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to consult the legislative history, which is usually resorted to only when there is an ambiguity in the statutory language. In the light of the prior decisions, it is difficult to detect any ambiguity in the amended statute. This is true even though some of the previous judicial constructions may have been dicta; they were nevertheless the only judicial definitions available to Congress. Mergers were defined as asset acquisitions, and Congress only extended the prohibitions of section 7 to asset acquisitions by corporations subject to the jurisdiction of the FTC. Nothing could be less ambiguous, particularly when one considers that the FTC was the agency requesting the amendment. The ambiguity, where it existed, was in the legislative history rather than the statutory language.[33] If the construction given by the Court was the one intended, Congress, as the dissent stated, "went at the matter in a very peculiar way."[34]

Given this extension of section 7, the remainder of the decision falls logically into place. The Bank Merger Act did not oust jurisdiction over mergers under the Clayton Act if that jurisdiction was already present.[35] In addition, if section 7 is applicable, this merger would violate it.[36] Commercial banking is a "line of commerce" and the four-county Philadelphia area would constitute a relevant geographical area according to the previous definitions of the Court.[37] Since the new bank would have more than thirty per cent of the banking business in this area, and since section 7 is designed to prevent possible violations of the Sherman Act in their incipiency, the necessary elements for an injunction appear to be present.

In conclusion, the primary problem with the decision is that Congress may, by recognizing the peculiar nature of banking in relation to the rest of the economy, have intended a different system of regulation: one that would not rely on enforced competition through the somewhat mechanical requirements of the Clayton Act, but one which would allow large, even monopolistic, amalgamations, when in the opinion of the regulatory authorities, they are in the public interest. If this was the Congressional intent when the section 7 amendment and the Bank Merger Act were passed, this intent is frustrated by the Court in this decision.

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Antitrust—Sherman Act—Conspiracy in Restraint of Trade to Eliminate Competition by the Transfer of Ownership of Patent Rights.— ***United States v. The Singer Mfg. Co.***[1]—Singer Manufacturing Company, the sole domestic manufacturer of household zigzag sewing machines, developed an improved multicam zigzag machine. Singer executed a non-

[33] See note 25 and accompanying text.

[34] Supra note 1, at 387.

[35] United States v. Borden Co., 308 U.S. 188 (1939).

[36] For a discussion of the necessary elements for the maintenance of a section 7 suit, see More Ado About Mergers: Brown Shoe Co. v. United States, 4 B.C. Ind. & Com. L. Rev. 159 (1962).

[37] E.g., Brown Shoe Co. v. United States, supra note 8.

[1] 374 U.S. 174 (1963).

exclusive cross-licensing agreement with Vigorelli, an Italian corporation owning patent rights to a similar zigzag design. The agreement permitted Singer to manufacture and sell machines under the Vigorelli patent. Prior to this agreement Singer had purchased the American patent rights of a Canadian, Harris, to be used by Singer in its reissued form with claims sufficiently broad to dominate the zigzag market. In particular Singer was concerned about the inroads made by a Japanese duplication of its machine introduced upon the American market. Singer also discovered the existence of another zigzag design upon file in Italy and owned by Gegauf, a Swiss corporation. If an American patent application had been filed by Gegauf within one year of its Italian filing date and had claimed the Italian filing date, the Harris patent would be dominated in the United States by the American patent thereby issued. Singer, knowing this, began negotiations with Gegauf concerning the United States rights to the Gegauf patent application. Faced with an adamant Gegauf, Singer used the dual pressure of the increasing Japanese competition in the United States and Europe, and the possibility of an interference proceeding before the Patent Office between the Harris patent and the Gegauf application. Singer intimated that in any interference proceeding the Gegauf claims could be severely limited by Singer. Faced with this threat and the Japanese competition, Singer and Gegauf entered into a mutual, non-exclusive cross-licensing agreement by which Singer could manufacture machines under the Gegauf patent and Gegauf could use the Singer patents. The parties in turn agreed "not to do anything, either directly or indirectly and in any country, the result of which might restrict the scope of the claims of the other party relating to the subject matter of the above mentioned patents and patent applications . . . [and] in accordance with the laws and regulations of the Patent Office concerned, to facilitate the allowance in any country of claims as broad as possible. . . ." Subsequently, Singer, continuing to emphasize the ability it would have as owner of the American patent, to eliminate the infringing Japanese machines, convinced Gegauf to assign to Singer the entire United States patent application. As the owner of the patent, Singer instituted proceedings before the Tariff Commission to bar admittance to the infringing Japanese machines. Infringement suits were likewise started in the United States to test the validity of the Gegauf patent. The district court held that no conspiracy in violation of the Sherman Act was established since Singer's primary purpose in all of the above transactions was to settle the conflict between the Harris and Gegauf patents. It also found a secondary purpose of obtaining protection against the Japanese machines which might infringe the Gegauf patent. On appeal, the Supreme Court reversed. HELD: The entire series of actions amounted to a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act.[2] The conspiracy was deemed to have arisen from the common intention of the parties, when transferring the patent rights, to eliminate competition from the infringing Japanese.

Under the Sherman Act and the Supreme Court's interpretation of the Act, conspiracies or combinations which are formed to exclude competition

[2] "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 declared to be illegal. . . ." 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

from a particular field are per se violative of Section 1 of the Act.[3] The existence of the conspiracy can be inferred from the conduct of the parties or from the general purpose of the combination.[4] In the *Singer* case the Court thus concluded that an illegal purpose—the exclusion of the infringing Japanese competitors—pervaded the entire transaction and negated any legitimate business purpose for the exchange of the patent rights.[5] In so holding the Court refused to differentiate between the elimination of competitors and the elimination of competitors who are infringing valid patent rights. The intention to eliminate competition, regardless of infringement or non-infringement, was thus held to be illegal. Furthermore, the existence of the conspiracy to eliminate competition was inferred from the exchange of patent rights—rights which by their very nature are designed to eliminate competition. Thus, the Court drew within the ambit of the Sherman Act activities which proceed inherently from the monopoly grant of the patent law. This holding of a conspiracy in restraint of trade based upon bare exchange of patent rights within a narrow commercial area of a general field is believed to be a unique decision by the Supreme Court, pointing to a further narrowing of the commercial utilization of patent rights.

Previous cases involving patent-antitrust questions have dealt with allied abuses of patents such as tying agreements requiring the purchase or sale of unpatented products,[6] patent pools by which an entire industry was compartmentalized and monopolized,[7] and attempts to fix the price of the patented article at the retail level after sale by the patentee.[8] The *Singer* case stands

[3] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing deemed intended to eliminate competition); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (limitation on use deemed intended to eliminate competition); and United States v. American Tobacco Co., 221 U.S. 106 (1911) (overpurchasing deemed intended to fix prices and eliminate competition).

[4] "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Interstate Circuit, Inc. v. United States, supra note 3, at 227.

[5] The facts found by the trial court attributed dual intentions to Singer in their relationship with Gegauf, i.e., patent settlement and patent dominance to eliminate the possibility of competition. The Supreme Court in rejecting one of these intentions or purposes thereby impliedly overthrew a large segment of the facts found by the lower court. Thereupon it interpreted the remaining facts found by the lower court to show the existence of a conspiracy. "Whether a conspiracy exists is a question of ultimate fact but whether the facts bring defendants within the prohibition of the statute is a question of law." Gary Theatres Co. v. Columbia Pictures Corp., 120 F.2d 891, 894 (7th Cir. 1941). Thus the Court in the instant case stated that it was applying a legal standard as a question of law to facts found by the lower court and accepted by the Supreme Court. Quaere: Is this fact finding by the Supreme Court or reversal of mistakes of law? Cf. the vigorous dissent by Mr. Justice Harlan.

[6] Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948); and International Salt Co. v. United States, 332 U.S. 392 (1947).

[7] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[8] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. General Elec. Co., 272 U.S. 476 (1926); and Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8 (1918).

alone in holding that an exchange of patent rights in a competitive market area violates the antitrust laws if the exchange was motivated by an intention existing between the two parties that unlawful competition[9] might thereby be eliminated. When such intention is shown, a per se violation of the Sherman Act is found without any consideration of the degree of monopoly, the unreasonableness of the restraint or the fact that patents were involved—previous questions which were deemed crucial in all patent-antitrust cases.

A patent is a statutorily created grant by Congress to the inventor of the right to prevent others, for a period of seventeen years, from making, using or selling the product or process claimed within the patent.[10] The patent laws allow the owner of the patent to assign, sell or license part of, or the entire interest in the invention covered by the patent.[11] Thus, by statute, a monopoly, as well as "commerce" in this monopoly, is recognized in the particular invention. Under Section 1 of the Sherman Act "every . . . combination . . . or conspiracy, in restraint of trade or commerce . . ."[12] is condemned as illegal. This therefore continuously presents the delicate question of whether the activity conducted by the patentee falls within the scope of the patent monopoly and is thereby governed by patent law, or goes beyond its scope and falls within the purview of the general law and thereby becomes subject to the Sherman Act.[13] So long as a party has maintained himself within the purview of the patent monopoly, no question of antitrust law is involved. The difficulty lies in determining where the patent monopoly ends and an abuse of the monopoly begins in a given fact complex.

In holding activity as being beyond the ambit of the patent monopoly, the Court has previously held that patent pools,[14] wherein eighty-five per cent of the industry was monopolized and uniform standards of output, sales, quality and price were maintained, violated the Sherman Act.[15] This is clearly illegal and "transcended what was necessary to protect the use of the patent or the

[9] Although the parties believed that Gegauf's patent was dominant in the zigzag field due to its scope and earlier date, Singer independently owned the Harris patent which it originally hoped to have reissued with sufficient breadth to control the field. Therefore both parties concerned had significant patent holdings prior to the exchange and the Japanese activity was unlawful as individually applied to each party.

[10] 66 Stat. 804 (1952), 35 U.S.C. § 154 (1958).

[11] "Subject to the provisions of this title, patents shall have the attributes of personal property. Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States. . . ." 66 Stat. 810 (1952), 35 U.S.C. § 261 (1958).

[12] Supra note 1.

[13] "Beyond the 'limited monopoly' granted by the patent, the methods by which a patent is exploited are 'subject to the general law.'" Transparent-Wrap Corp. v. Stokes and Smith Co., 329 U.S. 637, 644 (1947); United States v. Masonite Corp., 316 U.S. 265 (1942).

[14] Patent pool is not a word of art and has been defined as: "[A] group of patents assembled under a common ownership or common control. The ownership may be in a single company, in an agent for a group of companies or may be distributed through a group of companies which exchange rights under their respective patents under varying terms and conditions." 4 Toulmin, Treatise on the Antitrust Laws of the United States 534, § 19.1. They are furthermore not illegal per se.

[15] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912).

monopoly which the law conferred upon it. They [the activities] . . . accomplished a restraint of trade condemned by the Sherman law."[16] In considering the rights conferred under the patent law, the Court in the *Sanitary* case[17] stated: "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."[18]

Prior to this case the Supreme Court established the rule that any conditions, except those in their nature illegal, can be imposed by the patentee in exchange for the right to manufacture, use or sell the article.[19] This reasoning was recently upheld with respect to grant backs of future inventions.[20] Later cases reaffirmed the standard as to whether or not the contract is itself illegal or violative of valid statutes of the United States.[21] The Court in the celebrated *General Electric* case,[22] in upholding the ability of a patentee to restrict the sale price of a patented product on the retail level, stated the test as being whether "the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."[23] This decision, while severely limited by later cases,[24] is still precedent, although perhaps merely for the proposition that the resale prices of "agents" can be controlled by the patentee. From these cases the rule appears to be that a patentee is entitled to use his patent to obtain a reasonable reward for it, provided that in obtaining this reward he does not transcend the "positive prohibitions" of the general law.

Examples of transcending the positive prohibitions of the general law arose originally in the area of monopoly, where the Court held that absent a showing of monopoly and the control of interstate markets inherently flowing from such a monopoly, the cross license agreements did not *necessarily* suppress or unduly restrict competition; there had to be a definite factual showing of illegality.[25] Similarly in later cases where a clear monopoly was established,[26] the Court continued to apply the test of having to show the existence of a monopoly and control of interstate markets.[27]

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16 Id. at 48.

17 Supra note 15.

18 Ibid. at 49.

19 Bement v. National Harrow Co., 186 U.S. 70 (1902).

20 Transparent-Wrap v. Stokes and Smith, supra note 13.

21 "The right to make regulation in the public interest under the police power of the States or in the exertion of the authority of Congress over matters within its constitutional power is controlled by general principles of law, and the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States." United Shoe Mach. Corp. v. United States, 258 U.S. 451, 463 (1922).

22 Supra note 8.

23 Supra note 8, at 490.

24 See, in particular, United States v. Line Material Co., 333 U.S. 287 (1948) where the Court with only eight Justices sitting split on the question of overruling the General Electric case.

25 Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 170 (1931).

26 Hartford-Empire v. United States, supra note 7.

27 The test of the Standard Oil case, supra note 24, continued to be applied. The test developed in this case was that "Any agreement between competitors may be illegal if part of a larger plan to control interstate markets. . . . Such contracts must be

Subsequent cases involving attempts to fix retail prices developed somewhat different standards. In these cases the emphasis is placed upon the concerted activity of the licensees. Thus, a corporation holding a basic patent could not constitute other competitive parties on the same level of competition "agents" to sell at prices which it determined.[28] Similarly, the activity was deemed beyond the ambit of patent rights where the entire industry was licensed and prices were fixed by the license agreements.[29] The justification for this lack of any requirement for monopoly or inquiry as to the reasonableness of the activity lies in the per se illegality, in the absence of any patent, of attempts to fix prices. The last case to consider the possibility of price fixing as being within the patent grant[30] continued to emphasize the concerted activity of the parties as being beyond the scope of the patent law and within the prohibitions of the Sherman Act. In this case the Court deemed as crucial the fact that one party was empowered to act as exclusive agent of the other party for the determination of retail prices. It emphasized the requirement of singularity of action.[31]

In comparing each of these cases with the *Singer* case, the initial conclusion is that in all prior cases either a monopoly over an industry was established or prices were fixed by means of cross license agreements. The *Singer* case contained no allegations of monopoly or price fixing. The sole basis for the finding of a conspiracy was the concerted activity of transferring patent rights to the one of two parties best able to prevent infringement by a third party, upon an invention under which both parties had previous rights.[32] The conclusion of conspiracy under the facts accepted by the Supreme Court, that the parties were in agreement as to the objective of eliminating the infringing Japanese competitors from the market, appears proper in view of the emphasis in the recent price fixing cases upon the *quasi* per se illegality of concerted activity by patentees and their licensees. It is submitted that in the area of patent rights where the grant consists of an inherent monopoly, the existence of a conspiracy in restraint of trade should be required to be more clearly established than in the ordinary conspiratorial antitrust suit. This requirement of caution arises from the ambivalence of valid patent objectives and illegal restraint of trade objectives where patent rights are involved. It is furthermore submitted that such continued emphasis upon concerted activity to the derogation of the patent monopoly will lead to such a narrowing of the

scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances, or whether their effect is to suppress or unduly restrict competition. . . . Moreover, . . . agreements . . . which tend to limit the supply or to fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. . . ." 283 U.S. 163, 169 (1931). Cf. also United States v. National Lead, 332 U.S. 319, 327-28 (1947), where the court held the existence of monopoly as being crucial.

28 United States v. Masonite Corp., 316 U.S. 265 (1942).

29 United States v. United States Gypsum Co., 333 U.S. 364 (1948).

30 Supra note 24.

31 "In short, he and his associates get the benefits of a conspiracy or combination in restraint of competition. That is more than an 'exclusive right' to an invention; it's an 'exclusive right' to form a combination with competitors to fix the prices of the products of invention." 333 U.S. 287, 319 (1948) (Douglas concurring).

32 Supra note 9.

patent monopoly that any exchange of patent rights between two or more parties may be deemed to be a violation of the antitrust laws. Such a restrictive view of patent rights, while coming close to abolishing the patent monopoly, will clearly lead to a curtailment of patent exchanging in industry, when the apparent effect of the exchange is to benefit both parties to the agreement. This curtailment of exchangeability may in turn lead to a lessening of competition if the parties, reluctant to face antitrust suits, refuse to license other parties to use their developments. Further, this natural progression of conclusions from recent cases, emphasizing concerted activity, appears to be in direct conflict with the statutory free assignability of patent rights and the prior precedent requiring clear evidence of a monopoly, price fixing scheme or other type of patent abuse before patent transfers would be deemed conspiracies in restraint of trade.

ROBERT T. TOBIN

Antitrust—Vertical Division of Markets.—*White Motor Co. v. United States;*[1] *Snap-On Tools Corp. v. Federal Trade Commission.*[2]—Restrictions on the ability to compete are at the heart of antitrust violations.[3] These restrictions continue to vary in form, as different in technique as there are differences in the whole mercantile sphere. Even so, while the form may generally govern a court's approach to a possible restraint, it is rather the effect of the restrictive market distribution agreements which should dictate the response.[4] This duality in antitrust litigation becomes especially evident when the court is presented with a *sui generis* of form; as in the cases here noted, the two courts confront initially the vertical territory limitation.[5] In the one instance—*White Motor*—a wholesale manufacturer of trucks, and the other—*Snap-On Tools*—a wholesale producer of tool equipment, each decided that the sound method of marketing its product was the use of independent distributorships. The independence, however, was less than total since the truck and the tool retailers each signed a contract limiting their access to markets by prescribing delineated geographic areas in which a distributor or retailer could do business. Additionally, there could be no competition with the manufacturer in acquiring certain large accounts, e.g., government contracts.

The essential quality of the form of the respective practices was that the origin of the restraints on market areas came from the manufacturer down to the distributor. In the instance of White Motor Co., there were also signed

1 372 U.S. 253 (1963).

2 321 F.2d 825 (7th Cir. 1963).

3 [A]greements or combinations between dealers, having for their sole purpose the destruction of competition . . . are injurious to the public interest and void.

Dr. Miles Medical Co. v. John D. Park & Son Co., 220 U.S. 373, 408 (1911).

4 The test of illegality under the Sherman Act is the presence of an unreasonable restraint without regard to whether the conspiracy is among affiliated parties or those integrated under common ownership or among those otherwise independent. United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

5 The note will treat primarily the geographic restrictions imposed by the manufacturer; the restrictions on the classes of customers to be served raise substantially the same issues.