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RESTRAINTS OF TRADE AND UNFAIR COMPETITION

EDWARD P. HODGES*

I. INTRODUCTION

A. *Development of Antitrust Laws.*

The Sherman Act[1] became law on July 2, 1890. Section 1 of the Act condemns every contract, combination, or conspiracy in restraint of interstate or foreign trade and commerce. Section 2 condemns monopolization, attempts to monopolize and conspiracies to monopolize any part of interstate or foreign trade and commerce. The penalty for violation of either section is a fine not exceeding $5,000 or imprisonment not exceeding one year, or both. The Attorney General is authorized to enforce the law by criminal or civil proceedings, or both. Any person who suffers damages as a result of a violation of the Sherman Act may sue the guilty parties and recover treble damages.

In the minds of many, the beginning of the Sherman Act enforcement is associated with the advent of President Theodore Roosevelt a decade later. This view is supported by a rather interesting chain of events during the intervening period. In the *Knight* case,[2] decided in 1894, the Supreme Court held that due to its intrastate nature manufacturing could not be reached under the Sherman Act —and this, despite the fact that the defendants represented an integrated combination controlling 98% of the sugar refining industry in the United States. The effect of this case on Sherman Act enforcement is typified by the report[3] of Attorney General Harmon to President Cleveland to the effect that the Sherman Act was unenforceable against industrials.

In condemning price-fixing and other activities of rate bureaus in the *Freight Association* cases,[4] decided in 1897 and 1898, the Supreme Court demonstrated that there was something the Sherman Act could reach but did not provide a broad enough juris-

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The opinions expressed are personal and do not purport to reflect the official view of the Department of Justice.

1. 15 U. S. C. § 1, *et seq.*
2. United States v. E. C. Knight Co., 156 U. S. 1 (1894).
3. Rep. of Attorney General (1896) XXVii.
4. United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290 (1897); United States v. Joint Traffic Ass'n., 171 U. S. 505 (1898).

dictional basis to be of much value. However, in 1899 some life was breathed into the Sherman Act by the decision in the *Addyston Pipe* case,[5] in which the Supreme Court condemned price-fixing and allocation of customers by a loose combination of pipe manufacturers. Added importance was given to the *Addyston Pipe* case by the classic opinion[6] of Judge Taft of the Circuit Court. Despite its importance, the *Addyston Pipe* case was only a partial recovery as it was generally believed that through consolidations, holding companies, and other integrated combinations the Sherman Act could be avoided.

The accelerating trend toward combinations at the turn of the century was no doubt brought about by sound business judgment resulting from the economic conditions of the times. Improved transportation and communications served as a stimulant. Another stimulant was the decision in the *Knight* case. Such was the situation when President Theodore Roosevelt came on the scene.

On March 10, 1902, the *Northern Securities* case[7] was filed and on May 10, 1902 the *Packers* case[8] was filed. The decision in the *Northern Securities* case, handed down in March 1904, went far to erase the effect of the *Knight* case in that the Court held that a holding company could not control two largely parallel railroad systems. The decision in the *Packers* case in 1905 completed the restoration of the Sherman Act as a legal weapon to undergird free enterprise. The highlight of the decision was Mr. Justice Holmes' oft-quoted definition that commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.

President Roosevelt's bold action in putting life into antitrust enforcement cannot be minimized. However, it is surprising that President Taft has not generally been given his due. The simple fact is that in one-half the time he filed twice as many cases under the Sherman Act as President Roosevelt did. Moreover, he continued to evidence his strong faith in the Act in his opinions and votes as Chief Justice of the United States.

In 1911, the Supreme Court decided that the *Oil* trust[9] and the *Tobacco* trust[10] should be dissolved. Added importance was given to the *Standard Oil* case by the adoption by the Supreme Court of the rule of reason which, in brief, is that while the Sherman Act in

5. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899).
6. United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).
7. Northern Securities Co. v. United States, 193 U. S. 197 (1904).
8. Swift & Co. v. United States, 196 U. S. 375 (1905).
9. Standard Oil Co. v. United States, 221 U. S. 1 (1911).
10. United States v. American Tobacco Co., 221 U. S. 106 (1911).

language condemned every restraint, in fact it condemned only *unreasonable* restraints. In the *Freight Association* cases, mentioned above, the Supreme Court had bitterly debated and rejected the rule of reason. It has been stated more than once that antitrust decisions prior to the announcement of the rule of reason are of little value.

One unanticipated result of the announcement of the rule of reason was to create a strong feeling that the Sherman Act had been weakened through vagueness and, therefore, it would be more difficult to enforce. In response to this feeling, on September 26, 1914, upon the recommendation of President Wilson, the Federal Trade Commission Act[11] was adopted. "Unfair methods of competition" were condemned with a view to supplementing the Sherman Act by reaching incipient violations.

Enactment of the Clayton Act[12] followed on October 15, 1914. Section 2 of that Act, aimed at price discrimination, sprang from the continued public fear and hatred of price manipulation. Section 3, relating to tie-in clauses and requirement contracts, to a certain extent was prompted by the dismissal of the indictment in the *Winslow* case[13] which involved the leasing system of United Shoe Machinery Corporation. Sections 7 and 8, aimed at mergers and interlocking directorates, were brought about by the public feeling that the trusts still represented too great a concentration of economic power. In 1936, Section 2 of the Clayton Act was amended by the Robinson-Patman Act[14] in an attempt to better the position of the small merchant in meeting the competition of the chain stores which were rapidly being established and expanded. In 1950, Section 7 of the Clayton Act was amended[15] to reach mergers through acquisition of assets and broaden this Section's scope.

In 1937, the Sherman Act was amended by the Miller-Tydings Act[16] so as to legalize resale price maintenance in interstate commerce where a resale price maintenance law existed in the state of resale. This firming up of the price structure was brought about by the opponents of cut-rate stores. In 1952, the McGuire Act[17] was adopted in order to require non-signers of resale price agreements to follow the prices established by the manufacturer for wholesalers once such a contract had been entered into with a merchant in the state of resale.

11. 15 U. S. C. § 44, *et seq.*
12. *Id.*, § 12, *et seq.*
13. United States v. Sidney W. Winslow, 227 U. S. 202 (1913).
14. 15 U. S. C. § 13, *et seq.*
15. *Id.*, § 13a.
16. *Id.*, § 1, as amended.
17. *Id.*, § 45, as amended.

In 1938, the Wheeler-Lea amendment[18] broadened Section 5 of the Federal Trade Commission Act. Prior to this amendment the Act had prohibited only "unfair methods of competition," and it was then necessary to show that there was "competition" which would be affected by the unfair method. The amended language also prohibited "unfair or deceptive acts or practices" and now most of the deceptive practice cases are brought under this language and in such cases the Commission can proceed directly to protect the consumers from deception without regard to whether competition is involved and without regard to whether competition has been injured.

The Wheeler-Lea Act of 1938, in addition to broadening Section 5, added specific provisions to the Federal Trade Commission Act concerning food, drug, and cosmetics. The Federal Trade Commission also has duties under the Wool Products Labeling Act of 1939,[19] the Trade-Mark Act of 1946,[20] and the Fur Products Labeling Act effective in 1952.[21] However, these Acts are of narrow scope and the Sherman Act, the Federal Trade Commission Act, and the Clayton Act may be regarded as the basic antitrust laws.

B. *Interrelation of Acts Involved.*

All violations of Section 2 of the Sherman Act generally violate Section 1. In the Sherman Act "in restraint of" means in or affecting interstate or foreign commerce. However, in the Federal Trade Commission Act only activities "in" such commerce can be reached. The *Pacific Paper Trade Association* case[22] contains a good discussion of what constitutes interstate commerce as applied to the Federal Trade Commission Act in conspiracy cases. Aside from this jurisdictional difference, all violations of the Sherman Act violate Section 5 of the Federal Trade Commission Act. The Federal Trade Commission Act also reaches (1) incipient violations of the Sherman Act (which the Sherman Act cannot reach) and (2) the unlawful trade practices of one person (which the Sherman Act cannot reach). Therefore, the vast majority of situations can be reached by both the Sherman Act and the Federal Trade Commission Act. Accordingly, cases under these Acts will be discussed together except with respect to unilateral illegal trade practices under the Federal Trade Commission Act.

18. *Ibid.*
19. *Id.*, §§ 66-68j.
20. *Id.*, §§ 1051-1127.
21. *Id.*, §§ 69-69j.
22. Federal Trade Commission v. Pacific Trade Ass'n., 273 U. S. 52 (1927).

C. *Interrelation of Enforcement Agencies.*

The Antitrust Division today normally has a staff of 300 lawyers, 30 economists, and 8 field offices. The Federal Trade Commission today normally has a staff of 350 lawyers, 35 economists, and 6 field offices. Close liaison is maintained between the Antitrust Division and the Federal Trade Commission in order to prevent duplication of activities.

Antitrust Division investigations aside from grand jury investigations are made by the FBI leading to civil or criminal proceedings, or both, following customary judicial procedures. However, all civil cases brought by the Department of Justice can be appealed by either party directly to the Supreme Court under the Expediting Act of 1910.[23]

Federal Trade Commission investigations are conducted by its own staff. Complaints are issued by and hearings are held before the Commission. If a cease and desist order is issued by the Commission upon the completion of a hearing, the defendant may appeal to the appropriate Court of Appeals and then either side may apply to the Supreme Court for certiorari. If no appeal is taken a penalty for violation of the cease and desist order is automatically imposed after sixty days. If a litigated judgment is violated, the Government may proceed in court in the nature of a contempt to impose a penalty of $5,000 for each violation. The Federal Trade Commission and the Antitrust Division have concurrent jurisdiction in the enforcement of Sections 2, 3, 7 and 8 of the Clayton Act.

II. THE SHERMAN ACT AND THE FEDERAL TRADE COMMISSION ACT

A. *Prices.*

1. *Horizontal Price-fixing.*

The initial cases[24] instituted under the Sherman Act, which include the first case[25] to reach the Supreme Court, were directed at price-fixing. The Supreme Court declared the practice to be illegal.

In the *Addyston Pipe* case the Supreme Court did more than merely condemn price-fixing. It affirmed the classic opinion by Judge Taft. Judge Taft explained with great care that no justification could be found in the reasonableness of the prices or economic conditions facing the industry. However, over the years defendants attempted to justify price-fixing on the ground of reasonableness.

23. 15 U. S. C. § 28.
24. United States v. Jellico Mt. Coal & Coke Co., 46 Fed. 432 (1891).
25. United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290 (1897).

Finally, in the *Trenton Potteries* case,[26] and in the *Socony-Vacuum* case,[27] with even greater elaboration and emphasis, the Supreme Court declared that price-fixing is illegal *per se*. The Court in the latter case stated:[28]

> . . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.

2. *Vertical Price-fixing.*

In the *Dr. Miles Medical* case[29] the Supreme Court laid down the doctrine that a manufacturer and the wholesalers and retailers of its products could not agree on resale prices, even though the product be made by a secret process. Competition between vendors of the manufacturer's product would have been destroyed, and the cost to the consumer made higher, if the agreement had been permitted to stand. The Court could see no reason for differentiating this type of agreement from any other type of agreement fixing prices.

A situation involving the distribution of resale price lists by a manufacturer, the urging by the manufacturer that retailers comply with such lists, and the refusal of the manufacturer to deal with retailers who refused to follow the suggested prices was presented to the Court for consideration in the *Colgate* case.[30] The Court held that this was not a combination in restraint of trade within the doctrine of the *Miles* case. The Court grounded its decision on the right of a trader to sell to whom he pleases and under conditions he chooses.

The *Colgate* case was somewhat qualified by the decision in the *Beechnut Packing* case,[31] in which the Court held that while a seller may refuse to sell to those who will not resell his products at a fixed price, to go beyond refusal by attempting to police customers through agreements, etc. to see that such a price is maintained was a violation of Section 5 of the Federal Trade Commission Act and an unfair method of competition.

26. United States v. Trenton Potteries, 273 U. S. 392 (1927).
27. United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).
28. *Id.*, at 221.
29. Dr. Miles Medical Co. v. J. D. Park & Sons, 220 U. S. 373 (1911).
30. United States v. Colgate Co., 250 U. S. 300 (1919).
31. Federal Trade Commission v. Beechnut Packing Co., 257 U. S. 441 (1922).

In the *General Electric Company* case,[32] the Supreme Court held that the *Miles* case did not control a bona fide agency system.

In the *Kiefer-Stewart* case,[33] the Supreme Court held that agreements to fix maximum resale prices no less than those to fix minimum prices crippled the freedom of traders and thereby restrained their ability to sell in accordance with their own judgment. The Court also rejected respondents' contention that they were "mere instrumentalities of a single manufacturing-merchandizing unit" and, therefore, it was impossible for them to have conspired in violation of the Sherman Act. The Court stated:[34] "The rule is especially applicable where, as here, respondents hold themselves out as competitors."

3. *Vertical Price-fixing Under The Miller-Tydings Act and The McGuire Act.*

The Miller-Tydings Act,[35] which amended both Section 1 of the Sherman Act, and the Federal Trade Commission Act, provides that vertical minimum price-fixing contracts shall not be in violation of the antitrust laws or the Federal Trade Commission Act when such contracts involve (a) trade-marked or branded commodities, (b) which are in competition with other similar commodities, and (c) when such contracts are valid under the state law of the place of resale. Forty-five states have such laws, differing in detail, but all permitting the making of vertical contracts establishing minimum resale prices and binding persons not parties to the contracts.

a. Attempt at horizontal price-fixing under the Miller-Tydings Act.

The *Frankfort Distilleries* case[36] involved an agreement among producers, middlemen, and retailers "to adopt a single course in making contracts of sale and to boycott all others who would not adopt the same course." The Supreme Court held the combination illegal as not coming within the Miller-Tydings exemption, which expressly provides that it shall not apply to horizontal agreements.

b. Attempts at vertical price-fixing for commodity in successive stages of production.

In the *Univis Lens* case[37] a manufacturer of lens blanks entered into contracts to fix the price at which the finished lenses were sold

32. United States v. General Electric Co., 272 U. S. 476 (1926). See Also United States v. Line Material Co., 333 U. S. 287 (1948).
33. Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211 (1951).
34. *Id.*, at 215.
35. 15 U. S. C. § 1, as amended.
36. United States v. Frankfort Distilleries, 324 U. S. 293 (1945).
37. United States v. Univis Lens Co., 316 U. S. 241 (1942).

by its licensee. The Court held that the Miller-Tydings Act did not save this price-fixing activity from violating the Sherman Act, that there is nothing "to indicate that [the Miller-Tydings] provisions were to be so applied to products manufactured in successive stages by different processors that the first would be free to control the price of his successors." Univis was not the manufacturer of the commodity sold and the licensee, in fact, did not resell.

In condemning the system of eye-glass lenses distribution in the *Bausch & Lomb* case, the Court said:[38]

> We think that where a distribution system exists, prior to the making of such price maintenance contracts, which is illegal because of unallowable price fixing contracts and where that illegality necessarily persists in part because a portion of the resales are not covered by the "Fair Trade" contracts, ... subsequent price maintenance contracts, otherwise valid, should be cancelled, along with the invalid arrangements, in order that the ground may be cleansed effectually from the vice of the former illegality.

The above cases demonstrate that the Miller-Tydings Act will not insulate agreements among competitors in restraint of trade, nor does it permit vertical price-fixing of commodities which are processed during a stage of distribution.

c. Non-signers.

The Miller-Tydings Act speaks in terms of "contracts or agreements" and makes no reference to non-signers. In the *Schwegmann* case[39] the Supreme Court ruled that persons not parties to agreements establishing minimum resale prices of commodities in interstate commerce are not bound by those agreements, even though the state of resale does have a law binding non-signers.

Following the *Schwegmann* case, the McGuire Act,[40] permitting the binding of non-signers, was enacted in 1952 as an amendment to Section 5 of the Federal Trade Commission Act. We now have the anomaly of, on the one hand, the Miller-Tydings Act, as an amendment to Section 1 of the Sherman Act, permitting resale price maintenance *contracts* but not permitting the binding of non-signers, and, on the other hand, the McGuire Act, as an amend-

38. United States v. Bausch & Lomb Co., 321 U. S. 707, 724 (1944).
39. Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951).
40. 15 U. S. C. § 45, as amended.

ment to Section 5 of the Federal Trade Commission Act, permitting the binding of non-signers of these contracts.

The Supreme Court has recently denied review in two cases dealing with this subject which will now be discussed.

The *Grayson-Robinson* case[41] arose under the Georgia Fair Trade Act[42] of 1937. The Supreme Court of that State held that, since the state law provided for the binding of non-signers, it was inconsistent with the Sherman Act at the time of passage and, therefore, was invalid; that it accordingly offended the supremacy clause as well as the commerce clause of the Federal Constitution, and that provision of the Georgia Constitution which declares that legislative acts violative of the U. S. Constitution are void.

The State Court also declared that the State Act offended the State Constitutional provision that "no person shall be deprived of life, liberty, or property, except by due process of law."

The United States Supreme Court denied a petition for writ of certiorari on October 12, 1953.[43]

Shortly after enactment of the McGuire Act, another attempt was made to require Schwegmann to abide by the Louisiana Fair Trade Law and not to sell below "Fair Trade" prices even though he was a non-signer of a resale price maintenance contract. The District Court[44] granted an injunction against Schwegmann and the Court of Appeals[45] affirmed in a 2-1 decision, denying defendant's challenge to the constitutionality of the state law and of the McGuire Act.

The Court of Appeals relied on *Old Dearborn Distributing* case[46] which had upheld the constitutionality of state fair trade acts as legitimately protecting the good will of the manufacturer or trademark owner.

The moving party in this case was the trade-mark owner and the Court withheld decision on whether the result would be different if a distributor (not the owner of a trade-mark, to the ownership of which good will accrued) were seeking enforcement of the law.

On October 19, 1953, the Supreme Court denied certiorari in this case also.[47]

41. Grayson-Robinson Stores v. Oneida, Ltd., 209 Ga. 613, 75 S. E. 2d 161 (1953).
42. Ga. L. 1937, p. 800, § 1, *et seq.*
43. Oneida, Ltd. v. Grayson-Robinson Stores, 74 S. Ct. 39 (U. S. 1953).
44. Schwegmann Brothers v. Eli Lilly & Co., 109 F. Supp. 269 (E. D. La. 1953).
45. Schwegmann Brothers v. Eli Lilly & Co., 205 F. 2d 788 (5th Cir. 1953).
46. Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U. S. 183 (1936).
47. Schwegmann Brothers v. Eli Lilly & Co., 74 S. Ct. 71 (U. S. 1953).

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The Court's reservation in this case may turn out to be a significant one. It appears that very often the impetus for enforcement of "fair trade" prices comes from retailers or distributors rather than from a manufacturer. If a distributor is not able to persuade a manufacturer to undertake enforcement, the *Schwegmann* case does not settle the question whether the distributor has the right to sue to protect the manufacturer's good will.

Another interesting question is whether other state courts may follow the Georgia decision and hold pre-McGuire Act state fair trade laws invalid.

4. *Unilateral Price Discrimination. (Robinson-Patman Act)*

The Robinson-Patman Act[48] amending as it does the Clayton Act, prohibits discrimination in price (a) where the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly; or (b) where the effect may be to injure, prevent or destroy competition. It further prohibits other classes of discriminations not directly involving price itself; for example, the furnishing of services or other facilities to customers on terms not proportionately equal.

The Act by prohibiting price discrimination endeavors to prevent this burden or disadvantage which otherwise would occur when the recipient assumes the role of seller in the next step of distribution. The area of competition to which the Robinson-Patman Act is directed is competition at any level of the distributive process which is affected whenever a buyer is a recipient of a discriminatory price.

To convert a "price differential" into a "price discrimination" under the Robinson-Patman Act, it must (a) be in commerce, (b) relate to a commodity, (c) involve parties entitled to equal treatment, and (d) have the prescribed injurious effect upon competition.

This is not to say, however, that all price differentials which contain all of the elements of a price discrimination are unlawful. In enacting the Robinson-Patman Act, Congress provided for certain so-called justifiable discriminations which may be found in the provisos following the price discrimination of Section 2(a). For example, it is an absolute defense to a charge of price discrimination for a seller to prove that its price differential makes only due allowance for differences in costs or for price changes made in response to changing market conditions. In addition, the Congress made provision in Section 2(b) for justifiable use of price discrimination in individual situations. This relates to the meeting of a lower price offered by a competing seller.

48. 15 U. S. C. § 13a.

This right of the seller under Section 2(b) to meet in good faith an equally low price of a competitor was considered by the Supreme Court in *Corn Products Refining Co.* case[49] and in the *Cement Institute* case.[50] While the Court did not sustain the seller's defense in either case, it recognized the relevance of the evidence in support of that defense. The decision in each case was based on the insufficiency of the seller's evidence to establish its defense but not upon the inadequacy of the defense as a matter of law.

In 1950, the Supreme Court again considered the effect of Section 2(b) in the *Standard Oil Co.* case.[51] The Federal Trade Commission there maintained that even though the price differential may have been made in good faith to meet the lower price of a competitor, it does not constitute a defense in the face of affirmative proof that the effect of the differential was to injure, destroy and prevent competition.

However, the Court rejected this argument interpreting the proviso of Section 2(b) as providing the equivalent justification for a price differential as the proviso of Section 2(a).

In connection with the question of price discrimination under a basing point situation, it is interesting to note that the prohibition of Section 2 of the Robinson-Patman Act applies to discriminatory prices, whether or not the purchasers are in the same locality. In the *Corn Products Co.* case the Court pointed out that there was nothing in the words of the statute which would support such a distinction and that the statutory purpose (to prevent injuries to competition through price discrimination) would preclude any such distinction. The purchasers were found to be in competition with each other even though in different localities.

B. *Distribution.*

1. *Restriction of Distribution Facilities.*

Because of the inherent monopolistic characteristics of common carriers, particularly railroads, the courts have been generally quick to condemn combinations among such carriers to restrain trade unless the combination's activity falls within a specific statutory exemption. Thus, in the *Trans-Missouri Freight Association*[52] and the *Joint Traffic Association*[53] cases, the Supreme Court found viola-

49. Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 (1945).
50. Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948).
51. Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 (1951).
52. United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290 (1897).
53. United States v. Joint Traffic Ass'n., 171 U. S. 505 (1898).

tions of the Sherman Act in the attempts of railroads to control competition through the organization of associations which had as their primary objective the fixing of rates.

In the *Northern Securities* case[54] a different device to achieve the elimination of competition between competing carriers was presented. In that case, the stockholders of the Great Northern Railway Company and the Northern Pacific Railway Company organized a holding company to which was transferred the controlling stock of both carriers. The Court held that by this device competition between the two railroads was destroyed and thereby a restraint of trade was effected.

In the *Union Pacific Railroad* case,[55] the Supreme Court was quick to condemn a similar result which was achieved through the purchase of one railroad of a controlling stock interest in a competing line.

Similarly, the Supreme Court applied the *Union Pacific* doctrine in the *Southern Pacific Company* case[56] where it refused to permit the defendant to hold controlling stock in another line despite the fact that the two railroads had been operated as a unified system for fourteen years.

The Supreme Court was equally alert to strike down restraints on transportation which were effectuated by monopolizing terminal facilities. In the *Terminal Railway Association* case,[57] the Supreme Court held that the acquisition of control by a group of railroads of the terminal facilities of St. Louis would violate the Sherman Act unless all the carriers serving that City were permitted to participate in the control since, otherwise, the Court recognized that nonparticipating carriers would no longer be in a position to successfully serve St. Louis. In reaching this conclusion, the Court noted that ordinarily railroad companies could combine their terminal facilities and exclude other carriers therefrom without violating the Sherman Act since the excluded railroads could usually build their own terminals. Here, however, because of St. Louis' peculiar topographical conditions, such action was impossible.

A further development in the application of the Sherman Act to common carriers was presented in the *Reading Company* case[58] where a combination of railroad and coal companies were charged with, and found guilty of, restraining the sale and transportation of coal. The

54. Northern Securities Co. v. United States, 193 U. S. 197 (1904).
55. United States v. Union Pacific R. R. Co., 226 U. S. 61 (1912).
56. United States v. Southern Pacific Co., 259 U. S. 214 (1922).
57. United States v. Terminal R. Association, 224 U. S. 383 (1912).
58. United States v. Reading Co., 226 U. S. 324 (1912).

six defendant carriers controlled the only means of transportation between the Eastern Pennsylvania anthracite fields and tidewater from which the coal was distributed by rail and water; and, they, together with the coal companies which they controlled, produced and sold 75% of the total annual supply of anthracite. The defendants achieved the restraint by working together to preclude from the district prospective transportation competition and by shutting out the coal of independent operators from competition at tidewater with their own coal. In their efforts to secure this second objective, the defendants, pursuant to an agreement among themselves, proceeded to enter into contracts with the independent coal producers under the terms of which they would buy the entire output of the latter. The contracts were to extend not only for the life of the mines presently in operation but were to be extended to mines subsequently opened. With respect to these contracts, the Supreme Court stated:[59]

> In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition and of a purpose to unduly restrain the freedom of production, transportation and sale of the article at tide-water markets.

In a subsequent case[60] brought against the Reading Company, the Supreme Court found that the holding company was still violating the Sherman Act by continuing in active control of two competing interstate commerce carriers and two coal companies, thus, effectively suppressing all competition between the four companies and pooling their earnings. Accordingly, the Court directed the dissolution of the combination.

2. *Channelization of Distribution.*

In the *Eastern States Lumber Association* case,[61] the Government was successful in having enjoined a combination of retail lumber dealers which had entered into a conspiracy to prevent wholesale dealers in the Middle Atlantic area from selling directly to consumers of lumber by having their trade association circulate among the retailers a list of all wholesalers who sold directly to consumers. In

59. *Id.*, at 370.
60. United States v. Reading Co., 253 U. S. 26 (1920).
61. Eastern States Lumber Ass'n. v. United States, 234 U. S. 600 (1914).

this case, the Supreme Court recognized that the practical effect of the defendants' program was to cause retailers to refrain from buying from non-cooperating wholesalers and that, therefore, the combination was illegal even though there was no formal agreement among the retailers not to buy from those wholesalers whose names appeared on the circulated list. The law of this case is still in full force today. Therefore, any combination among a business group to require that goods be sold through particular channels exclusively is illegal and in violation of the Sherman Act.

3. *Allocation of Marketing Areas and of Customers.*

Competitors who are fearful of the consequences of unrestricted price competition and desirous of establishing competitive stability may seek to accomplish their purpose by allocating markets. Sharing the market may consist in allocating fixed percentages of the available business to each producer, dividing sales territory on a geographical basis, or alloting customers to each seller. All such arrangements are illegal.

Thus, in the *Addyston Pipe* case,[62] which involved a combination among six manufacturers of cast iron pipe, the defendants, by agreement and through the instrumentality of an association, established a threefold division of their sales territory in only one of which free competition was to exist. In one of the other market areas the cities were allocated to particular members of the combination who were required to sell at prices fixed by the group and pay bonuses to the association which were, in turn, to be distributed to the membership. In the remaining territory each contract was allocated to that member of the combination who would agree to pay the largest bonus for division among the members of the association. The Court of Appeals for the Sixth Circuit,[63] in an opinion written by Judge Taft, and affirmed by the Supreme Court, held that division of markets was illegal under the Sherman Act.

Any doubt as to the illegality of the division of domestic or world markets by agreement was put to rest in the *National Lead Company* case[64] where the Supreme Court held that allocation of markets to members of a combination violated the Sherman Act regardless of prevalent economic conditions which were relied upon to justify the practice. The Supreme Court there affirmed the lower court's finding that the defendants had participated in an "international cartel"

62. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899).
63. United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).
64. United States v. National Lead Co., 332 U. S. 319 (1947).

in restraint of interstate and foreign commerce in titanium products through the pooling of patents and the allocation of markets in violation of Section 1 of the Sherman Act.

Similarly, in the *Timken Roller Bearing Company* case,[65] the Supreme Court found that the defendant, a domestic corporation, had violated the Sherman Act by conspiring with a British corporation and a French corporation, in each of which it had a financial interest, to restrain interstate and foreign commerce in the manufacture and sale of bearings. In this case it was found that under agreement between them the corporation had allocated trade territories among themselves; fixed prices on products of one sold in the territory of the others; cooperated to protect each other's markets and to eliminate outside competition; and participated in cartels to restrict imports to, and exports from, the United States.

4. *Boycotts.*

The earliest Sherman Act decision dealing with a boycott is the *Montague* case,[66] where an association of wholesalers and manufacturers in its by-laws provided that no dealer member should buy from any manufacturer who was not a member of the association or sell for less than list price to anyone not a member, and that manufacturers who sold to non-members should forfeit their membership. In a unanimous decision, the Supreme Court held that the formation of the association and its activities constituted an agreement in restraint of trade within the meaning of the Sherman Act.

Although giving little guide as to the proper approach to a boycott case, the *Montague* decision held that a clearcut concerted refusal to deal which restrained interstate commerce was a violation of the Sherman Act.

Subsequent to the *Eastern States Retail Lumber* case, the *Sugar Institute*[67] and the *Paramount Famous Lasky*[68] cases held that the boycotting activities there involved amounted to unreasonable restraints of trade. None of these cases considered whether the unreasonableness was due to the surrounding circumstances or whether it was due to the adoption, in and of itself, of the boycott. However, in the *Fashion Originators' Guild of America* case,[69] the Supreme Court indicated that a boycott was unreasonable in itself and could not be justified on any ground; in fact, the Supreme Court held that no error had been committed in that case by the exclusion of evidence

65. Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951).
66. W. W. Montague & Co. v. Lowry, 193 U. S. 38 (1904).
67. Sugar Institute v. United States, 297 U. S. 553 (1936).
68. Paramount Famous Lasky Corp. v. United States, 282 U. S. 30 (1930).
69. Fashion Originators Guild v. Trade Commission, 312 U. S. 457 (1941).

offered by the defendants to prove that the practices they followed were reasonable and necessary for the protection of all members of their industry against the evils growing out of the pirating of original fashion designs. In the *Fashion Originators' Guild* case, the restraint consisted of a boycott by dress manufacturers of retailers who patronized style pirates. These manufacturers sought to achieve their aim by agreeing to refuse to sell to manufacturers and retailers of garments who dealt in the pirated copies or who would not agree to refrain from selling them. In holding this activity illegal the Supreme Court stated:[70]

> . . . And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy *(Montague & Co. v. Lowry,* 193 U. S. 38, 45; *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott *(Eastern States Retail Lumber Dealers' Assn. v. United States,* 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs *(United States v. American Linseed Oil Co.,* 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs *(United States v. American Linseed Oil Co., supra,* 262 U. S. at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 242.

Subsequently, in the *International Salt Company* case, the Supreme Court cited the *Fashion Originators' Guild Company* case in holding that "it is unreasonable *per se* to foreclose competitors from any substantial market."[71]

In subsequent cases the Supreme Court has indicated that it is illegal for any business group to engage in a boycott. Thus, in the

70. *Id.,* at 465.
71. International Salt Co. v. United States, 332 U. S. 392, 396 (1947).

American Medical Association case,[72] it was held that it was a violation of the Sherman Act for the defendants to conspire to prevent Group Health (a non-profit corporation organized by Government employees to provide medical care and hospitalization on a pre-payment basis) from functioning by conspiring to coerce physicians from accepting employment under Group Health and by restraining hospitals from affording facilities for the care of patients of Group Health's physicians. The Supreme Court noted that the fact that the defendants were physicians and medical organizations was of no significance if the purpose and effect of their conspiracy was to impose a restraint on the business of Group Health.

In the *Associated Press* case,[73] the Supreme Court extended the prohibition against boycotting activities to the newsgathering field. In that case, the Supreme Court held that the by-laws of the Associated Press, a cooperative association engaged in gathering and distributing news in interstate and foreign commerce, violated the Sherman Act in that it prohibited service of AP news to non-members, prohibited members from furnishing spontaneous news to non-members, and empowered members to block membership applications of competitors. Likewise, it has been held in the *Allen Bradley Company* case[74] that boycotting activities by labor unions constitute a violation of the Sherman Act if the union acts in a combination with non-labor groups to create business monopolies and to control the marketing of goods in interstate commerce. In the *Women's Sportswear Manufacturers Association* case,[75] the Supreme Court reiterated the ruling of the *Allen Bradley* case.

C. *Trade Associations.*

While consistently recognizing that there is a useful and legitimate place for the trade association in the business world, the courts have unhesitatingly condemned association activities which are in effect devices to enable the membership to impose restraints on commerce through price-fixing, price-stabilization, boycotting or division of markets. However, there is a twilight zone of association activity which separates the clearly legal from the definitely illegal and this is found in the collection and dissemination of detailed statistics among the membership, the adoption of uniform accounting procedures, and credit bureau functions. If these and similar activities are nothing

72. American Medical Ass'n. v. United States, 317 U. S. 519 (1943).
73. Associated Press v. United States, 326 U. S. 1 (1945).
74. Allen Bradley Co. v. Local No. 3, 325 U. S. 797 (1945).
75. United States v. Women's Sportswear Manufacturers Association, 336 U. S. 460 (1949).

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more than a subterfuge to fix or stabilize prices or cause the association membership to refuse to deal with third parties other than upon the terms mutually agreed upon by the association, they unquestionably fall within the prohibitions of the Sherman Act.

1. *Collection and Dissemination of Statistics and Related Activities.* In those instances where a trade association is used as a vehicle to apprise in detail each member of the competition which is being provided by its competitors in the association (the so-called "open competition" plan), then the courts have found it necessary to scrutinize the entire plan in order to determine whether it has resulted in the elimination of competition or is likely to do so. In other words, the legality of the activities can only be assessed in such instances in light of their total effect on interstate commerce. Parenthetically, it should be noted that frequently where the association is found to be engaged in the collection and dissemination of detailed statistical information, it is also urging the membership to follow a uniform system of accounting in order to make the statistics more meaningful. Therefore, the legality of a uniform system of accounting is considered in the context of the entire association program of gathering and distributing information. Of course, if the cost accounting system is found just to be a means of arriving at uniform prices, it would be illegal as a means to obtain a goal which is prohibited by the Sherman law.

One of the principal criteria which the courts have seemingly resorted to in determining the illegality of the so-called "open competition" plan is whether the detailed statistics which are collected and disseminated among the association membership are available to the public who buys from or sells to the individual members of the plan. Where the information is kept from the public, it would appear that the courts are more prone to find that the statistical activities of the association are more than a convenient means to enable the membership to stabilize prices, and consequently unlawful.

The *American Column & Lumber Co.* case[76] was the first "open competition" case to come before the Supreme Court. Some 365 hardwood lumber mills, whose production amount to 1/3 of the total national production, participated in the plan. The most detailed statistics were collected from and disseminated to the membership and such information was unavailable to the public. Thus, the members were required to submit daily sales and shipping reports; monthly production and stock reports; price lists; and, all price

76. American Column & Lumber Co. v. United States, 257 U. S. 377 (1921).

changes as soon as made. The association distributed to the members monthly production summaries, weekly sales and shipment reports, monthly stock reports, monthly summaries of price lists, and market report letters analyzing production and sales and general market conditions. At frequent meetings of the membership, information was elicited as to future production and the views of the members as to market conditions. There was also a provision made for inspection of the books of the individual members by association employees in order to check on the accuracy of the reports. Thus, under this plan each member was thoroughly informed with respect to the minutest detail of the business operations of the other members.

The Supreme Court held that the plan violated the Sherman Act even though there was no formal agreement by the membership as to their future conduct either with respect to production or prices. This was unnecessary, for the Court pointed out:[77]

> The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals.

The Court further noted that the whole approach of the membership was:[78]

> . . . not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved.

The second case to consider the "open competition" plan was the *American Linseed Oil Co.* case[79] and the Court again found that the plan violated the Sherman Act. Here again detailed statistics were gathered and disseminated without making them available to the public. Further, the members were obliged to furnish the association a schedule of their prices and not to depart therefrom prior to giving the association notice.

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77. *Id.*, at 399.
78. *Id.*, at 410.
79. United States v. American Linseed Oil Co., 262 U. S. 371 (1923).

However, in the *Maple Flooring Association* case,[80] the Supreme Court found that the plan was legal. In this case it should be noted that all of the statistics involved dealt with past and closed transactions; that they were given wide publicity by being published in trade journals and by being sent to the Department of Commerce; and that none of the statistics which were gathered and disseminated included current price quotations. In upholding the legality of the plan, the Supreme Court noted that the statistics did not differ in any essential respect from trade or business statistics which are frequently gathered and publicly disseminated in numerous branches of industry. It should be noted in this case that at association meetings there were no discussions as to past or future prices.

In the companion case of the *Cement Manufacturers Protective Association*,[81] the Supreme Court, likewise, found that the "open competition" plan was legal.

That each of these "open competition" plans must be considered on its own peculiar facts as was observed by the Court in the *Maple Flooring* case, is illustrated by the Supreme Court's opinion in the *Sugar Institute* case[82] wherein the Court recognized that, in light of the peculiar pricing policy that had been followed by that industry over the years, the Sherman Act was not violated even though the members of the Institute made public announcement of future prices and terms of sale. However, the Court said it was unlawful for the association to secure adherence, without deviation, to prices and terms thus announced.

2. *Uniform Credit and Arbitration Policies.*

In the *Paramount Famous Lasky Corporation* case,[83] the Supreme Court made it crystal clear that it is unlawful for the members of an industry to agree to deal with third parties only on terms satisfactory to the combination. In that case, ten producers and distributors of motion pictures, controlling 60% of the entire film business, agreed to deal with the distributors only on a standard form of contract providing, among other things, for the arbitration of all controversies. In holding that such an agreement violated the Sherman Act, the Supreme Court stated:[84]

> The fact that the standard exhibition contract and rules of arbitration were evolved after six years of discussion and ex-

80. Maple Flooring Mfrs. Ass'n. v. United States, 268 U. S. 563 (1925).
81. Cement Mfrs. Protective Ass'n. v. United States, 268 U. S. 588 (1925).
82. Sugar Institute v. United States, 297 U. S. 553 (1936).
83. Paramount Famous Lasky Corp. v. United States, 282 U. S. 30 (1930).
84. *Id.*, at 43.

perimentation does not show that they were either normal or reasonable regulations. That the arrangement existing between the parties cannot be classed among 'those normal and usual agreements in aid of trade and commerce' spoken of in *Eastern States Lumber Ass'n. v. United States, supra,* page 612 of 234 U. S., is manifest. Certainly it is unusual, and we think it necessarily and directly tends to destroy 'the kind of competition to which the public has long looked for protection.' *United States v. American Oil Co., supra,* page 390 of 262 U. S. * * *

Again in the *First National Pictures, Inc.* case,[85] the Supreme Court declared illegal an agreement among the parties thereto to refuse to supply motion pictures to any exhibitor who refused to assume any contracts entered into by his predecessor with members of the combination. Even though the defendants in that case sought to justify their mutually agreed upon policy as affording them reasonable protection against a practice of exhibitors evading film service contracts by transferring their theatres, the Supreme Court held that such justification did not constitute a valid defense to the charge of violating the Sherman Act.

D. *Unilateral Illegal Trade Practices Under The Federal Trade Commission Act.*

1. *Restraints of Trade.*

Many of the practices which have been termed unfair under the Federal Trade Commission Act will be readily recognizable as being also actionable torts. These practices are in contra-distinction to those which we ordinarily think of as comprising violations of the antitrust laws, that is, price-fixing, attempts to monopolize, conspiracies, and so forth. The next few examples concern cases which, have been termed under the heading, interference with advantageous trade relations.

a. Cutting off competitors' supplies or access to marketing facilities.

For example, in the case of *Darling & Co.,*[86] the respondent was a corporation engaged in the purchase of raw materials consisting chiefly of shop fats, bones, suet, and hides, and in processing these raw materials, and then selling the finished product. Darling & Co. was the predominant organization in the rendering business in the territories in which it and its subsidiary corporations operated. The Commission found that the company engaged in, among other prac-

85. United States v. First National Pictures, Inc., 282 U. S. 44 (1930).
86. F. T. C. v. Darling & Co., 30 F. T. C. 739 (1940).

tices the practice of quoting a higher price for the purchase of raw materials than were justified by the trade conditions without intending to pay such prices, but with the intention to cause injury to its competitors. It also paid higher prices in those localities in which it met competition for the purchase of raw materials, thus eliminating the competitors' source of supply. Another practice that it entered into for the purpose of eliminating its competitors' sources of supply was that of making loans to butchers on condition that they sell all of their fats, bones, suet and other offal exclusively to respondent. The Commission found that these practices constituted unfair trade practices within the Federal Trade Commission Act and issued an order to cease and desist.

b. Enticing away employees of competitors with the purpose and effect of harrassing and embarrassing such competitors; acquiring confidential information unfairly; etc.

This same company, in this same case, enticed competitors' drivers and solicitors, who had routes covering supply sources of raw material, into its employ by offering higher wages. The purpose was, of course, not to raise their standard of living but rather to dry up the competitors' supply sources.

Where a company entices employees away from competitors for the purpose of obtaining confidential information of the competitor, the Commission has held this a violation of the Federal Trade Commission Act. In the *Standard Car Equipment Co.* case[87] the respondent had been engaged in inducing employees of its competitors to leave their employment for the purpose of demoralizing and breaking down the competitive organizations. The respondent also acquired trade secrets and confidential information of its competitors through a former employee. The Commission ordered the respondents to cease and desist from this employee-raiding practice. In the *Allen Sales Service* case[88] former employees of a company formed a competitive organization. The Federal Trade Commission held that these employees could not utilize confidential information, which they had acquired during the period of their employment, in their new organization.

c. Appropriating trade-mark, trade name or other values wrongfully.

The Federal Trade Commission has condemned the practice of fashioning a new trade-mark or trade name for the purpose of lead-

87. F. T. C. v. Standard Car Equipment, 1 F. T. C. 144 (1918).
88. F. T. C. v. Allen Sales Services, Inc., 1 F. T. C. 459 (1919).

ing the public to believe that the new product is the same as an older, well-established one. In the *M. G. Slocum* case[89] a company displayed the name "B-D, Basilli-Destroy" in simulation of an older and well-established trade-mark, "B-K, Bacilli-Kil", which had been previously registered. The Commission held that this appropriating and reproducing of the trade-mark amounted to a violation of the Federal Trade Commission Act.

d. Inducing breach of competitors' contracts.

Where a carburetor manufacturer induced gas station dealers already handling a competitive carburetor to cancel existing sales contracts with the manufacturer of the competitive carburetor and, moreover, sought to require them not to handle the competitive carburetor in the future, it was held to be unfair competition under the Federal Trade Commission Act.[90]

e. Chance merchandising schemes.

However, the Federal Trade Commission Act is not limited merely to the above easily recognizable predatory practices. The Supreme Court has repeatedly pointed out that the Congressional purpose in enacting the Federal Trade Commission Act was a broader one than merely to condemn those actions which were already illegal at common law and the Sherman Act. Thus in the *Keppel* case[91] the Supreme Court held that the practice of a candy manufacturer in distributing, in interstate commerce, assortments of candy through a chance-merchandising scheme was an unfair method of competition under the Act. In that case a candy manufacturer arranged an assortment of penny candy so as to include a few pieces that had concealed within its wrapper a single penny, so that the purchasers of those particular pieces of candy received back the amount of the purchase price. The Supreme Court, in holding that this practice was violative of the Federal Trade Commission Act, pointed out that the mere fact that competing candy manufacturers or distributors may adopt the merchandising-by-chance scheme does not immunize the practice. The Court said:[92]

> . . . a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade.

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89. F. T. C. v. M. G. Slocum, 4 F. T. C. 155 (1921).
90. Carter Carburetor Corp. v. F. T. C., 112 F. 2d 722 (8th Cir. 1940).
91. F. T. C. v. Keppel & Bros., Inc., 291 U. S. 304 (1934).
92. *Id.*, at 312.

f. Exclusive contracts.

Last term the Supreme Court decided a case which reiterated the broad scope of the Federal Trade Commission Act. This *Motion Picture Advertising Service* case[93] involved a company engaged in the production and distribution of advertising motion pictures which depict and describe commodities offered for sale. This company entered into five-year contracts with theatre owners; in many instances the contracts provided that the theatre owner would show only those advertising films supplied by that company. The Supreme Court sustained the Federal Trade Commission's contention that exclusive contracts for a greater period of time than one year had, in this case, a tendency to restrain competition and to develop a monopoly which, if allowed to proceed unchecked, would ultimately result in violation of the Sherman Act. The significant factor to be kept in mind, however, is that the practice here found violative of the Federal Trade Commission Act was not necessarily one which would also violate the section of the Clayton Act dealing with exclusive contracts, Section 3. Thus the Court states that the[94]

> . . . Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . — to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . , as well as to condemn as 'unfair methods of competition' existing violations of them.

E. *Patents.*

The patent laws were enacted pursuant to constitutional authorization contained in Article I, Section 8 of the Constitution, which provides that the Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Consistent with this Constitutional authorization, a patent system was formulated which has stood practically unchanged for over one hundred years.[95] The heart of that system is a grant to inventors and discoverers "for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery . . . throughout the United States and the Territories thereof."[96] In other words, the patent laws grant a 17-year monopoly to the inventor of the thing he has invented. The purpose of these laws,

93. F. T. C. v. Motion Picture Advertising Service Co., 344 U. S. 392 (1952).
94. *Id.*, at 394.
95. Robinson, THE LAW OF PATENTS, Vol. 1, § 49, p. 81 (1890).
96. 35 U. S. C. 40, *et seq.*

as the Constitutional provision indicates, is to reward inventors for their contributions, stimulate them to further efforts and encourage them to incur the commercial risk that may be necessary if the public is to obtain the benefit of their contributions.[97]

1. *Price-fixing.*

An undoubted reason for the increase in the number of antitrust cases involving patents during the past decade, is that investigations have revealed a number of instances where patents were being used as colorable sanctions for monopolistic practices beyond the legal rights derived from the ownership of such patents. The misuse of patents as the new fashion for cloaking restraint and monopoly appears to have been in part, at least, the indirect result of two decisions of the Supreme Court — the *General Electric* decision,[98] in 1926, and the *Trenton Potteries* decision,[99] in 1927. The *General Electric* decision held that a patentee-manufacturer could legally license another to make and sell the patented product at fixed prices and under other terms of sale agreed to by the licensor-licensee. The Court, in the *Trenton Potteries* decision, held that price-fixing arrangements relating to unpatented articles were wholly unreasonable and unlawful. While the *Trenton* doctrine was not new, the decision served as a reminder that the old-fashioned, crude method of agreeing upon prices was clearly a dangerous practice. A more subtle means of accomplishing the same result was needed. Thus, in an attempt to avoid the strict prohibitions against price-fixing, some members in industry began more and more to lean on the doctrine of the *General Electric* decision as a device for achieving price uniformity and avoiding price competition. Patent licensing arrangements, many of which stabilized prices in entire industries, followed. Of course, all such arrangements were not illegal, but as shown by the court decisions handed down during the period from 1939 to date, the theory of the *General Electric* decision was, in at least some instances, distorted beyond recognition.[100]

2. *Tie-in Problems.*

It is a well-settled rule that a patentee may not grant a license upon the condition that the licensee purchase materials used with the patented article, or as a part of the patented combination, from

97. Kendall v. Winsor, 62 U. S. 322, 328 (1859); Woodbridge v. United States, 263 U. S. 50 (1923).
98. United States v. General Electric Co., 272 U. S. 476 (1926).
99. United States v. Trenton Potteries, 273 U. S. 392 (1927).
100. Hartford-Empire v. United States, 323 U. S. 386 (1945); United States v. Line Material Co., 333 U. S. 287 (1948); United States v. U. S. Gypsum Co., 333 U. S. 364 (1948).

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the patentee himself. Justice Douglas, in his dissent in the *Hazeltine* decision stated:[101]

> . . . One who holds a patent on article A may not license the use of the patent on condition that B, an unpatented article, be bought. Such a contract or agreement would be an extension of the grant of the patent, contrary to a long line of decisions. (Citing several cases). For it would sweep under the patent an article that is unpatented or unpatentable. Each patent owner would become his own patent office and, by reason of the leverage of the patent, obtain a larger monopoly of the market than the Constitution or statutes permit.

A majority of the Court agreed with Justice Douglas' statement of the rule. The majority held, however, that a license agreement, under which the licensee paid a royalty based on a percentage of its total sales in certain lines without regard to whether or not the product sold was patented or unpatented, was not contrary to the rule. Justice Douglas and Black dissented, taking the position that the basing of the royalty upon total sales resulted in the patent owner using ". . . the patent to bludgeon his way into a partnership with this licensee, collecting royalties on unpatented as well as patented articles."

Despite the *Hazeltine* decision, it is suggested that this is still a safe proposition to follow — a patent should not be used in such a manner as to extend monopoly control over products not covered by the patent as such. In the first place, the majority was careful to distinguish certain cases[102] standing for the traditional doctrine in "tie-in" cases. And, in the second place, the Court laid considerable emphasis upon the fact that the royalty provision was ". . . a convenient mode of operation designed by the parties to avoid the necessity of determining whether each type of petitioner's products embodies any of the numerous Hazeltine patents."

3. *Grant-back Provisions.*

One of the liveliest questions that has arisen relates to grant-back provisions whereby a patentee compels the assignment back to him of improvement patents developed by his licensee. This would be a logical place to discuss that problem since the tying clause doctrine is, at least in part, applicable.

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101. Automatic Radio Co. v. Hazeltine, 339 U. S. 827, 837 (1950).

102. United States v. U. S. Gypsum Co., 333 U. S. 364, 389, 400 (1948); Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661, 665-666 (1944); Morton Salt Co. v. Suppiger Co., 314 U. S. 488, 778 (1942).

https://scholarcommons.sc.edu/sclr/vol6/iss2/3

In the *Transparent Wrap* case,[103] Judge Learned Hand used the rule of the tying clause to hold that the patentee could not compel the licensee to give a grant-back provision. The Supreme Court, however, in a five to three decision,[104] reversed this holding and held that such a condition was not illegal *per se*. It did make it clear, however, that any such transaction would be illegal if the effect of the requirement was to restrain trade or create a monopoly within the ban of the antitrust law. Consistently, the Court referred the case back for determination of the effect of the requirement under the antitrust laws.

In two subsequent cases,[105] both of them antitrust cases, District Courts have held that the doctrine of the *Transparent Wrap* case was no defense against similar practices where it appeared that the effect of the grant-back clause was to lessen competition in violation of the antitrust laws.

4. *Patent Pools.*

Many patents are relatively narrow in scope, others overlapping still other patents. There may be a dominant subservient relationship between patents in which no invention can be used to the best advantage unless there is access to the other inventions. Where these situations exist, a patent pooling arrangement whereby two or more members of an industry throw their patents into a common pot and make them available to each other, may be desirable. Where the objectives of such a pool is to give the public the benefit of the latest technology, there would seem to be no objection to it under the antitrust laws. The decision in the *Standard Oil* case[106] holds that a pool of the oil-cracking patents was not illegal on the facts of that case. An unrestricted pool is in accord with the antitrust laws and may substantially further competition.

The situation is quite different, however, where restrictions are imposed upon the participants of the pool. If these restrictions should, for example, exclude certain members of the industry from the pool, then there would appear to be no doubt that the arrangement is illegal. It is one thing to have an "open" pool and another thing to have a "closed" pool. If the pooling arrangement is being used for the purpose of imposing quantity, price or quality restrictions, or

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103. Stokes & Smith Co. v. Transparent Wrap Machine Corp., 156 F. 2d 198 (2nd Cir. 1946).

104. Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637 (1947).

105. United States v. General Electric Co., 80 F. Supp. 989, 1005, 1006 (S. D. N. Y. 1948); United States v. General Electric Co., 82 F. Supp. 753, 815-816 (D. C. N. J. 1949).

106. Standard Oil Co. v. United States, 283 U. S. 163 (1931).

territorial allocations, this, too, would be illegal. In support of this there may be cited the old "bathtub" case,[107] decided in 1912, in which such activities were held to be illegal under the antitrust laws. In that case, Justice McKenna stated:[108]

> 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.

There are, of course, other evils which may crop up in pooling arrangements. There shall be mentioned only two:

a. Where there is the establishment of a common litigation fund and concerted action and effort by the participants to enforce the pooled patents against outsiders then the arrangement is dangerously close to a violation of the antitrust laws. By putting up a "common front" to the remainder of the industry and making a demonstration of great financial strength the pool is in position to coerce weaker concerns. Because of the high cost of patent infringement litigation the individual concern is at a decided disadvantage in fighting the combined strength of the pool. Quite often the individual concern abandons the struggle with the pool even though it may have a meritorious position.

b. If the participants represent a substantial part of industry and if they agree not to compete with each other in the acquisition of patents from outsiders — again the pool is getting dangerously close to a violation. A combination not to compete in the acquisition of patents is the same in principle as a combination not to compete in the purchase of tobacco.[109]

Judge Picard's decision in the *Besser* case[110] discusses the problems relating to concerted efforts to enforce patents and patent rights.

5. *Allocation of Fields and Territories.*

In the early days, when the inventor exploited his self-contained invention there was very little, if any, problem since it is clear that the patent laws gave him a 17-year monopoly of the invention. Generally, his sphere of activity was in a relatively narrow area. Today, commercial organizations operate in an ever widening area of trade. This has resulted in these organizations coming in conflict with

107. Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 (1912).
108. *Id.*, at 49.
109. American Tobacco Co. v. United States, 328 U. S. 781 (1946).
110. Besser Mfg. Co. v. United States, 343 U. S. 444 (1952).

similar organizations in the same area of trade. Frequently patent arrangements have resulted whereby two or more competitors arrange their patent rights in such a manner that one attains the rights of all for a certain geographical territory or for a certain field of use, another obtains the rights of all for another territory or field, and so on. With the expansion of international trade, the areas covered by these arrangements have expanded. Indeed, arrangements of this kind are not infrequently international in scope as shown by the recent decision in the *Imperial Chemical Industries* case[111] and in the *Lead* case.[112]

F. *Monopoly.*

The *Standard Oil* case,[113] is the landmark decision in the construction of Section 2 of the Sherman Act. Prior to the adoption of the Sherman Act, a number of the dominating oil companies of the country had combined, first, by means of a trust device and later through Standard Oil of New Jersey, a holding company. The Supreme Court's decision that the combination had unreasonably restrained and monopolized interstate commerce was based on the following circumstances: (1) the dominating power and control over the oil industry which the combination had attained, and (2) the intent, manifested by its acts, to secure and maintain this mastery by excluding others from the field. Since the combination had been formed prior to the passage of the Sherman Act, the effect of the decision was that the mere continued existence of the combination, in view of the purpose for which it had been formed and the manner in which it had executed its power, constituted a violation of Section 2.

In 1911, the Government sought to dissolve U. S. Steel which had been organized in 1901 to acquire and hold the stock of twelve independent operating companies. However, during the period between its organization and the filing of the suit, the company's share of the market had decreased from 50 per cent to about 41 per cent and the business of certain competitors had grown at a rate more rapid than that of the defendant. The Supreme Court in a 4-3 decision[114] affirmed the dismissal of the complaint by the lower court[115] finding that the corporation had not engaged in predatory practices,

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111. United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S. D. N. Y. 1951).
112. United States v. National Lead Co., 332 U. S. 319 (1947).
113. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).
114. United States v. U. S. Steel Corp., 251 U. S. 417 (1920).
115. United States v. U. S. Steel Corp., 223 Fed. 55 (3rd Cir. 1915).

had not attempted to oppress competitors, had encountered substantial competition, and had abandoned certain price-fixing agreements before the suit was filed. In view of these facts, the Supreme Court concluded that the defendant had neither the purpose nor the power to control prices and that even though U. S. Steel was of impressive size, size alone did not constitute a violation of the Sherman Act.

Again in the *International Harvester Co.* case,[116] the Supreme Court held that control over 64 per cent of the market did not, when unaccompanied by otherwise unlawful conduct, establish a violation of the Sherman Act. Again, as in the *Steel* case, the Court found that the defendants had not endeavored to drive competitors out of business, that substantial competition remained, and that defendant's share of the market had decreased from 77 per cent to 64 per cent during the period of the litigation. The Court again announced the doctrine that "mere size" or "unexerted power" is not sufficient to constitute a monopolization unless competitors have been excluded or unless there is shown a specific intent to acquire monopoly control.

In view of these two last mentioned adverse decisions there was considerable doubt as to the utility of Section 2 of the Sherman Act in preventing or retarding the growth of monopolies. However, the section was revivified by the case against Aluminum Company of America.[117] The Court of Appeals for the Second Circuit acting as a special court in place of the Supreme Court which could not muster a quorum, in an opinion by Judge Learned Hand, held that the Aluminum Company of America had been guilty of monopolization in violation of Section 2 of the Sherman Act in the manufacture of virgin aluminum in the United States. Judge Hand, in his opinion, did not rest his judgment on the corporation's coercive or immoral practices. Instead, he found that Alcoa acquired by its voluntary actions 90 per cent of the domestic market. The Court concluded that an enterprise has "monopolized" if, regardless of its intent, it has achieved a monopoly by manoeuvres which, though "honestly industrial," were not economically inevitable, but were rather the result of the firm's free choice of business policies. Judge Hand referred to the economic purpose of the Sherman Act in these words:[118]

Many people believe that possession of unchallenged economic

116. United States v. International Harvester, 274 U. S. 693 (1927).
117. United States v. Aluminum Company of America, 148 F. 2d 416 (6th Cir. 1945).
118. *Id.*, at 427.

> power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

And he referred to the social purpose as follows:[119]

> It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

Both the technique and the language of Judge Hand were expressly approved in the *American Tobacco Co.* case.[120] Comparable principles were applied in the *Griffith, Schine* and *Paramount* theatre cases.[121] The *Griffith* case named as defendants four theatre chains and ten major motion picture distributing companies alleging a monopoly of the exhibition of motion pictures in three southwestern states through the negotiation of blanket contracts between the exhibitor and distributor defendants for the exhibition of all desirable pictures, as a result of which competing independent exhibitors were precluded from an opportunity to obtain the best pictures. The Supreme Court in reversing the judgment of a lower court in favor of the defendants held that to prove a violation of Section 2 it was not always necessary to show a violation of Section 1 and the Court concluded that an enterprise had monopolized in violation of Section 2 if it (a) had the power to exclude competition, and (b) had exercised it, or had the purpose to exercise it.

In the *American Tobacco* case, where three principal producers of cigarettes were convicted of conspiring to monopolize commerce in leaf tobacco and tobacco products by fixing prices at which they would purchase leaf tobacco and would sell tobacco products, the Supreme Court held that actual exclusion of competitors is not a necessary ingredient of the offense of monopolization. The Supreme Court stated that the material consideration "is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." It quoted with approval from Judge Hand's opinion in Alcoa and

119. *Ibid.*
120. American Tobacco Co. v. United States, 328 U. S. 781 (1946).
121. United States v. Griffith, 334 U. S. 100 (1948); Schine Chain Theatres, Inc. v. United States, 334 U. S. 110 (1948); United States v. Paramount Pictures, Inc., 334 U. S. 131 (1948).

stated that the power to exclude competitors coupled with a purpose to use that power where necessary constituted the essential ingredient of the offense.

III. Clayton Act

A. *Lease or Sale Agreement Not To Use Goods of a Competitor of the Lessor or Seller.*

Section 3 of the Clayton Act is a more specific, and in certain respects a more limited, statute than the Sherman Act. It provides that no person engaged in commerce, in the course of that commerce, shall sell or lease, or contract to sell or lease goods, wares, merchandise, machinery, supplies or other commodities, on the condition that the buyer or lessee shall not use or deal in the goods of a competitor of the seller or lessor, where the effect thereof "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

It has been said that the test of illegality under the Clayton Act is less stringent than that under the Sherman Act. This difference, it is suggested, lies primarily in the fact that the Clayton Act is designed to reach restraints and monopolization in their incipiency, before they have developed to a point where they can be reached under the Sherman Act.

The words of the Clayton Act "Where the effect of such contracts . . . may be to substantially lessen competition or tend to create a monopoly" have been interpreted to mean "probability" and not "mere possibility." However, in determining whether the probable effect of a given contract or series of contracts will be to substantially lessen competition or tend to create a monopoly, the courts have used some of the tests used in determining whether a given restraint violates the Sherman Act. Market dominance and monopoly power, or other economic power to force buyers to accept exclusive dealing arrangements, are of significance in Clayton Act as well as Sherman Act cases.

The two most important types of exclusive dealing arrangements which fall within the applicable scope of the Clayton Act are tie-in sales and requirements contracts.

1. *Application to Tie-in Leases or Sales.*

A tie-in sale is a form of arrangement in which the seller usually possesses some distinct advantage over competitors with respect to a particular commodity, and he requires the buyer, in order to secure that commodity, to agree to purchase from the seller other com-

modities, thus extending to them the seller's advantage in the tying commodity. Illustrations of common tie-in sales are the sale or lease of a patented machine or product, with agreement by the buyer to use with that machine or product only those goods which he purchases from the seller or lessor of the machine; or a contract for the sale of a commodity in short supply, which the seller possesses but which competing concerns may not have, upon the condition that the buyer will purchase other goods from the seller. The Supreme Court has said that "tie-in agreements serve hardly any purpose beyond the suppression of competition."

For example, in the *United Shoe Machinery* case[122] the Supreme Court sustained a decree enjoining the use of restrictive clauses in leases as violations of the Clayton Act. These clauses included a provision that if the lessee failed to use exclusively machinery of certain kinds made by the lessor, the latter would have the right to cancel the leasing arrangement.

A similar situation was presented in the *International Business Machines Corp.* case,[123] where IBM, the lessor of tabulating machines, licensed the use of such equipment upon the condition that the lessee operate only with cards supplied by the lessor. The Court concluded that the effect of these leases was to substantially lessen competition, and refused to allow the defendants to introduce the good will of the manufacturer as a justification for the practice.

A most recent example is the *International Salt Co.* case,[124] where the defendant had a patent monopoly on certain types of salt dispensing machines. It leased these machines on the condition that the lessee purchase from the lessor all salt tablets to be used in the machines. The Supreme Court held that this lease agreement extended the lawful monopoly which defendant had over the machines to an unlawful monopoly over the unpatented salt tablets used therein. Although the dollar volume of sales of salt involved in this arrangement was only a half million dollars, and probably amounted to only a small percentage of the total national sales of salt, the Supreme Court held that this extension of a patent monopoly to unpatented products was an unreasonable restraint in itself, and that since the amount of commerce involved was substantial, the defendant's percentage of total industry sales of salt was irrelevant.

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122. United Shoe Machinery Co. v. United States, 258 U. S. 451 (1922).
123. International Business Machines Corp. v. United States, 298 U. S. 131 (1936).
124. International Salt Co. v. United States, 332 U. S. 392 (1947).

2. *Application to Exclusive Arrangements and Requirement Contracts.*

Aside from tie-in sales or leases, a contract between a seller and a single buyer who represents a substantial part of the total market, or a series of contracts with buyers who represent a substantial part of the market, whereby the buyers agree to purchase their full requirements of a specified commodity from the seller would also fall within the ambit of the Clayton Act. Contracts for the purchase of a specified quantity of goods would have practically the same effect if the quantity which is specified is sufficiently large to meet all existing and anticipated requirements of the buyers for a considerable period of time. Requirements contracts which are terminable by the buyer, or which do not extend for an undue or unreasonable length of time would not be as likely to unreasonably restrain trade or to substantially lessen competition.

The *Fashion Originator Guild* case[125] involved the validity of requirements contracts under the Clayton Act. The Guild was composed of 176 garment manufacturers, who occupied a commanding position in their line of business. The Guild sold 38 per cent of the women's dresses wholesaling at $6.75 and 60 per cent of those at $10.75. The Guild adopted a system of sale under which textiles would be sold to garment manufacturers only upon the condition that the buyers would not use or deal in textiles which are copied from the designs of Guild members, and under which garment manufacturers would sell to retailers only on the condition that the retailers would not handle such copied designs. The Court rejected the argument that the use of requirements contracts was a necessary measure of protection against the evils growing from the pirating of original designs, and concluded that the power of the combination and the coercion it exercised upon others brought the practices within the condemnation of the Clayton Act.

In the *Standard Oil Co.* case,[126] the defendant entered into exclusive dealing contracts with about 6,000 independent service station operators. This was about 16 per cent of total outlets and they handled about $66,000,000 worth of petroleum products and automotive accessories, representing about 7 per cent of gasoline, 5 per cent of lubricating oil, 2 per cent of tires and 2 per cent of storage batteries sold in the geographical area involved. Under these contracts, the dealer's undertaking was to purchase from Standard all of his

125. Fashion Originators Guild, Inc. v. Federal Trade Commission, 312 U. S. 457 (1941).
126. Standard Oil of California v. United States, 337 U. S. 293 (1949).

requirements of one or more products. The District Court in the *Standard Oil* case[127] held that the exclusive dealing contracts in issue constituted an unreasonable restraint of trade in violation of both the Sherman and Clayton Acts, since the intended effect was to deny dealers access to competitors' products and deny suppliers access to a substantial number of potential outlets for their products. The District Court concluded that the number of outlets foreclosed and the volume of business affected by the agreements were substantial whether considered comparatively or not. The Supreme Court, on review, sustained the decree under the Clayton Act, but did not consider whether it might also be sustained under the Sherman Act.

B. *Acquisition by One Corporation of the Stock or Assets of Another Corporation.*

The Clayton Act as enacted in 1914 was drafted with the purpose of making more definite the illegal practices covered generally by the Sherman Act, and Section 7 specifically prohibited certain types of corporate mergers and acquisitions. As originally drafted, Section 7 prohibited the acquisition by one corporation of the corporate stock of another corporation where the effect of such acquisition may be to substantially lessen competition between the corporations involved in any section or community or tend to create a monopoly in any line of commerce. By this Section the Congress sought to discourage the merger process by curbing two of the easiest methods by which companies could combine, i. e., (1) by stock acquisition, and (2) by holding company control of competing corporations.

The judicial interpretation of Section 7, as originally enacted, deprived that provision of most of its intended effect. In the *International Shoe Company* case,[128] involving a merger of the two largest shoe manufacturing companies in the country, Section 7 was held to be applicable only if (1) the combining corporations had been in substantial competition with each other prior to their union, and (2) if it were shown that competition in the industry at large had been substantially lessened. In this case the Court found that because of the types of shoes manufactured and the areas in which they were distributed by the respective merging companies, competition in the industry as a whole had not been lessened since the companies were not found to have been in substantial competition with each other prior to their union.

127. United States v. Standard Oil of California, 78 F. Supp. 850 (S. D. Calif. 1948).
128. International Shoe Co. v. Federal Trade Commission, 280 U. S. 291 (1930).

In *Thatcher Manufacturing Co.* case[129] and in the *Swift* case,[130] it was held that the Federal Trade Commission was ousted of jurisdiction if the acquiring company exchanged the acquired stock for the assets of the acquired company before a cease and desist order of the Commission could be issued. Moreover, the terms of that Section, limited as they were to stock acquisitions, provided an opportunity of evasion by resort to the device of asset acquisition. These statutory deficiencies, coupled with the increase in corporate mergers and acquisitions that followed World War II, prompted the Congress in December 1950 to amend Section 7 by the enactment of Public Law 899,[131] 81st Congress.

Basically this amendment changed Section 7 so as to prohibit the acquisition of the assets as well as the stock of a corporation where such acquisition may result in a substantial lessening of competition or a tendency to create a monopoly. As presently drafted, this Section does not require that the merging corporations be competitors in order for its prohibitions to apply. Moreover, the House and Senate Reports accompanying Public Law 899 make it clear that this amendment is more than a re-enactment of Sherman Act prohibitions.

In the recent case of *Hamilton Watch Co. v. Benrus Watch Co.*,[132] in the Second Circuit, the first case of significance to reach an Appellate Court under the amended Section 7 of the Clayton Act, there is afforded the first opportunity of having the benefit of judicial interpretation of this Section. In this case, Hamilton filed a complaint in the United States District Court for the Southern District of Connecticut, alleging a violation of Section 7 of the Clayton Act by Benrus Watch Company in purchasing a large block of the voting stock of Hamilton, a competitor in the manufacture and sale of watches. The complaint further alleged that should Benrus succeed in achieving control over Hamilton, it would control such a significant portion of the watch industry as to substantially lessen competition in that line of commerce. The complaint prayed, among other things, that Benrus be required to divest itself of its Hamilton stock, restrained from acquiring additional Hamilton stock, and that pending final disposition of the suit, a preliminary injunction issue enjoining Benrus from voting its Hamilton shares. District Court Judge Hincks made findings of fact and conclusions of law and entered an order enjoining Benrus, pending a trial and a final order, from vot-

129. Thatcher Mfg. Co. v. Federal Trade Commission, 272 U. S. 554 (1926).
130. Swift & Co. v. Federal Trade Commission, 272 U. S. 554 (1926).
131. 15 U. S. C. §§ 18, 21.
132. Hamilton Watch v. Benrus Watch Co., 206 F. 2d 738 (2nd Cir. 1953).

ing such Hamilton stock. Benrus appealed from this order to the United States Court of Appeals for the Second Circuit. Circuit Court Judge Frank, speaking for the Court, affirmed the District Court in an opinion dated June 30, 1953, and stated:[133]

> Defendant argues that it appears unmistakably that defendant did not violate Section 7 of the Clayton Act. Were that true, we would now know that plaintiff could have no final relief, and that therefore the granting of the preliminary injunction was an obvious error; indeed, we might direct dismissal of the complaint. But we think that the present record sufficiently discloses that the court, after a trial, may be required to conclude that Benrus was not innocent of a Section 7 violation. * * *
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> * * *
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> Nor, on the basis of [the District Court's] findings, can we hold that the judge erred in temporarily holding, in effect, as follows: (a) The acquisition of control of Hamilton by Benrus very probably would substantially lessen competition in "a line of commerce" within the meaning of Section 7. (b) The purchases by Benrus of Hamilton shares were not made "solely for investment" but for the primary purpose of obtaining such control; had this purpose not been frustrated by action of Hamilton's management, Benrus would successfully have carried it out. (c) Those purchases therefore violated Section 7. (d) Purchases thus unlawfully made do not cease to be unlawful — so as to preclude an order of divestment — because the purpose is balked.
>
> Although we now indulge in no ultimate conclusion, we believe the amendment of Section 7 in 1950 certainly casts doubt on decisions — including *International Shoe Co. v. F.T.C.*, 280 U. S. 291, and *United States v. Columbia Steel Co.*, 334 U. S. 495 — interpreting that section as it stood previously. The Senate Committee Report stated that the intent of the amendment was "to cope with monopolistic tendencies in their incipiency and well before they had attained such effects as would justify a Sherman Act proceeding." Interference at an early stage, if possible, seems the paramount aim.

On October 9, 1953, Benrus consented in the District Court to the issuance of a permanent injunction restraining it from voting its

133. *Id.*, 740-742.

shares of Hamilton stock, from soliciting proxies for stockholders meetings, and from acquiring more Hamilton stock.

C. *Interlocking Directorates.*

Section 8 of the Clayton Act, in its pertinent provisions, provides:

> . . . no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Except for the unreported decision of the District Court for the Northern District of Ohio in the *Mather* case,[134] in February 1935, Section 8 had not been interpreted by the courts until this year. The decision in this case did not go to the merits since the directors involved resigned from at least one of the companies involved in each of their dual directorships subsequent to the Government's complaint and the Court dismissed the complaint as moot.

In the *Sears, Roebuck* case,[135] the Government charged that Sears and the B. F. Goodrich Company competed in the retail sale of tires and tubes and a variety of other products and that Sidney Weinberg served as a director of both companies in violation of Section 8. The relief sought by the Government included, *inter alia,* an order declaring the dual directorship of Sidney J. Weinberg in both Sears and Goodrich illegal and directing his resignation from one or both corporate defendants.

The defendants admitted that Sears and Goodrich were competitors in the sale of the above commodities in 97 communities throughout the United States and that the approximate total annual dollar volume of sales of the above items by Sears and Goodrich in these communities was in excess of $65,000,000 and $16,000,000, respectively. The Court, in granting the Government's motion for summary judgment found that Sears and Goodrich are competitors and held that Section 8 forbids the defendant Weinberg to be a director of both corporations at the same time.

The court stated that the basic issue presented for decision under the admitted facts was whether Sears and Goodrich are "competitors,

134. United States v. William G. Mather (Ci. 5153, N. D. Ohio, 1936), unreported.
135. United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (1953).

so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

IV. Exemptions.

The most important areas of exemption are *labor, agricultural cooperatives, transportation, exports, insurance, trade-marked goods* and *patents.* Trade-marked goods have already been considered in connection with the Miller-Tydings Act and the McGuire Act. No specific exemption has been granted as to patents, but a patent confers certain monopolistic rights, and as we have seen, an improper exercise of those rights is a violation of the antitrust laws.

A. *Labor.*

The courts early held that certain activities carried on by employees in an effort to improve their conditions of employment constituted restraints upon employers and fell within the ambit of the Sherman Act. An example of this was the effort of a union to induce a hat manufacturer to unionize his factory. In order to achieve this objective, the union imposed economic pressure upon the manufacturer by urging its members not to purchase hats made by the employer. In the course of an action against the union to recover treble damages for violation of the Sherman Act brought by the employer, the Supreme Court held[136] that the boycott conducted by the union was an illegal restraint of trade and that the employer was entitled to recover from the union and its members three times the amount of the damages he suffered.

As a result of this and similar holdings, Congress at the behest of labor in passing the Clayton Act in 1914 incorporated in that Act a Section 20 which provided, in effect, that the antitrust laws were not applicable to a strike, boycott or peaceful picketing which grows out of a dispute between employers and employees concerning the terms or conditions of employment. However, this first labor exemption was interpreted by the Supreme Court as covering only the disputes between an employer and his *immediate* employees.

In 1932 Congress enacted the Norris-LaGuardia Act.[137] This Act specifically provided that the area of union activity which was to be free from injunction was not to be restricted to an *immediate* employer-employee relation. Since this statute speaks in terms of limiting the use of an injunction and does not refer to the Sherman Act, there was no agreement as to what, if any, extent this legislation

136. Loewe v. Lawlor, 208 U. S. 274 (1908).
137. Norris-LaGuardia Act, 29 U. S. C. §§ 101-115.

placed labor unions outside of the scope of the Sherman Act. However, in the *Hutcheson* case,[138] the Supreme Court, in an opinion written by Mr. Justice Frankfurter, held that whether union conduct fell within the Sherman Act was to be determined by reading the Sherman Act and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text, with the latter two statutes establishing the permissible bounds of union activities. Consequently, the Supreme Court held that restraints imposed upon an employer as a result of a jurisdictional dispute between two unions were part of a labor dispute that the Norris-LaGuardia Act had in effect placed outside the scope of the Sherman Act. The practical effect of this decision was to insulate labor unions from the Sherman Act to the extent the acts were committed in the course of a labor dispute. The big question mark left by this decision was what, if any, activities of labor unions would be held by the courts not to be acts growing out of a labor dispute and insulated from the Sherman Act. That question, however, was not long in being answered. In the *Allen Bradley* case,[139] the Supreme Court stated that labor unions do violate the Sherman Act when they aid and abet business groups in imposing restraints which violate the Sherman Act, even though the motive of the union in joining the business group is to further interests of their members as wage earners. This holding was no surprise in view of the reference to the Brims case in the Hutcheson case.[140]

It is thus seen that at the present time practically all activities of organized labor fall within exemption from the antitrust laws except the situation where a union combines with an employer or other non-labor group to impose restraints of a kind which these laws prohibit.

B. *Agricultural Commodities.*

In the case of products grown on the land, the output of any one producer is ordinarily very small compared with the output of producers of manufactured goods. This puts the grower at a disadvantage in marketing his product, which the Congress has sought to remedy by various legislation. By the Capper-Volstead Act,[141] passed in 1922, Congress authorized growers of agricultural commodities to act together in processing and marketing their products, providing certain requirements are met and this group activity is

138. United States v. Hutcheson, 312 U. S. 219 (1941).
139. Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945).
140. United States v. Hutcheson, 312 U. S. 219, 232, fn. 3 (1941).
141. Capper-Volstead Act, 7 U. S. C. §§ 291, 292.

done through the medium of an association operated for the mutual benefit of its producer members. The law permits such associations to have "marketing agencies in common" and they may make such "contracts and agreements" as are necessary to effect their authorized purposes. The law further provides that the Secretary of Agriculture may issue a corrective order if he finds that any association is monopolizing or restraining trade to such an extent that the price of any agricultural commodity is "unduly enhanced".

When a producer's cooperative itself processes and markets, it is within the authority given by this legislation and is free from the prohibitions of the antitrust laws. However, if the cooperative markets by selling the produce which it handles to private corporations, and joins with the latter in an agreement fixing the price at which the corporations resell to consumers, such action goes beyond the immunity which the statute gives and is subject to the antitrust laws. The Cooperative Marketing Act of 1926[142] further extended the permissible limits of cooperative activity among producers of agricultural products and the Agricultural Marketing Agreement Act of 1937[143] permits the Secretary of Agriculture to issue orders regulating the marketing of certain agricultural products. Such orders may regulate the price to be paid to producers by processors of the product. Such orders, however, may be issued only after hearings and findings and only if the issuance of the order is approved by a stated percentage of the producers. The statute provides that compliance with the provisions of such a marketing order is not a violation of the antitrust laws. On the other hand, no immunity exists if, after such an order has been terminated, the parties agree among themselves to continue to observe the provisions of the terminated order.

C. *Transportation.*

Congress has provided for federal regulation of almost all aspects of the business of transportation whether by railroad, motor carrier or air. The various transportation statutes confer upon the regulatory agencies power to approve various types of transactions, such as joint traffic arrangements or acquisitions of control of one carrier by another, and provide that such approved transactions shall be exempt from the antitrust laws.

Absent such administrative agency approval, the various transportation statutes do not provide for any blanket antitrust exemp-

142. Cooperative Marketing Act, 7 U. S. C. §§ 451, 455.
143. Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 608b, 608d.

tion. The Interstate Commerce Act[144] authorizes the Interstate Commerce Commission to fix maximum rates, minimum rates or specific rates. It has been held however that this Act contemplates that the carriers shall act competitively in establishing rates or in providing service, subject to the regulating agency's power to step in and direct what shall be done. Thus if the railroads agree with each other upon the rates which they will charge or the services which they will perform, they violate the antitrust laws, unless there is a specific statutory provision exempting such an agreement from the antitrust laws. Because of the limited extent to which the railroads are exempted from the antitrust laws, the Government, several years ago, filed a complaint against a group of Western Railroads.[145] The Government's case was simply that since the Interstate Commerce Act did not authorize carriers to agree on rates, any such action on their part would fall well within the purview of the Sherman Act which makes all price fixing agreements illegal *per se*. However, before this case was decided, the railroads prevailed upon Congress to pass the Reed-Bulwinkle Act,[146] in 1948. This Act authorized the Commission to approve, subject to certain conditions, agreements by the railroads providing for joint discussion and action upon rates to be charged and services to be rendered. The Commission, however, is not authorized to approve such agreements unless they preserve the freedom of any carrier to act independently if it so desires. The Act specifically provides that if any such agreements are approved by the Commission, action taken thereunder is exempt from the antitrust laws.

The antitrust laws are not only met with in the various transportation statutes in those instances where exemptions therefrom are provided for. Their philosophy is frequently one of the factors which the administrative body has to consider in making its determinations. Thus in certain instances where the regulatory agency is required by the statute to take such action as it may find to be in the public interest, the maintenance of competition has been held on occasions to be one of the factors that the Commission must consider in determining public interest, where competition may be affected by its approval or disapproval of a proposed transaction.

A decision[147] of the Supreme Court, recently handed down, pre-

144. 49 U. S. C. § 15.
145. United States v. Association of American Railroads, (Ci. 246, D. Neb., 1944).
146. Reed-Bulwinkle Act, 49 U. S. C. § 5b.
147. Federal Communications Commission v. R. C. A. Communications, Inc., 346 U. S. 86 (1953).

sents an instance where the Federal Communications Commission based its action principally on competition and the Supreme Court held that this factor alone was not decisive. In this particular case a company applied for a license to engage in transmitting messages by radio to Holland and Portugal where another company was already operating under a license from the Commission. Although the Commission found that the new operation would not bring better service or lower rates in the radio communication field, it granted the license on the ground that the national policy favored competition and that on that basis the license should be issued. The Supreme Court however held that in this instance the Commission had erred in regarding such national policy as *decisive* of the public interest, to the exclusion of other relevant factors.

D. *Exports.*

The Webb-Pomerene Act,[148] passed in 1918, provides that the antitrust laws shall not apply to an association organized solely to engage in export trade. Acts done by the association and agreements made by it, in the course of export trade, are also given exemption. The exemptions, however, do not include restraints of trade within the United States or restraints upon the export trade of any domestic competitor.

Under this Act, export associations are required to file information as to their organization and membership with the Federal Trade Commission, which may also call for additional information as to the association's practices. The Commission is given the power to conduct investigations to determine whether an export association is staying within the limits of the Webb-Pomerene Act and it may recommend to the association such changes as would enable it to operate "in accordance with law". If these recommendations are not complied with, the Commission is to refer the matter to the Attorney General.

A number of years ago the Government brought a suit[149] against an export association and a number of its members charging violation of the Sherman Act and alleging that the association, by failure to remain within the limitations of the Webb-Pomerene Act, had lost its insulation from the antitrust laws. In this particular case the defendants unsuccessfully urged that in view of the investigatory power of the Federal Trade Commission, exclusive jurisdiction rested in that agency to determine in the first instance whether an

148. Webb-Pomerene Act, 15 U. S. C. §§ 61, 65.
149. United States Alkali Export Ass'n., Inc. v. United States, 325 U. S. 196 (1945).

export corporation was acting outside of the limitations established by the Webb-Pomerene Act. The Supreme Court held that initial action by the Commission to ascertain whether an association was acting within the scope of the Webb-Pomerene Act is not a condition precedent to a suit under the antitrust laws against an export association.

E. *Insurance.*

The business of insurance has also been given certain exemptions from the antitrust laws. For a number of years it was thought that the insurance business was not interstate commerce and therefore could not be reached under the antitrust laws. However, on June 5, 1944 the Supreme Court decided the *Southern Underwriters* case,[150] in which it held that the business of making contracts of insurance between persons residing in different states is a part of the trade or commerce among the several states to which the antitrust laws apply. Following this decision Congress was not long in passing legislation which conferred upon insurance companies a broad exemption from the antitrust laws. This legislation is presently contained in the Act of Congress, commonly known as the McCarran Act.[151] This Act specifically provides that the Sherman Act exemption contained therein is inapplicable to any agreement to boycott, coerce or intimidate. However, it provides that otherwise the antitrust laws shall be applicable to the business of insurance only to the extent that such business is not regulated by state law. Since practically all of the states have laws regulating the insurance business, the antitrust laws presently apply only to a limited extent to that business.

150. United States v. Southeastern Underwriters' Ass'n., 322 U. S. 533 (1944).
151. McCarran Act, 15 U. S. C. §§ 1011, 1012.