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## NOTES.

### ANTI-TRUST LAW AS APPLIED TO LABOR CASES.

The recent case of *Loewe* v. *Lawlor* (208 U. S. 274) on its facts presented a boycott of the plaintiff, a hat manufacturer, by the defendants, members of a vast combination, called the United Hatters of America. This organization is a part of the American Federation of Labor, and the boycott was effected by threatening plaintiff's customers throughout the States with loss of patronage if they continued to deal with the plaintiff. The case was held to be within the Sherman Anti-Trust Act [1] and the defendants were required to pay triple damages under Section 7 of that Act.

The broad principle upon which the case rests is that the Act

[1] Act of July 2, 1890.

applies to combinations of labor as well as capital. This conclusion is based upon the generality of the language of the Act, in that it embraces "*every* contract in restraint of trade;" upon the fact that during the pendency of the bill in Congress futile efforts were made to exempt labor organizations from its operation; and that in at least one case the point had been decided.[2] It is manifest that in holding that the Act applied to combinations of labor as well as capital, a principle was laid down which was much broader than were the facts of the case. The emphasis is laid upon the combination and not upon the *means* employed to effectuate this combination. Thus, although the means here resorted to was a boycott, yet the decision does not seem to have been rested upon this ground. It is submitted, therefore, that the doctrine of our case, that a combination of labor in restraint of interstate commerce is unlawful, substantially affects the common law rules in trade and labor cases. A consideration of the scope of this doctrine will make this apparent.

In our analysis of this doctrine we find these three elements, all of which must exist in order that the doctrine may apply: (1) the combination; (2) the restraint; (3) the interstate commerce; we shall take these up in their order. The combination may be of individuals or groups of individuals, and may take the form of a contract, an unincorporated association, or a corporation.[3] The "restraint" to be within the Act need not be an unreasonable one.[4] On the principle that the fixing of the price of goods embarked in interstate commerce by the members of an association *inter se*, is unlawful,[5] it would seem that the fixing of the price of labor employed in interstate commerce is also unlawful. Therefore, it would seem that a strike in pursuance of such a combination would be within the Act; and that this would probably also be true in case of a "sympathetic" strike. Lastly, the restraint must be of interstate in contradistinction to intrastate commerce. Thus, under the principle that the restraint which the Act declares unlawful is

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[2] *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 994; see also *In re* Dels. 64 Fed. 724.

[3] *Addystone Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Northern Securities Case*, 193 U. S. 197.

[4] *Northern Securities Case* (*supra*).

[5] *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *U. S.*, 196 U. S. 395; *Addystone Pipe & Steel Co.* v. *U. S.* (*supra*).

a restraint upon the transportation and sale, and not upon the manufacture of goods,[6] it would seem to follow that a combination, having for its purpose the fixing of the price of labor in the manufacture of goods within a State, would not be unlawful; and the same result would probably be reached even where the defendant had manufactories in several States. Of course, if, as in the present case, that purpose were effectuated by a means which was a restraint upon the sale of the goods, the combination would thereby become unlawful.

In view of the decision of the principal case, it is not surprising that a number of bills are pending in Congress intended to affect the doctrine of the case—some seeking to annul the decision, and some merely to modify it. It is in the latter category that the proposed Hepburn Amendment to the Anti-Trust Act is to be placed. It provides that "nothing in the said Act * * * is intended * * * to interfere with the right of employees to strike for any cause or combine with each other or with employers for the purpose of peacefully obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment."

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## The Effect of the Negotiable Instruments Act on the Liability of a Surety.

The first decisions under a uniform code are always to be watched with interest, upon whatever point they may arise, for the tendency of the Courts to follow them will be very strong. Particularly significant are they when bearing upon a fundamental principle of common law. Hence the profession has read with much thought the opinions of the Supreme Courts of Maryland and Oregon, delivered in the cases of *Vanderford* v. *Farmers' and Mechanics' National Bank of Westminster,* and *Cellers* v. *Lyons,* respectively, and collected in 10 L. R. A. (N. S.) 129 and 133. The question arising in these two cases, which, for purposes of interpreting the Negotiable Instruments Act was the same, related to the effect of a binding agreement between the payee of a promissory note and one of two joint and several makers, to extend the time of payment, without

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[6] *U. S.* v. *E. C. Knight Co.,* 156 U. S. 1.

[7] Thus, in *In re* Dels, 64 Fed. 724, a combination originally lawful because not affecting interstate commerce was held unlawful because it later did so.

the knowledge or consent of the other maker, who was on the note only as a surety, and known to be so by all parties. In *Cellers* v. *Lyons* the defendant, when he signed the note, had written the word 'surety" after his name; in *Vanderford* v. *The Bank,* the knowledge of his position had come to the holder in some other way, after the note was given, but it was clearly proved; as was also the binding agreement for extension of time and the ignorance thereof on the part of the defendant. Yet in both cases they so construed the Act as to prevent the discharge of the surety.

The grounds of both decisions are the same. Section 192 of the Act (as originally numbered) defines the party primarily liable as one "who, by the terms of the instrument, is absolutely required to pay the same." These defendants were makers; a maker is absolutely required to pay the note; therefore, defendants have assumed a primary liability. What, then, said the Courts, are the defences enumerated in the Act for parties with primary liability? Section 119 declares that "a negotiable instrument is discharged,

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Nowhere in this section, say the Courts, do we find any mention of binding agreements entered into by one of several comakers discharging the others. That provision appears in the next section, defining the grounds for discharge of a person *secondarily* liable; (Section 120, cl. 6). "By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." This language, in the judgment of the Courts, is exclusive; it applies to parties secondarily liable and to such only; moreover, one who, by the terms of the instrument, is absolutely required to pay, may never lay claim to such exemption. The only defences open to him are those outlined in Section 119. Wherefore, the inevitable conclusion that, however clearly he may have proved himself a surety, one who has signed as accommodation maker may not be thus discharged.

One of the interesting things about these two decisions is, that the Maryland Court pronounced what was already the rule in the jurisdiction,[1] whereas the Supreme Court of Oregon, in order to arrive at the same conclusion, found it necessary to reverse the existing law of the State.[2] The doctrine arrived at by these Courts was the rule of the early decisions, before equitable defenses were permitted in courts of law,[3] as a necessary result of the principle that paro[1] evidence could not be introduced to vary the terms of a written instrument. But with the introduction of equitable defenses into actions at law, the doctrine was repudiated, and the surety allowed to plead notice on the part of the creditors of his real position on the instrument.[4] Once this step was taken, it was easy to apply the ordinary rules of suretyship, and in the great majority of jurisdictions the accommodation maker was dischargeable under the exact facts of the cases before us.[5] A few States, including Maryland, adhered to the older doctrine,[6] and in these, of course, the Act has wrought no change,[7] but it may be safely laid down that the accepted rule was the other way.[8]

Not the least interesting thing about these decisions is the fact that such an interpretation was foreseen and warned against by Mr. Ames in his famous controversy with Brewster when the Act was passed. He says, ("Comments and Criticisms upon the Negotiable Instruments Law, 14 Harvard Law Review, 241"), with reference to Section 120 sub-sections 5 and 6, that "another sub-section should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser." And he adds: "The authorities are almost unanimous on this point also, although in a few jurisdictions the accommodation party must resort to equity

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[1] *Yates* v. *Donaldson*, 5 Md., 389 (1854).
[2] *Findley* v. *Hill*, 8 Or. 247 (1880).
[3] 2 Daniel on Negotiable Instruments, Sec. 1334; *Fentum* v. *Pocock*, 5 Taunton 192 (1813).
[4] *Pooley* v. *Havadine*, 7 El. and Bl. 431 (1857).
[5] *Baily* v. *Edwards*, 4 Best and Smith 761 (1864); *Hubbard* v. *Gurney*, 64 N. Y. App. 457 (1876).
[6] *Delaware Co. Trust Co.* v. *Title Ins. Co.*, 199 Pa. 17 (1901).
[7] Crawford on The Negotiable Instruments Law of Pennsylvania, p. 110.
[8] 7 Cyc. Law and Proc. 882.

for his relief." The failure to add the sub-section recommended by him rendered possible, and perhaps inevitable, the conclusion reached in these 1907 decisions.

I say "*perhaps* inevitable," for a possible way out has been indicated by Mr. Thomas A. Street in a brief note on these same cases in the eleventh volume of Law Notes, page 105. He criticises the decisions in unmistakeable terms, and points out that the introduction of Clause 4 in Section 119—"by any other Act which will discharge a simple contract for the payment of money,"—contemplated the arising of situations unprovided for by a definite section of the Statute, and rendered possible their decision upon common law principles. This, he says, is such a situation. This clause was apparently not dwelt upon in either argument; perhaps it may yet have its effect upon the Courts. The only other Court which has passed upon the question, so far as the writer can discover, is the Supreme Court of New York, in the case of *National Citizens' Bank* v. *Toplitz,* 81 N. Y. Supp. 422 (1903), in which the same interpretation was rendered. The case has not the authority of the Court of Appeals, however, which refused to rule upon this very question, giving judgment upon another point in the pleading.

Mr. Street ends his article with a short but cogent invective against what he calls smooth but dangerous defining clauses (of the nature of Section 192), in all uniform codes, which clog the free play of judicial interpretation. Certainly if such a clause permits a construction contrary to the design of the draughtsmen[9] and subversive of a fundamental and generally accepted rule of the common law, the moral is not without its point.

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## Restrictions Upon the Use of Land.

A covenant running with the land at law must be under seal; privity of estate is required; and it is immaterial whether the subsequent transferees have notice or not. Those agreements, which run with the land only in equity, termed restrictions, require neither seal nor privity, and notice is essential. In actions upon covenants (1) between the original parties, and (2) by or against transferees; and in actions upon restrictions (3) between the original parties—but not (4) by or against

[9] See address of A. M. Eaton—Reports of American Bar Association for 1907—page 1164.

transferees—there is a concurrent remedy at law and in equity. In all these three cases of concurrent jurisdiction, the question is always one of contracts; and the remedy in equity is always a question of the specific performance of contracts. Whether the burden is negative or affirmative[1] equity will grant relief, either against the original party or his transferee,[1] if the contract is such as equity can specifically enforce. In the fourth class of actions above—actions upon restrictions by or against transferees—there is no concurrent jurisdiction. The remedy in equity is exclusive. Nor is it based upon contract. It is not a question of specific performance, but of constructive trusts. Unless a holder is a purchaser for value and without notice,[2] he is bound as is a purchaser of land from one who has previously contracted to sell it. He takes a *res* in which another has an equity, and the obligation is constructively fastened upon him. In order that there be such an equity in the land, the agreement (1) must concern the use of the land; (2) it must be intended to bind future owners;[3] and (3) it must be one which equity has power specifically to enforce. In England the doctrine has been limited to negative burdens,[4] although as against the promisor, it is held to be immaterial whether the burden is affirmative[5] or negative. Since in England it is apparently the law, that the burden of a covenant running with the land, made by the owner of a fee simple with one other than his lessee, will not run so as to be enforceable against a transferee of the land,[6] there is never any remedy in England upon any agreement concerning land against a transferee, unless there can be a remedy by injunction—with the exception of the burden of a spurious easement, and of a charge upon land.[7] Both of the latter are held to run, and both impose affirmative duties. But in America the prevailing rule is that the burden of a covenant runs as well as the benefit,[8] and equity will

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[1] *Countryman* v. *Deck*, 13 Abb. New Cas. 110 (1883).

[2] *Tulk* v. *Moxhay*, 2 Ph. 774 (1848).

[3] Cf. *Norcross* v. *James*, 140 Mass. 188 (1885); *Brown* v. *Marshall*, 19 N. J. Eq. 537 (1868).

[4] *Haywood* v. *Brunswick Bldg. Soc.*, L. R. 8 Q. B. D. 403 (1881); Cf. *Hood* v. *North Eastern R. R.*, L. R., 8 Eq., Cas. 666 (1869).

[5] *Storer* v. *Great Western Ry. Co.*, 2 Y. & C. C. 48 (1842).

[6] *Keppel* v. *Bailey*, 2 Myln. & K. 517 (1834); *Austerberry* v. *Corp. of Oldham*, 29 Chan. Div. 750 (1885).

[7] *Morland* v. *Cook*, L. R. 6 Eq. 252 (1868) as explained in *Austerberry* v. *Corp. of Oldham*, *supra*.

[8] *Electric City Land & Improvement Co.* v. *West Ridge Coal Co.*, 187 Pa. 500 (1898).

enforce an affirmative burden against the transferee.[1] If the doctrine of constructive trusts is the true basis of allowing the burden of a restriction to run, it should also be immaterial whether it is affirmative or negative. If the contract is one that equity has power specifically to enforce, there is an equity in land in one case just as much as in the other. There is the same probability in one as in the other that the transferee paid less because of the burden—an unjust enrichment in each case. Unless there is some rule of policy, preventing the burdening of successive holders with the performance of affirmative acts for the benefit of others, those American courts which refuse to follow the English limitations, must be considered to have adopted the sounder rule.[9]

As to who is entitled to the benefit of the restriction, depends upon the intentions of the parties. Where the intentions are not expressed, it is a question of construction. Policy favors encumbering the land as little as possible; and therefore, unless a contrary intention appears, the benefit will be construed as personal to the promisee.[10] Prior grantees of the promisee may enforce the restriction against subsequent grantees, if it is clearly shown that it was so intended. This generally happens when land is divided up into lots, and laid out according to a general plan, and each lot is sold subject to the restrictions in that plan.[11] But if it appears that the restrictions were only intended for the benefit of the promisee, or land still retained by him, even though there were agreements between the promisee and each grantee, prior grantees will not be allowed the benefit of restrictions in subsequent grants.[12] If the intention is clearly expressed, there should be no reason why a restriction should not ensue to the benefit of an occupant of land never owned by the promisee. When the restriction benefits adjoining land, owned by the promisee, there is a presumption that it was for the benefit of this land, and subsequent holders can enforce it.[13] The assignment of the contract of restriction is presumed, when the land, to which it is attached, is assigned;

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[9] *Gould* v. *Partridge*, 52 N. Y. App. Div. 40 (1900).

[10] *Badger* v. *Broadman*, 16 Gray (Mass.) 559; *Keates* v. *Lyon*, L. R. 4 Chan. App. 218 (1869).

[11] *Barrow* v. *Richard*, 8 Paige (N. Y.) 351 (1840).

[12] *Jewell* v. *Lee*, 14 Allen (Mass.) 145 (1867); *Sharp* v. *Ropes*, 110 Mass. 381 (1892).

[13] *Peck* v. *Conway*, 119 Mass. 546 (1875); *Wilson* v. *Mass. Inst. Technology*, 75 N. E. Rep. (Mass.) 128 (1900). Cf. *Keates* v. *Lyon*, *supra*.

and the grantee gets the benefit of it whether he had notice of it or not.[14]

In a recent case land was conveyed to a canal company on condition that it construct a basin upon the land conveyed. The consideration was "the benefit which would result" to the grantors, "as owners of said land, by cutting the canal through, and erecting the said work, etc." The grantors erected a mill on the part retained, and for seventy years the basin was used by the grantors and their transferees as a place for loading and unloading vessels. A railroad acquired the land with notice, and constructed its road through the basin. The Court said that relief would have been granted upon the doctrine of Tulk *v.* Moxhay, were the original grantors bringing the bill; but denied relief to the subsequent grantees, because there was no reservation of an easement in fee, due to lack of words of inheritance, and because there was no covenant running with the land. Dawson *v.* Western Maryland Ry. Co., 68 Atl. Rep. (Md.) 301, Dec., 1907.[15] Whether the benefit was intended to be personal to the promisee, was not discussed. There may have been laches or acquiescence.[16] If the subsequent grantee was not entitled to the use of the basin, the purpose of the restriction could be considered to have failed, and therefore the burden should not be enforced.[17] In Massachusetts, where the same doctrine as to reservations is held, an opposite decision was reached, upon analogous facts.[18]

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## "Revival" of a "Revoked" Will.

One of the most mooted questions of the law of wills is the question of the so-called "revival" of a will "revoked" by an express statement to that effect in a later will, the revoking instrument being subsequently destroyed. The courts in England early differed as to the effect of such an act, the ecclesiastical courts holding that the question was one entirely of intention to be decided according to all the facts and circumstances of each particular case and to determine this question admitted

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[14] *Child* v. *Douglass*, Kay 560 (1854) and see *Rogers* v. *Hosegood* (1900) 2 Ch. 388, p. 406.

[15] Cf. *Hood* v. *North Eastern R. R.*, supra.

[16] *Whitney* v. *Union Ry.*, 11 Gray (Mass.) 359 (1858).

[17] *Duke of Bedford* v. *British Museum*, 2 M. & R. 552 (1822).

[18] *Bailey* v. *Agawan Nat. Bank*, 76 N. E. Rep. (Mass.) 449 (1901).

parol evidence,[1] while the common law courts held[2] that the second will never revoked the first, a will being in its very nature merely intentional and inoperative till the testator's death.[3] A similar difference of opinion has existed in this country. In Pennsylvania[4] it has been held that the presumption is in favor of a "revival" of the first will unless a contrary intention can be shown by contemporary declarations of the testator (*res gesta*). In Massachusetts[5] a wider latitude is allowed and the question being wholly one of intention subsequent parol declarations of the testator are as freely admitted as they were in the English ecclesiastical courts. On the other hand, in Michigan[6] it has been laid down as a positive rule of law that the destruction of a revoking will can never operate to revive the revoked will—the revocation in such cases taking place from the time of the excution of the revoking instrument —and parol evidence is inadmissable to show a contrary intent. In the recent case of Bates *v.* Hacking[7] a diametrically opposite decision was reached, largely on the authority of Goodright *v.* Glazier,[8] which the court cited with approval and followed. It was held that a clause of revocation in a will could have no effect till the date of the testator's death, it partaking of the ambulatory nature of the rest of the will and hence the destruction of a will containing a clause of revocation could have no effect on a prior will, the latter never having been revoked.

The decision[9] has much to commend it. The Pennsylvania and Massachusetts rules (affected as they were by the rulings of the English ecclesiastical courts) seem clearly wrong, since to admit parol evidence—even though it be part of the *res gesta*—seems to be a clear violation of the Statute of Wills

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[1] *Moore* v. *Moore,* 1 Phillim. 375; *Usticke* v. *Barden,* 2 Addams 116.

[2] *Goodright* v. *Glazier,* 4 Burrows 2512 (1776).

[3] The question was finally settled in England by the Wills Act, 7 Wm. IV, and 1 Vict. c. 26, Sec. 22, under which it has been held that no will or codicil revoked by a clause to that effect in a subsequent will can be revived by the destruction of such revoking will or codicil.

[4] *Flintham* v. *Bradford,* 10 Pa. 82 (1848).

[5] *Pickens* v. *Davis,* 134 Mass. 252 (1883).

[6] *Scott* v. *Fink,* 45 Mich. 241 (1881); *Cheever* v. *North,* 106 Mich. 290 (1895).

[7] 68 Atl. 622 (Decided Dec. 30, 1907. Rehearing Jan. 28, 1908).

[8] *Supra.*

[9] It is interesting to note that in *Goodright* v. *Glazier* (*supra*) the reports do not clearly indicate whether or not an express clause of revocation existed in the second will. Subsequent decisions in quoting the case have, however, generally assumed the existence of such a clause.

requiring testamentary instruments to be in writing. The argument against the Michigan rule is that it practically divides one instrument—with one signature and one attestation—into two: one, the clause of revocation, which takes effect immediately, and the other, the rest of the will, which has no effect till the testator's death. Were the clause relied on for the revocation put in a separate instrument there would, of course, be no doubt as to its immediate operation, and the Michigan courts hold the fact that it is put into a will ought not to effect its character.

Certainly, it would seem that the term "revival" is a misnomer (except in jurisdictions which admit parol evidence), since if a will is once revoked it would seem it could not be reinstated without complying with the terms of the statute. If it has never been revoked by the second will, of course there can be no revival, the effect of the original will never having been altered. Had the second will been one merely inconsistent in substance with the first and contained no express clause of revocation, the first would in no case be revoked till the testator's death and hence no question of revival could arise.[9] In Bates *v.* Hacking[7] there was a statute specifying the methods by which a will might be revoked. That revocation by a clause to that effect in a subsequent will was one of the methods enumerated was held immaterial in determining the question as to the time when such revocation clause took effect.