed to keep clear the distinction between a restraint as a direct or indirect restraint, and a restraint as operating on state or interstate commerce. Only one expression has been found referring to this distinction, which is of vital importance to the clear understanding of the application of the act.[54]

The vague use of the terms "direct" and "indirect" by the courts is illustrated in the decisions collected in the note.[55] It will appear from an examination of these cases that the terms "direct" and "indirect" are used in an attempt to distinguish a restraint on interstate commerce from a restraint on intra-state commerce, an entirely inadmissible use of the terms, because the distinction is between the trade restrained and not between the kind of restraints on the trade. It is first necessary to conclude what kind of trade is involved, and that question is answered by principles entirely apart from the law of restraints

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merce. In The Charles E. Wiswell, 86 Fed. 671, 1 Fed. A. T. Dec. 850, it was held that the members of the Hudson River Tugboat Asso. holding coasting licenses and engaged in towing on the waters of the Hudson River above Poughkeepsie and entirely within the State of New York, were not engaged in interstate commerce. In U. S. v. Coal Dealers' Asso. (1898) 85 Fed. 252, 1 Fed. A. T. Dec. 749, an association of retail dealers in coal, in San Francisco, combined with miners and shippers of coal from other states all residing in, and doing business in San Francisco. The combination controlled all the coal mines accessible to the San Francisco market. The court cited the Original Package decision, said there was no difference between that and the case at bar, and that the combination affected interstate commerce, relying on the case of United States v. Hopkins, 82 Fed. 529, 1 Fed. A. T. Dec. 725, in the lower court, which at that time had not been reversed by the Supreme Court.

[54] "For the purpose of clear exposition, the facts set forth in the petition should be separated in two groups—those that are intended to bring the transaction within the body of interstate commerce and those that are intended to fix upon such transaction the character of unlawful combination and conspiracy." Grosscup, J., in U. S. v. Swift, 122 Fed. 529 at 532, 2 Fed. A. T. Dec. 237 at 241.

[55] In U. S. v. E. C. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, 1 Fed. A. T. Dec. 379, affirming 60 Fed. 934, 1 Fed. A. T. Dec. 258, which affirmed 60 Fed. 306, 1 Fed. A. T. Dec. 250, one of the grounds of decision was that as there was no proof of any intent to restrain interstate commerce, the fact that the interstate commerce might be indirectly affected was not enough to entitle complainants to a decree. In U. S. v. Workingmen's Amalgamated Council of New Orleans, *et al.* (1893), 54 Fed. 994, 1 Fed. A. T. Dec. 110, a sympathetic strike of warehousemen and draymen was held to be a restraint on interstate commerce because it affected the transportation of interstate shipment through the city where the strike was in effect. In Hopkins v. United States (1898), 171 U. S. 578, 19 Sup. Ct. Rep. 40, 43 L. Ed. 290, 1 Fed. A. T. Dec. 941, reversing 84 Fed. 1018, 1 Fed. A. T.

on trade. If the trade is intra-state, then the restraint is not cognizable under the act whether direct or indirect. If the trade is interstate, then the restraint may be void whether direct or indirect. It is probable that the majority of the restraints which are void are indirect restraints. It is therefore a confusion in terminology to say that an indirect restraint on interstate commerce is not subject to the act.

Dec. 748, 82 Fed. 529, 1 Fed. A. T. Dec. 725, the members of a live stock yard exchange did their business at stock yards situate on each side of the dividing line between two states. The members of the stock exchange received stock in consignment from owners in different states and sold to persons in other states. Held that the character of the business was to be determined by facts occurring at Kansas City, and that the circumstances of consignment was immaterial. That there was no direct and immediate effect on interstate commerce, although the cost of conducting interstate commerce might be increased by the operations of the exchange. The rules of the exchange limited the number of solicitors which each member might send out to different states which also was held not to be a direct restraint on interstate commerce. Peckham, J., said: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate." It is difficult to distinguish this case from U. S. v. Workingmen's Amalgamated Council, *supra*. In Anderson v. United States (1898) 171 U. S. 604, 19 Sup. Ct. Rep. 50, 43 L. Ed. 300, 1 Fed. A. T. Dec. 967, see 82 Fed. 998, 1 Fed. A. T. Dec. 742, the members of a live stock yard exchange were themselves purchasers of live stock in different states which they bought and sold to each other and shipped away. Under the rules of the exchange, they refused to do business with those who would not enforce their rules. It was held that the combination did not directly affect interstate commerce. From the remarks of Peckham, J., it appears that the exchange was unobjectionable anyhow. It would have been much better to have placed the decision squarely on the ground of a valid combination. The strict interpretation of the statute will and has resulted in many strained decisions as to what is interstate commerce. The court distinguished U. S. v. Jellico Mountain Coal Company and U. S. v. Coal Dealers' Association on the ground that in those cases the agreement provided for the fixing of prices. In Union Sewer Pipe Co. v. Connelly (1900), 99 Fed. 354, 2 Fed. A. T. Dec. 1, the court said that at common law a contract not in itself in restraint of trade is not void because one of the parties thereto is a party to the contract which is in restraint of trade, that the one contract is based indirectly on the other, and that the case was not within the Anti-Trust Act because that act only covers contracts which are themselves directly in restraint of trade, and does not affect those which are indirectly in restraint of trade. Here the word indirect is used to distinguish between two different contracts. The ground of decision may be better stated thus: The circumstance that the plaintiff is engaged in the performance of a contract in restraint of trade is immaterial in adjusting his rights under another contract with a third party. In Ellis v. Inman & Poulson & Co. (1903) 124 Fed. 956, 2 Fed. A. T. Dec. 268 reversed in 131 Fed. 182, 2 Fed. A. T. Dec. 577, all the lumber manufacturers of Portland entered into a combination to monopolize the local lumber market, advance the price of lumber, and refused to sell their lumber to consumers who purchased at outside mills. Plaintiff purchased at the outside mill and defendant refused to sell to him, it was held that he could recover and judgment sustaining demurrer to complaint was reversed. The defendant contented that the inability of plaintiff to buy was

We furthermore must not confuse the question of whether the necessary effect of the combination is to restrain trade with the question whether it indirectly restrains trade. The two are

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occasioned solely by the inability of outside mills to furnish the lumber they dealt in, and which the plaintiff wished to buy. The court said that the circumstance that no one had invested capital in such mills did not render the restraint of interstate commerce any the less direct and necessary. In Phillip v. Iola Portland Cement Co. (1903) 125 Fed. 593, 2 Fed. A. T. Dec. 284, a manufacturer of cement in Kansas, contracted to sell cement to B., in Texas, B. agreeing not to sell the cement out of Texas. B. refused to accept and pay for a portion of the amount contracted for, and when sued, set up in defence that the contract was void under the Act of 1890. Judgment was entered for the plaintiff. Sanborn, J., 125 Fed. at 597, 2 Fed. A. T. Dec. at 286, said: "if the contract had the effect of restraining the vendee from using the product they purchased to compete with other jobbers and manufacturers out of Texas, this restriction was not the chief purpose or main effect of this contract of sale, but merely indirect and immaterial incident of it. The agreement of sale imposed no direct restraint upon competition in commerce among the states, did not constitute a restraint of that commerce and was not obnoxious to the Act of July 2, 1890." In Montague & Co. v. Lowry (1904) 193 U. S. 38; 24 Supr. Ct. 307, 48 L. Ed. 608, 2 Fed. A. T. Dec. 327, a combination between middlemen in one state and manufacturers in another state was held a direct restraint on interstate commerce, although it only affected the intra-state market, and prevented a dealer not a member of the association from buying from the manufacturers outside of the state. The restraint on intra-state trade and the restraint on interstate trade were inseparable. In Cammors-McConnell Co. v. McConnell, 140 Fed. 412, 2 Fed. A. T. Dec. 817, 140 Fed. 987, 2 Fed. A. T. Dec. 825, a covenant was probably attached to the sale of a good-will and bound the covenantor not to engage in the importing and selling of tropical fruits or in any other business in competition with the vendee, and was enforced in equity. The court apparently held that there was nothing to show that the covenantee was obtaining a monopoly or control of the market or intended to, which was different ground from that assigned because the contract might easily, in its performance, restrain interstate trade. Toulmin, J., said: "The indirect effect of the contract under consideration might be to enhance the price of tropical fruit, but the contract itself would not directly or necessarily, for that reason, be in restraint of interstate trade or commerce. While it might tend to restrain such trade, the restraint would be an indirect result." "A contract may, in a variety of ways, affect interstate commerce and yet be entirely valid because the interference produced by the contract is not direct. The fact that trade and commerce might be indirectly affected is not sufficient. The effect must be direct and proximate." In Arkansas Brokerage Co., *et al.*, v. Dunn and Powell, Inc. (1909) 173 Fed. 899, 3 Fed. A. T. Dec. 752, a number of manufacturers in different states organized a corporation to do their jobbing business for them in a certain town. Plaintiff, a jobber, with whom they had formerly done business, and who had now lost their trade, sued under §7. It was held that there was no restraint of interstate trade, that the volume remained the same as before, and the whole field was opened to competition, and there was only an indirect, incidental and unimportant restraint on interstate commerce. In Virtue v. Creamery Package Mfg. Co. (1913) 227 U. S. 8, 33 Sup. Ct. Rep. 202, 57 L. Ed. 202, affirming (1910) 179 Fed. 115, 3 Fed. A. T. Dec. 794, a contract by which a corporation engaged in interstate selling constituted another corporation its sole selling agent, was held valid (in the court below), because even though it could be said to incidentally or indirectly restrain competition by giving the corporation the

not coterminous.[56] It is sometimes said that if the necessary effect of the contract or combination is to restrain trade, it is void, even though it does not in terms refer to interstate trade. What this phraseology probably means, more accurately expressed, is that if the contract or combination does actually produce a restraint, it is void, even though on its face it does not call for such a restraint. We must, however, remember that the case may arise before the contract has been performed or the combination carried out or after it has been completed and the restraint produced. The language of the court will differ in the two cases, and, in the first case, looking forward, they will talk about the necessary effect, that is to say, decide what the contract or combination will inevitably produce; and, in the second case, they will say what it has produced.[57]

The judges also have a way of saying in a given case that there is no restraint on trade, when what they really mean is that the restraint is not unlawful. This springs probably from the unfortunate notion, which we have already referred to, that the term "contracts in restraint of trade" at

exclusive right to sell its product, it would not violate the statute because such incidental and indirect effect does not come within the provisions of the act. In Field v. Asphalt Co. (1904) 194 U. S. 618, 24 Sup. Ct. Rep. 784, 48 L. Ed. 1142, 2 Fed. A. T. Dec. 555, 117 Fed. 925, 2 Fed. A. T. Dec. 192, it was decided that the specification in a city ordinance of a particular kind of asphalt to be used in paving the city streets had a remote and indirect bearing on interstate commerce and was valid, although competitive bidding was impossible by reason of the specification. The true ground of decision was that the parties had a right to make a contract for themselves. The case arose on a taxpayer's bill to have the city restrained from paying for the paving of certain streets with that particular asphalt. The last sentence of the fourth paragraph of the syllabus in the official report is insensible; something has been omitted. In Lowe v. Lawlor (1908) 208 U. S. 274, 28 Sup. Ct. Rep. 301, 52 L. Ed. 488, 3 Fed. A. T. Dec. 324, a combination of laboring men, none of whom were engaged in interstate trade, declared a boycott against a manufacturer, thus interfering with his sales. It was held in an action under §7 by the employer against the union that the defendants had imposed a direct restraint on interstate commerce, although a negligible amount of interstate business might be affected.

[56] This error was made by Knappen, J., in Bigelow v. Calumet & Heckla Mining Co. (1908) 167 Fed. 704 at 712, *et seq.*, 3 Fed. A. T. Dec. 593 at 605, *et seq.*

[57] "We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessary to restrain interstate trade." Gilbert, J., in Gibbs v. McNeeley (1902) 118 Fed. 120 at 126, 2 Fed. A. T. Dec. 194 at 203. See also U. S. v. E. C. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. Ed. 325.

common law only refers to unlawful restraints, from which it must follow that a lawful restraint is no restraint at all. Restraints on trade are numerous, but they may be arranged under several well-defined headings, and under each heading they may be further arranged according to the amount of the restraint actually produced. When we consider each heading, therefore, we will, in proceeding from the less restraints to the greater, finally reach a point which cannot be accurately pointed out, where the restraint will become unlawful. It is much better to say that there are restraints in all these cases, but that some are lawful and some unlawful, than to make use of ambiguous phrases, from which it may be inferred that a lawful restraint is no restraint at all, which statement is merely a contradiction in terms.

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(To be continued.)