corporation, or complain of a wrong, so long as its regular authorities are acting honestly within the discretionary powers which have been entrusted to them."

In Dudley *v.* Kentucky High School, 9 Bush, 578, the Court said: "Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment on the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to decide the line of policy to be pursued by the corporation."

See also Lord *v.* Copper Miners' Co., 2 Phill., 751; Treadwell *v.* Salisbury Manf. Co., 7 Gray, 393; Durfee *v.* Old Colony etc., R. R. Co., 5 Allen, 231; Farieria *v.* Riter, 15 Phila., 58; and Sprague *v.* Illinois River R. R. Co., 19 Ill., 174.

H. BOVEE SCHERMERHORN.

DEPARTMENT OF TRUSTS AND COMBINATIONS IN RESTRAINT OF TRADE.

EDITOR-IN-CHIEF,
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UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION.[1] CIRCUIT COURT, KANSAS.

Contracts in Restraint of Trade—Common Carriers.

An agreement between fifteen railway companies, extending through eighteen States and Territories west of the Missouri River, for the purpose of mutual protection, whereby a committee formed of representatives from each of the contracting roads should be appointed to establish rates, rules and regulations on the traffic subject to said association, and to consider changes therein and make rules for meeting the competition of outside lines, is not an agreement, combination or conspiracy in restraint of trade in violation of the Act of July 2, 1890, § 1.

Nor is such an agreement in violation of § 2 of such Act as tending to the monopolization of trade and commerce.

It was not the intention of Congress to include common carriers subject to the Interstate Commerce Act of February 4, 1887, within the provisions of the Act of July 2, 1890, which is a special statute relating to combinations in the form of trusts and conspiracies in restraint of trade.

[1] Reported in 53 Fed. Rep., 440, 1892.

OPINION OF THE COURT.

RINER, J.:

The rule of law which recognizes the rights of the public to have the benefit of fair and healthy competition, and to require that equal facilities and reasonable rates shall be secured to all, does not condemn a contract between railway companies operating competing lines, which is made for the sole purpose of preventing strife and preventing financial ruin to one or the other, so long as the purpose and effect of such an agreement is not to deprive the public of its right to have adequate facilities and fixed and reasonable prices. On the contrary, such agreements, instead of being obnoxious to the law, because detrimental to the public interest, are to be upheld for the reason that they benefit the public by preventing unjust discrimination among shippers and providing equal facilities for the interchange of traffic, and thus avoiding many of the unfair and unjust results which often follow the unrestricted competition of rival companies.

In the case stated an injunction was prayed by the attorney general under the Anti-trust Act of July 2, 1890, 26 Stat. at Lg., 209; but the attempt to extend the act to traffic arrangements between common carriers failed on two grounds: One that such agreements are not combinations in restraint of trade, and the other that common carriers subject to the conditions of the Act of February 4, 1887, are not governed by the later statute of 1890. An examination of the cases on which the learned judge bases his decision may not be unprofitable in aiding us to decide whether a new departure has been taken in this department of the law or not.

The question as to the legality or illegality of contracts in so-called restraint of trade is a much mooted one, while the test to be applied varies in different courts. The general rule is that contracts in restraint of trade, if partial and reasonable, are not void, but the practical difficulty is to determine what restraint is reasonable. And this is where the courts divide, some being influenced by the actual effect of the agreement, others, and these the great majority, by the supposed injurious tendency. The following cases, taken up in the order of citation by the court in the principal case, show this difference in opinion:

The first case cited is Commonwealth *v.* Carlisle, Brightly N. P., 36 (1821), which came before the court on a writ of *habeas corpus* after a commitment on the charge of conspiracy. The defendants

were arrested for forming a combination among the master shoemakers to employ no one save those who would accept a certain reduction in wages. It appeared that the employees had previously compelled a rise in wages by a similar combination among themselves. GIBSON, C. J., released the defendants on bail, holding that the case was one for a jury, as the motive for combining or the nature of the object to be attained were the discriminating circumstances in such cases. People *v.* Fisher, 14 Wend., 9, was the case of an indictment against certain journeymen shoemakers for conspiring to raise the prices for making shoes, and to compel their fellow-workmen to accept such wages and none lower. It was held to be a combination with an object injurious to the public. In the next case cited, Hooker *v.* Vandewater, 4 Denio, five canal companies agreed to establish rates of freight and passage to govern the association. The object was declared in the agreement to be "to establish and maintain fair and uniform rates of freight and to equalize the business of forwarding on the Erie and Oswego Canal among themselves, and to avoid all unnecessary expenses in doing the same." The Court, however, held: "To destroy rivalry and keep up the prices to certain rates was the great object of the agreement. The transaction amounted as I think, to a conspiracy to commit an act injurious to trade."

In Stanton *v.* Allen, 5 Denio, 434, there was an agreement by thirty-five canal companies with the avowed purpose of "establishing fair and uniform rates of freight," whereby the earnings of the companies were virtually pooled. The action arose on a promissory note given in pursuance of the agreement. The Court held the contract void, as injury to the public must be the inevitable result in poorer service and higher rates. Note that it did not appear that such had actually been the result, but the judge draws this picture of inevitable injury by a process of deduction.

Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa., 173, arose on an agreement entered into by five coal companies to divide two coal regions of which they had the control. A committee was to be appointed to decide all matters of importance, to fix prices and to appoint a general agent to whom all the coal mined was to be delivered, and who was to have power to suspend shipments by any company beyond its proportion. The Court held the agreement illegal as in restraint of trade, as also forbidden by a New York statute which forbids "persons to conspire to commit any act injurious to trade or commerce." Craft *v.* McConoughy, 79 Ill., 346, was an action for division of profit under an agreement made by four local grain dealers. Profits were to be pooled and prices fixed by a committee. The combination controlled all the warehouses in the city, though its organization was kept a secret. There were no proofs that the rates had been unreasonably raised. The Court held, however, that the contract was void as injurious and oppressive to the public. In Salt Co. *v.* Guthrie, 35 Ohio, 666, an agreement was called in question by which an association had been formed by certain dealers in a salt-producing district of Ohio. A

committee was to regulate price and grade and control the time of receiving the product from the members, none of whom were to sell at their own factories save at retail. It was in evidence that the association did not include all the dealers in the district, and that its salt was placed in competition with the product of outside dealers. The Court nevertheless held the contract void, as the tendency of such contracts is to destroy competition.

The learned judge next cites Texas R. R. *v.* Southern Pacific, 6 So. Rep., 888, where specific performance was sought of an agreement to pool the traffic of the two roads and not to discriminate against each other. But the Court refused to grant the petition, saying: "We have been at great pains to examine all the authorities, ... and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce." In Anderson *v.* Jett, 12 S. W. Rep., 670 (Kt. App. Ct.), specific performance was sought for an agreement between the owners of two competitive steamboats to divide the net earnings. Prayer was refused. Gibbs *v.* Gas Co., 130 U. S., 396, was an action brought on an agreement to pay for services in forming a pool of the gas companies of the city of Baltimore. The contract was held to be illegal and recovery refused, the Court saying: "Courts decline to enforce contracts which impose a restraint, though only partial, upon a business of such character that restraint to any extent will be prejudicial to the public; but where the public welfare is not involved, and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained." From this statement of Chief Justice FULLER, Judge RINER comes to the conclusion in the principal case, that the question whether or not the contract is prejudicial to the public interest is the test to be applied. But it will be seen that in this as well as in the previous cases cited certain business of a *quasi* public nature, including common carriers, had been set down as of such a character that restraint, though only partial, would be prejudicial to the public interest. And though the learned judge is right in saying that the question whether the restraint is prejudicial to the public interest is the test, yet the decisions had gone further and held that any restraint in the nature of a pool or an arrangement by common carriers to fix rates was prejudicial to the public interest, so that he might have decided the case here without going further. The Court, however, now turns to certain cases where restraints have been deemed reasonable. But it is noticeable that in every instance the restraint was upon the use of a patent right or secret process, or else it was to insure the whole of the good will of the business, while there is not one case of combination by common carriers to refute the four adverse decisions already quoted.

In Roller Co. *v.* Cushman, 143

Mass., 353, three manufacturers of patent roller shades entered into an agreement to fix prices and divide profits for three years. The agreement was held valid, as it did not look to affecting competition from without, as the parties had a monopoly by their patent. Also, Gloucester Glue Co. *v.* Cement Co., 154 Mass., 92. In Davis *v.* Mason, 5 Tenn. R., 120, a partial restraint put upon a surgeon on the sale of his practice was held valid. To same effect is Homer *v.* Ashford, 3 Bing., 322. In Cloth Co. *v.* Lorsout, L. R., 9 Eq., 345, there is a very strong opinion as to the validity of contracts in restraint of trade, and a contract restraining one from selling anywhere within the kingdom was held valid; but here, again, it was a patent process for making oil-cloth that was sold. Where a dealer in drive-wells sold his stock in trade and covenanted not to engage in the business of making drive-wells, it was held, he could be restrained from entering the business within a reasonable radius of his former store. But this was clearly in the nature of a sale of the good-will: Hubbard *v.* Miller, 27 Mich., 15. Again, where the restriction covered the whole of the United States, yet was only coextensive with the business, it was held reasonable for the protection of the purchaser: Thermometer *v.* Pool, 51 Hun., 157.

In Diamond Match Co. *v.* Roeber, 106 N. Y., 473, the defendant had sold his stock, trade-mark and good-will, and covenanted with plaintiff not to engage in the match business within any of the United States, save Nevada and Montana. The plaintiff was a syndicate engaged in buying up all the match factories in the country, and now sued to enjoin the defendant from breaking his covenant. The court held in a very able opinion that the common law doctrine that contracts in general restraint of trade are void without regard to circumstances, has been much weakened and modified, and enjoined the defendant from breaking his covenant. In reply to the argument, urged by the defendant, that the purpose of the plaintiff was to crush competition, the Court said: "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties." And the Court comes to the opinion, "that the covenant, being supported by a good consideration and constituting a partial and not a general restraint, and being in view of the circumstances disclosed reasonable, is valid and not void." It is a remarkable fact that in Richardson *v.* Buhl, 43 N. W. Rep., 1102, the Supreme Court of Michigan decided that a contract by this same syndicate, identical with the one in the above case, was unreasonable and void. SHERWOOD, Chief Justice, said: "It is difficult to conceive of a monopoly which can affect a greater number of people or one more extensive in its effect on the country, than that of the Diamond Match Company." In the next case cited, where the purchaser of a steamer which had been used in California cove-

nanted not to employ it within ten years of date of sale on Californian waters, the United States Supreme Court held the agreement valid, and not against public policy: Navigation Co. *v.* Winsor, 20 Wall., 64.

On sale of a printing establishment a restriction on the vendor not to engage in the business within the State was held valid, and the vendor was compelled to live up to it. Judge CHRISTIANCY, in a masterly opinion, showed that "the public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers, but may also bring them so low that capital becomes unprofitable, and business men fail to the general injury of the community:" Beal *v.* Chase, 31 Mich., 521.

From the above cases the court comes to the conclusion as stated in the part of the opinion quoted at the head of this article, that cases must be judged according to their circumstances, and that such a contract between common carriers is valid, and is not an agreement, combination or conspiracy in restraint of trade in violation of the first section of the Act of July 2, 1890. The Court, speaking through Judge RINER, says: "My own view is that the contention of counsel is altogether too broad. The public is not entitled to free and unrestricted competition, but what it is entitled to is fair and healthy competition; and I see nothing in this contract which necessarily tends to interfere with that right." He then goes on to show that there is a large field left for competition in the manner and quickness of service, general facilities, etc., and that the fixing of rates was but a small infringement on the freedom of trade.

The point of view of the court in this case is particularly interesting. In Cleveland R. R. *v.* Closser, 126 Ind., 348, it was said: "It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is at least *prima facie* illegal." And again: "If such a contract can stand, it must be upon an affirmative showing, and one so full, complete and clear as to remove the presumption that it was formed to do mischief to the public by repressing fair competition." From this it appears that the courts have looked with anything but a friendly eye upon such combinations in the past. But in the principal case the contract is construed in the most liberal manner, and is by no means treated as *prima facie* illegal. It is true the case before us was heard on bill and answer, and, therefore, all allegations of fact in the answer were admitted to be true. But never before, I think, in a case of this kind has a court taken the real object of the agreement to be the same as the nominal one stated therein. The object here, as stated, was the establishment of just and reasonable charges, and in accordance with this it was affirmed in the answer that the public had been benefited by the establishment of such just and reasonable rates. The Court says in effect, as long as your charges are reasonable your combination is all right. While in most previous cases of combinations in trade the actual beneficial effect on the public has been discounted, and the object, as

set forth in the agreement, has been looked upon as only a cover to some sinister design.

In State *v.* Standard Oil Co., 30 N. E., 279 (Ohio Supreme Court), which was a proceeding in the nature of *quo warranto* against an Ohio corporation for joining the Standard Oil Trust, the Court said: "It may be true that it (the trust) has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly and it is the policy of the law to regard not what may, but what usually happens." From the facts in this case it would appear that it was the policy of the law, at least in Ohio, to disregard actual facts for preconceived theories. Again in Richardson *v.* Buhl, *supra*, in regard to the evidence that prices and rates had been reduced by the combination of dealers, the Court said: "It is no answer to say that this monopoly has, in fact, reduced the price of friction matches. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." In another one of the cases cited as authority by Judge RINER, Salt Co. *v.* Guthrie, it was said: "It is no answer to say that competition in the salt trade was not, in fact, destroyed or that the price of the commodity was not unreasonably advanced; courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." In Hooker *v.* Vandewater, *supra*, the object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight and equalizing the business among themselves, and to avoid all unnecessary expense in the same." Of this, JEWETT, J., observed: "The object of the agreement, as expressed in the written contract, was plausible enough, but it is impossible to conceal the real intention." He adds, "to destroy which rivalry and keep up the price to certain rates fixed by themselves was the great, if not the sole, object of the agreement." See also Stanton *v.* Allen, 5 Denio, 434; People *v.* North River Sugar Refining Co., 54 Hun., 354; Texas & Pac. R. R. *v.* Southern Pacific R. R.; 6 So. Rep., 888.

Railroad Co. *v.* State of Texas 36 Am. & Eng. R. R. Cas., 481, though directly in point, seems to have been overlooked by both judge and counsel in the principle case. There a bill in equity was brought by the attorney general to restrain several railroads from carrying out a traffic agreement identical with the one in the principal case, save that the contracting roads were fewer in number. The contract was held illegal as contrary to the constitution of Texas which provides that "no railroad . . . . or managers of any railroad corporation, shall consolidate the stock, property and franchises of such corporations with . . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line." The case was heard on bill and answer. The Court came to the conclusion that "a leading object, if not the sole object of the association is, by the appointment of a common governing committee, to fix rates of transportation so as to prevent competion among he several parties to the contract;"

and it was determined that the carrying out of this would result in giving such control to one road over another as is forbidden by the constitution. The judge, however, gives forth the dicta that it was not quite clear to his mind "that even in the absence of the constitutional provission, ... the defendant's association could not be enjoined as being in restraint of competition and contrary to public policy;" again evidencing the unfriendly way in which the courts have viewed any combination in trade to adjust prices and rates whether reasonable or no.

It is certainly refreshing to find such a broad and economic view of a class of agreements which has more often been the subject of abuse than of thoughtful consideration, as is expressed by Judge RINER. Surely this cry that competition is the life of trade should become dumb in the presence of the present stagnation of trade when it is becoming manifest to the minds of all that exchange of labor, which means exchange of money, is the life of trade, and that competition is but a slight element in comparison.

Such legal questions as the one involved in the principal case cannot be settled offhand by a simple reference to some dicta laid down in Queen Anne's time. Times and business conditions change and a rule which is based on public policy must vary with the conditions of the age. Such a rule as that against contracts in restraint of trade can only be rightly applied where the court gives full force and effect to the economic conditions and social needs of the age. Judge RINER has considered these conditions and his decision, we think, marks a step in advance in this department of the law of contracts.

C. F. EGGLESTON.