THE FEDERAL ANTI-TRUST ACT OF 1890.*

MONOPOLY.

A monopoly exists where all the selling or buying in a particular commodity is in the hands of an individual or combination of individuals. Monopolies are of several kinds considered with respect to their origin, and the principles of the common law applicable vary accordingly.

A monopoly may arise (1) by individual effort, that is, successful competition, which may be fair or unfair; (2) by grant from the state, as patents, franchises, etc.; (3) by operation of nature; (4) by accident; (5) by purchase; (6) by combination.58

The act does not define monopoly, but provides that every person who shall monopolize or attempt to monopolize or combine to monopolize shall be subject to the penalties prescribed. If we adopt a strict construction of the act, every monopoly relating to interstate trade will be unlawful. If we adopt a liberal construction, we must distinguish between these several kinds of monopolies, and it is most unfortunate that the statute is not worded accordingly. The common law apparently had no objection to a monopoly per se but only to some of the means of achiev-

* Continued from the December issue, 62 University of Pennsylvania Law Review, 102.

There was no objection at common law to (1) a monopoly achieved by successful fair competition, (2) a monopoly arising by accident, (3) a monopoly by grant from the state, and there are several *dicta* that the act does not apply to the case of a monopoly achieved by individual effort. Although the common law afforded a remedy for unfair competition, there does not seem to be anything to show that there was any objection to a monopoly achieved by unfair competition. It seems probable also that if the monopoly has been achieved by an unlawful act, it comes within the condemnation of the act as an unlawful monopoly and should be disposed of as a monopoly, even though the court would have no power to prevent by injunction the unlawful act which has been committed.

No case has been decided involving the application of the act to any kind of a monopoly except (1) such as have their origin in a grant by the state, (2) natural monopolies. Any case, therefore, relating to an ordinary business is to be referred to that part of the act condemning combinations in restraint of trade, and will be discussed under that heading in a subsequent part of the article.

We may first point out a principle common to natural monopolies and patents, both being inevitable and protected by the law. A combination of such monopolists will be capable of correspondingly greater mischief, and consequently may be looked upon by the law with a very jealous eye, and circumscribed within much narrower bounds than will be the case with an ordinary business. In all these cases, it seems as if the greater power enjoyed by the individual monopolist gives him less power of combination than in the case of a merchant engaging in a business more open to competition.

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59 Further support to this view is furnished by reference to the title in which the word unlawful apparently only refers to restraints, but there is room to argue that it also qualifies monopoly. See George F. Canfield, 9 *Columbia Law Review*, 104.

Monopolies arising by grant from the state are of two kinds, patents and public service corporations, and of the latter, common carriers are the only ones which have been considered by the courts in connection with the application of the act, and will be separately discussed.

**NATURAL MONOPOLY.**

The owner of a natural monopoly, such as a coal mine, oil well, etc., stands in a class by himself. The law cannot condemn his business without interfering unduly with rights of property. The real difficulty in these cases in this country is that the state failed to impose proper restrictions on the acquisition of the rights in the beginning. Of course, in many of these cases, the monopoly is more apparent than real because the owner of a source of supply is in competition with other persons owning similar sources of supply. If in such case the product is sold in another state, the penalties of the act would apply if we adopt a literal construction of the statute. No such application of the act has been invoked. Where, however, a number of natural monopolists combine, they may bring themselves under the provisions of the statute. In several cases such a combination has been dissolved in proceedings by the United States under Section 4.61

PATENTS.

A patentee has a monopoly of the manufacture and sale of the patented article, and is very much in the position of an owner of a natural monopoly. Both control the sole source of supply of the commodity in question. Since this right rests on an express act of Congress, there is strong ground to argue that the Act of 1890, even when strictly interpreted, does not apply. "'Monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession."\(^6\)

Just, however, as a combination of two or more owners of a natural monopoly may incur the condemnation of the law, so a combination of the two or more patentees may, in like manner, be obnoxious to the Anti-Trust Act.\(^6\)

The patentee may employ middlemen or enter into restrictive agreements with them. He may not care to manufacture and may give others the right to manufacture at a royalty. He may compel the purchaser of the patented articles to enter into agreements restricting the use thereof. The principles governing the validity of any of these arrangements depend upon the proper construction of the patent laws, and the individual rights of the patentee, and lie outside the scope of our discussion.\(^6\)

Any valid arrangement of this kind, however, may be made the

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\(^6\) Of course, a patentee may dispose of his product and yet not be engaged in interstate business, although such cases are probably very rare. The patented article is not in itself a commodity of interstate commerce because it is patented, and does not become subject to the Act of 1890 until bought and sold in the channels of interstate commerce. This principle was overlooked by Baker, J., in Rubber Tire Wheel Co. v. Milwaukee Rubber Wheel Co. (1907) 154 Fed. 358 at 362, 3 Fed. A. T. Dec. 272 at 278, where he said: "The necessary implication (from the Patent Laws and the Act of 1890) is that the patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states." The jurisdiction of the Federal government over patents rests on an express grant in the constitution, and not on the commerce clause, consequently a patent does not come within the purview of the power over interstate commerce until the patented article has been disposed of in the channel of interstate commerce. The owner may release the article from the dominion of the monopoly without engaging in interstate commerce.

cloak of a combination of patentees securing the control of the market, which the rights under their individual patents would not give them, and which control would be sufficient to violate the statute.

The decisions may be considered under the following heads: (1) where in a suit for infringement or some controversy between the patentees the invalidity of the combination under the Act of 1890 is set up in defence; (2) where the United States has proceeded under Section 4 for an injunction against the combination of patentees.65

When there is a sale of a patent with a covenant in restraint of trade by the vendor, the validity of which is drawn into question, the case seems to depend on principles relating to covenants in restraint of trade in general and not to involve any principles peculiar to patentees.66 We shall first discuss the case of a combination between patentees.

In Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.,67 the bill was dismissed in the court below on the ground that the plaintiff was asking for an injunction to enforce a contract relating to the use of patents, that the plaintiff had acquired so many patents that its operations extended beyond a monopoly in the beneficial use of a specific invention only, and that it intended to create, in common with many other manufacturers, a monopoly in the manufacture of the article to which the patents related by securing and holding all the patents relating thereto. On appeal the decision was reversed, and a decree for the plaintiff entered, the court saying the case was that of a bill to restrain interference and infringement and, per Grosscup, J., that the patents all related to one invention and were blossoms of the same tree. Baker, J., delivered the opinion of the majority and evidently went on the ground that since the separate patentees had full

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65 We have already noticed that the circumstance that the plaintiff is a member of a combination unlawful under the Act of 1890 is no defence to a third party in a suit for infringement. See n. 29, ante.

66 This subject has been discussed under covenants in restraint of trade. For an instance of such a case see American Brake Beam Co. v. Pungs (1903), 141 Fed. 923, 2 Fed. A. T. Dec. 826.

power over their patents, they must have the same power when the patents were combined.

In *Goshen Rubber Works v. Single Tube Auto. and Bicycle Tire Co.*, there was an action by a patentee against a licensee to recover royalties. The defence was that the agreement was in restraint of trade and therefore void. The patentee granted various licenses of the same patent, and then entered into a restrictive agreement between the various licensees and itself, agreeing upon certain royalties, upon which agreement the suit was brought. Judgment was entered for the plaintiff, the court saying that the contract was beneficial to the patentee and that the public had no right to competition between the different licensees, and consequently the modification regulating the sale was valid. The court also said that the restrictions were like those in the Rubber Tire Wheel case.

In *Bement v. The National Harrow Co.*, the Harrow Company brought suit on its license contract with one Bement, and the Supreme Court held that the contract in itself was valid and enforceable, there being nothing in the record from which the court could draw any proper inference as to the existence of other contracts or a combination of manufacturers of spring tooth harrows; that the license contract related to a patent conferred by grant of the United States Government; that the fact that the conditions in the contract kept up the monopoly or fixed prices did not render them illegal; that the contract affected interstate commerce because it called for the manufacture of harrows in one state and the sale of the product in another state, and that the contract was not within the Act of 1890.

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, the owner of a patent brought an action at law to recover royalties due under the license system. In the court below judgment was entered for the defendant on the ground that the contracts were void within the Act of 1890 because the contracts

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THE FEDERAL ANTI-TRUST ACT OF 1890

attempted to secure results not contained within or flowing from the lawful monopoly of the patent, and because the system comprised (1) the raising and maintenance of prices and restriction of interstate trade in circuits where the patent was declared void, (2) the creation of a fund for crushing out competition throughout the United States. On appeal, the decision was reversed on the ground that none of the provisions of the contract touched any matter outside of the monopoly under the patent. Grosscup, J., agreed, but took occasion to say that he was not prepared to hold that patented articles are never articles of trade among the states, within the meaning of the Act of 1890. There was in this case a requirement that the licensee join the licensor in a combination or pool to control the output and price of the patented article.

In United States Consolidated Seeded Raisin Co. v. Griffin & Skelly Co.,\(^n1\) there was litigation over a number of patents between various claimants, and an agreement was made conveying the patents to a common owner who was to grant licenses, defend the patents, each claimant taking the license from him, and the court held in a suit on the license that the agreement was valid on the authority of Bement v. National Harrow Co. In this case all the licenses were in a common form, and defendant was a party to the combination.

In Blount Mfg. Co. v. Yale & Towne Mfg. Co.,\(^n2\) there was a combination of manufacturers under various patents, each to restrict his own trade to increase and maintain price, pool profits, and eliminate competition, which was held void under the Act of 1890. The case arose on a demurrer to a bill in equity to enforce the contract, and asking for an accounting in accordance with the terms of the contract concerning profits arising from the manufacture and sale of the article.

In National Harrow Co. v. Hench,\(^n3\) a number of manufacturers of spring tooth harrows organized a corporation to which each assigned the patents under which he was operating, and took

back an exclusive license to sell the same style of harrows and
no other upon a scale of uniform prices fixed in a schedule. The
combination controlled the sale of 90 per cent. of the spring
tooth harrow business in the United States, and it was held that
the corporation could not enforce the contract in equity, it being
void as in restraint of trade.

No clear principle is laid down in these cases, but it is appre-
hended that the distinction to be drawn is between individual
action and combined action. The patentee has a monopoly, and
under it is entitled to restrain trade. The question in any case,
therefore, is whether the restraint arises from the exercise of
rights granted by the letters patent, in which case it is valid, or
whether the restraint arises from the combination of the rights
of several patentees, in which case, if the restraint is, under a
liberal construction of the statute, too great, the combination may
be void. The tendency appears to be to sustain most combina-
tions of patents, proceeding partly upon the erroneous idea that
the patentee has greater power of combination because he is a
patentee, whereas, as we have pointed out, he should have less.
This issue is entirely one of fact.

Only one case has been found of a proceeding by the United
States under Section 4 to enjoin a combination of patentees. In
Standard Sanitary Mfg. Co. v. United States, the defendants
were members of a combination embracing 85 per cent. of the
manufacturers and 90 per cent. of the jobbers in enameled iron-
ware in the United States. It appeared that a certain corpora-
tion had obtained a patent on an improved process of enameling,
and that this company controlled about 50 per cent. of the busi-
ness and steadfastly refused for some time to grant to any other
manufacturer any license to use the patent. The product of the
other manufacturers was inferior in quality, and its sale was said
to hurt the reputation of enameled ironware and generally injure
the business. In this condition of the trade, an individual not
connected with the corporation procured an assignment of the

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4 (1912) 226 U. S. 20, 33 Sup. Ct. Rep. 9, 57 L. Ed. 9, affirming (1911) 191
THE FEDERAL ANTI-TRUST ACT OF 1890

patent, as well as several other infringing ones, to himself, and then brought 85 per cent. of the manufacturers and 90 per cent. of the jobbers together in an arrangement by which they all took licenses from him and entered into agreements as to the price at which the articles should be sold. The agreement eliminated all competition between the manufacturers and the jobbers. The court held that the agreements were void under the Act of 1890 because they transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it, and distinguished this case from the Bement case, because there there was only one contract involved and here there was a large number of contracts covering almost the entire market. The case seemed to go on the ground that the whole agreement was for the purpose of elimination of competition and used the patent as a cloak for the purpose. The question is, after all, one of fact, and it is probable that the circumstance in this case that an individual interjected himself into the situation and procured the patents and arranged the contrivance, was an important element in influencing the court in reaching the decision it did. If the corporation controlling the patent had itself made these arrangements, a different result might have been reached.

There is no reason to suppose that the rule is different in the case of proceedings by the United States from that applicable in the case of proceedings between the parties, and the question is the same in all cases,—does the control over the market arise merely from the patent rights or from the power of the combination?

LABOR UNIONS.

Labor unions seem to require separate treatment, as they involve several forms of restraint of trade, which may be specified as follows: (1) The laborers, by combining, may effect a monopoly in the sale of their labor and deprive the employer of a free labor market, thereby producing a state of affairs with respect to the sale of labor directly condemned by the act, and in no wise to be distinguished from a monopoly by sellers or manufacturers of any particular product, as, for instance, petroleum or tobacco. (2) The members of the union may, by use of force, threats,
and persuasion against other employees of their employer who are not members of the union, compel the latter to leave work. In this case they induce a third party to break the contract with the employer, and the question of how far the action of inducing a third party to break a contract is an actionable wrong is one on which there is considerable law, and which seems to be fully covered by the common law. It is doubtful whether it is within the provisions of the act. (3) By a boycott the members of the union may injure the sale of their employer’s goods or diminish his business by driving away customers, that is, preventing others from dealing with him. (4) The employees of a railroad company engaged in interstate transportation may, by a strike, cause a suspension of the operations of the railroad, and thus prevent the free flow of commerce between the states. This is the form of restraint of trade by a labor union which has perhaps attracted the most attention.

We may summarize these four forms as follows: (1) monopoly of the selling of labor; (2) action upon other employees inducing them to break their contract; (3) damage to the employer’s business by driving away customers; (4) combination of employees preventing employer from fulfilling its public duty. The chief evil to the employer under the first form is the necessity of his paying a high price for labor, perhaps an excessive price, and a restraint on his freedom in the purchase of labor. This restraint, of course, is the same as the restraint on any other purchaser, but the employer seems to have very little sympathy from the public on this score, and his plight in this connection attracts very little attention. It was earnestly contended that labor unions, that is, combinations of laboring men were not subject to the provisions of the Act of 1890. It seems perfectly clear, however, and it has been so decided in a number of cases, that every such combination is subject to this provision just as any other combination in restraint of trade.55 In a num-

55 Labor unions have been held subject to equity proceedings by the United States under §4 in the following cases: U. S. v. Workingmen’s Amalgamated Council of New Orleans, et al. (1893), 54 Fed. 994, 1 Fed. A. T. Dec. 110, affirmed in 57 Fed. 85, 1 Fed. A. T. Dec. 184; in this case an injunction was issued against a general and sympathetic strike of a number of labor
ber of proceedings independently of the statute, the provisions of the act have been applied to a combination of laborers.  

Only one case has arisen of a proceeding under Section 7. The same principle, of course, applies, and a labor union is no more exempt from liability from such a suit than is any other combination. The only reason that such suits are not brought oftener is that the defendants in such cases are usually unable to respond in damages. The question as to this remedy arose in the case of Loewe v. Lawlor, commonly referred to as the Danbury Hatters Case, in which there was an action for treble dam-


Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (1894) 62 Fed. 803, 1 Fed. A. T. Dec. 266; the employees of a railroad under the management of a receiver refused to haul Pullman cars until the Pullman Company had acceded to the demands of its striking employees, and the court issued an injunction restraining the sympathetic strike of the employees of the railroad company in this particular. Waterhouse, et al., v. Cover (1893), 55 Fed. 148, 1 Fed. A. T. Dec. 119; in this case it was decided that a rule of the Brotherhood of Locomotive Engineers forbidding a member of the Brotherhood from hauling cars of a railroad company on which the engineers belonging to the Brotherhood are on a strike, is in restraint of interstate commerce, and consequently the receiver of a railroad company will not, unless the rule is abrogated, be authorized to enter into an agreement with the officers of the Brotherhood. In this case the Brotherhood submitted to the court the question of the validity of the rule, the proceedings arising in a petition for an order on the receiver to enter into the contract with them. Where a labor union threatens a strike unless a certain brewer will join an association of brewers, which is formed for the purpose of raising the price of the product and apportioning the sales, a retail dealer who had been in profitable relations with an independent brewer was allowed an injunction against the union because if the brewer yielded to the threat of a strike and joined the association, the retail dealer would be irreparably injured and his profitable relations with the brewer at an end. Leonard v. Abner-Drury Brewing Co. (1905) 25 Appeal (D. C.) Cases, 161; 3 Fed. A. T. Dec. 1.

The plaintiffs were manufacturers of hats in Danbury, Connecticut, selling their product throughout the United States. Defendants were a union of workmen in hats existing throughout the United States, and were seeking, by striking and by declaring a boycott against the plaintiffs' goods, to force the plaintiffs to accede to the demands that plaintiffs' shops should be conducted in accordance with the rules of the union. The defendants demurred to the plaintiffs' statement, and the Supreme Court held that the demurrer should be overruled, saying that it was immaterial that the defendants were not themselves engaged in interstate business.

**Remedy Under Section 7.**

Section 7 gives an action at law for treble damages to any person who is injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by the act, that is, by the first and second sections. We must therefore examine the first and second sections to ascertain what is forbidden, and then see who is or may be injured by the doing of the unlawful act. The discussion of this section may be conveniently arranged under the following headings: (1) competition which may be fair or unfair; (2) purchaser against combination; (3) combinations of retailers, wholesalers and manufacturers; (4) refusal to trade; (5) covenants in restraint of trade. A tabular analysis of the first, second, seventh and eighth sections is appended in the note.

The important question is whether there is only a right of action for acts which come within the common law conception of unfair competition or whether other acts of competition may be complained of. The authorities give us no answer to this

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"The bearing of this section on combinations of carriers and labor unions is elsewhere discussed.

**Tabular Analysis of the First, Second, Seventh and Eighth Sections.**

(See Table on Next Page.)
question.\textsuperscript{81} It was contended in one case,\textsuperscript{82} without approval, however, by the court, that Section 7 gives a right of action only where a violation of the preceding sections results in legal injury to the plaintiff at common law.

It is perfectly plain that the act cannot give a right of action for every act of competition without discouraging the very freedom of trade and opportunity for competition which it is the obvious object of the statute to promote. Yet this is what the statute does, if literally interpreted, because the second section condemns as unlawful every attempt to monopolize; and since an attempt to monopolize describes the normal effort of every active successful business man, it follows that his competitors might sue him for damages caused by his successful competition,

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\textbf{Things forbidden by § 1.}\hfill\textbf{Persons restrained who may be injured and sue under § 7.}

\begin{itemize}
  \item \textbf{Every} Contract
  \item Combination in the form of trust or otherwise
  \item Conspiracy in restraint of trade, etc.
  \item \textbf{Covenator}
  \item \textbf{Covenantee}
  \item \textbf{Competitors of covenanter}
  \item \textbf{Third persons}
  \item \textbf{Persons buying from or selling to the covenantee}
  \item \textbf{Persons buying from or selling to the combination}
  \item \textbf{The members of the combination}
  \item \textbf{Competitors of the combination}
  \item \textbf{Same as in case of combination}
\end{itemize}

\begin{itemize}
  \item \textbf{Every} Person Corporation (by Sec. 8) who shall
  \item Attempt to monopolize
  \item \textbf{Any part of interstate trade}
  \item \textbf{Competitors of the monopoly}
  \item \textbf{Persons buying from or selling to the monopoly}
  \item \textbf{Members of the monopoly}
  \item \textbf{Competitors}
  \item \textbf{Persons buying from or selling to the attempted monopoly not injured since no monopoly achieved}
  \item \textbf{Members of the combination}
\end{itemize}


whether fair or unfair. No case has arisen as to this point, and our discussion of the decided cases will therefore be confined to competition by a combination. The difficulty with this part of the law is that the competitive power of combination is so much greater than that of an individual that the opportunity for acts of unfair competition are greater, and consequently the common law needs considerable expansion.

We have already pointed out that at common law combinations which unlawfully restrain trade could operate with impunity so far as third parties were concerned, as no question as to the validity of the combination could come before the court until one of the members sought to enforce the terms of the combination against another. This section of the statute was probably intended to give a remedy for this state of affairs.

In *Virtue v. Creamery Package Mfg. Co.*, the plaintiff, a manufacturing company, brought a suit under Section 7 against a combination of competitors, several of whom owned patents, and complained of the following acts: (1) prosecution against plaintiff by the defendants of two infringement suits, one of which resulted in a decree for a plaintiff and reference for an accounting; (2) circulation in the market of reports that plaintiff's product was an infringement of defendant's patents; and the court held there could be no recovery on either ground. The plaintiff also alleged that one of the defendants, who was the plaintiff in one of the infringement suits was a party to an unlawful combination, and the court said that, conceding that to be so, it had the right to sue, and could not, therefore, be held liable in an action of damages for bringing suit. One of the parties defendant had been constituted the sole selling agent of a corporation which had been one of the plaintiffs in one of the aforesaid infringement suits, which contract was held to be perfectly valid and not obnoxious to the Act of 1890. The Supreme Court went on the ground that the combination alleged was not proved, although one of the corporate defendants might in itself consti-

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stitute an unlawful combination under the act. The legality of the acts of competition alleged was not, therefore, passed upon. 84

In Monarch Tobacco Works v. American Tobacco Co., 85 the plaintiff, a corporation, sued several defendants, alleging a conspiracy to restrain trade, averring (1) secretly acquiring control of a hostile competing corporation, and falsely pretending that the said corporation remained independent; (2) secretly acquiring control of a box company with which the plaintiff had a secret contract for the production of boxes, thereby acquiring a material knowledge of the plaintiff’s affairs, and thereby ascertaining how many boxes the plaintiff required for its business. Demurrer to the complaint was overruled.

In People’s Tobacco Co. v. American Tobacco Co., 86 the complaint which was held to constitute a good cause of action set out that the plaintiff corporation was engaged in interstate business and that the several defendant corporations were guilty of the following acts: (1) Enticing away plaintiff’s workmen; (2) by false pretences to labor union receiving right to use union label; (3) enticing away plaintiff’s customers; (4) issuing coupons and premiums to purchasers, drawing away trade from plaintiff and compelling plaintiff to do the same (plaintiff claimed special item of damages for this); (5) secretly buying up rival companies, and particularly sellers of raw product, and causing them to discriminate against plaintiff; (6) paying consideration to retailers not to handle plaintiff’s goods; (7) bidding up tobacco and compelling plaintiff to pay more for raw material; (8) organizing a dummy competing corporation.

In Ware Kramer Tobacco Co. et al. v. American Tobacco Co. et al., 87 the plaintiff by its amended complaint, demurrer to which was overruled, set out that the defendants, being an unlawful combination within the terms of the statute, (1) resorted to

84 The opinion of McKenna, J., is somewhat obscure. He refers to the Owatonna Company, but as there were two companies of that name, one plaintiff and the other defendant; it is not perfectly clear which he has in mind.


unfair and coercive means to prevent the organization of the plaintiff company. (2) That one of defendant's managing officers threatened the persons proposing to organize the plaintiff company that, by fair means or foul, the defendant would destroy it. (3) That stockholders or prospective stockholders of the plaintiff company (afterwards organized) were threatened by officers of the defendants that the American Tobacco Company would take away from such persons the sale of its products. (4) That an officer in a bank was threatened by one of defendants that if he participated in the organization, his business would be made to suffer. (5) That persons from whom plaintiff bought raw product were threatened with injury to business. (6) That one of the incorporators of the plaintiff company was offered that if plaintiff would surrender its charter, all expenses incurred would be paid. (7) That false and unjust statements were circulated by defendants in regard to plaintiff's business and goods. (8) That the defendants (a) maintained spies upon plaintiff's shippers, and sent their representatives to customers so ascertained; (b) used coupons in an unfair manner; (c) sold cigarettes below cost of production; (d) paid jobbers extra discounts in territory where plaintiff's cigarettes were selling, giving jobbers free goods to induce them to press the sale of their goods as against the plaintiff; (e) required dealers not to handle plaintiff's goods; (f) interfered with the labor of independent manufacturers; (g) made jobbers and dealers afraid to keep plaintiff's goods exposed on their shelves. (9) That a large order from China to plaintiff for cigarettes was discovered by the defendants through their spies, and the defendants through their efforts shut the plaintiff out of that market. (10) That the defendants procured a representative to be employed as manager of the plaintiff's sales department, who so managed the sales department of the plaintiff's business as to greatly injure and decrease it, acting in the interests of the defendants.

In *American Banana Co. v. United Fruit Co.*, the plaintiff, 88

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THE FEDERAL ANTI-TRUST ACT OF 1890

a corporation under the laws of Alabama, brought suit against the defendant for acts of competition, which were set out as follows: (1) Instigating the officers of a foreign government to seize a plantation of plaintiff situate therein and preventing plaintiff from exporting bananas therefrom to the United States.89 (2) Outbidding plaintiff by securing long term contracts with producers of bananas in foreign countries. (3) Defendant establishing a transportation line between the United States and the said foreign countries, which line, at the behest of defendant, discriminated against the plaintiff. (4) Enticing away plaintiff's employees. (5) Threatening to discharge from its own services such of its workmen as became financially interested in the plaintiff's enterprise. The court held that there could be no recovery. In one case, where the plaintiff was prevented from operating a refinery which was built, its right to recover was sustained.90

So much therefore of the decision in American Banana Co. v. United Fruit Co.,91 that the act gives no right of action to one who is merely prevented from embarking on a new enterprise by the threatening aspect of an already existing monopoly or combination, may probably be disregarded.

No clear principle can be drawn from these cases. Numerous different acts, some of them clear common law torts, have been complained of and the courts have generally disposed of the case on the complaint as a whole, without distinguishing the difference, if any, in the various acts of the defendant. Consequently it is impossible to clearly point out which acts are valid under the act, and as many of them clearly seem to be valid, the invalid ones cannot be distinguished sufficiently to lay down any rule. On the whole, we shall have to leave this branch of the subject in some obscurity until a greater accumulation of decided cases has furnished an opportunity to give some shape to the law. It may be concluded, however, that the remedy furnished by Sec-

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89 As to this see note 6, ante.
tion 7 goes beyond the limits of the common law remedy for unfair competition.

Buyer or Seller Against the Combination.

The person buying or selling the particular commodity is injured when the combination restrains the freedom of the buying or selling, which restraint may affect the price, quality, etc., of the article. All the cases which have arisen have turned on the element of price, and in nearly every case the purchaser has been complaining. Our discussion of the authorities, therefore, will be limited to these cases. The law seems to be that the purchaser is entitled to a price fixed by free competition, or perhaps a reasonable price, and that he is entitled to recover as damages the difference between that and the price paid. It does not follow, however, that he is entitled to compel the combination to sell to him at a reasonable price, or that the law will, except in the case of public service corporations, fix a price and compel a sale. Even the broad language of the Act of 1890 does not cover this point because its terms only condemn contracts and the making of certain contracts, and do not extend to the compulsory formation of a contract.

The leading case on this subject is Chattanooga Foundry Pipe Works v. Atlanta, where the plaintiff, who had bought from the combination declared unlawful in Addyston Pipe & Steel Co. v. United States, was held entitled to recover the difference between the price which he paid and a fair or reasonable price. Holmes, J., who delivered the opinion in this case, said "the transaction which did the wrong was a transaction between parties in different states if that be material." The bearing of the phrase "if that be material" is obscure. It may be gathered from

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The same rule would apply to a seller who is compelled by the combination of buyers to sell at a price below that fixed by free competition.


it that the learned judge thinks that it is not necessary for the sale to be an interstate sale. It is difficult, however, to see how the plaintiff can come within the scope of the act unless his trade with persons in another state has been restrained. It might be said that the combination, by acting upon purchases and sales between different states, so affected the price that a purchase by a resident of a state from somebody in that state, would necessarily be at a price brought about by the combination. There is also some doubt as to what the learned judge means by "the transaction which did the wrong." Does he refer to the act of combining among the defendants or to a sale at the enhanced price? It may perhaps be assumed that he meant the latter in view of a subsequent passage in the opinion, where he says that the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. It is apprehended that the true principle is this: the wrongful act is the combination, the act of combining, and that act of combining, when it deprives the purchaser of his freedom in buying, produces as a result a sale of the commodity at an enhanced price. It will appear, therefore, upon reflection that the sale is the result of the wrongful act, and not the wrongful act itself, and that the motives and inducements to make the sale are immaterial. Furthermore, the learned judge admits the damage to the plaintiff is the difference between the enhanced price which he pays and a price fixed by competition. This enhanced price, however, is part of the consideration of the sale, an element in

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*No case on this point has been found. In Montague v. Lowry (1904), 193 U.S. 38, 24 Sup. Ct. 307, 48 L. Ed. 668, 2 Fed. A. T. Dec. 327, affirming 115 Fed. 27, 2 Fed. A. T. Dec. 12, which affirmed 106 Fed. 38, 2 Fed. A. T. Dec. 53, see 98 Fed. 87, 1 Fed. A. T. Dec. 995, where the demurrer was overruled, the enhancement of the intra-state price was said to be part of the purpose of the interstate combination, and the plaintiff who was compelled to pay that excess price was entitled to recover it, but in this case the plaintiff was prevented from buying in the channels of interstate trade. A restraint as to interstate business may, it seems, be void notwithstanding a negligible amount of intra-state business might be affected in carrying it out. See remarks of Fuller, J., in Loewe v. Lawler (1908), 208 U. S. 274 at 301, 28 Sup. Ct. Rep. 301, 52 L. Ed. 489, 3 Fed. A. T. Dec. 324 at 350. Confer, Ellis v. Inman Poulson & Co., et al., 131 Fed. 182, 2 Fed. A. T. Dec. 577, reversing 124 Fed. 955, 2 Fed. A. T. Dec. 268.*
it, and if the sale itself is the wrongful act, how can an element in the wrongful act be the damage to the plaintiff?

In *Thomson v. The Union Castle Mail S. S. Co.*, there was an action at law for treble damages under Section 7. A combination of ship owners issued a circular promising rebates to shippers who did not patronize competing vessels. A shipper did so patronize, and the defendants refused to pay him any more rebates. It was held in the court below that the plaintiff's claim to the rebates, if any, was not an item of damages that grew out of the combination of ship owners, and hence plaintiff could not recover. On appeal, however, the decision was reversed and a new trial ordered, the court saying that the combination charged a sum in excess of reasonable rates which the plaintiffs were entitled to recover since they were coerced into paying that amount. There was nothing in the report, however, to show that the rebate was in excess of a reasonable rate, and it is difficult to see how the court reached such a conclusion.

In one case, however, where a combination sold goods under a contract to pay rebates to such purchasers as observed the restrictions imposed as to the purchase of the goods, it was held that the payment of the price exacted was voluntary, and when the combination went into the hands of a receiver, the purchaser could not recover the amount of the rebates out of the bankrupt estate. The court laid down the principle that the purchaser who had bought and paid for the goods at the enhanced price could not retain the goods and recover the price paid or any part of it. This case seems inconsistent with the others and may be disregarded unless it is explained on the ground that the recovery of the rebates would give an unfair preference as against the other creditors.

It seems perfectly clear under the cases that a purchaser who has been compelled to pay an enhanced price brought about

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by the unlawful combination may recover the difference between that price and a price which would have obtained without the operations of the combination.

Combination of Retailers, Wholesalers and Manufacturers.

A retailer is, in one aspect of a case, a competitor of a wholesaler, and as at the same time as he buys from him, the two stand in the relation of buyer and seller. So also a manufacturer or a wholesaler is a competitor of the retail dealer and also sells to him. The competition in this branch of trade seems to be very intense in the modern business world, and restrictive agreements are of very frequent occurrence.¹⁰¹

The cases amply sustain the principle that where a combination of manufacturers and wholesalers or retailers is sufficiently strong to restrain the freedom of the trade of the retailer and prevent him from dealing in that particular commodity, the retailer may sue under Section 7. So also a manufacturer or a wholesaler who is restricted by a combination of retailers and wholesalers or other manufacturers and shut out from a portion of his market, may in like manner recover treble damages under the act.

In United States v. Eastern States Retail Lumber Dealers Assn.,¹⁰¹ᵃ an association of retail dealers issued a circular among themselves designed to assist in preventing wholesale dealers from dealing directly with the customers. On proceedings by the United States an injunction was issued against the issuance of the circular on the ground that the circulation of the report discouraged competition by the wholesalers. The court did not inquire into whether the business of the wholesalers was unduly restrained, which it should have done, if the Supreme Court decisions in favor of a liberal construction of the act are to be followed. It is apprehended that the decision is open to objection on this ground. The cases arising between the parties are as follows:

¹⁰¹ The case of the manufacturer is separately discussed in a subsequent portion of this article.

In *Mines v. Scribner et al.*,\(^\text{102}\) the members of a combination of booksellers who agreed not to sell copyrighted books to any one who sold below the list price were held liable to plaintiff, who was on the blacklist as having sold below the fixed price and could not buy. Demurrer to complaint overruled.\(^\text{103}\)

In *Hale v. O'Conner Coal & Supply Co., Inc.*,\(^\text{104}\) the plaintiff brought an action under Section 7, and his complaint was held sufficient on demurrer. The plaintiff was a retail coal dealer, and sued a combination of other dealers who formed an exchange for maintaining prices, and because plaintiff would not maintain the prices, excluded him from obtaining coal, and circulated false and malicious reports as to plaintiff's standing. This case decides that one retail dealer may recover damages from a combination of dealers who interfere with his procuring supplies from wholesalers and circulate false reports about him.

In *Montague v. Lowry*,\(^\text{105}\) certain wholesale dealers in San Francisco entered into an agreement of exclusive buying and selling with all the manufacturers in the United States in a particular commodity by which the wholesale dealers agreed to charge double prices to those not members of the association, and the manufacturers agreed not to sell to them. It was held that the combination between the dealers and manufacturers was so bound together that the enhancement of price in California was part of the purpose and the plaintiff was entitled to recover treble damages under Section 7. The manufacturers in several states had refused to sell to him because he was not a member of the association, and consequently he had been compelled to procure tiles at the excess price from the dealers.

In *Wheeler-Stenzel Co. v. Nat. Window Glass Assn.*,\(^\text{106}\) a

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\(^{102}\) (1906) 147 Fed. 927, 2 Fed. A. T. Dec. 1035. It does not appear exactly what damages were claimed.

\(^{103}\) Of course, the publisher of a book is, in a sense, the manufacturer, and the seller of a manufactured product, and his case, therefore, is the same as that hereafter discussed of a manufacturer and the sale of his product.


manufacturer of glass and an association of wholesale dealers entered into an agreement by which the manufacturer was to sell exclusively to the association at a fixed price and charge a higher price to others. The combination controlled 75 per cent. of the buying and selling, and it was held that the plaintiff, an outsider, had a right of action under Section 7, and demurrer to his complaint was overruled. The plaintiff alleged that the combination deprived him of customers and prevented him from making a legitimate profit upon the customers which he retained.

In *Loder v. Jayne*, a retail dealer who refused to sell according to the list price fixed by the combination of manufacturers and retail and wholesale dealers, was allowed to recover against members of the combination, who, in consequence, had refused to sell to him direct, as a result of which he was compelled to procure the drugs from individual retail dealers and at a greater price than in the regular way.

In *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. et al.*, the plaintiff, a manufacturer of watch cases, sued the defendants, manufacturers and sellers of watch cases, who combined and agreed not to sell to any person who should thereafter buy or sell any goods manufactured by the plaintiff, and in consequence plaintiff lost a great deal of business. The defendants had entered into an agreement for the purpose of maintaining a fixed price for their goods. It was held he could not recover. The court said that the allegations did not preclude the inference that defendant sold its entire product in the state where it was manufactured, and there was nothing to show that the defendant did include all or substantially all the manufacturers of watch cases, and as the article was not of prime necessity, there was no objection to the defendant removing competition among themselves. Wallace, J., dissented on the ground that as the combination of the defendants was designed to compel the plaintiff to join in the compact to maintain an arbitrary scale

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of prices, and necessarily resulted in depriving dealers in many states of the untrammeled exercise of their right to buy from the plaintiff and was therefore unlawful, that no combination is justified in combining to compel a competing manufacturer to join them and destroy his business if he refuses to do so.

Refusal to Trade.

The law does not favor compelling an individual to sell at a certain price or to a particular person. Generally speaking, each seller may, except in case of public service corporations, refuse to sell to any person and fix his own price or terms of sale. Any other principle would seriously circumscribe the very freedom of trade which the law is striving to maintain. While this principle held good at common law, so far as individual action was concerned, the law was otherwise when a number of traders joined together in refusing to trade with a particular person. The most that the common law could do in such a case was to refuse to enforce the terms of the combination as amongst its members in a suit between them. If we adopt a liberal construction of the statute, the same principle will be observed except that under Section 7 there is the additional remedy which the party refused may pursue against the combination.

The distinction between rights of individuals to refuse to trade, and the right of the member of a combination to refuse to trade was referred to in one case, and in another case, which may be referred to the heading of individual action, the plaintiff refused was denied a right to sue under this section. In


Whitwell v. Continental Tobacco Co. (1903) 125 Fed. 454, 2 Fed. A. T. Dec. 271. In this case a corporation refused to sell its tobacco products to anyone who bought from a competitor, and it was held that no action lay under §7 by a middleman who declined to refuse to buy from competitors, demurrer to complaint being sustained. The corporation owned certain brands and had a monopoly, and the plaintiff was unable to procure those goods elsewhere. It was not an article of prime necessity. Defendant intended to and did acquire a monopoly in sale of goods of their brand.
other cases, where a combination refused to trade with the plaintiff, he was permitted to recover treble damages under this section.\textsuperscript{111}

Covenants in Restraint of Trade.

The effect of Section 7 on the case of contracts of sale in restraint of trade is uncertain. There are several persons concerned. The covenantee is injured by the non-performance of the covenant, but as he is only entitled to enforce when the covenant is valid and may avail himself of the invalidity of the covenant when sued by the covenantee for non-performance, and as the right of recovery given by the act cannot be used by way of set-off, he does not seem to come within the provisions of the section. The covenantor may perhaps enforce the covenant when it is invalid and the covenantee is without a remedy. The question then is, may the suit be brought under this section? No case has arisen as to this. The competitor of the covenantor, however, is benefited by the performance of the covenant because in that case one competitor is removed. It seems, therefore, as if the only person really injured is the buyer or seller of the covenantee, and the question arises against whom shall he bring suit—the covenantor or the covenantee? An innocent covenantor, in the case of a covenantee taking contracts to cover the market, should not be liable, as we have seen that he is probably at common law not affected with the illegality of the contract. The covenantee, however, is always a guilty party and

\textsuperscript{111} In Ellis v. Inman Poulson & Co. (1904) 131 Fed. 182, 2 Fed. A. T. Dec. 577, reversing (1903) 124 Fed. 956, 2 Fed. A. T. Dec. 268, a combination of lumber manufacturers raised the price of lumber in Portland, and refused to sell to anyone who bought lumber from competitors, and it was held that the outside dealers could recover in an action under §7 because his trade in dealing with the outside dealers was restrained. The case of the Arkansas Brokerage Co., et al., v. Dunn & Powell, Inc. (1909) 173 Fed. 899, 3 Fed. A. T. Dec. 752, was an action for damages under §7. The plaintiff, a broker, brought suit against a number of jobbers who had organized a corporation to do their own brokerage business, purchasing from manufacturers and jobbers in other states, and which corporation did practically all of the wholesale business of the locality. Some of these jobbers had theretofore done business with the plaintiff, and it was held that he could not recover, even though he was forced to withdraw from business in that locality. The case, however, proceeded on the ground that the combination did not affect interstate commerce, and the court also seemed to think that the combination was valid, anyhow.
should be liable, and where the covenantor participates in the intent or effort to control the buying and selling, he also should be liable. The question then arises, are they jointly and severally liable or only severally liable? The authorities furnish no answer to the question.

It seems clear that as between the members of a combination neither can sue the other under Section 7 for treble damages for the restraint imposed by the combination. No man can enter into an unlawful scheme and then enforce as against a partner in the transaction the penalties prescribed by the act.\textsuperscript{112}

\textit{Philadephia.}

\textit{Roland R. Foulke.}

\textit{(To be concluded.)}

\textsuperscript{112} Where the plaintiff enters into the agreement forming the trust, and has been sued by the trust for alleged failure on his part to observe the terms of the agreement, he cannot recover under §7 for damages caused by the bringing of the suit at law, Bishop v. American Preservers Co., et al. (1900), 105 Fed. 845, 2 Fed. A. T. Dec. 51, see 51 Fed. 272, 1 Fed. A. T. Dec. 49.