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## THE EFFECT OF THE DECISION IN THE SUGAR INSTITUTE CASE UPON TRADE ASSOCIATION ACTIVITIES\*

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The Supreme Court has declared that the Sherman Act,<sup>1</sup> "as a charter of freedom, . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>2</sup> It has announced that voluntary action to end abuses and to foster fair competitive opportunities may be undertaken by industry and "the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."<sup>3</sup> It is pertinent to examine the decision of the court in *The Sugar Institute, Inc. v. United States*,<sup>4</sup> to see whether, when these principles are applied to a concrete set of facts, a definite and practical result is obtained.<sup>5</sup>

The *Sugar Institute* suit was brought by the United States to dissolve the Institute and to restrain the sugar refining companies which composed it,

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\* Revision of address before Trade Association Executives in New York City on April 7, 1936.

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1. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927).

2. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359 (1933).

3. *Id.* at 374.

4. 56 Sup. Ct. 629 (1936). For a previous history of the case see Handler, *The Sugar Institute Case and the Present Status of the Anti-Trust Law* (1936) 36 COL. L. REV. 1.

5. The first case to reach the Supreme Court under the Sherman Act also concerned the sugar industry. The case, *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), held that the Sherman Act was powerless to reach a combination which monopolized the sugar refining business within the State of Pennsylvania. Although the combination had a substantial control of the refining business in the United States, the Court found that it did not directly restrain interstate commerce. For a time it was believed that the decision had destroyed the effectiveness of the Sherman Act, but subsequent cases have so restricted the holding that the Knight case is no longer a substantial obstacle to the enforcement of the anti-trust laws. The Sugar Institute case is in marked contrast to the narrowly legalistic interpretation which the Supreme Court adopted in its opinion in the Knight case.

and the individual defendants, from engaging in an illegal conspiracy in restraint of interstate and foreign commerce in violation of the Sherman Anti-Trust Act. The district court refused to dissolve the Institute.<sup>6</sup> It held, however, that the combination unreasonably restrained interstate and foreign commerce in sugar. A decree was entered which permanently enjoined the defendants from engaging in 45 stated activities. The Supreme Court modified and affirmed this decree.

But the meaning of the decision in the *Sugar Institute* case cannot properly be understood by a mere recital of the provisions of the final decree. The restrictions which the Act imposes "are not mechanical or artificial."<sup>7</sup> The conclusions of the Court depend upon "a close and objective scrutiny of particular conditions and purposes . . . in each case."<sup>8</sup> The inhibitions of the decree are predicated on a factual background which colors and explains the decision itself.<sup>9</sup> The condemnation of a particular practice under the peculiar facts before the Court cannot be taken as a final determination that all similar practices are illegal in all cases and under all circumstances.

#### THE FACTS

The facts presented to the Supreme Court were in dispute. The contentions of the government were upheld as to the facts and for purposes of this analysis must be accepted. These facts and the inferences drawn from them by the Court may be summarized as follows:

The Sugar Institute was organized in 1927. Prior to its formation the fifteen defendant sugar companies refined more than 80 per cent of all sugar consumed within the United States. The Court found that subsequent to 1927 these companies refined between 70 and 80 per cent of all the sugar consumed within the United States. The formation of the Institute did not therefore result in increasing the relative size of these companies. But obviously insofar as these companies acted concertedly their power was increased. It was the combined size and power of the members of the Institute which the Court considered in determining the extent of the restraint imposed and as showing the public concern in the problem presented.

The Court emphasized the fact that sugar has become a standardized commodity. It was pointed out in the argument and briefs of counsel that the prices of such standardized commodities must necessarily approach uniformity. While the Court apparently recognized uniformity of price as an economic consequence of uniformity of product, it significantly observed:

6. *United States v. Sugar Institute, Inc.*, 2 C. C. H. Fed. Trade Reg. Serv. ¶¶ 7124, 7236 (S. D. N. Y. 1934).

7. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360 (1933).

8. *Ibid.*

9. This background was presented to the lower court in over 900 exhibits and 10,000 pages of testimony.

"The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."<sup>10</sup>

Prior to the formation of the Sugar Institute numerous unfair and uneconomic competitive practices had grown up. Many of the refiners had been accustomed to announce their prices to the trade just as is done in many other large industries. In many instances, however, refiners had departed from the openly published prices and had given secret prices and rebates to favored customers. As a result, the actual price structure of the industry was unknown to competitors. Neither buyers nor sellers were able to determine what prices were being paid or obtained by their competitors. Most of these secret concessions and rebates were favorable to the large purchasers. The actual prices charged varied with the extent of pressure which the buyers could exert and the degree of the deception to which they and the refiners were willing to resort. There is no doubt that this condition resulted in serious financial loss both to the refiners and to the buyers of sugar.

In view of these facts, the defendants urged that the primary purpose of the Institute and its members was to abolish secret concessions, to eliminate wasteful production, and to supply accurate trade statistics. This contention was rejected. The Court held that the activities of the Institute and its members went beyond what was necessary to accomplish these avowed purposes and that the restraint imposed by the agreement of the Institute and its members was unreasonable.

#### THE PRACTICES CONDEMNED

(a) Much of the opinion is devoted to a consideration of the so-called "basic agreement." The "basic agreement" was this: The defendant agreed to sell sugar only upon prices, terms and conditions publicly announced in advance of sale, and to adhere, without deviation, to such prices, terms and conditions until changes were also publicly announced. This, of course, does not mean that there was a general agreement as to a price to be charged by all members of the Institute. It means merely that each member of the Institute was free to set his own price, but that once the price was determined by each there was an agreement which obligated each refiner not to deviate from that price until he posted a new price. It was this agreement not to sell except at the posted price which the Court, in the light of all the facts, found objectionable. And the decree enjoins "the carrying out of the open price plan so far as it seeks to compel . . . an adherence to prices, terms, etc. announced in advance [of sale]."<sup>11</sup>

The emphasis placed by the Court upon the "basic agreement" does not mean that in the absence of circumstances indicative of an unlawful intent

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10. 56 Sup. Ct. at 643.

11. 56 Sup. Ct. at 644.

an "open price plan" is necessarily illegal. If the only obligation imposed by the Sugar Institute had been the requirement that members publicly post prices to be charged to particular classes of customers in particular localities, it would have been difficult to find any substantial restraint of trade because the only compulsion imposed upon members would have been the obligation to give publicity to prices. The objectionable requirement here, if any of the open price provisions were in themselves objectionable, was that members should sell *only* upon prices *announced in advance* of sale.

The defendants urged that the agreement required the seller merely to give publicity to prices coincident with the sale. The Court did not comment upon this argument, but in enjoining the "basic agreement" it was careful to indicate that its condemnation extended to the scheme as a whole and not to any particular practice considered as an isolated act. The Court definitely stated that it was because of the range and effect of the limitation upon freedom of action imposed by the "basic agreement" and the resultant inability to make "special arrangements" that not only the agreement but the course of action under it were considered unreasonable restraints of trade. And the inhibitions of the decree extend only to "adherence to prices . . . *announced in advance of sale.*"<sup>12</sup>

The insistence of the Court that the refiners should be free "to make special arrangements" is somewhat puzzling. By "special arrangements" the Court must have meant sales which departed from the prices or terms *previously* announced. It does not follow, however, that the insistence upon "special arrangements" is to be taken either as an approval of a secret arrangement or as a condemnation of an agreement to give publicity to prices coincident with the sale. The provisions of the Clayton Act prohibiting price discriminations<sup>13</sup> clearly support the view that "special arrangements" has no reference to secret arrangements or to any practice intended to promote discriminations.<sup>14</sup>

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12. *Ibid.* Italics added.

13. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade." Clayton Act, § 2, 38 STAT. 730 (1914), 15 U. S. C. A. § 13 (1927).

14. It is true that the Clayton Act prohibits price discrimination only where the effect is substantially to lessen competition, or to tend to create a monopoly in any line of commerce. But the Congressional debates make it clear that discriminatory price-cutting was regarded as an evil in itself by many members of Congress. It was looked upon as a species of unfair competition, regardless of who practiced it. The first drafts of the Act outlawed discrimina-

The following observation of the Court significantly points out that the "basic agreement" could not be divorced from an illegal scheme, and for that reason, if for no other, it was enjoined:

"The 'basic agreement' cannot be divorced from the steps taken to make it effective, and the requirements of the Institute must be viewed in the light of the particular opportunities which they cut off or curtailed. The crucial question—whether, in the ostensible effort to prevent unfair competition, the resources of fair competition have been impaired—is presented not abstractly but in connection with various concrete restrictions to which the decree below was addressed."<sup>15</sup>

What were these "concrete restrictions" which the Court emphasized in holding the combination illegal?

(b) The members of the Institute agreed that no quantity discounts should be granted to any purchaser. It was found as a fact that what was prohibited by the agreement was not only "unsystematic and secret quantity discounts"<sup>16</sup> but also discounts "systematically graded according to quantity."<sup>17</sup> In condemning this practice, the Court pointed out that the sale of sugar in quantities often effected substantial economies and that the agreement precluded the seller from passing these savings on to the purchaser. A decree was approved which enjoined the defendants by concert of action from "preventing, restraining or refusing to grant quantity or other discounts where such discounts reflect, effect, or result in economies to refiners either in direct or indirect cost."<sup>18</sup>

This, of course, does not mean that a single manufacturer must differentiate in price between a purchaser buying a small quantity and a purchaser buying a large quantity of a given commodity. But it does mean that competitors dominating an industry may not agree to eliminate all differences in price based on quantities purchased, particularly where sales in quantity can be made at a saving in cost.

Section 2 of the Clayton Act condemns price discriminations but it specifically excepts from its condemnation discounts based on differences in quantities.<sup>19</sup> In 1914, when Section 2 of the Clayton Act was before Congress, there was some thought that discounts in any form should be prohibited by statute. It was said in debate that such discrimination gave special

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tion where combined with an intent to injure and regardless of any tendency to create a monopoly. The change later introduced may perhaps be attributed to a change from a penal to a regulatory type of statute, in the course of which the test of intent gave way to a supposedly more objective standard. See 51 CONG. REC. 9159, 9260, 15790, 15819, 15934, 16043, 16057, 16115, 16145, 16159, 16267 (1914). But see *id.* at 9265.

15. 56 Sup. Ct. at 637.

16. *Id.* at 640.

17. *Ibid.*

18. *Ibid.*

19. See note 13 *supra*.

advantage to the large buyer.<sup>20</sup> An arbitrary condemnation of quantity discounts was excluded from the Clayton Act because it was regarded as Utopian,<sup>21</sup> and because the main evil with which the legislators were concerned was local price-cutting, which had become a political storm-center during the rise of Standard Oil.

The fact that the Court now blocks an attempt to eliminate quantity discounts by voluntary agreement suggests that discriminations in price based on the quantity sold are not necessarily the indicia of monopoly. As late as 1914, price discriminations of all kinds were regarded mainly as weapons of aggression employed by growing large-scale combinations against their weaker competitors. Apparently the Court now feels that agreements to eliminate quantity discounts may deprive the buyer of savings in cost of manufacture to which he is justly entitled. Since in general the large buyers will be entitled to such discounts it is apparent that the Court will not permit industry by agreement to penalize the large buyer by denying him the benefit of lower manufacturing costs. The result is that the small buyer will probably continue to conduct his business at a competitive disadvantage.<sup>22</sup>

(c) The members of the Institute had agreed to make no contracts permitting the buyer to take delivery of sugar more than 30 days after date. The Court found that in the sugar industry long term contracts had "a real economic value to refiner and to consumer" and held that the agreement to eliminate such contracts unreasonably restrained trade. With respect to such contracts there is nothing in the opinion which prevents any manufacturer from adopting any policy which he chooses to follow, but concert of action which imposes arbitrary and onerous conditions on any class of purchaser and which "would tend to prevent many entirely fair contracts" is prohibited.

(d) The Court found that the refiners had an agreement under which they refused to deal with any broker, warehouseman or customer who acted both as a broker and as a warehouseman. To enforce this agreement each refiner submitted lists of its brokers and warehousemen. These lists were circulated among the refiners, and brokers who acted both as brokers and warehousemen were dropped from the list. The commissions to be paid warehousemen and brokers were also set by agreement. It was found that this practice was carried out in a harsh and arbitrary manner without regard to the effect upon the brokers.

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20. 51 CONG. REC. 9072, 9168, 9263, 9590, 14250 (1914).

21. *Id.* at 9072.

22. It is now clear, however, that small purchasers may obtain the benefit of large-scale buying by the use of purchasing agencies. In *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1932) the Court upheld the legality of an exclusive selling agency formed by 137 producers of soft coal. This combination was upheld although the agency represented about 73 per cent of the commercial production in the immediate producing region. It did not, however, dominate or control any substantial market.

The Court, without qualification, condemned this practice when carried out as the result of an agreement among competitors dominating and controlling an industry. The Court considered it reasonably certain that adequate protection against illicit practices could have been secured by means far less drastic. Here again the decision does not mean that a particular manufacturer acting alone is prevented from selecting his own customers or even from refusing to deal. It does not mean that an individual manufacturer may not impose reasonable restrictions upon any purchaser.<sup>23</sup> But it does mean that this result may not be accomplished by an agreement between competitors, where the dominant motive is "to preserve the uniformity of price structure."<sup>24</sup>

In condemning the agreements eliminating quantity discounts and long-term contracts and the agreements affecting brokers and warehousemen, the Court did not make new law. It merely reaffirmed and applied a principle of law that has long been settled. The members of the Sugar Institute refined and sold 80 per cent of all sugar sold in the United States. It therefore seems apparent that these refiners had the power to impose upon buyers and dealers such conditions as the refiners agreed upon. The effect of the agreement not to deal with brokers or warehousemen who acted as both was therefore to prevent all brokers and warehousemen from engaging in business except upon the conditions agreed upon and imposed by the refiners. The agreement to eliminate quantity discounts and long term contracts similarly imposed arbitrary and onerous conditions upon all buyers of sugar. No doctrine is more firmly established under the Sherman Act than that competitors by agreement may not impose conditions upon those with whom they deal, where, as in the *Sugar Institute* case, those conditions substantially injure such third parties. As early as 1907 in *Loewe v. Lawlor*,<sup>25</sup> the Supreme

23. In *Federal Trade Comm. v. Raymond Bros.*, 263 U. S. 565, 573 (1924) the Supreme Court observed: "It is the right, 'long recognized', of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal'. Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself'. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. . . . Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. . . . Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself'. And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.

"A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed. . . ."

24. *Ibid.*

25. 208 U. S. 274, 293 (1908). See also *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440 (1910); *Eastern State Lumber Co. v. United States*, 234 U. S. 600 (1914); *Ander-*

Court expressly pointed out that the Sherman Act "prohibits any combination whatever which essentially . . . restricts . . . the liberty of a trader to engage in business,"<sup>26</sup> or a combination "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes. . . ."<sup>27</sup>

The lower court made a definite and specific provision in its decree enjoining any agreement to sell on delivered prices or on any system of delivered prices including zone prices, or to refuse to sell f. o. b. refinery. In the Supreme Court the defendants waived their assignments of error as to this provision as well as to certain other provisions affecting various aspects of transportation.<sup>28</sup> No argument on these questions having been made, the

son v. Shipowners' Ass'n, 272 U. S. 359 (1926); United States v. American Linseed Oil Co., 262 U. S. 371, 390 (1923); Montague v. Lowrey, 193 U. S. 38, 47 (1904); Binderup v. Pathe Exchange, Inc., 263 U. S. 291 (1923).

26. 208 U. S. at 293.

27. *Id.* at 295.

28. In the present session of Congress bills have been introduced to amend the anti-trust laws to prohibit the use of delivered prices and the refusal to sell f. o. b. point of origin, whether (a) by agreement among competitors or (b) by the individual act of one person.

The so-called Anti-Basing Point Act was introduced on February 20, 1936, by Representative Utterback as H. R. 11329 and by Senator Wheeler as S. 4055. The bill would prohibit the following: (Sec. 27) the addition to the shipping point price of a charge for delivery other than the actual cost of delivery through such agency as the purchaser may elect to specify; (Sec. 28) agreements to maintain any system of quoting a price which includes any amount as transportation charge which is not actually defrayed by the seller; (Sec. 29) the quotation of a delivered price without stating the amount thereof which represents cost of transportation and without giving the buyer the option of deducting this amount and paying the difference as an f. o. b. point of origin price.

The Robinson Bill, S. 3154 (originally called the Anti-Chain Store Bill), would achieve much the same result by eliminating from Section 2 of the Clayton Act the provision which now permits different prices in the same or different communities made in good faith to meet competition. It is under this provision that delivered prices are usually justified. In the report of the Senate Judiciary Committee on this Bill, Senator Logan says: "The weakness of present Section 2 (of the Clayton Act) lies principally in the fact that: (2) it permits discriminations to meet competition." That this was the fundamental purpose of the Robinson Bill is clear from the debate on April 28, 1936, in which Senator Logan said: "Then there was another provision in the Clayton Act which was fatal, namely, that price discrimination might be made in order to meet competition. That is where the chief defect in the Clayton Act is to be found."

The origin of this notion about the chief defect of the Clayton Act is to be found in Dr. Fetter's book, *THE MASQUERADE OF MONOPOLY* (1931), in which he said (at 315): ". . . excusing, in any class of cases, local discrimination under the mistaken belief that it is a necessity to competition 'in good faith' is but preserving in bad faith and in all cases the evil powers of monopoly." Dr. Fetter has finally convinced the Federal Trade Commission and, through it, certain leaders in Congress that the weaknesses of the law and the errors of the courts must be corrected by legislation which would remove the privilege to deviate in price for the purpose of meeting competition, which would forbid freight absorption, whether by agreement or not, and which would require f. o. b. origin prices. On his dismay at the errors of the courts, see his discussion of the case of *Fairmont Creamery Co. v. State of Minnesota*, 274 U. S. 1 (1927), (*THE MASQUERADE OF MONOPOLY* at 318 *et seq.*). In this case the United States Supreme Court held unconstitutional a Minnesota statute forbidding a different price to one customer than to another, irrespective of motive.

The Robinson Bill was passed by the Senate on April 30, 1936, but not until Senator McNary had included an amendment which would preserve the right to deviate in price in the same or different communities in good faith to meet competition. At this writing the companion bill, H. R. 8442, known as the Patman Bill, is awaiting a rule from the Rules Committee which would permit it to come to debate in the House. Should the Patman Bill be passed by the House it would then go to a conference committee with the Robinson Bill. If a compromise bill should be enacted into law, it would be particularly significant to note whether (1) it includes the McNary amendment and (2) it has the effect of requiring the exclusive use of f. o. b. origin prices.

Court accepted the findings below that the defendants' action went further than was necessary to prevent secret rebating and amounted to an illegal restraint of trade, and said that it found "no reason for disturbing the findings on these subjects."<sup>29</sup> The same rule which the Court applied to the agreements to eliminate quantity discounts, *etc.*, would seem to condemn these practices as to which the defendants waived their assignments of error.

Emphasizing the elements which have been pointed out above and considering them all as part of a unified plan, the Court stated that "there is no room for doubt as to the nature and effect of the restrictions",<sup>30</sup> and held the combination illegal. But there were specific practices which the Court approved.

#### STATISTICAL INFORMATION

The holdings of the *Sugar Institute* case with respect to statistical information become most significant when examined in the light of the four earlier cases which deal with this problem. These are the *Hardwood Lumber*,<sup>31</sup> the *Linseed Oil*,<sup>32</sup> the *Maple Flooring*,<sup>33</sup> and the *Cement Association* cases.<sup>34</sup> In each of these cases the Court examined as a whole the practices of a particular trade association, especially those statistical activities which affected prices. In the light of all the facts, it reached a conclusion as to the total effect of these activities. In two instances it found the combination unlawful and in two instances it found the combination lawful.

In the *Hardwood Lumber* case, the statistics collected by the association disclosed the name of the member and the purchaser in each transaction. The members agreed to inform the secretary of all changes in prices and to be subject to audits and inspection. Their reports were not made public. A questionnaire was sent periodically to all members asking for certain estimates as to future activities. The records of the meetings of the association and literature sent to members disclosed an attempt to persuade members to limit production and thus raise prices. Prices had, as a matter of fact, actually risen. The Court inferred an unlawful purpose and condemned the organization.

In the *Linseed Oil* case, the reports of subscribers were extremely detailed, and there was an agreement among them to telegraph any quotations made by them which varied from the established price list. A zoning system was in use on the basis of which a delivered price policy had been established. Again, each subscriber submitted to investigations. There were penalties

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29. 56 Sup. Ct. at 639.

30. *Id.* at 640.

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

32. United States v. American Linseed Oil Co., 262 U. S. 371 (1923).

33. Maple Flooring Manufacturers Ass'n v. United States, 268 U. S. 563 (1925).

34. Cement Manufacturers Protective Ass'n v. United States, 268 U. S. 588 (1925).

and forfeitures for breaches of the subscription agreement. All reports were treated as confidential. In this case, also, prices had risen after the establishment of the organization. The Court found, upon an examination of the whole situation, that the purpose and policy of the organization were to suppress competition.

The *Maple Flooring* and *Cement Association* cases, which came later, are sometimes regarded as having limited the effect of the *Hardwood Lumber* and *Linseed Oil* cases. It seems more helpful to treat the later cases as having been distinguished on their facts. These facts were quite different in many respects, and if the decision of the Court is regarded as turning upon the legality of the scheme as a whole rather than upon the legality of particular practices there need be no conflict in the holdings.

The *Maple Flooring* case revealed a situation in which the prices of members of the association were lower than those of non-members. The reports which were made dealt only with past and closed transactions, rather than future deals. The names of members and purchasers were not given in these reports, but the general statistics gathered were given wide publicity. In addition, no agreement among the members was alleged either affecting production, fixing prices or for price maintenance. In the *Cement Association* case, it appeared that the exchange of detailed information was definitely for the purpose of preventing fraud by the buyers. Reports were sent to members without comment. Prices were not excessive, and while they had risen during the period under consideration, they had not risen as much as the prices of many other commodities.

The most illuminating comparison is between the instant case and the *Maple Flooring* case. As to the latter, it should be further noted that the Court held that the dissemination of information is normally an aid to commerce and that the natural effect of the acquisition of wider and more scientific knowledge of business conditions cannot be said to be an unreasonable restraint of trade. In that case it was held that trade associations might openly and fairly gather and disseminate information as to the cost of their product, the volume of production and the actual price which the product had brought in *closed* transactions, and that these activities might be conducted pursuant to agreement.

In the *Sugar Institute* case the Supreme Court authorizes the use of a statistical service which is much more comprehensive and detailed than that considered in the *Maple Flooring* opinion. The decree not only permits members of the Institute to give immediate publicity as to prices and terms of sale in all closed transactions, but it also expressly authorizes the association to make advance announcements as to *future* prices and terms of sale. The Court authorized the distribution of such information, since "it does not appear that arrangements merely to circulate or relay such announcements

threaten competitive opportunities.”<sup>35</sup> The Court pointed out that the vice in the *Sugar Institute* agreement did not lie in the announcement of past, current and future prices, for “the unreasonable restraint . . . lay not in advance announcements, but in the steps taken to secure adherence without deviation from prices and terms thus announced.”<sup>36</sup>

It is now clear that a trade association may distribute current price information where such distribution is for the purpose of advising competitors and others of market conditions and not for the purpose of concertedly fixing or raising prices or curtailing production.

The opinion in the *Sugar Institute* case indicates inferentially that an association may collect and disseminate price information relating to particular sales. In holding that the agreement of the Sugar Institute went further than was necessary to correct the evils at which it was said to be aimed, the Court pointed out significantly that “if immediate publicity had been given to prices and terms in all ‘closed transactions’ competitive pressure would have been so great that the refiners would either have had to abandon the discriminatory practices or extend them to all.”<sup>37</sup> This statement is meaningless unless it refers to the disclosure of the details of particular past sales. Obviously neither a buyer nor a seller can determine whether a competitor has given a discriminatory price unless he knows the amount of the product which such competitor has sold, the location of the buyer, the quality of the goods purchased, and other essential facts. If, as the Court suggests, competitive pressure would eliminate unfair discrimination, the Court must necessarily have had in mind the distribution of statistical information with sufficient particularity to identify the locality of the buyer, the date and the amount of the purchase, and other factors which may justify a seller in giving one purchaser a lower price than another. The implied authorization of the publication of such detailed facts is a material clarification of the law governing the conduct of trade associations. If this analysis of the opinion is correct, industry may employ the effective weapon of publicity in dealing with unfair rebates and discriminations.

#### AGREEMENTS TO ELIMINATE UNFAIR TRADE PRACTICES OR OTHER EVILS

The opinion in the *Sugar Institute* case has been criticized as making it impossible for industries voluntarily to correct unfair trade practices and other evils which they face. This would appear to be not the true meaning of the opinion. Rather, the opinion sustains the view that an agreement to eliminate a practice that is unfair within the meaning of established law or that tends to destroy an industry would not be questioned if limited to the accomplishment of that one purpose. The opinion specifically affirms

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35. 56 Sup. Ct. at 643.

36. *Ibid.*

37. *Id.* at 641.

the doctrine laid down in the *Appalachian Coals* case,<sup>38</sup> where the Court upheld an agreement among competitors, who produced approximately 75 per cent of all coal produced in the "Southern Appalachian Coal Field," to market their product exclusively through a common sales agency. It appeared there, however, that the agency would not be in a position to dominate or control any market in which coal was sold. It was admitted that the agreement tended to stabilize prices, but this effect upon the price structure was justified because the agreement was intended to correct, and did not in fact go beyond an attempt to correct, deplorable competitive conditions existing in the sale of coal. In referring to the *Appalachian Coals* case, the Court again lays down the principles which define similar lawful agreements:

"Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities . . . ." <sup>39</sup>

Unlike the *Appalachian Coals* case, it was conceded by the Institute that the evils which faced the sugar industry could have been corrected without obligating the members to adhere without deviation to the future prices and terms of sale which they had filed. It would seem, then, that the agreement in the *Sugar Institute* case went further than was necessary in order to correct the evils at which it was aimed. The combination in the *Sugar Institute* case was condemned not because it eliminated competitive evils and unfair practices, but because it unnecessarily imposed arbitrary and onerous conditions upon sellers and buyers and others; and furthermore, to paraphrase the language of the Court, because the activities of the Institute, although ostensibly for the purpose of preventing unfair competition, had in actuality the effect of impairing fair competition.

#### EFFECT OF THE DECISION

The practical effect of the decision may be summarized as follows:

(1) Competitors in an industry may not by agreement impose conditions which substantially and adversely affect the normal freedom of buyer and seller jointly to determine prices or other conditions of sale in specific

38. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

39. 56 Sup. Ct. at 642.

transactions.<sup>40</sup> The condemnation of an agreement to eliminate quantity discounts illustrates this doctrine.

(2) Competitors may, however, agree to eliminate unfair trade practices; that is, those practices which have been held to be illegal under prior decisions. And even in such cases the agreement will be sustained only if it is confined in its operation and effect to the elimination of the illegal practices. An agreement by competitors to abandon false and misleading advertising is typical of the class of agreements which a court will uphold.<sup>41</sup> Such an agreement is effective because it crystallizes the application of the law to the specific problems of the group.

(3) Where depressed economic conditions or unsound business practices threaten its life, industry need not sit idle, but may attempt to alleviate those conditions by agreement.<sup>42</sup> This in reality is a doctrine of economic self-defense. Whether or not such an agreement unreasonably restrains trade will, of course, depend upon the particular facts surrounding each agreement. It is certain, however, that an agreement to correct industrial evils will not be condemned by the Court merely because it tends to affect production or to stabilize prices. But, of course, industry under the guise of correcting evils may not restrain trade.

(4) A properly devised and operated open price plan is not illegal. This is one of the most significant points in the *Sugar Institute* case.

Members of an association may properly exchange information concerning prices, whether past, present, or future—so long as no one of the members is prevented, by agreement or otherwise, from changing his price at any time. More particularly, the *Sugar Institute* case says that each member of an industry must be free at any time to deviate from any of the prices, terms, and conditions of sale which he has openly announced.

While competitors may openly file their prices, it of course goes without saying that there may be no concerted activity in setting the price which is to be filed.<sup>43</sup>

Furthermore, it is not only the selling price which may be openly announced, for this is meaningless unless we know all of the surrounding conditions of this price. And so competitors may file prices, discounts,

40. See cases cited in note 25, *supra*, and *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930); *United States v. First Nat. Pictures, Inc.*, 282 U. S. 44 (1930).

41. It is axiomatic that it is not illegal to agree not to violate the law.

42. In *United States v. American Tobacco Co.*, 221 U. S. 106, 177 (1911), in rejecting the contention of the government that the Sherman Act condemned all contracts and combinations directly restraining commerce, whether the restraint imposed was reasonable or not, the Supreme Court said: "Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. . . ."

43. *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927).

allowances, and all other terms and conditions of sale. In fact, these items would seem to be a necessary part of any open price plan because *price* has meaning only as we are able to answer the questions, "Price of what?" and "Price under what conditions?"

If information is exchanged for the purpose of checking fraud, then it would seem that members of a trade association may report all of their contracts and permit the association to circulate detailed information about these contracts. Mere summaries of production and sales would have a limited value. If fraud and discrimination are to be discovered and checked, it may be necessary—and it appears to be permissible—for the members of groups to reveal publicly all of the essential details concerning any closed transaction. This procedure would provide the most practical guarantee that all buyers who are similarly situated will be treated equally.

(5) There is another specific activity of trade associations the status of which is clarified by the *Sugar Institute* case. The Supreme Court has often denied that there should be a penalty upon intelligence; in fact, the Court has urged that accurate knowledge of competitive conditions is often necessary if competition is to be free and fair. But it is now clear that members of a trade association are free to compile and disseminate information about competitive conditions only so long as they make it reasonably available to others who have a right to the same information. However, the Court recognizes that there may be certain information of interest only to the members of a group which they may compile in a confidential manner without obligation of wide publication. The facts in each individual case will determine whether the information may be held confidential or whether it must be made public.

The decision in the *Sugar Institute* case serves to reveal and make clear the distinction that must exist between concerted action which confines itself to the correction of economic abuses and unfair competition, and concerted action which reaches further to restrain the normal processes of effective competition.