A TREATISE ON

MONOPOLIES AND UNLAWFUL COMBINATIONS

OR

RESTRAINTS

EMBRACING

EVERY CONTRACT, COMBINATION IN THE FORM OF TRUST, POOL OR OTHERWISE IN RESTRAINT OF TRADE OR COMMERCE

ALSO

THE FEDERAL AND STATE CONSTITUTIONS APPLICABLE AND ANTI-TRUST STATUTES

ALSO

TRADE OR LABOR UNIONS

AND

PROCEDURE, DEFENSES AND DAMAGES

BY

JOSEPH A. JOYCE

OF THE NEW YORK, CALIFORNIA AND CONNECTICUT BARS; AUTHOR OF "JOYCE ON INSURANCE" AND JOINT AUTHOR OF "JOYCE ON ELECTRIC LAW," ETC.

THE BANKS LAW PUBLISHING CO.
NEW YORK
1911

PREFACE

One of the most if not the most important of the subjects which for some time has occupied the attention of the Bench and Bar throughout the United States is that of monopolies, and other unlawful combinations in the form of a trust, pool, holding company or otherwise, or of conspiracies in restraint of trade or commerce; and this is especially so at the present time in view of the late "Rule of Reason" and "Light of Reason" decisions rendered by the United States Supreme Court in the Standard Oil Company and American Tobacco Company cases. The author, therefore, believing that a treatise covering this branch of the law will be of value to this profession has endeavored to logically and as concisely as is consistent with an exhaustive and clear treatment to cover the above subject including the common law, the Federal Constitution, so far as applicable, and anti-trust statutes; also the State constitutional prohibitions against monopolies, trusts, etc., as well as all the State anti-trust enactments, as to monopolies, trusts and combinations to control articles of necessity, prices, production, cost of exchange or transportation, or to prevent competition; also the subject of trade or labor unions; also procedure, parties, pleading, defenses, evidence and damages in connection with the above. Principles and illustrative cases, including all the latest decisions, are given. The author trusts that the work will meet with approval.

JOSEPH A. JOYCE.

New York City, 1911.

TABLE OF CONTENTS

CHAPTER I

GENERAL TERMS AND DEFINITIONS

§ 1. Combination Defined.
2. Competition Defined.
3. Conspiracy Defined.
4. Civil Conspiracy Defined.
5. Engrossing Defined.
6. Exclusive Right or Privilege Defined.
§ 7. Forestalling Defined.
8. Monopoly Defined.
9. Monopolist Defined.
10. "Pooling" Defined.
11. Regrating Defined.
12. "Trust" Defined.

CHAPTER II

TERMS AND DEFINITIONS UNDER SHERMAN ANTI-TRUST ACT

§ 13. Sherman Anti-Trust Act.
14. Anti-Trust Amendments to Wilson Tariff Act—Trusts, etc., in Restraint of Import Trade Declared Void—Penalty.
15. Terms and Definitions Involved in Meaning and Application of Sherman Anti-Trust Act.
16. Commerce—Interstate Commerce — Commerce with Foreign Nations Defined.
17. Intrastate Commerce Defined.
18. Commodity — Commodities Defined.
19. Competing Line Defined.
20. Conspiracy Defined — Conspiracy in Restraint of Trade Defined.
§ 21. Contract Defined.
22. Monopoly "Monopolize" Defined.
23. Contract in Restraint of Trade Defined.
24. "Restraint of Trade"—"Restraint"—"In Restraint of Trade or Commerce" Defined.
25. Trade Defined.
26. Traffic Defined.
27. Transportation Defined.
28. "Transportation Within the State"—Meaning of.
29. "Trust" — "Holding" Corporation or Company.

CHAPTER III

TERMS AND DEFINITIONS RELATING TO LABOR OR TRADE UNIONS

§ 30. Blacklist Defined.
31. Boycott Defined.
32. Boycott—Essential Elements of.
33. Boycotting Defined.
34. Secondary Boycott Defined.
35. Picket Defined.
36. "Picketing" Defined.
37. Closed Shop Defined.
38. Labor Union—Labor Organization—Trade Union Defined.
§ 39. Lockout Defined.
40. Open Shop Defined.
41. Strike Defined.
42. "Legal Strike" Defined.
43. Strikes and Boycotts Distinguished.
44. Trade Union Defined.
45. Union Shop Defined.

CHAPTER IV

DISTINCTIONS AND SYNONYMS GENERALLY

§ 46. Distinctions—Monopolies Resulting from Grant or Contract.
47. Distinctions — Monopolies and Engrossing.
48. Distinctions — Monopolies and Combinations.
49. Distinctions—Exclusive Privilege and Monopoly.
50. "Monopolize" Used in Statute Synonymous with "Aggregate" or "Concentrate."
51. Combination in the Form of Trust Used in Statute Synonymous with "Pooling."
§ 52. Distinction Between State Anti-Trust Statute and Contracts in Restraint of Trade.
53. Distinction Between Contracts Per Se in Restraint of Trade and Contracts Which Tend to Destroy Competition and Create Monopolies.
54. Distinctions — "Restrictions in Trade" in State Not Synonymous with "Restraint of Trade."

CHAPTER V

DISTINCTIONS AND SYNONYMS—SHERMAN ANTI-TRUST ACT

§ 55. Distinctions — Combination and Sale—Sherman Anti-Trust Act.
56. "Combination" or "Conspiracy" Synonymous — Sherman Anti-Trust Act.
§ 57. Distinctions—Conspiracy in Restraint of Trade and Contract in Restraint of Trade — Sherman Anti-Trust Act.
58. Sherman Anti-Trust Act—

"In Restraint of Trade" Synonymous with "Trade or Commerce" — "Trade" and "Commerce" Synonymous—"Contract in Restraint of Trade" Analogous to "Monopolize."

CHAPTER VI

NATURE ESSENTIALS OR TEST OF CONSPIRACY

§ 59. Unlawfulness — Exclusive Combination—Restraint of Trade.
60. Combination or Confederation and Unlawful Design or Means Employed.
§ 61. Motive or Intention.
62. Overt Acts.
63. Overt Acts—New York.
64. Conspiracy to Commit Offense Against or to Defraud United States—Overt Act.

CHAPTER VII

NATURE ESSENTIALS OR TEST OF MONOPOLIES

§ 65. Restraint of Competition—Control of Production, —Commodities and Prices.
66. Same Subject.
67. Monopoly — To "Monopolize" Power to Raise Prices or Exclude Competition Distinguished—Motive.
68. What Degree of Restraint of Competition Essential — Monopoly and Restraint of Competition Distinguished.
69. Effect of Personal Service or Occupation.
§ 70. Monopoly as Essential Feature of Charter or Franchise —Whether Such Grant Exclusive in Nature.
71. Same Subject—Rule of Construction of Grants Applicable.
72. When Grants of Charters or Franchises Are Exclusive.
73. Same Subject.
74. When Grants of Charters or Franchises Are Not Exclusive.

CHAPTER VIII

NATURE ESSENTIALS OR TEST UNDER SHERMAN ANTI-TRUST ACT

§ 75. Sherman Anti-Trust Act—Unlawful Restraints and Monopolies—What Is Embraced—Generally.
§ 76. Labor Combinations Within Prohibition of Sherman Anti-Trust Act.
77. Regulation or Restraint of

Commerce—Intrastate, Interstate or Foreign.
§ 78. Monopoly—Exclusive Right.
79. Monopoly—Size or Magnitude of Business.
80. Direct and Necessary Effect Upon Competition in Interstate or Foreign Commerce.
81. Same Subject.
82. Fair Regulation of Business —Indirect or Incidental Effect Upon Competition in Interstate or Foreign Commerce.
§ 83. Reasonable and Unreasonable Restraints.
83a. The "Rule of Reason" and "Light of Reason" Decisions.
84. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act Generally.
85. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act—Overt Act.

CHAPTER IX

NATURE ESSENTIALS OR TEST—CONTRACTS IN RESTRAINT OF TRADE

§ 86. Public Policy as Test—Generally.
87. Public Policy as Test—Degree of Injury to Public.
88. Public Policy as Test—General and Partial Restraint of Trade.
89. Public Policy as Test—Contracts in Restraint of Trade — Contracts Tending to Create Monopolies—Useful Commodities.
90. Public Policy as Test—Contracts Affecting Articles of Prime Necessity.
91. What Contracts Not Void as Against Public Policy.
92. Public Policy Test—Public Service Corporations.
93. Same Subject.
94. Effect of Changed Conditions as to Trade, Commerce, etc. — Public Policy — English Courts.
95. Same Subject — Federal Courts.
96. Same Subject—State Courts.
97. Extent of Illegality of Contract in Restraint of Trade —New Rule.
§ 98. Effect of State Statute Upon Illegality of Such Contract.
99. Restraint of Trade—Monopolies—Degree of Competition.
100. Same Subject.
101. What Degree of Competition Permissible.
102. Circumstances Are to Be Considered in Determining Legality of Restraint.
103. Whether Contract Is in Restraint of Trade is Question for Court.
104. Consideration of Contract in Restraint of Trade.
105. Motive.
106. Reasonable and Unreasonable Restraints — Generally.
107. Where Contract in Restraint of Trade Is One of a System of Contracts—Reasonable and Unreasonable Restraint.
108. Reasonableness as to Territory or Area Covered.
109. Test of Reasonableness—Fair Protection to Covenantee.

CHAPTER X

SHERMAN ANTI-TRUST ACT—CONSTRUCTION OF

§ 110. Power of Congress—Generally.
111. Constitutionality of Act.
112. Purpose of Act.
113. Scope of Act—Generally.
114. Construction of Act—Generally.
115. Construction of Act—"Commerce" and "Restraint of Trade" Construed.
116. Construction of Act — Should Not Be Narrow or Forced.
§ 117. Statute Does Not Extend to Acts Done in Foreign Countries.
118. The Question of Reasonableness or Unreasonableness of Restraint.
119. Conspiracy May Have Continuance.

CHAPTER XI

SHERMAN ANTI-TRUST ACT—VIOLATIONS—GENERALLY

§ 120. Test of Legality of Contract or Combination.
121. Where Chief Object Is to Increase Trade.
122. Where Separate Elements of Scheme Lawful.
123. Violations—What Essential to Constitute.
124. Violations — Essentials of Contracts in Order to Constitute.
§ 125. Violations — What Constitute—Generally.
126. Violations—Size or Extent of Business Not Alone a Test.
127. Violations — Combinations Entered Into Before Passage of Act.
128. Violations — By Combinations — Stockholder Not Criminally Liable.
129. Defenses—Generally.

CHAPTER XII

SHERMAN ANTI-TRUST ACT — VIOLATIONS — PARTICULAR CONTRACTS CONSTRUED

§ 130. Purchase of Good Will and Business.
131. Where Corporation Holds Majority of Stock of Another Corporation.
132. Exchange of Shares of Stock-Holding Corporations.
§ 133. Contracts Between Owners of Copyright.
134. Contracts Between Holders of Patents.

§ 135. Patents— Licenses — Conditions Generally.
136. Patents — Licenses—Particular Conditions.
137. Patents—Right to Modify Terms of Licenses.
138. Proprietary Medicines — Contracts as to.
139. Acts and Combinations of Labor Organizations.
140. Manufacturing and Other Contracts—Generally.
141. Contracts as to Manufacture Within a State.
142. By Manufacturers of Shingles.
143. By Manufacturers of Iron Pipes.
§ 144. By Tobacco Manufacturers and Jobbers.
145. By Manufacturers of Liquorice Paste.
146. By Association Dealing in Tiles, Mantels and Grates.
147. By Sugar Refining Companies.
148. By Dealers in Fresh Meats.
149. By Association of Cattle Dealers.
150. By Board of Trade—Contract as to Quotations.
151. By Railroad Companies.
152. By Owners of Vessels.
153. Mining Contracts.
154. Contracts Between Coal Companies.

CHAPTER XIII

SHERMAN ANTI-TRUST ACT—VIOLATIONS AS DEFENSE TO ACTION BY COMBINATION

§ 155. Contract with Combination — Voluntary Purchaser—Illegality of Combination no Defense.
156. Contract with Combination — Voluntary Purchaser—Application of Rule.
157. Contract with Combination —When Illegality of Combination a Defense.
§ 158. Suit by Combination for Infringement of Patent—Illegality of Combination as Defense.
159. Suit by Combination for Infringement of Trade-Mark or Copyright — Illegality of Combination as Defense.

CHAPTER XIV

SHERMAN ANTI-TRUST ACT—PROCEDURE AND DAMAGES

§ 160. Who May Sue—When Individual May—Injury to "Business or Property."
161. Who May Sue—Injunction —Right of Individual—Suit by Attorney General.
§ 162. Who May Sue—Right of Stockholder—Creditor.
163. Who May Sue—Right of Member of Combination.
164. Who May Sue—Municipal Corporation a "Person."

§ 165. Who May Sue—State Not a "Person" or "Corporation."
166. Who May Sue—Right of Receiver.
167. Time of Entering into Combination as Affecting Right to Recover.
168. Jurisdiction of Courts—Generally.
169. Jurisdiction—Parties—Summoning of.
170. Jurisdiction—Parties—Summoning of — Not Restricted by Judiciary Act.
171. Jurisdiction — Exercise of Not Discretionary—Summoning Parties.
172. Jurisdiction — Extent of Judgment.
173. Sufficiency of Complaint or Petition—General Rules.
174. Sufficiency of Complaint—Rules in Force in State Where Action Brought—Practice Act.
175. Sufficiency of Complaint—Particular Cases.
176. Sufficiency of Complaint—Duplicity.
177. Sufficiency of Complaint—Joinder of Defendants—Election.
178. Sufficiency of Indictment—General Rules.
§ 179. Sufficiency of Indictment—Charging Officers, Agents or Stockholders.
180. Indictment Charging Conspiracy — Denial Under General Issue.
181. Indictment Not Conclusive—Removal Proceeding.
182. Evidence — Admissibility — Weight.
183. Evidence—As to Intent—When Essential.
184. Evidence—Burden of Proof.
185. Evidence — Presumption in Respect to Combination.
186. Evidence — Documents — Witnesses — Power of Court.
187. Witness—Examination of a "Proceeding."
188. Damages — Recovery of — Generally.
189. Damages—Nature of Action for—Jury Trial.
190. Damages — Action for — Statute of Limitations—A Civil Remedy.
191. Damages—Where Payment of Higher Price Compelled.
192. Damages Cannot Be Set off.
193. Distribution of Assets of Holding Corporation — Right to Return of Shares.

CHAPTER XV

INTERSTATE COMMERCE ACT—POOLING OF FREIGHTS, ETC.

§ 194. Pooling of Freights or Division of Earnings Prohibited—Interstate Commerce Act.
195. Pooling of Freights — "Freights" Defined.
196. Pooling of Freights — Nature and Scope of Statute.
§ 197. What Constitutes "Pooling of Freights."
198. What Does Not Constitute "Pooling of Freights."
199. Pooling of Ocean or Water Freights Not Within Statute or Within Jurisdiction of Interstate Commerce Commission.

§ 200. Combinations to Prevent Continuous Carriage of Freight to Destination Prohibited — Interstate Commerce Act.

§ 201. Interstate Commerce Act Not Inconsistent with Sherman Anti-Trust Act.

CHAPTER XVI

CONSTITUTIONAL LAW—FEDERAL CONSTITUTION

§ 202. Preliminary Statement.

203. Constitution and Laws of United States Supreme Law of Land—Application to Combinations, Trusts, etc.

204. Constitutional Vestment of Powers in Congress.

205. Commerce Clause of Constitution—Power of Congress.

206. Purpose of Vestment in Congress of Power to Regulate Commerce.

207. Regulation of Commerce — Extent of Interference with Private Contracts or Combinations — Interstate and Intrastate Commerce.

208. Obligation of Contract Clause Not a Limitation on Congress.

209. Impairment of Obligation of Contracts—Whether State Constitution a "Law."

210. Impairment of Obligation of Contracts — Whether "Law" Applies Only to State Legislative Enactments.

211. Impairment of Obligation of Contracts—Whether Municipal Ordinance a "Law."

212. Impairment of Obligation of Contracts—Word "Law" Does Not Apply to Judicial Decisions, etc., Unless.

§ 213. Obligation of Contract Clause Refers to Subsequently Enacted "Law" of State.

214. Same Subject—Change of Remedy or Procedure.

215. Nature of Laws Prohibited by Obligation of Contracts Clause.

216. Nature of Contracts Embraced by Obligation of Contracts Clause — Between What Parties.

217. Nature of Contracts—Obligation of Contracts Clause Embraces Implied and Express Contracts.

218. Obligation of Contracts—Legal and Legislative Contracts — Construction of Contract — Authority of Federal Supreme Court.

219. Bridges—Exclusive Grant or Privilege—Impairment of Contract Obligation.

220. Ferry — Exclusive Grant—Impairment of Contract Obligation.

221. Railroad Charter—Provision Against Competing Lines —Impairment of Contract Obligation.

222. Telephone Company's Exclusive Grant — Impairment of Contract Obligation.

§ 223. Electric Lighting—Exclusive Grant or Privilege—Impairment of Contract Obligation.
224. Exclusive Right to Supply Gas—Impairment of Contract Obligation.
225. Water Companies — Exclusive Contracts, Grants or Privileges—Impairment of Contract Obligation.
226. Powers Reserved to the States.
227. Fifth Amendment — Generally.
228. Fourteenth Amendment — Generally.
229. Fourteenth Amendment — No State to Abridge Privileges or Immunities.
230. Fourteenth Amendment — Due Process Clause — Fifth Amendment.
231. Liberty to, or Freedom of Contract — Generally — Fourteenth Amendment—Fifth Amendment.
§ 232. Liberty to, or Freedom of Contract Continued — Power of Government to Restrict, Regulate or Control.
233. Liberty to, or Freedom of Contract Continued — Power of Congress Under Commerce Clause to Restrict, etc.
234. Liberty to, or Freedom of Contract Continued—Police Power of States.
235. Liberty to, or Freedom of Contract Continued — Standard Oil Company's Case.
236. Liberty to, or Freedom of Contract Continued — State Statutes Prohibiting Combinations, etc. — Instances.
237. Fourteenth Amendment — Equal Protection of the Laws.
238. Same Subject — Power of Congress and of States.

CHAPTER XVII

CONSTITUTIONAL LAW—STATE CONSTITUTIONS

§ 239. Creation of Monopolies—State Constitutions Prohibiting Monopolies — Generally.
240. Alabama Constitution—Legislative Duty as to Monopolies, Combinations, etc., to Control Articles of Necessity, etc., or to Prevent Competition.
241. Alabama Constitution Continued—Effect Upon Competition — Meaning of "Unreasonably" and "Reasonable Competition."
§ 242. Arkansas Constitution — Monopolies Prohibited.
243. Idaho Constitution—Combinations to Control Prices, Regulate Production, etc., Prohibited — Duty of Legislature.
244. Kentucky Constitution — Legislative Duty as to Trusts, Combinations, etc., to Control Prices.
245. Louisiana Constitution — Combinations, etc., to Control Prices, Unlawful — Duty of Legislature.

§ 246. Maryland Constitution — Monopolies Prohibited.
247. Minnesota Constitution — Combinations to Control Food Products a Criminal Conspiracy—Duty of Legislature.
248. Mississippi Constitution — Duty of Legislature to Prevent Trusts, Combinations, etc.
249. Montana Constitution — Combinations, Trusts, etc., to Fix Prices or Regulate Production Prohibited — Duty of Legislature.
250. Montana Constitution Continued — Necessity of Showing Intent.
251. Montana Constitution Continued — Meaning of "Trust" Therein.
252. North Carolina Constitution —Monopolies Prohibited.
253. North Dakota Constitution —Combinations to Control Prices, Cost of Exchange or Transportation Prohibited — Franchises Forfeited.
254. Oklahoma Constitution — Monopolies Prohibited—Duty of Legislature as to Combinations, Monopolies, etc.
255. South Dakota Constitution —Monopolies and Trusts Prohibited — Combinations to Control Prices, Production, Transportation, or to Prevent Competition Prohibited—Duty of Legislature.
§ 256. Tennessee Constitution — Monopolies Prohibited.
257. Texas Constitution — Monopolies Prohibited.
258. Utah Constitution — Combinations to Control Prices, Cost of Exchange or Transportation Prohibited—Duty of Legislature.
259. Washington Constitution— Monopolies and Trusts Prohibited — Combinations to Control Prices, Production, Transportation or to Prevent Competition Prohibited—Duty of Legislature.
260. Washington Constitution Continued—Its Provisions Not Self-Executing.
261. Washington Constitution Continued—Combinations of Common Carriers to Share Earnings Prohibited.
262. Wyoming Constitution — Monopolies Prohibited—Combinations to Prevent Competition, Control Productions or Prices, etc., Prohibited.
263. Constitutional Provisions Prohibiting Granting Special or Exclusive Privileges, Immunities or Franchises, etc.
264. Same Subject—General Instances.
265. Constitutional Provisions Prohibiting Creation of Corporations by Special Act, etc.
266. Same Subject—General Instances.

CHAPTER XVIII

FEDERAL AND STATE LEGISLATIVE POWERS—MONOPOLIES, ETC.

§ 267. Power of Congress to Prohibit Restraints Upon Competition — Railroad Corporations.
268. Legislative Powers of State —Generally.
269. Federal and State Legislative Powers Distinguished.
270. Same Subject — Interstate and Intrastate Commerce.
271. Police Power — Definition and General Principles—Monopolies May Be Prohibited, etc.
272. Grant of Monopoly—Sovereign Power or State Is Source of Grant or Franchise.
§ 273. Test of Legislative Power to Grant.
274. Legislative Power of State to Grant.
275. Monopoly Cannot Be Implied from Mere Grant—Public Grants of Franchises, Privileges, etc.—Construction Against Grantee.
276. Legislative Power to Prohibit Combinations, Monopolies, etc.—Anti-Trust Acts.

CHAPTER XIX

POWERS OF MUNICIPAL CORPORATIONS—MONOPOLIES, ETC.

§ 277. Rule as to Powers of Municipal Corporations.
278. Delegation of Legislative Power to Municipalities.
279. Municipal Ordinances Must Not Conflict with Constitution.
§ 280. Power of Municipality to Create Monopolies or to Make Contracts Tending to Create a Monopoly.
281. Same Subject — Municipality May Adopt Reasonable Measures — Although Slight Inequalities Exist as to Benefits Conferred.

CHAPTER XX

FEDERAL LEGISLATION—PATENTS, COPYRIGHTS, TRADE-MARKS AND POST ROADS ACT

§ 282. Patents—Source and Nature of—Whether Monopolies or Contracts.
283. Same Subject.
§ 284. Patents—Police Power of States.
285. Source of Copyright—Exclusive Right or Monopoly.

§ 286. Copyright Law Secures Exclusive Right or Monopoly.
287. Copyright — Statutory and Common-Law Right Distinguished — Exclusive Property.
288. Trade-Marks and Trade-Names — Monopoly—Exclusive Right.
289. Unfair Competition—When Cannot Be Predicated Solely on Use of Trade-Name.
§ 290. Loss of Right to Individual Appropriation—Intent of Injunction Bill to Extend Monopoly of Trade-Mark or Trade-Name.
291. Expiration of Patent—Use of Generic Name—Loss of Trade-Mark Rights.
292. Post Roads Act Prohibits State Monopolies in Commercial Intercourse by Telegraph.
293. Railroad Right of Way—Telegraph Line—Exclusive Contract—Monopoly.

CHAPTER XXI

STATE AND MUNICIPAL LEGISLATION OR CONTRACTS—PARTICULAR INSTANCES

§ 294. Exclusive Grants or Contracts—Monopolies—Generally.
295. Booms—Logs and Logging—Monopoly.
296. Bridges—Monopolies.
297. When Contract by City, as Owner of Ferry Franchise, with Bridge Company Creates no Monopoly.
298. Electric Lighting—Exclusive Right—Contract Power of City as to.
299. Electric Lighting—Control of Streets — Exclusive Grants, etc.—Municipalities, Towns, etc.
300. Ferries—Monopolies, Exclusive Privileges, etc.
301. Ferries—Exclusive Grant—Municipal Ordinance — Delegated Authority.
302. Exclusive Right to Use Wharf for Ferry Purposes.
303. Gas—Grant by State of Exclusive Privilege or Monopoly—Police Power.
§ 304. Gas—Grant by Municipality of Exclusive Privilege or Monopoly.
305. Municipal Lease to Private Corporation to Supply Gas —Exclusive Right—Monopoly.
306. Gas—Void Grants and Contracts—Monopoly.
307. Gas—Purchasers of Exclusive Rights.
308. Intoxicating Liquors—"Dispensary System" — Monopoly.
309. Irrigation—Monopoly.
310. Market House—Contract for by City or Town—Monopoly.
311. Navigable Canal—Monopoly.
312. Omnibuses—Grant of Privilege to Run—Where a Monopoly.
313. Railroads—Exclusive Privileges.

§ 314. School Text-Book Statutes—Exclusive Privilege—Monopoly—Contracts.
315. Slaughter House or Market House—When Municipality or Village Cannot Create.
316. Street Railways—Control of Streets—Exclusive Grants—Municipalities.
317. Telephone Companies—Exclusive Grants or Privileges.
318. Telegraph Companies—Exclusive Grants.
319. Toll Bridges — Exclusive Grants.
320. Toll Roads — Municipal Grant—Monopoly.
321. Toll Wharf — Exclusive Grant.
322. Union Label on City Printing.
323. Requirement That Only Union Labor or Union Shops Be Employed — Award of Contract.
324. Warehouses—Monopoly.
325. Waterworks or Water Supply—Power of Municipality.
326. Waterworks or Water Supply—Exclusive Right of Municipality and of Private Corporation Distinguished.
§ 327. Waterworks or Water Supply — Grant by State of Exclusive Privilege or Monopoly.
328. Waterworks or Water Supply—Grant by Municipality of Exclusive Right or Monopoly.
329. Waterworks or Water Supply—Instances of Valid Contracts by Municipality—Exclusive Privilege or Monopoly.
330. Waterworks or Water Supply—Instances of Void Contracts — Exclusive Privilege or Monopoly.
331. Waterworks or Water Supply—Defense That Contract Creates Monopoly.
332. Injunction Restraining Municipality—Water System.
333. Contract with State Water Company—Constitutional Law—Due Process.
334. Waterways — Exclusive Right to Collect Tolls—Monopoly.
335. Consolidation of Corporations — Exclusive Privileges—Monopoly.

CHAPTER XXII

POWER OF STATE—POLICE POWER—GENERALLY

§ 336. Police Power of State—Restraining Right of Contract—Generally.
337. Police Power of State—As to Contract and Combinations in Restraint of Trade—Generally.
338. Police Power of State—Prevention of Discrimination.
339. Police Power of State—Prohibiting Giving of Rebates.
§ 340. Police Power of State—Corporations—Limitations in Federal Constitution — Fourteenth Amendment.
341. Police Power of State—Foreign Corporations—Fourteenth Amendment.
342. Power of State to Provide

Mode and Means of Procedure to Enforce Statute —Power of Supreme Court of United States.

§ 343. Power of Legislature as Affected by Constitutional Provision Requiring Passage of Laws.

CHAPTER XXIII

STATE STATUTES—CONSTITUTIONALITY AND CONSTRUCTION —GENERALLY

§ 344. State Statutes — Constitutionality of—Generally.

345. Constitutionality — Liberty of Contract—Due Process of Law.

346. Constitutionality — Class Legislation — Liberty of Contract.

347. Constitutionality—Discrimination.

348. Constitutional Provision Requiring Legislature to Enact Laws — Not a Repeal of a Prior Law.

349. Contract Prior to Passage of Act Does Not Render It Unconstitutional.

350. Construction — General Rules.

351. Construction—As to Intent of Legislature.

352. Construction—Where Part of Act Unconstitutional.

353. Construction—As to Title and Body of Act.

354. Construction—Rule as to Statutes in Pari Materia.

355. Construction as to Statutes in Pari Materia—Special and General Statutes—Excepted Class.

§ 356. Construction—Rule as to Additional and Descriptive Words.

357. Word "Arrangement" Construed.

358. Word "Combination" Construed.

359. Words "Commodity" and "Convenience"—Personal Services Not—Telephone Service Is.

360. Word "Court" Construed.

361. Words "In Restraint of Trade" Construed.

362. Word "Monopoly" Construed.

363. Word "Person" Construed — Whether Corporations Included.

364. Words "Real Value" Construed.

365. Word "Trade" Construed.

366. Application of Statute—Generally.

367. Penalty Provisions of Act—Review by United States Supreme Court.

368. Territorial Legislature — Power of Congress—Delegation of Power to Subordinate Bodies.

CHAPTER XXIV

STATE STATUTES—PARTICULAR CONSTITUTIONAL AND STATUTORY PROVISIONS

§ 369. Constitutional Provision Prohibiting Consolidation of Parallel and Competing Lines of Railroad.
370. Combination to Fix or Limit the Price or Premium for Insuring Property Prohibited.
371. Statute Prohibiting Condition of Sale Not to Sell Goods of Any Other Person.
372. Statute Forbidding Discrimination in Prices for Petroleum.
373. Purchaser from Combination —Statute Relieving from Liability.
§ 374. Provisions as to Punishment —Fine or Imprisonment—Forfeiture of Charter—Revocation of Permit.
375. Statute Permitting Pooling by Farmers of Farm Products.
376. Exception in Statute—Sale of Good Will of Business—Agricultural Products or Live Stock.
377. Donnelly Anti-Trust Act—New York.

CHAPTER XXV

STATE STATUTES—VIOLATIONS—GENERAL PRINCIPLES

§ 378. Contracts and Combinations —Legality and Illegality—General Principles.
379. Intention as Affecting—Presumption as to.
380. All Provisions of Contract Should Be Considered —Presumption as to Legality.
381. Mere Form of Association or Combination Not Controlling Test of Legality.
382. Combination to Carry Out Restrictions Prohibited—Where Combinations May so Operate—Result Is Immaterial—Each Case Controlled by Own Facts.
§ 383. Where Contract Legal but One of Several Links in Illegal Combination.
384. Where By-Laws of Association Show Illegality.
385. Where Contract or Combination Involves Interstate Commerce Not Subject to State Anti-Trust Law.
386. Where Contract Made or Combination Formed Outside of State.
387. Combination Formed Before Passage of Statute.
388. Foreign Corporations Subject to State Anti-Trust Laws.
389. What Constitutes a Trust—Texas Statute.

CHAPTER XXVI

STATE STATUTE—VIOLATIONS—PARTICULAR CONTRACTS AND COMBINATIONS

§ 390. Consolidation of Several Corporations — Transfer of Property to One.
391. Contract Between Rival Corporations Each Obtaining Interest in Other.
392. Where Statute or Charter Permits Consolidation of Corporations.
393. Purchase of Assets of Corporations.
394. Mining Corporation — Purchase by of Stock in Another Mining Corporation.
395. Contracts Between Common Carriers—Consolidation of Railroad Companies — Parallel and Competing Lines.
396. Contract Between Railroad Company and Palace Car Company.
397. Merger of Street Railways.
398. Contracts Between Railroad Companies and Express or Transfer Companies—Exclusive Right.
399. Car Service Association Merely Agent of Several Railroads.
400. Agreements Between Steamboat Companies.
401. Contract Between Manufacturer and Purchaser Not to Resell Below Certain Price — Proprietary Medicines—Uniform Jobbing Price.
402. Exclusive Rights—Contracts Between Vendor and Purchaser—When a Violation.
403. Exclusive Rights—Contracts Between Vendor and Purchaser—When Not a Violation.
§ 404. Exclusive Contract—Sale of By-Product Distinguished from Sale of Entire Output.
405. Contract Giving Exclusive Right to Sell Goods on Certain Premises.
406. Agreement Restraining Purchaser Using Premises for Certain Purpose.
407. Agreement Between Agent of Seller and Purchaser—Coal Oil.
408. Contracts Between Principal and Agent.
409. Sale of Business and Good Will—Contracts Not to Engage in Competition.
410. Sale of Business and Good Will—Contract Not to Engage in Competition—Exception in Statute as to.
411. Sale of Business and Good Will — Laundry Not a Manufacturing Establishment.
412. Agreement to Refrain from Entering Into Business.
413. Agreements Between Brewers Not to Sell to One Indebted—To Raise Price.
414. Agreement Between Bricklayers' Union and Mason and Builders' Association.
415. Associations of Cattle Owners, Buyers and Sellers—By-Laws and Rules.
416. Agreement Between Cotton Seed Oil Manufacturers—Withdrawal of Agent by One.

§ 417. Corporation Composed of Crushed Granite Dealers —Agreement as to Bluestone.
418. Consolidation of Gas Companies — Agreements Between.
419. Agreement Limiting Right to Buy Grain.
420. Agreement Between Ice Companies.
421. Agreements Between Insurance Companies or Agents to Fix Rates.
422. Agreements Between Lumber Dealers.
423. Contracts Between Proprietors of Newspapers and Job Printing Establishments.
424. Contracts Between Newspaper Publisher and Carriers.
425. Agreements Between Packing Companies to Control Price of Meat.
426. Contracts in Respect to Patented Articles.
427. Agreement Between Physicians—Schedule of Price.
428. Physicians — Dissolution of Partnership — Agreement Not to Practice.
§ 429. Agreements Between Dealers in Plumbers' Supplies and Master Plumbers' Association.
430. Agreements Between Publishers—Price at Retail—Not to Sell to Certain Class.
431. News Association for Distributing.
432. Agreement Between Retailers Not to Purchase from Certain Wholesalers.
433. Agreements Between Salt Manufacturers.
434. Contracts Relating to Telephone Service.
435. Telegraph Companies — Service of Is Not a Commodity.
436. Agreement Between Theatrical Owners or Managers—Plays Not Commodities.
437. Combination to Induce Employees to Break Contracts with Employers.
438. Undertaking by Corporations to Induce Employees to Trade with Another.
439. Contract to Instruct in Treatment of Scalp and Hair—To Use Only Certain Remedies.

CHAPTER XXVII

STATE STATUTE—PROSECUTIONS, REMEDIES AND DEFENSES

§ 440. Parties Defendant — Who Subject to Prosecution.
441. Remedy Provided by Statute Exclusive.
442. Statutes Providing for Punishment—Fine—Imprisonment.
443. Liability Where Agreement Legal When Made—Effect of Subsequent Statute.
§ 444. Statute Construed by Highest Court of State—Review by United States Supreme Court.
445. Annulment of Charter—Forfeiture of Franchise — Right of Stockholder to Enforce.
446. Application to Annul Charter—Granting of in Discretion of Court.

§ 447. Foreign Corporation—Ouster of—When Court no Discretion.
448. Foreign Corporations—Nature of Right to Transact Business—Ouster of.
449. Foreign Insurance Company—Authority of Insurance Commission to Revoke Certificate.
450. Suit for Injunction by Person Injured—Defense.
451. Violation of Law as Preventing Relief Against Ordinance — Ceasing Violations.
452. Action for Damages—Person Injured by Conspiracy.
453. Action by Party to Illegal Contract or Combination.
454. Enjoining Acts Done After Combination Declared Illegal.
455. That Corporation Foreign One Is no Defense.
456. That Prices Not Raised Is no Defense.
457. No Defense That Complete Monopoly Not Obtained.
458. Motives of Those Instigating Suit Are Immaterial.
459. Good Motives or Intent no Defense Where Statute Violated.
§ 460. Illegality of Combination or Contract as Defense—Independent of Statute—Collateral Contract.
461. Illegality of Combination or Contract as Defense Where Permitted by Statute.
462. Illegality of Combination or Contract as Defense Continued—Instances.
463. Illegality of Combination or Contract as Defense—Action for Rent.
464. Illegality of Combination or Contract as Defense — Contract Made Prior to Statute.
465. Illegality of Combination or Contract as Defense—Where Statute Prescribes No Mode of Procedure for Determining Illegality.
466. Combination to Raise Prices—Defense That Law Does Not Favor Increased Sale of Article.
467. Illegality of Association as Defense to Action by for Penalty.

CHAPTER XXVIII

STATE STATUTES—PLEADING

§ 468. Rule as to Certainty.
469. General Rule — Indictment or Information in Language of Statute Sufficient.
470. Legal Conclusions.
471. Joinder of Defendants.
472. Not Necessary to Allege a Combination in a Position to Control Market.
473. Necessity of Averring Intent, Purpose or Effect.
§ 474. Averring Terms of Agreement—Particular Articles Subject of.
475. Conspiracy — Means by Which to Be Effectuated Need Not Be Charged.
476. Conspiracy — Averring Names of Persons to Be Injured.
477. In Proceeding by Information to Forfeit Corporate Franchise.

§ 478. Complaint in Action to Restrain—New York.
479. Necessity of Averring Acts to Be in Restraint of Trade.
§ 480. Rule as to Party Seeking to Enforce Forfeiture — Defense That Member of Illegal Combination.
481. Complaint to Recover Penalty.

CHAPTER XXIX

EVIDENCE

§ 482. Proof of Illegality — Evidence of Circumstances in Connection with Making of Contract—Acts of Parties—Declaration.
483. Evidence as to Intent.
484. Same Subject—Positive Evidence Not Necessary.
485. Letters as Evidence of Conspiracy — Statements of Parties.
486. Combination to Raise Prices —Evidence to Show Reason for Increase—Rebuttal of.
487. By-Laws of Association or Corporation as Evidence.
488. Presumption as to Innocence.
489. Burden of Proof—Illegality of Contract—Partnership Accounting.
§ 490. Sufficiency of Evidence—Proof of Conspiracy to Raise Price.
491. Sufficiency of Evidence—Time of Entering Into Conspiracy.
492. Damages—Conspiracy—Erroneous Exclusion of Evidence as to Intent to Injury.
493. Evidence of Disloyalty as Tending to Prove Non-Existence of Trust.
494. Requiring Production of Books and Documents.
495. Compelling Witness to Testify—Immunity Statute.
496. Taking of Testimony Before Trial — Examination of Witnesses — Constitutionality of Statute.

CHAPTER XXX

LABOR OR TRADE UNIONS

§ 497. Right of Workingmen to Organize.
498. Right of Workingmen to Organize — Expressions of Courts.
499. Labor Union—Presumption as to Being Law-Abiding Body.
§ 500. Right to Organize Extends to Labor Whether Physical or Intellectual.
501. Right of Workingmen to Strike.
502. Right to Strike—Limitations on.
503. Picketing — Legality of — General Rule.

§ 504. Picketing—Decisions Holding Unlawful.
505. Picketing — When Unlawful.
506. Picketing—Whether Lawful Depends on Facts and Circumstances—Rule as Supported by Authority.
507. Picketing—No Injunction to Protect.
508. Picketing—Ordinances as to Valid.
509. Right to Strike—Refusal to Work with Non-Union Man — Massachusetts Rule.
510. Right to Strike—Refusal to Work with Non-Union Man—Pennsylvania Rule.
511. Right to Strike—Refusal to Work with Non-Union Man—New York Decisions.
512. Right to Strike—Refusal to Work with Non-Union Man—Other Decisions.
513. Right to Strike—Refusal to Work with Non-Union Man—Conclusion.
514. Use of Persuasion by Strikers.
515. Use of Persuasion — Employees Under Contract.
516. Use of Violence, Threats or Intimidation by Strikers.
517. Threats — Intimidation — What Constitute.
518. Boycotts Generally.
519. Boycott Circulars — When Held Legal.
520. Boycott Circulars — When Held Illegal.
521. Boycott Circulars—Constitutional Provision as to Freedom of Speech.
522. Contracts Between Employer and Employee.
523. Contracts Between Employer and Employee Continued.
§ 524. Officers—Power of Trade Union—Board of Directors or Committees to Contract.
525. Injunction — Sufficiency of Complaint for Threatened Injury to Persons and Property — New York Code.
526. Parties—Process—Service—Injunction.
527. Injunction—Right to in New York.
528. Injunction to Restrain Payment of Strike Benefits—Specific Performance.
529. Injunction—Evidence of Unlawful Acts of Members During Strike.
530. Injunction — No Defense That Act a Crime.
531. Injunction — Question of Law and Fact.
532. Preliminary Injunction — When Vacated as to Union but Permitted to Stand as to Individual Members but Not so as to Prevent Peaceful Picketing.
533. Injunction — Contract—Nature of Proceeding.
534. Constitutional Law — Congress no Power to Make it a Criminal Offense for Carrier to Discharge Employee Because Member of Labor Union — Fifth Amendment — Contract —Interstate Commerce.
535. Statute Prohibiting Discharge of Employee Because Member of Labor Union.
536. Statute as to Becoming Member of Labor Union — Condition of Employment.
537. Statute Prohibiting Granting of Injunction Against Union.

§ 538. Statute as to Suits Against Unincorporated Associations.
539. Statute as to Labels and Stamps.
§ 540. Legality of Union as Affected by Constitution of Union.

APPENDIX A

Standard Oil Company of New Jersey v. United States, 221 U. S. 1
Headnotes (Official)
Opinion } (Official)
Dissenting Opinion }
United States v. American Tobacco Company, American Tobacco Company v. United States, 221 U. S. 106
Headnotes (Official)

TABLE OF CASES CITED

[References are to Sections]

A

Abbott v. City of Duluth (104 Fed. 833), 222
Aberthaw Construction Co. v. Cameron (194 Mass. 208), 515
Adair v. United States (208 U. S. 161), 231, 534, 536
Adams v. Standard Oil Co. of Ky. [(Miss., 1910), 53 So. 692,] 13
Adams Express Co. v. Kentucky (214 U. S. 218), 270, 271
Adams Express Co. v. State (161 Ind. 328), 336
Addyston Pipe & Steel Co. v. United States (175 U. S. 211) (see "Appendix A"), 77, 80, 81, 82, 111, 125, 141, 143, 157, 172, 205, 207, 233, 270
Adee v. Nassau Electric R. Co. (72 N. Y. Supp. 992), 316
Ætna Fire Ins. Co. v. Kennedy (161 Ala. 600), 271
Ætna Ins. Co. v. Commonwealth (106 Ky. 864), 18, 421
Ahern, Matter of, v. Elder (195 N. Y. 493), 269
Alabama & V. Ry. Co. v. Turner [(Miss., 1910), 52 So. 261,] 277
Albertype Co. v. Gust-Feist Co. (102 Tex. 219), 385
Alexander v. United States (201 U. S. 117), 186
Alger v. Thacher [19 Pick. (236 Mass.,) 51], 86, 88, 89, 106
Allegheny County v. McKeesport Diamond Market (123 Pa. St. 164), 272
Allen v. Hunter (6 McLean, 303), 9, 282
Allers Commission Co. v. Spencer (205 Mo. 105), 441
Allgeyer v. Louisiana (165 U. S. 578), 82, 231, 271
Allis-Chalmers Co. v. Iron Moulders' Union (150 Fed. 155), 505
Allis-Chalmers Co. v. Reliable Lodge (111 Fed. 264), 503
Allyn, Appeal of (81 Conn. 534), 230, 269, 271
Altgelt v. City of San Antonio (81 Tex. 436), 326, 328
American Banana Co. v. United Fruit Co. (213 U. S. 347), 64, 85, 117
American Banana Co. v. United Fruit Co. (166 Fed. 261), 173
American Banana Co. v. United Fruit Co. (160 Fed. 184), 167
American Biscuit & Mfg. Co. v. Klotz (44 Fed. 721), 10, 46, 50, 51, 65, 67
American Can Co. v. Agricultural Ins. Co. (12 Cal. App. 133), 21
American Casualty Ins. Co's. Case (Boston & Albany Rd. Co. v. Mercantile Trust & Deposit Co.) (82 Md. 535) 86.
American Express Co. v. Southern Indiana Express Co. (167 Ind. 292), 336
American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, Nos. 1 and 3 (90 Fed. 608), 503
American Strawboard Co. v. Haldeman Paper Co. (83 Fed. 619), 406
American Strawboard Co. v. Peoria Strawboard Co. (65 Ill. App. 502), 463
American Teleph. & Teleg. Co. v.

[References are to Sections]

Morgan County Teleph. Co. (138 Ala. 597), 317
American Tobacco Co. v. Commonwealth [(Ky.) 115 S. W. 745,] 473
American Tobacco Co. v. United States, see United States v. American Tobacco Co.
American Tobacco Co. v. Werckmeister (207 U. S. 284), 285, 286, 287
American Union Coal Co. v. Pennsylvania R. Co. (159 Fed. 278), 188
American Union Teleg. Co. v. Western Union Teleg. Co. (67 Ala. 26), 271
American Waterworks & Guarantee Co. v. Home Water Co. (115 Fed. 171), 211
Ames v. American Telephone & Telegraph Co. (166 Fed. 820), 162, 166
Ames v. Union Pacific Ry. Co. (64 Fed. 165), 270
Anchor Electric Co. v. Hawkes (171 Mass. 101), 109
Anders v. Gardner (151 N. C. 604), 106
Anderson v. Louisville & Nashville R. Co. (62 Fed. 46), 16
Anderson v. Shawnee Compress Co. (17 Okla. 231), 87, 106, 109
Anderson v. United States (171 U. S. 604), 80, 82, 123, 149
Andrews v. Kingsbury (212 Ill. 97), 88, 106
Angelica Jacket Co. v. Angelica (121 Mo. App. 226), 109
Ansley v. Ainsworth (4 Ind. Ty. 508), 208
Anton v. Greenhow (107 U. S. 769), 214
Appeal of. See particular name.
Application of. See particular name.
Arkansas Brokerage Co. v. Dunn & Powell (173 Fed. 899), 140
Arkansas Stave Co. v. State [(Ark., 1910) 125 S. W. 1001,] 21, 231
Arnold & Co. v. Jones' Cotton Co. (152 Ala. 501), 109
Arnot v. Pittston & Elmira Coal Co. (68 N. Y. 558), 80
Arthur v. Oakes (63 Fed. 310), 41, 498, 505
Asbell v. Kansas (209 U. S. 251), 270
Association v. Starkey (84 Mich. 76, 80), 86, 87, 88, 102, 106, 108, 406
Atchison, T. & S. F. Ry. Co. v. Gee (139 Fed. 582), 504
Atkins v. Disintegrating Co. [18 Wall. (U. S.) 272], 170
Atkins v. Fletcher Co. (65 N. J. Eq. 658), 507, 518
Atlanta v. Chattanooga Foundry & Pipeworks (127 Fed. 23), 164, 188, 189, 190, 191
Atlanta, City of, v. Stein (111 Ga. 789), 322
Atlantic Coast Line Rd. Co. v. Beasley (54 Fla. 311), 86
Atlantic Coast Line Rd. Co. v. Riverside Mills (219 U. S. 186), 200, 205, 232, 270
Attorney General v. A. Booth & Co. (143 Mich. 89), 229, 330, 335, 341
Attorney General v. Consolidated Gas Co. [56 Misc. (N. Y.) 49], 377
Attorney General v. Detroit Common Council (150 Mich. 310), 277
Attorney General v. Preston (53 Mich. 177), 269
Attorney General v. Rumford Chemical Works (32 Fed. 591), 282
Attorney General, Matter of [124 App. Div. (N. Y.) 401], 418, 446
Attorney General, Matter of (155 N. Y. 441), 496
Attorney General's Appeal, Matter of [22 App. Div. (N. Y.) 285], 496
Aurora Water Co. v. City of Aurora (129 Mo. 540), 277

[References are to Sections]

B

Badger Brass Mfg. Co. v. Daly (137 Wis. 601), 515
Bagg v. Wilmington, Columbia & Augusta R. Co. (109 N. C. 279), 16
Baglin v. Cusenier Co. (221 U. S. 580), 288
Bailey v. City of Philadelphia (184 Pa. St. 594), 305
Bailey v. Master Plumbers (103 Tenn. 99), 384, 467
Bailey v. Phillips (159 Fed. 535), 106
Ball v. Texarkana Water Corp. [(Tex. Civ. App., 1910), 127 S. W. 1068], 277
Ballantine v. Cummings (220 Pa. St. 621), 3
Baltimore, City of, v. Chesapeake & Potomac Teleph. Co. (92 Md. 692), 71
Baltzer v. North Carolina (161 U. S. 240), 212
Bancroft v. Union Embossing Co. (72 N. H. 402), 106, 109
Bank of Augusta v. Earle [13 Pet. (638 U. S.) 519], 272
Bank of California v. San Francisco (142 Cal. 276), 272
Bank of Commerce v. New York City [2 Black (67 U. S.), 620], 203
Bank of Commerce, In re Application of (153 Ind. 460), 264, 266
Bank of Toledo v. City of Toledo (1 Ohio St. 622), 70, 71, 72, 275
Banks v. Manchester (128 U. S. 244), 285
Bannon & Mulkey v. United States (156 U. S. 464), 64
Baratario Canning Co. v. Joulian (80 Miss. 555), 402
Barbee v. Plank Road Co. (6 Fla. 262), 8
Barbier v. Connolly (113 U. S. 27), 370
Barnes v. Chicago Typographical Union (232 Ill. 424), 504
Barnes & Co. v. Berry (157 Fed. 883), 524, 528
Barnett v. Powell [16 Ky. (6 Littell) 409], 18
Barr v. Craven (89 L. T. 574), 106
Barr v. Essex Trades Council (53 N. J. Eq. 101), 31, 502, 517
Barrett v. State [(Ind., 1911), 93 N. E. 543], 227, 271
Barron v. Baltimore [7 Pet. (32 U. S.) 243], 227
Bartholomew v. City of Austin (85 Fed. 359), 8, 257, 275, 328
Barton v. Mulvane (59 Kan. 313), 461
Bauer v. State (3 Okla. Cr. 529), 3
Beal v. Chase (31 Mich. 490), 109
Beales v. Amador County Supervisors (35 Cal. 624), 269
Bear v. City of Cedar Rapids [(Iowa, 1910), 126 N. W. 324], 277
Beard v. Dennis (6 Ind. 200), 106, 109
Beattie v. Callanan (81 N. Y. Supp. 413), 515, 516
Beatton v. Tarrant (102 Ill. App. 124), 505, 506
Beck v. Railway Teamsters' Protective Union (118 Mich. 497), 31, 35, 497, 498, 502, 505, 509, 518, 519, 521
Beechley v. Mulville (102 Iowa, 602), 18, 421, 452, 453
Beekman v. Third Ave. Rd. Co. (153 N. Y. 144), 316
Beetham v. Frazer (21 T. L. R. 8), 106
Beinecke Coal Min. Co. v. Wood (112 Fed. 477), 516
Bell, In re (69 Kan. 855), 495
Belmont Bridge Co. [18 How. (59 U. S.) 421], 270
Bement v. National Harrow Co. (186 U. S. 70), (see "Appendix A") 134, 135, 136, 157
Bennett v. Nichols (9 Ariz. 138), 264
Berea College v. Kentucky (211 U. S. 46), 534

[References are to Sections]

Berlin Machine Works v. Perry (71 Wis. 495), 106
Bessemer, City of, v. Bessemer Waterworks (152 Ala. 391), 277
Bessne & Co. v. Corn Products Mfg. Co. (Ind. App., 1911) (94 N. E. 353), 459, 460
Best v. Bander [29 How. Pr. (N. Y.) 489], 18
Beyer v. National Building & Loan Assoc. (131 Ala. 369), 264
Bigelow v. Calumet & Hecla Min. Co. (167 Fed. 721), 118, 120, 153, 183
Bigelow v. Calumet & Hecla Min. Co. (155 Fed. 869), 161, 378, 394
Bigelow v. Old Dominion Copper Mining & Smelting Co. (74 N. J. Eq. 457), 86
Bilafsky v. Conveyancers' Title Ins. Co. (192 Mass. 504), 60
Bingham v. Brands (119 Mich. 255), 344, 402
Binney v. Cumberland Ely Coffee Co. (183 Fed. 650), 175
Binns v. Vitagraph Co. of America (124 N. Y. Supp. 515), 25
Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co. (79 Ala. 465), 277, 316
Birmingham Mineral R. Co. v. Parsons (100 Ala. 662), 271
Bishop v. American Preservers' Co. (51 Fed. 272), 173
Bishop v. American Preservers' Co. (105 Fed. 845), 162
Bishop v. Palmer (146 Mass. 469), 97, 106
Blackstone v. Miller (188 U. S. 189), 213
Blackstone's Estate, In re (171 U. S. 682), 213
Blair v. Chicago (201 U. S. 400), 71, 218, 275
Blake v. McClung (172 U. S. 239), 370
Blake v. Winona & St. Peter Co. (19 Minn. 418), 272
Blankenship v. City of Sherman (33 Tex. Civ. App. 507), 277
Blanner v. Williams Co. (69 N. Y. Supp. 165), 106
Blindell v. Hagan (54 Fed. 40), 161, 505
Blocki v. People (220 Ill. 444), 71
Bloom v. Home Ins. Co. (91 Ark. 367), 86, 106, 409
Blount Mfg. Co. v. Yale & Towne Mfg. Co. (166 Fed. 555), 134, 136
Board of School Directors of Madison Parish v. Coltharp [(La., 1911), 54 So. 299], 266
Board of Trade v. Christie Grain & Stock Co. (198 U. S. 236), 150
Boasberg v. Walker (111 Minn. 445), 60
Boatmans' Bank v. Fritzlein (175 Fed. 183), 461
Bobbs-Merrill Co. v. Straus (210 U. S. 339), 287
Bobbs-Merrill Co. v. Straus (147 Fed. 15), 286
Bobbs-Merrill Co. v. Straus (139 Fed. 155), 133
Bohmer v. Haffen (161 N. Y. 390), 335
Bohn Manufacturing Co. v. Hollis (54 Minn. 223), 60, 502
Bong v. Campbell Art Co. (214 U. S. 236), 287
Booth v. People (184 U. S. 425), 231
Booth v. Town of Woodbury (32 Conn. 118), 269
Booth & Co. v. Davis (127 Fed. 875), 130
Booth & Co. v. Seibold [37 Misc. R. (N. Y.) 10], 409
Borough of. See name of.
Boston & Albany Rd. Co. v. Mercantile Trust & Deposit Co. (82 Md., 535, 34 Atl. 778), 86
Boulton v. Bull (2 H. Bl. 463), 296
Bowman v. Chicago & N. W. R. Co. (125 U. S. 465), 16
Boyce, Ex parte (27 Nev. 299), 269
Boyd v. United States (116 U. S. 616) (see "Appendix A").
Brace Bros. v. Evans (5 Pa. Co. Ct. R. 163), 31

[References are to Sections]

Brady v. Daly (175 U. S. 148), 189
Brady v. Pennsylvania Rd. Co. (2 I. C. C. R. 131), 200
Branson v. Industrial Workers of the World (30 Nev. 270), 31
Brass v. Stoeser (153 U. S. 391), 271
Brenham v. Becker (1 White & Willson's Civ. Cas., §§ 1243, 1244), 278
Brenham, City of, v. Brenham Water Co. (67 Tex. 542), 257, 277, 294, 326, 328
Bridge Proprietors v. Hoboken Co. [1 Wall. (68 U. S.) 116], 219
Bridges v. Shallcross (6 W. Va. 562), 269
Bridgewater Ferry Co. v. Sharon Bridge Co. (145 Pa. St. 404), 300
Brimmer v. Redman (138 U. S. 78) (see "Appendix A")
Brine v. Insurance Co. (96 U. S. 627), 214
Broad v. Jollyfe (Cro. Jac. 596), 88
Broadway & Locust Point Ferry Co. v. Hankey (31 Md. 346), 302
Brodnax v. Missouri (219 U. S. 285), 234, 271
Brooklyn Distilling Co. v. Standard Distilling & Distributing Co. [120 App. Div. (N. Y.) 237], 463
Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & West End R. R. Co. [23 App. Div. (N. Y.) 29], 395
Brothers v. Brothers (29 Colo. 69), 21
Brown v. Epps (91 Va. 726), 269
Brown v. Haselman (79 Ark. 213), 350
Brown v. Houston (114 U. S. 622), 270
Brown v. Jacobs Pharmacy Co. (115 Ga. 429), 80
Brown v. Kling (101 Cal. 295), 108
Brown v. Maryland [12 Wheat. (25 U. S.) 419], 16, 271
Brown v. Rounsavell (78 Ill. 589), 82
Brownsville Glass Co. v. Appert Glass Co. (136 Fed. 240), 1
Buckhout v. Witner (157 Mich. 406), 410
Buckshorn Plaster Co. v. Consolidated Plaster Co. (47 Colo. 516), 462
Budd v. New York (143 U. S. 517), 271
Bullitt v. Sturgeon (127 Ky. 332), 269
Bullock v. Johnson (110 Ga. 486), 106
Burroughs v. City of Cherokee (134 Iowa, 429), 277
Burrows v. Interborough Metropolitan Co. (156 Fed. 389), 49, 397
Bush v. New York Life Ins. Co. (119 N. Y. Supp. 796), 264
Bushnell v. Beloit (10 Wis. 195), 269
Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co. (111 U. S. 746), 8, 82, 89
Butterick Publishing Co. v. Fisher (203 Mass. 122), 371
Butterick Publishing Co. v. Rowe (141 Wis. 533), 426
Butterick Pub. Co. v. Typographical Union (100 N. Y. Supp. 292), 505, 519

C

Clain v. City of Wyoming (104 Ill. App. 538), 272
Caldwell v. Texas (137 U. S. 692), 230
Caldwell v. Vanvlissengen (9 Harr. 415), 282
California State Teleg. Co. v. Alta Teleg. Co. (22 Cal. 399), 73, 318
California Steam Navigation Co. v. Wright (6 Cal. 258), 82

[References are to Sections]

Caliga v. Inter-Ocean Newspaper Co. (215 U. S. 182), 287
Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., In re (96 Fed. 756), 26
Camfield v. United States (167 U. S. 518), 271
Campbell v. Chicago, Milwaukee & St. Paul Ry. Co. (86 Iowa, 587), 16
Campbell v. Haverhill (155 U. S. 610), 189
Canadian Pac. R. Co. v. Western Union Teleg. Co. (17 Can. S. C. 151), 94
Canal Company v. Clark [13 Wall. (80 U. S.) 311], 288
Canterberry v. Miller (76 Ill. 355), 21
Cape May, Delaware & S. P. R. Co. v. City of Cape May (59 N. J. L. 393), 278
Capital City Dairy Co. v. Ohio (183 U. S. 238), 227
Capital City Light & Fuel Co. v. City of Tallahassee (42 Fla. 462), 223
Carew v. Rutherford (106 Mass. 1), 498, 502, 509
Carroll v. Campbell (110 Mo. 557), 300
Carroll v. Greenwich Ins. Co. (199 U. S. 401), 236, 264, 271, 337, 370
Carson River Lumbering Co. v. Patterson (33 Cal. 334), 16
Carter v. Alling (43 Fed. 208), 103, 106
Carter v. Oster (134 Mo. App. 146), 512
Casey v. Cincinnati Typographical Union (45 Fed. 135), 31, 502, 505
Casey v. State (53 Ark. 334), 350
Cedar Rapids Water Co. v. City of Cedar Rapids (118 Iowa, 234), 325
Central Coal & Coke Co. v. Hartman (111 Fed. 96), 188
Central Land Co. v. Laidley (159 U. S. 103), 209
Central New York Teleph. & Teleg. Co. v. Averill (199 N. Y. 128), 88, 92
Central New York Teleph. & Teleg. Co. v. Averill (129 App. Div. 752), 86, 232
Central New York Teleph. & Teleg. Co. v. Averill (114 N. Y. Supp. 129), 86, 232
Central New York Teleph. & Teleg. Co. v. Averill (110 N. Y. Supp. 273), 97
Central Ohio Salt Co. v. Guthrie (35 Ohio St. 666), 86, 87
Central Passenger Ry. Co. v. Louisville Bagging Manfg. Co. (3 Am. Elec. Cas. 252) 278.
Central Shade Roller Co. v. Cushman (143 Mass. 353), 1
Central Trans. Co. v. Pullman's Palace Car Co. (139 U. S. 24), 197, 275
Central Trust Co. v. Ohio Cent. R. Co. (23 Fed. 306), 197
Central Trust Co. of New York v. Municipal Traction Co. (169 Fed. 308), 275
Champer v. City of Greencastle (138 Ind. 339), 271
Champion v. Ames. See Lottery case.
Chappel v. Brockway 21 [Wend. (N. Y.) 157], 106
Charge to Grand Jury, In re (151 Fed. 834), 16, 114
Charles E. Wisenall, The (74 Fed. 802), 155
Charles River Bridge v. Warren Bridge [11 Pet. (36 U. S.) 420], 8, 66, 71, 72, 219, 272, 275, 276, 296
Chattanooga Foundry & Pipe Works v. Atlanta (203 U. S. 390), 160, 164, 191
Chenango Bank v. Brown (26 N. Y. 467), 269
Chesapeake & Ohio Fuel Co. v. United States (115 Fed. 610)

[References are to Sections]

(see "Appendix A"), 24, 65, 80, 82, 83, 112, 118, 121, 154
Chicago v. Sheldon [9 Wall. (76 U. S.) 50], 212
Chicago v. Northwestern Rd. Co. See Railroad Co. v. Fuller.
Chicago, v. Rumpff (45 Ill. 90), 277, 280, 315, 330
Chicago, v. Weber (216 Ill. 304), 271, 274
Chicago & Western Indiana Rd. Co. v. Dunbar (95 Ill. 571), 74, 272
Chicago, Burlington & Quincy Rd. Co. v. Chicago (166 U. S. 226), 228
Chicago, Burlington & Quincy Rd. Co. v. Drainage Commrs. (200 U. S. 561), 271
Chicago, Burlington & Quincy Rd. Co. v. McGuire (219 U. S. 549), 231, 271
Chicago, Burlington & Quincy Rd. Co. v. Nebraska (47 Neb. 549), 278
Chicago, Burlington & Quincy Rd. Co. v. United States (220 U. S. 559) ("Appendix A")
Chicago City Ry. v. People (73 Ill. 541), 272
Chicago Gaslight & Coke Co. v. People's Gas Light & Coke Co. (121 Ill. 530), 92
Chicago, Indianapolis & Louisville Ry. Co. v. Southern Indiana Ry. Co. (38 Ind. App. 234), 395
Chicago, Indianapolis & Louisville Ry. Co. v. United States (219 U. S. 486), 270
Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co. (61 Fed. 993), 197
Chicago, Rock Island & Pacific Ry. Co. v. Arkansas (219 U. S. 453), 270
Chicago, St. L. & N. G. R. Co. v. Pullman Southern Car Co. (139 U. S. 79), 102
Chicago Union Traction Co. v. City of Chicago (199 Ill. 484), 278
Chicago Wall Paper Mills v. General Wall Paper Co. (147 Fed. 491), 155, 455, 460
Chicago, Wilmington & Vermillion Coal Co. v. People (214 Ill. 421), 354, 440, 442, 455, 457, 475
Church v. Kelsey (121 U. S. 282), 209
Churchill v. Gronewig (81 Iowa, 449), 21
Cilley v. United Shoe Mach. Co. (152 Fed. 726), 173
Cincinnati, P. B. S. & P. Packet Co. v. Bay (200 U. S. 179) (see "Appendix A"), 152
Cincinnati Street Ry. Co. v. Snell (193 U. S. 30), 236
Cincinnati, W. & Z. R. Co. v. Supervisors (1 Ohio St. 77), 269
Citizens' Bank of Louisiana v. Parker (192 U. S. 73), 263
Citizens' Gaslight Co. v. Louisville Gas Co., (81 Ky. 263), 303
Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co. (171 Fed. 553), 68, 241
Citizens' St. Ry. Co. v. Africa (100 Tenn. 26), 71
Citizens' St. Ry. Co. v. Detroit (171 U. S. 48), 294, 316
City. See name of.
City v. Lamson [9 Wall. (76 U. S.) 477], 212
City Carpet Beating Works v. Jones (102 Cal. 506), 108
City Street Improvement Co. v. Regents' University of California (158 Cal. 776), 269
Civil Rights Cases (109 U. S. 3), 228
Clark v. City of South Bend (85 Ind. 276), 277
Clark v. Cyclone Woven Wire Fence Co. (22 Tex. Civ. App. 41), 402, 403
Clark v. Needham (125 Mich. 84), 86, 87
Clark, In re (65 Conn. 17), 271
Clarksburg Electric Light Co. v. City of Clarksburg (47 W. Va. 739), 223, 299

[References are to Sections]

Clark's Estate, In re (195 Pa. St. 520), 263
Clemmitt v. Watson (14 Ind. App. 38), 60
Clemons v. Meadows (123 Ky. 178), 106
Cleveland, Columbus, Cincinnati & Indianapolis R. Co. v. Closser (126 Ind. 348), 92
Cleveland Electric Ry. Co. v. Cleveland (204 U. S. 116), 71, 275
Clifford v. State (29 Wis. 327), 26
Clinton v. Englebrecht [13 Wall. (U. S.) 434], 368
Coe v. Errol (116 U. S. 517), 16
Cœur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner (51 Fed. 260), 505
Coffey v. Harlan County (204 U. S. 659), 342
Coffeyville, etc., Co. v. Perry (69 Kan. 297), 536
Cohen v. Berlin & Jones Envelope Co. (166 N. Y. 292), 103
Cohen v. United Garment Workers (72 N. Y. Supp. 341), 518, 519
Cohens v. Virginia [6 Wheat. (19 U. S.) 264], 203
Cole v. Edwards (93 Iowa, 477), 108
Collector, The, v. Day [11 Wall. (78 U. S.) 113], 226
Colorado Telephone Co. v. Fields [(N. M., 1910), 110 Pac. 571], 275
Columbia Carriage Co. v. Hatch (19 Tex. Civ. App. 120), 402, 462
Columbus v. Mercantile Trust & Deposit Co. of Balt. (218 U. S. 645), 225, 271
Combs v. Sewell (23 Ky. L. Rep. 169), 300
Comer v. Burton-Lingo Co. (24 Tex. Civ. App. 251), 409
Commonwealth v. Alger [7 Cush. (6 Mass.) 53], 271
Commonwealth v. Bavarian Brewing Co. (112 Ky. 925), 348, 466
Commonwealth v. Bavarian Brewing Co. (23 Ky. Law Rep. 2334), 413
Commonwealth v. City of Philadelphia (132 Pa. St. 288), 277
Commonwealth v. Drewry [15 Gratt. (Va.) 1], 269
Commonwealth v. Eclipse Hay Press Co. (31 Ky. L. Rep. 824), 16
Commonwealth v. Emmers (221 Pa. St. 298), 264
Commonwealth v. Emmers (33 Pa. Super. Ct. 151), 264
Commonwealth v. Gloucester Ferry Co. (98 Pa. St. 105), 16
Commonwealth v. Grinstead (111 Ky. 223), 82, 401
Commonwealth v. Grinstead (108 Ky. 59), 348, 374, 469
Commonwealth v. Hodges (137 Ky. 233), 244, 375
Commonwealth v. Housatonic R. Co. (143 Mass. 264), 16
Commonwealth v. Hunt [4 Metc. (Mass.) 111], 504
Commonwealth v. International Harvester Co. (131 Ky. 551), 229, 244, 348, 350, 354, 364, 375, 473
Commonwealth v. Lancaster Sav. Bk. (123 Mass. 493), 18
Commonwealth v. Mallet (27 Pa. Super. Ct. 41), 269
Commonwealth v. Peasler (177 Mass. 267), 183
Commonwealth v. People's Five Cent Sav. Bank [5 Allen (87 Mass.), 428], 18
Commonwealth v. Strauss (191 Mass. 545), 371
Commonwealth v. Strauss (188 Mass. 229), 371
Commonwealth v. Telly (33 Pa. Super. Ct. 35), 60
Concord Rd. v. Greeley (17 N. H. 47), 269
Connecticut Mut. Life Ins. Co. v. Cushman (108 U. S. 51), 214
Connett v. United Hatters of North America (76 N. J. Eq. 202), 501, 514, 516
Connolly v. Union Sewer Pipe Co.

[References are to Sections]

(184 U. S. 540), 155, 156, 157, 159, 161, 192, 230, 237, 376
Conradt v. Miller (2 Alaska, 433), 277
Consolidated Coal Co. v. Schmisseur (135 Ill. 371), 88
Consolidated Forwarding Co. v. Southern Pac. Co. (9 I. C. C. R. 182), 194
Consolidated Grocery Co. v. Hammond (175 Fed. 641), 182
Consumers' Oil Co. v. Nunnemaker (142 Ind. 560), 86, 102, 103, 106
Continental Ins. Co. v. Parkers (142 Ala. 650), 271
Continental Securities Co. v. Interborough Rap. Transit Co. (165 Fed. 945), 8, 362
Continental Wall Paper Co. v. Voight & Sons Co. (212 U. S. 227), 13, 125, 145, 157
Converse v. Ætna National Bk. (79 Conn. 163), 214
Cooley v. Board of Wardens of Phila. [12 How. (53 U. S.) 299], 16
Cooper v. Edeborn (31 Pittsb. Leg. J. (N. S.) 50], 108
Coquard v. National Linseed Oil Co. (171 Ill. 480), 445
Corfield v. Coryell (4 Wash. 371), 16
Corning, In re (51 Fed. 205), 22, 178
Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. (13 I. C. R. 266), 199
Cottington v. Swan (128 Wis. 321), 106, 109
Couk & Duncan v. Skeen (109 Va. 6), 269
Council Bluffs, City of, v. Kansas City, St. Joseph & Council Bluffs R. Co. (45 Iowa, 338), 16, 27
Coverly v. Terminal Warehouse Co. (75 N. Y. Supp. 145), 86
Covington & Cincinnati Bridge Co. v. Kentucky (154 U. S. 204), 270
Cowan v. Fairbrother (118 N. C. 406), 86, 92, 106, 109
Crandall v. Nevada [6 Wall. (73 U. S.) 35], 270
Crawford v. Wick (18 Ohio St. 190), 87
Crescent City Gaslight Co. v. New Orleans Gaslight Co. (27 La. Ann. 138), 274, 303
Cross v. North Carolina (132 U. S. 131), 168
Crossley v. California (168 U. S. 640), 168
Crowley v. Christensen (137 U. S. 89), 231
Crump v. Commonwealth (84 Va. 927), 31, 33, 502, 503, 516, 517
Crump v. Ligon (37 Tex. Civ. App. 172), 409
Crump, In re (84 Va. 927), 31, 33, 502, 503, 516, 517
Crystal Ice Co. v. Wylie (65 Kan. 104), 462
Crystal Ice & Mfg. Co. v. State (23 Tex. Civ. App. 293), 420
Culp v. Love (127 N. C. 457), 90
Cumberland Telephone & Telegraph Co. v. Attorney General [(Miss., 1911), 54 So. 670], 361, 390, 434, 441
Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General [(Miss., 1911), 54 So. 446], 390, 434, 441
Cummins v. Reading School District (198 U. S. 11), 271
Cummins v. Union Bluestone Co. (164 N. Y. 401), 417
Cummins v. Union Bluestone Co. (44 N. Y. Supp. 787), 90
Curran v. Arkansas [15 How. (56 U. S.) 304], 214
Curran v. Galen [77 Hun (N. Y.), 610], 498
Curran v. Galen (152 N. Y. 33), 498, 511
Curryer v. Merrill (25 Minn. 1), 314
Curten v. Atkinson (54 N. C. 133), 26
Curtis v. Gokey (69 N. Y. 300), 106
Cutting v. Florida Ry. & Nav. Co. (46 Fed. 641), 200

[References are to Sections]

D

Dabs v. State (39 Ark. 355), 271
Daniel Ball, The [10 Wall. (77 U. S.) 557], 200
Daniels v. Tearney (102 U. S. 415), 214
Danville, City of, v. Noone (103 Ill. App. 290), 280
Darcantel v. Slaughter-House, etc., Co. (44 La. Ann. 632), 8
Dartmouth College v. Woodward [4 Wheat. (17 U. S.) 518], 21, 216
Davenport v. Kleinschmidt (6 Mont. 502), 6, 8, 239, 272, 277, 280, 328, 330
Davenport Gas & Electric Co. v. City of Davenport (124 Iowa, 22), 298
Davidson v. New Orleans (96 U. S. 97), 230
Davidson, The (122 Fed. 1006), 321
Davies v. Barney [2 Gill & J. (Md.) 382], 106
Davies v. Racer [72 Hun (N. Y.) 43], 108
Davies, Matter of (168 N. Y. 89), 377, 442, 495
Davis v. Booth & Co. (131 Fed. 31), 130, 409
Davis v. Mason (5 T. Rep. 118), 94
Davis v. Starrett (97 Me. 568), 31
Davis v. United Portable Hoisting Engineers (51 N. Y. Supp. 180), 511
Davis v. Vories (141 Mo. 234), 286
Davis Machine Co. v. Robinson (84 N. Y. Supp. 837), 511
Dawden & Pook, Ltd., v. Pook [Law Rep. (1904) 1 K. B. D. 45], 103
Dealy v. United States (152 U. S. 539), 64, 85
Dean v. Clark (30 N. Y. Supp. 45), 86
Debs, In re (158 U. S. 564), 114, 503
Deems v. Mayor & Council of Baltimore (80 Md. 173), 271
Delaware, Lackawanna & Western R. R. Co. v. Bowns (58 N. Y. 573), 41
Delaware, L. & W. R. Co. v. Frank (110 Fed. 689), 163
Delaware, L. & W. R. Co. v. Kutter (147 Fed. 51), 151
Delaware, L. & W. R. Co. v. Switchmen's Union of North America (158 Fed. 541), 501
Dennehy v. McNulta (86 Fed. 825), 155, 460
Denny v. Bennett (128 U. S. 489), 214
Denver & Swansea Ry. Co. v. Denver City Ry. Co. (2 Colo. 673), 272, 316
Denver, City of, v. Hubbard (17 Colo. App. 346), 298
Desbrow v. Cass County Suprs. (119 Iowa, 538), 86
Detroit Citizens' Street Ry. Co. v. Detroit Ry. (171 U. S. 48), 277
Detroit Citizens' St. R. Co. v. Detroit (110 Mich. 384), 71
Detroit Salt Co. v. National Salt Co. (134 Mich. 103), 378, 433, 482
Diamond Match Co. v. Roeber (106 N. Y. 473), 88, 99, 108, 109
Dickinson v. Cunningham (140 Ala. 527), 314
Dillon v. Erie R. Co. (43 N. Y. Supp. 320), 16
Disbrow v. Creamery Package Mfg. Co. (111 Minn. 237), 460
Distilling & Cattle Feeding Co. v. People (156 Ill. 448), 100, 335
District of Columbia v. Brooks (214 U. S. 138), 238, 271
Dodge v. Woolsey [18 How. (59 U. S.) 331], 203
Doherty & Co., v. Rice (186 Fed. 204), 392
Donelson v. Beckett (4 Burr, 2408), 287
Dorsey, In re [7 Port. (Ala.) 293], 269
Douglass v. Kentucky (168 U. S. 488), 218
Downes v. Bennett (63 Kan. 653), 415
Downing v. Lewis (59 Neb. 38), 86

[References are to Sections]

Downing v. Lewis (56 Neb. 386), 411
Dozier v. Alabama (218 U. S. 124), 207
Dr. Miles Medical Co. v. John D. Park & Sons Co. (164 Fed. 803), 138
Drowin v. Boston & Maine Rd. Co. (74 Vt. 343), 313
Dueber Watch-Case Mfg. Co. v. Howard Watch & Clock Co. (66 Fed. 637), 24, 168, 173
Duffy v. Stockey (11 Ind. 70), 109
Dunbar v. American Teleph. & Teleg. Co. (238 Ill. 456), 106, 335
Duncan v. Atchison, Topeka & Santa Fe Rd. Co. (6 I. C. C. R. 85), 194
Dunshee v. Standard Oil Co. [(Iowa, 1910), 126 N. W. 342], 60
Dyer v. Tuskaloosa Bridge Co. [2 Port. (Ala.) 296], 72

E

Eagle Insurance Co. v. Ohio (153 U. S. 440), 271
Earlville, City of, v. Radley (237 Ill. 242), 277
East India Company v. Sandy's (10 Howell State Trials, 386), 8
East Line & R. R. Co. v. Rushing (60 Tex. 306), 275
Eckerson v. City of Des Moines (137 Iowa, 452), 269
Economic Power & Const. Co. v. City of Buffalo (112 N. Y. Supp. 1127), 265
Edgar Lumber Co. v. Cornie Stave Co. [(Ark., 1910), 130 S. W. 452], 106, 109
Edgerton v. Hodge (41 Vt. 676), 21
Edwards v. Kearzey (96 U. S. 595), 21, 214
Edwards v. National Window Glass Jobbers' Assn. (139 Fed. 795), 166
Edwards County v. Jennings (89 Tex. 618), 330
Eisel v. Hayes (141 Ind. 41), 108
Elder v. Whitesides (72 Fed. 724), 505
Elkhart, City of, v. Lipschitz (164 Ind. 671), 277
Ellerman v. Chicago Junction Rys. and Union Stockyards Co. (49 N. J. Eq. 217), 108, 109
Elliman v. Carrington [L. R. (1901) 2 Ch. 275], 86
Ellis v. Inman Poulsen & Co. (131 Fed. 182), 173
Elsey Development Co. v. Powell (147 Ala. 300), 269
Embry v. Hargadine-McKittrick Dry Goods Co. (127 Mo. App. 383), 21
Emerson v. Commonwealth (108 Pa. St. 111), 71, 275
Emery v. Ohio Candle Co. (47 Ohio St. 320), 92
Employing Printers Club v. Doctor Blosser Co. (122 Ga. 509), 437
Enders v. Enders (164 Pa. St. 266), 86
Enfield Toll Bridge Co. v. Hartford & New Haven Rd. Co., 17 Conn. 40), 296
Engel v. O'Malley (219 U. S. 128), 271
Engles v. Morginstern (85 Neb. 51), 52, 86, 106
Equitable Life Ins. Society v. Commonwealth (113 Ky. 126), 231
Equitable Loan Investment Assn. v. Peed (153 Ind. 697), 464
Erdman v. Mitchell (207 Pa. St. 79), 510
Ertz v. Produce Exchange Co. (82 Minn. 173), 384, 453
Espenson v. Koepke (93 Minn. 278), 106, 409
Eureka v. Wilson (15 Utah, 53), 278
Evers v. Hudson (36 Mont. 135), 269
Ex parte. See particular name.
Express Cos., In Matter of (1 I. C. C. R. 349), 194

F

Fanning v. Gregour [16 How. (57 U. S.) 524], 301
Fanning v. Osborne (102 N. Y. 441), 316

[References are to Sections]

F. A. Patrick & Co. v. Deschamp [(Wis., 1911), 129 N. W. 1093], 16
Farmers' Canal Co. v. Frank (72 Neb. 136), 309
Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (60 Fed. 803), 41, 76, 505
Farren v. Close (Law Rep. 4 Q. B. 602), 41, 97
Farris v. Henderson (1 Okla. 384), 16
Fearnley v. De Mainville (5 Colo. App. 441), 86
Fechteler v. Palm Bros. Co. (133 Fed. 462), 391
Ferris v. American Brewing Co. (159 Ind. 539), 88
Field v. Barber Asphalt Co. (194 U. S. 618), 112
Finch v. Schneider Granite Co. (187 Mo. 244), 344, 349, 383, 417, 465
Finklea v. Farish (160 Ala. 230), 269
Fire Insurance Companies v. State (75 Miss. 24), 476
Firemen's Fund Ins. Co. v. Hellner (159 Ala. 447), 271
First Methodist Episcopal Church of Chicago v. Dixon (178 Ill. 260), 263
Fishburn v. City of Chicago (171 Ill. 338), 65
Fisheries Co. v. Lennen (116 Fed. 217), 86, 106
Fisk v. Jefferson Police Jury (116 U. S. 131), 217
Fiske v. The People ex rel. Raymond (188 Ill. 206), 323
Flaccus v. Smith (199 Pa. St. 128), 515
Flaherty v. Hanson (215 U. S. 515), 271
Flannagan v. Buxton [(Wis., 1911), 129 N. W. 642], 277
Fleckenstein Bros. v. Fleckenstein (76 N. J. L. 613), 88
Flint v. Stone Tracy Co. (220 U. S. 108), 268
Florida Central & P. R. Co. v. Ocala St. & S. R. Co. (39 Fla. 306), 316
Ford v. Chicago Milk Shippers' Assoc. (155 Ill. 166), 335, 344, 440
Forrest Photographic Co. v. Hutchinson Grocery Co. [(Tex. Civ. App., 1908), 108 S. W. 768], 403
Fort Worth & Denver City Ry. Co. v. Whitehead (6 Tex. Civ. App. 595), 26
Foster v. Retail Clerks' Protective Assoc. (78 N. Y. Supp. 860), 503, 516, 517
Fowls v. Park (131 U. S. 88), 102, 108, 109
Frank v. City of Decatur [(Ind., 1910) 92 N. E. 173], 277
Frank Menne Factory v. Harback (85 Ark. 278), 373, 480
Franklin County Grammar School v. Bailey (62 Vt. 467), 21
Franklin Union v. The People (220 Ill. 355), 3, 60
Freight Bureau v. Cincinnati, New Orleans & Texas Pac. Ry. Co. (6 I. C. C. R. 195), 194
Freudenthal v. Espey (45 Colo. 488), 106, 109
Fry v. State (63 Ind. 552), 16
Ft. Smith Light & Power Co. v. Kelley (94 Ark. 461), 99, 101, 106, 418
Ft. Worth & Denver City Ry. Co. v. State (99 Tex. 34), 396
Fuller v. Chicago & N. W. R. Co. (31 Iowa, 187), 16
Fullington v. Kyle Lumber Co. (139 Ala. 242), 87
Fuqua, Hinkle & Davis v. Pabst Brewing Co. (90 Tex. 298), 402

G

Gadsden v. City of Mitchell (145 Ala. 137), 325
Gage v. State (24 Ohio Cir. Ct. R. 724), 229
Gale v. Village of Kalamazoo (23 Mich. 344), 280, 298, 310, 315, 330

[References are to Sections]

Galindo v. Walter (8 Cal. App. 234), 277
Garland v. State (112 Md. 83), 60
Garsed v. City of Greensboro (126 N. C. 159), 308
Gates v. Hooper (90 Tex. 563), 358, 389, 409
Gatzow v. Buening (106 Wis. 1), 502
Gay v. Board of Commissioners of Cumberland County, etc. (122 N. C. 471), 308
Geise v. Pennsylvania Fire Ins. Co. [(Tex. Civ. App., 1908), 107 S. W. 555], 25
General Electric Co. v. Wise (119 Fed. 922), 158
General Lumber Co. v. Mississippi (217 U. S. 433), 336
Georgia, Macon & Western Ry. v. Davis (13 Ga. 68), 71
Gerino, Ex parte (143 Cal. 412), 263
German Alliance Ins. Co. v. Hale (219 U. S. 307), 230, 271, 337, 370
Germania Sav. Bank v. Darlington (50 S. C. 337), 277
Getz Bros. & Co. v. Federal Salt Co. (147 Cal. 115), 106, 433
Gibbons v. Ogden [9 Wheat. (22 U. S.) 1], 16, 17, 210
Gibbs v. Consolidated Gas Co. of Balt. (130 U. S. 396), 92, 102, 109, 197, 406
Gibbs v. McNeeley (118 Fed. 120), 80, 120
Gibbs v. McNeely (107 Fed. 211), 141, 142
Gillespie v. Ft. Wayne & Southern R. Co. (17 Ind. 243), 265
Gillespie v. People (188 Ill. 176), 536
Gilman v. Philadelphia [3 Wall. (70 U. S.) 713], 270
Gladish v. Kansas City Live Stock Exchange (113 Mo. App. 726), 415
Gleason v. McKay (134 Mass. 419), 18
Gloucester Ferry Co. v. Pennsylvania (114 U. S. 196), 16, 270
Gloucester Isinglass & Glue Co. v. Russia Cement Co. (154 Mass. 93), 101
Godfrey v. Roessele (23 Wash. L. Rep. 129), 109
Godfrey v. Roessele (5 D. C. App. 299), 108
Goldberg, Bowen & Co. v. Stablemen's Union (149 Cal. 429), 537
Goldfield Consol. Mines Co. v. Goldfield Miners' Union (159 Fed. 500), 4, 501, 505, 523, 531, 536
Goodman v. Henderson (58 Ga. 567), 106
Gordon v. Mansfield (84 Mo. App. 367), 86, 109
Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. (166 Fed. 431), 137
Govin v. City of Chicago (132 Fed. 848), 218
Grace v. State (40 Ark. 97), 350
Grand Ave. Ry. Co. v. People's Ry. Co. (132 Mo. 34), 316
Grand Rapids Elect. Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co. (33 Fed. 659), 277, 298, 299, 304, 310
Grand Trunk Ry. Co. of Canada, In re Investigation of (3 I. C. C. R. 89), 200
Grand Union Tea Co. v. Lewitsky (153 Mich. 244), 109
Grassville v. Lowdin (11 Ohio St. 349), 106, 109
Gray v. Board of Commissioners of Cumberland County, etc. (122 N. C. 471), 252
Gray v. Building Trades Council (91 Minn. 171), 31, 32, 497, 501, 514, 516, 518, 519
Gray v. Minneapolis & St. Louis R. Co. (110 Minn. 527), 16
Green v. Bennett [(Tex. Civ. App., 1908), 110 S. W. 108], 3, 4, 60
Green v. Biddle (8 Wheat. (21 U. S.) 1], 215, 216
Green v. Elbert (63 Fed. 309), 228

[References are to Sections]

Green v. Price (13 Mees. & W. 695), 97
Greene, In re (52 Fed. 104), 8, 16, 22, 78, 82, 178, 179, 181
Greenwich Ins. Co. v. Carroll (125 Fed. 121), 236, 264
Greer Mills & Co. v. Stoller (71 Fed. 1), 161
Greite v. Henricks [71 Hun (N. Y.), 7], 108
Grenada Lumber Co. v. Mississippi (217 U. S. 433), 60, 98, 105, 208, 230, 234, 236, 237, 271, 340, 367, 432, 444
Grice, In re (79 Fed. 627), 82
Griffith v. Connecticut (218 U. S. 563), 216, 271
Griswold v. Hepburn [2 Duv. (63 Ky.) 20], 269
Griswold v. Illinois Cent. R. Co. (90 Iowa, 265), 86
Grogan v. Chaffee (156 Cal. 611), 66, 378
Grundy v. Edwards [7 J. J. Marsh. (30 Ky.) 368], 106
Guerand v. Dandelet (32 Md. 561), 106, 109
Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co. (86 Fed. 407), 161
Gulf, Colorado & Santa Fe Ry. Co. v. State (72 Tex. 404), 395
Guthrie Daily Leader v. Cameron, Auditor (3 Okla. 677), 6, 8

H

Hackett v. J. J. Reynolds Co. (62 N. Y. Supp. 1076), 86, 106
Hackett v. Wilson (12 Oreg. 25), 6
Hadden v. Collector [5 Wall. (72 U. S.) 107] ("Appendix A")
Hadley Dean Plate Glass Co. v. Highland Glass Co. (143 Fed. 242), 155
Hagan v. Blindell (56 Fed. 696, 6 C. C. A. 86), 505
Hale v. Henkel (201 U. S. 43), 186, 187
Hale v. O'Connor Coal & Supply Co. (181 Fed. 267), 173
Hamilton-Brown Shoe Co. v. Saxey (131 Mo. 212), 505
Hamilton Gaslight & C. Co. v. Hamilton (146 U. S. 258), 71, 211, 275
Hamilton Mfg. Co. v. Massachusetts [6 Wall. (73 U. S.) 632], 18
Hammon Lumber Co. v. Sailors' Union of the Pacific (167 Fed. 809), 533
Hammond Packing Co. v. Arkansas (212 U. S. 322), 230, 494
Hampton v. Caldwell & Hall [(Ark., 1910), 129 S. W. 816], 106
Haney v. Caldwell (43 Ark. 184), 21
Hanford v. Davies (163 U. S. 273), 209, 212
Hannibal & St. Joseph Rd. Co. v. Missouri River Packet Co. (125 U. S. 260), 71
Harbison-Walker Refractories Co. v. Stanton (227 Pa. St. 55), 82, 86, 101, 102, 109
Hardee v. Brown (56 Fla. 377), 277
Harders Fire Proof Storage & Van Co. v. Chicago (235 Ill. 58), 269
Harding v. American Glucose Co. (182 Ill. 216), 65, 87, 108, 251, 344, 388, 440, 456, 482
Hardwick Farmers' Elevator Co. v. Chicago, Rock Island & Pac. Ry. Co. (110 Minn. 25), 16
Hardy v. Atchison, Topeka & Santa Fe R. Co. (32 Kan. 698), 16
Harmon v. City of Chicago (110 Ill. 400), 271
Harriman v. Northern Securities Co. (197 U. S. 244), 193
Harris v. Theus (149 Ala. 133), 109
Harrison v. Glucose Sugar Refining Co. (116 Fed. 304), 108, 155, 460
Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co. (70 Fed. 201), 86
Hartford Fire Ins. Co. v. City of Houston [(Tex. Civ. App., 1908), 110 S. W. 973], 330
Hartford Fire Ins. Co. v. City of Houston (102 Tex. 317), 331

[References are to Sections]

Hartz v. Eddy (140 Mich. 79), 463
Haskell v. Barker Car Co. v. Alleghany Forging Co. [(Ind. App., 1910), 91 N. E. 975], 21
Hastings Industrial v. Baxter (125 Mo. App. 494), 462
Hathaway's Will, In re (4 Ohio St. 385), 95
Hauser v. Harding (126 N. C. 295), 106
Havemeyer v. Iowa County [3 Wall. (70 U. S.) 294], 212
Hawthorn v. People (109 Ill. 302), 269
Haynes v. Doman [L. J. (1899), 2 Ch. 13], 102, 103, 106, 108
Hazelhurst, City of, v. Mayes [(Miss., 1910), 51 So. 890], 277
Head Money Cases (112 U. S. 580), 270
Heim Brewing Co. v. Belinder (97 Mo. App. 64), 2, 68, 413, 459, 461
Heimbuecher v. Goff, Homes & Co. (119 Ill. App. 373), 403
Helena, City of, v. Helena Waterworks Co. (122 Fed. 1), 71, 275
Henderson v. Mayor of New York (92 U. S. 259), 16, 270, 277
Henry Bill Publishing Co. v. Smythe (27 Fed. 914), 286
Henry L. Doherty & Co. v. Rice (186 Fed. 204), 392
Hepburn v. Griswold [8 Wall. (75 U. S.), 603], 203, 204
Herreshoff v. Boutineau (17 R. I. 3), 96, 106, 108, 109
Herriman v. Menzies (115 Cal. 16), 8, 65, 90
Hill v. Gudgell (9 Ky. L. Rep. 436), 106
Hill & Co. v. Gray & Worcester (163 Mich. 12), 107
Hilton v. Echersley (6 El. & Bl. 47, 97
Hinde v. Gray (1 Man. & G. 195), 94
Hitchcock v. Anthony (83 Fed. 779), 406
Hitchman Coal & Coke Co. v. Mitchell (172 Fed. 963), 468, 522, 534
Hoagland v. Segur (38 N. J. L. 230), 109
Hodge v. Sloan (107 N. Y. 244), 102
Hoeker v. Western Union Teleg. Co. (45 Fla. 363), 87
Hoff v. Lenerrman (143 Ill. App. 170), 106
Hohorst, In re (150 U. S. 653), 170
Holden v. City of Alton (179 Ill. 318), 323
Holden v. Hardy (169 U. S. 366), 228
Holland v. Sheehan (108 Minn. 362), 86
Holly v. Slate (14 Tex. App. 505), 269
Holmes v. Hurst (174 U. S. 82), 287
Holmes v. Martin (10 Ga. 503), 106, 109
Homer v. Graves (7 Bing. 735), 87, 109
Home Telephone Co. v. Granby Neosho Telephone Co. (147 Mo. App. 216), 350, 359
Home Telephone Co. v. North Manchester Teleph. Co. [(Ind., App., 1910), 92 N. E. 558], 93, 109
Home Telephone Co. v. Sarcoxie Light & Teleph. Co. [(Mo., 1911), 139 S. W. 108], 434
Hood & Moore's Stores, Ltd., v. Jones [81 L. T. (N. S.) 169], 106
Hooker v. Vandewater [4 Denio (N. Y.), 349], 58, 92, 197
Hooper v. California (155 U. S. 648), 16
Hoops Tea Co. v. Dorsey Co. (99 Ill. App. 181), 108
Hopkins v. Jones (22 Ind. 310), 208
Hopkins v. Oxley Stave Co. (83 Fed. 912), 498, 502, 503
Hopkins v. United States (171 U. S. 578) (see "Appendix A"), 80, 82, 149
Hornby v. Close (Law Rep. 2 Q. B. 153), 97
Horner v. Graves (7 Bing. 735), 94

[References are to Sections]

Horst, Mayor, etc., v. Moses (48 Ala. 146), 72, 273
Hostler v. Marlowe (44 W. Va. 707), 300
Hot Springs Electric Light Co. v. City of Hot Springs (70 Ark. 300), 223
Houch v. Anheuser-Busch Brewing Assoc. (88 Tex. 184), 103, 344
Houck & Co. v. Wright (77 Miss. 476), 403, 462, 463
House v. Mayes (219 U. S. 270), 203, 269, 271, 340
House v. McMullen [(Cal. App., 1909), 100 Pac. 344], 21
Houston & Texas Central Rd. Co. v. Mayes (201 U. S. 321), 271
Hovey v. State (119 Ind. 395), 269
Howell v. State (83 Neb. 448), 479
Hubbard v. Miller (27 Mich. 15), 86, 97, 102, 104, 106, 109, 406
Huber v. Merkel (117 Wis. 355), 271
Hudspeth v. Hall (111 Ga. 510), 74
Hughes v. Murdock (45 La. Ann. 935), 269
Hughes v. States (6 Ark. 131), 350
Hulen v. Earel (13 Okla. 246), 428
Hull Electric Light Co. v. Ottawa Elec. Light Co. (Rap. Jud. Queb. 14 C. S. 124), 16
Hunt v. Riverside Co-operative Club (140 Mich. 538), 384, 429
Hunter v. Charleston & Western Carolina Ry. Co. (81 S. C. 169), 28
Huntington v. Attrill (146 U. S. 657), 189
Harsen v. Gavin (162 Ill. 377), 86, 88, 103, 104, 109
Hydes Ferry Turnpike Co. v. Davidson County (91 Tenn. 291), 300

I

Illinois Trust & Savings Bk. v. Arkansas City Water Co. (67 Fed. 196), 280, 330
Illinois Trust & Savings Bank v. City of Arkansas City (76 Fed. 271), 277
Imperial Curtain Co. v. Jacob [(Mich., 1910), 127 N. W. 772], 16
Independent Baking Powder Co. v. Boorman (130 Fed. 726), 159
Independent Refiners' Assoc., etc., v. Western New York & Pennsylvania Rd. Co. (5 I. C. C. R. 415), 194
Indiana Mfg. Co. v. J. T. Case Threshing Mach. Co. (154 Fed. 365), 135
Indianapolis, City of, v. Indianapolis Gaslight & Coke Co. (66 Ind. 396), 277
Indianapolis, City of, v. Navin (151 Ind. 139), 266
Ingraham v. National Salt Co. (130 Fed. 676), 155
In re. See particular name.
Interborough Metropolitan Co., Matter of [125 App. Div. (N. Y.) 804], 397
International Harvester Co. v. Circuit Judge (163 Mich. 55), 460
International Harvester Co. v. Commonwealth [(Ky. C. A., 1911), 138 S. W. 248], 484, 486, 491
International Harvester Co. v. Commonwealth (137 Ky. 668), 382, 440, 455, 482, 486, 490
International Harvester Co. v. Commonwealth (124 Ky. 543), 491
International Harvester Co. v. Commonwealth (30 Ky. Law Rep. 716), 455, 469
International Text Book Co. v. Lynch (81 Vt. 101), 16
International Text Book Co. v. Pigg (217 U. S. 91), 16
International Tooth Crown Co. v. Hanks Dental Assoc. (111 Fed. 916), 282
Inter-Ocean Publishing Co. v. Associated Press (184 Ill. 438), 431
Interstate Commerce Com. v. Baird (194 U. S. 25), 186

[References are to Sections]

Interstate Commerce Commission v. Illinois Cent. Rd. Co. (215 U. S. 452), 16
Interstate Commerce Commission v. Southern Pac. Co. (132 Fed. 829), 195, 198
Iron Moulders' Union v. Allis-Chalmers Co. (116 Fed. 45), 501, 503, 515
Irving v. Joint District Council (180 Fed. 896), 37, 498

J

Jack v. Kansas (199 U. S. 372), 495
Jackson v. Byrnes (103 Tenn. 698), 86
Jackson v. Town of Union (82 Conn. 266), 25
Jackson, Matter of [57 Misc. R. (N. Y.) 1], 377, 435
Jackson Co. Horse Railroad v. Rapid Transit Railway Co. (24 Fed. 306), 298, 330
Jacobs v. Beecham (221 U. S. 263), 289
Jacobs v. Cohen (183 N. Y. 207), 106, 497, 523
Jacobs v. Cohen (90 N. Y. Supp. 854), 523
Jacobsen v. Massachusetts (197 U. S. 11), 231, 271, 340
Jacoway v. Denton (25 Ark. 625), 86
Jayne v. Loder (149 Fed. 21), 184
Jefferson Bank v. Skelly [1 Black (66 U. S.), 436], 275
Jenkins v. Temples (39 Ga. 655), 106
Jersey City v. North Jersey St. Ry. Co. (74 N. J. L. 774), 264
Jersey City v. North Jersey Ry. Co. (72 N. J. L. 383), 275
Jersey City Printing Co. v. Cassidy (63 N. J. Eq. 759), 501, 505, 512
Jervey, Ex parte (66 Fed. 957), 16, 27
Jetton-Deckle Lumber Co. v. Mather (53 Fla. 969), 60
Job Printers' Union v. Kinsley (107 Ill. 654), 289
John D. Park & Sons Co. v. Hartman (153 Fed. 24), 135, 138
John D. Park & Sons Co. v. National Wholesale Druggists' Assoc. (175 N. Y. 1), 29, 31, 63, 401, 470
John J. Sesson Co. v. United States (182 Fed. 573), 175
Johnson Publishing Co. v. Mills (79 Miss. 543), 314
Johns-Pratt Co. v. Sachs (176 Fed. 738), 158
Jolly v. Brady (127 N. C. 142), 106
Jonas Glass Co. v. Glass Bottle Blowers' Assoc. (72 N. J. Eq. 653), 33, 504
Jones v. Clifford's Exec. (5 Fla. 510), 87
Jones v. Great South Fireproof Hotel Co. (86 Fed. 387), 214
Jones v. Maher (116 N. Y. Supp. 180), 505, 506
Jones v. Van Winkle Gin & Machine Works (131 Ga. 336), 505, 514
Jones Cold Store Door Co. v. Jones (108 Md. 439), 106
Joplin, City of, v. Southwest Missouri Light Co. (191 U. S. 150), 217, 223
Justice v. Lang (42 N. Y. 493), 21
Justices, Opinion of [(Mass., 1908), 85 N. E. 545], 16, 18

K

Kansas v. Colorado (206 U. S. 46), 226, 269
Kansas Natural Gas Co. v. Haskel (172 Fed. 545), 206
Karasek v. Peier (22 Wash. 419), 271
Karges Furniture Co. v. Amalgamated Woodworkers' Local Union (165 Ind. 421), 3, 4, 501, 503, 506, 514, 516
Keck v. United States (172 U. S. 446) (see "Appendix A")
Keene Syndicate v. Wichita Gas

[References are to Sections]

Electric Light & Power Co. (69 Kan. 284), 87
Keith v. Herschberg Optical Co. (48 Ark. 146), 106
Keller v. United States (213 U. S. 138), 271
Kellogg v. Sowerly (190 N. Y. 370), 63, 452, 459, 492
Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co. (37 Fed. 567), 200, 207
Kepner v. United States (195 U. S. 100) (see "Appendix A")
Ketchikan Co. v. Citizens' Co. (2 Alaska, 120), 277
Kevil v. Standard Oil Co. (8 Ohio N. P. 311), 108
Kidd v. Pearson (128 U. S. 1), 16
Kimball v. Atchison, Topeka & Santa Fe R. Co. (46 Fed. 888), 19
Kimball v. Grantsville City (19 Utah, 368), 269
King v. Elling (24 Mont. 470), 263, 264
King v. Fountain (126 N. C. 196), 106
King v. Phœnix Ins. Co. of Brooklyn (195 Mo. 290), 212
King v. Pony Gold Mining Co. (24 Mont. 470), 263, 264
Kingsbury v. Nye (9 Cal. App. 574), 269
Kingsley, City of, v. Dyerly (79 Kan. 1), 16
Kirch v. City of Louisville (30 Ky. L. Rep. 1356), 266
Kirkham v. Russell (76 Va. 956), 277
Kitchen v. Greenabaum (61 Mo. 110), 86
Knight & Jillson Co. v. Miller (172 Ind. 27), 62, 86, 100, 103, 108, 230, 237, 336, 337, 351, 353, 379, 483
Knoxville Water Co. v. Knoxville (200 U. S. 22), 71, 275
Knoxville Water Co. v. Knoxville (189 U. S. 434), 230
Knudsen v. Berm (123 Fed. 636), 516
Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co. (90 Miss. 551), 416
Kramer v. Old (119 N. C. 1), 106
Kring v. Missouri (107 U. S. 221), 214
Kroschel v. Monkers (179 Fed. 961), 271
Krouschnabel-Smith Co. v. Krouschnabel (87 Minn. 230), 109

L

Lafayette Bridge Co. v. City of Streator (105 Fed. 729), 465
Lake Shore & M. S. Ry. Co. v. Ohio (173 U. S. 285), 271, 340
LaMoine Lumber & Trading Co. v. Kesterson (171 Fed. 980), 16
Lamont, Corliss & Co. v. Hershey (140 Fed. 763), 289
Lampson's Will, In re (53 N. Y. Supp. 531), 86
Lange v. Werk (2 Ohio St. 519), 109
Lanser v. Kearney (147 Iowa, 335), 88
Lanzet v. J. W. Lafton Mfg. Co. (184 Ill. 326), 86, 88, 102, 103, 106, 108
Larabee v. Dolley (175 Fed. 365), 21
Laredo, City of, v. International Bridge & Tramway Co. (66 Fed. 246), 49, 257, 274, 297
Laurel Hill Cemetery v. San Francisco (216 U. S. 358), 271
Lawson v. Cobban (38 Mont. 138), 86
Leach v. Cargill (60 Mo. 316), 277
Leather Cloth Co. v. Lorsont (Law Rep. 9 Eq. Cas. 345), 86, 94
Leavenworth County Commrs. v. Miller (7 Kan. 479), 269
Leeper v. State (103 Tenn. 500), 8, 314
Leetham v. Johnston-White (76 N. J. Eq. 304), 109
Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction (75 N. J. L. 922), 16

[References are to Sections]

Lehigh Water Co. v. Easton (121 U. S. 388), 212, 213
Lehigh Water Co.'s Appeal (102 Pa. St. 515), 6
Leibengood v. Missouri, Kansas & Topeka Ry. Co. (83 Kan. 25), 16
Leloup v. Port of Mobile (127 U. S. 640), 16
Leman v. Chipman (82 Neb. 392), 21
Leng & Co., Ltd., v. Andrews [Law Rep. (1909), 1 Ch. D. 763], 109
Leon Levy, Ex parte (43 Ark. 42), 242
Leslie v. Lorillard (110 N. Y. 519), 88, 102, 108
Levine v. Klein (120 N. Y. Supp. 196), 4
Lewis v. Weatherford Mineral Wells & Northwestern Ry. Co. (36 Tex. Civ. App. 48), 398
Lewis, Appeal of (67 Pa. St. 153), 269
License Cases [5 How. (46 U. S.) 504], 16, 270
License Tax Cases [5 Wall. (72 U. S.) 462], 270
Likins Petition (223 Pa. St. 456), 269
Lincoln St. R. Co. v. City of Lincoln (61 Neb. 109), 71, 275
Linden Land Co. v. Milwaukee Electric Ry. & Light Co. (107 Wis. 493), 316
Lindsay & Co., Ltd., v. Montana Federation of Labor (37 Mont. 264), 3, 32, 60, 521
Lindsay & Phelps Co. v. Mullen (176 U. S. 126), 16
Lindsley v. Natural Carbonic Gas Co. (220 U. S. 61), 237, 271
Linn v. Ligsbee (67 Ill. 75), 86, 103, 104
List v. Commonwealth (118 Pa. St. 322), 16
Little Rock & Ft. S. Railway Co. v. Oppenheimer (64 Ark. 271), 350
Liverpool & London & Globe Ins. Co. v. Clunie (88 Fed. 160), 449
Lloyd v. Dollison (194 U. S. 445), 227
Lochner v. New York (198 U. S. 45), 231
Locker v. American Tobacco Co. [121 App. Div. (N. Y.) 443], 478
Loder v. Jayne (142 Fed. 1010), 138, 184
Loeb v. Eastman Kodak Co. (183 Fed. 704), 162
Loeffler v. City of Chicago (246 Ill. 43), 277
Loewe v. California State Confederation (139 Fed. 71), 502, 518
Loewe v. Lawlor (142 Fed. 216), 173
Loewe v. Lawlor (208 U. S. 274), 76, 113, 122, 129, 139 (See "Appendix A")
Logan v. North Carolina Rd. Co. (116 N. C. 940), 92
Logan & Sons v. Pyne (43 Iowa, 524), 280, 298, 312, 330
Lohse Patent Door Co. v. Fuelle (215 Mo. 421), 4, 31, 32, 69, 497, 498, 501, 518
Long v. City of Duluth (49 Minn. 280), 330
Long v. Towl (42 Mo. 545), 106, 109
Long Island R. Co. v. City of New York (199 N. Y. 288), 264
Long Island Water Supply Co. v. Brooklyn (166 U. S. 685), 71, 275
Longshore Printing Co. v. Howell (26 Oreg. 527), 41
Los Angeles v. Los Angeles City Water Co. (177 U. S. 558), 329
Los Angeles City Water Co. v. City of Los Angeles (88 Fed. 720), 329
Lottery Case (188 U. S. 321), 16, 197
Lottowanna, The [21 Wall. (88 U. S.) 558], 270
Lough v. Outenbridge (143 N. Y. 271), 65
Louisiana v. Jumel (107 U. S. 711), 209, 214
Louisiana, State of, v. Morgan (28 La. Ann. 482), 275
Louisville & Nashville Rd. Co. v. Kentucky (161 U. S. 677), 19, 271

[References are to Sections]

Louisville & Nashville Rd. Co. v. Milton (218 U. S. 36), 237, 238
Louisville & Nashville Rd. Co. v. Mottley (219 U. S. 467), 205, 207, 233
Louisville & Nashville Rd. Co. v. Railroad Commission of Tenn. (19 Fed. 679), 16
Louisville Bagging Manuf. Co. v. Central Passenger Ry. Co. (95 Ky. 50), 278
Louisville Gas Co. v. Citizens' Gas Co. (115 U. S. 683), 218, 224, 263, 271, 303
Louisville Underwriters, In re (134 U. S. 488), 170
Love v. Cavatt (26 Okla. 179), 21
Loverin & Browne Co. v. Travis (135 Wis. 322), 16
Low v. Blackford (87 Fed. 406), 214
Lowenstein v. Evans (69 Fed. 908), 165
Lowry v. Tile, Mantel & Grate Assoc. (98 Fed. 817), 80
Luddington Water Supply Co. v. City of Luddington (119 Mich. 480), 329
Lukin Rule Co. v. Fringeli (57 Ohio St. 596), 88, 108, 109
Lynch v. City of Springfield (174 Mass. 430), 277
Lynch, Ex parte (16 S. C. 32), 269

M

Mac. See Mc.
Macauley Bros. v. Tierney (19 R. I. 255), 60
MacGinnis v. Boston & Montana Consol. Copper & Silver Min. Co. (29 Mont. 428), 250, 251, 465, 483
Mackall v. Ratchford (82 Fed. 41), 505
Macon & W. R. Co. v. Davis (13 Ga. 68), 275
Macon, Town of, v. Patty (57 Miss. 378), 271
Madison, City of, v. Madison Gas & Electric Co. (129 Wis. 249), 271
Maestri v. Board of Assessors (110 La. 517), 72, 272
Mallon v. May (11 Mees. & W. 652), 103
Mallinckrodt Chemical Works v. Nemnich (83 Mo. App. 6), 69, 106, 108
Manchester v. Massachusetts (139 U. S. 240), 270
Manchester & L. R. Co. v. Concord R. Co. (66 N. H. 100), 93
Mandeville v. Harmon (42 N. J. Eq. 185), 106
Mannington v. Hocking Valley Ry. Co. (183 Fed. 133), 19, 95
Mapes v. Metcalf (10 N. Dak. 601), 376, 423
Marchant v. Pennsylvania R. Co. (153 U. S. 380), 230
Marion Trust Co. v. Bennett (169 Ind. 346), 265
Marshall & Bruce Co. v. City of Nashville (109 Tenn. 495), 8, 89, 322
Marshall Engine Co. v. New Marshall Engine Co. (203 Mass. 410), 109
Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. (114 Iowa, 574), 86, 88
Martell v. White (185 Mass. 255), 509
Martin v. McFall (65 N. J. Eq. 91), 497, 518
Martin v. O'Brien (34 Miss. 21), 263, 321
Marx & Haas Jeans Clothing Co. v. Watson (168 Mo. 133), 502
Massigault v. Springs (199 U. S. 473), 271
Master Granite & Blue Stone Cutters' Assoc. (23 Pa. Co. R. 517), 16
Master Horseshoers' Protective Ass'n v. Quinlivan (82 N. Y. Supp. 288), 516
Master of Gunmakers v. Fell (Willes, 388), 94
Masters v. Lee (39 Neb. 574), 30
Matter of. See particular name.

[References are to Sections]

Matthews v. People (202 Ill. 389), 39, 231
Matthews v. Shankland (56 N. Y. Supp. 123), 3, 31
Mattison v. Lake Shore & M. S. Ry. Co. (2 Ohio N. P. 276), 30
Maxwell v. Dow (176 U. S. 581), 227
May v. Sloan (101 U. S. 231), 25
Mayo v. Dover & Foxcroft Village Fire Co. (96 Me. 539), 277
McCall v. Wright (198 N. Y. 143), 101
McCarthy, Ex parte (29 Cal. 393), 269
McClanahan v. Breeding (172 Ind. 457), 86
McCord v. Thompson Starrett Co. (113 N. Y. Supp. 385), 522
McCormick In re v. Bonfils (9 Okla. 605), 21
McCormick Typothetæ v. Typographical Union (117 N. Y. Supp. 70), 533
McCracken v. Hayward [2 How. (43 U. S.)], 608
McCulloch v. State of Maryland [4 Wheat. (17 U. S.) 316], 203
McCurry v. Gibson (108 Ala. 451), 109
McGrew v. Missouri Pac. Ry. Co. (230 Mo. 416), 231, 268
McGuire v. Chicago, Burlington & Quincy R. Co. (131 Iowa, 340), 269, 270
McLean v. Arkansas (211 U. S. 539), 534
McLean v. Denver & Rio Grande Ry. Co. (203 U. S. 38), 270
McLeod v. Burroughs (9 Ga. 213), 71
McMeekin v. Central Carolina Power Co. (80 S. C. 512), 266
McNamara v. Gargett (68 Mich. 454), 86
McNaughton Co. v. McGirl (20 Mont. 124), 16
McRee v. Wilmington & Raleigh Rd. Co. (47 N. C. 186), 319
Meeker v. Lehigh Valley R. Co. (183 Fed. 548), 173, 184
Meeker v. Lehigh Valley R. Co. (162 Fed. 354), 188, 189
Meffert v. State Board of Med. Reg. & Exam. (66 Kan. 710), 271
Meier v. Spear [(Ark., 1910), 132 S. W. 988], 31, 498
Memphis & S. L. R. Co. v. Union Ry. Co. (116 Tenn. 500), 000
Memphis, City of, v. Memphis Water Co. [5 Heisk. (52 Tenn.) 495], 8, 256, 274, 325, 327
Memphis, City of, v. Postal Teleg. Cable Co. (139 Fed. 707), 278
Merchants' Ad-Sign Co. v. Sterling (124 Cal. 429), 410
Merchants' Ice & Cold Storage Co. v. Rohrman (138 Ky. 530), 390
Meredith v. Zinc & Iron Co. (55 N. J. Eq. 211), 7, 101
Merriman v. Cover, Drayton & Leonard (104 Va. 428), 86, 87, 104, 106, 109
Merritt & Co. v. Layton [(Del. Super., 1910), 75 Atl. 795], 21
Merz Capsule Co. v. United States Capsule Co. (67 Fed. 875), 130
Metcalf v. American School Furn. Co. (122 Fed. 115), 130, 161
Metcalf v. American School Furn. Co. (108 Fed. 909), 161, 162
Milhau v. Sharp (27 N. Y. 611), 70
Miller v. Commonwealth (88 Va. 618), 268
Miller v. Palmer (58 Md. 451), 21
Mills v. County of St. Clair (7 Ill. 197), 72, 275, 300
Mills v. United States Printing Co. (91 N. Y. Supp. 185), 32, 36, 505, 511, 513
Millville Gaslight Co. v. Vineland Light & Power Co. (72 N. J. Eq. 305), 71, 72, 73, 275
Millville Improvement Co. v. Pitman, Glassboro & Clayton Gas Co. (75 N. J. L. 410), 264
Mines v. Scribner (147 Fed. 927), 133
Minneapolis & St. Louis Ry. Co. v. Beckwith (129 U. S. 26), 271

[References are to Sections]

Minneapolis, St. Paul & Sault St Marie Ry. Co. v. Railroad Commission (136 Wis. 146), 269
Minnesota v. Barber (136 U. S. 313). (See "Appendix A")
Minnesota v. Northern Securities Co. (194 U. S. 48), 161, 165
Minnesota Iron Co. v. Kline (199 U. S. 593), 232
Minturn v. Larne [23 How. (64 U. S.) 435], 298, 330
Mires v. St. Louis & San Francisco R. Co. (134 Mo. App. 379), 16
Missouri Pacific Ry. Co. v. Larabee Flour Mills Co. (211 U. S. 612), 270
Missouri Pacific Railway Co. v. Nebraska (217 U. S. 196), 271
Missouri Pacific Railway Co. v. Texas & Pac. Ry. Co. (30 Fed. 2), 197
Missouri River Power Co. v. Steele (32 Mont. 433), 269
Mitchel v. Reynolds (1 P. Wms. 181), 86. (See "Appendix A"), 86, 88, 94
Mobile v. Watson (116 U. S. 289), 214
Mobile, County of, v. Kimball (102 U. S. 691), 16, 270
Mogul Steamship Co. v. McGregor (21 Queen's B. Div. Law Rep. 553), 59, 68
Mogul Steamship Co. v. McGregor, Gow & Co. [(1892) App. Cas. 25]. (See "Appendix A"), 97
Monarch Tobacco Works v. American Tobacco Co. (165 Fed. 774), 114, 122, 123, 160, 167, 174, 177, 191
Monongahela River Consol. Coal & Coke Co. v. Jutte (210 Pa. St. 288), 106, 109
Montague & Co. v. Lowry (193 U. S. 38). (See "Appendix A"), 146
Montgomery v. Multnomah Ry. Co. (11 Oreg. 344), 6
Moorman & Givens v. Parkerson [(La., 1911), 54 So. 47], 88
Moran v. Miami County [2 Black (67 U. S.), 722], 275
More v. Bonnet (40 Cal. 251), 106
Morgan's Steamship Co. v. Louisiana Board of Health (118 U. S. 455), 270
Moroney Hardman Co. v. Goodwin Pottery Co. [Tex. Civ. App. (1909), 120 S. W. 1088], 385
Morrill v. Boston & Maine Railroad (55 N. H. 331), 395
Morris v. City of Indianapolis [(Ind.), 94 N. E. 705], 271
Morris Run Coal Co. v. Barclay Coal Co. (68 Pa. St. 173), 80, 109, 197
Morrow County Illuminating Co. v. Village of Gilead (10 Ohio S. & C. P. Dec. 235), 298
Motion Pictures Patent Co. v. Laemmle (178 Fed. 104), 158
Moultrie County v. Rockingham Ten-Cent Savings Bank (92 U. S. 631), 209
Mulcahy v. Reg. (L. R. 3 H. L. 317), 61
Murdock, Kerr & Co. v. Walker (152 Pa. St. 595), 503, 506
Murray v. Menefee (20 Ark. 561), 300
My Laundry Co. v. Schmeling (129 Wis. 597), 109
My Maryland Lodge v. Adt (100 Md. 238), 502

N

Napa State Hospital v. Dasso (153 Cal. 698), 266
Nashua & Lowell Rd. Corp. v. Boston & Lowell Rd. Corp. (19 Fed. 804), 197
National Benefit Co. v. Union Hospital Co. (45 Minn. 272), 108, 109
National Biscuit Co. v. Ohio Baking Co. (127 Fed. 160), 288
National Cotton Oil Co. v. Texas (197 U. S. 115). (See "Appendix A"), 8, 46, 65, 232, 236, 276, 337, 444

[References are to Sections]

National Enamel & Stamping Co. v. Haberman (120 Fed. 415), 106, 108, 109
National Fireproofing Co. v. Mason Builders' Assoc. (169 Fed. 259), 3, 4, 78, 161, 414, 497, 523
National Folding Box & Paper Co. v. Robertson (99 Fed. 985), 158
National Harrow Co. v. Hench (84 Fed. 226), 134
National Holton-Brake-Beam Co. v. Inter-Changeable Brake-Beam Co. (106 Fed. 693), 383
National Home Building & Loan Assn. v. Black (153 Ind. 701), 464
National Lead Co. v. Grate Paint-Stove Co. (80 Mo. App. 247), 448
National Protective Assoc. v. Cumming (170 N. Y. 315), 60, 497, 501, 502, 511, 513
National State Bank v. Haskell (219 U. S. 104), 271
Navigation Co. v. Winsor, [20 Wall. (87 U. S.) 64], 87, 88, 102, 108, 109, 406
Nelson v. United States (201 U. S. 92), 182, 186
Nester v. Continental Brewing Co. (161 Pa. St. 473), 87
Newburyport Water Co. v. Newburyport (193 U. S. 561), 333
Newell v. Meyendorff (9 Mont. 454), 108
New Haven Rd. Co. v. Interstate Commerce Commission (200 U. S. 404). (See "Appendix A")
New Orleans v. New Orleans Waterworks Co. (142 U. S. 79), 218, 326
New Orleans Gaslight Co. v. City of New Orleans (42 La. Ann. 188), 277
New Orleans Gaslight Co. v. Drainage Commission (111 La. 838), 224
New Orleans Gaslight Co. v. Hart (40 La. Ann. 474), 271
New Orleans Gas Co. v. Louisiana Light Co. (115 U. S. 650), 72, 209, 224, 271, 304, 327
New Orleans, Mobile & Tex. R. Co. v. Southern & Atlantic Teleg. Co. (53 Ala. 211), 293
New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. (125 U. S. 18), 210, 212, 225, 245
New Orleans Waterworks v. New Orleans (164 U. S. 471), 225, 278
New Orleans Waterworks Co. v. Rivers (115 U. S. 674), 327
New York v. Miln [11 Pet. (36 U. S.) 102], 271
New York v. Squire (145 U. S. 175), 271
New York Bank Note Co. v. Hamilton Bank Note, Engraving & Printing Co. (180 N. Y. 280), 102, 106
New York Bank Note Co. v. Kidder Press Mfg. (192 Mass. 391), 109
New York, New Haven & Hartford Rd. Co. v. Interstate Commerce Commission (200 U. S. 361), 270
New York, New Haven & Hartford Rd. Co. v. Offield (77 Conn. 417), 263, 313
Niagara Fire Ins. Co. v. Cornell (110 Fed. 816), 231, 346
Nicomen Boom Co. v. North Shore Boom & Driving Co. (40 Wash. 315), 295
Noble State Bank v. Haskell (219 U. S. 104), 228, 271
Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co. [Law Rep. (1894) App. Cas. 535, 565], 86, 94, 103, 109
Norman Prince (185 Fed. 169), 195
Northern Pacific Railway Co. v. Duluth (208 U. S. 583), 271
Northern Securities Co. v. United States (193 U. S. 197) (see "Appendix A"), 13, 16, 29, 58, 65, 75, 77, 80, 81, 83, 110, 112, 114, 116, 125, 132, 151, 161, 182, 193, 203, 205, 226, 233, 236, 270, 350.
Northumberland County v. Zimmerman (75 Pa. St. 26), 271
Northwestern Consol. Mill. Co. v.

[References are to Sections]

Callam & Sons (177 Fed. 786), 159
Northwestern Warehouse Co. v. Oregon Railway & Navigation Co. (32 Wash. 218), 260, 324
Norton v. Thomas & Sons Co. (99 Tex. 578), 403
Norwich Gaslight Co. v. Norwich City Gas Co. (25 Conn. 19), 8, 272, 274, 276, 298, 304, 307
Nutting v. Massachusetts (183 U. S. 553), 16

O

Oakdale Mfg. Co. v. Garet (18 R. I. 484), 109, 335
O'Connell v. Reg. (11 Cl. & F. 233), 62
Ohio Baking Co. v. National Biscuit Co. (127 Fed. 116), 288
Ohio Life Ins. & Trust Co. v. Debolt [16 How. (57 U. S.) 416], 212, 219, 275
O. H. Jewell Filter Co. v. Jackson (140 Fed. 340), 383
Oklahoma v. Kansas Natural Gas Co. (221 U. S. 229), 206, 270, 271
Olcott v. Supervisors [16 Wall. (83 U. S.) 678], 212
Omaha Horse Rd. Co. v. Cable Tramway Co. (30 Fed. 324), 71, 275, 330
Omaha Water Co. v. City of Omaha (147 Fed. 1), 263, 265, 277, 294
O'Neil v. Behanna (182 Pa. St. 236), 517
O'Neil v. Vermont (144 U. S. 223), 16
Opinions of Justices, In re (204 Mass. 607), 16
Opinions of Justices [(Mass., 1908), 85 N. E. 545], 18
Oregon Ry. & Nav. Co. v. Campbell (180 Fed. 253), 17, 71, 272, 275
Oregon Steam Navigation Co. v. Hale (1 Wash. Ty. 283), 88, 109
Oregon Steam Navigation Co. v. Winsor [20 Wall. (87 U. S.) 64], 87, 88, 102, 108, 109, 406
Osborn v. Benbow (38 Mo. App. 25), 108
Oshkosh Waterworks Co. v. Oshkosh (187 U. S. 437), 213
Otis Steel Co. v. Local Union, No. 218, of Cleveland, etc. (110 Fed. 698), 503
Ottawa v. Carey (108 U. S. 110), 277
Over v. Byram Foundry Co. (37 Ind. App. 452), 86, 102, 403
Owen County Burley Tobacco Society v. Brumback (32 Ky. L. Rep. 916), 244, 375
Owensboro v. Owensboro Waterworks Co. (191 U. S. 358), 225
Oxley Stave Co. v. Cooper's International Union (72 Fed. 695), 31

P

Pacific Factor Tea Co. v. Adler (90 Cal. 110), 86, 90
Pacific Postal Teleg. Cable Co. v. Western Union Teleg. Co. (50 Fed. 493), 293
Paddleford, Fay & Co. v. Mayor, etc., of Savannah (14 Ga. 438), 16, 17
Palmer v. City of Helena (40 Mont. 498), 277
Paragon Oil Co. v. Hall (7 Ohio C. Ct. 240), 108
Parfitt v. Ferguson (38 N. Y. Supp. 466), 306
Paris, City of, v. Sturgeon (50 Tex. Civ. App. 519), 277
Park v. Modern Woodmen of America (181 Ill. 214), 266
Park & Sons Co. v. Hartman (153 Fed. 24), 135, 138
Park & Sons Co. v. National Wholesale Druggists' Assoc. (175 N. Y. 1), 29, 31, 63, 401, 470
Parkinson Co. v. Building Trades Council of Santa Clara County (154 Cal. 581), 497, 501, 519
Passenger Cases [7 How. (48 U. S.) 283], 16, 270
Pasteur Vaccine Co. v. Burkey (22 Tex. Civ. App. 232), 462

[References are to Sections]

Patch Mfg. Co. v. Protection Lodge (77 Vt. 294), 520
Paterson Chronicle Co. v. Mayor, etc., of Paterson (66 N. J. L. 129), 323
Patnode v. Westenhaven (114 Wis. 460), 60, 61, 440
Patterson v. Glassmire (166 Pa. St. 230), 108
Patterson v. Kentucky (97 U. S. 501), 384
Patterson v. Missouri Pac. Ry. Co. (77 Kan. 236), 16
Patterson v. Wollmann (5 N. Dak. 608), 8, 72, 276, 300
Paul v. Virginia [8 Wall. (75 U. S.) 168], 16
Pearsall v. Great Northern Ry. Co. (161 U. S. 646), 71, 225, 275
Peltz v. Eichele (62 Mo. 171), 106
Pennsylvania v. Wheeling & Belmont Bridge Co. [18 How. (59 U. S.) 421], 270
Pennsylvania R. Co. v. Canal Commissioners (21 Pa. St. 9), 71, 275
Pennsylvania R. Co. v. Commonwealth [(Pa., 1886), 7 Atl. 368], 19
Pennsylvania Sugar R. Co. v. American Co. (166 Fed. 254), 120, 173, 175
Pensacola Teleg. Co. v. Western Union Teleg. Co. (96 U. S. 1), 16, 203, 292, 318
People v. Aachen & Munich Fire Ins. Co. (126 Ill. App. 636), 337
People v. American Ice Co. (120 N. Y. Supp. 443), 8, 68, 357
People v. American Ice Co. [135 App. Div. (N. Y.) 180], 445, 448, 474
People v. Board of Election Commissioners of Chicago (221 Ill. 9), 265
People v. Bowen [30 Barb. (N. Y.) 24], 303
People v. Butler Street Foundry (201 Ill. 236), 442, 455, 495
People (ex rel. Peabody) v. Chicago Gas Trust Co. (130 Ill. 268), 86
People (ex rel. Healy) v. Clean Street Co. (225 Ill. 470), 263, 279
People v. Collins (9 Cal. App. 622), 86
People v. Commercial Life Ins. Co. [(Ill., 1910), 93 N. E. 90], 264
People (ex rel. Woodhaven Gas Co.) v. Deehan (153 N. Y. 528), 71, 275
People v. Detroit United Ry. (162 Mich. 460), 275
People v. Dickerson (17 Det. Leg. N. 1044), 230, 231
People (ex rel. Single Paper Co., Ltd.) v. Edgcomb (98 N. Y. Supp. 965), 322
People v. Fisher [50 Hun (N. Y.), 552], 45
People v. Flagg (46 N. Y. 401), 269
People (ex rel. Rhodes) v. Fleming (10 Colo. 553), 269
People (ex rel.) v. Fox (247 Ill. 402), 264
People v. Gilson (109 N. Y. 389), 82
People v. Hawkins (157 N. Y. 1), 86
People v. King (110 N. Y. 418), 27
People v. Klaw (106 N. Y. Supp. 341), 16
People v. Klaw [55 Misc. R. (N. Y.) 72], 436
People v. Marcus (185 N. Y. 257), 536
People v. Marcus (97 N. Y. Supp. 322), 522, 536
People v. McFarlin (43 Misc. 591, 89 N. Y. Supp. 527), 510, 518, 523
People v. Milk Exchange (145 N. Y. 267), 335
People v. Montena (123 N. Y. Supp. 1074), 27
People v. Murphy (195 N. Y. 176), 271
People v. North River Sugar Refining Co. (54 Hun, 377), 65
People v. People's Gas Light & Coke Co. (205 Ill. 482)
People v. Perley (123 N. Y. Supp. 436), 277
People v. Public Service Commission (125 N. Y. Supp. 1000), 266

[References are to Sections]

People v. Radt (71 N. Y. Supp. 846), 519
People v. Raymond (34 Cal. 492), 16
People v. Richard (1 Mich. 216), 475
People (ex rel. Koerner) v. Ridgley (21 Ill. 65), 272
People v. Sacramento Butchers' Assn. (12 Cal. App. 471), 459, 469, 471, 472, 475, 487
People (ex rel. Healy) v. Shedd (241 Ill. 155), 86
People v. Sheldon (139 N. Y. 251) (see "Appendix A"), 63
People (ex rel. Gill) v. Smith (5 N. Y. Cr. R. 513), 511
People v. Woodhaven Gas Co. (153 N. Y. 528), 275
People v. Young (45 N. Y. Supp. 772), 269
People's Bank v. Dalton (2 Okla. 476), 86
People's Rd. v. Memphis Rd. [10 Wall. (77 U. S.) 38], 272
People's Tobacco Co. v. American Tobacco Co. (170 Fed. 396), 173
Peoria Gas & Electric Co. v. Peoria (200 U. S. 48), 451
Perdue v. State (134 Ga. 300), 227
Perls v. Saalfield Co. [C. A. (1892) 2 Ch. 149], 109
Peterson v. Schmidt (13 Ohio C. C. 205), 108
Pettibone v. United States (148 U. S. 197), 3, 20, 84
Philadelphia & Southern Steamship Co. v. Pennsylvania (122 U. S. 326), 270
Phillips v. Iola Portland Cement Co. (125 Fed. 593), 120, 140
Phillips Village Corp. v. Phillips Water Co. (104 Me. 103), 277
Pickard v. Pullman Southern Car Co. (117 U. S. 34), 270
Pickett v. Walsh (192 Mass. 572), 497, 501, 502, 509
Pidcock v Harrington (64 Fed. 821), 161
Pierce v. Stablemen's Union (156 Cal. 70), 31, 34, 501, 504, 518, 530, 537
Pike v. State Board of Land Commissioners [(Idaho, 1911), 113 Pac. 447], 86
Pike v. Thomas [4 Bibb. (7 Ky.) 486], 88
Pikes Peak Power Co. v. City of Colorado Springs (105 Fed. 1), 277
Pinkney, In re (47 Kan. 89), 25, 365
Pittsburg, C., C. & St. L. Ry. Co. v. Hartford City (170 Ind. 674), 266
Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Town of Crown Point (146 Ind. 421), 277
Plant v. Woods (176 Mass. 492), 32, 509
Planters' Bank v. Sharp [6 How. (47 U. S.) 301], 214
Platt v. City & County of San Francisco (158 Cal. 74), 277
Platt v. LeCocq (150 Fed. 391), 269
Plumb v. Christie (103 Ga. 686), 308
Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (60 W. Va. 508), 8, 12, 65, 66, 75, 87, 89, 96, 102, 106, 109
Poindexter v. Greenhow. See Virginia Coupon Cases.
Pooling of Freights, In re (115 Fed. 588), 197
Pope Motor Car Co. v. Keegan (150 Fed. 148), 503
Pope Turnbo v. Bedford (147 Mo. App. 692), 439
Porter v. Vinzant (49 Fla. 213), 277
Post v. Railroad (103 Tenn. 184), 474
Postal Teleg. Cable Co. v. Alabama (155 U. S. 482), 165
Postal Teleg. Cable Co. v. City of Mobile (179 Fed. 955), 16
Postal Teleg. Cable Co. v. State (110 Md. 608), 16

[References are to Sections]

Potter County Water Co. v. Austin Borough (206 Pa. St. 297), 225
Prescott v. Bidwell (18 So. Dak. 64), 410
Price v. People (193 Ill. 114), 271
Pritchard v. Norton (106 U. S. 124), 214
Prame v. Ferrell (166 Fed. 702), 102, 106
Pueblo & Arkansas Valley Rd. Co. v. Taylor (6 Colo. 1), 86
Pueblo, City of, v. Stanton (45 Colo. 523), 277
Purcell v. Smidt (21 Iowa, 55), 269
Purington v. Hincliff (219 Ill. 159), 502
Purnell v. McLane (98 Md. 589), 272
Purvis v. Local No. 500, United Brotherhood of Carpenters (214 Pa. St. 348), 502, 518

Q

Queen Ins. Co. v. The State (86 Tex. 250), 12, 16, 18, 54, 86, 90, 106
Quinn v. Leathern (70 Law J. P. C. 76), 60, 518
Quinn v. Shields (62 Iowa, 129), 21

R

Rafferty v. Buffalo City Gas Co. [37 App. Div. (N. Y.) 618], 392
Ragsdale v. Nagle (106 Cal. 332), 108
Rahrer, In re (140 U. S. 545), 16
Railroad Co. v. Fuller [17 Wall. (84 U. S.) 560], 16
Railroad Co. v. Husen (95 U. S. 465), 16
Railroad Co. v. McClure [10 Wall. (77 U. S.) 511], 209
Railroad Co. v. Richmond [19 Wall. (86 U. S.) 584], 206, 207
Railway Co. v. Schaffer (65 Ohio St. 414), 536
Rakestraw v. Lanier (104 Ga. 188), 106
Rand, McNally & Co. v. Hartrauft (29 Wash. 591), 313
Ratcliff v. Wichita Union Stockyards Co. (74 Kan. 1), 271
Rayburn Water Co. v. Armstrong Water Co. (9 Pa. Dist. R. 24), 72
Re. See particular name.
Read v. Atlantic City (49 N. J. L. 558), 277
Reading Rd. Co. v. Pennsylvania. See State Freight Tax.
Reagan v. Mercantile Trust Co. (154 U. S. 413), 270
Reclamation Dist. No. 70 v. Sherman (11 Cal. App. 399), 266
Redland Fruit Co. v. Sargent (51 Tex. Civ. App. 619), 348, 405, 462
Reelfoot Lake Levee Dist. v. Dawson (97 Tenn. 151), 269
Reese, In re (107 Fed. 942, 47 C. C. A. 87), 503
Reese, In re (98 Fed. 984), 503
Reform Club of Masons & Plasterers L. A. 706, v. Laborers' Union Protective Society (60 N. Y. Supp. 388), 511, 516
Reid v. Southern Ry. Co. (153 N. C. 490), 16
Reid v. Trowbridge (78 Miss. 542), 298
Renz v. Kremer (142 Wis. 1), 271
Retail Lumber Dealers' Assoc. v. State (95 Miss. 337), 98, 105, 271, 432
Revere Water Co. v. Inhabitants of Winthrop (192 Mass. 455), 61
Rex v. Eccles (1 Leach, 274), 475
Rex v. Gill & Henry (2 B. & Ald. 204), 475
Rex v. Kenrick (5 Q. B. 61), 62
Reynolds v. Davis (198 Mass. 294), 502, 515
Rice v. Standard Oil Co. (134 Fed. 464), 120, 173, 176
Richards v. American Desk & Seating Co. (87 Wis. 503), 109
Richardson v. Buhl (77 Mich. 658), 65, 89, 335
Richmond County Gaslight Co.

[References are to Sections]

v. Middletown (59 N. Y. 228), 304, 330
Richmond, Fredericksburg & Potomac Rd. Co. v. Louisa Rd. Co. [13 How. (54 U. S.) 71], 221
Riverside Mills v. Atlantic Coast Line R. Co. (168 Fed. 987), 16
Robbins v. Shelby Co. Tax Dist. (120 U. S. 480), 270
Robbins v. Shelby Taxing District (120 U. S. 489) (see "Appendix A")
Roberts, Ex parte (166 Mo. 207), 269
Roberts v. Lemeret (73 Neb. 365), 106, 109
Robinson, In re, v. City of St. Thomas (23 Ont. Rep. 489), 317
Robinson v. Lamb (126 N. C. 492), 252, 300
Robinson v. Suburban Brick Co. (127 Fed. 804), 141
Robson v. Hamilton (41 Oreg. 239), 86
Rockland Water Co. v. Camden & Rockland Water Co. (80 Me. 544), 74, 275
Rogers v. Evarts (17 N. Y. Supp. 264), 517
Rohlf v. Kasemeier (140 Iowa, 182), 18, 351, 359, 427, 500
Rosenbaum v. United States Credit System Co. (65 N. J. L. 255), 97, 103, 109
Rourke v. Elk Drug Co. [75 App. Div. (N. Y.) 145], 452
Roush v. Gesman (126 Iowa, 498), 106
Rousillon v. Roussillon (14 Ch. D. 351), 94
Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (142 Fed. 531), 135, 136
Ruddy v. United Association of Journeymen Plumbers [(N. J. L., 1910), 75 Atl. 742], 512
Run v. Barclay (68 Pa. St. 187), 61
Russell v. Courier Printing & Pub. Co. (43 Colo. 321), 86
Russell & Sons v. Stampers & Gold Leaf Local Union No. 22 (107 N. Y. Supp. 303), 499, 516, 525, 526, 527, 529, 531, 532
Russia Cement Co. v. Frauenhar (126 Fed. 228), 289

S

Sackett & Wilhems Lithographing & Print Co. v. National Assoc. of Employing Lithographers (61 Misc. (N. Y.) 150], 37, 40
Safety Insulated Wire & Cable Co. v. Mayor, etc., of Baltimore (66 Fed. 140), 277
Saginaw Gaslight Co. v. City of Saginaw (28 Fed. 529), 298, 304, 330
Saint. See St.
Salinger v. Western Union Teleg. Co. [(Iowa), 126 N. W. 362], 27
Salt Lake City v. Christensen (34 Utah, 38), 269
San Antonio Gas Co. v. State (22 Tex. Civ. App. 118), 335, 344, 382, 482
San Diego Water Co. v. San Diego Flume Co. (108 Cal. 549), 8
San Francisco Gas Co. v. City of San Francisco (9 Cal. 453), 277
San Louis Water Co. v. Estrada (117 Cal. 168), 266
Santa Clara Mill Lumber Co. v. Hayes (76 Cal. 387), 89
Saxlehner v. Wagner (216 U. S. 275), 290
Schlang v. Ladies Waist Makers' Union (124 N. Y. Supp. 289), 497, 518
Schmalz v. Wooley (57 N. J. Eq. 303), 264
Schneider v. City of Menasha (118 Wis. 298), 277
Schultz v. State (112 Md. 211), 277
Schwalm v. Holmes (49 Cal. 665), 82
Schwarez v. International Ladies G. W. Union (124 N. Y. Supp. 918), 511, 516

[References are to Sections]

Scott v. Farmers' & Merchants' National Bank (97 Tex. 31), 369
Scranton Elect. Light & Heat Co. v. Scranton Illuminating, Heat & Power Co. (122 Pa. St. 154), 71
Searle Manufacturing Co. v. Terry (56 Misc. 265, 106 N. Y. Supp. 438), 501, 503, 532
Seattle & Lake Washington Waterway Co. v. Seattle Dock Co. (35 Wis. 503), 334
Seattle Brewing & Malting Co. v. Hansen (144 Fed. 1011), 520
Seattle, City of, v. Clark (28 Wash. 717), 271
Seattle, City of, v. Dencker (58 Wash. 501), 8, 89
Seavy v. Spratling (133 Ga. 27), 88
Security Savings & Loan Assn. v. Elbert (153 Ind. 198), 464
Seibert v. Lewis (122 U. S. 284), 214
Sentner v. Straus (130 Fed. 389), 159
Seymour v. Osborne [11 Wall. (60 U. S.) 516], 283
Sharpe v. Hasey (134 Wis. 618), 25
Shawnee Compress Co. v. Anderson (209 U. S. 423). (See "Appendix A"), 83
Shawnee Sewerage & Drainage Co. v. Stearns (220 U. S. 462), 216
Sheehan v. Scott (145 Cal. 684), 269
Shelby v. Ziegler (22 Okla. 799), 21
Sherlock v. Alling (93 U. S. 99), 270
Sherman County v. Simons (109 U. S. 735), 263
Sherry v. Perkins (147 Mass. 212), 32, 505
Shreveport v. Cole (129 U. S. 36), 209
Shreve Traction Co. v. Kansas City, Shreveport & Gulf Ry. Co. (119 La. 759), 278
Shute v. Heath (131 N. C. 281), 106
Shuttleworth v. State (35 Ala. 415), 18
Siebold, Ex parte (100 U. S. 371), 203
Simmons-Burke Clothing Co. v. Linton (90 Ark. 73), 21
Sims v. Steadman (62 S. C. 300), 214
Singer Manufacturing Co. v. June Manufacturing Co. (163 U. S. 169), 291
Singer Manufacturing Co. v. Long (18 C. D. 412), 291
Sinsheimer v. United Garment Workers (28 N. Y. Supp. 321), 519
Sinton v. Ashbury (41 Cal. 425), 278
Skaggs v. Simpson (33 Ky. L. Rep. 410), 109
Skaneateles Water Co. v. Skaneateles (184 U. S. 354), 74, 225
Skelly v. Bristol Sav. Bk. (63 Conn. 83), 21
Skinner v. Garnett Gold-Mining Co. (96 Fed. 735), 263
Slaughter v. Thacker Coal & Coke Co. (55 W. Va. 642), 75, 87, 106
Slaughter-House Cases [16 Wall. (83 U. S.) 36], 8, 227, 276
Slidell v. Grandjean (111 U. S. 412), 275
Smalley v. Greene (52 Iowa, 241), 82
Smiley v. Kansas (196 U. S. 447), 234, 236, 271, 336, 337, 444
Smith v. Alabama (124 U. S. 465), 271
Smith v. Berryman (142 Mo. App. 373), 277
Smith v. Du Bose (78 Ga. 413), 86
Smith v. San Francisco & North Pac. Ry. Co. (115 Cal. 584), 86
Smith's Appeal (113 Pa. St. 579), 106, 108
Snead v. Central of Georgia Ry. Co. (151 Fed. 608), 16
Solon v. State (Tex. Civ. App. 1908) 349], 269
Soon Hing v. Crowley (113 U. S. 703), 370
South Carolina v. United States (199 U. S. 437), 226
Southern Express Co. v. Keiler [(Va., 1909) 64 S. E. 38], 27
Southern Fire Brick & Clay Co. v. Garden City Land Co. (223 Ill. 616), 92, 101, 106, 378

[References are to Sections]

Southern Gun Co. v. Laylin (66 Ohio St. 578), 269
Southern Indiana Expr. Co. v. United States Expr. Co. (88 Fed. 659), 161
Southern Pacific Co. v. Interstate Commerce Commission (200 U. S. 536), 195, 198
Southern Pacific Terminal Co. v. Interstate Commerce Commission (219 U. S. 498), 16
Southern Railway Co. v. Greene (216 U. S. 400), 237
Southern Railway Co. v. King (217 U. S. 524), 205, 270, 271
Southern Railway Co. v. Machinists' Local Union (111 Fed. 49), 505
Southern Wisconsin Power Co., In re (140 Wis. 245), 266
South Pasadena, City of, v. Pasadena Land & Water Co. (152 Cal. 579), 277
Southwestern Missouri Light Co. v. City of Joplin (113 Fed. 817), 217
Spaulding v. Inhabitants of Peabody (153 Mass. 129), 299
Spease Ferry, In re (138 N. C. 219), 300
Spies v. People (122 Ill. 212), 3
Sportswood v. Morris (12 Idaho, 360), 272
Spring Valley Water Co. v. City & County of San Francisco (165 Fed. 667), 231
St. Hyacinth Congregation v. Borneki (141 Wis. 205), 266
St. Joseph Plank Road v. Kline (106 La. 325), 320
St. Louis v. Kaime (180 Mo. 309), 277
St. Louis & C. R. Co. v. Postal Teleg. Co. (173 Ill. 508), 293
St. Louis & San Francisco R. Co. v. State (87 Ark. 562), 16
St. Louis Gaslight Co. v. St. Louis Gas Fuel & Power Co. (16 Mo. App. 52), 306
St. Paul, Minneapolis & Manitoba Railway Co. v. Minnesota (214 U. S. 497), 271
Stahr v. Hichman Grain Co. (132 Ky. 496), 473
Standard Oil Co. v. State (117 Tenn. 618), 336, 351, 363, 385, 407, 440, 473, 483
Standard Oil Co. v. United States (221 U. S. 1). (See "Appendix A"), 15, 16, 22, 23, 24, 58, 85a, 233, 235, 267, 276
Standard Oil Co. of Ky. v. Tennessee (217 U. S. 413), 237
Standard Paint Co. v. Trinidad Asphalt Mfg. Co. (220 U. S. 446), 288, 289
Staroske v. Pulitzer Pub. Co. [(Mo., 1911), 138 S. W. 36], 423
Starr Burying Ground Assoc. v. North Lane Cemetery Assoc. (77 Conn. 83), 263
State v. Adams Lumber Co. (81 Neb. 392), 350, 422
State v. Ætna Fire Ins. Co. (66 Ark. 480), 480
State (ex rel. Crow) v. Ætna Ins. Co. (150 Mo. 113), 264
State v. Aiken (42 S. C. 222), 308
State (ex rel.) v. Allen (178 Mo. 555), 223
State v. Ameker (73 S. C. 330), 3
State v. Arkadelphia Lumber Co. (70 Ark. 1011), 350
State (ex rel. Crow) v. Armour Packing Co. (173 Mo. 356), 2, 425
State Star Pub. Co. v. Assoc. Press (159 Mo. 410), 271, 431
State v. Bienstock [(N. J., 1909), 73 Atl. 530], 3, 60
State v. Boland (144 Mo. 534), 482
State (ex rel. Monnett) v. Buckeye Pipe Line Co. (61 Ohio St. 520), 344
State v. Central Lumber Co. (24 S. Dak. 136), 8, 48, 231, 237, 271, 288, 346, 374
State v. Central of Georgia Railway Co. (109 Ga. 716), 395
State (ex rel. Means) v. Chicago,

[References are to Sections]

R. T. & P. Ry. Co. [(Ark., 1910), 128 S. W. 555], 356
State v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. (40 Minn. 267), 16
State v. Cincinnati Gaslight & Coke Co. (18 Ohio St. 262), 298, 304, 330
State v. Citizens' Bank of Louisiana (52 La. Ann. 1086), 263
State v. City of Bangor (98 Me. 114), 265
State (ex rel. Spokane & British Columbia Teleph. & Teleg. Co.) v. City of Spokane (24 Wash. 53), 317
State v. Clark (30 Wash. 439), 269
State (ex inf. Crow) v. Continental Tobacco Co. (177 Mo. 1), 365, 389, 393, 448
State v. Creamery Package Mfg. Co. [(Minn., 1911), 132 N. W. 268], 447, 448
State v. Creamery Package Mfg. Co. (110 Minn. 415), 390, 453
State v. Crowley (41 Wis. 271), 475
State v. Cudahy Packing Co. (33 Mont. 179), 203, 249
State (ex rel. Postal Teleg. Cable Co.) v. Delaware & Atlantic Teleg. & Teleph. Co. (47 Fed. 633), 92
State v. Delaware, Lackawanna & Western R. Co. (30 N. J. L. 473), 16
State v. Denny (118 Ind. 449), 269
State v. Donaldson (32 N. J. L. 151), 512, 517
State v. Drayton (82 Neb. 254), 338, 346
State v. Duckworth (5 Idaho, 642), 16
State v. Duluth Board of Trade (107 Minn. 506), 5, 8, 23, 46, 53, 65, 68, 80, 82, 89, 90, 96, 97, 100, 106, 109, 247, 378, 379, 497, 500
State v. Duncan (78 Vt. 364), 32
State v. Dyer (67 Vt. 690), 505
State v. Eastern Coal Co. (29 R. I. 254), 3, 5, 8, 13, 60, 61, 63, 89
State v. Eckenrode [(Iowa, 1910), 127 N. W. 56], 16
State v. Effler [(Del., 1910), 78 Atl. 411], 3
State v. Erickson (54 Wash. 472), 475, 485
State (ex inf.) v. Firemen's Fund Ins. Co. (152 Mo. 1), 18, 264, 370, 379, 482, 493
State v. Fitzpatrick (16 R. I. 1), 271
State v. Fountain [6 Pen. (Del.) 520], 269
State v. Freeholders of Hudson (23 N. J. L. 206), 72
State v. Gage (72 Ohio St. 210), 344, 374
State v. Glenn Lumber Co. (83 Kan. 399), 354, 469
State v. Glidden (55 Conn. 46), 31, 33, 502, 503
State v. Goldhart (172 Ind. 210), 269
State v. Goodwill (33 W. Va. 179), 82, 536
State v. Grays Harbor & Puget Sound Ry. Co. (54 Wash. 530), 16
State v. Griffin (69 N. H. 1), 271
State (ex rel. Clark) v. Haworth School Trustee, etc. (122 Ind. 462), 8, 314
State v. Henke (19 Mo. 225), 18
State (Myers) v. Hudson Co. Elec. Co. (60 N. J. L. 350), 299
State v. Illinois Cent. R. Co. (246 Ill. 188), 16
State v. Indiana & Ill. Southern Rd. Co. (133 Ind. 69), 16
State v. International Harvester Co. (81 Kan. 610), 446
State v. International Harvester Co. (79 Kan. 371), 471, 485
State v. International Harvester Co. (79 Ark. 517), 350, 442
State v. Jack (69 Kan. 387), 495
State v. Jackson Cotton Oil Co. (95 Miss. 6), 343, 378
State v. Julow (129 Mo. 163), 536
State (ex rel. Hardley) v. Kansas City Live Stock Exchange (211 Mo. 181), 440, 450

[References are to Sections]

State v. Kreutzberg (114 Wis. 530), 271, 535, 536
State v. Lancashire Fire Ins. Co. (66 Ark. 466), 370
State v. Laredo Ice Co. (96 Tex. 461), 344
State (ex rel. Worley) v. Lewis (55 Fla. 570), 277
State v. Lewis (26 Utah, 125), 269
State v. McCaw (77 S. C. 351), 266
State v. Messner (43 Wash. 206), 3
State v. Milwaukee Gaslight Co. (29 Wis. 454), 274, 303
State (Clapp) v. Minnesota Thresher Mfg. Co. (40 Minn. 213), 272
State v. Missouri, K. & T. R. Co. of Texas (99 Tex. 516), 213, 387, 398, 483
State v. Missouri Pac. Ry. Co. (81 Neb. 15), 16
State v. Monarch Portland Cement Co. [(Kan., 1910), 111 Pac. 487], 469
State v. Moore (104 N. C. 714), 271
State v. Moore (40 Neb. 854), 269
State v. Moore & Ligon (19 Ala. 520), 272
State v. Morgan (2 S. Dak. 32), 16
State (ex rel. Laclede Gaslight Co.) v. Murphy (130 Mo. 10), 278
State v. Norton (23 N. J. L. 33), 3
State v. Omaha Elevator Co. (75 Neb. 637), 354, 355, 488
State v. Penny (42 Mont. 118), 271
State v. Perry (151 N. C. 661), 252, 310
State v. Phipps (50 Kan. 609), 16, 25, 421
State v. Portland General Electric Co. (52 Oreg. 502), 266
State v. Post (55 N. J. L. 264), 6
State v. Racine Sattley Co. [(Tex. Civ. App., 1911), 134 S. W. 400], 3, 98
State v. Real Estate Bank [5 Pike (5 Ark.), 595], 72
State v. Redmoor (134 Wis. 89), 269
State v. Richcreek (167 Ind. 217), 271
State v. Schlatterbeck (39 Ohio St. 268), 95
State v. Schlitz Brewing Co. (104 Tenn. 715), 16, 25, 332, 344, 346, 360
State v. Scougal (3 S. Dak. 56), 272
State (ex rel. Henson) v. Sheppard (192 Mo. 497), 269
State v. Shippers' Warehouse Co. (95 Tex. 603), 376, 392
State (ex rel. Woodward) v. Skeggs, (154 Ala. 249), 269
State v. Small (82 S. C. 93), 26
State v. Smiley (65 Kan. 240), 234, 337, 344, 419
State v. Standard Oil Co. (61 Neb. 28), 448
State v. Standard Oil Co. (49 Ohio St. 137), 92
State (ex rel. Young) v. Standard Oil Co. (111 Minn. 85), 372
State (ex rel. Hadley) v. Standard Oil Co. (218 Mo. 1), 230, 237, 271, 336, 339, 341, 344, 345, 347, 374, 445, 455, 471, 477, 494, 495, 496
State v. Standard Oil Co. of Kentucky (120 Tenn. 86), 237
State v. Stewart (59 Vt. 273), 505
State v. Stockford (77 Conn. 227), 497, 501, 503, 517
State (ex rel. Berryhill) v. St. Paul Gaslight Co. (92 Minn. 467), 404
State v. St. Paul, Minneapolis & Manitoba Ry. Co. (98 Minn. 380), 71, 271, 275
State (ex rel. Cascade R. R. Co.) v. Superior Court (5 Wash. 346), 395
State (ex inf. Crow) v. Swarzschild & Sulzberger Co. (173 Mo. 394), 425
State ex rel. v. Talbot (123 Mo. 69), 482
State v. Tampa Waterworks Co. (56 Fla. 858), 277
State (ex inf. Attorney General) v. Terminal Railroad Association (182 Mo. 284), 369

[References are to Sections]

State (Southern N. E. Teleph. Co.) v. Towers (71 Conn. 657), 317
State v. United States Express Co. (63 W. Va. 299), 16
State v. Vanderbilt (37 Ohio St. 643), 95
State v. Virginia-Carolina Chemical Co. (71 S. C. 544), 340, 344, 352
State (ex rel. Coleman) v. Western Union Teleg. Co. (75 Kan. 609), 205
State (ex rel. Case) v. Wilson (151 Mo. App. 723), 277
State v. Wilson (73 Kan. 334), 415, 461
State v. Witherspoon (115 Tenn. 138), 344, 468, 469, 474, 475
State Board of Health v. Diamond Mills Paper Co. (63 N. J. Eq. 111), 264
State Freight Tax [15 Wall. (82 U. S.) 232], 16, 270
Staten Island Midland R. Co. v. Staten Island Electric R. Co. (54 N. Y. Supp. 598), 72
State Tonnage Tax Cases [12 Wall. (79 U. S.) 204], 16
Stein v. Bienville Water Supply Co. (141 U. S. 67), 71, 225, 275
Sterling Remedy Co. v. Wyckoff, Seamans & Benedict (154 Ind. 437), 464
Sternberg v. O'Brien (14 N. J. L. 237), 109
Stewart & Bro. v. Sterns & Culvert Lumber Co. (56 Fla. 570), 86, 89, 97, 101, 102, 109, 380
Stines v. Borman (25 Ohio St. 580), 406
Stone v. Textile Examiners' & Shrinkers' Employers' Assn. (122 N. Y. Supp. 137), 38
Stout v. State (43 Ark. 414), 350
Stovall v. McCutchen (107 Ky. 577), 88
Stratton v. Morris (5 Pick. (89 Tenn.) 497], 269
Strauss v. American Publishers' Association (177 N. Y. 473), 430
Strauss v. American Publishers' Assn. [92 App. Div. (N. Y.) 350], 454
Sullivan v. Texas (207 U. S. 416), 218
Sunset Teleph. & Teleg. Co. v. City of Eureka (172 Fed. 755), 16
Superior Coal Co. v. E. R. Darlington Lumber Co. (236 Ill. 83), 109
Sutton v. Head (86 Ky. 156), 88, 106
Swann v. Swann (21 Fed. 299), 86
Swanson v. City of Ottumwa (131 Iowa, 540), 212
Swearington v. United States (161 U. S. 446) (see "Appendix A")
Swift & Co. v. United States (196 U. S. 375) (see "Appendix A"), 65, 77, 80, 82, 83, 89, 122, 129, 141, 148, 173, 183, 236
Swigert & Howard v. Tilden (121 Iowa, 650), 86, 88, 96, 106, 109
Syracuse Water Co. v. City of Syracuse (116 N. Y. 167), 71, 328

T

Tacoma Hotel Co. v. Tacoma Light & Water Co. (3 Wash. 316), 277
Talcott v. Brackett (5 Ill. App. 60), 109
Tallman v. Gaillard (57 N. Y. Supp. 419), 511
Tammany Waterworks v. New Orleans Waterworks (120 U. S. 64), 225
Tarbell v. Rutland Rd. Co. (73 Vt. 347), 86
Taylor v. Saurman (110 Pa. St. 3), 88
Teachout v. Des Moines Broad Gauge St. Ry. Co. (75 Iowa, 722), 316
Teal v. Felton [12 How. (53 U. S.) 284], 168
Tecktonius v. Scott (110 Wis. 441), 86
Temperton v. Russell [(1893), 1 Q. B. 715], 502
Territory v. DeWolfe (13 Okla. 454), 304

[References are to Sections]

Territory v. Farnsworth (5 Mont. 303), 16
Territory v. Leslie [(N. M., 1910), 106 Pac. 378], 3
Territory v. Long Bell Lumber Co. (22 Okla. 890), 368
Territory v. Reyburn (1 Kan. 55), 208
Texarkana Gas & Electric Co. v. City of Texarkana [(Tex. Civ. App., 1909), 123 S. W. 213], 271
Texas & Pacific Coal Co. v. Lawson (89 Tex. 394), 389, 405, 460
Texas & Pacific Ry. Co. v. Henson [(Tex.), 132 S. W. 118], 27
Texas & Pacific Ry. Co. v. Southern Pac. Ry. Co. (41 La. Ann. 970), 197
Texas Brewing Co. v. Templeman (90 Tex. 277), 402
Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (62 Fed. 803), 43, 76, 498
Thomas v. Lee County [3 Wall. (70 U. S.) 327], 212
Thomas v. Miles (3 Ohio St. 274), 106
Thomas v. Williamson (51 Fla. 332), 269
Thompson v. Cobb (95 Tex. 140), 214
Thompson v. Hubbard (131 U. S. 123), 285
Thomson v. Union Castle Mail S. S. Co. (166 Fed. 251), 83, 118, 129, 152, 167, 173
Thorington v. Montgomery (147 U. S. 490), 227
Thorpe v. Rutland & B. R. Co. (27 Vt. 140), 269
Thousand Island Park Assoc. v. Tucker (173 N. Y. 203), 264
Thousand Islands Steamboat Co. v. Visgar (83 N. Y. Supp. 325), 321
Thrift v. Elizabeth City (122 N. C. 31), 8, 252, 278, 280, 328
Thurlow v. Massachusetts. See License Cases.
Tibby Brothers Glass Co. v. Pennsylvania Railroad Co. (219 Pa. St. 430), 395
Timmerman v. Dever (52 Mich. 34), 46
Tinsley v. Treat, United States Marshal (205 U. S. 20), 181
Tivoli, Manchester, Ltd., v. Colley (52 W. R. 632), 106
Tobler v. Austin (22 Tex. Civ. App. 99), 86, 106
Tode v. Gross (127 N. Y. 480), 101, 102
Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Co. (54 Fed. 730), 3, 31, 42, 502, 505
Toledo Bank v. Bond. See Bank of Toledo v. City of Toledo.
Toledo W. & W. Ry. Co. v. City of Jacksonville (67 Ill. 37), 271
Town of. See name of.
Tracy v. Banker (170 Mass. 266), 539, 540
Trade-Mark Cases (100 U. S. 82), 16, 288
Transportation of Immigrants, In re (10 I. C. C. R. 13), 194
Trenton v. Wahrenburg (30 Ind. App. 304), 106, 109
Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co. (60 N. J. L. 246), 86
Trenton Potteries Co. v. Oliphant (58 N. J. Eq. 507), 109, 335
Trenton Potteries Co. v. Oliphant (56 N. J. Eq. 680), 88, 89, 91, 96, 102, 106, 108, 109
Tribolet v. United States (11 Ariz. 436), 56
Trust Company of Georgia v. State (109 Ga. 736), 458
Trustees of Exempt Firemen's Benev. Fund v. Roome (93 N. Y. 313), 6
Trustees of Southampton v. Jessup (162 N. Y. 122), 71, 275
Tuckahoe Canal Co. v. Tuckahoe & James River Ry. Co. [11 Leigh (Va.), 42], 70, 275, 311
Tugman v. City of Chicago (78 Ill. 405), 280

[References are to Sections]

Turner v. City of Hattiesburg [(Miss., 1910), 53 So. 681], 266
Turner v. Johnson [7 Dana (37 Ky.), 435], 106
Turner v. Wilkes County Commrs. (173 U. S. 461), 209
Turner v. Williams (194 U. S. 279), 226
Turnpike Co. v. State [3 Wall. (70 U. S.) 210], 74, 275
Tuscaloosa Ice Mfg. Co. v. Williams (127 Ala. 110), 87, 90, 100
Twelfth St. Market Co. v. Philadelphia & Reading Term. R. Co. (142 Pa. St. 580), 74
Twin Village Water Co. v. Damariscotta Gaslight Co. (98 Me. 325), 299
Typothetæ v. Typographical Union (117 N. Y. Supp. 144), 533
Typothetæ v. Typographical Union, No. 6 (129 N. Y. Supp. 967), 533

U

Underwood v. Barker, L. R. (1 Ch. D. 300), 86, 94, 102, 106, 109
Union Central Life Ins. Co. v. Champlin (11 Okla. 184), 86
Union Ferry Co., Matter of (98 N. Y. 139), 6, 264
Union Pacific Coal Co. v. United States (173 Fed. 737), 80, 82, 120, 124, 128, 155, 185
Union Pac. R. Co. v. Ruef (120 Fed. 102), 503
Union Strawboard Co. v. Bonfield (193 Ill. 420), 86, 88, 108
Uniontown, City of, v. State ex rel. Glass (145 Ala. 471), 272
Union Trust Co. of N. Y. v. Atchison, Topeka & Santa Fe R. Co. (8 N. Mex. 327), 293
United Shoe Machinery Co. v. Kimball (193 Mass. 351), 109
United Shoe Machinery Co. of Canada v. Brunet [Law Rep. (1909) App. Cas. 330], 103
United States v. Addyston Pipe & Steel Co. (85 Fed. 271) (see "Appendix A"), 20, 77, 80, 86, 87, 95, 97, 109
United States v. Agler (62 Fed. 824), 505
United States v. American Bell Teleph. Co. (128 U. S. 315), 282
United States v. American Naval Stores Co. (172 Fed. 455), 3, 8, 20, 78, 79, 123, 126, 185
United States v. American Tobacco Co. (221 U. S. 106), 15, 16, 22, 23, 24, 58, 233
United States v. American Tobacco Co. (164 Fed. 700), 16, 46, 55, 65, 67, 79, 83, 101, 114, 118, 126, 131, 141
United States v. American Tobacco Co. (163 Fed. 701), 144, 160
United States v. Arredondo [6 Pet. (31 U. S.) 691], 275
United States v. Baltimore & Ohio R. Co. (165 Fed. 113), 27
United States v. Benett (65 Fed. 62), 440
United States v. Black (160 Fed. 431), 64
United States v. Britton (108 U. S. 199), 64
United States v. Cassidy (67 Fed. 698), 16, 25, 58, 76
United States v. Chesapeake & O. Fuel Co. (105 U. S. 104), 65
United States v. Chicago & N. W. Ry. Co. (157 Fed. 616), 16
United States v. Coal Dealers' Assoc. (85 Fed. 252), 25, 58, 80, 83, 118, 168
United States v. Cole (153 Fed. 801), 60, 64
United States v. Colorado & N. W. R. Co. (157 Fed. 321), 16
United States v. Debs (64 Fed. 724), 16, 20, 25, 111, 114, 115, 116
United States v. E. C. Knight Co. (156 U. S. 1). (See "Appendix A"), 8, 16, 65, 77, 82, 87, 141, 147
United States v. Elliott (64 Fed. 27), 505

[References are to Sections]

United States v. Elliott (62 Fed. 801), 76
United States v. Erie R. Co. (166 Fed. 352), 16
United States v. Freight Assoc. (166 U. S. 290). (See "Appendix A")
United States v. Goldberg (12 Meyer Fed. Dec. 41), 60
United States v. Greenhut, 50 Fed. 469), 178
United States v. Haggerty (116 Fed. 510), 505
United States v. Hamburg-American Line (159 Fed. 104), 27
United States v. Heike (175 Fed. 852), 186
United States v. Heinze (218 U. S. 532), 238
United States v. Heth [3 Cranch (7 U. S.), 399], 275
United States v. Holliday [3 Wall. (70 U. S.) 407], 16
United States v. Jellico Mountain Coal & Coke Co. (46 Fed. 432), 80
United States v. Joint Traffic Assoc. (171 U. S. 505) (See "Appendix A"), 16, 80, 81, 82, 83, 111, 151, 201, 231, 233, 267
United States v. Kane (23 Fed. 748), 505
United States v. Kertel (157 Fed. 396), 3, 60
United States v. Kissel (173 Fed. 823), 3, 20, 57, 62, 64, 84, 85, 119, 180
United States v. MacAndrews & Forbes Co. (149 Fed. 823), 1, 20, 58, 84, 120, 145, 178, 179
United States v. MacFarland (28 App. D. C. 552), 277
United States v. Mooney (116 U. S. 106), 170
United States v. Moore (173 Fed. 122), 3, 61
United States v. Musgrave (160 Fed. 700), 86
United States v. Nelson (52 Fed. 646), 178
United States v. New York, New Haven & Hfd. R. Co. (165 Fed. 742), 230
United States v. Northern Securities Co. (120 Fed. 721), 80
United States v. Northern Securities Co. (193 U. S. 197). (See Northern Securities Co. v. United States) (See "Appendix A")
United States v. Patterson (59 Fed. 280), 178
United States v. Patterson (55 Fed. 605), 15, 20, 24, 58, 80
United States v. Pratt (98 U. S. 450), 57
United States v. Reading Co. (183 Fed. 427), 15, 22, 24, 80, 81, 124, 126, 151, 182
United States v. Standard Oil Co. (173 Fed. 177), 79, 80, 82, 110, 112, 113, 115, 120, 132, 182, 185
United States v. Standard Oil Co. of Ind. (155 Fed. 305), 16
United States v. Standard Oil Co. (152 Fed. 290), 169, 170, 171
United States v. Stevenson (215 U. S. 200), 64
United States v. Sweeney (95 Fed. 434), 505
United States v. Swift & Co. (122 Fed. 529), 16, 27, 80, 83, 89
United States v. Trans-Missouri Freight Assoc. (58 Fed. 58), 10, 196, 231, 515
United States v. Trans-Missouri Freight Assoc. (53 Fed. 440), 8
United States v. Trans-Missouri Freight Assoc. (166 U. S. 290). (See "Appendix A"), 23, 58, 75, 76, 78, 80, 83, 86, 97, 106, 114, 118, 123, 127, 151, 201, 233, 350, 387
United States v. Union Pacific Ry. Co. (98 U. S. 569), 169
United States v. Union Pac. Ry. Co. (45 Fed. 221), 293
United States v. Union Pac. Ry. Co. & Western Union Teleg. Co. (160 U. S. 1), 293
United States v. Virginia-Carolina

[References are to Sections]

Chemical Co. (163 Fed. 66), 169, 178
United States v. Weber (114 Fed. 950), 497, 505, 516
United States v. Wells-Fargo Express Co. (161 Fed. 606), 534
United States v. Wong Kim Ark (169 U. S. 649). (See "Appendix A")
United States v. Workingmen's Amalgamated Council of N. O. (54 Fed. 994), 76, 139, 505
United States Chemical Co. v. Provident Chemical Co. (64 Fed. 946), 8, 12, 66, 68, 82, 99, 109
United States Consol. Seeded Raisin Co. v. Griffin & Shelley Co. (126 Fed. 364), 134, 135
United States Fidelity & Guaranty Co. v. Commonwealth (139 Ky. 27), 16
United States Gypsum Co. v. Gleason (135 Wis. 539), 16
United States Heater Co. v. Iron Moulders' Union (129 Mich. 354), 538
United States Saving & Loan Co. v. First Methodist Protestant Church, (153 Fed. 702), 464
Up River Ice Co. v. Denler (114 Mich. 296), 86, 88, 104, 106
Urmston v. Whitelake [(2 B. D.) 8 R. R. & Corp. L. J. 153] 89

V

Vance v. W. A. Vandercook Co. (170 U. S. 438), 16
Van Hook v. City of Selina, 70 Ala. 361), 271
Van Patten v. Chicago, Milwaukee & St. Paul R. Co. (74 Fed. 981), 170
Vegelahn v. Guntner (167 Mass. 92), 60, 505, 506, 509
Venning v. Atlantic Coast Line R. Co. (78 S. C. 42), 16
Vermilye v. Western Union Teleg. Co. [(Mass., 1911), 93 N. E. 635], 000
Vicksburg v. Vicksburg Waterworks Co. (206 U. S. 496), 294, 328, 332
Vidal v. Girard's Executors [2 How. (43 U. S.) 127], 86
Vigilancia, The (73 Fed. 457), 214
Village of. See name of.
Vincennes, City of, v. Citizens' Gaslight Co. (132 Ind. 114), 277, 304
Virginia Coupon Cases (114 U. S. 270), 214
Virtue v. Creamery Package Mfg. Co. (179 Fed. 115), 123, 140, 158
Von Bremen v. MacMonnies (122 N. Y. Supp. 1087), 88

W

Wabash R. Co. v. Hannahan (121 Fed. 563), 497, 501
Wabash, St. Louis & Pacific Ry. Co. v. Illinois (118 U. S. 557), 16, 17, 270
Waco Water & Light Co. v. City of Waco [(Tex. Civ. App., 1894), 27 S. W. 675], 326, 329
Wagner v. City of Rock Island (146 Ill. 139), 277
Wagner v. Minnie Harvester Co. (25 Okla. 558), 461
Wagoner Undertaking Co. v. Jones (134 Mo. App. 101), 462
Wakefield v. Van Tassell (202 Ill. 41), 86
Walker v. Cronin (107 Mass. 555), 509
Walker v. Lawrence (177 Fed. 363), 86, 109
Walker v. Whitehead [16 Wall. (83 U. S.) 314], 214
Wallace v. City of Reno (27 Nev. 71), 269
Walla Walla v. Walla Walla Water Co. (172 U. S. 1), 225, 298
Waller v. Osborn [(60 Fla.), 52 So. 970], 277
Walsh v. Association of Master Plumbers (97 Mo. App. 280), 31, 429

[References are to Sections]

Walsh v. Dwight (58 N. Y. Supp. 91), 82, 403
Walsh, Ex parte [(Tex. Civ. App., 1910), 129 S. W. 118], 237
Ward v. Byrne (5 M. & W. 548), 94
Ware & Leland v. Mobile County (209 U. S. 405), 16
Ware-Kramer Tobacco Co. v. American Tobacco Co. (180 Fed. 160), 8, 118, 120, 160, 161, 173, 252
Warfield v. Booth (33 Md. 63), 106
Warren v. Bouvier (124 N. Y. Supp. 641), 86
Warren v. Jones (51 Me. 146), 109
Washburn v. Dosch (68 Wis. 436), 108
Washington Toll Bridge Co. v. Commissioners of Beaufort (81 N. C. 491), 252, 300, 319
Water, Light & Gas Co. of Hutchinson v. Hutchinson (207 U. S. 385), 71, 74, 223, 225, 294
Waters-Pierce Oil Co. v. State (19 Tex. Civ. App. 1), 344
Waters-Pierce Oil Co. v. Texas (212 U. S. 86), 230, 337, 343, 345, 386, 442, 443
Waterworks Co. v. City of Washburn (129 Wis. 73), 325
Waterworks Co. v. Rivers (115 U. S. 674), 225
Watkins v. Griffith (59 Ark. 344), 350
Watkins v. Morley (2 Tex. App. Div. Cas., § 723), 109
Watson v. Harlem & New York Nav. Co. [52 How. Pr. (N. Y.) 348], 1, 400
Watson v. Maryland (218 U. S. 173), 271
Watson v. St. Louis, I. M. & S. Ry. Co. (169 Fed. 942), 534
Watson, In re (17 S. Dak. 486), 269
Wayne Monroe Teleph. Co. v. Ontario Teleph. Co. (112 N. Y. Supp. 424), 109
Webb v. Dunn (18 Fla. 721), 16
Webb Press Co. v. Bierce (116 La. Ann. 905), 87, 412
Weber v. Rogan (188 U. S. 10), 210, 212
Webster v. Williams (62 Ark. 101), 106
Weinsberg v. St. Louis Cordage Co. (135 Mo. App. 553), 21
Weisert Bros. Tobacco Co. v. American Tobacco Co. (163 Fed. 712), 145
Welch v. Phelps & Bigelow Windmill Co. (89 Tex. 653), 82, 408
Welton v. Missouri (91 U. S. 275), 16
Western Union Teleg. Co. v. American Union Teleg. Co. (65 Ga. 160), 293
Western Union Teleg. Co. v. American Union Teleg. Co. (9 Biss. 72, Fed. Case No. 17,444), 293
Western Union Teleg. Co. v. Atlantic & Pacific States Teleg. Co. (5 Nev. 102), 16, 293
Western Union Teleg. Co. v. Atlantic R. Co. (91 U. S. 283), 318
Western Union Teleg. Co. v. Baltimore & Ohio Teleg. Co. (23 Fed. 12), 293
Western Union Teleg. Co. v. Burlington & Southwestern R. Co. (11 Fed. 1), 293
Western Union Teleg. Co. v. Call Pub. Co. (181 U. S. 92), 318
Western Union Teleg. Co. v. Chicago & Paducah Rd. Co. (86 Ill. 246), 92
Western Union Teleg. Co. v. Commercial Milling Co. (218 U. S. 406), 16, 271
Western Union Teleg. Co. v. Crovo (220 U. S. 364), 270
Western Union Teleg. Co. v. James (162 U. S. 650), 271
Western Union Teleg. Co. v. Kansas (216 U. S. 1), 205
Western Union Teleg. Co. v. Norman, (77 Fed. 13), 272
Western Union Teleg. Co. v. Pendleton (122 U. S. 347), 16, 271
Western Union Teleg. Co. v. Penn-

[References are to Sections]

sylvania Rd. Co. (195 U. S. 540), 292
Western Union Teleg. Co. v. Texas (105 U. S. 460), 16
Western Wooden Ware Assoc. v. Starkey (84 Mich. 76), 86, 87, 88, 102, 106, 108, 406
West Manayunk Gaslight Co. v. New Gaslight Co. (21 Pa. Co. Ct. Rep. 379), 71
Westminster Water Co. v. City of Westminster (98 Md. 551), 216
West River Bridge Co. v. Dix [6 How. (47 U. S.) 507], 214, 215
West Virginia Transp. Co. v. Ohio River Pipe Line Co. (22 W. Va. 600), 86
West Virginia Transp. Co. v. Standard Oil Co. (50 W. Va. 611), 60, 61
Wheaton v. Peters [8 Pet. (33 U. S. 591], 285, 287
Wheeler v. City of Sault Ste. Marie (17 Det. Leg. N. 1117), 277
Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn. (154 Fed. 864), 173
Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn. (152 Fed. 861), 118
Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co. (138 U. S. 287), 220
W. H. Hill & Co. v. Gray & Worcester (163 Mich. 12), 107
Whitaker v. Keilby (106 N. Y. Supp. 511), 92, 109
White v. City of Meadville (177 Pa. St. 643), 325
White v. Hard [13 Wall. (80 U. S.) 646], 214
White v. White (132 Wis. 121), 4
White-Smith Music Pub. Co. v. Apollo Co. (209 U. S. 1), 287
White, Tompkins & Courage v. Wilson (23 T. L. R. 469), 106
Whitlock v. Hawkins (105 Va. 242), 269
Whittaker v. Howe (3 Beav. 383), 94
Whitwell v. Continental Tobacco Co. (125 Fed. 454), 75, 80, 82, 114, 122, 125, 140
Wichita Electric Co. v. Hinckley [(Tex. Civ. App., 1910), 131 S. W. 1192], 203
Wilcox v. Cherry (123 N. C. 79), 21
Wiley v. Baumgardner (97 Ind. 66), 106
Wiley & Drake v. National Wall Paper Co. (70 Ill. App. 543), 462
Wilkesbarre Elec. L. Co. v. Wilkesbarre L. H. & M. Co. [(Penn., 1886), 4 Kulp, 47], 71
Williams v. Fears (110 Ga. 584), 16, 26
Williams v. Rogan (59 Tex. 438), 21
Williams v. Wingo (177 U. S. 601), 220
Williams, In re (158 Cal. 550), 508
Willicut & Sons Co. v. Driscoll (200 Mass. 110), 516
Willis v. Kalmback (109 Va. 475), 269
Willson v. Morse (117 Iowa, 581), 462, 489
Wilmington Water Power Co. v. Evans (166 Ill. 548), 272
Wilson v. Hey (232 Ill. 389), 497, 516, 520
Wiltse v. City of Red Wing (99 Minn. 255), 277
Winch v. Tobin (107 Ill. 212), 269
Winchester v. Corinna (55 Me. 9), 269
Winona, City of, v. Botzet (169 Fed. 321), 277
Wire Company v. Murray (80 Fed. 811), 505
Wisconsin Cent. R. Co. v. United States (164 U. S. 190), 275
Wittenberg v. Mollyneaux (60 Neb. 583), 91
Wolff v. Hirschfeld [(Tex. Civ. App.), 57 S. W. 572], 86, 409
Wood v. City of Seattle (23 Wash. 1), 259, 262, 316
Wood v. Common Council of City of Birmingham (56 N. Y. Supp. 105), 73

[References are to Sections]

Wood v. Whitehead Bros. Co. (165 N. Y. 545), 88, 96, 101, 102, 232
Wood Mowing & Reaping Co. v. Greenwood Hardware Co. (75 S. C. 378), 65, 109, 382
Woodruff v. Hughes (2 Ga. App. 361), 3
Woodruff v. New York & New Eng. R. Co. (59 Conn. 63), 271
Woods v. Colfax County (10 Neb. 552), 263
Woodward v. Alson [12 Heisk. (Tenn.) 581], 189
Wooten v. Harris (153 N. C. 43), 106, 107, 409
Worcester, City of, v. Worcester Consolidated St. Ry. Co. (196 U. S. 539), 278
Wright v. Cunningham (115 Tenn. 445), 268, 278
Wright v. Nagle (101 U. S. 791), 71, 298, 330
Wright v. Rydor (36 Cal. 342), 88, 106, 109
Wright v. State (88 Md. 436), 8
Wunch v. Shankland (69 N. Y. Supp. 349), 511

Y

Yarmouth v. Yarmouth (34 Me. 411), 272
Yazoo & Mississippi Valley Rd. Co. v. Searles (85 Miss. 520), 248, 251, 340, 381, 399
Yick Wo v. Hopkins (118 U. S. 356), 370

Z

Zikos v. Oregon R. & Nav. Co. (179 Fed. 893), 16

JOYCE

ON

MONOPOLIES AND UNLAWFUL COMBINATIONS

OR

RESTRAINTS

CHAPTER I

GENERAL TERMS AND DEFINITIONS

§ 1. Combination Defined.
2. Competition Defined.
3. Conspiracy Defined.
4. Civil Conspiracy Defined.
5. Engrossing Defined.
6. Exclusive Right or Privilege Defined.
§ 7. Forestalling Defined.
8. Monopoly Defined.
9. Monopolist Defined.
10. "Pooling" Defined.
11. Regrating Defined.
12. "Trust" Defined.

SECTION 1. **Combination Defined.**

A combination is the union or association of two or more persons or parties for the attainment of some common end.[1]

The union or association of two or more persons or things, by set purpose or agreement, in order to effect some object by joint operation; as a combination of capital or of labor.[2] It is declared, however, that "'combination' is a word not yet possessed of an accurate legal

[1] Brownsville Glass Co. v. Appert Glass Co. (U. S. C. C.), 136 Fed. 240, 245, per Buffington, Dist. J., quoting Cent. Dict. (case of contract or license to use certain patents; trusts; when organization a "combination").

[2] Webster's Universal Dict. (Ed. 1910–1911). See also Watson v. Harlem & New York Navigation Co., 52 How. Pr. (N. Y.) 348, 353, per Lawrence, J. Examine Central Shade Roller Co. v. Cushman, 143 Mass. 353, 364, 9 N. E. 629.

meaning; its place in criminal law is, I believe, no older than this statute,[3] of itself it means no more than 'co-operation'—a union of effort."[4]

§ 2. **Competition Defined.**

Competition is defined to be the struggle between rivals for the same trade at the same time. That there cannot be competition in the absence of trade is self-evident, and although it is a popular saying that "competition is the life of trade," yet it is quite certain that trade is the mother of competition, since the latter springs from the former. Therefore, it would seem to follow that whatever restrains trade restrains competition in exact degree.[5]

§ 3. **Conspiracy Defined.**[6]

The most generally accepted definition of a conspiracy is that it consists of a combination between two or more persons to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means.[7] A conspiracy is also similarly defined as a combination of two or more persons,

[3] Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209; U. S. Comp. Stat., 1901, p. 3200. See § 13 herein.

[4] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823, 831, per Hough, Dist. J.

[5] Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 76, 71 S. W. 691, substantially the language of Ellison, J.

"*Competition is the life of trade*" as to the evil effects of "Pools, trusts and conspiracies to fix or maintain the prices of the necessaries of life." See, under the above headline, State ex. inf. Crow v. Armour Packing Co., 173 Mo. 356, 387, 73 S. W. 645, per Marshall, J.

[6] See §§ 4, 20, herein.

[7] United States v. Moore (U. S. C. C.), 173 Fed. 122 (a case of conspiracy to defraud the United States under Rev. Stat., § 5440; U. S. Comp. Stat., 1901, p. 3676. See also Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Co. (U. S. C. C.), 54 Fed. 730, 739, per Taft, Cir. J.; State v. Effler (Del. Gen. Sess., 1910), 78 Atl. 411; Matthews v. Shankland, 56 N. Y. Supp. 123, 129; State v. Bienstock (N. J., 1909), 73 Atl. 530, 535 (quoting from State v. Norton, 23 N. J. L. 33); State v. Ameker, 73 S. C. 330, 338, 339, 53 S. E. 484; State v. Racine Sattley Co. (Tex. Civ. App., 1911), 134 S. W. 400 (case under State Anti-Trust Statute).

Conspiracy is a combination or agreement between two or more persons to do an unlawful thing, or to do a lawful thing in an unlawful manner. Ballantine v. Cummings, 220 Pa. St. 621, 70 Atl. 546 (trespass for damages for conspiracy).

by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.[8] Under another definition a conspiracy is the combining of two or more persons for the purpose of doing something unlawful, oppressive or immoral, as a means or an end.[9]

§ 4. Civil Conspiracy Defined.[10]

Substantially the same definitions have been given of

Criminal conspiracy is a confederating of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means. Territory v. Leslie, (N. M. 1910), 106 Pac. 378 (quoting Bishop's New Crim. Law).

"A conspiracy at common law may be defined in short, as an agreement or combination formed between two or more persons to do an unlawful act or to do a lawful act by unlawful means." Franklin Union v. The People, 220 Ill. 355, 77 N. E. 176 (case of labor union; injunction; contempt).

[8] *United States:* Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. 542; United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, 460, per Sheppard, Dist. J. (a case of conspiracy in restraint of interstate commerce; criminal prosecution; Act of July 2, 1890); United States v. Keitel (U. S. D. C.), 157 Fed. 396 (indictment; conspiracy to defraud United States).

Indiana: Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 424, 75 N. E. 877.

Montana: Lindsay & Co., Ltd., v. Montana Federation of Labor, 37 Mont. 264, 274, 96 Pac. 127 (quoting Anderson's Dict. of Law, 234, as approved in Spies v. People, 122 Ill. 212, 3 Am. St. Rep. 320, 12 N. E. 865).

Texas: Green *v.* Bennett (Tex. Civ. App., 1908), 110 S. W. 108.

Washington: State v. Messner, 43 Wash. 206, 86 Pac. 836.

A conspiracy is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose. Bauer v. State, 3 Okla. Cr. 529, 530, 107 Pac. 525.

A conspiracy "has been defined as an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods." United States v. Kissel (U. S. C. C.), 173 Fed. 823, 825.

[9] Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551 (action for damages for alleged conspiracy to oust plaintiff from possession of certain premises).

"A 'conspiracy' may be broadly defined as a combination to effect an illegal object as an end or means." National Fireproofing Co. v. Mason Builders' Assoc. (U. S. C. C. A.), 169 Fed. 259, 94 C. C. A. 535.

A criminal conspiracy is a confederation to do something unlawful either as a means or an end. State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1.

[10] See §§ 3, 20, herein.

A civil conspiracy consists in a combination of two or more persons to do

civil as of criminal conspiracy. It would seem, however, that such qualifications relating to the cause of action, to the gravamen or essentials of the offense as are embodied in the following statements, are material.[11] Thus every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.[12] So any combination of two or more persons to do a criminal or unlawful act by any means or to do a lawful act by criminal or unlawful means is an actionable conspiracy at common law, and upon the purpose thereof being consummated is actionable by the person injured to recover compensation therefor.[13]

§ 5. Engrossing Defined.

"Engrossing" is defined or "described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total

an unlawful act by lawful or unlawful means, or to do a lawful act by unlawful means. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877; Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500 (injunction; miners' union).

A "civil conspiracy" may be defined as a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object; or a lawful object by unlawful or oppressive means. Natural Fireproofing Co. v. Mason Builders' Assoc. (U. S. C. C. A.), 169 Fed. 259, 94 C. C. A. 535. See also Green v. Bennett (Tex. Civ. App., 1908), 110 S. W. 108 (case of action by stockholders, complaining of certain acts of defendants in placing a bank in voluntary liquidation).

[11] *Conspiracy is synonymous with collusion or connivance.* Levine v. Klein, 120 N. Y. Supp. 196, 65 Misc. 458 (alleged agreement or conspiracy for divorce).

[12] Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (injunction; trades unions; strikes; "boycott").

[13] White v. White, 132 Wis. 121, 111 N. W. 1116 (action for damages for alleged consummated conspiracy to injure; essentials of conspiracy at common law held sufficient and that it was unnecessary to satisfy every essential of statute. Section 4466a, St. 1898).

engrossing of any other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and finable at the common law."[14] Coal is declared to be an article of prime necessity and therefore legally capable of being engrossed.[15]

§ 6. Exclusive Right or Privilege Defined.

A right or privilege is exclusive where the grant thereof carries with it the right to all the work of the character therein named, and which precludes every other person or corporation from sharing the privilege or enjoying an equal privilege, and which also precludes the legislature from conferring equal or like rights upon other persons or corporations for the reason that the entire privilege has been granted and there is no residue for distribution.[16] The word "exclusive" is derived from "*ex*," out, and "*claudere*," to shut. An act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise. The most familiar instances of grants of exclusive privileges or franchises are to be found in acts authorizing the establishment of ferries, toll bridges, turnpikes, telegraph companies and the like. The delegation to a corporation of the power to acquire title to land for public purposes is not a grant of an "exclusive" privilege, for the same delegated power may be conferred upon any corporation to whom the legislature may see fit to intrust it.[17]

[14] 4 Blackstone's Comm. 160.

"*The old offenses of regrating, engrossing and forestalling are no longer known to the law;* but modern legislatures are still seeking a solution of the same problem—how to maintain the right to freely buy and sell the necessaries of life in a market which is free from artificial and conventional restrictions." State v. Duluth Board of Trade, 107 Minn. 506, 527, 121 N. W. 395, per Elliott, J.

It is declared that: "Doubtless engrossing is an offense at common law in this State." State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1, 4.

[15] State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1, 4.

[16] Guthrie Daily Leader v. Cameron, Auditor, 3 Okla. 677, 688, 41 Pac. 635, per Burford, J. (a case of a special statute granting a special and exclusive privilege to a printing company; held void).

[17] Union Ferry Co., Matter of Application of, 98 N. Y. 139, 151, per

§ 7. Forestalling Defined.

"Forestalling is derived from *fare, via* and *stall, impedimentum* and by the common law regrating and engrossing were comprehended within forestallment." [18] The offense of forestalling the market was also an offence against public trade. "This which * * * is also an offense at common law, was described by statute [19] to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there; any of which practices make the market dearer to the fair trader." [20] Where rival corporations are not exercising any public franchise of carrying passengers or goods, but only the franchise of being a corporation, and their business is one that may be conducted by private individuals, in that they are simply the owners of a certain species of property, such as a certain mineral deposit, which, in its natural state, is of no use to mankind, and which after it has been manufactured and made fit for use, can hardly be classed as a necessity, the law forbidding forestalling the market does not apply

Rapallo, J.; Davenport v. Kleinschmidt, 6 Mont. 502, 531, 13 Pac. 249, per McLeary, J., gives same definition.

Exclusive franchise, privilege or immunity; meaning of, see the following cases:

Montana: Davenport v. Kleinschmidt, 6 Mont. 502, 529–531, 13 Pac. 249 (holding that a right to furnish all the water to a municipal corporation for twenty years, which right cannot be abridged, is an exclusive privilege).

New Jersey: State v. Post, 55 N. J. L. 264, 26 Atl. 683.

New York: Trustees of Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 328, 45 Am. Rep. 217 (a grant of a right to receive a certain proportion of public funds is not an exclusive privilege, franchise or immunity, under a constitutional provision prohibiting such grants by private or local bill).

Oregon: Hackett v. Wilson, 12 Oreg. 25, 31, 32, 6 Pac. 652 (exclusive privilege confined to ferry landings and such privilege can be implied beyond that); Montgomery v. Multnomah Ry. Co., 11 Oreg. 344, 3 Pac. 435 (ferry franchise gives exclusive privilege of transportation between certain points on ferry landings).

Pennsylvania: Lehigh Water Co.'s Appeal, 102 Pa. St. 515, 527.

[18] Dane's Abridg., chap. 205, art. 2. See note to § 5, herein.

[19] 5 and 6 Edw. VI, c. 14.

[20] 4 Blackstone's Comm. 160; Dane's Abridg., chap. 205, art. 2.

to the purchase of such property. So where such rival interests consolidate under a condition precedent which involves the purchase of other mines and plants, no monopoly is created.[21]

§ 8. Monopoly Defined.[22]

Various definitions have been given of the word "monopoly," but the main governing idea is that of exclusive control, a stifling of competition. An early definition which has been extensively quoted is as follows: "A monopoly is an institution or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindered in their lawfull trade." [23] In a New

[21] Meredith v. Zinc & Iron Co., 55 N. J. Eq. 211, 221, 37 Atl. 539.

[22] See § 22, herein.

[23] Coke's Inst. 181, Part 3, Cap. 85; 4 Blackstone's Comm. 159; Bacon's Abridg., title "Monopoly."

This definition is quoted or given substantially in the following cases:

United States: United States v. E. C. Knight Co., 156 U. S. 1, 9, 15 Sup. Ct. 249, 39 L. ed. 525, per Mr. Justice Fuller (a case of control of manufactories of refined sugar, and construction and application of ShermanAnti-Trust Act of July 2, 1890, 26 Stat. 209; U. S. Comp. Stat., 1901, p. 3200); Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. ed. 585, per Mr. Justice Field (a case of grant of exclusive privileges for stock-landing and slaughter-houses; bill for injunction; constitutional law); Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 102, 21 L. ed. 394, per Mr. Justice Field in dissenting opinion; Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 607, 9 L. ed. 773, per Mr. Justice Story in dissenting opinion; Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160, 170; Bartholomew v. City of Austin, 85 Fed. 359, 364, 29 C. C. A. 568, 573; United States v. Trans-Missouri Freight Assoc., 53 Fed. 440, 452, per Reiner, Dist. J. (case of agreement or combination between carriers to maintain rates; injunction; Sherman Anti-Trust Act, July 2, 1890, s. c., 58 Fed. 58, 92, 7 C. C. A. 15, 24 L. R. A. 73, per Sanborn, Cir. J., s. c., 166 U. S. 290, 41 L. ed. 100, 17 Sup. Ct. 540; Greene, In re, 52 Fed. 104, 116, per Jackson, Cir. J. (case of monopoly; restraint of trade; Sherman Anti-Trust Act, July 2, 1890; indictment).

Connecticut: Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19, 38, per Hinman, J., quoting Bouvier.

York case it is declared that a monopoly in the modern sense is created where as the result of an effort to that end, previously competing businesses are so concentrated in the hands of a single person or corporation or in a few persons or corporations acting together, that they have power to practically control prices of a commodity and thus suppress competition. A monopoly exists where all or nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, or of a corporation or set of corporations acting together so as to practically bring the handling or production of a commodity within such single control to the exclusion of competition or free traffic therein.[24] Monopoly has also been defined as a special privilege conferred on

Indiana: State ex rel. Clark v. Haworth School Trustee, etc., 122 Ind. 462, 498, 23 N. E. 946, 7 L. R. A. 240, per Berkshire, J.

Louisiana: Darcantel v. Slaughter-House, etc., Co., 44 La. Ann. 632, 642, 11 So. 239.

Maryland: Wright v. State, 88 Md. 436, 443, 41 Atl. 795, per Pearce, J., who adds: "To constitute a monopoly within the meaning of this definition there must be an allowance or grant by the State to one or several of a sole right—that is a right to the exclusion of all others than the grantee or grantees." This case was not a grant but statute prohibiting the sale of any article in imitation of butter; demurrer to indictment overruled.

Minnesota: State v. Duluth Board of Trade, 107 Minn. 506, 527, 121 N. W. 395, per Elliott, J.

Montana: Davenport v. Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249, per McLeary, J. (case of grant by city ordinance being a monopoly; gives an exclusive right or sole power).

Tennessee: Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 508, 71 S. W. 815, per Wilkes, J. (case of invalidity of ordinance requiring union label on city printing).

Webster's definition of monopoly given in Herriman v. Menzies, 115 Cal. 16, 21, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504, 509, per Whiting, J.

[24] People v. American Ice Co., 120 N. Y. Supp. 443, 456, 457, per Wheeler, J., s. c. (upon points as pleading, etc.), 120 N. Y. Supp. 41, 135 App. Div. 180.

"A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein. Anything less than this is not a monopoly." Herriman v. Menzies, 115 Cal. 16, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81 (a case of association of stevedores; held not void as a contract in restraint of trade, nor as creating a monopoly).

one or more persons to the exclusion of all others; [25] as the sole power of dealing in a particular thing or doing a particular thing, either generally or in a particular place; [26] as an exclusive privilege not enjoyed by others; [27] as an

[25] Barbee v. Plank Road Co., 6 Fla. 262, 268, so declared in discussion of point raised that an act of incorporation created a monopoly in that it granted exclusive privileges.

A monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. City of Seattle v. Dencker, 58 Wash. 501, 108 Pac. 1086.

"A monopoly is when the sale of any merchandise or commodity is restrained to one, or a certain number; and has, says Coke (11 Coke, 84–89, 8 Coke, 125), three inseparable consequences: the increase of the price, the badness of the wares, the impoverishment of others." 7 Dane's Abridg. 38, chap. 205, art. 5.

" 'It is said to be a monopoly when one person alone buys up the whole of one kind of a commodity fixing a price at his own pleasure.' " State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1, 4, per Dubois, J., quoting from Black's L. Dict.

[26] San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 559, 41 Pac. 495, 25 L. R. A. 839 (case of exclusive agency of a water company for a flume company; contract held not to create a monopoly).

Monopoly is " 'the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise.' " Herriman v. Menzies, 115 Cal. 16, 21, 46 Pac. 730, 35 L. R. A. 318, 56 A. S. R. 81, quoting Bouvier's L. Dict.

"Various definitions of 'monopoly' have been given: 'The abuse of free commerce, by which one or more individuals have procured the advantage of selling alone all of one particular kind of merchandise, to the detriment of the public; any combination among merchants to raise the price of any particular merchandise to the detriment of the public.' The popular meaning of 'monopoly' at the present day seems to be the sole power (or power largely in excess of that possessed by others) of dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business. Anything less than this is not a monopoly." United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, 458, per Sheppard, Dist. J.

" 'The popular meaning of "monopoly" at the present day seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity, or at some particular place or market, or of carrying on some particular business.' " Davenport v. Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249, citing 2 Rap. & L. Law Dict. 834, 835.

[27] Guthrie Daily Leader v. Cameron, Auditor, 3 Okla. 677, 689, 41 Pac. 635, per Burford, J. (applied to a statute construed as a special act granting a special and exclusive privilege to a printing company; held void).

Monopoly is "an exclusive privilege to carry on a traffic." "The possession or the assumption of anything to the exclusion of other possessors; thus a man is popularly said to have a monopoly of any business of which

exclusive right granted to a few of something which was before of common right.[28] "So that it is not the case of a monopoly if the subjects had not the common right or

he has acquired complete control." Century Dict. as quoted in Continental Securities Co. v. Interborough Rap. Transit Co. (U. S. C. C.), 165 Fed. 945, 956 (consolidation of street railroads).

[28] Leeper v. State, 103 Tenn. 500, 514, 53 S. W. 962, 48 L. R. A. 167 (case where "Uniform Text-Book Act" held not obnoxious to the constitutional provisions against monopoly and special class legislation).

This definition is quoted in the following cases: Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 607, 9 L. ed. 773, per Mr. Justice Story in dissenting opinion; Bartholomew v. City of Austin, 85 Fed. 359, 364, 29 C. C. A. 568, 573; United States v. Trans-Missouri Freight Assoc., 53 Fed. 440, 452, per Riner, Dist. J. (agreement or combination between carriers to maintain rates; injunction; Sherman Anti-Trust Act, July 2, 1890); Thrift v. Elizabeth City, 122 N. C. 31, 37, 20 S. E. 349, 44 L. R. A. 427, per Douglass, J. (case of ordinance attempting to grant exclusive privilege for construction of waterworks, etc., and exclusive use of streets; unconstitutional); City of Memphis v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495, 528; Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 520, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, per Cox, J.

"Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient." United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946, 950, citing Green's Case, 52 Fed. 104.

"But what is a monopoly, as understood in law? It is an exclusive right granted to a few, of something which was before of common right. Thus a privilege granted by the king for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading, which before he had is a monopoly; 4 Black. Comm. 159; Bac. Abridg. Prerogative, J: 4. My Lord Coke, in his Pleas of the Crown, 3 Inst. 181, has given this very definition of a monopoly; and that definition was approved by Holt & Treby (afterwards chief justices of the king's bench), arguendo, as counsel, in the great case of the East India Company v. Sandy's, 10 Howell State Trials, 386. His words are, that a monopoly is 'an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' So, that it is not the case of a monopoly, if the subjects had not the common right or liberty before to do the act, or possess and enjoy the privilege or franchise granted, as a common right. 10 Howell's State Trials, 425. And it deserves an especial remark, that this doctrine was an admitted concession, pervading the entire arguments of the counsel who opposed, as well as of those who maintained the grant of the exclusive trade in the case of the East India Company v. Sandy's, 10 How. St. Tr. 386, a case which constitutes, in a great measure, the basis of this branch of the law." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 607, 9 L. ed. 773, per Mr. Justice Story,

liberty before to do the act, or possess and enjoy the privilege or franchise granted, as a common right." [29] In a comparatively recent case in the Federal Supreme Court monopoly has been defined to be unified tactics with regard to prices. It is the power to control prices which makes the inducement of combinations and their profit.[30]

§ 9. **Monopolist Defined.**

A monopolist is one who by the exercise of the sovereign power, takes from the public that which belongs to it, and gives to the grantee and his assigns an exclusive use.[31]

§ 10. **" Pooling " Defined.**

"Pooling" has been defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits.[32]

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it, and if they do not effect that result, it is only because they do not completely accomplish their main purpose.[33]

quoted in Patterson v. Wollmann, 5 N. Dak. 608, 615, 616, 67 N. W. 1040, 33 L. R. A. 536, per Corliss, J.

[29] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 607, 9 L. ed. 773, per Mr. Justice Story; Bartholomew v. City of Austin, 85 Fed. 359, 364, 29 C. C. A. 568, 573; City of Memphis v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495, 528.

[30] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 25 Sup. Ct. 382, 49 L. ed. 689 (case under Anti-Trust Acts of Texas to forfeit license of corporation for violating those statutes).

[31] Allen v. Hunter, 6 McLean (U. S. C. C.), 303, 305, 306, Fed. Cas. No. 225, p. 477.

[32] American Biscuit & Mfg. Co. v. Klotz (U. S. C. C.), 44 Fed. 721, 724, construing Act of La., July 5, 1890, in connection with Sherman Anti-Trust Act of July 2, 1890 (case of pooling of bakeries).

Pooling is "a combination among persons or companies normally competitive, as among transportation or shipping interests, whereby a uniform rate is set and maintained, the profits being shared on a percentage basis." Webster's Universal Dict. (Ed. 1910–1911).

[33] United States *v.* Trans-Missouri Freight Assoc. (U. S. C. C. A.), 58 Fed. 58, 65, per Sanborn, Cir. J.

§ 11. **Regrating Defined.**

Regrating was an offense at common law and was described by statute [34] "to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit." [35]

§ 12. **"Trust" Defined.**[36]

A trust has been defined as a contract, combination, confederation or understanding, express or implied, between two or more persons, to control the price of a commodity or services for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly.[37] By very recent commercial usage the technical meaning of the word "trusts" has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public.[38] In a Federal case the court declares that "Combinations in the nature of modern trusts * * * are those which aim at a union of energy, capital and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right for another." [39]

[34] 5 and 6 Edw. VI, c. 14.

[35] 4 Blackstone's Comm. 160; Dane's Abridg., chap. 205, art. 4. See note to § 5, herein.

[36] See § 29, herein.

[37] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 520, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, per Cox, J.

[38] Queen Ins. Co. v. The State, 86 Tex. 250, 266, 24 S. W. 397, 22 L. R. A. 483, per Gaines, Assoc. J., a case of alleged combination of insurance companies to fix rates, and construction of a State statute defining trusts, etc.; restrictions in trade; combinations in restraint of trade.

[39] United States Chemical Co. v. Provident Chemical Co. (U. S. C. C.), 64 Fed. 946, 950, per Priest, Dist. J., a case of a lease with a stipulation claimed to be in restraint of trade and void; held not to confer any special or exclusive privilege and that no monopoly was created and lease not void.

CHAPTER II

TERMS AND DEFINITIONS UNDER SHERMAN ANTI-TRUST ACT

§ 13. Sherman Anti-Trust Act.
14. Anti-Trust Amendments to Wilson Tariff Act—Trusts, etc., in Restraint of Import Trade Declared Void—Penalty.
15. Terms and Definitions Involved in Meaning and Application of Sherman Anti-Trust Act.
16. Commerce—Interstate Commerce—Commerce with Foreign Nations Defined.
17. Intrastate Commerce Defined.
18. Commodity, Commodities Defined.
19. Competing Line Defined.
20. Conspiracy Defined — Conspiracy in Restraint of Trade Defined.
§ 21. Contract Defined.
22. Monopoly, "Monopolize" Defined.
23. Contract in Restraint of Trade Defined.
24. "Restraint of Trade"—"Restraint"—In Restraint of Trade or Commerce" Defined.
25. Trade Defined.
26. Traffic Defined.
27. Transportation Defined.
28. "Transportation Within the State"—Meaning of.
29. "Trust"—"Holding" Corporation or Company.

§ 13. Sherman Anti-Trust Act.

The Sherman Anti-Trust Act[1] is entitled "An act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and provides as follows:

Trusts, etc., in the States in restraint of trade, etc., illegal—Persons combining guilty of misdemeanor—Penalty.

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprison-

[1] Act of July 2, 1890, chap. 647, 26 Stat. 209, U. S. Comp. Stat., p. 3200.

ment not exceeding one year, or by both said punishments, in the discretion of the court.

Persons attempting to monopolize, etc., guilty of misdemeanor—Penalty.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Trusts, etc., in Territories or District of Columbia illegal—Persons engaged therein guilty of misdemeanor—Penalty.

"Sec. 3. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Jurisdiction of United States Circuit Courts—Prosecuting officers—Procedure—Hearing, etc.—Temporary restraining order, etc.

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent

and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Process—Summoning other parties—Subpœnas.

"Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of the act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Trusts, etc., property in transit—Forfeiture, seizure and condemnation.

"Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Damages—Litigation—Recovery.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.[2]

[2] The remedies given under this statute, are three in number: First,

"Person" or "persons" defined.

"Sec. 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country." [3]

§ 14. Anti-Trust Amendments to Wilson Tariff Act—Trusts, etc., in Restraint of Import Trade Declared Void —Penalty.[4]

"Sec. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary

a criminal prosecution; Second, a forfeiture of property; and, Third, an action by any person injured to recover threefold damages. Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. ed. 486, aff'g 148 Fed. 939.

[3] *A corporation, while by fiction of law recognized for some purposes as a person, is not endowed* with the inalienable rights of a natural person, but it is an artificial person, created and existing only for the convenient transaction of business. Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 698, 24 Sup. Ct. 436, 454.

A corporation doing business within a State other than that of its creation, having an office and agents therein, and subject to the process of the courts of such State, is a "person" within the meaning of the equal protection clause of the Fourteenth Amendment. Adams v. Standard Oil Co. of Ky. (Miss. 1910), 53 So. 692.

To what extent corporations are persons see Joyce on Franchises, §§ 64–66.

Corporations are amenable for conspiracy in the enforcement of contracts in civil law and may be guilty criminally of conspiracy. State v. Eastern Coal Co., 29 R. I. 454, 70 Atl. 1.

Corporation defined see Joyce on Franchises, §§ 50, 51 and extended note thereto.

Association defined. An association is: (a) "an organization of persons without a charter, for business, humanity, charity, culture or other purpose: any unincorporated society or body:" (b) "a body of persons invested with some, yet not full, corporate rights and powers; as a joint-stock association, a building and loan association." (c) "'Association' *ex vi termini* implies agreement, compact, union of minds, purpose, and action. May apply to those already associated with persons named or those who may come in afterward: as in acts of incorporation." Anderson's Dict. of Law.

To what extent definition of corporation includes an association see Joyce on Franchises, §§ 52–54.

[4] Act of Aug. 27, 1894 (§§ 73–77), chap. 349, 28 Stat. 570; U. S. Comp. Stat., 1901, p. 3202.

to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof, in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Jurisdiction of United States Circuit Courts—Prosecuting officers—Proceedings—Temporary restraining order, etc.

"Sec. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions, setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Summoning additional parties—Subpœnas.

"Sec. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Forfeiture, etc., of property affected by trust.

"Sec. 76. That any property owner under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof) mentioned in section seventy-three in this act, and being in the course of transportation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Suits by parties injured—Damages.

"Sec. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.[5]

[5] *The foregoing sections were expressly preserved* in the Dingley Act of 1897. Section 34 of that Act (30 Stat. 213; U. S. Comp. St., 1901 p. 1702) concludes as follows:

"*And further provided,* That nothing in this act shall be construed to repeal or in any manner affect the sections numbered seventy-three, seventy-four, seventy-five, seventy-six, and seventy-seven of an act entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,' which became a law on the twenty-eighth day of August, eighteen hundred and ninety-four."

As to enforcing trust and interstate commerce laws—Exemptions from testifying—Perjuries excepted, see also:

§ 15. Terms and Definitions Involved in Meaning and Application of Sherman Anti-Trust Act.

The terms of the Sherman Anti-Trust Act [6] requiring

"*An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes,*" providing as follows:

"* * * That for the enforcement of the provision of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the court of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. * * *

Approved February 25, 1903, chap. 755, 32 Stat. 854, 903; U. S. Comp. Stat., Suppl. 1905, pp. 602, 606.

As to enforcing trust, etc., laws—Assistant to attorney general authorized, see also:

"*An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and three, and for prior years, and for other purposes,*" providing as follows:

"* * * That under, and to be paid from, the appropriation of five hundred thousand dollars for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and other Acts mentioned in said appropriation, made in the legislative, executive and judicial appropriation Act for the fiscal year nineteen hundred and four, the President is authorized to appoint, by and with the advice and consent of the Senate, an assistant to the Attorney-General with compensation at the rate of seven thousand dollars per annum and an Assistant Attorney-General at a compensation at the rate of five thousand dollars per annum; and the Attorney-General is authorized to appoint and employ, without reference to the rules and regulations of the civil service two confidential clerks at a compensation at the rate of one

[6] See §§ 13, 14, herein.

definition are: contract;[7] combination;[8] trust;[9] conspiracy;[10] restraint of trade or commerce;[11] trade;[12] commerce;[13] trade or commerce among the several States or with foreign nations;[14] monopolist,[15] monopolize,[16] and monopoly.[17] Other definitions are involved in the construction of the statute in order to ascertain its application as well as its meaning.[18] So in construing this statute, the following divisions may be made: (1) Contract in restraint of trade. (2) Combination in restraint of trade. (3) Conspiracy in restraint of trade. And "there can be no question but that the second and third parts as thus put receive color from the first. * * * The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in *pari materia*, and so has as its basis the engrossing or controlling of the market, or

thousand six hundred dollars each per annum, to be paid from said appropriation. Said assistant to the Attorney-General and Assistant-Attorney-General shall perform such duties as may be required of them by the Attorney-General. * * *

Approved March 3, 1903, 32 Stat. 1031, 1062.

As to anti-trust cases being given precedence in Circuit Courts—Certificate of attorney general—Composition of court—Revision by Supreme Court—Appeal direct to Supreme Court—Proviso pending appeals, see also:

"*An act to expedite the hearing and determination of suits in equity pending or hereafter brought under* the act of July second, eighteen hundred and ninety entitled 'an act to protect trade and commerce against unlawful restraints and monopolies.' 'An act to regulate commerce' approved February fourth, eighteen hundred and eighty-seven or by any other acts having a like purpose that may be hereafter enacted." Act of Feb. 11, 1903, c. 544, 32 Stat. 823; U. S. Comp. Stat., Suppl. 1905, pp. 622, 623.

[7] See § 25, herein.

[8] See § 1, herein.

[9] See §§ 12, 29, herein.

[10] See §§ 3, 4, 20, herein.

[11] See §§ 23, 24, herein.

[12] See § 25, herein.

[13] See §§ 16, 17, herein.

[14] See § 16, herein.

[15] See § 9, herein.

[16] See § 22, herein.

[17] See §§ 8, 22, herein.

[18] Some of these have been given under general definitions, while others are given under this chapter.

of lines of trade." [19] Again, in order to violate the Sherman Anti-Trust Act there must be a contract, combination or conspiracy, which in purpose or effect tends to restrain trade or commerce among the States, or to monopolize some portion thereof. Whether in purpose or effect violative of the act, such contract, combination or conspiracy must have the ordinary effect attached to those words. There must be a meeting of the minds of two or more to accomplish some common purpose directly violative of the statute, or a purpose which will, whether intentional or not, in effect constitute a restraint of trade and commerce among the several States.[20]

§ 16. Commerce—Interstate Commerce—Commerce with Foreign Nations Defined.

While domestic commerce and interstate commerce are different things, still both are comprehended in the single word commerce.[21] Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are vital agents of commercial prosperity.[22] Another definition

[19] United States v. Patterson (U. S. C. C.), 55 Fed. 605, 640, per Putnam, J., in analyzing the Sherman Anti-Trust Act.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix A," herein.

[20] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix A," herein.

[21] State v. Schlitz Brewing Co., 104 Tenn. 715, 744, 745, 59 S. W. 1033, 78 Am. St. Rep. 941, per Caldwell, J., in construing anti-trust statute of the State.

[22] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 229, 230, per Mr. Justice Johnson.

An electric light is in its nature an article of commerce. Hull Electric Light Co. v. Ottawa Electric Light Co., Rap. Jud. Quebec, 14 C. S. 124.

is this: commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange. The whole transaction from initiation to culmination is commerce.[23]

"Commerce" is a broader term than "trade." It is the word in that clause of the Constitution by which power is conferred on Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." [24] In a broader and more distinct exercise of that power than ever before asserted Congress passed [25] the enactments known as the "Interstate Commerce Law." The Sherman Anti-Trust Act is another exercise of that constitutional power, and the word "commerce" as used therein should not be given a more restricted meaning than it has in the Constitution.[26]

"Commerce" in the Federal Constitution comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities.[27]

In the recent Standard Oil Co. case [27a] it is held that the commerce referred to by the words "any part" in § 2 of the Anti-Trust Act, as construed in the light of the manifest purpose of that act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce.

In the great case of Gibbons v. Ogden,[28] it was said that

[23] United States v. Swift & Co. (U. S. C. C.), 122 Fed. 529, 531, per Grosscup, Cir. J.

[24] U. S. Const., art. 1, § 8.

[25] In 1887 and 1888.

[26] United States v. Debs (U. S. C. C.), 64 Fed. 724, 749, per Woods, Cir. J. See § 58, herein.

[27] F. A. Patrick & Co. v. Deschamp (Wis., 1911), 129 N. W. 1096.

[27a] Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. ——, 31 Sup. Ct. ——, under "Appendix A," herein.

[28] 9 Wheat. (22 U. S.) 1, 189–194, 6 L. ed. 23. See § 26, herein.

commerce, undoubtedly is traffic, but it is something more, it is intercourse.[29] It describes the commercial intercourse between nations, and parts of nations, in all its branches,[30] and is regulated by prescribing rules for

[29] Quoted in International Textbook Co. v. Pigg, 217 U. S. 91, 106, 54 L. ed. 678, 30 Sup. Ct. 481.

[30] *Intercourse includes means by which trade carried on;* commerce with foreign nations and among the several States can mean nothing more than intercourse with those nations and among the States for the purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage over land through the States where such passage becomes necessary to the commercial intercourse between the States. Corfield v. Coryell, 4 Wash. (U. S. C. C.) 371, 378, 6 Fed. Cas. 546, 550, per Washington, J.

Intercourse by telegraph is commerce; is also interstate and foreign commerce. Western Union Teleg. Co. v. Commercial Milling Co., 218 U. S. 406, 54 L. ed. 1088, 31 Sup. Ct. 59 (is interstate commerce); Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, 1382, 32 L. ed. 311 (telegraph communications are commerce, and when carried on between different States is interstate commerce); Western Union Teleg. Co. v. Pendleton, 122 U. S. 347, 357, 7 Sup. Ct. 1126, 30 L. ed. 1187, (cited in International Textbook Co. v. Pigg, 217 U. S. 91, 107, 54 L. ed. 678, 30 Sup. Ct. 481); Western Union Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067 (telegraph company is instrument of foreign and interstate commerce; its business is commerce itself); Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 9, 24 L. ed. 708 (rule that commercial intercourse is an element of commerce applied to telegraph companies cited in International Textbook Co. v. Pigg, 217 U. S. 91, 106, 54 L. ed. 678, 30 Sup. Ct. 481). See Joyce on Electric Law (2d ed.), § 43. See also *Id.*, § 44, that *telephone is instrument of commerce and interstate commerce.*

Statute regulating the receiving and transmission of telegraph messages; when not interstate commerce. When messages are interstate commerce, see Vermilye v. Western Union Teleg. Co., (Mass., 1911), 93 N. E. 635.

Intercourse or communication through the mails or otherwise, between persons in different States, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States within the commerce clause of the Federal Constitution. International Textbook Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678, rev'g 76 Kan. 328, 91 Pac. 74.

The making of a contract of insurance is a mere incident of commercial intercourse; the business of insurance is not commerce, nor the contract an instrumentality thereof. In these respects there is no distinction between fire or marine insurance. Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 634, 22 Sup. Ct. 238, 239; Hooper v. California, 155 U. S. 648, 655, 15 Sup. Ct. 207, 39 L. ed. 297; Paul v. Virginia, 8 Wall. (75 U. S.) 168, 183, 19 L. ed. 357. Insurance contracts or policies are not articles of commerce,

carrying on that intercourse.[31] The term necessarily includes navigation.[32] The words "commerce with foreign nations,[33] and among the several States,[34] and with the Indian tribes," [35] as used in the Federal Constitution, comprehend every species of commercial intercourse between the United States and with foreign nations and among the several States. It includes every sort of trade carried on between this country and any other, nor does it stop at the external boundary of a State. "Commerce" as the word is used in the Constitution is a unit every part of which is indicated by the term.[36] Goods actually

they are not subjects of trade and barter as something having an existence and value independent of the parties to them; they are not commodities to be shipped and forwarded and put up for sale, per Mr. Justice Field. See Joyce on Franchises, § 87.

[31] *Not every species of property is subject to the control of Congress, even though it is the subject of commerce,* or is used or even essential in commerce. Trade-Mark Cases, 100 U. S. 82, 95, 25 L. ed. 550.

[32] *Power to regulate applies to navigation and navigable streams within a State* whenever such streams are used as a means for the carrying on of commerce among the States or with foreign nations. Such power also extends to navigation carried on by vessels exclusively employed in transportation of passengers. Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

[33] *Commerce with foreign nations, without doubt, means* commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. United States v. Holliday, 3 Wall. (70 U. S.) 407, 417, 18 L. ed. 182, per Mr. Justice Miller.

"*All commerce between nations is permissive or conventional.* The first includes every allowance of it, under what is termed by writers upon international law the liberty, or freedom of commerce—its allowance by statutes, or by the orders of any magistracy having the power to exercise the sovereignty of a nation in respect to commerce. Conventional commerce is, of course, that which nations carry on with each other under treaty stipulations." Passenger Cases (Smith v. Turner), 7 How. (48 U. S.) 283, 415, 12 L. ed. 702, per Mr. Justice Wayne.

[34] *Commerce between nations or among the States has several branches.* It consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in bringing from one nation and selling to another, or in transporting merchandise from the seller to the buyer to gain the freight. Passenger Cases (Smith v. Turner), 7 How. (48 U. S.) 283, 416, 12 L. ed. 702, per Mr. Justice Wayne.

[35] *Commerce with the Indian tribes* means commerce with the individuals composing these tribes. United States v. Holliday, 3 Wall. (70 U. S.) 407, 417, 18 L. ed. 182, per Mr. Justice Miller.

[36] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 189, 193, 194, 215, 6 L. ed. 23, per Mr. Chief Justice Marshall.

destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the

For other definitions, description or construction of the terms commerce, interstate commerce, and commerce with foreign nations see the following cases:

United States: Northern Securities Co. v. United States, 193 U. S. 197, 368, 24 Sup. Ct. 436, 474, 48 L. ed. 679 (per Mr. Justice White in dissenting opinion, quoting in part from Gibbons v. Ogden, in above text); Ware & Leland v. Mobile County, 209 U. S. 405, 409, 52 L. ed. 855, 28 Sup. Ct. 526, aff'g 146 Ala. 163, 41 So. 153 (interstate and intrastate commerce distinguished); Lottery Case (Champion v. Ames), 188 U. S. 321, 346, 23 Sup. Ct. 321, 322, 47 L. ed. 492 (per Mr. Justice Harlan, quoting from Gibbons v. Ogden, in above text); Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 147, 44 L. ed. 400, 20 Sup. Ct. 325 (per Mr. Justice Brewer; consists of intercourse and traffic, including navigation and transportation, and transit of persons and property); United States v. E. C. Knight Co., 156 U. S. 1, 12, 15 Sup. Ct. 249, 3 L. ed. 325 (per Mr. Chief Justice Fuller, quoting from Gibbons v. Ogden, in above text); O'Neil v. Vermont, 144 U. S. 223, 36 L. ed. 450, 12 Sup. Ct. 693 (per Mr. Justice Field in dissenting opinion, quoting from 91 U. S. 275, 280, given below); Rahrer, In re, 140 U. S. 545, 556, 11 Sup. Ct. 865, 35 L. ed. 572 (per Mr. Chief Justice Fuller, quoting from Gibbons v. Ogden, in above text); Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 9 Sup. Ct. 6 (per Mr. Justice Lamar); Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 479, 480, 31 L. ed. 700, 8 Sup. Ct. 689, 696, 698, 699 (bringing of goods to the buyer from the seller is commerce, whether interchange of the commodities is by land or by water); Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244 (transportation is commerce among the States, even as to such part of the carriage as lies within the State where it includes the transportation of goods under one contract and by one voyage from the interior of such State to another State); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 159 (commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities; and this applies to commerce with foreign nations); Mobile, County of, v. Kimball, 102 U. S. 691, 697, 702, 26 L. ed. 238 ("commerce embraces navigation, the improvement of the harbors and bays along our coast, and of navigable rivers within the States connecting them." Case also gives substantially same definition as in 114 U. S. 196, *ante*); Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen, 95 U. S. 465, 469, 470, 24 L. ed. 527 ("That the transportation of property from one State to another is a branch of interstate commerce is undeniable." Transportation is essential to commerce, or rather it is commerce itself, per Mr. Justice Strong); Henderson v. Mayor of New York, 92 U. S. 259, 270, 23 L. ed. 543 [commerce means trade, and it means intercourse. It means commercial intercourse between nations and parts of nations in all its branches. It includes navigation as the principal means by which foreign intercourse is effected, per Mr. Justice Miller; court quotes also from 3 Wall. (70 U. S.) 417, given below]; Welton v. Mis-

course of transportation to another State or are delivered to a carrier for transportation; this is the same whether

souri, 91 U. S. 275, 280, 23 L. ed. 347 (commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any or all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States, per Mr. Justice Field); Railroad Co. (Chicago & Northwestern Rd. Co.) v. Fuller, 17 Wall. (84 U. S.) 560, 568, 21 L. ed. 710 (commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on, per Mr. Justice Swayne); Case of the State Freight Tax (Reading Rd. Co. v. Pennsylvania), 15 Wall. (82 U. S.) 232, 275, 21 L. ed. 146 [commerce includes not only traffic, but intercourse and navigation. It does not make any difference whether the interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce, per Mr. Justice Strong, quoting also from 7 How. (48 U. S.) 283, 416, given below]; State Tonnage Tax Cases, 12 Wall. (79 U. S.) 204, 214 (commerce as used in the Constitution, comprehends navigation, and extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several States, except such as is completely internal and which does not extend to or affect other States, per Mr. Justice Clifford); United States v. Holliday, 3 Wall. (70 U. S.) 407, 417, 18 L. ed. 182 (per Mr. Justice Miller, quoting first part of Gibbons v. Ogden, in above text); Cooley v. Board of Wardens of Phila., 12 How. (53 U. S.) 299, 13 L. E. 996 (regulations of navigation are regulations of commerce); Passenger Cases (Smith v. Turner), 7 How. (48 U. S.) 283, 401, 12 L. ed. 702 ("Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is a part of commerce is not now an open question," per Mr. Justice McLean); Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 446, 6 L. ed. 678 (commerce is intercourse; one of the most ordinary ingredients is traffic, per Mr. Chief Justice Marshall); Postal Teleg. Cable Co. v. City of Mobile (U. S. C. C.), 179 Fed. 955; Zikos v. Oregon R. & Nav. Co. (U. S. C. C.), 179 Fed. 893, 898; Sunset Teleph. & Teleg. Co. v. City of Eureka (U. S. C. C.), 172 Fed. 755; La Moine Lumber & Trading Co. v. Kesterson (U. S. C. C.), 171 Fed. 980, 983 (per Washburn, Dist. J., quoting Pomeroy on Const. Law, p. 376 and 114 U. S. 196, given above); Riverside Mills v. Atlantic Coast Line R. Co. (U. S. C. C.), 168 Fed. 987, 989 (per Speer, Dist. J., quoting from Gibbons v. Ogden, at p. 230, in above text); United States v. Erie R. Co. (U. S. D. C.), 166 Fed. 352; United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700; United States v. Chicago & N. W. Ry. Co. (U. S. D. C.), 157 Fed. 616; United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27; United States v. Standard Oil Co. of Ind. (U. S. D. C.), 155 Fed. 305; Charge to Grand Jury, In re (U. S. D. C.), 151 Fed. 834; Snead v. Central of Georgia Ry. Co. (U. S. C. C.), 151 Fed. 608, 612, 613 (per Speer, Dist. J., quoting from Mr. Chief Justice Marshall and Mr. Justice Johnson in Gibbons v. Ogden, in above text); United

the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same State

States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252, 265 (per Morrow, Cir. J., quoting 114 U. S. 196, given above; also, it cannot stop at the external boundary of each State, but may be introduced into the interior); United States v. Cassidy (U. S. D. C.), 67 Fed. 698, 705 (same as last case, per Morrow, Dist. J.); Jervey, Ex parte (U. S. C. C.), 66 Fed. 957, 959 (per Simonton, Cir. J., quoting 114 U. S. 196, given above; also transportation is essential to commerce or rather is commerce itself. See 95 U. S. 465, 470, given above); Anderson v. Louisville & Nashville R. Co. (U. S. C. C.), 62 Fed. 46, 49 (transportation of passengers is commerce, per Barr, Dist. J.); Louisville & Nashville Rd. Co. v. Railroad Commission of Tenn. (U. S. C. C.), 19 Fed. 679, 709 (definition in 114 U. S. 196, given above); Green, In re (U. S. C. C.), 52 Fed. 104, 113 (per Jackson, Cir. J.; see definitions in 114 U. S. 203; 102 U. S. 691, 702, given above).

Arkansas: St. Louis & San Francisco R. Co. v. State, 87 Ark. 562, 113 S. W. 203.

California: People v. Raymond, 34 Cal. 492, 497 (commerce includes intercourse with foreign nations and between the several States, and is not limited to an exchange of commodities only; intercourse includes transportation of passengers); Carson River Lumbering Co. v. Patterson, 33 Cal. 334, 339 (commerce coextensive with intercourse).

Florida: Webb v. Dunn, 18 Fla. 721, 724 [same as in 12 Wall. (79 U. S.) 214, given above].

Georgia: Williams v. Fears, 110 Ga. 584, 589, 35 S. E. 699, 701, 50 L. R. A. 685 [per Cobb, J., quoting from 114 U. S. 196, 102 U. S. 691, 17 Wall. (84 U. S.) 568, 12 Wheat. (25 U. S.) 419, all given above; and Gibbons v. Ogden, in above text]; Paddleford, Fay & Co. v. Mayor, etc., of Savannah, 14 Ga. 438, 514 (commerce declared not to mean intercourse or navigation).

Idaho: State v. Duckworth, 5 Idaho, 642, 51 Pac. 456 (commerce means not only traffic but also intercourse. As applied to States it means commercial intercourse between them).

Illinois: State v. Illinois Cent. R. Co., 246 Ill. 188, 210, 92 N. E. 814, per Carter, J.

Indiana: State v. Indiana & Illinois Southern Rd. Co., 133 Ind. 69, 83, 32 N. E. 817, 18 L. R. A. 502 (per Olds, C. J., quoting Webster and Century Dicts.); Fry v. State, 63 Ind. 552, 562, 30 Am. Rep. 238 (commerce includes interstate passenger traffic).

Iowa: State v. Eckenrode, (Iowa, 1910), 127 N. W. 56; Campbell v. Chicago, Milwaukee & St. Paul Ry. Co., 86 Iowa, 587, 589, 53 N. W. 351, 17 L. R. A. 443 (per Robinson, C. J., quoting from 102 U. S. 702, 91 U. S. 280, both given above, and from Gibbons v. Ogden, in above text); Council Bluffs, City of, v. Kansas City, St. Joseph & Council Bluffs R. Co., 45 Iowa, 338, 349, 24 Am. Rep. 773, per Miller Ch. J.; Fuller v. Chicago & N. W. R. Co., 31 Iowa, 187, 207, per Beck, J.

Kansas: Leibengood v. Missouri, Kansas & Topeka Ry. Co., 83 Kan. 25, 109 Pac. 988; Kinsley, City of, v. Dyerly, 79 Kan. 1, 98 Pac. 228; Patterson v. Missouri Pac. Ry. Co., 77 Kan. 236, 94 Pac. 138; State v. Phipps, 50

where they are to be delivered to a carrier for the foreign destination.[37]

Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152; Hardy v. Atchison, Topeka & Santa Fe R. Co., 32 Kan. 698, 5 Pac. 6, 10.

Kentucky: United States Fidelity & Guaranty Co. v. Commonwealth, 139 Ky. 27, 129 S. W. 314; Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. Rep 824, 104 S. W. 224 (what acts constitute interstate commerce).

Maryland: Postal Teleg. Cable Co. v. State, 110 Md. 608, 618, 73 Atl. 679.

Massachusetts: Opinion of Justices, In re, 204 Mass. 607, 613, 91 N. E. 405, 27 L. R. A. (N. S.) 483; Commonwealth v. Housatonic R. Co., 143 Mass. 264, 9 N. E. 547.

Michigan: Imperial Curtain Co. v. Jacob (Mich., 1910), 17 Det. Leg. N. 751, 127 N. W. 772.

Minnesota: Gray v. Minneapolis & St. Louis R. Co. 110 Minn. 527, 124 N. W. 1100; Hardwick Farmers' Elevator Co. v. Chicago, Rock Island & Pacific Ry. Co., 110 Minn. 25, 124 N. W. 819; State v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 40 Minn. 267, 268, 41 N. W. 1047, 12 Am. St. Rep. 730, 3 L. R. A. 238.

Missouri: Mires v. St. Louis & San Francisco R. Co., 134 Mo. App. 379, 114 S. W. 1052.

Montana: McNaughton Co. v. McGirl, 20 Mont. 124, 49 Pac. 631, 653, 38 L. R. A. 367, 63 Am. St. Rep. 610; Territory v. Farnsworth, 5 Mont. 303, 5 Pac. 869, 874.

Nebraska: State v. Missouri Pac. Ry. Co., 81 Neb. 15, 115 N. W. 614.

Nevada: Western Union Teleg. Co. v. Atlantic & Pacific States Teleg. Co., 5 Nev. 102, 108, 109, Crandall, Ex parte, 1 Nev. 294, 302.

New Jersey: Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction, 75 N. J. 922, 68 Atl. 806, case affirms 75 N. J. L. 68, 66 Atl. 923; State, Lehigh & Wilkes-Barre Coal Co. v. Carrigan, 39 N. J. L. 35, 37; State v. Delaware, Lackawanna & Western R. Co., 30 N. J. L. 473, 487.

New York: People v. Klaw, 106 N. Y. Supp. 341, 55 Misc. 12; Dillon v. Erie R. Co., 43 N. Y. Supp. 320, 325, 19 Misc. 116.

North Carolina: Reid v. Southern Ry. Co., 153 N. C. 490, 69 S. E. 618; Bagg v. Wilmington, Columbia & Augusta R. Co., 109 N. C. 279, 280, 281, 14 S. E. 79, 80, 14 L. R. A. 596, 26 Am. St. Rep. 569.

Oklahoma: Farris v. Henderson, 1 Okla. 384, 393, 33 Pac. 380, 383.

Pennsylvania: List v. Commonwealth, 118 Pa. St. 322, 12 Atl. 277, 279; Commonwealth v. Gloucester Ferry Co., 98 Pa. St. 105, 120; Master Granite & Blue Stone Cutters' Assoc., 23 Pa. Co. R. 517, 520.

South Carolina: Venning v. Atlantic Coast Line R. Co., 78 S. C. 42, 12 L. R. A. (N. S.) 1217, 58 S. E. 983.

South Dakota: State v. Morgan, 2 S. Dak. 32, 50, 48 N. W. 314, 320.

Tennessee: State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 1039, 78 Am. St. Rep. 941.

Texas: Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397, 401, 22 L. R. A. 483.

[37] Southern Pacific Terminal Co. v. Interstate Commerce Commission,

§ 17. Intrastate Commerce Defined.

A transportation of goods which is begun and ended

Vermont: International Text Book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541, case reversed in 218 U. S. 664, 54 L. ed. 1201, 31 Sup. Ct. 225.

Washington: State v. Grays Harbor & Puget Sound Ry. Co., 54 Wash. 530, 103 Pac. 809.

West Virginia: State v. United States Express Co., 63 W. Va. 299, 60 S. E. 144.

Wisconsin: Loverin & Browne Co. v. Travis, 135 Wis. 322, 115 N. W. 829; United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 N. W. 238.

---

219 U. S. 498, 55 L. ed. —, 31 Sup. Ct. —, citing and relying upon Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. 475.

Interstate commerce does not begin until the articles have been shipped or started for transportation from one State to the other. Reid v. Southern Ry. Co., 153 N. C. 490, 69 S. E. 618.

Equipment of interstate railroad, including cars for transportation of its own fuel are instruments of interstate commerce. Interstate Commerce Commission v. Illinois Cent. Rd. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280 rev'g 173 Fed. 930.

Railroad carrier's business as part of trade or commerce—Interstate commerce. See United States v. Joint Traffic Association, 171 U. S. 505, 570, 19 Sup. Ct. 25, 43 L. ed. 259, per Peckham, J., quoted from in Joyce on Franchises, § 106.

Exchange by transportation not sole test of interstate commerce but only an adjunct—Transaction includes each essential part, reaching as entirety into two or more States. "When commerce * * * is between parties dealing from different States—to be effected so far as the immediate act of exchange goes by transportation from State to State—it is 'commerce between the States,' within the meaning of the Constitution, and the statute known as the Sherman Act." (See §§ 13, 14, herein.) "But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more States; and that the parties dealing with reference thereto deal from different States. An interstate commercial transaction is, in this sense, an affair rising from different States, and centering in the act of exchange, each essential part of the affair being as much commerce as is the center." United States v. Swift & Co. (U. S. C. C.), 122 Fed. 529, 531, per Grosscup, Cir. J.

The assumption "that commerce in the constitutional sense only embraces shipments in a technical sense and does not therefore extend to carriers engaged in interstate commerce, certainly in so far as so engaged and the instrumentalities by which such commerce is carried on" is a doctrine, the "unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23, and which has not since been open to question." Interstate Commerce Commission v. Illinois Cent.

within the limits of a State, and disconnected with any carriage outside the State is exclusively commerce within the State.[38] In other words, commerce which is completely internal is that which is carried on between persons, or man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States.[39]

§ 18. Commodity, Commodities Defined.

Commodity means, primarily, convenience, profit, advantage, interest. It also means that which affords ease, convenience, profit, or advantage; anything that is useful, particularly in commerce, including everything movable that is bought and sold; commodities are movables, valuable by money, the common measure; the synonym is merchandise, goods, wares, stock.[40]

[38] Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244 (case relates to right of State to regulate carrier's rates). See also Oregon Ry. & Nav. Co. v. Campbell (U. S. C. C.), 180 Fed. 253. Examine Joyce on Franchises, § 369.

[39] Gibbons v. Ogden, 9 Wheat. (22 U. S.)1, 194, 6 L. ed. 23, per Mr. Chief Justice Marshall.

Internal commerce is that which takes place entirely within the limits of a State. Paddleford, Fay & Co. v. Mayor of Savannah, 14 Ga. 438, 514.

Commerce which is completely internal is not within the scope of the "commerce clause" of the Federal Constitution, and, therefore, is not the subject of congressional regulation. Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

[40] Webster's Universal Dict. (ed. 1910–1911); substantially same definition is given in Rohlf v. Kasemeier, 140 Iowa, 182, 186, 118 N. W. 276. See also Best v. Bauder, 29 How. Pr. (N. Y.) 489, 492. Compare Queen Ins. Co. v. State, 86 Tex. 250, 265, 24 S. W. 397, 401, 22 L. R. A. 483, per Gaines, Assoc. J.

Commodity, anything that is useful; any object of commerce; anything

---

Rd. Co., 215 U. S. 452, 474, 30 Sup. Ct. 155, 54 L. ed. 280, rev'g 173 Fed. 930, per Mr. Justice White.

Interstate commerce embraces the right to send liquors from one State into another and also the act of sending the same, and is within the power given by the Federal Constitution to regulate commerce. Vance v. W. A. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100. See also Joyce on Actions and Defenses by and Against Corporations, §§ 51–54. So ardent spirits are the subject of sale and lawful commerce. The License Cases (Thurlow v. Massachusetts), 5 How. (46 U. S.) 504, 599, 12 L. ed. 256, per Mr. Justice Catron.

The word "commodities," under a constitutional clause [41] giving to the legislature power and authority to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the State, includes the transfer of shares in the capital stock of a corporation, association or company, domestic or foreign made in said State, also all agreements for such transfers.[42] Under a Kentucky decision it is

that can be bought or sold, animals excepted; goods; wares; merchandise. Synonym of goods; merchandise; wares. Stormonth's Eng. Dict.

Commodity. 1. An article of trade or convenience, a movable article of value; something that is bought and sold. * * * 2. Convenience; suitableness; advantage; profit. 3. A supply furnished; quantity. Standard Dict.

For other definitions of "commodity" or "commodities" see the following cases:

United States: Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (73 U. S.) 632, 640, 18 L. ed. 904 (commodities does not mean goods and wares alone but also signifies convenience, privilege, profit and gain, per Mr. Justice Clifford).

Alabama: Shuttleworth v. State, 35 Ala. 415, 417 ("article" and "commodity" embrace most movable things which may become the subject of commerce).

Kentucky: Barnett v. Powell, 16 Ky. (6 Littell) 409, 410 (the term commodity is properly used to signify almost any description of articles called movable or personal estate).

Massachusetts: Commonwealth v. Lancaster Sav. Bk., 123 Mass. 493, 495 ("commodity" is a general term and includes the privilege and convenience of transacting a particular business).

Texas: Queen Ins. Co. v. State, 86 Tex. 250, 265, 24 S. W. 397, 401, 22 L. R. A. 483 (the word is ordinarily used in the commercial sense of any movable and tangible thing that is ordinarily used or produced as the subject of barter or sale. Webster's definition also given).

[41] Const. Mass., art. 4, § 1, c. 1, pt. 2.

[42] Opinion of the Justices (Mass., 1908), 85 N. E. 545. See also Hamilton Company v. Massachusetts, 6 Wall. (73 U. S.) 632, 640, 18 L. ed. 904, per Mr. Justice Clifford.

Corporate franchises as commodities. "It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities and subject to an excise. So with corporate franchises granted by a foreign government." Gleason v. McKay, 134 Mass. 419, 424, 425, per Morton, C. J. The defendant in this case was not a corporation, but merely a partnership. See Finch's Law of England, 126 (38). Where a State constitution empowers the legislature to impose and levy reasonable duties and excises upon "commodities," etc., an act of incorporation is declared to be a commodity or privilege. Commonwealth v. People's Five Cent Sav. Bank, 5 Allen (87 Mass.), 428, 435, per Bigelow, C. J., who says: "Cer-

not an indictable offense to conspire to fix insurance rates, either by virtue of the statute [43] against conspiracies to regulate the prices of "merchandise, manufactured articles or property of any kind," or by the common law as it existed prior to the fourth year of King James I.[44] Insurance has, however, been held a commodity within the meaning of a code provision [45] prohibiting the formation of combinations between individuals or corporations to regulate or fix the price of "oil, lumber, coal * * * or any other commodity," and a compact between local agents in a city to fix rates upon all risks therein, imposing certain penalties for taking of risks at less rates than those fixed by the association is within the inhibition of said code so forbidding the formation of combinations or confederations to regulate the price of any commodity.[46] The term "commodity," as used in the Iowa code [47] relating to an unlawful combination, pool or trust to control the price or limit the quantity of any article of merchandise, or commodity manufactured, mined, produced or sold in the State, does not comprehend personal services, either skilled or unskilled.[48]

§ 19. **Competing Line Defined.**

The term "competing line" means that no railroad or railway line is "competing" until it is constructed. Competition as between railroads necessarily relates to

tainly it is most just and reasonable that a privilege, or to use the words of the Constitution, 'a commodity,' which an act of incorporation furnishes * * * should bear a portion of the public burdens, in the form of an excise."

[43] Ky. Stat., § 3915.

[44] Ætna Ins. Co. v. Commonwealth, 106 Ky. 864, 25 Ky. L. Rep. 503, 45 L. R. A. 355, 51 S. W. 624. See Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483.

[45] Iowa Code, § 5454.

[46] Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. Examine State ex inf. Firemen's Fund Ins. Co., 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

[47] § 5060.

[48] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276. Examine also State v. Henke, 19 Mo. 225, 226, holding that "commodity" under a statute prohibiting buying, selling or receiving "any commodity whatsoever" from a slave, etc., did not include the manual labor of a slave.

transportation, and in respect to transportation, the term "competing" signifies a road complete and ready for operation.[49] "For these reasons we think the proper construction of the phrase, a 'parallel or competing line,' is that it includes a projected road, surveyed, laid out, and in process of construction, as we have found to be the fact in this case, if such road, when completed and in operation, would actually compete with the road seeking control. Before competition it is 'parallel'; when completed it becomes 'competing.'" [50]

§ 20. Conspiracy Defined—Conspiracy in Restraint of Trade Defined.[51]

The conspiracy which the Federal Anti-Trust Act refers to has been defined as the agreement, confederation, combination, design, scheme, plan, or purpose of two or more parties to accomplish by their concerted action or cooperation an unlawful result by either lawful or unlawful means, or a lawful result by unlawful means. Here it is the unlawful or criminal results which are made punishable, and those results are the monopolizing of trade and commerce among the several States and with foreign nations, and the restraint of trade and commerce among the several States and with foreign nations. The law condemns these two results, and when two or more persons

[49] Mannington v. Hocking Valley Ry. Co. (U. S. C. C.), 183 Fed. 133, 150; construed in connection with Gen. Code, Ohio, § 8806.

[50] Pennsylvania Rd. Co. v. Commonwealth (Pa., 1886), 7 Atl. 368, 373, per Simonton, P. J., case where injunction was sought to restrain one railroad company from obtaining and exercising control of another railroad company upon ground of constitutional prohibition.

What are not "competing lines." See Kimball v. Atchison, Topeka & Santa Fe R. Co. (U. S. C. C.), 46 Fed. 888, 890, under Mo. Rev. Stat., § 2569. "I will say, that when the statute speaks of competing roads it evidently means roads that are substantial competitors for business; it refers to competition of some practical importance, such as is liable to have an appreciable effect on rates." *Id.*, 890, per Thayer, J.

"*Parallel lines are not necessarily competing lines*, as they not infrequently connect entirely different termini and command the traffic of distinct territories." Louisville & Nashville Rd. Co. v. Kentucky, 161 U. S. 677, 698, 40 L. ed. 849, 16 Sup. Ct. 714, per Mr. Justice Brown.

[51] See §§ 3, 4, herein.

conspire to produce either of these results there is a violation of the statute.[52] Again, "'conspiracy' is, unlike 'combination' a term of art. In the anti-trust law it is to be interpreted independently of the preceding words.[53] * * * The elements of a conspiracy to be here considered are that it must depend upon the concerted action of two or more persons to accomplish an unlawful result by any means, or a lawful result by unlawful means.[54] The statute declares, in effect, that if the purpose of the concerted action is to restrain trade between the States, such purpose is unlawful, and the concert of action is a conspiracy. It is wide enough to cover, not only a destruction of the trade of competitors by wrongful means [55] but any restraint of interstate trade if the same be accomplished by a predetermined and concerted action of two or more individuals." [56] Again, a conspiracy in restraint of trade, made criminal by the Sherman Anti-Trust Act, is more than a contract in restraint of trade; the latter is instantaneous, but the former is a partnership in criminal purposes and as such may have continuance in time.[57]

§ 21. Contract Defined.

A contract is an agreement upon sufficient consideration to do or not to do a particular thing.[58] It has also been defined as a compact between two or more persons, and it

[52] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, 460, per Sheppard, Dist. J.

Conspiracy defined as a combination between two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means (in connection with words "a conspiracy in restraint of trade" in Sherman Anti-Trust Act. United States v. Addyston P. & S. Co., 85 Fed. 271, 293, 29 C. C. A. 141, per Taft, Cir. J.

[53] United States v. Debs (U. S. C. C.), 64 Fed. 725, 747.

[54] Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419.

[55] United States v. Patterson (U. S. C. C.), 55 Fed. 605.

[56] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823, 831, per Hough, Dist. J.

[57] United States *v.* Kissel, 218 U. S. 601, 31 Sup. Ct. —, 54 L. ed. 1168, reversing 173 Fed. 823; see § 52, herein.

[58] Anderson's Dict. of Law, citing 2 Blackstone's Comm. 442.

is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed, and this differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties.[59]

[59] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, holding that the charter of a private corporation is a contract. See on this point Joyce on Franchises, §§ 311 *et seq.*

For other definitions of contract see the following cases:

United States: Edwards v. Kearzey, 96 U. S. 595, 599, 600, 24 L. ed. 793, per Mr. Justice Swayne; Larabee v. Dolley (U. S. C. C.), 175 Fed. 365.

Arkansas: Arkansas Stave Co. v. State (Ark., 1910), 125 S. W. 1001; Simmons-Burks Clothing Co. v. Linton, 90 Ark. 73, 78, 117 S. W. 775; Haney v. Caldwell, 43 Ark. 184, 189.

California: American Can Co. v. Agricultural Ins. Co., 12 Cal. App. 133, 106 Pac. 720; House v. McMullen (Cal. App., 1909), 100 Pac. 344, 346, per Burnett, J. (under Code).

Colorado: Brothers v. Brothers, 29 Colo. 69, 71, 66 Pac. 901, per Gabbert, J.

Connecticut: Skelly v. Bristol Sav. Bk., 63 Conn. 83, 87, 26 Atl. 474, 475, 19 L. R. A. 599, 38 Am. St. Rep. 340, per Andrews, C. J.

Delaware: Merritt & Co. v. Layton, (Del. Super., 1910), 75 Atl. 795.

Illinois: Canterberry v. Miller, 76 Ill. 355, 357, per Craig, J.

Indiana: Haskell & Barker Car Co. v. Allegheny Forging Co. (Ind. App., 1910), 91 N. E. 975, 976.

Iowa: Churchill v. Gronewig, 81 Iowa, 449, 454, 46 N. W. 1063, 1065, per Granger, J.; Quinn v. Shields, 62 Iowa, 129, 139, 17 N. W. 437, 442, 49 Am. Rep. 141, per Beck, J.

Maryland: Miller v. Palmer, 58 Md. 451, 460, per Stone, J.

Missouri: Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 565, 116 S. W. 461, per Nortoni, J.; Embry v. Hargadine-McKittrick Dry Goods Co., 127 Mo. App. 383, 387, 388, 105 S. W. 777, per Goode, J.

Nebraska: Leman v. Chipman 82 Neb. 392, 117 N. W. 885, 887, per Calkins, C.

New York: Justice v. Lang, 42 N. Y. 493, 496, 497, 1 Am. Rep. 576, per Lott, J.

North Carolina: Wilcox v. Cherry, 123 N. C. 79, 83, 31 S. E. 369, 370, per Douglas, J.

Oklahoma: Love v. Cavett 26 Okla. 179, 109 Pac. 553; Shelby v. Ziegler, 22 Okla. 799, 98 Pac. 989, 994, per Williams, C. J.; McCormick v. Bonfils, 9 Okla. 605, 616, 60 Pac. 296, 299, per Irwin, J.

Texas: Williams v. Rogan, 59 Tex. 438, 440.

Vermont: Franklin County Grammar School v. Bailey, 62 Vt. 467, 476, 20 Atl. 820, 822, 10 L. R. A. 405, per Ross, J.; Edgerton v. Hodge, 41 Vt. 676, 680, per Wilson, J.

§ 22. **Monopoly, "Monopolize" Defined.**[60]

"Monopoly" has been given its common-law meaning as being the construction clearly intended by Congress under the Sherman Anti-Trust Act.[61] The word "monopolize" in the Sherman Anti-Trust Act "is hard to define, and no attempt at an exhaustive definition need be made. It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things." [62]

§ 23. **Contract in Restraint of Trade Defined.**

The contract in restraint of trade, which originally fell under the condemnation of the common law, was one whereby a party bound himself not to follow some particular occupation, trade, calling, or profession, or to engage in some particular business for a period within a particular territory.[63] Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain

[60] See §§ 8, 9, herein.

[61] Corning, In re, 51 Fed. 205, 212 (case of indictment; monopoly; restraint of trade and commerce in distillery products among the several States), Act July 2, 1890. See also §§ 8, 9, herein and citations.

"'To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade.'" Greene, In re, 52 Fed. 104, 116, as applied to Act of July 2, 1890 (Webster's def.).

"'A sole engrossing to a man's self by means which prevent other men from engaging in competition with him.'" Greene, In re, 52 Fed. 104, 116, as applied to Act of July 2, 1890.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. ——, 31 Sup. Ct. ——; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. ——, 31 Sup. Ct. ——, under "Appendix A," herein.

[62] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 456, per Gray, Cir. J.

[63] State v. Duluth Board of Trade, 107 Minn. 506, 523, 121 N. W. 395, per Elliott, J.

trade. Some of those contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere.[64]

§ 24. "Restraint of Trade"—"Restraint"—"In Restraint of Trade or Commerce" Defined.

The term "restraint of trade" as used in the Federal Anti-Trust Act [65] is no new one. It had theretofore been used by courts in applying the doctrines of the common law in determining the validity of contracts. It is to be presumed that the lawmakers when they chose that phrase, intended that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used, for the act is described as one "to protect trade and commerce against unlawful restraints and monopolies"; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. The "restraint of trade" which is obnoxious to the provisions of the first section, must be of such kind as was, before the passage of the act, recognized as unlawful. [66] "Restraint" as used in the

[64] United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 328, 17 Sup. Ct. 540, 41 L. ed. 1007, per Mr. Justice Peckham in construing the Sherman Anti-Trust Act.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix," A herein.

[65] See § 13, herein.

[66] Dueber Watch-Case Mfg. Co. v. Howard Watch & Clock Co. (U. S. C. C. A.), 66 Fed. 637, 643, 14 C. C. A. 14 (action for damages caused by unlawful acts and combination). See also United States v. Patterson (U. S. C. C.), 55 Fed. 605, 639, 640, noted under §§ 15, 58, herein.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —,31 Sup. Ct. —, under "Appendix A," herein.

Sherman Anti-Trust Act "is a comprehensive word, and covers the several kinds thereof described in—check; hinder; repress; curb; restrict. By the use of this broad phrase, 'in restraint of trade or commerce,' it would seem that one of the objects Congress had in view was the maintenance of that natural, free flow of commerce incident to its commercial competitive character. We are therefore justified in holding that, although the word 'competition' is not used therein, this act,[67] was 'aimed to maintain interstate commerce on the basis of free competition.'" [68]

§ 25. Trade Defined.

In its general sense, trade comprehends every species of exchange or dealing, but its chief use is to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail, and so it is used in the Sherman Anti-Trust Act.[69]

The word "trade" in its broadest signification, includes

[67] "As said in Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 620, 53 C. C. A. 256, 266 (a case in which two of the present justices of the Supreme Court sat)."

[68] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 460, per Gray, Cir. J.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix A," herein.

[69] United States v. Debs (U. S. C. C.), 64 Fed. 724, 749, per Woods, Cir. J.

Trade undeniably includes dealings in both imported and domestic commodities. State v. Schlitz Brewing Co., 104 Tenn. 715, 744, 59 S. W. 1033, 78 Am. St. Rep. 941, per Caldwell, J., in construing State Anti-Trust Statute.

To trade is to engage in the purchase or sale of goods, wares and merchandise. Jackson v. Town of Union, 82 Conn. 266, 269, 73 Atl. 773, per Hall, J.

"*Trading or mercantile business,*" within a State statute providing for the taxation of the property of such a business, covers the business of purchasing standing timber and cutting, sawing and selling it. Jackson v. Town of Union, 82 Conn. 266, 73 Atl. 773.

"*Trade and manufacture*" *are not technical words. A place of trade is* a place devoted to the business of buying and selling or of plying some mechanical vocation. Sharpe v. Hasey, 134 Wis. 618, 114 N. W. 1118.

not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.[70]

The word "trade" embraces within its meaning commercial traffic, and it also has a limited and restricted significance which applies to mechanical pursuits; but in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions and those that pertain to liberal arts and the pursuit of agriculture.[71]

The commercial sense of the word "trade" and possibly the most common signification given to it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities. In the broader sense, "trade" is any occupation or business carried on for subsistence or profit.[72]

"Trade" within the meaning of a State anti-trust statute, declaring unlawful trusts and combinations in restraint of trade, etc.,[73] relates only to domestic trade, and not to trade or commerce between citizens of different States, or interstate commerce.[74]

§ 26. **Traffic Defined.**

"Traffic" is commerce, trade, sale or exchange of merchandise, bills, money and the like. It is the passing

[70] May v. Sloan, 101 U. S. 231, 237, 25 L. ed. 797, per Mr. Justice Bradley.

[71] Geise v. Pennsylvania Fire Ins. Co. (Tex. Civ. App., 1908), 107 S. W. 555.

[72] State v. Phipps, 50 Kan. 609, 614, 31 Pac. 1097, 1098, 34 Am. St. Rep. 152, 18 L. R. A. 657, per Simpson, C., quoting from Pinkney, In re, 47 Kan. 89, 27 Pac. 179.

[73] Kan. Laws of 1889, chap. 257.

[74] State v. Phipps, 50 Kan. 609, 34 Am. St. Rep. 152, 18 L. R. A. 657.

For other definitions see the following cases: United States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252, 265, per Morrow, J.; United States v. Cassidy (U. S. D. C.), 67 Fed. 698, 705, per Morrow, Dist. J.; Binns v. Vitagraph Co. of America, 124 N. Y. Supp. 515, 67 Misc. 327, what constitutes unlawful purposes of trade or advertising under State statute prohibiting use of name or picture without consent.

of goods or commodities from one person to another for an equivalent in goods or money.[75]

The word "traffic," like "trade," comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the retaining may be expected.[76]

"Traffic" is either State or interstate traffic, according to its origin and destination. It is shipped by the consignor in the State where the consignee dwells, or it is not. If not it is interstate traffic.[77]

§ 27. Transportation Defined.

Transportation is the means by which commerce is carried on; without transportation there would be no commerce between nations or among the States,[78] as transportation is essential to commerce, or rather is commerce itself.[79] The word "transportation" in the Act of Congress amending the Interstate Commerce Act [80]

[75] Williams v. Fears, 110 Ga. 584, 590, 35 S. E. 699, 701, 50 L. R. A. 685, per Cobb, J., quoting Bouvier's L. Dict. and Anderson's Dict. of Law.

[76] State v. Small, 82 S. C. 93, 63 S. E. 4, per Pope, Ch. J., quoting Curten *v.* Atkinson, 54 N. C. 133.

Traffic is the buying of something from another or the selling of something to another and is allied to trade. Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., In re (U. S. D. C.), 96 Fed. 756, 757.

"Deal or traffic" synonymous. Clifford v. State, 29 Wis. 327, 329 (indictment; intoxicating liquor case).

[77] Fort Worth & Denver City Ry. Co. v. Whitehead, 6 Tex. Civ. App. 595, 598, 26 S. W. 172.

[78] Council Bluffs, City of, v. Kansas City, St. Joseph & Council Bluffs R. Co., 45 Iowa, 338, 349, 24 Am. Rep. 773.

[79] Jervey, Ex parte (U. S. C. C.), 66 Fed. 957, 959, per Simonton, Cir. J.

Exchange by transportation not sole test of interstate commerce but only an adjunct. Transaction includes each essential part, reaching as entirety into two or more States. United States v. Swift & Co. (U. S. C. C.), 122 Fed. 529, 531, see quotation from this case in last note to § 16, herein.

"Transportation companies;" railroad company within meaning of words. Texas & Pacific Ry. Co. v. Henson (Tex.), 132 S. W. 118; case modifies (Tex. Civ. App., 1909), 121 S. W. 1127.

Liability of express company as "transportation company," see Southern Express Co. v. Keiler (Va., 1909), 64 S. E. 38.

[80] Act June 29, 1906, 34 Stat. 584, c. 3591, § 1; U. S. Comp. Stat. Supp., 1907, p. 892, amending Act Feb. 4, 1887, c. 104, 24 Stat. 380; U. S. Comp. Stat., 1901, p. 3155.

includes all kinds of instrumentalities of shipment and carriage.[81]

§ 28. "Transportation Within the State"—Meaning of.

The words "transportation within the State," used in a statute, covering the obligation of railroad companies to transport freight received, do not embrace interstate transportation, and such an enactment cannot have operation beyond the territory of the State.[82]

§ 29. "Trust"—"Holding" Corporation or Company.[83]

A "trust," or at least a combination in restraint of interstate and international commerce, exists under the Sherman Anti-Trust Act,[84] where stockholders of railroad corporations, having competing and substantially parallel lines crossing several States, combined and conceived a scheme of organizing a corporation which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; and pursuant to such combination a securities company was organized as the holding corporation through which that scheme should be executed, and under that scheme said holding company became the holder, or rather the custodian, of a large majority of the stock of each of the combining corporations, the stock-

[81] United States v. Baltimore & Ohio R. Co., 165 Fed. 113, 91 C. C. A. 147.

For other definitions of transportation see the following cases: United States v. Hamburg-American Line, 159 Fed. 104, 86 C. C. A. 294 (means carriage from one place to another; alien deportation act); Salinger v. Western Union Teleg. Co. (Iowa, 1910), 126 N. W. 362 (if transportation may be construed as something more than a free pass it might also be construed as something less or other than regular fare); People v. Montena, 123 N. Y. Supp. 1074, 13 App. Div. 421 ("transportation" of fish and game).

[82] Hunter v. Charleston & Western Carolina Ry. Co., 81 S. C. 169, 69 S. E. 13.

[83] See § 12, herein.

[84] See § 13, herein.

holders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation. Under the above arrangement the constituent companies necessarily ceased to be in active competition for trade and commerce along their respective lines, and became practically one consolidated corporation, by the name of a holding corporation, the principal, if not the sole object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease.[85]

[85] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

Other definitions are as follows:

"A combination of interests in the form of a company, organization, or association, holding a controlling share of the stock of several smaller corporations engaged in the same or allied branches of business or industry, a majority of the stock in each of the component corporations being transferred to a central committee or board of trustees, in whom the supreme authority is vested, and who, while issuing to the stockholders certificates showing their individual interests and rights to dividends, use the voting power of the stock in electing boards of directors for the various associated corporations, and in any other way that may be deemed judicious, thus directing their policy for the common object of unifying management, suppressing or lessening competition, regulating prices and output, cheapening cost of production, expanding business, and increasing profits." Webster's Universal Dict. (ed., 1910–1911).

"A consolidation or combination of several individuals, companies, or corporations, engaged in or pursuing the same or allied branches of business or industry, into one corporation, which becomes the absolute owner of the stock, properties, and interests of the component companies or corporations, new stock certificates and bonds being issued in accordance with the capitalization, the policy, and the scope of the new organization, and the general affairs of which are administered by one centralized management consisting of a board of directors and executive officers, whose object is to expand business and increase profits by lessening or eliminating competition, lowering the cost of production, and regulating the amount produced; a single corporation owning or controlling most, if not all, the individuals, companies, or corporations engaged in the same or an allied branch of industry, including their stock, properties, and appurtenances." Webster's Universal Dict. (ed., 1910–1911).

In an address on "Some Needed Legislative Reforms in Corporate Management" delivered before the New York County Lawyers' Association, at Hotel Astor, N. Y., Jan. 5, 1911, by Samuel Untermeyer of N. Y., he said in part, as to holding companies:

"The first corporate abuse to which I desire to direct attention to-day as

requiring legislative attention is the financial device known as the 'holding Company.' It is a recent abomination and one of the most prolific means of oppression. It is mainly responsible for the loss of public confidence in security-values which is so largely the cause of the financial panics and depressions of recent times. If it were made impossible, as it should be both by State and Federal legislation, many of the corporate evils from which we are suffering would disappear with it. It is only of late years that corporations have had the power to hold the shares of other corporations. Like many other powers with which they have been clothed it was the result of the vicious competition between the States in bidding against one another for the patronage of the corporations in laxity of requirements and improper special privileges. * * * If you can get rid of the holding Company, as you can, you will have abated the most serious of the corporate evils of the present. * * * I do not mean to say that it does not sometimes happen that the Companies of which the control is thus acquired are improved and enlarged on the rare occasions on which that course happens to suit the purpose of the holding Company. But even in those cases the power to oppress the minority is utilized to gather in the stock at low prices before the plans of the majority are put into effect. * * * But great as have been and are the abuses practiced in the affairs of industrial corporations the greatest frauds upon minority stockholders through the medium of the holding Company have been perpetrated by railroad and other public service corporations; for here the opportunities are greater and the minority interest is generally more widely distributed. Of late years since the enforcement of the laws against railroads acquiring control of parallel or competing lines, the evils from this source are somewhat diminished; but they are still very acute and substantial with regard to connecting lines. * * * Incidentally it may be well to remember that but for the device of the holding company the majority of the trusts that are afflicting the country, especially the great ones, could never have been born. * * * The principle of the holding Company can be and has been of late so extended and utilized that a small minority may absolutely dominate the corporation. * * * The suppression of the holding company is only one of the necessary legislative reforms, but it is the most important of them all."

CHAPTER III

TERMS AND DEFINITIONS RELATING TO LABOR OR TRADE UNIONS

§ 30. Blacklist Defined.
31. Boycott Defined.
32. Boycott—Essential Elements of.
33. Boycotting Defined.
34. Secondary Boycott.
35. Picket Defined.
36. "Picketing" Defined.
37. Closed Shop Defined.
38. Labor Union—Labor Organization—Trade Union Defined.
§ 39. Lockout Defined.
40. Open Shop Defined.
41. Strike Defined.
42. "Legal Strike" Defined.
43. Strikes and Boycotts Distinguished.
44. Trade Union Defined.
45. Union Shop Defined.

§ 30. Blacklist Defined.

Blacklist is defined as a list of persons debarred from employment or credit, or thought unworthy of trust. To put upon a blacklist; to proscribe; to boycott.[1]

§ 31. Boycott Defined.

A boycott is defined as a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear

[1] Webster's Universal Dict. (ed. 1910), titles "Black"; "Blacklist."

"*Blacklist.*" See Masters v. Lee, 39 Neb. 574, 58 N. W. 222, 225. See next following note.

"*Blacklisting.*" Mattison v. Lake Shore & M. S. Ry. Co., 2 Ohio N. P. 276, 279, 3 Ohio Dec. 526, 529; John D. Park & Sons Co. v. National Wholesale Druggists' Assoc., 175 N. Y. 1, 12, 67 N. E. 136, 139, 62 L. R. A. 632, 96 Am. St. Rep. 578.

of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy.[2] A boycott is also defined as a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy.[3] Another definition is as follows: boycott means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means, of fair publication, and fair oral or written persuasion, to induce others interested in or sympathetic with their cause, to withdraw their social intercourse and business patronage from the employer. They may even request another to withdraw his patronage from the employer, and use moral intimidation or coercion of threatening a like boycott against him if he refuses to do so. "To say that a boycott is a 'conspiracy' immediately implies illegality, and puts the conduct of the boycotters under the ban of the law. So also does the definition which describes boycotting as 'illegal coercion' designed to accomplish a certain end, * * * boycott * * * is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed."[4]

[2] Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 446, 114 S. W. 997, citing Gray v. Building Trades Council, 91 Minn. 171, 179, 97 N. W. 663, 666, 63 L. R. A. 753, 103 A. St. Rep. 477, where it is also said (at p. 179) that a boycott is held by nearly all the authorities to be an unlawful conspiracy.

[3] Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Co. (U. S. C. C.), 54 Fed. 730, 738, per Taft, Cir. J.

[4] Pierce v. Stablemen's Union, 156 Cal. 70, 76, 77, 103 Pac. 324.

For other definitions and meanings of boycott see the following cases:

United States: Oxley Stave Co. v. Coopers' International Union (U. S. C. C.), 72 Fed. 695, 699; Casey v. Cincinnati Typographical Union (U. S. C. C.), 45 Fed. 135, 143, 12 L. R. A. 193.

Arkansas: Meier v. Speer (Ark., 1910), 132 S. W. 988.

§ 32. **Boycott—Essential Elements of.**

It is said that intimidation and coercion are essential elements of a boycott, and that it must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done. What amounts to coercion, intimidation, or threats of injury must necessarily depend upon the facts of each particular case.[5] But it is also declared that: "The experience of Captain Boycott has added to our language a substantive and a verb. There is little, if any, question as to the meaning of the substantive, but there is no commonly accepted definition of the verb. Some courts have defined it as necessarily implying violence, or intimidation, or the threat thereof; others as but necessarily implying abstention. * * * I think that the verb 'to boycott' does

Connecticut: State v. Glidden, 55 Conn. 46, 76, 8 Atl. 890, 896, 3 Am. St. Rep. 23.

Maine: Davis v. Starrett, 97 Me. 568, 574, 55 Atl. 516, 518.

Michigan: Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 525, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Minnesota: Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 666, 63 L. R. A. 753.

Missouri: Walsh v. Association of Master Plumbers, 97 Mo. App. 280, 292, 71 S. W. 455, 459.

Nevada: Branson v. Industrial Workers of the World, 30 Nev. 270, 294, 95 Pac. 354.

New Jersey: Barr v. Essex Trades Council, 53 N. J. Eq. 101, 121, 30 Atl. 881, 888.

New York: John D. Park & Sons Co. v. National Wholesale Druggists' Assoc., 175 N. Y. 1, 67 N. E. 136, 139, 62 L. R. A. 632, 96 Am. St. Rep. 578; Matthews v. Shankland, 56 N. Y. Supp. 123, 128, 129, 25 Misc. 604.

Pennsylvania: Brace Bros. v. Evans, 5 Pa. Co. Ct. R. 163, 171.

Virginia: Crump, In re, 84 Va. 927, 6 S. E. 620, 627, 10 Am. St. Rep. 895.

[5] Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477. See State v. Duncan, 78 Vt. 364, 63 Atl. 225.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix A," herein.

As to last point in text see also Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 448, 114 S. W. 997, 1004, citing Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

not necessarily signify that the doers employ violence, intimidation or other unlawful coercive means, but that it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose. And as such a combination may be formed and held together by argument, persuasion, entreaty or by the 'touch of nature,' and may accomplish its purpose without violence or other unlawful means, i. e., simply by abstention. I think it cannot be said that 'to boycott' is to offend the law."[6]

§ 33. **Boycotting Defined.**

"Boycotting" commonly so called includes an organized attempt to induce the public to refrain from purchasing the products of a manufacturer and to deprive him of a part of his trade market, such attempt having for its object the compelling of the manufacturer to unionize his business and the submission of its conduct to the regulations of a labor union whereby an irreparable injury to his property is occasioned.[7]

[6] Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. 605, 609, 611, per Jenks, J., quoted in part, and relied on, in Lindsay & Co., Ltd., v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127.

[7] Jonas Glass Co. v. Glass Bottle Blowers' Assoc., 72 N. J. Eq. 653, 65 Atl. 953. See Crump, In re, 84 Va. 927, 939, 6 S. E. 620, 627, 10 Am. St. Rep. 895.

See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. —; United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. —, under "Appendix A," herein.

"*Boycotting.* A combination between persons to suspend or discontinue dealings or patronage, with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who by non-compliance with the demand has rendered himself obnoxious to the immediate parties, and, perhaps to their personal and fraternal associates. The persons directly so confederating have hitherto as a class been employees as against either their own employer or the employer of others in a like business, or else of retail dealers as against a particular manufacturer or wholesale dealer. The means employed have been the withdrawal of custom and good-will in business of the immediate parties and of such

§ 34. **Secondary Boycott.**

A "secondary boycott" so called, exists where striking employees seek to compel third persons who have no quarrel with their employer to withdraw from all association with the latter by moral intimidation, coercion or threats, that unless such third person so withdraw the striking employees will inflict similar injury or a like boycott on such third person. The legality of this boycott is denied by the English and Federal courts and by many of the State courts, but in certain respects the California courts recognize no substantial distinction between the primary and secondary boycotts so called.[8]

§ 35. **Picket Defined.**

"Picket" is defined as "a body of men appointed by a labor organization to prevent the employment of non-union labor, especially during a strike, by patrolling the neighborhood of the place of employment and by other means." [9]

§ 36. **"Picketing" Defined.**

"Picketing" may simply mean the stationing of men for observation. If in the doing of this act, solely for such a purpose, there be no molestation or physical annoyance, or let or hindrance of any person, then it cannot be said

others as they could influence. The word may refer to the fact of combining or to the resolution as executed. The practice takes its name from one Boycott, an agent for Lord Erne on certain estates in the western part of Ireland. Having lost favor with the tenants, from evictions and other harsh treatment, they agreed not to work for him, and the tradesmen of the community not to deal with him." Anderson's Dict. of Law. See further as to origin of word: State v. Glidden, 55 Conn. 46, 76, 8 Atl. 890, 3 Am. St. Rep. 23; Crump's Case, 84 Va. 927, 939, 6 S. E. 620, 10 Am. St. Rep. 895.

[8] Pierce v. Stablemen's Union, 156 Cal. 70, 76, 77, 103 Pac. 324.

[9] Webster's Universal Dict. (ed., 1910–1911).

"*Picket.*" "'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' Cent. Dict., Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it." Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 520, 521, 77 N. W. 13.

that such an act is *per se* unlawful. But "picketing" may also mean the stationing of a man or men to coerce or to threaten, or to intimidate or to halt or to turn aside against their will those who would go to and from the picketed place to do business, or to work, or to seek work therein, or in some other way to hamper, hinder or harass the free dispatch of business by the employer. In that case picketing may well be said to be unlawful.[10]

§ 37. Closed Shop Defined.

A shop becomes a "closed" shop the moment men are discriminated against with reference to their employment, because they are union men.[11]

A "closed shop" is one in which only union labor is employed.[12]

§ 38. Labor Union—Labor Organization—Trade Union Defined.

The ordinary definition of a labor organization or trade union is as follows: "A combination of workmen of the same trade or of several allied trades for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members." [13]

§ 39. Lockout Defined.

A lockout is the closing of a factory or workshop by an employer, usually in order to bring the workmen to satis-

[10] Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. 605.

[11] Sackett & Wilhelms Lithographing & Print. Co. v. National Association of Employing Lithographers, 61 Misc. R. (N. Y.) 150, 113 N. Y. Supp. 110.

[12] Irving v. Joint District Council (U. S. C. C.), 180 Fed. 896.

[13] Stone v. Textile Examiners' & Shrinkers' Employers' Assn., 137 App. Div. (N. Y.), 655, 122 N. Y. Supp. 137, quoting from 28 Am. & Eng. Ency. of Law (2d ed.), 440. See also § 44, herein.

"*A Labor Union is defined as* an association of workmen usually, but not necessarily employed in the same trade for the purpose of combined action in securing the most favorable wages and conditions of labor." Stone v. Textile Examiners' & Shrinkers' Employers' Assn., 137 App. Div. (N. Y.) 655, 122 N. Y. Supp. 137, quoting from 24 Cyc. 816.

factory terms by a suspension of wages.[14] A lockout is also defined as the shutting up of a manufactory or other place of business by the employers because of unwillingness of employees to work on terms satisfactory to the former.[15]

§ 40. **Open Shop Defined.**

The term "open shop" has a distinctive trade meaning and, in reference to trade matters means, that in selecting employees, there shall be no discrimination against union or nonunion men. The principle of an "open shop" is that in it men are employed regardless of whether they are union or nonunion. Defining the term as meaning nonrecognition of unions as such is not sufficient.[16]

§ 41. **Strike Defined.**

A strike is briefly defined as a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced and on its objects.[17] Another definition is this: A strike is a combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode or manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like.[18]

In a case in the Circuit Court of Appeals it was said that the following definition was proffered to the court at the argument below, as one recognized by the labor organizations of the country: "A strike is a concerted cessation of or refusal to work until or unless certain con-

[14] Matthews v. People, 202 Ill. 389, 398, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73.

[15] Standard Dictionary.

[16] Sackett & Wilhelms Lithographing & Print. Co. v. National Association of Employing Lithographers, 61 Misc. R. (N. Y.) 150, 113 N. Y. Supp. 110.

[17] Farree v. Close, L. R. 4 Q. B. 611, per Sir James Hannen, quoted in Longshore Printing Co. v. Howell, 26 Oreg. 527, 542, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

[18] Delaware, Lackawanna & Western R. R. Co., 58 N. Y. 573, 582, per Allen, J.

ditions which obtain or are incident to the terms of employment are changed. The employee declines to longer work, knowing full well that the employer may immediately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employee to service, of employing new men, or of forcing conditions under which old men are glad to return to service under the old conditions." The court said after referring to this definition: "The learned judge below said that a more exact definition of a strike was a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand." [19]

§ 42. "Legal Strike" Defined.

In a case decided in 1893 in the Federal Circuit Court a temporary injunction was granted against the chief of the Brotherhood of Locomotive Engineers who had sent out a dispatch that there was "a legal strike in force upon" certain railroads, etc., and it was said that: "a 'legal' strike, in brotherhood parlance, means one consented to by the grand chief. His consent is necessary, under the rules of the order, to entitle the men thus out of employment to the three months' pay allowed to striking members." [20]

§ 43. Strikes and Boycotts Distinguished.

There is a distinction between strikes and boycotts. The latter though unaccompanied by violence or intimidation have been generally pronounced as unlawful by the

[19] Arthur v. Oakes, 63 Fed. 310, 326, 11 C. C. A. 209. The court reversed the judgment of the court below on the ground that the injunction order did not sufficiently describe the strikes which the injunction was intended to restrain. In Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (U. S. C. C.), 60 Fed. 803, 821, a definition similar to that above stated by the court was given.

[20] Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Co. (U. S. C. C.), 54 Fed. 730, 733.

courts of the United States and of England. Strikes, however, are not necessarily unlawful, the right of employees to combine and peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory being generally recognized. So it is said: "The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment is not a fanciful one, or one which needs the power of fine distinction to determine which is which." [21]

§ 44. **Trade Union Defined.**

An organized association of workmen skilled in any trade or industrial occupation, formed for the protection and promotion of their common interests, especially to secure remunerative wages for their labor.[22]

§ 45. **Union Shop Defined.**

A union shop is one in which none but members of an association are engaged as workmen.[23]

[21] Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (U. S. C. C.), 62 Fed. 803, 817, 818, per Taft, C. J.

[22] Standard Dictionary. See also § 38, herein.

Trade Union. "A combination of workmen of the same trade or of several allied trades for the purpose of securing to each member by united action the conditions most favorable for labor; an association of workmen formed principally for the purposes of regulating the prices and the hours of labor and, in many cases, the number of men engaged by an employer, the number of apprentices which may be bound in proportion to the journeymen employed by a master, and the like. As accessories these unions may collect funds for benefit societies, insurance of tools, libraries, and reading rooms; but their fund to which every member must regularly contribute a stated sum, is principally reserved for enabling the men to resist, by strikes and otherwise, such action on the part of the employers as would tend to lower the rate of wages or lengthen the hours of labor." Webster's Universal Dict. (ed., 1910–1911).

[23] People v. Fisher, 50 Hun (N. Y.), 552, 554, 3 N. Y. Supp. 786.

CHAPTER IV

DISTINCTIONS AND SYNONYMS GENERALLY

§ 46. Distinctions—Monopolies Resulting from Grant or Contract.
47. Distinctions—Monopolies and Engrossing.
48. Distinctions—Monopolies and Combinations.
49. Distinctions—Exclusive Privilege and Monopoly.
50. "Monopolize" Used in Statute Synonymous with "Aggregate" or "Concentrate."
51. "Combination in the Form of Trust" Used in Statute Synonymous with "Pooling."
§ 52. Distinction Between State Anti-Trust Statute and Contracts in Restraint of Trade.
53. Distinction Between Contracts *Per Se* in Restraint of Trade and Contracts Which Tend to Destroy Competition and Create Monopolies.
54. Distinctions — "Restrictions in Trade" in Statute Not Synonymous with "Restraint of Trade."

§ 46. Distinctions—Monopolies Resulting from Grant or Contract.[1]

According to the early definitions of "monopoly" it arose from a grant or commission from the sovereign; [2] and the modern monopolies are generally such as result indirectly from the sovereign power or State by grant of some exclusive privilege, or the right to carry on a business which is dependent upon the existence of some special privilege or franchise. Such a grant is not, however, essential to the existence of a monopoly, as a practical monopoly may exist without such aid, and it is clear, from the decisions and the language of the courts, that competitors may by means of contracts or combinations obtain such a control of a trade industry or commodity

[1] See §§ 70–74, herein.

[2] Part 3, Coke's Inst. 181, Cap. 85; 4 Blackstone's Comm. 159; Bacon's Abridg., title "Monopoly." See also cases cited *ante*, herein, under definitions of "monopoly."

as to result in a monopoly, with the power to suppress competition and practically control prices in that trade, industry, or commodity and so substantially or wholly suppress competition.[3] So it is decided in a Federal Supreme Court case that the idea of monopoly is not now confined to a grant of privileges. It is understood to include "a condition produced by the acts of mere individuals." Its dominant thought now is, "the notion of exclusiveness or unity." In other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them.[4] Again, in an early Federal case the court, in construing a State statute in connection with the Sherman Anti-Trust Act, said: "In construing Federal or State statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean 'to aggregate' or 'concentrate' in the hands of a few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others." [5]

§ 47. Distinctions—Monopolies and Engrossing. Monopolies have been declared to be much the same

[3] See State v. Duluth Board of Trade, 107 Minn. 506, 529, 121 N. W. 395.

[4] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 25 Sup. Ct. 382, 49 L. ed. 689 (suit brought under the Anti-Trust Acts of Texas to forfeit the license of the National Cotton Oil Co., to do business in Texas for violating those statutes) quoted in United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 720, per Noyes, Cir. J.

[5] American Biscuit & Mfg. Co. v. Klotz (U. S. C. C.), 44 Fed. 721, 724, construing Act of La., July 5, 1890, in connection with Federal Anti-Trust Act, July 2, 1890, chap. 647, 26 Stat. 209; U. S. Comp. Stat., 1901, p. 3200 (a case of the pooling of bakeries of twelve different States).

offense in other branches of the trade that engrossing was in provisions,[6] but it is also asserted that monopoly and engrossing differ only in this, that the first is by patent from the king, the other by act of the subject, between party and party, but that they are both equally injurious to trade, and the freedom of the subject, and therefore are equally restrained at the common law.[7]

§ 48. **Distinctions—Monopolies and Combinations.**

The statutes of most States, up to very recent years, were aimed only at monopolies brought about through combinations. So that in treating of the subject of monopoly, both text-book writers and judges have spoken of them as though monopoly and combination were one and the same, thus causing many to consider that there could be no monopoly except there was combination, while, as a matter of fact, combination is simply a means, and but one or many means, by which a monopoly is acquired; monopoly being the end sought, combination a means therefor.[8]

§ 49. **Distinctions—Exclusive Privilege and Monopoly.**

An exclusive privilege is not necessarily a monopoly.[9] And although the strict legal meaning of the word "monopoly" and its essential quality is the power to exclude all others from the field monopolized, still the term has a different and a commoner and equally well-understood meaning. When a person or persons have, in fact, obtained a substantially complete control of a particular business or article of trade, they are said to have a monopoly, although they have no legal power to prevent others from competing or attempting to compete with them.[10]

[6] 4 Blackstone's Comm. 159.

[7] Bacon's Abridg. (Bouvier's ed., 1860), "monopoly" citing Skin. 169.

[8] State v. Central Lumber Co. 24 S. Dak. 136, 123 N. W. 504, 509, per Whiting, J.

[9] City of Laredo v. International Bridge & Tramway Co., 66 Fed. 246, 248, 14 C. C. A. 1.

[10] Burrows v. Interborough Metropolitan Co. (U. S. C. C.), 156 Fed. 389, 392.

§ 50. "Monopolize," Used in Statute Synonymous with "Aggregate" or "Concentrate."

The word "monopolize" as used in a statute, has been defined as meaning the same as "to aggregate" or "concentrate" in the hands of a few to the exclusion of others; to accomplish this end by what is expressed, in popular language, by the word pooling.[11]

§ 51. "Combination in the Form of Trust" Used in Statute Synonymous with "Pooling."

The words "combination in the form of trust" in a State statute is declared to mean just what in popular language is expressed by the word pooling; that is, an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits.[12]

§ 52. Distinction Between State Anti-Trust Statute and Contracts in Restraint of Trade.

A distinction is made in Nebraska, between the Anti-Trust Act of that State and contracts in restraint of trade, and the court says: "We think it clear from an examination of the title and the body of this act that it is directed against combinations and conspiracies to interfere with the ordinary conduct of trade and business, and that it is no part of its object to condemn or render illegal such contracts in partial restraint of trade as have for many years been held valid by the courts of England and America." [13]

§ 53. Distinction Between Contracts Per Se in Restraint of Trade and Contracts Which Tend to Destroy Competition and Create Monopolies.

Two distinct kinds of contracts were recognized by the

[11] American Biscuit & Mfg. Co. v. Klotz (U. S. C. C.), 44 Fed. 721, 724, construing Act of La., July 5, 1890, in connection with Sherman Anti-Trust Act, July 2, 1890 (case of pooling of bakeries).

[12] American Biscuit & Mfg. Co. v. Klotz (U. S. C. C.), 44 Fed. 721, 724; Act La., July 5, 1890 (case of pooling of bakeries).

[13] Engles v. Morgenstern, 85 Neb. 51, 55, 122 N. W. 688, per Letton, J., construing Comp. Stat. Neb., 1901, chap, 91*a*, § 1, "Trusts." See § 20 *ante*.

common law as in restraint of trade. They were: (1) contracts *per se* in restraint of trade whereby an individual contracts himself out of a trade; and (2) contracts which tend to destroy competition and thus create monopolies. The reasonableness of the particular contract determined the validity of the first "while the second class are against public policy and invalid because of their tendencies without reference to their reasonableness." [14]

§ 54. **Distinctions—" Restrictions in Trade " in Statute Not Synonymous with " Restraint of Trade."**

A combination between two or more insurance companies to increase their rates or to diminish the rates to be paid to their agents, is in a general sense a combination in restraint of trade. But where a statute defines and prohibits trusts and combinations of capital "to create and carry out restrictions in trade," etc., the words restrictions in trade are not to be construed as synonymous with the words "restraint of trade"; at least not to the extent of subjecting such a combination as that above stated to punishment as for an offense under the statute.[15]

[14] State v. Duluth Board of Trade, 107 Minn. 506, 526, 121 N. W. 395, per Elliott, J.

[15] Queen Ins. Co. v. The State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483.

CHAPTER V

DISTINCTIONS AND SYNONYMS—SHERMAN ANTI-TRUST ACT

§ 55. Distinctions — Combination and Sale—Sherman Anti-Trust Act.
56. "Combination" or "Conspiracy" Synonymous — Sherman Anti-Trust Act.
57. Distinctions—Conspiracy in Restraint of Trade and Contract in Restraint of Trade — Sherman Anti-Trust Act.
§ 58. Sherman Anti-Trust Act—"In Restraint of Trade" Synonymous with "Trade or Commerce"—"Trade" and "Commerce" Synonymous—"Contract in Restraint of Trade" Analogous to "Monopolize."

§ 55. Distinctions—Combination and Sale—Sherman Anti-Trust Act.

A combination of competitive interests when a combination, as distinguished from a sale, is a combination which, restraining interstate commerce, violates the Federal anti-trust statute. Whether a transaction amounts to a sale or to a combination depends upon whether the vendor parts with all interests in the business sold or merely changes the form of his investment. A *bona fide* sale of a plant for cash or its equivalent possesses none of the elements of combination. An exchange of one plant for an interest in united plants possesses all the elements of combination.[1]

§ 56. "Combination" or "Conspiracy" Synonymous—Sherman Anti-Trust Act.

The words "combination * * * or conspiracy" as used in the Federal Anti-Trust Act in relation to "restraint of trade or commerce" are synonymous.[2]

[1] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 718, per Noyes, Cir. J.; Act July 2, 1890.

[2] Tribolet v. United States, 11 Ariz. 436, 95 Pac. 85; Act July 2, 1890, c. 647, § 3, 26 Stat. 209; U. S. Comp. Stat., 1901, p. 3201.

§ 57. Distinctions—Conspiracy in Restraint of Trade and Contract in Restraint of Trade—Sherman Anti-Trust Act.

A conspiracy in restraint of trade is more than a contract in restraint of trade; the latter is instantaneous, but the former is a partnership in criminal purposes, and as such may have continuance in time, and this applies and is so held in regard to a conspiracy made criminal by the Sherman Anti-Trust Act. And although mere continuance of result of a crime does not continue the crime itself, if such continuance of result depends upon continuous co-operation of the conspirators, the conspiracy continues until the time of its abandonment or success.[3]

[3] United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 1—, 54 L. ed. 1168, a case of a writ of error brought by the United States to reverse a judgment of the Circuit Court sustaining pleas in bar pleaded to an indictment by the defendants in error. "The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time. The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement; and that therefore the *continuando* may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequently acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime. The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It is also true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Pratt, 98 U. S. 450, 25 L. ed. 193. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought, and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competition from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different

§ 58. Sherman Anti-Trust Act—"In Restraint of Trade" Synonymous with "Trade or Commerce"—"Trade" and "Commerce" Synonymous—"Contract in Restraint of Trade" Analogous to "Monopolize."

"In restraint of trade" in the Sherman Anti-Trust Act[4] is a fixed, well-known common-law expression and is synonymous with the words "trade or commerce" under that statute. The words "trade" and "commerce" are also synonymous; and an indictment must allege that there was a purpose to restrain trade as implied in the common-law expression "contract in restraint of trade" analogous to the word "monopolize" in the second section. This is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise.[5] "So in

from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is the result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." Opinion of the court, per Mr. Justice Holmes, pp. 607, 608.

In the case of United States v. Kissel (U. S. C. C.), 173 Fed. 823, which was reversed by the above-cited Supreme Court decision it was declared that the word "conspiracy" instead of being employed with a sinister meaning, as usually understood, has, as used in the Sherman Anti-Trust Act, substantially the same meaning as the word "contract." A conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade.

[4] See § 13, herein.

[5] United States v. Patterson (U. S. C. C.), 55 Fed. 605, 639, 640. See United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823, 831.

What is only necessary to show to vitiate a combination such as the Sherman Anti-Trust Act of July 2, 1890, condemns. See Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540; both cases are considered elsewhere herein.

this statute [6] I think the words 'trade or commerce' mean substantially the same thing. But the use of the word 'trade' nevertheless is significant. In my judgment, it was probably used because it was a part of the common-law expression, 'in restraint of trade.' * * * This has become a fixed, well-known common-law expression."[7] "The word 'commerce' is undoubtedly in its usual sense, a larger word than 'trade' in its usual sense. Sometimes 'commerce' is used to embrace less than 'trade,' and sometimes 'trade' is used to embrace as much as 'commerce.' They are, in the judgment of the court, in this statute [8] synonymous." [9]

[6] Sherman Anti-Trust Act. See § 13, herein.

[7] United States v. Patterson (U. S. C. C.), 55 Fed. 605, 640, per Putnam, J. See § 16, herein.

[8] Sherman Anti-Trust Act. See § 13, herein.

[9] United States v. Patterson (U. S. C. C.), 55 Fed. 605, 639, per Putnam, J.; United States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252, 265 ("Trade" in a business sense has been defined as "The exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce" as used in the statute (Sherman Anti-Trust Act) and under the terms of the Constitution, has, however, a broader meaning than the word "trade," per Morrow, Cir. J. Same words in United States v. Cassidy (U. S. D. C.), 67 Fed. 698, 705, per Morrow, Dist. J. See § 16, herein.

Distinction between "trade" and "commerce." See also United States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252, 265, per Morrow, Cir. J.; United States v. Cassidy (U. S. D. C.), 67 Fed. 698, 705, per Morrow, Dist. J.; Hooker v. Vandewater, 4 Denio (N. Y.), 349, 353, 47 Am. Dec. 258. In this case (decided in 1847) the statute of New York, (2 Rev. Stat. 691, § 8) provided that: "If two or more persons shall conspire, to commit any act injurious to trade or commerce, they shall be guilty of a misdemeanor." [See 3 Birdseye's Cumming & Gilbert's Consol. Laws N. Y. (as amended to 1910) annot., p. 3845, Laws 1909, chap. 88, § 580, subdiv. 6]. The court per Jewett, J., said: "The words *trade and commerce* are said by Jacobs, in his Law Dictionary, not to be synonymous; that commerce relates to dealings with foreign nations; trade, on the contrary, means mutual traffic among ourselves, or the buying, selling or exchanging of articles between members of the same community." It would seem, however, that such a distinction would not now obtain. See § 16, herein.

CHAPTER VI

NATURE ESSENTIALS OR TEST OF CONSPIRACY

§ 59. Unlawfulness — Exclusive Combination—Restraint of Trade.
60. Combination or Confederation and Unlawful Design or Means Employed.
§ 61. Motive or Intention.
62. Overt Acts.
63. Overt Acts—New York.
64. Conspiracy to Commit Offense Against, or to Defraud United States—Overt Acts.

§ 59. Unlawfulness — Exclusive Combination — Restraint of Trade.

An exclusive combination is not necessarily a conspiracy. Thus, in a frequently cited and discussed English case decided in 1888 the principal points were the engrossing of a particular trade, a combination or conspiracy to keep up rates of freight and the exclusion of rival traders from the combination. The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion, sustained damage:—It was held that the association, being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will toward them, was not unlawful, and that no action for a con-

spiracy was maintainable.[1] In this case Lord Chief Justice Coleridge said: "It cannot be, nor indeed was it, denied that in order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an indictment or the subject of an action. * * * It is therefore no doubt necessary to consider the object of the combination as well as the means employed to effect the object, in order to determine the legality or illegality of the combination. And in this case it is clear that if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants, and a person injured by their misdemeanor has an action in respect of his injury. * * * I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who suffered injury from them. The question comes at last to this, what was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offer. I do not think it matters that the

[1] Mogul Steamship Co. v. McGregor, 21 Queens B. Div. Law Rep. 553.

withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. * * * One word in passing only on the contention that this combination of the defendants was unlawful because it was in restraint of trade. It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas on condition of their customers dealing with them and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question." [2]

§ 60. Combination or Confederation and Unlawful Design or Means Employed.

Confederation and unlawful design are essential to the offense of conspiracy which necessarily implies a united design for an unlawful object.[3] A conspiracy is formed when two or more persons agree together to do an unlawful act; in other words, when they combine to accomplish, by their united action, a crime or unlawful purpose.[4] The gravamen of the offense is the combination, and a combination may amount to a conspiracy although its object be to do an act which if done by an individual would not be an unlawful act.[5] An act harmless when done by one may

[2] Mogul Steamship Co. v. McGregor, 21 Queens B. Div. Law Rep. 553.

[3] Commonwealth v. Tilly, 33 Pa. Sup. Ct. 35. See Patnode v. Westenhaven, 114 Wis. 460, 90 N. W. 467. Examine West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591.

Essentials of conspiracy. See also Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (injunction; labor union); Dunshee *v.* Standard Oil Co. (Iowa, 1910), 126 N. W. 342; Boasberg v. Walker, 111 Minn. 445, 127 N. W. 467; United States v. Kertel (U. S. D. C.), 157 Fed. 396 (conspiracy to defraud United States; indictment).

[4] United States v. Cole (U. S. D. C.), 153 Fed. 801, 803 (indictment; offense committed against United States) quoting United States v. Goldberg, 12 Meyer Fed. Dec. 41, 42, Fed. Cas. No. 15,233.

[5] Franklin Union v. The People, 220 Ill. 355, 77 N. E. 176 (case of labor

become a public wrong when done by many acting in concert and become the object of a conspiracy operating in restraint of trade and so subject to the police power of a State.[6] It is decided, however, that what a person may lawfully do, a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy provided the means employed be not unlawful.[7] It is also asserted that if the act done is lawful the combination of several persons to commit it does not render it unlawful. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others each of whom is clothed with the same right. In other words, the mere combination of action is not an element which gives character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used in furtherance of the purpose, which makes the act illegal.[8] Again, whether a combination or conspiracy is wrongful or illegal depends upon the quality of the acts charged to have been committed. If those acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal or wrongful conspiracy, unless the means used to accomplish the purpose, the purpose itself being lawful, were unlawful.[9]

union; injunction; contempt). Compare Bilafsky v. Conveyancers' Title Ins. Co., 192 Mass. 504, 78 N. E. 534.

[6] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 31 Sup. Ct. 535 (case of bill in equity to dissolve association). See Quinn v. Leathem, 70 Law J. P. C. 76 (1901), App. Cas. 495, 85 Law T. 289, 50 Wkly. R. 139.

[7] State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1.

[8] Lindsay & Co., Ltd., v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127, citing or considering the following cases:

Indiana: Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367.

Massachusetts: Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722.

Minnesota: Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 119, 21 L. R. A. 337.

New York: National Protective Assoc. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135.

Rhode Island: Macauley Bros. v. Tierney, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L. R. A. 455.

[9] Green v. Bennett (Tex. Civ. App., 1908), 110 S. W. 108 (action by

§ 61. Motive or Intention.

If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy.[10] And it is declared that all unlawful conspiracies must be attended with a corrupt motive.[11] But it is also asserted that a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable, if for a criminal object or for the use of criminal means.[12]

§ 62. Overt Acts.

The gravamen of the offense of conspiracy is the combination and this is complete at common law, by the combination itself, and it is unnecessary to prove any overt act as done in pursuance of it. The material question is the imperious tendency, and not whether the intent is evil.[13] So a conspiracy if entered into could be criminally

stockholders complaining of certain acts of defendants in placing a bank in voluntary liquidation). See Garland v. State, 112 Md. 83, 75 Atl. 631, State v. Bienstock (N. J., 1909), 73 Atl. 530.

[10] State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1, 4, per Dubois, J., quoting from Run v. Barclay, 68 Pa. St. 187, 8 Am. Rep. 159, per Agnew, J. See Revere Water Co. v. Inhabitants of Winthrop, 192 Mass. 455, 78 N. E. 497.

[11] United States v. Moore (U. S. C. C.), 173 Fed. 122, a case of conspiracy to defraud the United States under Rev. Stat., § 5440, U. S. Comp. Stat., 1901, p. 3676. See Revere Water Co. v. Inhabitants of Winthrop, 192 Mass. 455, 78 N. E. 497. Examine West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591.

[12] Opinion of the judges in Mulcahy v. Reg., L. R. 3 H. L. 317, quoted in Broom's Leg. Max. (7th Amer. ed., 1874), note pp. 312, *313. See Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467.

[13] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823 (a case under Anti-Trust Act of Ind., Acts, 1899, p. 257, c. 148). See also United States v. Raley (U. S. D. C.), 173 Fed. 159; United States v. McLaughlin (U. S. D. C.), 169 Fed. 302; Friedman, In re (U. S. D. C.), 164 Fed. 131; Garland v. State, 112 Md. 83, 75 Atl. 631; Remmers v. Remmers, 217 Mo. 541, 117

punished at common law whether any act in furtherance of it was done or not.[14]

§ 63. Overt Acts—New York.

It is declared in a New York case that it is not essential to establish a criminal conspiracy to prove the doing of an act unlawful in itself, or which might injuriously affect the public, where an unlawful agreement is shown and some act is proved showing that the parties have proceeded to act upon the agreement the offense is established. And this is so even though the state penal code provides that no agreement simply, with certain exceptions, shall constitute such a conspiracy, and requires, aside from the agreement, some act done in pursuance thereof. A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity is, in contemplation of law, an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices; where it appears that the parties acted under the agreement an indictment for conspiracy is sustainable.[15]

S. W. 1117; People v. Miles, 108 N. Y. Supp. 510, 123 App. Div. 862, case affirmed 192 N. Y. 541, 84 N. E. 1117.

[14] United States v. Kissel (U. S. C. C.), 173 Fed. 823, 825.

"*The gist of the offense of conspiracy,* however, is the bare engagement and association to break the law, whether an act be done in pursuance thereof, by the conspirators or not [per Tindal, C. J.; O'Connell v. Reg., 11 Cl. & F. 233; Rex v. Kenrick, 5 Q. B. 61 (48 E. C. L. R.)]; and, provided the indictment show either that the conspiring together was for an unlawful purpose or to effect a lawful purpose by unlawful means, this will be sufficient; and whether anything has been done in pursuance of it is immaterial, so far as regards the sufficiency of the indictment." Broom's Leg. Max. (7th Amer. ed., 1874), pp. 312, *313.

[15] People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690 (combination among retail coal dealers), cited in State v. Eastern Coal Co. 29 R. I. 254, 70 Atl. 1, 4; followed in Kellogg v. Sowerly, 190 N. Y. 370, 373, 375, 83 N. E. 47 (civil action for damages caused by conspiracy); cited in Park & Sons Co. v. National Wholesale Druggists' Assoc., 175 N. Y. 1, 34, 36, 67 N. E. 136 (injunction against continuance of alleged conspiracy, etc.).

§ 64. Conspiracy To Commit Offense Against, or to Defraud United States—Overt Acts.

The offense of conspiracy under the Federal statute covering a conspiracy to commit an offense against or to defraud the United States,[16] differs from a like offense at common law [17] and an overt act is necessary apart from the conspiracy, to establish such statutory offense: [18] under that enactment a mere conspiracy is not an offense, but, in addition to the conspiracy one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. No indictment can be

[16] Rev. Stat. § 5440; U. S. Com. Stat. 1901, p. 3676, providing that: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

[17] United States v. Black (U. S. C. C. A.) 160 Fed. 431, 434, 87 C. C. A. 383. See also *Id.* as to essentials of conspiracy.

Conspiracy to commit offense against United States not a felony at common law; and if made a felony by statute, an indictment for so conspiring is not defective by reason of failing to aver that it was feloniously entered into. Bannon & Mulkey v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494.

[18] United States v. Cole (U. S. D. C.), 153 Fed. 801.

Overt act—Indictment—Conspiracy to defraud United States. A charge that an overt act was done according to and in pursuance of a conspiracy which had been previously recited, is equivalent to charging that it was done to effect the object of the conspiracy. Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. 680.

When overt act may be done anywhere—Conspiracy against United States—When crime complete. If an illegal conspiracy be entered into within the limits of the United States and within the jurisdiction of the court the crime is complete, and the subsequent overt act in pursuance thereof may be done anywhere. Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. 680; compare American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. 511, considered at beginning of this section.

Indictment—Fact of conspiring must be charged against all the conspirators, but the doing of overt acts in furtherance of the conspiracy may be charged only against those who committed them, in an indictment for conspiracy under § 5440, U. S. Rev. Stat. Bannon & Mulkey v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494.

Indictment—Conspiracy must be sufficiently charged; cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy in indictment under U. S. Rev. Stat. § 5440. United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. 531.

brought in the United States for the offence of conspiracy at the common law because it has not been made an offense by any Federal statute.[19] Where, however, Congress has made a certain act a crime and indictable, it follows that if two or more conspire to commit the prohibited act they conspire to commit an offense against the United States within the terms of the above statute.[20]

[19] United States v. Kissel (U. S. C. C.), 173 Fed. 823, 825.

[20] United States v. Stevenson (No. 2), 215 U. S. 200, 30 Sup. Ct. 37, 54 L. ed. 157; Rev. Stat. U. S. § 5440.

CHAPTER VII

NATURE ESSENTIALS OR TEST OF MONOPOLIES

§ 65. Restraint of Competition—Control of Production—Commodities and Prices.
66. Same Subject.
67. Monopoly—"To Monopolize"—Power to Raise Prices or Exclude Competition Distinguished—Motive.
68. What Degree of Restraint of Competition Essential—Monopoly and Restraint of Competition Distinguished.
69. Effect of Personal Service or Occupation.
§ 70. Monopoly as Essential Feature of Charter or Franchise—Whether Such Grant Exclusive in Nature.
71. Same Subject—Rule of Construction of Grants Applicable.
72. When Grants of Charters or Franchises are Exclusive.
73. Same Subject.
74. When Grants of Charters or Franchises are not Exclusive.

§ 65. Restraint of Competition—Control of Production—Commodities and Prices.

It is a well settled general rule that all contracts in which the public are interested which tend to prevent competition, whenever a statute or known rule of law requires competition, are void.[1] The idea of monopoly as understood at the present time includes the suppression of competition by unification of interests or management, or through agreement and concert of action. It is the power to control prices which makes both the inducement to make such combinations and the concern of the law to prohibit them.[2] So it is declared in a Federal case that the authorities warrant the statement that a monopoly, in the modern sense, is created when, as a result of efforts to

[1] Fishburn v. City of Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482, 49 N. E. 532; case of ordinance making it indispensable that asphaltum, which could only be obtained from a certain corporation, should be used; held void as creating a monopoly.

[2] National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689 (case under anti-trust acts of Texas of 1889, 1895 and 1899).

that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition.[3] In this same sense trade and commerce are said, in a Minnesota case, to be monopolized within the meaning of the Federal statute and the constitution and statute of that State. And that: "Like the ancient monopolies the practical monopoly is under the ban of the law because it tends to prevent competition and enhance the price or deteriorate the commodity or service to which it relates." It is also asserted in the same case that the definition of monopoly involves the principle of destruction of competition in trade or commerce, the doing of acts contrary to public policy. And that contracts and combinations which tend to create a monopoly are against public policy, and, therefore, illegal, because they deprive the community of the

[3] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 721, per Noyes, Cir. J., citing the following cases:

United States: National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 382, 49 L. ed. 689; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679; United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325; Chesapeake & O. Fuel Co. v. United States, 115 Fed. 610, 53 C. C. A. 256; United States v. Chesapeake & O. Fuel Co., (C. C.) 105 Fed. 104; American Biscuit & Mfg. Co. v. Klotz (C. C.), 44 Fed. 724.

California: Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81.

Illinois: Harding v. American Glucose Co., 182 Ill. 615, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189.

Michigan: Richardson v. Buhl, 77 Mich. 658, 43 N. W. 1102, 6 L. R. A. 457.

New York: Lough v. Outenbridge, 143 N. Y. 271, 38 N. E. 392, 25 L. R. A. 674, 42 Am. St. Rep. 712; People v. North River Sugar Refining Co., 54 Hun, 377, *n.*, 3 N. Y. Supp. 401, 2 L. R. A. 33.

South Carolina: Wood v. Glenwood Hardware Co., 75 S. C. 383, 55 S. E. 973, 9 L. R. A. (N. S.) 501.

West Virginia: Pocahontas Coke Co. v. Powhatan Coal, etc., Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901.

Since writing the above text the combination in the principal case (164 Fed. 700) has been decreed illegal and ordered dissolved etc. See "Appendix A" herein.

benefits of competition and thus place the power to control production and fix prices in the hands of a few persons.[4]

§ 66. Same Subject.

It is declared that combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another.[5] It is also asserted in a California case that a monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition or free traffic therein.[6] And in case of a grant the idea of exclusion of all competition is stated as follows: "A monopoly is that which has been granted without consideration; as a monopoly of trade; or of the manufacture of any particular article, to the exclusion of all competition. It is withdrawing that which is a common right, from the community, and vesting it in one or more individuals to the exclusion of all others." [7] In a West Virginia case it is asserted that the word "monopoly" as now used and understood embraces any combination the tendency of which is to prevent competition in its broad

[4] State v. Duluth Board of Trade, 107 Minn. 506, 529, 544, 121 N. W. 395, per Elliott, J.

[5] United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946, 950, per Priest, Dist. J., a case where defense was set up that a certain contract or lease sued on was in restraint of trade, a monopoly and void, but as it conferred no special or exclusive privilege and did not destroy competition, defense was not sustained.

[6] Grogan v. Chaffee, 156 Cal. 611, 613, 105 Pac. 745. A case of limitation of price on resale of olive oil; condition in contract; injunction; restraint of trade.

[7] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 567, 9 L. ed. 773, per Mr. Justice M'Lean.

and general sense and to control prices to the detriment of the public.[8]

§ 67. Monopoly—" To Monopolize "—Power to Raise Prices or Exclude Competition Distinguished—Motive.

It must be noted that the authorities hold that the material consideration, in determining whether a monopoly exists, is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so.[9] Where a statutory offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce" and "to monopolize, or attempt to monopolize, any of the trade or commerce" it is declared that "To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression 'to monopolize' is obtained by getting at the evil which the law maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force." [10]

§ 68. What Degree of Restraint of Competition Essential—Monopoly and Restraint of Competition Distinguished.

Although a monopoly may deprive the community of the benefits of competition and place the control of pro-

[8] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 520, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, per Cox, J.

[9] United States v. American Tobacco Co. (U. S. C. C.) 164 Fed. 700, 721, per Noyes, Cir. J. See end of note 3 last preceding.

[10] American Biscuit & Mfg. Co. v. Klotz (U. S. C. C.), 44 Fed. 721, 725, per the court construing the La. Act, July 5, 1890 and the Sherman Anti-trust Act of July 2, 1890 (a case of pooling of bakeries in twelve states).

duction, commodities and prices in the hands of a few, still it does not follow necessarily that "every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions, which are unobjectionable and necessary in order that business shall not completely stagnate." [11] So in a case where the defense was set up that a certain contract or lease sued on was in restraint of trade, a monopoly and void, the defense was not sustained, as the contract or lease conferred no special or exclusive privilege and did not destroy competition.[12] The words of Lord Chief Justice Coleridge in a well known English case are pertinent here. They are as follows: "It must be remembered that all trade is and must be, in a sense, selfish: trade, not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or defeat them. Very lofty minds like Sir Philip Sydney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sydneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business." Again, "the defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to pursue their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable

[11] State v. Duluth Board of Trade, 107 Minn. 506, 544, 121 N. W. 395.

[12] United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946, 950.

offers customers to deal with them rather than their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of the profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole." [13] The New York anti-monopoly act [14] treats a monopoly and restraint of competition as two distinct things; a monopoly usually, if not always restrains competition, but usually is the result of a restraint of competition, but a restraint in competition may not extend to the degree of creating a monopoly, and to vitiate such contracts as that statute condemns it need not be shown that the arrangement which the defendant made in fact resulted or might result in a total suppression of all competition, or might or would result in a complete and absolute monopoly excluding all competition, the complete control of the production and sale of a commodity. It is only essential that the contract restrains competition and tends to deprive the public of the advantages which flow from free competition.[15]

§ 69. Effect of Personal Service or Occupation.

At common law, personal service, an occupation, could not be the subject of a monopoly. Unless there is property

[13] Mogul Steamship Co. v. McGregor, 21 Queens B. Div. Law Rep. 552, 553. Judgment was affirmed by a divided court in Law Rep. 23 Queens B. Div. 598, affirmed in appeal cases (1892, H. L.), 25. Opinion quoted in part in Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co. (U. S. C. C.), 171 Fed. 553, 559; case also cited and considered in Helm Brewing Co. v. Belinder, 97 Mo. App. 64, 72, 71 S. W. 691.

[14] Consol. Laws, Chap. 20, §§ 340-346 (Gen. Bus. Law), See Birdseyes, Cumming & Gilberts, consol. Laws, N. Y., pp. 1875-1879; Laws 1909, chap. 25, Art. 22.

[15] People v. American Ice Co., 120 N. Y. Supp. 443. s. c. (upon points as to pleading, etc.), 120 N. Y. Supp. 41, 135 App. Div. 180.

to be affected with a public interest there is no basis laid for the fact or the charge of a monopoly.[16]

§ 70. Monopoly as Essential Feature of Charter or Franchise—Whether Such Grant Exclusive in Nature.[17]

Monopoly is not an essential feature of a franchise; and it is declared in a New York case that a corporation with banking powers would be no less a franchise if there were no law restraining private banking, which alone gives to banking corporations the character of monopolies.[18] So a monopoly cannot be implied from a mere grant of a charter to a company to construct a work of public improvement, and to take the profits; there must be an express provision in the charter to give such a monopoly; the legislature must restrain itself therein from granting charters for rival and competing works. Therefore, where a company was granted a charter to construct a navigable canal along the valley of a stream, and to take the profits into consideration of the work, and there was no provision against the exercise of power to charter other and rival companies, it was determined that the legislature was not restrained from chartering a company to construct a railroad along the same valley, even though it might afford the same public accommodation as the canal and in effect might impair or annihilate its profits.[19]

In an Ohio case the court, per Bartley, C. J., basing its conclusions upon the language of Mr. Burke, in a speech upon a bill to repeal the charter of the East India Company, said: "The true nature of the franchise of a private corporation, is here portrayed in clear and conprehensive language. We are here told that it is an institution to establish monopoly and to create power; that to speak of

[16] Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, relying upon State v. Associated Press, 159 Mo. 410, 456, 60 S. W. 91, 104, 51 L. R. A. 151, 81 Am. St. Rep. 368.

[17] See § 46 herein.

[18] Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J., quoting Bouvier.

[19] Tuckahoe Canal Co. v. Tuckahoe & James River Ry. Co., 11 Leigh (Va.), 42, 36 Am. Dec. 374.

such charters and their effects in terms of the greatest possible moderation, they do at least suspend the natural rights of mankind at large; and in their very frame and constitution, are liable to fall into a direct violation of them; that all special privileges of this kind, claimed or exercised in exclusion of the greater part of the community, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be someway or other exercised ultimately for their benefit; and that they are not original self-derived rights, or grants for the mere and sole private benefit of the holders, but rights and privileges, which in the strictest sense are derivative trusts, and from their very nature accountable to the power which created them." [20]

§ 71. Same Subject—Rule of Construction of Grants Applicable.

It is pertinent, in this connection, to notice the rule that grants of charters or franchises should, as to all rights claimed under them, be strictly construed against the grantee and most favorably to the sovereign power or State,—that is, strictly against the corporation and liberally in favor of the public.[21] Such grants of franchises

[20] Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 635, 636.

[21] *United States:* Water, Light & Gas Co. of Hutchinson v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257, case affirms 144 Fed. 256; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, citing Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 26 Sup. Ct. 427; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 705, case reverses 73 Fed. 933; Hamilton Gas Light & C. Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. ed. 963; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409; Hannibal & St. Joseph Rd. Co. v. Missouri River Packet Co., 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. 874; Omaha Horse Rd. Co. v. Cable Tramway Co., 30 Fed. 324. Rule also applied to franchises giving monopolies. Georgia Macon & Western Ry. v. Davis, 13 Ga. 68.

Illinois: Blocki v. People, 220 Ill. 444, 77 N. E. 172; Mills v. County of St. Clair, 7 Ill. 197.

Maryland: Baltimore, City of v. Chesapeake & Potomac Teleph. Co., 92 Md. 692, 48 Atl. 465.

Minnesota: State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 108 N. W. 261.

should be in plain language, and certain and definite in their nature,[22] as only that passes which is granted in clear and explicit terms; whatever is not unequivocally granted is withheld, and nothing passes by implication except what is necessary to carry into effect the obvious intent of the grant.[23] The above rule as to strict construction is held to apply so that grants of a franchise or privilege are not ordinarily to be taken as grants of an exclusive privilege.[24]

So it is declared that "Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from the legislature its power will always be construed most strongly in favor of the State. These are elementary principles." [25]

It is also said that an exclusive privilege cannot legally exist where there is the slightest doubt as to its validity, and that a special franchise to be exclusive must be absolutely free from ambiguity.[26]

Nebraska: Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802.

New Jersey: Millville Gas Light Co. v. Vineland Light & Power Co. (N. J. Eq. 1906), 65 Atl. 504.

New York: Trustees of Southampton v. Jessup, 162 N. Y. 122, 127, 56 N. E. 538, per Vann, J., case reverses 10 App. Div. 456.

Ohio: Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 636, per Bartley, J.

Pennsylvania: Emerson v. Commonwealth, 108 Pa. 111.

Tennessee: Citizens' St. Ry. Co. v. Africa, 100 Tenn. 26, 53, 42 S. W. 485, 878.

[22] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. 399, 27 Sup. Ct., citing Blair v. Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. ed. 801.

[23] Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. ed. 353; Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. ed. 622; Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773; City of Helena v. Helena Waterworks Co., 122 Fed. 1, 59 C. C. A. 159; People *ex rel.* Woodhaven Gas Co., v. Deehan, 153 N. Y. 528, 47 N. E. 787, case reverses 11 App. Div. 175; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 26 N. Y. St. R. 364, 22 N. E. 381; Pennsylvania Ry. Co. v. Canal Commissioners, 21 Pa. 9, 22, per Black, C. J.

[24] Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 41 L. ed. 1165, 17 Sup. Ct. 718, per Brewer, J.; McLeod v. Burroughs, 9 Ga. 213.

[25] Wright v. Nagle, 101 U. S. 791, 796, 25 L. ed. 921, per Waite, C. J.

[26] West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 379 (a franchise under Pa. Act. 1874).

And in a comparatively late case in the United States Supreme Court it is held that the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable, and not merely convenient to them.[27]

So under a New York decision, grants of franchises by the same State are to be so strictly construed as to operate as a surrender of the sovereignty no further than is expressly declared by the terms of the grant; the grantee takes nothing in that respect by inference, except so far, therefore, as, by the terms of the grant, the exercise of the franchise rights granted is made exclusive, the legislative power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be to those previously granted.[28]

In the construction of charters and statutes granting exclusive privileges to street-railways, gas or water companies authority therefore must be given explicitly by the legislature in clearly expressed terms—the right will not be implied from the use of general language—and, as a rule, municipalities have no power to grant such exclusive rights to said companies except upon legislative authorization subject to the same rules of construction as above stated.[29]

Where a statute grants exclusive rights to supply light or heat, a corporation which comes within the terms of the statute may exercise such exclusive privilege. But where the statute provides for the incorporation of companies "for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public, by any other means," it does not include electric lighting,

[27] Water, Light & Gas Co. of Hutchinson v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, case affirms 144 Fed. 256.

[28] Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 26 N. Y. St. R., 364, 22 N. E. 381.

[29] Detroit Citizens' St. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 28 Chic. L. News. 409, 3 Det. L. N. 377, 5 Am. Eng. Cas. (N. S.) 15, affirmed 171 U. S. 48, 18 Sup. Ct. 732. See Morawetz on Priv. Corp. (Ed. 1882) 431 Cooley on Const. Lim. (Ed. 1890) pp. 231 *et seq* 4 Thomp on Corp. (Ed. 1895) §§ 5348, 5398–5403.

where such grant is relied on for the purpose of claiming an exclusive privilege, especially so where the act in question gives no power to enter upon the public streets for the erection of poles and placing of wires, the privilege of so entering being confined to the laying of pipes only and the process of lighting by electricity being unknown when the statute was enacted.[30]

The rule was also relied upon in this case, that a legislative grant to a corporation of exclusive privileges is to be construed most strictly, that every intendment not obviously in favor of the grant must be construed against it, and that monopolies are not to be favored.[31]

§ 72. When Grants of Charters or Franchises are Exclusive.

It is said that charters or franchises "contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. Some of these charters or franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for public accomodation, and to be affected with *jus publicum*, and they are necessarily exclusive in their nature. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of contract." [32] It is further declared

[30] Scranton Elect. Light & Heat Co. v. Scranton Illuminating Heat & Power Co., 122 Pa. 154, 9 Am. St. Rep. 79, 15 Atl. 446, 3 Am. Elec. Cas. 499; Act of Pa. 1874, § 34, cl. 3, *contra*, except as to exclusive privilege; Wilkesbarre Elec. L. Co. v. Wilkesbarre L. H. & M. Co. (C. C. Penn. 1886) 4 Kulp. 47.

[31] Citing Emerson v. Commonwealth, 108 Pa. 111. The court in the principal case (122 Pa. 154, cited in last preceding note), per Gordon, C. J., said: "Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence, as a rule, detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly."

[32] Kent's Comm. (14th ed.) bottom p. 723, * p. 458; Horst, Mayor, etc., v. Moses, 48 Ala. 146, per Peters, J., dissenting in part; Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J.; State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec. 509, per Lacy, J.

that every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interfered with; it is a contract whose obligation cannot be constitutionally impaired.[33] So certain franchises are founded upon a valuable consideration and are necessarily exclusive in their nature and cannot be resumed at pleasure or the grant impaired by any act of the government without a breach of contract.[34] Again, a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it.[35]

§ 73. Same Subject.

Legislative grants of charters or franchises whether granted by special charters or under general laws, confer privileges which are exclusive in their nature as against all persons upon whom similar rights have not been conferred, so that any attempted exercise of such rights, without

[33] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 604, 618, 637, 638, 643, 645, 9 L. ed. 773, per Story, J., in dissenting opinion.

See the following cases:

Illinois: Mills v. County of St. Clair, 7 Ill. 197.

New Jersey: Millville Gas Light Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504; State v. Freeholders of Hudson, 23 N. J. L. 206, 209, per Carpenter, J.

New York: Staten Island Midland R. Co. v. Staten Island Electric R. Co., 54 N. Y. Supp. 598, 34 App. Div. 181.

North Dakota: Patterson v. Wollman, 5 N. Dak. 608, 33 L. R. A. 536, 67 N. W. 1040.

Ohio: Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 635, 636, per Bartley, C. J.

Pennsylvania: Rayburn Water Co. v. Armstrong Water Co., 9 Pa. Dist. R. 24, 30 Pittsb. L. J. N. S. 239.

Obligation of contracts. See Joyce on Franchises, §§ 301, 340.

[34] Dyer v. Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 303, 304, 27 Am. Dec. 655, per Hitchcock, J.

[35] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516.

legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the property rights of those upon whom the franchises have been so conferred.[36] The grant of every charter or franchise or privilege is "an exclusive one, in the sense that all others are excluded from the enjoyment of that particular franchise or privilege. The true test is not, are all others excluded from the enjoyment of that particular grant? But are all others excluded from the enjoyment of a like grant? The fact that no others enjoy a like immunity does not render the immunity exclusive. It is not whether others enjoy a similar privilege, immunity or franchise, but are others prohibited from a similar enjoyment by reason of the enactment."[37] So, in a California case, it is said that franchises are necessarily exclusive in character, otherwise their value would be liable to be destroyed or seriously impaired; and that even though the grant does not declare the privilege to be exclusive, yet that is necessarily implied from its nature.[38]

§ 74. When Grants of Charters or Franchises are not Exclusive.

In a case in the Federal Supreme Court it is held that there are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind; and that a grant of power conferring such a privilege is not necessarily a grant making that privilege exclusive.[39] And although the term "franchise" is sometimes used to mean an exclusive right held by grant from the sovereign power, such in its nature that the same right or privilege cannot be subsequently granted to another

[36] Millville Gaslight Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504.

[37] Wood v. Common Council of City of Binghamton, 56 N. Y. Supp. 105, 111, 26 Misc. 208, per Mattice, J.

[38] California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 399, 422, per Crocker, J.

[39] Water, Light & Gas Co. of Hutchinson v. City of Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. ed. 257, case affirms 144 Fed. 256.

without the grant operating as an invasion of the franchise of the first grantee and of his property rights. The strictly legal signification of the term is not, however, always confined to exclusive right and the word is used in law to designate powers and privileges which are not always exclusive in their nature.[40] Again, a franchise may consist solely in being a corporation and carrying on business solely in a corporate capacity and still be also a right which any person or persons may exercise without any grant from the State, and, therefore, such a right would not be an exclusive one, and the corporation would be a private one as distinguished from a public one with no public functions which it would be under obligation to perform.[41] It is also asserted that a grant of a public Ferry Franchise carries with it no exclusive privilege, and that such franchise is subject to the power of the proper authorities under state laws to establish such other public ferries over the same waters as public convenience demands, and that any injury thereby sustained by the first grantee is *damnum absque injuria*.[42] And if a State grants no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by to the injury of the first.[43]

[40] Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576, per Dickey, J.

[41] Twelfth St. Market Co. v. Philadelphia & Reading Term. R. Co., 142 Pa. 580, 590, 21 Atl. 989.

[42] Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

[43] Turnpike Co. v. State, 3 Wall. (70 U. S.) 210, 18 L. ed. 180. See also Rockland Water Co. v. Camden & Rockland Water Co., 80 Me. 544, 1 L. R. A. 388, 15 Atl. 785. Examine Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. 400, affirming 161 N. Y. 154, 55 N. E. 562, affirming 54 N. Y. Supp. 1115, 33 App. Div. 642.

CHAPTER VIII

NATURE ESSENTIALS OR TEST UNDER SHERMAN ANTI-TRUST ACT

§ 75. Sherman Anti-Trust Act—Unlawful Restraints and Monopolies—What is Embraced—Generally.
76. Labor Combinations Within Prohibition of Sherman Anti-Trust Act.
77. Regulation or Restraint of Commerce, Intrastate, Interstate or Foreign.
78. Monopoly—Exclusive Right.
79. Monopoly—Size or Magnitude of Business.
80. Direct and Necessary Effect Upon Competition in Interstate or Foreign Commerce.
§ 81. Same Subject.
82. Fair Regulation of Business—Indirect or Incidental Effect Upon Competition in Interstate or Foreign Commerce.
83. Reasonable and Unreasonable Restraints.
83a. The "Rule of Reason" and "Light of Reason" Decisions
84. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act—Generally.
85. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act—Overt Acts.

§ 75. Sherman Anti-Trust Act—Unlawful Restraints and Monopolies—What Is Embraced—Generally.

The following propositions may be stated in the premises: (1) The Sherman Anti-Trust Act [1] was leveled at only unlawful restraints and monopolies: (2)When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had long been applied by the several states when dealing with combinations that were in restraint of their domestic commerce: (3) combinations even among private manufacturers or dealers whereby interstate or international commerce are restrained are equally embraced by the act: [2] (4) under this act, every contract, combination, and

[1] See §§ 13, 14 herein.

[2] Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698.

conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates that law, and a corporation is a person; [3] and: (5) Before a contract can be declared illegal under the Federal Anti-Trust Act it must appear that the contract is clearly within the provisions of that statute.[4]

§ 76. Labor Combinations Within Prohibition of Sherman Anti-Trust Act.

The prohibition: "Every contract or combination in the form of trust or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal" in the Sherman Anti-Trust Act [5] includes all combinations of labor as well as of capital; it includes combinations which are composed of laborers acting in the interest of laborers.[6]

§ 77. Regulation or Restraint of Commerce, Intrastate, Interstate or Foreign.

The Sherman Anti-Trust Act has no reference to the

[3] Whitwell v. Continental Tobacco Co., 125 Fed. 454.

Corporations as Persons see § 13 herein.

[4] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, citing Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436; United States v. Trans-Missouri Freight Assoc. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540; Slaughter v. Thacker Coal & Coke Co., 55 W. Va. 642, 47 S. E. 247.

[5] See §§ 13, 14 herein.

[6] United States v. Workingmen's Amalgamated Council of N. O. (U. S. C. C.) 54 Fed. 994, 26 L. R. A. 158, case affirmed (U. S. C. C. A.) 57 Fed. 85. (In this case the United States filed a bill under the Sherman Act in the Circuit Court averring the existence of "a gigantic and wide spread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several States and with foreign countries" and upon the contention that the statute did not refer to labor combinations and the court granting the injunction, held as stated in the text.) Cited in Loewe v. Lawlor, 208 U. S. 274, 301, 52 L. ed. 403, 28 Sup. Ct. 219; United States v. Cassidy (U. S. D. C.), 67 Fed. 698, 705; Grand Jury, *In re* (U. S. D. C.) 62 Fed. 840, 841; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (U. S. C. C.), 62 Fed. 803, 821; United States v. Elliott (U. S. C. C.), 62 Fed. 801, 803; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (U. S. C. C.), 60 Fed. 803, 815; United States v. Trans-Missouri Freight Assoc. (U. S. C. C. A.) 58 Fed. 58, 71.

mere manufacture or production of articles or commodities within the limits of the several States:[7] for, even though the jurisdiction of Congress over commerce among the States is full and complete, it has none over commerce which is wholly within a State;[8] but whilst every instrumentality of domestic commerce is subject to State Control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress.[9] It follows, therefore, that Congress has no jurisdiction over combinations or agreements so far as they relate to a restraint of commerce which is wholly intrastate; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.[10] It is held that the monopoly and restraint denounced by the Sherman Anti-Trust Act "to protect trade and commerce against unlawful restraints and monopolies" are a monopoly in interstate and international trade or commerce and not a monopoly in the manufacture of a necessity of life; that it is for the States to regulate production, and the authority of Congress is limited to commerce among the States.[11] The Knight case

[7] Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698.

[8] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96. See Joyce on Franchises, §§ 367, 369.

Subject to the restrictions imposed by the constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce. Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698.

[9] Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698.

[10] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[11] United States v. E. C. Knight & Co., 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. 249. This case is commented on in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 240, 44 L. ed. 136, 20 Sup. Ct. 96, as follows: "The case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect

is considered at some length and commented on by Taft, Cir. J.,[11a] as follows: "It seems to us clear that, from the beginning to the end of the opinion, the chief justice draws the distinction between a restraint upon the business of manufacturing and a restraint upon the trade or commerce between the States in an article after manufacture, with the manifest purpose of showing that the regulating power of Congress under the constitution could affect only the latter, while the former was not under Federal control and rested wholly with the States. Among the subjects of commercial regulation by Congress, he expressly mentions 'contracts to buy, sell, or exchange goods to be transported among the several States,' and leaves it plainly to be inferred that the statute does embrace combinations and conspiracies which have for their object to restrain, and which necessarily operate in restraint of, the freedom of such contracts."

§ 78. **Monopoly—Exclusive Right.**

The thing essential to the existence of a monopoly is the concentration of business in the hands of a few,[12] and in order to constitute the offense of monopolizing or attempting to monopolize under the act of Congress, known as the Sherman Anti-Trust Act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein.[13] In an early Federal case the court in construing this Statute said: "A monopoly of trade embraces two essential elements: (1) The acquisition of an

interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce." The principal case is also distinguished in Swift & Co. v. United States, 196 U. S. 375, 397, 49 L. ed. 518, 25 Sup. Ct. 276, see note under § 82 herein.

[11a] In United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 296, 297, 29 C. C. A. 141.

[12] National Fireproofing Co. v. Mason Builders Assoc. (U. S. C. C. A.) 169 Fed. 259, 94 C. C. A. 535.

[13] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, 457; act July 2, 1890, 26 Stat. 209, chap. 647; U. S. Comp. Stat. 1901, p. 3200, per Sheppard, Dist. J.

exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control." [14] Again, in another Federal case it is declared that a monopoly "involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. * * * There is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured." [15]

§ 79. Monopoly—Size or Magnitude of Business.

The essence of a monopoly "is found not so much in the creating of a very extensive business in the hands of a single control." The size of a business alone is not necessarily illegal; it is not in itself a violation of the Federal Anti-Trust Act against unlawful restraints and monopolies and of conspiring to monopolize.[16] The criminal act in the Statute is the certain and necessary prevention of all other persons from engaging in such business, and therefore stifling competition. The evil consists in the destruction of the trade of all other persons in the same commodity and not merely the enlargement of the trade of one person or corporation. The law is violated by the crushing of competition by means of force, threats, intimidation, fraud,

[14] United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 82, 7 C. C. A. 15, 24 L. R. A. 73 (S. C. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540); per Sanborn, Cir. J., a case, under the act of July 2, 1890, 26 Stat. 209, chap. 647, Rev. Stat. Supp. 762, of restraint of interstate commerce, construction of the statute and monopoly.

[15] *In re* Greene, 52 Fed. 104, 116, per Jackson, Cir. J., a case of construction of act of July 2, 1890, and the words "monopolize" or "attempt to monopolize."

[16] See § 13 herein for statute.

or artful and deceitful means and practices, which violates the law. The monopoly contemplated is the power acquired over the traffic, sale, and purchase of a commodity, in the course of interstate or foreign commerce, by which the free flow of such commerce and competition in such commodity is necessarily crushed and stifled.[17] So it is declared that: "Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by methods contrary to the public policy as expressed in the statutes or in the common law. The wrongful element in a monopoly under the act is not necessarily the violation of some penal Statute, but may consist of other acts or conduct which the law condemns and the benefit of which, if sought in a civil court of justice, could not be obtained." [18]

§ 80. Direct and Necessary Effect Upon Competition in Interstate or Foreign Commerce.

The test of the legality of a contract or combination under the Sherman Anti-Trust Act [19] is its direct and necessary effect upon competition in interstate or international commerce. The act embraces and declares to be illegal every contract combination or conspiracy in whatever form, of whatever nature and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. If the necessary effect of a contract, combination or conspiracy is to stifle, or directly and substantially to restrict, free competition in interstate or international commerce it is within the terms of that

[17] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, 458.

[18] United States v. Standard Oil Co. (U. S. C. C.) 173 Fed. 177, 195, per Hook, Cir. J. Since writing the above text this case has been modified and affirmed. See "Appendix A" herein.

"Size is not made the test." United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 701, 702, per Lacombe, Cir. J. Case reversed, etc. See "Appendix A" herein. See this case in note to § 80 herein.

[19] See §§ 13, 14 herein.

enactment and violates the law. The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.[20] So

[20] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 698, 24 Sup. Ct. 436, 454; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. 50, quoted from in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 476, per Buffington, Cir. J.; United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177, 178, quoted from in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 426, per Buffington, Cir. J. See also State v. Duluth Board of Trade, 107 Minn. 506, 544, 121 N. W. 395.

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate." Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 19 Sup. Ct. 40, per Mr. Justice Peckham; opinion quoted from in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 476, per Buffington, Cir. J.

The shutting off of the operation of the general law of competition is at the basis of the statutory prohibition in relation to contracts in restraint of trade or commerce. See United States v. Joint Traffic Assoc., 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259. Opinion in case is quoted from in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 476, per Buffington, J.

The test of an "unlawful combination" under the Federal anti-trust act, is its necessary effect upon free competition in commerce among the States or with foreign nations. A combination, the necessary effect of which is to stifle, or directly and substantially to restrict such competition is unlawful under that act. Union Pacific Coal Co. v. United States (U. S. C. C. A.), 173 Fed. 737.

The Sherman Anti-Trust Act looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is within the meaning of said statute, a restraint of trade. United States v. Swift & Co. (U. S. C. C.), 122 Fed. 529. Decree in case modified and affirmed in Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518.

"Disregarding various dicta and following the several propositions which have been approved by the successive majorities of the Supreme Court, this language, 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations' is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers however small. * * * Every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above

it is declared in a case in the Circuit Court that the real question in every case which arises under the Anti-Trust Act is whether or not the contract, combination or conspiracy challenged is in restraint of trade among the States. "It has now been settled by repeated decisions of the Supreme court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling, or substantial restriction of competition, and the test of the legality which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law." [21] Again, in order to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by

construed prohibits every contract or combination in restraint of competition. Size is not made the test." United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 701, 702, per Lacombe, Cir. J. Case reversed, etc. See "Appendix A" herein.

[21] Whitwell v. Continental Tobacco Co. (U. S. C. C.), 125 Fed. 454, 457, 458, per Sanborn, Cir. J., citing the following cases: Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. ed. 136; United States v. Joint Traffic Assoc., 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. ed. 259; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. ed. 1007; United States v. Northern Securities Co. (U. S. C. C.), 120 Fed. 721, 725; (Northern Securities Co. v. United States, 193 U. S. 197, 328, 48 L. ed. 679, 24 Sup. Ct. 436); Gibbs v. McNeeley, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 619, 53 C. C. A. 256, 265; Lowry v. Tile Mantel & Grate Assoc. (U. S. C. C.) 98 Fed. 817, 826, *Id.* (U. S. C. C.), 106 Fed. 40, 45; United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 294, 29 C. C. A. 141, 163, 46 L. R. A. 122; United States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252; United States v. Jellico Mountain Coal & Coke Co. (U. S. C. C.), 46 Fed. 432, 12 L. R. A. 753; Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547; Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159.

its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.[22] So in order to maintain a bill for an injunction, under the Sherman Anti-Trust Act, the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is its necessary effect.[23]

§ 81. Same Subject.

Any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates commerce to that extent, and thus trenches upon the power of the national legislature, and violates the statute. Thus where certain contracts relate to the sale or transportation to other States of specific articles as a direct and immediate result of the combination entered into, and they restrain the manufacturing, purchase, sale or exchange of the manufactured article among the several States, and enhance their value they come within the provisions of the Federal statute. And when the direct, immediate and intended effect of a contract or combination among dealers in a commodity is the enhancement of its price, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made.[24] Every combination or conspiracy, therefore, which would

[22] Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 48 L. ed. 679, 698.

Does the contract or combination have the necessary effect to restrain interstate commerce? This constitutes the question in each case. Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 619, 53 C. C. A. 256, 265, per Day, Cir. J.

[23] United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

As to allegation of purpose in indictment see United States v. Patterson (U. S. C. C.), 55 Fed. 605, 639, 640.

[24] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96. Opinion in case is quoted from in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 476, per Buffington, Cir. J.

extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the Anti-Trust Act. Thus the consolidation of parallel and competing interstate railroad lines, for the purpose of holding the shares of stock of the constituent companies, the stockholders, in lieu of the stock of said consolidating companies, to receive shares in the holding company, destroys competition between the original companies; and although no individual investment is involved, still where there is a combination by several individuals separately owning stock in two competing railroad companies, engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a direct restraint of trade by destroying competition. It is illegal and a "trust" within the meaning of said Anti-Trust Act, but if not, it is a combination in restraint of interstate or international commerce so as to come within the condemnation of that enactment.[25] So the natural, direct and immediate effect of competition in the case of railroad rates affecting interstate commerce, would be to lower rates and so increase the demand for commodities, the supplying of which increases commerce and the fact that the creation of an association to fix rates and fares on competitive interstate traffic prevented any real competition between the railway systems involved, operates to restrain the trade or commerce carried on by them.[26]

§ 82. Fair Regulation of Business—Indirect or Incidental Effect Upon Competition in Interstate or Foreign Commerce.

We have seen that, in order to come within the provi-

[25] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[26] United States v. Joint Traffic Assoc., 171 U. S. 505, 577, 19 Sup. Ct. 25, 43 L. ed. 259. Opinion in case is quoted from in United States v. Reading Co. (U. S. C.), 183 Fed. 427, 476, per Buffington, Cir. J.

sions of the Sherman Anti-Trust Act,[27] the direct, immediate or necessary effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations.[28] But where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate or foreign commerce and where the undisputed facts clearly show that the purpose of an agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement were well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.[29] So an agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce would not seem to be covered by the act, although the agreement might indirectly and remotely affect commerce.[30] If a combination under said Anti-Trust Act [31] promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade, within the true interpretation of said act, and it

[27] See §§ 13, 14 herein.

[28] See §§ 80, 81, herein.

[29] Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. 50. (Suit to dissolve a voluntary unincorporated association called the Traders' Live Stock Exchange.) See also Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 19 Sup. Ct. 40.

[30] United States v. Joint Traffic Assoc., 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. ed. 259, quoted in Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 619, 622, 53 C. C. A. 256, 265, 268, per Day, Cir. J.

[31] See § 13 herein.

is not subject to its denunciation.[32] So even though it be conceded that a monopoly is created in the production within a State of a necessity of life still it may bear no such direct relation to commerce between the States or with foreign countries as to come within the provisions of the Sherman Anti-Trust Act.[33] The court in this case said: "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * Contracts, combinations, or conspiracies to

[32] Whitwell v. Continental Tobacco Co. (U. S. C. C.), 125 Fed. 454, *citing the following cases:*

United States: Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. ed. 136; Anderson v. United States, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. ed. 300; Hopkins v. United States, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. ed. 290; United States v. Joint Traffic Association, 171 U. S. 505, 568, 19 Sup. Ct. 25, 31, 43 L. ed. 259; Allgeyer v. Louisiana, 165 U. S. 578, 589, 7 Sup. Ct. 427, 41 L. ed. 832; Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co., 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. ed. 585; Grice, *In re* (U. S. C. C.) 79 Fed. 627, 644; United States Chemical Co. v. Provident Chemical Co. (U. S. C. C.) 64 Fed. 946; Greene, *In re* (U. S. C. C.) 52 Fed. 104, 115, 116, 117.

California: Schwalm v. Holmes, 49 Cal. 665; California Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

Illinois: Brown v. Rounsavel, 78 Ill. 589.

Iowa: Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267.

Kentucky: Commonwealth v. Grinstead, 111 Ky. 223, 63 S. W. 427.

New York: People v. Gillson, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; Walsh v. Dwight, 58 N. Y. Supp. 91, 93.

Texas: Welch v. Phelps & Bigelow Windmill Co., 89 Tex. 653, 36 S. W. 71.

West Virginia: State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863.

If the necessary effect of a combination is but incidentally and indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not fall under the ban of the law. Union Pacific Coal Co. v. United States (U. S. C. C. A.), 173 Fed. 737; United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177. See also State v. Duluth Board of Trade, 107 Minn. 506 544, 121 N. W. 395.

[33] See § 13 herein for statute.

control domestic enterprise in manufacture * * *, production in all its forms * * * , might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy." [34] The Sherman Anti-Trust Act has no application where the contract sought to be declared illegal concerns a legitimate business transaction and the unlawful restraint complained of is only incidental or collateral, or has only a remote and indirect bearing upon interstate commerce.[35]

§ 83. Reasonable and Unreasonable Restraints.

The Sherman Anti-Trust Act [35a] is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy or monopoly upon such trade or commerce.[36] At the common law contracts were invalid

[34] United States v. E. C. Knight & Co., 156 U. S. 1, 12, 16, 39 L. ed. 325, 15 Sup. Ct. 249. This case is distinguished in Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276, in that the effect of the combination in the Swift case upon interstate commerce was direct and not accidental, secondary or remote as in the Knight case; and that it does not matter if a combination embraces restraint and monopoly of trade within a single state if it also embraces and is directed against commerce among the States. It was also held, in the Swift case, that even if the separate elements of a scheme or combination are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce, the plan may make the parts unlawful. See also comment on the Knight case in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 240, 44 L. ed. 136, 20 Sup. Ct. 96. See note under § 77 herein.

[35] Harbison-Walker Refractories Co. v. Stanton, 227 Pa. St. 55, 75 Atl. 988.

[35a] See § 13 herein.

[36] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

The prohibitory provisions of the Sherman Anti-Trust Act apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. United States v. Trans-Missouri Freight Assoc.,

when in unreasonable restraint of trade, and were not enforced by the courts. But, in the exercise of its right to regulate interstate and foreign commerce and to prohibit individuals by contract or otherwise from impeding the free and untrammelled flow of such trade, Congress has prohibited all contracts in restraint of trade, irrespective of the determination by the courts of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The Federal Anti-Trust Act leaves for

166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007 (cited in United States v. Swift & Co. [U. S. C. C.], 122 Fed. 529, 534). See also United States v. Joint Traffic Assoc., 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25, where the court considered that it was no defense that the rates established or to be established were reasonable, and that so far as the rates and fares were concerned there was no substantial difference between the agreement in this case and the one set forth in the case of United States v. Trans-Missouri Freight Assoc.

"When the Anti-Trust Act was passed the rule had become firmly established in jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interests, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case." United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 72, 7 C. C. A. 15, 24 L. R. A. 73 (s. c. 166 U. S. 290), per Sanborn, Cir. J.

"And it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434, 28 Sup. Ct. 572, 52 L. ed. 865, per Mr. Justice McKenna, quoted in United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 717, which was reversed. See "Appendix A" herein.

Restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred. United States v. Swift & Co. (U. S. C. C.) 122 Fed. 529, decree in case modified and affirmed in Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276.

consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States. The question is, in each case, does the contract or combination have the necessary effect to restrain interstate commerce? [37] Does a contract or combination, alleged to be in violation of the Sherman Anti-Trust Act,[38] constitute any restraint whatever upon trade or commerce? If it does it is within the prohibition of the statute and it is immaterial that in view of all the circumstances and conditions the restraint is a fair and reasonable one; [39] it is also immaterial that the price of the commodity has actually been increased thereby. So whether the restraint of trade imposed by the combination is reasonable or unreasonable is immaterial in an action to recover treble damages under the Federal Anti-Trust Act.[40]

§ 83a. The "Rule of Reason" and "Light of Reason" Decisions.

Since the preceding and other sections—hereinafter appearing and covering substantially like doctrines of the Federal courts as set forth in their decisions—were written, the Standard Oil Case [40a] has been decided enunciating the "*rule of reason*" or "*light of reason*" doctrine, concerning which Mr. Chief Justice White says: "If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given

[37] Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610, 619, 53 C. C. A. 256, 265, per Day, Cir. J.

[38] See §§ 13, 14 herein.

[39] United States v. Coal Dealers' Assoc. (U. S. C. C.), 85 Fed. 252.

[40] Thomsen v. Union Castle Mail S. S. Co. (U. S. C. C. A.), 166 Fed. 251, 92 C. C. A. 315, revising 149 Fed. 433.

[40a] Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. 502 modifying and affirming 173 Fed. 177, followed in United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. 632 reversing 164 Fed. 700. See "Appendix A" herein.

the statute, instead of being refuted by the cases relied upon, is by these cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all. * * * The construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-Trust law aside from the contention as to the *Freight Association* and *Joint Traffic Cases* [40b] and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute."

These two cases were limited and qualified by the court in so far as they conflict with the construction above given to the Anti-Trust Act. It was also held that in prior cases where general language has been used, to the effect that *reason* could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-Trust Act, the unreasonableness of the acts under consideration was pointed out *and those cases are only authoritative by the certitude that the rule of reason was applied.* Mr. Justice Harlan, in his concurring and dissenting opinion, reviews at some length the *Trans-Missouri Freight Case* and the *Joint Traffic Case* (above given) and after considering extended extracts from the opinions therein says: "These utterances * * * show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the Anti-Trust Act as prohibiting and making illegal not only

[40b] United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540; United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25.

every contract or combination in whatever form which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempts to monopolize 'any part' of such trade or commerce."

He also refers to and considers a number of other cases, criticises the statement in the opinion of the court that "the previous cases above cited, 'cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them,'" and objects to the "intimations that the court proceeded in those cases, as far as the present question is concerned, without being guided by the 'rule of reason,' or the 'light of reason,'" and he adds: "It is more than intimated, if not suggested, that if the Anti-Trust Act is to be construed as prohibiting *every* contract or combination of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to the 'light of reason,' but had disregarded the 'rule of reason.' If the court in those cases was wrong in the construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court was delivered by a Justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. * * * Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the Justice who expressed the views of the court, or of the ability of the profound astute lawyers, who sought such an interpretation of the Act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to 'Judicial legislation'? Now this court * * * has now done what it then said it could not constitutionally do." The justice then excepts to

what he considers *a serious departure from the settled usages of the court in regard to the exclusion of the discussion of questions already settled by previous decisions* and then discusses what he considers "the most important aspect of the case" which "concerns the *usurpation by the judicial branch of the government of the functions of the legislative department*" and concludes that he dissents from that part of the opinion "which directs a modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-Trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare."

Although this epoch-marking opinion is given in full at the end of this treatise we have placed the above extracts in juxtaposition here in order more readily and clearly to compare the opposing views and reasoning in the case. The sections which precede this, as well as those elsewhere herein considered, present the law fully as it existed up to the time of rendering the "*rule of reason*" and "*light of reason*" decision. The questions now remain: Does that decision conflict with and overrule the prior decisions interpreting the Sherman Anti-Trust Act, or is it reconcilable therewith? Does it interpolate new words in the Anti-Trust Act, encroach upon legislative prerogatives and so in effect so *judicially legislate* as to nullify the statute and the intention of Congress in enacting it? We are strongly inclined to the opinion that it does overrule the prior decisions, that it is at least a step toward "*judicial legislation*," that it does in effect nullify the statute and the intention of Congress in enacting it, and we also think that the dissenting opinion is more in consonance with the law as declared under prior decisions and that these latter had rightly and properly interpreted this Act of Congress, especially so, in view of the fact that Congress could, by amending the statute, have expressed its disagreement with such prior interpretation by the Supreme Court.

§ 84. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act Generally.

The elements of a conspiracy to be considered under this act are that it must depend upon the concerted action of two or more persons to accomplish an unlawful result by any means or a lawful result by unlawful means.[41] A conspiracy in restraint of trade may have continuance in time and this applies to a criminal conspiracy under the Sherman Anti-Trust Act.[42]

§ 85. Conspiracy—Test or Essentials of, Under Sherman Anti-Trust Act—Overt Acts.

It is held that under the Sherman Anti-Trust Act [43] no overt act is necessary to the commission of the offense of conspiracy. That enactment provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade is guilty of the offense.[44] Upon writ of error however, by the United States to reverse the judgment of the Circuit Court sustaining pleas in bar pleaded to an indictment by the defendants in error, the judgment was reversed. Certain overt acts were alleged to have been done in pursuance of the plan and as coming down to within three years of the indictment. But all that was decided in the reversing case, as we have stated elsewhere, was that a conspiracy may have continuance in time, and that where, as in that case, the indictment, consistently with the other facts, alleged that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea.[45] But a conspiracy in this country to do acts in another

[41] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823, 831, per Hough, Dist. J., citing Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419.

[42] United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1168, revising 173 Fed. 823. See this case under § 57 herein as to distinctions.

[43] Act July 2, 1890, chap. 647, 26 Stat. 209; U. S. Comp. Stat. 1901, p. 3200, given under §§ 13, 14, herein.

[44] United States v. Kissel (U. S. C. C.), 173 Fed. 823, 825.

[45] United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124.

jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.[46]

[46] American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. 511 (holding also that the prohibitions of the Sherman Anti-Trust Law do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States). Compare Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. 680. Considered in note under this section.

CHAPTER IX

NATURE ESSENTIALS OR TEST—CONTRACTS IN RESTRAINT OF TRADE

§ 86. Public Policy as Test—Generally.
87. Public Policy as Test—Degree of Injury to Public.
88. Public Policy as Test—General and Partial Restraint of Trade.
89. Public Policy as Test—Contracts in Restraint of Trade—Contracts Tending to Create Monopolies—Useful Commodities.
90. Public Policy as Test—Contracts Affecting Articles of Prime Necessity.
91. What Contracts Not Void as Against Public Policy.
92. Public Policy Test—Public Service Corporations.
93. Same Subject.
94. Effect of Changed Conditions as to Trade, Commerce, etc.—Public Policy—English Courts.
95. Same Subject — Federal Courts.
96. Same Subject—State Courts.
97. Extent of Illegality of Contract in Restraint of Trade—New Rule.
§ 98. Effect of State Statute Upon Illegality of Such Contract.
99. Monopolies — Degree of Restraint of Trade — Competition.
100. Same Subject.
101. What Degree of Competition Permissible.
102. Circumstances Are to Be Considered in Determining Legality of Restraint.
103. Whether Contract Is in Restraint of Trade is Question for Court.
104. Consideration of Contract in Restraint of Trade.
105. Motive.
106. Reasonable and Unreasonable Restraints Generally.
107. Where Contract in Restraint of Trade Is One of a System of Contracts—Reasonable and Unreasonable Restraints.
108. Reasonableness or as to Territory or Area Covered.
109. Test of Reasonableness—Fair Protection to Covenanter.

§ 86. Public Policy as Test—Generally.

All the cases when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the

parties in dealing legally with some subject-matter of the contract.[1]

"The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade

[1] Leather Cloth Co. v. Lorsont, Law Rep. 9 Eq. Cas. 345, 353, 354, and it was held in this case that the restriction in question was not greater having regard to the subject-matter of the contract than was necessary for the protection of the purchasers, and was capable of enforcement against the vendors.

Public Policy Defined. See the following cases:

United States: Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91, 106, 44 L. ed. 84, 20 Sup. Ct. 33, per Mr. Justice Gray; Vidal v. Girard's Executors, 2 How. (43 U. S.), 127, 197, 198, 11 L. ed. 205, per Mr. Justice Story; Walker v. Lawrence, 177 Fed. 363, 366, 101 C. C. A. 417, per Brawley, Dist. J.; United States v. Musgrave (U. S. D. C.), 160 Fed. 700; Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 70 Fed. 201, 202, 17 C. C. A. 62, 30 L. R. A. 193 (public policy of a State or nation determined by its constitution, laws and judicial decisions, per Sanborn, Cir. J.), s. c. (U. S. C. C.) 62 Fed. 904, 906, per Shiras, Dist. J.; United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 59, 7 C. C. A. 15, 24 L. R. A. 73 (public policy determined by constitution, laws and judicial decisions); Swann v. Swann (U. S. C. C.), 21 Fed. 299, 301 (public policy determined by constitution, laws and judicial decisions).

Arkansas: Jacoway v. Denton, 25 Ark. 625, 634, per Gragg, J.

California: Smith v. San Francisco & North. Pac. Ry. Co., 115 Cal. 584, 600, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, per Harrison, J.; People v. Collins, 9 Cal. App. 622, 624, 99 Pac. 1109 (as to the term public policy no reason exists why a distinction should be drawn between matters which the statute forbids to be done by reason of public policy without expressly so stating and those particular matters as to which the reason is declared by statute).

Colorado: Russell v. Courier Printing & Pub. Co., 43 Colo. 321, 95 Pac. 936; Pueblo & Arkansas Valley Rd. Co. v. Taylor, 6 Colo. 1, 8, 45 Am. Rep. 512, per Stone, J.; Fearnley v. DeMainville, 5 Colo. App. 441, 446, 39 Pac. 73, per Reed, J.

Florida: Atlantic Coast Line Rd. Co. v. Beazley, 54 Fla. 311, 45 So. 761.

Georgia: Smith v. DuBose, 78 Ga. 413, 435, 3 S. E. 300, 6 Am. St. Rep. 260, per Hall, J.

Idaho: Pike v. State Board of Land Commrs. (Idaho, 1911), 113 Pac. 447.

Illinois: People *ex rel.* Healy v. Shedd, 241 Ill. 155, 89 N. E. 332 (public policy determined by constitution, legislation, judicial decision and practice of executive department; courts cannot change it); Wakefield v. Van Tassell, 202 Ill. 41, 44, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207, per Ricks, J.; People *ex rel* Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 294, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319, per Magruder, J.

freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

Indiana: McClanahan v. Breeding, 172 Ind. 457, 463, 88 N. E. 695, per Meyers, J.

Iowa: Disbrow v. Cass County Suprs., 119 Iowa, 538, 541, 93 N. W. 585, per Sherwin, J.; Griswold v. Illinois Cent. R. Co., 90 Iowa, 265, 268, 269, 57 N. W. 843, 24 L. R. A. 647, per Given, J.

Maryland: Boston & Albany Rd. Co. v. Mercantile Trust & Deposit Co. (Md. 1896), 34 Atl. 778, 785, 38 L. R. A. 97, per McSherry, C. J.

Michigan: McNamara v. Gargett, 68 Mich. 454, 460, 36 N. W. 218, 13 Am. St. Rep. 355, per Long, J.

Minnesota: Holland v. Sheehan, 108 Minn. 362, 365, 122 N. W. 1, per Brown, J.

Missouri: Kitchen v. Greenabaum, 61 Mo. 110, 115, per Sherwood, J.

Montana: Lawson v. Cobban, 38 Mont. 138, 139, 99 Pac. 128, per Smith, J.

New Jersey: Trenton Pass R. Co. v. Guarantor's Liability Indemnity Co., 60 N. J. L. 246, 37 Atl. 609, 610, 44 L. R. A. 213, per Magie, C. J.; Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153, 174 (public policy not a creature of the courts but of the legislature).

New York: People v. Hawkins, 157 N. Y. 1, 12, 51 N. E. 257, 68 Am. St. Rep. 736, 42 L. R. A. 490, per O'Brien, J.; Warren v. Bouvier, 124 N. Y. Supp. 641; Lampson's Will, *In re*, 53 N. Y. Supp. 531, 532, 33 App. Div. 49, per Adams, J.; Dean v. Clark, 30 N. Y. Supp. 45, 48, 80 Hun (N. Y.), 80, per Putnam, J.

Oklahoma: Union Central Life Ins. Co. v. Champlin, 11 Okl. 184, 187, 188, 65 Pac. 836, 55 L. R. A. 109, per Hainer, J.; People's Bank v. Dalton, 2 Okl. 476, 480, 37 Pac. 807, per Brierer, J.

Oregon: Robson v. Hamilton, 41 Ore. 239, 245, 69 Pac. 651, per Moore, C. J.

Pennsylvania: Enders v. Enders, 164 Pa. St. 266, 271, 30 Atl. 129, 44 Am. St. Rep. 598, 27 L. R. A. 56 (public policy in the administration of law by the courts is essentially different from what may be the public policy in the view of the legislature, etc., per Dean, J.

Vermont: Tarbell v. Rutland Rd. Co., 73 Vt. 347, 349, 51 Atl. 6, 56 L. R. A. 656, 56 Am. St. Rep. 119, per Tyler, J.

Public Policy as Test—Underlying Principle.

"The principle is this: *public policy requires that every man shall be at liberty* to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into com-

But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the particular circumstances of a particular case. It is a sufficient justification, and indeed the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is no way injurious to the public." [2] So an agreement which is founded on a good consideration and is limited to time, place and commodity and which indicates no intention to oppress or to create a monopoly or to prevent competition

petition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject matter of the contract. Leather Cloth Co. v. Lorsont, Law. Rep. 9 Eq. Cas. 345, 354. Approved in Bloom v. Home Ins. Co., 91 Ark. 367, 372, 121 S. W. 293; Up River Ice Co. v. Denler, 114 Mich. 296, 303, 72 N. W. 157.

[2] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Law Rep. [1894] App. Cas. 565, per Lord Macnaghten, quoted with approval in Underwood & Son, Ltd., v. Barker, Law Rep. [1899] 1 Ch. D. 300, 304, 68 L. J. Ch. 201, 80 L. T. 306, 47 W. R. 347, per Lindley, M. R.

It was said by Judge Taft in a Federal case that: "From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose upon themselves by contract. Courts recognize this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others. * * * The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade," render the first condition less important, but as a disposition exists to use every means to reduce competition, and to restrain monopolies, as is evidenced by the Sherman Anti-Trust Act, and similar State legislation, the second reason above given has not lost in importance at the present day. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 279, 280, 29 C. C. A. 141, per Taft, Cir. J. (in considering effect of and in construing Sherman Anti-Trust Act of July 2, 1890); citing and quoting from Alger v. Thacher, 19 Pick. (36 Mass.) 51, 54; Mitchel v. Reynolds, 1 P. Wms. 181, 190, per Chief Justice Parker.

as to the particular product is not void as against public policy; [3] that is, in general it is enforceable where the contract possesses the other essentials as to reasonableness; as to being limited; as to protection to the covenantee; and as to consideration.[4] But where the business to which the

[3] Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 114 Iowa, 574, 87 N. W. 496.

[4] *United States:* Walker v. Lawrence, 177 Fed. 363, 368, 101 C. C. A. 417 (is not against public policy when does not appear that contract was not a reasonable protection); Fisheries Co. v. Lennen (U. S. C. C.), 116 Fed. 217, affirmed in 130 Fed. 533, 65 C. C. A. 79.

Iowa: Swigert & Howard v. Tilden, 121 Iowa, 650, 97 N. W. 82, 100 Am. St. Rep. 374, 63 L. R. A. 608.

Michigan: Hubbard v. Miller, 27 Mich. 15 (when not especially injurious to public valid where otherwise valid).

Missouri: Gordon v. Mansfield, 84 Mo. App. 367 (valid when not injurious to public interests and not greater than protection requires.)

Nebraska: Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688 (valid when not unreasonable or against public policy); Downing v. Lewis, 59 Neb. 38, 80 N. W. 261 (not against public policy not void).

New York: Hackett & A. L. & J. J. Reynolds Co., 62 N. Y. Supp. 1076, 30 Misc. 733 (valid when reasonable and not against public policy).

Pennsylvania: Harbison-Walker Refractories Co. v. Stanton, 227 Pa. St. 55, 75 Atl. 988.

Tennessee: Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984 (not against public policy, held valid).

Texas: Queen Ins. Co. v. State, 86 Tex. 250, 263, 268, 24 S. W. 397, 22 L. R. A. 483 (not enforceable when against public policy); Wolff v. Hirschfeld (Tex. Civ. App.), 57 S. W. 572 (held not void as against public policy); Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706 (not against public policy and not unreasonable; held valid).

Virginia: Merriman v. Cover, Drayton & Leonard, 104 Va. 428, 51 S. E. 817 (valid if reasonable; limited; based on consideration, and not against public policy).

England: Elliman v. Carrington, L. R. [1901] 2 Ch. 275, 70 L. J. Ch. 577, 84 Law T. 858, 49 Wkly. Rep. 532.

"The policy of the law limits the right to enter into such contracts of sale only to the extent that they are held to injure the public by restraining trade." Cowan v. Fairbrother, 118 N. C. 406, 411, 412, 24 S. E. 212, per Avery, J.

Not every contract in restraint of trade or every exclusive privilege granted by a corporation is against public policy. The test of its validity is whether the restrictive provision is unreasonable or will operate to the injury of the public. Central New York Teleph. & Teleg. Co. v. Averill, 129 App. Div. 752, judgment modified in 199 N. Y. 128, 92 N. E. 206.

The test is whether the contract is inimical to the public interests. Over v. Byram Foundry Co., 37 Ind. App. 452, 77 N. E. 302, citing Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 564, 51 Am. St. Rep. 193, 41 N. E. 1048.

contract relates is of such a character that it cannot be subjected even to the partial restraint which is contemplated without injury to the public interest, then such partial restraint cannot be tolerated.[5]

§ 87. Public Policy as Test—Degree of Injury to Public.

At common law the test in every case is whether the agreement claimed to be in restraint of trade is injurious to the public interests. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the inevitable tendency of such contracts is injurious. All contracts which have a tendency to stifle competition are void as against public policy.[6]

The validity or invalidity of an agreement that in operation tends to restrain trade or to monopoly is in general determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public the agreement is contrary to public policy and will not be enforced. If not so injurious it may be enforced if otherwise legal and binding.[7]

[5] Central New York Teleph. & Teleg. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, citing West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600.

That such contracts are void when opposed to public policy, see also the following cases:

California: Pacific Factor Tea Co. v. Adler, 90 Cal. 110, 27 Pac. 36.

Illinois: Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346, affirming 93 Ill. App. 413; Lanzit v. J. W. Safton Mfg. Co., 194 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, reversing, 83 Ill. App. 168; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Linn v. Sigsbee, 67 Ill. 75.

Michigan: Clark v. Needham, 125 Mich. 84, 7 Det. Leg. N. 395, 51 L. R. A. 785, 83 N. W. 1027; Western Wooden Ware Assoc. v. Starkey, 84 Mich. 76, 85, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.

New York: Coverly v. Terminal Warehouse Co., 75 N. Y. Supp. 145, 70 App. Div. 82.

Wisconsin: Tecktonius v. Scott, 110 Wis. 441, 86 N. W. 672.

[6] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 828; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

[7] Stewart & Bro. v. Sterns & Culvert Lumber Co., 56 Fla. 570, 593, 48 So. 19, *citing the following cases:*

§ 88. Public Policy as Test—General and Partial Restraint of Trade.

The rule is well settled that contracts in general or total restraint of trade are void as against public policy and unenforceable.[8] A contract not to engage in a business if unlimited in respect to time and place is void as against

United States: United States v. E. C. Knight & Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325; Oregon Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315; United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141.

Alabama: Fullington v. Kyle Lumber Co., 139 Ala. 242, 35 So. 852; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125.

Florida: Hoeker v. Western Union Teleg. Co., 45 Fla. 363, 34 So. 901; Jones v. Clifford's Exec., 5 Fla. 510.

Illinois: Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, and notes.

Kansas: Keene Syndicate v. Wichita Gas, Electric Light & Power Co., 69 Kan. 284, 76 Pac. 834.

Louisiana: Webb Press Co. v. Bierce, 116 La. Ann. 905, 41 So. 203.

Michigan: Clark v. Needham, 125 Mich. 84, 83 N. W. 1027, 84 Am. St. Rep. 559.

Ohio: Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103.

Oklahoma: Anderson v. Shawnee Compress Co., 17 Okla. 231, 87 Pac. 815.

Pennsylvania: Nester v. Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 24 L. R. A. 247.

Virginia: Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

West Virginia: Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268; Slaughter v. Thacker Coal & Coke Co., 55 W. Va. 642, 47 S. E. 247.

England: Horner v. Graves, 7 Bing. 735, 20 Eng. C. L. 310.

"The interests of the parties alone are not the sole consideration involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The State has the welfare of its citizens in keeping, and the public interest is the pole-star to all judicial inquiries." Western Wooden Ware Assoc. v. Starkey, 84 Mich. 76, 83, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686, per Long, J.

[8] Seavy v. Spratling, 133 Ga. 27, 65 S. E. 137; Lanzet v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, case reverses 83 Ill. App. 168; Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346, affirming 96 Ill. App. 413; Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39 Atl. 923, case modified in 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 39 Ohio L. J. 253, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185.

public policy.[9] But while a contract in general restraint of trade is illegal and void, the law permits contracts in partial restraint of trade, under some circumstances, where they are not unreasonable and are supported by sufficient consideration.[10] In recent case in *Louisiana* it

[9] Von Bremen v. MacMonnies, 122 N. Y. Supp. 1087, 138 App. Div. 319, motion for reargument of case denied; motion to appeal to court of errors granted, 139 App. Div. 905.

See Taylor v. Saurman, 110 Pa. 3, 1 Atl. 40.

"The law is well settled that contracts in total restraint of trade are void for the reason that they are injurious to the public, depriving it of the industry of the party restrained, and also because of the injury to the party himself by being deprived of the opportunity to pursue his avocation for the support of himself and family; but a contract which is only in partial restraint of trade and is reasonable in its provisions as to time and place, and supported by a sufficient consideration, is valid, and the restraint is held to be reasonable whenever it is such, only, as affords a fair protection to the interests of the one in whose favor it is made." Andrews v. Kingsbury, 212 Ill. 97, 101, 72 N. E. 11 (case affirms 112 Ill. App. 518) citing Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Consolidated Coal Co. v. Schmisseur, 135 Ill. 371, 25 N. E. 795.

[10] Central New York Teleph. & Teleg. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206; (citing Oregon Steam Nav. Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419). See Ferris v. American Brewing Co., 159 Ind. 539, 58 N. E. 731, 52 L. R. A. 305.

"A contract in restraint of trade, to be valid, must show that the restraint imposed is partial, reasonable and founded upon a consideration capable of enforcing the agreement." Hursen *v.* Gavin, 162 Ill. 377, 380, 44 N. E. 735, aff'g 59 Ill. App. 66.

Contracts of this nature will be enforced where the restraint is only partial and where reasonable grounds exist for the restraint and where it is founded on a good consideration. Up River Ice Co. v. Denler, 114 Mich. 296, 302, 72 N. W. 157.

"Whilst it is true that contracts in restraint of trade are to be carefully scrutinized and looked upon with disfavor, all contracts in restraint of trade are not illegal. The restraint here is but partial—very inconsiderable." Stovall *v.* McCutchen, 107 Ky. 577, 580, 21 Ky. L. Rep. 1317, 54 S. W. 969, 47 L. R. A. 287, 92 Am. St. Rep. 373, per White, J., the contract was held valid and binding.

It is said in a case in the Federal Supreme Court that: "It is a well settled rule that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint must not be larger than is required for the necessary protection of the party with whom the contract is

is declared that the law will not permit a man to bind himself by contract, not to pursue, at any time or place, the calling whereby he earns his livelihood, because being so bound, he may become a charge upon the community,

made. * * * The application of the rule is more difficult than a clear understanding of it. * * * Cases must be judged according to their circumstances and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced." Oregon Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 66, 68, 22 L. ed. 315, per Mr. Justice Bradley. The contract in this case was held not void as in restraint of trade or as against public policy.

In a late *Iowa* case the court says: "The right of a person engaged in a business in a particular locality to sell out such business and agree not to engage in it for at least a limited period is too well established by our cases to justify an elaboration of the question." Sauser *v.* Kearney, 147 Iowa, 335, 339, 126 N. W. 322, 324, per McClain, J., citing Swigert & Howard v. Tilden, 121 Iowa 650, 97 N. W. 82, 63 L. R. A. 108, 100 Am. St. Rep. 374; Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 114 Iowa, 574, 87 N. W. 496.

In another case in the same State it is said: "The doctrine that contracts in general restraint of trade are held void as against public policy found root early in the development of our system of law, and recognition of such doctrine has continued down to the present time, but with more or less modification as different courts have been called upon to make practical application thereof. Formerly, in the enforcement of this doctrine, the rights of the immediate parties to a contract as between themselves, were put entirely out of view until it had been determined that the contract was not one, the enforcement of which would operate as an encroachment upon the interests of the general public. The reason of the rule is said to be two-fold—that such restraints work injury to the public by depriving it of the industry of the restricted party in the vocation for which he is best adapted, as well as by the tendency thereof to throw the person so restrained upon the public for support, or compel him to expatriate himself and transfer his residence and allegiance to some other State or country in order to pursue his occupation; also that the tendency of such restraint is to

but contracts whereby men bind themselves never thereafter to pursue a particular calling, within reasonable geographical limits, or not to pursue such calling at all within a reasonable time are generally upheld.[11]

foster monopolies, prevent competition, enhance prices, and might ultimately enable organized capital to silence all competition, become the sole producer and place the public at its mercy." Swigert & Howard v. Tilden, 121 Iowa 650, 654, 97 N. W. 82, 63 L. R. A. 108, 100 Am. St. Rep. 374, per Bishop, C. J., citing Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186; Alger v. Thacher, 19 Pick. (36 Mass.) 51, 31 Am. Dec. 19; Western Wooden-Ware Assoc. v. Starkey, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.

In a *Kentucky* case it is declared that: "It was one of the most ancient rules of the common law that all contracts in restraint of trade were void. We learn from the year books that this was considered the settled law of England as early as the year 1415; and its courts would not then tolerate the least infraction of this rule. It was enforced with much judicial severity and doubtless grew out of the law of apprenticeship under which no one in that country could earn a livelihood at any trade until after long service, and then he must continue in the one adopted by him or have none. For two hundred years the rule existed, without exception, that all contracts in restraint of trade were void. It was qualified, however, as the law of apprenticeship broadened; and a distinction was then drawn by the cases of Broad v. Jollyfe, Cro. Jac. 596, and Mitchell v. Reynolds, 1 P. Wms. 181 between a *general* and *limited* restraint of trade. Other decisions followed until it became the settled English rule, that while a contract not to do business *anywhere* is void, yet one stipulating not to do so in a particular place, or within certain limits, is valid. This has always been the rule in this country. The wisdom of the rule as qualified cannot be doubted. It is eminently suited to the genius of our institutions. It prevents the building up of monopolies and the creation of exclusive privileges. Contracts in general restraint of trade produce them, they tend to destroy industry and competition in a country, thus enhancing prices and diminishing the products of skill and energy; they impair the means of livelihood and injure the public by depriving it of the services of men in useful employments. The law therefore guards against these evils by declaring such contracts void. Pike *v.* Thomas, 4 Bibb (7 Ky.), 486, 7 Am. Dec. 74. This reasoning, however, does not apply to such as impose but a *special* restraint, as not to to carry on trade at a particular place or with certain persons, or for a limited reasonable time.

"The party contracting is then left free to exercise his trade or transact business at other places, other times, and with other persons. Indeed, a particular trade may be promoted by being limited for a short period to a few persons, and the public benefited by preventing too many from engaging in the same calling at the same place. If therefore the limitation be a reasonable one it will be upheld." Sutton v. Head, 86 Ky. 156, 157, 158, 5 S. W. 410, per Holt, J.

[11] Moorman & Givens v. Parkerson (La., 1911), 54 So. 47, citing Oregon

§ 89. Public Policy as Test—Contracts in Restraint of Trade—Contracts Tending To Create Monopolies—Useful Commodities.[12]

At common law any contract or agreement that in its

Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315; Fleckenstein Bros. v. Fleckenstein, 76 N. J. L. 613, 71 Atl. 295, 24 L. R. A. (N. S.) 913.

In a *Massachusetts* case the court says: "Among the most ancient rules of the common law, we find it laid down, that bonds in restraint of trade are void. As early as the second year of Henry V (A. D. 1415) we find by the Year Books, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true, the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years, the rule continued unchanged and without exceptions. Then an attempt was made to qualify it by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a general and a limited restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I, A. D. 1621. Broad v. Jolyffe, Cro. Jac. 596. When it was held, that a contract not to use a certain trade in a particular place, was an exception to the general rule and not void. And in the great and leading case on this subject, Mitchell v. Reynolds, reported in Lucas, 27, 85, 130, Fortescue, 296, and 1 P. Wms. 181, the distinction between contracts under seal, and not under seal, was finally exploded and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally, have been held to be void; while those limited as to time or place or persons, have been regarded as valid and duly enforced.

"Whether these exceptions to the general rule were wise and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer. This doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England, the law of apprenticeship and the law against the restraint of trade, may have a connection. But we think it very clear that they do not, in any measure, depend upon each other." Alger v. Thacher, 19 Pick. (36 Mass.), 51, 52, 31 Am. Dec. 119, per Morton, J.

In an early case in *Washington Territory* it was declared that: "Contracts in restraint of trade are of two kinds: 1, Those in *general* or *total* restraint of trade. 2, Those in partial or limited restraint of trade. Those of the first

[12] As to distinction between (1) contracts *per se* in restraint of trade whereby one contracts himself out of a trade; and (2) contracts which tend to destroy competition and create monopolies, see State v. Duluth Board of Trade, 107 Minn. 506, 526, 121 N. W. 395.

operation has or may have a tendency to restrain trade, monopoly, or to unnaturally control the supply of or to stifle competition in trade, to create or maintain a monopoly, or to unnaturally control the supply of or to increase the price of or to curtail the opportunity of obtaining useful commodities, to the injury of the public or any considerable portion of the population of any locality, is regarded as contrary to just governmental principles and inimical to the public welfare and therefore against public policy. And contracts or agreements that violate the principles designed for the public welfare are illegal and will not in general be enforced by the courts.[13]

class are void upon their face, and have been uniformly so held to be by English and American courts. For near two centuries all contracts in restraint of trade were included in this class and were therefore declared void. But as commerce and general business increased, and artizans of all kinds multiplied, this rule was felt to be unnecessarily rigorous. The first limitation of its general operation was made by the establishment of the distinction between contracts under seal and parol contracts. The courts for a time enforced the former but refused to enforce the latter. In other words the rule was virtually changed into a law of evidence. But this distinction, having no sure foundation in reason or policy was soon overthrown. Then came the present distinction between contracts in total restraint of trade, and those only in partial restraint, which is now firmly settled both by the adjudications in England and in this country. The first we have seen were uniformly held void. * * * Another method by which monopolies were sought to be obtained was by private contracts, by which one of the parties bound himself not to engage in, nor carry on some particular trade or business, without any limitation of time or place. The restraint was usually sought to be effected by means of a bond with a heavy sum fixed by the obligor as liquidated damages. Thus persons and corporations attempted to hedge themselves around—to deprive the public of the benefits of competition to secure a continuance of their monopoly." Oregon Steam Navigation Co. v. Hale, 1 Wash. Ty. 283, 284, 285, per Jacobs, Ch. J.

[13] Stewart & Bro. v. Sterns & Culvert Lumber Co., 56 Fla. 570, 48 So. 19.

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations. (1) Such contracts injure the parties making them because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such person to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all

Contracts among independent and unconnected manufacturers looking to the control of the prices of their manufacture by limitation of the production, by restriction on distribution, or by express agreement are opposed to public interest and unenforceable as tending to create a monopoly; especially so, if it be assumed that the article covenanted about has become a commodity of great importance to public health and comfort.[14] So a contract, combination or trust among various producers and sellers of a commodity, the direct and necessary or natural effect of which is to restrain competition and control the prices of such commodity, is in unreasonable restraint of trade, and void at common law because contrary to public

the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." Alger *v.* Thacher, 19 Pick. (36 Mass.) 51, 54, 31 Am. Dec. 119, per Morton, J.

"All grants of this kind (monopolies) relating to any known trade are made void by the common law, as being against the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all of which are manifest inconveniences to the public." Bacon's Abridg. (Bouvier's Ed., 1860) "Monopoly."

"All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment." Butchers' Union Slaughter House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. ed. 585, per Mr. Justice Field (case of grant of exclusive priviliges for stock-landing and slaughter-houses; bill for injunction; constitutional law). Quoted in Marshall, Bruce & Co. v. City of Nashville, 109 Tenn. 495, 509, 71 S. W. 815, per Wilkes, J. (case of invalidity of ordinance requiring union label on city printing).

Public policy favors competition in trade and opposes monopolies and restraints upon trade in useful commodities where the public welfare is injuriously affected. Stewart & Bro. v. Sterns & Culver Lumber Co., 56 Fla. 570, 48 So. 19.

[14] Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, case modifies 56 N. J. Eq. 680, 39 Atl. 923.

policy.[15] But it is declared that a corporation organized for the purpose of controlling the manufacture and sale of matches, and by means of which scheme all competition is stifled and opposition crushed, and the whole business of the country in that line engrossed by the said corporation is a menace to the public; its object and direct tendency being to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that such a monopoly has in fact reduced the price of friction matches. Such a policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by the courts as unlawful, and against public policy.[16] It is held, however, that restraint of trade is not to be tested by the prices that result from the combination, since a combination that leads directly to lower prices to the consumer may as against him be in restraint of trade, while a combination that leads directly to higher prices may as against the producer be restraint of trade.[17]

[15] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901.

Manufacturing corporations cannot combine under a contract to raise prices for a period of years against the interests of the public and in restraint of trade. Wimston v. Whitelegg, 2 B. D., 8 R. R. & Corp. L. J. 153.

Contracts in general restraint of trade, or contracts between individuals, to prevent competition and keep up the price of articles of utility, were among the contracts illegal under the common law, because opposed to public policy. Santa Clara Mill Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.

As to monopoly: "It is said that it has three inseparable consequences—the increase of the price, the badness of the wares, the impoverishment of others. Hence it naturally follows that monopolies are odious to the law." City of Seattle v. Denecker (Wash., 1910), 108 Pac. 1086, 1090, per Dunbar, J.

It was a crime at common law to buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling it at an unreasonable price. State v. Eastern Coal Co., R. I. 1908, 70 Atl. 1, 4.

[16] Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

[17] United States v. Swift & Co. (U. S. C. C.), 122 Fed. 529. Decree in case modified and affirmed in Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518.

§ 90. Public Policy as Test—Contracts Affecting Articles of Prime Necessity.

It is held that in determining whether or not a contract or combination is in unreasonable restraint of trade, it is immaterial whether or not the commodity which is the subject matter of the contract or combination is of prime necessity, if the commodity is an article of legitimate trade or commerce.[18] But it is also decided that an agreement, the purpose or effect of which is to create a monopoly, is unlawful, if it relate to some staple commodity, or thing of general requirement and use, or of necessity, and not something of mere luxury or convenience.[19] A contract to combine may however, be void as in restraint of trade where the combination is to create a monopoly in price and the control of a product even though it be not one of prime necessity.[20]

[18] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901.

[19] Herriman v. Menzies, 115 Cal. 16, 46 Pac. 730, 35 L. R. A. 318, 56 A. S. R. 81, association of stevedores; held not a monopoly or contract in restraint of trade.

"We take it as being well settled, that all combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy and contracts to effect or carry out such combinations are held void. * * * Combinations of this character are commonly called monopolies, but they are not the technical monopolies known to the common law." Queen Ins. Co. v. The State, 86 Tex. 250, 269, 24 S. W. 397, 22 L. R. A. 483, per Gaines, Assoc. J., a case of alleged combination of insurance companies to fix rates and construction of State statute.

Contract which prevents competition and promotes a monopoly in a necessity of life is void as against public policy. Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175.

Where the object or purpose is to control the supply and enhance the price of an article of actual necessity, a contract to restrain competition is void as against public policy. Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36.

A combination to stifle competition and trade in a necessity of life is contrary to public policy. Culp v. Love, 127 N. C. 457, 37 S. E. 476.

A conspiracy to creat a monopoly in commodities which constitute the necessities of life, or to enhance the market price thereof, to the prejudice of the consumer, was and is a criminal offense at common law. State v. Duluth Board of Trade, 107 Minn. 506, 530, 121 N. W. 395, per Elliott, J.

[20] Cummins v. Union Bluestone Co., 44 N. Y. Supp. 787, affirmed in 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262.

§ 91. What Contracts Not Void as Against Public Policy.

A contract is not against public policy when it relates to a matter wherein no duty is owed to the public.[21] And where manufacturing or trading corporations under broad legislative grants are empowered to acquire property and the control of other corporations who are competitors, contracts for such permitted purchases are not repugnant to public policy or invalid even though they tend to produce, and may temporarily produce, a monopoly of the commodity; nor are contracts, which are incidental to such permitted purchases and necessary to the protection of the purchaser in the enjoyment of the business purchased, invalid in such case, as against public policy.[22]

§ 92. Public Policy Test—Public Service Corporations.

The rule that agreements in general restraint of trade are void while those in partial restraint when reasonable and founded upon a valid consideration are valid is declared to be not applicable to corporations engaged in a public business.[23] And a combination between public service corporations to stifle competition is illegal and void as against public policy.[24] There are two classes of contracts, that will in no event be enforced because contrary to public policy, and these constitute exceptions to the general rule governing sales of the right of competition: 1. A quasi-public corporation cannot disable itself by contract from performing the public duties which it has undertaken to discharge in consideration of the privileges granted to it.[25] 2. Any agreement in contravention

[21] Wittenberg *v.* Mollyneaux, 60 Neb. 583, 83 N. W. 842.

[22] Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255, modifying 56 N. J. Eq. 680, 39 Atl. 923.

[23] Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616, 622, 79 N. E. 313.

[24] Cleveland, Columbus, Cincinnati & Indianapolis R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 45 Am. & Eng. R. Cas. 275, 9 Ry. & Corp L. J. 165, 45 Alb. L. J. 209, 3 Inter. Com. Rep. 387.

[25] Cowan v. Fairbrother, 118 N. C. 406, 414, 24 S. E. 212, per Avery, J.,

of the common or statute law generally, or any combination among those engaged in a business impressed with a public or *quasi* public character, which is manifestly prejudicial to the public interest, is void as against public policy, and upon the same principle no agreement tending to create a monopoly or designed to utterly destroy fair competition amongst public carriers will be enforced.[26] So the ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations engaged in a public business and in furnishing that which is a matter of public concern. Therefore, since telegraph and telephone companies are to be deemed public service corporations, affected by a public interest, contracts tending to restrict the free and general use of their lines are invalid.[27] So a contract giving an exclusive right for a term of years by and between a telephone and telegraph company is held void as against public policy.[28] It is declared however that: "Briefly, contracts in restraint of trade are void if they are so unreasonable as unduly to interfere with the rights of the public. The test is not whether the corporation has the right of eminent domain, or whether its property is impressed with a semi-public use, but whether or not such rights are unduly affected." [29]

citing Gibbs v. Consolidated Gas Co. of Balt., 130 U. S. 396, 410, 32 L. ed. 979, 9 Sup. Ct. 553; Logan v. North Carolina Rd. Co., 116 N. C. 940, 21 S. E. 959. See also Joyce on Franchises, §§ 63, 97, 111, and heading "Alienation" in Index to same.

[26] Cowan v. Fairbrother, 118 N. C. 406, 414, 24 S. E. 212, per Avery, J., citing State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279; Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819 and note; Hooker v. Vandewater, 4 Denio (N. Y.), 349, 47 Am. Dec. 258.

[27] Central New York Teleph. & Teleg. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, modifying 129 App. Div. 752, which reversed 110 N. Y. Supp. 273, 58 Misc. 59, citing Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 545, 13 N. E. 169; Western Union Teleg. Co. v. American Union Teleg. Co., 65 Ga. 160; St. Louis & Cairo Rd. Co. v. Postal Teleg. Co., 173 Ill. 508, 537, 51 N. E. 382; Western Union Teleg. Co. v. Chicago & Paducah Rd. Co., 86 Ill. 246.

[28] State, ex rel., Postal Teleg. Cable Co. v. Delaware & Atlantic Teleg. & Teleph. Co. (U. S. C. C.), 47 Fed. 633, 10 Ry. & Corp. L. J. 123.

[29] Whitaker *v.* Kilby, 106 N. Y. Supp. 511, 517, 55 Misc. 337, per Andrews, J.

§ 93. Same Subject.

A contract or agreement between public service corporations may be such as to be essential to the existence of a certain system such as a contract entered into for the purpose of establishing a competitive long distance telephone system, so that the main purpose of the combination is, therefore, not to restrain trade but to extend it, the restraint in effect being only incidental and minor; and where the public would not be injuriously affected by such an agreement, its only interest being in the character of the service and not in the lines or routes over which such service is rendered, the contract so far at least as it does not affect the public, and so far at least, as it is fair and within the power of the contracting corporations to make it, will be enforced.[30] Railroad companies may combine to prevent destructive competition where the public is not injured by increase of rates beyond a fair competitive standard or by a violation of any public duty owed by such corporations.[31] And a railroad company may validly give an exclusive right to maintain a telegraph line along its road and such contract is not void as in restraint of trade or as contrary to public policy.[32]

§ 94. Effect of Changed Conditions as to Trade, Commerce, etc.—Public Policy—English Courts.

The law as to contracts in restraint of trade was originally founded on public policy according to the ideas, and having regard to the business organization of the time. The whole business organization of society has been revolutionized by the use of railways, the post-office, and the telegraph, so that a single firm may have a business extending over a vastly larger portion of the earth's surface than would have been dreamt of in the days when questions similar to that raised in this action

[30] Home Telephone Co. v. North Manchester Teleph. Co. (Ind. App., 1910), 92 N. E. 558.

[31] Manchester & L. R. Co. v. Concord R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 8 R. R. & Corp. L. J. 443, 3 Inters. Com. Rep. 319.

[32] Canadian Pac. R. Co. v. Western Union Teleg. Co., 17 Can. S. C. 151.

were dealt with. In addition to this, it has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade.[33]

In this connection and for the purpose of determining what constitute the essentials or test of contracts or combinations in restraint of trade and whether the restraint is reasonable or unreasonable, against public policy, legal or illegal, what has been determined or declared by the courts in certain important cases is pertinent.[33a] Thus it is declared that: "In considering the application of the rule," as to the distinction between general and particular restraints and their validity, "and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. * * * Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be a reasonable protection to the covenantee. * * * Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law." And it was held that the covenant in the case then under discussion, though un-

[33] Underwood & Son, Ltd., v. Barker, Law Rep. [1899], 1 Ch. D. 300, 308, 68 L. J. Ch. 201, 80 L. T. 306, 47 W. R. 347, per Rigby, L. J.

[33a] See notes to §§ 88, 89 herein.

restricted as to space was not, having regard to the nature of the business and the limited number of customers—namely certain governments—wider than was necessary for the protection of the covenantee, nor injurious to the public interests of the country; that it was, therefore, valid and enforceable.[34]

§ 95. Same Subject—Federal Courts.

Inasmuch as the Federal and State Anti-Trust Statutes must be considered the following is important: "In construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment." [35]

But in another Federal case the court says: "Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices though in restraint of trade, and having no other purpose will be upheld. We think this conclusion

[34] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Law Rep. App. Cas. [1894] 535, 547, 548, per Lord Herschell, L. C., considering Mitchell v. Reynolds, 1 P. Wms. 181; Master, etc., of Gunmakers v. Fell, Willes, 388; Horner v. Graves, 7 Bing. 735, 743; Hinde v. Gray, 1 Man. & G. 195; Ward v. Byrne, 5 M. & W. 548; Whittaker v. Howe, 3 Beav. 383, 394; Davis v. Mason, 5 T. Rep. 118; Leather Cloth Co. v. Lorsant, Law Rep. 9 Eq. 345; Rousillon v. Rouissillon, 14 Ch. D. 351.

The principles laid down in the Nordenfelt case above are applied in Underwood v. Barker, L. R. [1899] 1 Ch. D. 300, 68 L. J. Ch. 201, 80 Law. T. 306, 47 W. R. 347.

[35] Mannington v. Hocking Valley Ry. Co. (U. S. C. C.), 183 Fed. 133, 155, per Sater, Dist. J., citing State v. Vanderbilt, 37 Ohio St. 643; State v. Schlatterbeck, 39 Ohio St. 268, 271; Hathaways Will, In re, 4 Ohio St. 385; Cooley's Const. Lim. (6th ed.) 69–74, 24 Am. & Eng. Ency. Law, 597, 605, 611, 616, 618.

is unwarranted by the authorities when all of them are considered." [36]

§ 96. Same Subject—State Courts.

The doctrine, which avoids a contract for being one in restraint of trade is founded upon a public policy. It had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was, more or less, necessary to the material well being and welfare of his community and of the state. The conditions which made so rigid a doctrine reasonable, no longer exist. In the present practically unlimited field of human enterprise, there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that, in some way, the public interests were endangered.[37]

In a West Virginia case the court says: "We approach the determination of this question realizing the great change that has taken place in industrial conditions and in business methods from those prevailing in the early history of the common law, and that the courts are constantly called upon to apply the principles of that law to such new conditions, in view of many decisions diverse and ofttimes conflicting, and amid an evolution of the application of old principles rather than the announcement of new principles, and to reach conclusions guided by what they deem the best considered cases and authorities on the subject." [38]

In a Minnesota case it is declared that: "The common-

[36] United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 283, 29 C. C. A. 141, per Taft, Cir. J., in considering effect of, and in construing Sherman Anti-Trust Act of July 2, 1890, see §§ 13, 14, herein.

[37] Wood v. Whitehead Bros. Co., 165 N. Y. 545, 551, 59 N. E. 357, per Gray, J., quoted in Swigert & Howard v. Tilden, 121 Iowa, 650, 657, 97 N. W. 82, 63 L. R. A. 108, 100 Am. St. Rep. 374, per Bishop, C. J.

[38] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 520, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, per Cox, J. See also Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 514, 43 Atl. 723, 46 L. R. A. 255, per Magie, C. J.

law rules were sufficient under ordinary conditions to protect the public and yet leave ample freedom for legitimate business transactions. But the astonishing material development of this country, with its opportunities for exploitation and the acquisition of great wealth, produced conditions which the common law with its inadequate remedies, seemed unable to control. Competition was rapidly being eliminated from the business situation, with the result that the prices of most of the articles of everyday use were determined arbitrarily by men who controlled their production and distribution, instead of by the laws which are supposed to operate when trade and commerce are free from artificial restraints. These abuses led to the enactment of a series of statutes which are popularly known as 'anti-trust statutes'." [39]

In an Iowa case the court says: "In view, however, of the ever-changing conditions of trade, commerce, the mechanics, arts, etc., and the diversity of interests which obtain in the various States and countries, it must be manifest that there can be no single standard respecting public policy. This is true to the extent that it frequently happens that in certain respects the policy of one State is found to be the exact opposite of that maintained by another; and, even where there is no essential difference in the matter of abstract definition, it may be certain that self-interest viewed from the standpoint of locality more or less immediate, will enter into and dominate the side of practical application. Now, in this country we have no such conditions as existed when the doctrine," that contracts in general restraint of trade are void as against public policy "was first promulgated. * * * To anyone familiar with present day conditions, it requires no argument to demonstrate that public policy requires that in trade matters there shall be no restraints imposed, save in those instances where it is clearly made to appear that the public welfare would be otherwise seriously endangered. And an all-important factor in business life is the

[39] State v. Duluth Board of Trade, 107 Minn. 506, 530, 531, 121 N. W. 395, per Elliott, C. J.

right of individual contract—the right to buy and sell, to bargain and convey at will. The demand for recognition of this, coming up from the world of business, has been heard, and countenance given thereto, by legislatures and courts everywhere. So, too, note has been taken of the baneful results which will follow, seemingly with inevitable certainty, from giving sanction even negatively, to acts or conduct involving fraud or bad faith. Certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and violation of personal contracts entered into in good faith and upon good consideration. In a recent case it has been well said: 'Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open or as numerous as now, and one rarely got out of the path he started on. Contracting not to follow one's trade was about the same as contracting to be idle or to go abroad for employment. But this is not so now. It is an every day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the State of the benefit of their industry. It would therefore be absurd in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees for a sufficient consideration, not to follow some one calling within the limits of some particular State. There is no expatriation in moving from one State to another, and from such removal a State would be likely to gain as much as it would lose.'" [40]

§ 97. Extent of Illegality of Contract in Restraint of Trade—New Rule.

At common law contracts in restraint of trade were not

[40] Swigert & Howard v. Tilden, 121 Iowa 650, 656, 97 N. W. 82, 63 L. R. A. 108, 100 Am. St. Rep. 374, per Bishop, C. J., citing Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

unlawful in the sense of being criminal, nor did their breach give rise to a civil action for damages in favor of one prejudicially affected thereby. They were simply void and were not enforced by the courts, nor could monopolies be legally enjoyed.[41]

In an early Michigan case the court said: "It has sometimes been said by text writers, and even by courts, that all contracts in restraint of trade, whether general or limited, are *prima facie* void, or that they are to be presumed void, until it be shown, not only that there was

[41] State v. Duluth Board of Trade, 107 Minn. 506, 530, 121 N. W. 395, per Elliott, J.; United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 279, 29 C. C. A. 141, per Taft, Cir. J. (in construing the Sherman Anti-Trust Act of 1890, see §§ 13, 14, herein), citing Mogul Steamship Co. v. McGregor, Gow & Co., [1892] App. Cas. 25; Hornby v. Close, Law Rep. 2 Q. B. 153; Lord Campbell, C. J., in Hilton v. Eckersley, 6 El. & Bl. 47, 66; Hannen, J., in Farren v. Close, Law Rep. 4, Q. B. 602, 612. Examine definition of "engrossing," § 5, herein.

"It has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade and void." United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 69, 7 C. C. A. 15, 24 L. R. A. 73 (166 U. S. 290), per Sanborn, Cir. J., a case under the Sherman Act (see § 13, herein), construction of the statute and monopoly; restraint of interstate commerce.

"Contracts in undue restraint of trade are loosely spoken of in the books as 'illegal contracts.' It is more accurate to style them 'unenforceable contracts.' It is not against the law to make such a contract, or illegal to perform it, as was said by Pollock, C. B., in Green v. Price, 13 Mees & W. 695: 'It is merely a covenant which the law will not enforce, but the party may perform it if he choose.'" Rosenbaum v. United States Credit System Co., 65 N. J. L. 255, 48 Atl. 237, 239, 53 L. R. A. 449, per Collins, J., quoted down to and including the words "unenforceable contracts," by Andrews, J., in Central New York Teleph. & Teleg. Co. v. Averill, 110 N. Y. Supp. 273, 278, 58 Misc. 59 (rev'd in 129 App. Div. 752, which was modified in 199 N. Y. 128, 92 N. E. 206), and the court adds: "And similar statements have been made in English cases. Yet, as is said by Judge Allen in Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, * * * A contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal."

an adequate consideration, but that the circumstances under which the contract was made were such as to render the restraint unreasonable. But the rule to be drawn from a careful analysis of the adjudged cases and the reasons upon which they are founded, does not seem to us to involve any such presumption in the accurate or legal sense of the term, and may be more correctly stated to be that all contracts in restraint of trade are void, if considered only in the abstract and without reference to the situation or objects of the parties or other circumstances under or with reference to which they were made; and this though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or an ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed." [42] Again, to be unlawful a restraint of trade or monopoly need not be complete and need not amount to a criminal offense. The test is whether the restraint or monopoly is injurious to the public.[43]

§ 98. **Effect of State Statute Upon Illegality of Such Contract.**

Whether a combination or contract in restraint of trade is or is not illegal at common law is immaterial under a state statute which does not infringe the Fourteenth amendment.[44] The Anti-Trust Statute of Texas [45] materially enlarged the doctrine of the common law as to monopolies and combines; and the effect, under that statute, of an agreement which is against public policy is not essential, the tendency is enough to bring it within the condemnation of the law. It is the settled policy of that

[42] Hubbard v. Miller, 27 Mich. 15, 19, per Christiancy, Ch. J.

[43] Stewart & Bro. v. Sterns & Culvert Lumber Co., 56 Fla. 570, 48 So. 19.

[44] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826 (code Miss., 1096, chap. 145, § 5002 [Laws 1900, Chap. 88], compare Laws Miss. 1908, p. 124, chap. 119). (Writ of error to review decree dissolving a voluntary association of retail lumber dealers as a combination in restraint of trade under State Statute.) Case affirms Retail Lumber Dealers' Assoc. v. State, 95 Miss. 337, 1909, 48 So. 1021.

[45] Laws, 1903, chap. 94, pp. 119–121.

state, under its anti-trust statutes and decisions, to prevent restrictions in trade, to prohibit them entirely without regard to their immediate effect on trade, it was not merely intended to regulate them.[46]

§ 99. Restraint of Trade—Monopolies—Degree of Competition.

One purpose of the law in prohibiting contracts in restraint of trade is to encourage competition, and thereby lower the prices and commodities to the public.[47] And as the natural effect of competition is to increase trade and commerce, so the termination of an existing competition by an aggregation or combination of individuals will, in some degree at least, affect such trade and commerce and deprive the community or country of the services of those independent dealers or corporations who have combined.

The restriction upon competition may be slight and be such only as is necessary to constitute a fair open and healthy regulation. Every contract or combination, therefore, does not necessarily operate in restraint of trade or commerce or constitute a monopoly.[48] To the extent that a contract prevents the vendor from carrying on the particular trade it deprives the community of any benefit it might derive from his entering into competition. But where the business is open to all others there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege.[49]

§ 100. Same Subject.

The true test is whether the contract or combination, in its apparent purpose or natural consequence, places a

[46] State v. Racine Suttley Co. (Tex. Civ. App., 1911), 134 S. W. 400, 403.

[47] Ft. Smith Light & Power Co. v. Kelley (Ark., 1910), 127 S. W. 975, 981.

[48] See §§ 67, 68, herein.

[49] Diamond Match Co. v. Roeber, 106 N. Y. 473, 481, 13 N. E. 422, 60 Am. Rep. 464, per Andrews, J., quoted in United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946, 949.

restriction upon competition, or tends to create a monopoly, or is inimical to trade or commerce, and it is not necessary that a pure monopoly is effected, or that the restraint is a complete one.[50]

The words of the court in a Minnesota case are pertinent, they are: "To say that a combination restrains trade and prevents competition is a repetition of the same idea—the giving of two names to the same thing. Whatever restrains trade prevents competition, and whatever prevents competition in trade necessarily restrains trade. The word 'monopoly' which plays so great a part in the law, conveys the same idea, because where there is monopoly there can be no competition. Production and hence prices, are under the control of the monopolist, to the possible and probable injury of the public. Freedom of trade requires competition. Without one the other cannot exist, and whatever restrains the one restricts the other. It is true that unrestrained and unregulated competition may destroy what it is designed to preserve; but the theory of law and legislation still is that the welfare of the public requires that competition in trade and commerce shall exist, in order that freedom of trade may be maintained." [51]

But a contract is in restraint of trade and clearly bad where it covers a necessity of life and tends to injure the public by stifling competition and creating a monopoly, as where the manifest purpose of said contract was to secure to the covenantee a monopoly in the production and sale of ice in a certain locality, and such was its operation and effect, and especially so where one of the results was to reduce the available supply of ice below the needs of the locality affected by it. It also operated to put it into the power of the covenantee to arbitrarily fix prices. Such a contract not only creates a monopoly but is against public policy as stifling competition.[52] A combination

[50] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 831, per Meyers, J.

[51] State v. Duluth Board of Trade, 107 Minn. 506, 523, 121 N. W. 395, per Elliott, J.

[52] Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 Lo. 669, 85 Am. St. Rep. 125, 50 L. R. A. 175.

is also in restraint of trade when it is organized for the purpose of getting control of the manufacture and sale of all distillery products so as to stifle competition and to be able to dictate the amount to be manufactured and the prices at which the same should be sold and it creates, or tends to create, a monopoly, especially so when no rational purpose for such organization can be shown consistent with an intention to allow business to run in its normal channels, to give competition its legitimate operation, and to allow both production and prices to be controlled by the natural influence of supply and demand, and the results, as shown by the information, were such as might be anticipated.[53]

§ 101. What Degree of Competition Permissible.

There should be and is a distinction between a consolidation of properties by purchase for legitimate business reasons in order to increase production and reduce cost, and a combination of owners and properties under one management which in many instances stifles competition and arbitrarily increases prices.[54] So agreements that in their operation and effect tend to facilitate, stimulate or promote trade are regarded with favor where they do not directly or indirectly injure the public.[55] The principle has been established in New York, and remains unimpaired up to the present time, that security from and limitation of competition in a given business is a valuable right in connection with said business, and that there are some contracts which, although they curtail competition to limited extent are valid and may be enforced.[56] Again, the law prohibiting contracts in restraint of trade does not

[53] Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 486, 41 N. E. 188, 47 Am. St. Rep. 200.

[54] Harbison-Walker Refractories Co. v. Stanton, 227 Pa. St. 55, 63, 75 Atl. 988, per Elkin, J. See United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, considered hereinafter.

[55] Stewart & Bro. v. Sterns & Culver Lumber Co., 56 Fla. 570, 48 So. 19.

[56] McCall v. Wright, 198 N. Y. 143, 91 N. E. 516, 518, citing Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 24 Am. St. Rep. 475, 13 L. R. A. 652; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

prevent one from making a contract by which he agrees to compete with others in the price of the commodity which he produces for the use of the public.[57] And a contract which in effect transfers the good will and custom of a business is not in restraint of trade and void as against public policy even though competition ceases to some extent.[58] An agreement may be entered into between two corporations to prevent competition in the manufacture of a valuable commodity out of an article nearly worthless, and such a combination is not against public policy.[59]

It is said by the court in a New Jersey case that: "I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property" (certain mineral deposits) "continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual and not of any legal or moral obligation or duty." [60]

In an Illinois case it is declared that the object of the Sherman Anti-Trust Act [61] and of the Anti-Trust Act of

[57] Ft. Smith Light & Traction Co. v. Kelley (Ark., 1910), 127 S. W. 975, 981. The text is as the court states the law, although it would seem that the word "not" should be inserted so as to read "agrees not to compete" instead of "agrees to compete."

[58] Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357.

[59] Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 93, 27 N. E. 1005, 12 L. R. A. 563.

[60] Meredith v. Zinc & Iron Co., 55 N. J. Eq. 211, 221, 37 Atl. 539, per Pitney, V. C.

[61] See §§ 13, 14, herein.

that State [62] is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition; and that it was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But that a contract may incidentally restrain competition or trade without violating the statutes if its chief purpose is to promote and increase the business of those who enter into it.[63]

§ 102. Circumstances Are To Be Considered in Determining Legality of Restraint.

It seems that, while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified.[64] Whether a contract in effect unlawfully tends to restrain trade or

[62] And the Ill. Stat. (Hurd's Stat., 1905, par. 269a, p. 725).

[63] Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313.

[64] Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 422. In this case the history of litigation upon the subject of contracts in restraint of trade showing the tendency of judicial opinion toward the relaxation of the old common law rule is given, and the authorities collated.

"The old courts judged such contracts by very strict standards but they have been regarded more favorably by later decisions. The case of Diamond Match Co. v. Roeber, 106 N. Y. 473, was quite a departure from the old law. * * * It was there said: 'The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances.' The principle of that case has been fully carried out in the subsequent decisions of this court. (Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652; and Wood v. Whitehead Bros. Co., 165 N. Y. 545, 550, 59 N. E. 357);" New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 293, 73 N. E. 48.

The old rule of law that all covenants in restraint of trade are prima facie contrary to public policy, and therefore void, has not been rescinded by recent decisions. Underwood & Son, Ltd., v. Barker, Law Rep. [1899], 1 Ch. D. 300, 68 L. J. Ch. 201, 80 L. T. 306, 47 W. R. 347, per Vaughan Williams, L. J.

Presumption is that contracts are legal, not illegal, and the burden is on him who sets up illegality as a defense in a suit to enforce a contract to show how and why it is unlawful. Harbison-Walker Refractories Co. v. Stanton, 227 Pa. St. 55, 75 Atl. 988. See also Hubbard v. Miller, 27 Mich. 15.

to a monopoly cannot be ascertained by any accurately defined rules, but must be ascertained from a practical consideration of the circumstances of the case in connection with provisions and principles of law and construction. The validity or invalidity of the contract should be determined by its real tendency with reference to trade and monopoly when in full operation [65] and each case involving the question of public policy and restraint of trade should be decided upon its own facts.[66] So in ascertaining whether the exclusion is wider than the covenantee's protection requires, and therefore uselessly in restraint of trade, each case will be considered and determined on the facts attendant upon the particular transaction [67] and in determining whether or not, under the princi-

[65] Stewart & Bro. v. Sterns & Culvert Lumber Co., 56 Fla. 570, 48 So. 19. See also Haynes v. Doman, L. J. [1899], 2 Ch. 13, 68 L. J. Ch. 419, 80 Law T. (N. S.) 569.

Contract must be reasonable under all the circumstances of the case. Lanzit v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, case reverses 84 Ill. App. 168.

Contracts in restraint of trade which, considered with reference to the situation, business and object of the parties, and in the light of all the surrounding circumstances, appear to have been made for a just and honest purpose and for the protection of legitimate interests, and are reasonable as between the parties, and not especially injurious to the public will be upheld; and the weight or effect to be given to the surrounding circumstances is not affected by any presumption for or against the validity of the restriction. Hubbard v. Miller, 27 Mich. 15.

[66] Over v. Byram Foundry Co., 37 Ind. App. 452, 457, 77 N. E. 302, per Roby, C. J., citing Oregon Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315; Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. ed. 67; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 564, 51 Am. St. Rep. 193, 41 N. E. 1048.

"Public welfare is first considered and if it be not involved and the restraint upon one party is not greater than protection to the other party requires the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable." Gibbs v. Consolidated Gas Co., 130 U. S. 396, 409, 9 Sup. Ct. 553, 557, 32 L. ed. 979, quoted in Prame v. Ferrell, 166 Fed. 702, 705, 92 C. C. A. 374, per Knappen, Dist. J., as "the modern rule."

[67] Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39 Atl. 923, case modified in 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255.

ples and rules of the common law, a contract or combination is in unreasonable restraint of trade, not only the contract should be considered, but its subject-matter, the situation of the parties, and all the circumstances surrounding the transaction so far as they are disclosed by the allegations of the bill.[68] And questions about contracts in restraint of trade must be judged not alone according to the circumstances on which they arise, but in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and his family.[69] Again, in determining that a contract is not void as being in general restraint of trade or against public policy, the contract will be interpreted in view of a condition implied by law, the condition being one that is not and cannot be dispensed with.[70]

§ 103. Whether Contract is in Restraint of Trade is Question for Court.

The question whether or not a contract is restraint of trade, and therefore void in law, is a question of law for the determination of the court, and if certain questions are left to the jury it will be assumed that they were so left in

[68] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901.

Whether such a contract "can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration. It will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public; in short upon all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be affected by any presumption for or against the validity of the restriction; if reasonable and just the restriction will be sustained, if not, it will be held void." Hubbard v. Miller, 27 Mich. 15, 21, per Christiancy, Ch. J., quoted in Western Wooden-Ware Assoc. v. Starkey, 84 Mich. 76, 81, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.

[69] Oregon Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315.

[70] Chicago, St. L. & N. G. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. 490.

order that they might find certain issues of fact necessary to be ascertained to enable the judge at the trial to decide whether the covenants in question were void for this reason.[71] So the reasonableness of a contract in alleged restraint of trade depends upon its true construction and legal effect and is, therefore, a question for the court alone, so that evidence from persons in the trade giving their views as to the reasonableness of the contract is inadmissible [72] and the question whether the terms of a covenant not to carry on a business beyond what is reasonably necessary for the protection of the covenantee under the circumstances of the case is a question for the judge and not for the jury.[73]

§ 104. Consideration of Contract in Restraint of Trade.

Contracts in restraint of trade if unobjectionable in

[71] United Shoe Machinery Co. of Canada v. Brunet, Law Rep. [1909] App. Cas. 330, 341, 78 L. J. P. C. 101, 100 L. T. 579, 53 S. J. 396, 25 T. L. R. 442. The case of Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Law Rep. [1894] App. Cas. 535, explained and held to have no application. See also Lanzit v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 39.

Whether an agreement is in restraint of trade is a question of law for the court. Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, citing Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292, 59 N. E. 906; Houck v. Anheuser-Busch Brewing Ass'n, 88 Tex. 184, 30 S. W. 869. See also Lanzit v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, cases reverses 83 Ill. App. 168.

Facts and circumstances; question a judicial one. Carter v. Alling (U. S. C. C.), 43 Fed. 208, 8 Ry. & Corp. L. J. 428.

[72] Haynes v. Doman, Law Rep. [1899], 2 Ch. D. 13, 68 L. J. Ch. 419, 80 L. T. 569.

What is a reasonable restraint of trade is a question of law for the court to determine under the facts and circumstances of each particular case. Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 564, 41 N. E. 1048, 51 Am. St. Rep., per Jordan, J.

"The reasonableness of an agreed restraint is a court question, and should be deducible from facts and circumstances recited in the contract or averred in the pleadings." Rosenbaum v. United States Credit-System Co., 65 N. J. L. 255, 48 Atl. 237, 239, 53 L. R. A. 449, per Collins, J., citing Mallan v. May, 11 Mees. & W. 652.

Contracts in restraint of trade must be construed by the court and the reasonable character and consideration of it determined. Linn v. Sigsbee, 67 Ill. 75, quoted in Hursen v. Gavin, 162 Ill. 377, 380, 44 N. E. 735.

[73] Dawden & Pook, Ltd., v. Pook, Law Rep. [1904], 1 K. B. D. 45, 73 L. J. K. B. 38, 89 L. T. 688, 52 W. R. 97, 20 T. L. R. 39.

other respects, require no greater pecuniary or valuable consideration to support them than any other contract, and if objectionable in other respects no amount of pecuniary consideration will render them valid; and the fact that the price paid does not exceed the cost of the goods protected does not affect the validity of the contract.[74]

§ 105. Motive.

It is held by the United States Supreme Court that a combination that is actually in restraint of trade under a State statute which is constitutional, is illegal whatever may be the motive or necessity inducing it [75] and it is declared in a New York case that the motive of the covenantee is not the test of the validity of the covenant.[76]

§ 106. Reasonable and Unreasonable Restraints Generally.

Contracts creating reasonable restraints of trade have generally been upheld the question being in most cases whether the restraint was reasonable or not.[77] And it is held that although a party may legally purchase the trade and business of another for the very purpose of preventing competition, still the validity of the contract, if supported by a consideration, depends upon its reasonableness between the parties.[78] Generally stated contracts or com-

[74] Hubbard v. Miller, 27 Mich. 15.

Contract in partial restraint of trade is valid if based on a legal and reasonable consideration. Hursen v. Gavin, 162 Ill. 377, 380, 44 N. E. 735; Linn v. Sigsbee, 67 Ill. 75; Up River Ice Co. v. Denler, 114 Mich. 296, 302, 72 N. W. 157; Merriman v. Lover, Drayton & Leonard, 104 Va. 428, 51 S. E. 817.

[75] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826, Code Miss., 1906, chap. 145, § 5002 (Laws 1900, chap. 88). Compare Laws Miss., 1908, p. 124, chap. 119 (writ of error to review decree dissolving a voluntary association of retail lumber dealers as a combination in restraint of trade under state statute; case affirms Retail Lumber Dealers' Assoc. v. State, 95 Miss. 337, 1909, 48 So. 1021.

[76] Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

[77] New York Bank Note Co. *v.* Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 293, 73 N. E. 48, per Cullen, Ch. J.

[78] Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

binations in partial restraint of trade which are reasonable are valid;[79] but contracts in restraint of trade which are unreasonable are unlawful and unenforceable.[80]

[79] *United States:* Prame v. Ferrell, 166 Fed. 702, 92 C. C. A. 374 (if reasonable is enforceable); National Enamel & Stamping Co. v. Haberman (U. S. C. C.), 120 Fed. 415; Fisheries Co. v. Lennen (U. S. C. C.) 116 Fed. 217 (held not unreasonable or invalid); Carter v. Alling (U. S. C. C.), 43 Fed. 208, 8 Ry. & Corp. L. J. 428.

Arkansas: Hampton v. Caldwell & Hall. (Ark. 1910) 129 S. W. 816; Edgar Lumber Co. v. Cornie Stave Co. (Ark. 1910), 130 S. W. 452; Ft. Smith Light & Traction Co. v. Kelley (Ark. 1910), 127 S. W. 975, 981 (when reasonable are not against public policy and, therefore, not void, citing Webster v. Williams, 62 Ark. 101, 34 S. W. 537; Keith v. Herschberg Optical Co., 48 Ark. 146, 2 S. W. 777); Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293 (when reasonable and on legal consideration will be enforced).

Colorado: Fredenthal v. Espey, 45 Colo. 488, 102 Pac. 280.

Georgia: Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703 (held not invalid as an unreasonable restraint); Jenkins v. Temples, 39 Ga. 655, 90 Am. Dec. 452.

Illinois: Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313; Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, affirming 112 Ill. App. 518; Lanzit v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171 (valid if reasonable and supported by good consideration) case reverses 83 Ill. App. 168; Hoff v. Lenerrman, 143 Ill. App. 170 (valid if reasonable as to time, place and terms, and if not against public policy).

Indiana: Trentman v. Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057.

Iowa: Roush v. Gesman, 126 Iowa, 498, 102 N. W. 495; Swigert v. Howard & Tilden, 121 Iowa, 650, 97 N. W. 82, 63 L. R. A. 608 (enforceable if reasonable and on good consideration).

Kentucky: Sutton v. Head, 86 Ky. 156, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274, 5 S. W. 410, citing Turner v. Johnson, 7 Dana (37 Ky.), 435; Grundy v. Edwards, 7 J. J. Marsh. (30 Ky.) 368, 23 Am. Dec. 409; Hill v. Gudgell, 9 Ky. L. Rep. 436.

Michigan: Up River Ice Co. v. Denler, 114 Mich. 296, 302, 4 Det. L. N. 507, 72 N. W. 157 (held not unreasonable); Hubbard v. Miller, 27 Mich. 15.

Minnesota: Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168.

Missouri: Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6.

Nebraska: Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688 (valid when not against public policy or unreasonable).

New Hampshire: Bancroft v. Embossing Co., 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298.

New Jersey: Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39

[80] Queen Ins. Co. v. The State, 86 Tex. 250, 263, 268, 24 S. W. 397, 22 L. R. A. 483.

See also the following cases:

United States: Bailey v. Phillips (U. S. C. C.), 159 Fed. 535; United

§ 107. Where Contract in Restraint of Trade is One of a System of Contracts—Reasonable and Unreasonable Restraints.

A contract when reasonable in its scope and as to duration and territory cannot lend itself to the formation of

Atl. 923, case modified in 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255.

New York: Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.), 292; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 48; Hackett v. A. L. & J. J. Reynolds Co., 62 N. Y. Supp. 1076, 30 Misc. 733 (valid when reasonable and not against public policy).

North Carolina: Wooten v. Harris, 153 N. C. 43, 68 S. E. 898; Anders v. Gardner, 151 N. C. 604 (valid if reasonable and supported by sufficient consideration); Jolly v. Brady, 127 N. C. 142, 37 S. E. 153; Hauser v. Harding, 126 N. C. 295, 35 S. E. 586; King v. Fountain, 126 N. C. 196, 35 S. E. 427; Kramer v. Old, 119 N. C. 1, 6, 25 S. E. 813; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212.

Pennsylvania: Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. St. 288, 310, 59 Atl. 1088, 1119, 105 Am. St. Rep. 812.

Texas: Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706 (not unreasonable, held valid).

Virginia: Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

Wisconsin: Cottington v. Swan, 128 Wis. 321, 107 N. W. 336.

England: Hood & Moores Stores, Ltd., v. Jones, 81 L. T. (N. S.) 169; Haynes v. Doman, L. J. [1899], 2 Ch. 13, 68 L. J. Ch. 419, 80 Law T. (N. S.) 569 (enforceable when not unreasonable); Underwood v. Barker, L. J. [1899], 1 Ch. 300, 68 L. J. Ch. 201, 80 Law T. (N. S.) 306, 47 Wkly. Rep. 347 (not unreasonable, may be enforced); White, Tompkins & Courage v. Wilson, 23 T. L. R. 469, Swinfen Eadey, J.; Barr v. Craven, 89 L. T. 574, 20 T. L. R. 51; Tivoli, Manchester, Ltd., v. Colley, 52 W. R. 632, 20 T. L. R. 437, Walton, J.

States v. Trans-Missouri Freight Assoc. (U. S. C. C. A.), 58 Fed. 58, 7 C. C. A. 15.

As to reasonableness and unreasonableness of contracts in restraint of trade, see State v. Duluth Board of Trade, 107 Minn. 506, 526, 121 N. W. 395, per Elliott, J.

California: Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 87 Pac. 416; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186.

Georgia: Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735; Goodman v. Henderson, 58 Ga. 567; Holmes v. Martin, 10 Ga. 503.

Illinois: Dunbar v. American Teleph. & Teleg. Co., 238 Ill. 456, 87 N. E. 521.

Indiana: Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193; Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Kentucky: Clemons v. Meadows, 123 Ky. 178, 94 S. W. 13, 29 Ky. L.

trusts or monopolies, unless shown to be one of many similar contracts tending to engross that particular business in a given territory.[81] But while a single contract, taken alone, may not be within the rule at common law against contracts in restraint of trade, yet where it is one of a great number of identical contracts made between a producer of an article of commerce and dealers therein, and they form a system of contracts which taken as a whole materially affects the public interests by stifling competition and trade in said article, it constitutes an unreasonable restraint, within the rule of the common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and

Rep. 619, 6 L. R. A. (N. S.) 847; Sutton v. Head, 86 Ky. 156, 9 Ky. L. Rep. 410, 5 S. W. 410, 9 Am. St. Rep. 274.

Maryland: Jones Cold Store Door Co. v. Jones, 108 Md. 439, 70 Atl. 88; Warfield v. Booth, 33 Md. 63; Guerand v. Dandelet, 32 Md. 561; Davis v. Barney, 2 Gill. & J. (Md.) 382.

Massachusetts: Bishop v. Pulmer, 146 Mass. 469, 16 N. E. 299; Alger v. Thacher, 19 Pick. (36 Mass.) 51, 31 Am. Dec. 119.

Michigan: Western Wooden-Ware Assoc. v. Starkey, 84 Mich. 76, 85, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.

Missouri: Peltz v. Eichele, 62 Mo. 171; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355.

Nebraska: Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770.

North Carolina: Shute v. Heath, 131 N. C. 281, 42 S. E. 704.

New Jersey: Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 27.

New York: Curtis v. Gokey, 69 N. Y. 300; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Blauner v. Williams Co., 69 N. Y. Supp. 165, 36 Misc. 173.

Ohio: Grassvilli v. Lowden, 11 Ohio St. 349; Thomas v. Miles, 3 Ohio St. 274.

Oklahoma: Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 Pac. 315.

Pennsylvania: Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251.

Rhode Island: Herreschoff v. Boutineau, 17 R. I. 3, 19 Atl. 712.

West Virginia: Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264; Slaughter v. Thacker Coal & Coke Co., 55 W. Va. 642, 47 S. E. 247, 104 Am. St. Rep. 1013.

Wisconsin: Berlin Machine Works v. Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236.

England: Underwood & Son, Ltd., v. Barker, Law Rep. [1899], 1 Ch. D. 300, 68 L. J. Ch. 201, 80 L. T. 306, 47 W. R. 347, per Vaughan Williams, L. J.; Beetham v. Frazer, 21 T. L. R. 8.

[81] Wooten v. Harris, 153 N. C. 43, 45, 68 S. E. 898, per Clark, C. J.

object of such system of contracts, and not merely ancillary or incidental to another and legitimate object.[82]

§ 108. Reasonableness as to Territory or Area Covered.

The restraint must be reasonable as to the territory or area covered.[83] Mere territorial limits are not in all in-

[82] W. H. Hill & Co. v. Gray & Worcester, 163 Mich. 12, 127 N. W. 803.

[83] *United States:* Fowle v. Park, 131 U. S. 88, 36 L. ed. 67, 9 Sup. Ct. 658; Oregon Steam Navigation Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315; National Enameling & Stamping Co. v. Haberman (U. S. C. C.), 120 Fed. 415; Harrison v. Glucose Sugar Refining Co. (U. S. C. C. A.), 116 Fed. 304.

California: Ragsdale v. Nagle, 106 Cal. 332; City Carpet Beating & Works v. Jones, 102 Cal. 506; Brown v. Kling, 101 Cal. 295.

District of Columbia: Godfrey v. Roessle, 5 D. C. App. 299.

Illinois: Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346, aff'g 96 Ill. App. 413; Lunzit v. J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, case reverses 83 Ill. App. 168; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Hoops Tea Co. v. Dorsey, 99 Ill. App. 181.

Indiana: Eisel v. Hayes, 141 Ind. 41; Martin v. Murphy, 129 Ind. 464.

Iowa: Cole v. Edwards, 93 Iowa, 477.

Michigan: Western Wooden-Ware Assoc. v. Starkey, 84 Mich. 76, 47 N. W. 604, 48 Alb. L. J. 108, 1 L. R. A. 503, 32 Cent. L. J. 186 (limitation void).

Minnesota: National Benefit Co. v. Union Hospital Co., 45 Minn. 279, 47 N. W. 806, 11 L. R. A. 437, 9 Ry. & Corp. L. J. 243.

Missouri: Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6, affirmed in 169 Mo. 388, 69 S. W. 355 (held void as covering too extended an area); Osborn v. Benbow, 38 Mo. App. 25.

Montana: Newell v. Meyendorff, 9 Mont. 454, 8 L. R. A. 440.

New Jersey: Ellerman v. Chicago Junction Rys. & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287, 11 Ry. & Corp. L. J. 97, 35 Am. & Eng. Corp. Cas. 388.

New York: Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456; Diamond Match Co. v. Roeber, 106 N. Y. 473; Davies v. Racer, 72 Hun (N. Y.), 43; Greite v. Henricks, 71 Hun (N. Y.), 7.

Ohio: Lufkin Rule Co. v. Fringeb, 57 Ohio St. 596, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185; Peterson v. Schmidt, 13 Ohio C. C. 205, 7 Ohio Dec. 202, 29 Chic. Leg. N. 291; Paragon Oil Co. v. Hall, 7 Ohio C. Ct. 240; Kevil v. Standard Oil Co., 8 Ohio N. P. 311, 11 Ohio S. & C. P. Dec. 114.

Pennsylvania: Patterson v. Glassmire, 166 Pa. St. 230, 31 Atl. 40; Smith's Appeal, 113 Pa. 579; Cooper v. Edeburn, 31 Pittsb. Leg. J. (N. S.) 50.

Rhode Island: Herreschoff v. Boutineau, 17 R. I. 1, 8 L. R. A. 469.

Wisconsin: Washburn v. Dosch, 68 Wis. 436.

stances however the controlling test of the legality of such contracts. All contracts which have a tendency to stifle competition are void as against public policy.[84] But although the restraint contracted for in respect to the areas covered may be offered to public policy and so unenforceable to that extent, still, if the restraint contracted for in respect to areas within which the business had been carried on is reasonably for the protection of the purchaser the contract to that extent is not opposed to public policy and may be enforced.[85] In an Illinois case the reason constituting the basis of the common law rule seems to be followed in this, that it is held in that State that a contract is void as against the public policy of the State where the covenantor agrees not to engage in business within his State and the effect would be to deprive the public, the people of the entire State, of the industry and skill of the covenantor and compel him to engage in some other business or move to another State in order to support himself and family and so expatriate himself so far as his citizenship of the State extended.[86]

§ 109. Test of Reasonableness—Fair Protection to Covenantee.

It seems that the sense of the modern decisions is that if the restraint is only conmensurate with the fair protection of the business sold, the contract is reasonable, valid and enforceable. It is only where the restriction can be of no avail to the vendee and unnecessarily hampers the vendor, that it becomes oppressive and void.[87]

England: Haynes v. Doman, L. J. [1899], 2 Ch. 13, 68 L. J. Ch. 419, 80 Law T. (N. S.) 569.

[84] Knight & Jillson Co. v. Miller, 172 Ind. 27, 38, 87 N. E. 823, per Myers, J., citing numerous cases.

[85] Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255, case modifies 56 N. J. Eq. 680, 39 Atl. 923.

[86] Lanzit v. J. W. Sefton Manufacturing Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, reversing 83 Ill. App. 168.

[87] United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946, 949, per Priest, Dist. J., citing Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. ed. 67; Long v. Towl, 42 Mo. 545; Eilerman v. Chicago Junction Rys.

It is also said in a Virginia case "In some of the later cases, both in England and this country, there has been a tendency to ignore the distinction between general and partial restraints, and to hold that restraints are valid and en-

& Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 473; Lawson on Cont., § 327.

See also the following cases:

United States: Oregon Steam Navigation v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315.

Alabama: Arnold & Co. v. Jones' Cotton Co., 152 Ala. 501, 504, 44 So. 662; Harris v. Theus, 149 Ala. 133, 136, 43 So. 131; McCurry v. Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Colorado: Freudenthal v. Espey, 45 Colo. 280, 102 Pac. 280.

Georgia: Holmes v. Martin, 10 Ga. 503.

Illinois: Superior Coal Co. v. E. R. Darlington Lumber Co., 236 Ill. 83, 86 N. E. 180, 127 Am. St. Rep. 275; Talcott v. Brackett, 5 Ill. App. 60.

Indiana: Trenton v. Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057; Duffy v. Stockey, 11 Ind. 70, 71 Am. Dec. 348; Beard v. Dennis, 6 Ind. 200.

Iowa: Swigert v. Tilden, 121 Iowa 650, 97 N. W. 82.

Kentucky: Skaggs v. Simpson, 110 S. W. 251, 33 Ky. L. Rep. 410.

Maine: Warren v. Jones, 51 Me. 146.

Maryland: Guerand v. Dandelet, 32 Md. 561, 3 Am. Rep. 564.

Massachusetts: New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463.

Michigan: Grand Union Tea Co. v. Lewitsky, 153 Mich. 244, 116 N. W. 1090; Beal v. Chase, 31 Mich. 490; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153.

Minnesota: Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806.

Missouri: Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805.

Nebraska: Roberts v. Lemont, 73 Nev. 365, 102 N. W. 770.

New Hampshire: Bancroft v. Union Embossing, 72 N. H. 402, 37 Atl. 97.

New Jersey: Hoagland v. Segur, 38 N. J. L. 230; Ellerman v. Chicago Junction Rys. & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

Ohio: Grasselli v. Lowden, 11 Ohio St. 349; Lange v. Werk, 2 Ohio St. 519.

Oklahoma: Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 Pac. 315.

Pennsylvania: Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. St. 288, 310, 59 Atl. 1088, 1119; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

Rhode Island: Oakdale Mfg. Co. v. Garet, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 724, 23 L. R. A. 639; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469.

South Carolina: Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973.

forcible when they are not greater than necessary for the fair protection of the covenantee in respect to the subject matter of the contract and not injurious to trade in general." [88] It is not the intention with which the covenantee

Texas: Watkins v. Morley, 2 Tex. App. Div. Cas. § 723.

Virginia: Merriman v. Cover, Drayton v. Leonard, 104 Va. 428, 51 S. E. 817.

West Virginia: Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

Wisconsin: My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540; Cottington v. Swan, 128 Wis. 321, 107 N. W. 336; Richards v. American Desk & Seating Co., 87 Wis. 503, 58 N. W. 787.

[88] Merriman v. Cover, Drayton & Leonard, 104 Va. 427, 51 S. E. 817.

Test of reasonableness is fair protection to covenantee and not so large as to interfere with public interests. National Benefit Co. v. Union Hospital Co., 45 Minn. 279, 47 N. W. 806, 11 L. R. A. 437, 9 Ry. & Corp. L. J. 243; Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287, 35 Am. & Eng. Corp. Cas. 388, 11 Ry. & Corp. L. J. 97; Sternberg v. O'Brien, 14 N. J. L. 237, 33 Cent. L. J. 224; Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 39 Ohio L. J. 253, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185.

Such contract valid when not greater than protection requires when not injurious to public interests. See the following cases:

United States: National Enameling & Stamping Co. v. Haberman (U. S. C. C.), 120 Fed. 415.

District of Columbia: Godfrey v. Roessle (D. C. App.), 23 Wash. L. Rep. 129.

Missouri: Gordon v. Mansfield, 84 Mo. App. 367; Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6.

Pennsylvania: Harbison-Walker Refractories Co. v. Stanton, 227 Pa. St. 55, 75 Atl. 988.

England: Underwood v. Barker, L. J. [1899], 1 Ch. 300, 68 L. J. Ch. 201, 80 Law T. (N. S.) 306, 47 Wkly. Rep. 347.

Where the prohibition is greater than the interest to be protected requires the covenant is unreasonable on its face and void as against public policy. Oregon Steam Navigation Co. v. Hale, 1 Wash. Ty. 283, relying upon Wright v. Ryder, 36 Cal. 342; Leng & Co., Ltd., v. Andrews, Law Rep. [1909], 1 Ch. D. 763, 78 L. J. Ch. 80, 100 L. T. 7, 25 L. T. R. 93; Leetham v. Johnstone-White, 76 L. J. Ch. 304, Law Rep. [1907], 1 Ch. 322, 96 L. T. 348, 23 T. L. R. 254, 14 Manson 162; Perls v. Saalfield Co. (C. A.) [1892], 2 Ch. 149, 66 L. T. Rep. (N. S.) 666, 46 Alb. L. J. 146.

United States: Courts decline to enforce contracts which impose a restraint though only partial, upon business of such character, that restraint to any extent will be prejudicial to the public interest. But where the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained. Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553.

"It would certainly seem to follow from the tests laid down for deter-

bought, but the relation of the covenant to the thing sold, which furnishes the test or guide for ascertaining the rea-

mining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In Horner v. Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest judicial authority on this branch of the law (see Lord Macnaghten's judgment in Nordenfeldt v. Maxim Nordenfelt Co. [1894], App. Cas. 535, 567) used the following language: 'We do not see how a better test can be applied to the question whether this is or is not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy. This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted merely to protect one of the parties from the injury which, in the execution of the contract or the enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and would therefore be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster. * * * It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities." The court then considers several cases and adds: "But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition to be more liberal

sonableness of the restraint imposed by the covenant.[89] Where an agreement is lawful in itself and is so limited as to time, place, subject matter and purpose as that its

in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time." United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282, 283, 29 C. C. A. 141, per Taft, Cir. J. (in considering effect of, and in construing Sherman Anti-Trust Act of July 2, 1890, see § 13 herein) quoted in part in Home Telephone Co. v. North Manchester Teleph. Co. (Ind. App., 1910), 92 N. E. 558, 560, 561.

Illinois: "The restraint is reasonable, when it is such only as to afford a fair protection to the interests of the party in whose favor it is imposed. If the restraint goes beyond such fair protection, it is oppressive to the other party and injurious to the interests of the public, and consequently void upon the ground of public policy. A contract in restraint of trade, to be valid, must show that the restraint imposed is partial, reasonable and founded upon a consideration capable of enforcing the agreement." Hursen v. Gavin, 162 Ill. 377, 380, 44 N. E. 735, aff'g 59 Ill. App. 66.

Indiana: The rule is that all contracts in restraint of trade are not necessarily invalid where such restraint is only partial, incidental or minor to the main object sought to be obtained which is for the public good. Home Telephone Co. v. North Manchester Teleph. Co. (Ind. App., 1910), 92 N. E. 558, 560, citing and considering United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Wayne Monroe Teleph. Co. v. Ontario Teleph. Co., 112 N. Y. Supp. 424, 60 Misc. 435.

Massachusetts: It is held that it is now settled that a covenant, even if it be unlimited both in time and space, not to engage in a particular business is valid if it is coupled with the sale of a business and is necessary to give the purchaser what he has bought. Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548. See also United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509.

Minnesota: "All restraints of trade were then thought to be unlawful; but in the course of time it was found that so rigorous and far-reaching a rule seriously interfered with ordinary everyday business transactions, and it was gradually relaxed until it is now the law of England and America that contracts in partial restraint of trade are valid, when reasonably necessary to protect the legitimate interests of the covenantee. It must, however, be a restraint which under all the circumstances and conditions, is reasonable, and as said by Tindal, C. J., in Horner v. Graves, 7 Bing. 735: 'We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' * * * As stated in a recent English textbook: 'The sole test of the validity of a contract in restraint of trade is its reasonableness in the interest of the cove-

[89] Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39 Atl. 923, case modified in 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612.

operation will afford only necessary and proper protection to the parties in the enjoyment of their rights, and will not materially or really injure the public, the agreement may

nantee, subject to the proviso that the covenant does not otherwise offend against public policy.'" State v. Duluth Board of Trade, 107 Minn. 506, 524, 525, 121 N. W. 395, per Elliott, J., citing to last quotation Matthews & Adler, Restraint of Trade, chap. 2, p. 39 (1907).

New Jersey: While the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort which have been sustained and enforced by courts have been generally declared to be such as restrain trade, not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 514, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, case modifies 56 N. J. Eq. 680, 39 Atl. 923.

Whether, considering the changed conditions of trade and business, a contract that the vendor of a business and its good will will not engage in a competitive business should now be pronounced against public policy if the restraint contracted for is general, but so broad a restraint is reasonably necessary for the protection of the purchaser, *quære.* Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 78 Am. St. Rep. 612, 46 L. R. A. 255, case modifies 56 N. J. Eq. 680, 39 Atl. 923.

"The modern doctrine seems to be that the restraint may properly be made as extensive as the reasonable need of protection." Rosenbaum v. United States Credit-System Co., 65 N. J. L. 255, 48 Atl. 237, 239, 53 L. R. A. 449, per Collins, J.

New York: "The law permits contracts in partial restraint of trade, if they are reasonable—if they be such as only to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. It is always to be remembered that the court should not arbitrarily interfere with freedom of contract. To justify its action, apprehension of danger to public interests should rest on clear grounds. In some tangible form the contract should threaten the public welfare." Whitaker v. Kilby, 106 N. Y. Supp. 511, 515, 55 Misc. 337, per Andrews, J.

North Carolina: "The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially so as to make it only co-extensive with the right of protection on the part of the purchaser. * * * Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right to compete has been held good in one or more instances where it extended throughout the world, and in other cases where it applied to a State or boundary including several States." Cowan v. Fairbrother, 118 N. C. 406, 412, 24 S. E. 212, per Avery, J., citing Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Law Rep. [1894], App. Cas. 535.

Virginia: A contract in restraint of trade is valid when founded on a valuable consideration if the restraint imposed is reasonable as between the

be enforced, even though it relates to and operates upon trade in useful commodities.[90]

parties, and not injurious to the public by reason of its effect upon trade. Whether or not the restraint is reasonable is to be determined by considering whether it is such as only to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Merriman v. Cover, Drayton & Leonard, 104 Va. 427, 429, 51 S. E. 817; quoted in Edgar Lumber Co. v. Cornie Stave Co. (Ark., 1910), 130 S. W. 452.

England: A covenant in restraint of trade which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy, unless some specific ground for so holding it void can be clearly established. But such cases are exceptional. Underwood & Son, Ltd., v. Barker, Law Rep. [1899], 1 Ch. D. 300, 68 L. J. Ch. 201, 80 L. T. 306, 47 W. R. 347, per Lindley, M. R. & Rigby, L. J.

"We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than necessary for the protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law, unreasonable." Horner v. Graves, 7 Bing. 735, 743, quoted with approval in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Law Rep. App. [1894] Cas. 535, 549, per Lord Herschel, L. C., quoted in Cowan v. Fairbrother, 118 N. C. 406, 413, 24 S. E. 212, per Avery, J., quoted in Walker v. Lawrence (U. S. C. C. A.), 177 Fed. 363, 366, per Brawley, Dist. J.

[90] Stewart & Bro. v. Sterns & Culvert Lumber Co., 56 Fla. 570, 48 So. 19.

CHAPTER X

SHERMAN ANTI-TRUST ACT—CONSTRUCTION OF

§ 110. Power of Congress—Generally.
111. Constitutionality of Act.
112. Purpose of Act.
113. Scope of Act—Generally.
114. Construction of Act—Generally.
115. Construction of Act—"Commerce" and "Restraint of Trade" Construed.
§ 116. Construction of Act—Should Not Be Narrow or Forced.
117. Statute Does Not Extend to Acts Done in Foreign Countries.
118. The Question of Reasonableness or Unreasonableness of Restraint.
119. Conspiracy May Have Continuance.

§ 110. Power of Congress—Generally.

Congress is declared to have plenary and indisputable power under the Commercial clause of the United States constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the Anti-Trust Act.[1] Congress has the power to establish rules by which interstate and international commerce shall be governed and by the Sherman Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce.[2] And it has been declared by the United States Supreme Court that when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than to apply to interstate commerce a rule that had long been applied by the several States when dealing with combinations that were in restraint of their domestic commerce. Subject to such restrictions as are imposed by the constitution upon

[1] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177, per Sanborn, J.

[2] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce.[3]

§ 111. **Constitutionality of Act.**

The grant to Congress by the constitution of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce. In the application of this doctrine it has been determined that the constitutional provisions as to the liberty of the individual does not limit the extent of that power so as to prevent the passage of a bill such as the Anti-Trust Act.[4]

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution there are many kinds of contracts which while not in themselves normal or mala in se, may yet be prohibited by the legislation of the States or, in certain cases, by Congress. And in the exercise of the power conferred upon it, Congress has power to prohibit generally contracts in restraint of trade as is done in the Sherman Anti-Trust Act and such legislation infringes upon none of the constitutional guarantees of the individual.[5] And, the power given by the fourth section of this act "to prevent and restrain violations" thereof is not an invasion of the right of trial by jury. As to this objection it was declared by the court: "Little need be added to what has already been said upon that subject. The same act may be a crime and a contempt of court. If an assault or murder be committed in the presence of a court, the offender will be punishable both for the crime and for the contempt, and so with any other act committed in violation both of a criminal statute and of an injunction or order of court. Within the proper

[3] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[4] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[5] United States v. Joint Traffic Assn., 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25.

subjects of equitable cognizance, as established when the Constitution was adopted, it was competent for Congress to vest the courts with the jurisdiction granted by this section and to impose upon them the duty of its exercise in proper cases.[6]

§ 112. **Purpose of Act.**

The Sherman Act was not intended to affect contracts which have a remote and indirect bearing upon commerce between the States.[7]

It was the policy of Congress in passing this act to discourage monopolies and to refuse to enforce contracts which had the effect to suppress competition, it being believed that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part.[8]

The Sherman Anti-Trust Act was leveled as appears by its title at only unlawful restraints and monopolies and it was not intended by Congress to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. The freedom of action in these respects is among the inalienable rights of every citizen.[9]

The Anti-Trust Act was enacted not to stifle but to foster competition and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part

[6] United States v. Debs (U. S. C. C.), 64 Fed. 724, per Woods, J.

[7] Field v. Barber Asphalt Co., 194 U. S. 618, 623, 48 L. ed. 679, 24 Sup. Ct. 436.

[8] Chesapeake & O. Fuel Co. v. United States, 115 Fed. 610, 53 C. C. A. 256.

[9] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

of interstate and international commerce, by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts.[10] And again it is declared that the purpose of the Sherman Anti-Trust Act was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition, and any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce.[11]

§ 113. **Scope of Act—Generally.**

The Federal Anti-Trust Act has a broader application than the prohibition of restraints of trade unlawful at common law. It prohibits any combination which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business. And this includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes.[12]

§ 114. **Construction of Act—Generally.**

The Sherman Act is not inconsistent with the previous act of 1887 [13] "to regulate commerce." [14]

Although the act of Congress known as the Sherman Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to

[10] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177, per Sanborn, J.; quoted in United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 456.

[11] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

[12] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301.

[13] Act Feb. 4, 1887, c. 104.

[14] United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

it which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.[15] Such a construction should be given to the Anti-Trust Act as tends to promote the remedy provided therein and to abate the mischief it was passed to prevent.[16]

Sections one and two of this act make illegal two different though nearly allied things, that is, the first section refers to combinations in restraint of interstate trade and commerce and the second section refers to combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade or commerce.[17]

In the construction and enforcement of this statute, corporations are persons, they are legal entities distinct from their stockholders, and the combination of two or more of them in restraint of trade is as unlawful as the combination of individuals.[18]

§ 115. Construction of Act—"Commerce" and "Restraint of Trade" Construed.

The word "commerce" as used in this act is not synonymous with "trade" as used in the common-law phrase

[15] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436; United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700.

[16] Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290.

As to application and construction of Sherman Anti-Trust Act see In re Charge to Grand Jury (U. S. D. C.), 151 Fed. 834.

In the case of United States v. Debs (U. S. C. C.), 64 Fed. 724, the construction of this act is considered. The case was appealed and it was said by the United States Supreme Court as to the determination reached by the court below, "We enter into no examination of the Act of July 2, 1890, chap. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed." Per Mr. Justice Brewer, In re Debs, 158 U. S. 564, 600, 39 L. ed. 1092, 15 Sup. Ct. 900.

[17] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[18] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

"restraint of trade" and should not be given a meaning more restricted than it has in the Constitution and as defined by the Supreme Court.[19] And though there may be a technical distinction between the phrase "in restraint of trade" as used in the act and the phrases "to injure trade" and "to restrain trade" yet it is said that the use of one expression rather than the other should not vary the interpretation of this act.[20]

§ 116. Construction of Act—Should Not Be Narrow or Forced.

In the construction of the Sherman Anti-Trust Act the rule has been applied that although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical or forced construction of words exclude cases from it that are obviously within its provisions. And while this act contains criminal provisions the Federal court has power by the terms thereof [21] in a suit in equity, to prevent and restrain violations of the act and may mold its decree so as to accomplish practical results such as law and justice demand.[22]

§ 117. Statute Does Not Extend to Acts Done in Foreign Countries.

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation.[23]

In the application of this doctrine it has been determined that the prohibitions of the Sherman Anti-Trust Law do not extend to acts done in foreign countries, even

[19] United States v. Debs (U. S. C. C.), 64 Fed. 724.

[20] United States v. Debs (U. S. C. C.), 64 Fed. 724.

[21] Section 4.

[22] Northern Securities Co. v. United States, 193 U. S. 197, 46 L. ed. 679, 24 Sup. Ct. 436.

[23] American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. 511, aff'g 166 Fed. 261, 92 C. C. A. 325.

though done by citizens of the United States and injuriously affecting other citizens of the United States and that a conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.[24]

[24] American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. 511, aff'g 166 Fed. 261, 92 C. C. A. 325. The allegations of the complaint were summed up as follows by Mr. Justice Holmes: "The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition, and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provisions against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either resign or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since and stopped the construction and operation of the plantation and railway. In August, one Astua, by ex parte proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit. As a result of the defendant's acts the plaintiff has been deprived of the use of

§ 118. **The Question of Reasonableness or Unreasonableness of Restraint.**

By the terms of the Sherman Anti-Trust Act contracts, combinations or conspiracies in restraint of trade or commerce among the several States, or with foreign nations, are declared to be illegal. Under such provision according to the earlier decisions the only question for the court to determine is whether the contract or combination is in its necessary effect a restraint upon such commerce, and it is not concerned with the question whether the restraint is a reasonable or unreasonable one and one which at common law would have rendered the contract invalid.[25] And it was decided that the terms of the act control, and as they forbid any such contract or combination without respect to its nature or beneficial results it was not essential that the restraint should be unreasonable within the well-understood definition of an unlawful restraint before the statute,[26] and that the prohibitory provisions of this act applied to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation and were not confined to those in which the restraint was unreasonable [27] but embraced all direct restraints.[28] The United States Supreme Court has, however, in the recent decision in The Standard Oil Co. v. United States [29] determined that the terms "restraint of trade" and "at-

the plantation and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market, and has compelled producers to come to its terms and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged."

[25] Chesapeake & O. Fuel Co. v. United States, 115 Fed. 610, 53 C. C. A. 256. Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315, rev'g 149 Fed. 933; Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn., 152 Fed. 864, 81 C. C. A. 658; United States v. Coal Dealers (U. S. C. C.), 85 Fed. 252.

[26] Bigelow v. Calumet & Hecla Min. Co., 167 Fed. 721, 94 C. C. A. 13.

[27] United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540; Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160.

[28] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 707.

[29] 221 U. S. 1, 000 Sup. Ct. 000.

tempts to monopolize," as used in the Anti-Trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act; that their meaning should be sought from the conceptions of both English and American law prior to the passage of the act; that the original doctrine that all contracts in restraint of trade were illegal, was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable; that the Anti-Trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade and that the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon it; and that the Anti-Trust Act contemplated and required a standard of interpretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibition.[29a]

§ 119. **Conspiracy May Have Continuance.**

The conspiracies made criminal by the Sherman Anti-Trust Act may have continuance, although mere continuance of result of a crime does not continue the crime itself; if such continuance of result depends upon continuous co-operation of the conspirators, the conspiracy continues until the time of its abandonment or success.[30]

[29a] See "Appendix A", herein, wherein the opinion in this case is given; and also see § 83*a*, herein, wherein the decision is considered.

[30] United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124, rev'g (U. S. C. C.) 173 Fed. 823.

CHAPTER XI

SHERMAN ANTI-TRUST ACT—VIOLATIONS—GENERALLY

§ 120. Test of Legality of Contract or Combination.
121. Where Chief Object Is to Increase Trade.
122. Where Separate Elements of Scheme Lawful.
123. Violations—What Essential to Constitute.
124. Violations — Essential of Contracts in Order to Constitute.
§ 125. Violations — What Constitute—Generally.
126. Violations—Size or Extent of Business Not Alone a Test.
127. Violations — Combinations Entered Into Before Passage of Act.
128. Violations — By Combinations — Stockholder Not Criminally Liable.
129. Defenses—Generally.

§ 120. Test of Legality of Contract or Combination.

The test of the legality of a contract or combination under the Sherman Anti-Trust Act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect of a combination, contract or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the States, or with foreign nations, it is a contract, combination or conspiracy in restraint of that trade, and it violates this law.[1]

"The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce; it is enough if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantage flowing from free competition." [2] And if the necessary effect of a combina-

[1] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177; Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578; Bigelow v. Calumet & Hecla Min. Co., 167 Fed. 721, 94 C. C. A. 13; Phillips v. Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19; see also Gibbs v. McNeely, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152, rev'g 107 Fed. 210.

[2] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed.

tion is to restrain interstate commerce it comes within the meaning of the Anti-Trust Act though the contract does not in express terms refer thereto.[3] But a contract in restraint of trade may or may not be in restraint of interstate trade. If it directly affects only production within the limits of a State it is in restraint of intrastate trade and is subject only to State laws. Any remote or incidental effect upon interstate trade is insufficient to bring it within the Federal enactment. If, however, the contract is for the purpose of controlling the disposition of the manufactured article across State lines, it directly affects interstate commerce and thus may contravene both State and national laws.[4]

§ 121. Where Chief Object Is to Increase Trade.

Although it is held to be no defense that the main purpose of an agreement of such a character was to increase the trade of the parties, to enhance competition in a larger field, and to improve the character of the product, which results are beneficial to the public and therefore a justification for an indirect and partial restraint of trade,[5] yet an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the Anti-Trust Act, because such

823, per Hough, J.; quoted in Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160.

The true inquiry is, does the combination tend directly to appreciably restrain interstate commerce and it is immaterial that the restraint of trade as such was not the ultimate object or to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination. Rice v. Standard Oil Co. (U. S. C. C.), 134 Fed. 464.

[3] Gibbs v. McNeely, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152, rev'g 107 Fed. 210.

[4] Pennsylvania Sugar R. Co. v. American Sugar R. Co., 166 Fed. 254, 92 C. C. A. 318, rev'g 160 Fed. 144.

[5] Chesapeake & O. Fuel Co. v. United States, 115 Fed. 610, 53 C. C. A. 256.

attempts are indispensable to the existence of any competition among the States.[6]

§ 122. **Where Separate Elements of Scheme Lawful.** Where the effect of a combination upon interstate commerce is direct even though the separate elements of such a scheme may be lawful yet if they are bound together by common intent as parts of an unlawful scheme to monopolize interstate commerce, the plan may make the parts unlawful.[7]

A series of acts each of which may be innocent in itself, may be wrongful if the direct object, purpose and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the States or the liberty of a trader to carry on his business be obstructed. Whatever is done by those engaged in the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause the injury "by reason" of the combination within the language of the provision of the act giving the remedy.[8] So a combination may be in restraint of trade and within the meaning of the Anti-Trust Act, although the persons exercising the restraint may not themselves be engaged in interstate trade, and some of the means employed may be acts within the State and individually beyond the scope of Federal authority, and operate to destroy intrastate trade as well as interstate trade. The acts must be considered as a whole, and if the purposes are to prevent interstate transportation the plan is open to condemnation under the act.[9]

§ 123. **Violations—What Essential to Constitute.** In order to condemn an agreement as void under the

[6] Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290.

[7] Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276.

[8] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[9] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301.

Act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce.[10] In order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States or with foreign nations.[11] And to constitute the offense of monopolizing or attempting to monopolize under this act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein.[12] In this case it was said: "In order to constitute a violation of this statute, which prohibits combinations and conspiracies to 'monopolize,' the monopoly must affect and operate directly upon commerce among the States of the United States or with foreign nations. It is not sufficient that it affects only the commerce within a single State. It must be interstate or foreign commerce. Such commerce includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations. The term comprehends new intercourse for the purpose of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between the citizens residing and domiciled in the different States." [13] But in order to maintain a suit under the Sherman Anti-Trust Act the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect.[14] And in order to constitute a violation of the act it is not necessary that the restraint of interstate trade and com-

[10] Virtue v. Creamery Package Mfg. Co., 179 Fed. 115, 102 C. C. A. 413.

[11] Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. 50.

[12] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455.

[13] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455, per Sheppard, J.

[14] United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

merce shall be so complete as to amount to total destruction.[15]

§ 124. **Violations—Essentials of Contracts in Order to Constitute.**

To violate the act there must be a contract, combination or conspiracy, which in purpose or effect tends to restrain trade or commerce among the States or to monopolize some portion thereof. Whether in purpose or effect violative of the act, such contract, combination or conspiracy must have the ordinary meaning attached to those words. There must be the meeting of the minds of two or more, to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentional or not, in effect constitute a restraint of trade and commerce among the several States.[16] So an agent of a corporation cannot alone form an unlawful combination between himself and his corporation by his thoughts and acts within the scope of his agency without the knowledge or participation of any agent or officer of the corporation. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination and it cannot be created by the action of one man alone.[17]

§ 125. **Violations—What Constitute—Generally.**

In determining whether a contract amounts to a combination in restraint of trade in violation of the Anti-Trust Act all the facts and circumstances will be considered.[18] Where the direct, immediate and intended effect of a contract or combination among dealers in a commodity is the enhancement of its price it amounts to a restraint of

[15] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[16] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 455, per Gray, J.

[17] Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578.

[18] Continental Wall Paper Co. v. Wright & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. 280, aff'g 148 Fed. 939, 78 C. C. A. 567.

trade in the commodity, even though contracts to buy it at the enhanced price are being made.[19] The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.[20] The power to regulate commerce and to prescribe the rules by which it shall be governed being vested in Congress and that body having enacted a statute such as the Sherman Anti-Trust Act entitled "an act to protect trade and commerce against unlawful restraints and monopolies" any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce by preventing or restricting its sale, thereby regulates interstate commerce to that extent and thus trenches upon the power of the national legislature and violates the statute.[21] Therefore, where combinations relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into and they restrain the manufacturing, purchase, sale or exchange of the manufactured articles among the several States and enhance their value, such combinations come within the provisions of the Anti-Trust Act.[22]

§ 126. Violations—Size or Extent of Business Not Alone a Test.

In construing the Anti-Trust Act it is said that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be

[19] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[20] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[21] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[22] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96; see also Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290.

an exclusion or, an intent by unlawful means to exclude, others from the same traffic or business, or from acquiring by the same means property and material things.[23]

The size of a business is not in itself a violation of the Anti-Trust Act and should carry with it no great weight. The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in such business, and thereby stifling competition. The evil is not the enlargement of the trade or business of one corporation, but the destruction of the trade of all other persons in the same commodity.[24] So it is said: "Size is not the test." Two individuals who have been driving rival express wagons between villages in two contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not." [25] So the fact that a business is conducted by means of a large number of stores is not of itself important, since many merchants find it more profitable to conduct their business through a chain of stores. The statute was not intended to strike down enterprise or to prevent the restraint of trade by destroying it.[26]

§ 127. Violations—Combinations Entered Into Before Passage of Act.

Though a combination or agreement entered into prior to the passage of the Sherman Anti-Trust Act might have been legal when made, yet where it came within the provisions of such act it became illegal on its passage and acts done under it after that statute became operative were done in violation of it.[27]

[23] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 456, per Gray, J.

[24] United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455.

[25] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700, 702, per Lacombe, P. J.

[26] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700.

[27] United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

§ 128. **Violations—By Combinations—Stockholder Not Criminally Liable.**

A corporation is another and entirely different person from any of its stockholders, whether they are corporations or individuals, and no corporation can by violating a law make any one of its stockholders who does not participate in that violation criminally liable therefor.[28]

§ 129. **Defenses—Generally.**

Where a combination so embraces and is so directed against commerce among the States that it comes within the provisions of this act it is immaterial that it embraces restraint and monopoly of trade within a single State.[29] That the combination complained of was formed in a foreign country is immaterial where it affects the commerce of this country and is put into operation here.[30] If the purposes of a combination are to prevent any interstate transportation, the fact that the means operate at one end before physical transportation commences and at the other end after the physical transporation was ended is immaterial.[31]

[28] Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578.

[29] Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276.

[30] Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315, reversing 149 Fed. 933.

[31] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301, rev'g 148 Fed. 924.

CHAPTER XII

SHERMAN ANTI-TRUST ACT—VIOLATIONS—PARTICULAR CONTRACTS CONSTRUED

§ 130. Purchase of Good Will and Business.
131. Where Corporation Holds Majority of Stock of Another Corporation.
132. Exchange of Shares of Stock-Holding Corporations.
133. Contracts Between Holders of Copyrights.
134. Contracts Between Owners of Patents.
135. Patents — Licenses—Conditions—Generally.
136. Patents — Licenses—Particular Conditions.
137. Patents — Right to Modify Terms of Licenses.
138. Proprietary Medicines — Contracts as to.
139. Acts and Combinations of Labor Organizations.
140. Manufacturing and Other Contracts—Generally.
§ 141. Contracts as to Manufactures Within a State.
142. By Manufacturers of Shingles.
143. By Manufacturers of Iron Pipes.
144. By Tobacco Manufacturers and Jobbers.
145. By Manufacturers of Licorice Paste.
146. By Association Dealing in Tiles, Mantels and Grates.
147. By Sugar Refining Companies.
148. By Dealers in Fresh Meat.
149. By Association of Cattle Dealers.
150. By Board of Trade—Contract as to Quotations.
151. By Railroad Companies.
152. By Owners of Vessels.
153. Mining Contracts.
154. Contracts Between Coal Companies.

§ 130. Purchase of Good Will and Business.

Where a person purchased the business and good will of a corporation engaged in business in different States and by the terms of the contract the stockholders of the corporation agreed that they would not either directly or indirectly be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same, it was decided that the Sherman Anti-Trust Act had no bearing upon the controversy.[1] In respect to

[1] Booth & Co. v. Davis (U. S. C. C.), 127 Fed. 875, 131 Fed. 31, 65 C. C. A. 269.

the contention that there was a violation of the Anti-Trust Act it was said in the Circuit Court of Appeals: "There is a clean distinction which seems to be lost sight of in the argument here, between the aggregation of properties by purchase where the seller no longer retains an interest in the property and a combination of owners and properties under one management, where each owner's interest is continued in the combination."[2]

§ 131. Where Corporation Holds Majority of Stock of Another Corporation.

The mere fact that the majority of the stock of a corporation which sells the manufactured products of another corporation is held by the latter does not constitute a violation of the Anti-Trust Act, it appearing that the former is engaged in the general business of selling to its customers whatever they may want no matter by whom it is manufactured.[3]

§ 132. Exchange of Shares of Stock-Holding Corporations.

The exchange of the stock or shares of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial re-

[2] Davis v. Booth & Co., 131 Fed. 31, 37, 65 C. C. A. 269, per Severens, C. J., who also further said, "To this latter class belong the case of Merz Capsule Co. v. United States Capsule Co. (U. S. C. C.), 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several States, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and connection must be supplied by the law making power, since the old law against forestalling the market has become obsolete. It is possible that it may be developed at the final hearing that interstate traffic may be directly involved in this agreement. But, if so, it will be prudent to postpone final decision in respect to the consequences thereof upon the validity of the agreement until the case is presented upon full proof, rather than by ex parte affidavits as now."

See Metcalf v. American School Furn. Co. (U. S. C. C.), 122 Fed. 115.

[3] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700.

striction of competition in that commerce, constitutes a combination in restraint of commerce among the States or with foreign nations that is declared illegal by the Sherman Anti-Trust Act.[4] And it has been determined by the United States Supreme Court that a combination of stockholders of two competing railroad companies to obtain control of the stock of such company by transferring it to a holding company for the purpose of eliminating competition, the object of which is accomplished by the organization of such holding company and the transfer of the stock necessary for such a purpose to it, is a "trust" within the meaning of the Sherman Anti-Trust Act, but if not it is a combination in restraint of international and interstate commerce which is sufficient to bring it under the condemnation.[5] So where in pursuance to a combination of stockholders of competing and substantially parallel railroad lines a corporation is organized to hold the shares of constituent companies, the shareholders of such companies to receive in lieu of their shares therein, shares of the holding corporation upon an agreed basis of value and under such scheme the holding company becomes the holder of a large majority of the stock in such companies, the stock of the holding company being received by those who delivered their stock upon the agreed basis, necessarily the constituent companies cease, under such arrangement, to be in active competition for trade and commerce along their respective lines and become practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which is to carry out the purpose of the original combination under which competition between the constituent companies would cease. Such an arrangement is an illegal combination in restraint of interstate commerce and falls within the prohibitions and provisions of the Sherman Anti-Trust Act. Under such conditions it is within the power of the Circuit Court in an action

[4] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

[5] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

brought by the Attorney-General of the United States after the completion of the transfer of such stock to it, to enjoin the holding company from voting such stock and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding corporation on any of their stock held by it.[6] And where twenty corporations which were engaged in the production and purchase of petroleum and the refining thereof and the transportation and sale of the same and of its products and which controlled numerous smaller companies entered into an agreement by which the majority of the stock of nineteen of such corporations was transferred to the Standard Oil Co. of New Jersey, one of the twenty, and by which the latter corporation was given the power to fix the rates of transportation and the purchase and selling prices which all these companies should pay and receive for petroleum and its products throughout the United States and in the traffic with foreign nations, it was held that such combination was in violation of the Anti-Trust Act and an injunction against the continuance of the combination was granted.[7]

§ 133. **Contracts Between Holders of Copyrights.** Though under the copyright laws a single publisher may do as he pleases with his copyrighted book yet it is declared that this right cannot be so extended that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners.[8] So where about ninety per cent of the book business was in the hands of certain publishers who formed an association under an agreement which provided that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should have been known to have sold to others who cut prices and that a black

[6] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[7] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

[8] Mines v. Scribner (U. S. C. C.), 147 Fed. 927.

list was to be kept containing the names of such persons and that no one on that black list could buy books of anybody in the scheme it was held that such agreement related to interstate trade and commerce and was violative of the Anti-Trust Act.[9]

§ 134. Contracts Between Owners of Patents.

A contract whereby the manufacturers of two independent patented devices agree not to compete in the same commercial field deprives the public of the benefits of competition and creates a restraint of trade which results not from the granting of the letters patent but from agreement. In such a case though the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased.[10] So where manufacturers of liquid door checks protected by patents, entered into contracts the plan which of comprehended the maintaining offices, the pooling of profits, the elimination of competition by agreeing not to compete in the same commercial field, and the restraint of improvement, it was held such a combination was within the Sherman Act for the reason that the restraint of trade or monopoly arose from combination, and not from the exercise of rights granted by letters patent.[11] But in another case

[9] Mines v. Scribner (U. S. C. C.), 147 Fed. 927; see also Bobbs-Merrill Co. v. Straus (U. S. C. C.), 139 Fed. 155, affirmed, 147 Fed. 15, 77 C. C. A. 607.

[10] Blount Mfg. Co. v. Yale & Towne Mfg. Co. (U. S. C. C.), 166 Fed. 555.

[11] Blount Mfg. Co. v. Yale & Towne Mfg. Co. (U. S. C. C.), 166 Fed. 555. In this case the court said: "An attempt to make profit out of letters patent by suppressing the invention covered thereby is outside the patent grant, and is so far removed from the spirit and intent of the patent law that the mere fact that an inventor may make a profit by suppressing his invention is not a sufficient reason for holding the Sherman act inapplicable to agreements affecting patented articles. If there is secured to the patentee all profits legitimately arising from the manufacture, use and sale of his invention, this is all that is within the terms of the grant. To prohibit contracts for the suppression or restraint of his own trade by the application of the Sherman Anti-Trust Act is not inconsistent with his right to manufacture, use and vend. That the Sherman act interferes with some supposed right, granted by the patent, to suppress an invention, is an unsound proposition, for the reason that letters patent grant no such rights either in terms or by reasonable implication. * * * The Sherman act is not incon-

it was determined that provisions in contracts by several owners of patents in respect to the same invention and by which the patents were conveyed to one of the parties, that the number of licenses which should be granted should be limited to those licensees who should be agreed upon, that the use and ownership of the patented machines by the licensee should be subject to certain conditions and that he should use no other machines of a similar character were held not to be in violation of the Sherman Anti-Trust Act.[12] And where a condition excluded the licensee from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents it was decided that the condition so far as it operated to have this effect was reasonable, but that it would be unreasonable to so construe the provisions as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others.[13]

§ 135. Patents—Licenses—Conditions—Generally.

Monopoly being the object of the patent laws it is a general rule subject to few exceptions that the patentee may enforce such conditions as are not illegal in regard to this kind of property as to the rights of the licensee to manufacture or use or sell the article, and that where such conditions were assented to by the latter they will

sistent with any rights acquired by the patentee when it prevents agreements in restraint of trade which are not designed to make valuable the right to use. There is no inconsistency between the grant of an exclusive and assignable right to make, use, and vend, and the prohibition of an agreement restraining or suppressing the sale of the article in interstate commerce, because any profit from such an agreement does not arise from the value of making, using, and vending. There is no inconsistency between the proposition that an inventor may withhold his invention from use as he sees fit, and the proposition that he may not make an agreement whereby, for the advantage of a competitor, trade in his patented article is restrained or suppressed." Per Brown, J.

[12] United States Consol. Seeded Raisin Co. v. Griffin & Shelley Co., 126 Fed. 364, 61 C. C. A. 334. Examine National Harrow Co. v. Hench (U. S. C. C.), 84 Fed. 226, 83 Fed. 36, 27 C. C. A. 349.

[13] Bement v. National Harrow Co., 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. 747.

be upheld by the courts. Therefore the fact that conditions of this nature inserted in a contract tend to keep up a monopoly does not render them illegal as in violation of the Sherman Anti-Trust Act.[14] There is, however, a limit of course as to the extent to which the conditions in a license may go, and they may be of such a character as to be in restraint of trade within the meaning of the Anti-Trust Act.[15]

§ 136. **Patents—Licenses—Particular Conditions.**

The right of the owner of letters patent to assign rights to manufacture, use and vend, upon condition that the assignee shall maintain certain prices, and to agree not to compete with his assignee or to license others to compete is recognized.[16] In respect to a provision in a license in regard to the price at which the patent may be sold by the licensee it is said in a case in the United States Supreme Court in which this question arose: "The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article." [17]

[14] Bement v. National Harrow Co., 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. 747; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co., 154 Fed. 365, 83 C. C. A. 343; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158; United States Consol. Seeded Raisin Co. v. Griffin & Shelley Co., 126 Fed. 364, 61 C. C. A. 334.

[15] Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (U. S. C. C.), 142 Fed. 531, holding that under the facts of the case certain conditions were of such a character.

[16] Blount Mfg. Co. v. Yale & Towne Mfg. Co. (U. S. C. C.), 166 Fed. 555.

[17] Bement v. National Harrow Co., 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. 747. Per Mr. Justice Peckham.

So a condition in a license that the patented article shall not be sold by the licensee except at the price provided for in the contract and which restricts the licensee as to the amount of his production will not be construed as being in restraint of trade within the meaning of the Anti-Trust Act where they are inserted in good faith and have for their object the protection of the monopoly of the patentee.[18]

§ 137. **Patents—Right to Modify Terms of Licenses.**

The dominion of the patentee remains after the execution of a license for the purpose of securing a substantial performance of the agreement by the licensee, and the terms of the license may be modified at any time by a subsequent arrangement between the licensor and the licensee, and is not in violation of the Anti-Trust Act, as the only right secured to the public by the licenses is to purchase the patented article after it has been manufactured and offered for sale and it does not obtain any right to have competition between different licensees continued or in any way prevent a modification of the licenses.[19]

§ 138. **Proprietary Medicines—Contracts as to.**

The exemption from common-law rules against monopolies and restraints of trade, and the provisions of the Federal Anti-Trust Act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent or productions covered by a copyright does not extend to articles made under a secret process or medicine compounded under a private formula.[20] So where the manufacturers of proprietary medicines put them upon the market under a

[18] Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (U. S. C. C.), 142 Fed. 531, holding that the fact that in some circuits of the Federal courts the patent had been held invalid did not operate to impeach the question of good faith, such patent having been upheld as valid in other circuits.

[19] Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co., 166 Fed. 431, 92 C. C. A. 183.

[20] John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158.

system of contracts intended to maintain the prices fixed by them, and the effect of the contract with jobbers, whether regarded as one of sale or agency, was to restrain jobbers from selling to any save retailers licensed by the manufacturers, and to restrain retailers from selling for resale to any save those licensed to buy or to persons who bought for consumption only, and to none, by either jobber or retailer, except at a price imposed by the manufacturers and the confessed object of the plan or system was to obtain a price to the jobber and to the retailer unaffected by any competition between them, it was decided that such system of contracts was in violation of the Anti-Trust Act.[21] And where manufacturers, wholesalers and retailers of drugs and proprietary medicines entered into a combination for the purpose of fixing a minimum price at which such articles should be sold at retail and prohibiting their sale only to those retailers who sold the same in accordance with the prices fixed by the combination it was determined that such articles being of general use, the combination was one in restraint of trade within the meaning of the Anti-Trust Act.[22]

[21] Dr. Miles Medical Co. v. John D. Park & Sons Co., 164 Fed. 803, 90 C. C. A. 579. The court said: "It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article when it has once passed under the dominion of a buyer. A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world. Coke on Littleton, § 360. The mere fact that one article or class of articles is made under an unknown and private formula and another class is not is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade." Per Lurton, C. J.

See also John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158.

[22] Loder v. Jayne (U. S. C. C.), 142 Fed. 1010, reversed upon other grounds in Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653.

§ 139. Acts and Combinations of Labor Organizations.

The Anti-Trust Act makes no distinction between classes. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the offers which the records of Congress show were made in that direction.[23] All combinations in restraint of commerce without reference to the character of the persons who entered into them are within the operation of the act. The interdiction includes combinations of labor as well as capital.[24]

A combination of labor organizations and the members thereof, to compel a manufacturer where goods are almost entirely sold in another State, to unionize his shops, and on his refusal so to do to boycott his goods and prevent their sale in States other than his own until such time as the resulting damages force him to comply with their demands, is a combination in restraint of interstate trade or commerce within the meaning of the Anti-Trust Act which entitles such manufacturer to maintain an action for threefold damages.[25] So there was held to be a combination in restraint of trade where it appeared that a combination of labor associations set out to secure and compel the employment of none but union men in a given business and as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city from State to State and to and from foreign countries.[26] And the fact that corporations of various labor organizations were in their origin and purposes innocent and lawful is not available as a ground of defense to a charge of unlawful combination which charge is fully established.[27]

[23] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301.

[24] United States v. Workingmen's Amalgamated Council of New Orleans (U. S. C. C.), 54 Fed. 994.

[25] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301, rev'g 148 Fed. 924.

[26] United States v. Workingmen's Amalgamated Council of New Orleans (U. S. C. C.), 54 Fed. 994.

[27] United States v. Workingmen's Amalgamated Council of New Orleans (U. S. C. C.), 54 Fed. 994.

§ 140. Manufacturing and Other Contracts—Generally.

A contract by which a manufacturer gives to another the exclusive right to sell his products, which are the subject of interstate commerce, is not in violation of the statute. Such a contract is a usual and reasonable method by which the manufacturer may provide for the disposition of the product and the effect, if any, upon interstate or international commerce, is only incidental and indirect.[28] And where a manufacturer enters into a contract with jobbers for the shipment of some of the manufactured product to the latter in another State and by the terms of the contract it is provided that the purchaser shall neither sell, ship nor allow to be shipped any of the product so purchased outside of a certain State, such contract has been held not to be in violation of the Anti-Trust Act.[29] But where a number of manufacturers situated in different States organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect is to restrain and monopolize interstate and foreign trade and commerce and is illegal under the Anti-Trust Act.[30] And where a manufacturer, a corporation and its employees restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of its goods was profitable to them it was held that the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the Anti-Trust Act.[31]

[28] Virtue v. Creamery Package Mfg. Co., 179 Fed. 115, 102 U. S. C. C. A. 413.

[29] Phillips v. Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19.

[30] Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. 280, aff'g 148 Fed. 939, 78 C. C. A. 567.

[31] Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290. The court said: "There is another reason why the complaint in this action

And where a number of jobbers who had been purchasing their supplies through brokers organized a corporation to do their own brokerage business as well as that of others and purchased their merchandise through such corporation though they were not obligated by any agreement so to do or to cease dealing with any broker, it was decided that the fact that goods were purchased through such corporation from other States and that some foreign manufacturers placed their accounts with it, their action being voluntary, and there being no proof connecting the parties in any unlawful scheme, did not constitute a violation of the act.[32]

§ 141. **Contracts as to Manufactures within a State.**

The monopoly and restraint denounced by the Sherman Anti-Trust Act "to protect trade and commerce against unlawful restraints and monopolies" are a monopoly in interstate or international trade or commerce and not a monopoly in the manufacture of a necessary of life.[33] In this case the distinction was made that the combination related to the business of manufacturing within a State and bore no direct relation to commerce between the States or with foreign nations, though it might indirectly affect it. This distinction is stated in a later case before

fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now no act or omission of a party is actionable, no act or omission of a party causes legal injury to another, unless it is either breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that damnum absque injuria for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at a price which would make their purchases profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less at prices so low that he could realize a profit by selling them again to others." Per Sanborn, C. J.

[32] Arkansas Brokerage Co. v. Dunn & Powell, 173 Fed. 899, 97 C. C. A. 454.

[33] United States v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. 249, aff'g 60 Fed. 934, 9 C. C. A. 297.

the United States Supreme Court wherein it is said: "The case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce." [34]

So in another case it is decided that the act being for the purpose of protecting interstate trade and commerce against unlawful restraint and monopolies it does not refer to manufactories within a State, the manufacture within a State of an article of commerce being declared not to be within the purview of the act although the manufacturing combination constitutes a monopoly. In such a case it is said to be immaterial that the manufactured article is intended for sale in other States and foreign countries but that the contract or combination must go further and provide for the sale and transportation to other States.[35]

§ 142. By Manufacturers of Shingles.

Where a certain kind of shingles could only be made in one State but were to a great extent shipped for use in other States and the manufacturers thereof located in such State formed an association to control the production and price of the shingles and proceeded to reduce the production by closing mills of its members, and at the same time increased the price of the product, such combination was held to be an illegal one within the meaning of the Sherman Anti-Trust Act.[36]

[34] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96; see also Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276, where a similar statement is made.

[35] Robinson v. Suburban Brick Co., 127 Fed. 804, 62 C. C. A. 484. See Gibbs v. McNeely, 107 Fed. 211, reversed in 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152.

[36] Gibbs v. McNeely, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152, rev'g 107 Fed. 210.

§ 143. By Manufacturers of Iron Pipes.

Several manufacturers who controlled the market for cast-iron pipe in a large number of States entered into an agreement and formed a combination the object of which was to suppress competition and thus control the prices of their product. This was done by the appointment of a board consisting of one representative from each shop. All inquiries for pipes were referred to this board which fixed the price it thought the job would stand and it was then sold to such shop of the combination as bid the highest bonus, and this shop at the public letting bid the fixed price and the other shops in the combination bid in excess thereof in order to deceive the public. It was decided that there was a violation of the Anti-Trust Act.[37]

§ 144. By Tobacco Manufacturers and Jobbers.

Where a large number of corporations engaged in the tobacco business and competing in purchasing raw materials, in manufacturing, in jobbing and in selling to the consumer formed a combination controlling a greatly preponderating proportion of the tobacco business in the United States in each and all its branches, which resulted in the elimination of competition, such combination was held to be in restraint of interstate commerce and in violation of the Anti-Trust Act.[38]

§ 145. By Manufacturers of Licorice Paste.

Where it appeared that defendants had agreed that there should be no competition in price for licorice paste; that they agreed from time to time upon and maintained noncompetitive prices therefor and actually sold at such prices and also induced certain competitors to establish and maintain arbitrary and noncompetitive prices; that such prices were in excess of reasonable and normal prices that would have prevailed; that there was a division and apportionment of the amount of such business which

[37] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[38] United States v. American Tobacco Co. (U. S. C. C.), 164 Fed. 700.

certain manufacturers should do and that one competitor entered into a contract stipulating the amount he might sell it was decided that there was a violation of the Anti-Trust Act.[39]

§ 146. **By Association Dealing in Tiles, Mantels and Grates.**

It appeared in this case that an association was formed in California by manufacturers of, and dealers in, tiles, mantles and grates, the dealers agreeing not to purchase materials from manufacturers who were not members and not to sell unset tiles to anyone other than members for less than list prices which were fifty per cent higher than the prices to members. The manufacturers, who were residents of States other than California, agreed not to sell to anyone other than members. Violations of the agreement rendered the members subject to forfeiture of membership. Membership in the association was prescribed by rules and dependent on conditions, one of which was the carrying of not less than a certain amount of stock and whether applicants were admitted was a matter for the arbitrary decision of the association. In an action by a firm of dealers in the same line of business in San Francisco whose members had never been asked to join the association and who had never applied for admission therein and which did not always carry the required amount of stock, to recover damages under the Sherman Anti-Trust Act,[40] it was decided that though the sales of unset tiles was within the State of California, and although such sales constituted a very small portion of the trade involved, agreement of manufacturers without the State not to sell to anyone but members was part of a scheme which included the enhancement of the price of unset tiles by dealers within the State, and that the whole thing was so bound

[39] United States Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 163 Fed. 701, followed in Weisert Bros. Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 163 Fed. 712. See also United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823.

[40] Section 7 as given in §§ 13, 14, herein.

together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and commerce within the meaning of the Anti-Trust Act and that the parties aggrieved were entitled to recover threefold the damages found by the jury.[41]

§ 147. By Sugar Refining Companies.

The American Sugar Refining Company, a corporation existing under the laws of the State of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business. In a proceeding under the provisions of the Sherman Anti-Trust Act "to protect trade and commerce against unlawful restraints and monopolies" it was determined that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life which could not be suppressed in the mode attempted and that the acquisition of the Philadelphia refineries by a New Jersey corporation, and the business of sugar refining in Pennsylvania, bore no direct relation to commerce between the States or with foreign nations.[42]

§ 148. By Dealers in Fresh Meat.

A combination of a dominant proportion of the dealers in fresh meats throughout the United States, not to bid against, or only in conjunction with, each other in order to regulate prices in and induce shipments to the live stock markets in other States, to restrict shipments, establish uniform rules of credit, make improper rules of cartage, and to get less than lawful rates from railroads, to the exclusion of competitors, with the intent to monopolize com-

[41] Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. 307.

[42] United States v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. 249, aff'g 60 Fed. 934, 9 C. C. A. 297.

merce among the States, is an illegal combination within the meaning and prohibition of the Anti-Trust Act.[43]

§ 149. **By Association of Cattle Dealers.**

Where an exchange was composed of an association of men doing business at its stockyards, and the business of the members was to receive consignments of cattle from different States, to prepare the same for market, to dispose of the cattle, and to receive and account for the proceeds to the owners after deducting charges, expenses and advances and the members were in the habit of soliciting consignments from owners but were forbidden from buying from a commission merchant in the same city who was not a member of the exchange and the rules also fixed the commission to be paid for selling such stock but prohibited the employment of agents except upon a stipulated salary; or the sending prepaid telegrams or telephone messages as to the condition or the market; or the transaction of business with any person violating the rules or regulations or with any expelled or suspended member after notice of such violation, it was determined that such business or occupation was not within the meaning of the Anti-Trust Act and that such act did not cover and was not intended to cover such kinds of agreements it being declared that such services were collateral to interstate trade or commerce and in the nature of local aid or facility provided for the cattle owner toward the accomplishment of his purpose to sell them and that an agreement among those who render the services relating to the terms under which they will render them is not a contract in restraint of interstate trade or commerce.[44]

In another case the Supreme Court reached a similar conclusion upon facts which were substantially the same, the main difference being that the members of the exchange, defendants in the present case, were themselves purchasers of cattle on the market, while the defendants in

[43] Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276.

[44] Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. 40.

the former case were commission merchants who sold cattle upon commission as a compensation for their services. In this case it was declared that where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.[45]

§ 150. **By Board of Trade—Contracts as to Quotations.**

Contracts under which a board of trade, which collects at its own expense, quotations, furnishes them to telegraph companies when it could refrain from communicating them at all, on condition that they will only be distributed to persons in contractual relations with, and approved by, the board and not to what are known as bucket shops, are not void and against public policy as being in restraint of trade either at common law or under the Sherman Anti-Trust Act.[46]

§ 151. **By Railroad Companies.**

Railroad carriers engaged in interstate or international trade or commerce are embraced by the Sherman Anti-Trust Act and every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce,

[45] Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. 50.

[46] Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. 637, rev'g 125 Fed. 161, 61 C. C. A. 11.

is made illegal by the act.[47] The provisions of the act apply to a contract between such carriers in restraint of such trade or commerce, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property.[48]

The doctrine above was shortly after affirmed by the United States Supreme Court in a case where it appeared that thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the joint traffic association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change these rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest therein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should co-operate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to continue in existence for five years. In construing this agreement the court declared that the fact that the rates were reasonable was not material as the agreement was one which in substance

[47] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[48] United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

operated to prevent competition between the companies which had entered into it, the result of which would be to restrain instead of promote commerce.[49] So where no individual investment is involved but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a direct restraint of trade by destroying competition and is illegal within the meaning of the Sherman Anti-Trust Act.[50] But where a railroad company entered into a contract with an individual by the terms of which the latter was "to build up, develop, increase, facilitate, and conduct the business of the transportation of milk" over the lines of the former; to be wholly responsible for the milk so transported; to charge for such transportation rates not in "excess of those charged by competitive railroads for similar services; to have the exclusive privilege to transport milk on said lines and to retain a certain per cent of the charges as compensation for his services it was decided that such contract was not in violation of the Anti-Trust Act.[51] And where the competition between two railroad companies engaged in the coal carrying business was but slight it was held that the purchase by one of the stock of the other was not a combination in violation of the act, it appearing that the main object of the purchase was to provide better terminal facilities for both roads and that such facilities were in fact greatly improved as a result thereof.[52]

§ 152. By Owners of Vessels.

Where there was a combination of shipowners, engaged

[49] United States v. Joint Traffic Assn., 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25.

[50] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[51] Delaware, L. & W. R. Co. v. Kutter, 147 Fed. 51, 77 C. C. A. 315.

[52] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427.

in foreign commerce, for the purpose of preventing competition between members by maintaining uniform rates and, to eliminate the possibility of competition with other lines, shippers patronizing such lines were required to pay that which was equivalent to forfeit money, it was held that there was a violation of the Anti-Trust Act.[53]

A contract, however, is not to be assumed to contemplate unlawful results unless a fair construction requires it. Therefore where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the provisions of the Sherman Anti-Trust Act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points. Even if there is some interference with interstate commerce a contract is not necessarily void under such act if the interference is insignificant and merely incidental and not the dominant purpose. The contract in such a case will be construed as a domestic contract and its validity determined by the local law.[54]

§ 153. **Mining Contracts.**

Where a company, engaged in mining and refining copper, by purchasing outright and obtaining proxies acquired control of the majority of the shares of another company also engaged in the same pursuit on adjoining property, the object of the former company being to enable it to elect a majority of the directors of the latter company and such act was authorized by the law of the State it was held that the Anti-Trust Act was not violated thereby there being nothing to show any intent to create a monopoly, restrain competition or diminish production and it being claimed that the only object was to extend the industrial life of the company so acquiring control and to bring about a more economical management of their

[53] Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315, rev'g 149 Fed. 933.

[54] Cincinnati, P. P. S. & P. P. Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. 208.

own property by a friendly and mutually advantageous use of the facilities of the two companies.[55]

§ 154. Contracts Between Coal Companies.

Where an association composed of independent producers of coal and coke entered into a contract with a fuel company by which the latter was to handle the output of the members of such association for the western market, to be shipped over a certain line of railroad, and by the terms of the contract the fuel company was prohibited from selling the product of competing mines or to sell below a minimum price to be fixed by an executive committee, the company to retain a certain fixed sum per ton as compensation and to pay over to the association all profit in excess of such sum, and such committee fixed the amount which was to be furnished by each member of the association, it was decided that the contract was one in restraint of interstate commerce within the provisions of the Sherman Anti-Trust Act.[56] But in another case it was declared that there was nothing in the Anti-Trust Act which deprived a coal company of any of its rights as owner and vender of merchandise to fix its prices therefor, the terms on which it will sell, to select its customers and to sell to some at one price and one set of terms and to others at another price and on a different set of terms. In the application of this principle it was held that such a company did not violate the act by refusing to sell its coal to a certain person unless he would withdraw his advertisement of a reduction in the retail price of it, there being no evidence of a combination between such company and some other person or persons so to do.[57]

[55] Bigelow v. Calumet & Hecla Min. Co., 167 Fed. 721, 94 C. C. A. 13, aff'g Bigelow v. Calumet & Hecla Min. Co. (U. S. C. C.), 167 Fed. 704.

[56] Chesapeake & O. Fuel Co. v. United States, 115 Fed. 610, 53 C. C. A. 256.

[57] Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578.

CHAPTER XIII

SHERMAN ANTI-TRUST ACT—VIOLATIONS AS DEFENSE TO ACTION BY COMBINATION

§ 155. Contract with Combination—Voluntary Purchaser—Illegality of Combination no Defense.
156. Contract with Combination—Voluntary Purchaser—Application of Rule.
157. Contract with Combination—When Illegality of Combination a Defense.
§ 158. Suit by Combination for Infringement of Patent—Illegality of Combination as Defense.
159. Suit by Combination for Infringement of Trade-Mark or Copyright — Illegality of Combination as Defense.

§ 155. Contract with Combination—Voluntary Purchaser—Illegality of Combination no Defense.

Where a contract is independent of, and in no way connected with, the illegal purposes for which a combination may be formed it is held to be no defense to an action thereon that such combination is one in violation of law.[1]

Though a combination may be unlawful as being in restraint of trade within the meaning of the Anti-Trust Act yet such act does not declare illegal or void any sale made by such combination or its agents of property acquired for the purpose of being sold; such property not being at the time in course of transportation from one State to another or to a foreign country. The contract of sale may be regarded as collateral to the agreement between the seller and the other corporations forming the illegal combination and the buyer cannot refuse to comply with his contract of purchase upon the ground of the illegality of the combination.[2] So it is no objection to the enforce-

[1] Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484.

[2] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431. See also Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 Fed. 242, 74 C. C. A. 462.

ment of a contract, in the consideration and performance of which nothing illegal adheres, that it may incidentally aid one of the parties in evading or violating the statute.[3]

The Sherman Anti-Trust Act does not invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods.[4]

One who voluntarily and knowingly deals with parties to such a combination, cannot on the one hand take the benefit of his bargain and on the other have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal or the prices unreasonable.[5]

§ 156. Contract with Combination—Voluntary Purchaser—Application of Rule.

Where a combination which was formed for the sale of sewer pipe, sold some of such pipe under special contracts with the purchaser for an agreed price and the latter when sued upon the contract set up the illegality of the combination as defense, it was decided that such defense could not be maintained.[6] And where the proof showed

[3] Ingraham v. National Salt Co., 130 Fed. 676, 65 C. C. A. 54.

[4] Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 Fed. 242, 74 C. C. A. 462.

Where a stranger enters into a contract with an unlawful combination, and such contract is founded upon a good consideration and is collateral to the unlawful scheme or combination it is not tainted thereby. Chicago Wall Paper Mills v. General Wall Paper Co., 147 Fed. 491, 78 C. C. A. 607.

[5] Dennehy v. McNulta, 86 Fed. 825, 30 C. C. A. 422, aff'g Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415, 40 U. S. App. 578.

[6] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431. Mr. Justice Harlan said: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the

that the tugs mentioned in the libel rendered services to the claimants' dredge in sums aggregating several hundred dollars it was held that the claimant could not avoid payment for such services thus requested and accepted by him, upon the ground that the tug owners were members of an association which was illegal and void under the Anti-Trust Act.[7]

§ 157. Contract with Combination—When Illegality of Combination a Defense.

Where a person is sued upon a contract which is void as in violation of the Anti-Trust Act, he may set up as a defense to such action that the contract is one in violation of the Sherman Anti-Trust Act.[8]

While a voluntary purchaser of goods at stipulated prices under a collateral independent contract cannot avoid payment merely on the ground that the vendor was an illegal combination, it is determined that a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense.[9] In this case it was said: "In such cases the

protection of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe."

[7] The Charles E. Wisewall (U. S. D. C.), 74 Fed. 802. The court said: "Assuming, however, in order to avoid argument, that the agreement by which the tugs undertook to act in unison was prohibited by the act, as being in restraint of trade, my present impression is that this assumption will not aid the claimant. He should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services and having accepted the benefit thereof, he should pay." Per Coxe, J.

[8] Bement v. National Harrow Co., 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. 747. The court said: "As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal." Per Mr. Justice Peckham.

[9] Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53

aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by law." [10] This case was also distinguished from Connolly v. Union Sewer Pipe Co.[11] as follows: "In that case the defendant who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of, nor in execution of, any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason alone of its illegal character, from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress." [12]

L. ed. 486, 29 Sup. Ct. 280, aff'g 148 Fed. 939, 78 C. C. A. 567. See also Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 247, 44 L. ed. 136, 20 Sup. Ct. 96.

[10] Per Mr. Justice Harlan.

[11] 184 U. S. 540, 545, 46 L. ed. 679, 22 Sup. Ct. 431.

[12] Per Mr. Justice Harlan, who further said: "The case now before us

§ 158. Suit by Combination for Infringement of Patent —Illegality of Combination as Defense.

The mere fact that a company may be a party to an unlawful combination does not deprive it of the right to sue and recover damages against an infringer of patents owned by it or to bring suit if it believes the patents are being infringed.[13]

The fact that the owner of a patent is a member of a combination which is in violation of the Anti-Trust Act confers no right upon a third person to infringe such patent, nor is the owner thereof precluded by such fact from seeking relief by way of an injunction against such an infringement.[14]

So in a suit for an infringement of a patent the court granted a motion to strike out a paragraph of an answer which alleged that the complainant was a party to an unlawful conspiracy which tended to restrain trade and oppress defendant in his business.[15] And in another case it was said on a motion for a preliminary injunction that the charge, if established, that the complainant is itself, or is a member of, a combination in violation of the Federal Anti-Trust Statute, is not a defense available in an action for the infringement of a patent and fails to show a defect in the complainant's title.[16]

is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods, which, it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme. * * * If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

[13] Virtue v. Creamery Package Mfg. Co., 179 Fed. 115, 102 C. C. A. 413; National Folding Box & Paper Co. v. Robertson (U. S. C. C.), 99 Fed. 985.

[14] General Electric Co. v. Wise (U. S. C. C.), 119 Fed. 922. The court said: "It is difficult to understand how or why a violation of the Sherman Anti-Trust law by this complainant, if there has been such a violation, confers any right on the defendant to infringe this patent. The act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating some statute." Per Ray, D. J.

[15] Johns-Pratt Co. v. Sachs Co. (U. S. C. C.), 176 Fed. 738.

[16] Motion Pictures Patent Co. v. Laemmle (U. S. C. C.), 178 Fed. 104.

§ 159. Suit by Combination for Infringement of Trade-Mark or Copyright—Illegality of Combination as Defense.

One who has infringed a trade-mark cannot invoke as a defense to liability therefor the fact that the owner of the trade-mark has violated the Sherman Anti-Trust Act.[17] So in a suit for an injunction to restrain the infringement of a trade-mark the defendant cannot avail himself of the plea, as a defense, that the complainant acquired the trade-mark as the result of a conspiracy with the manufacturer for the purpose of destroying the competition between the defendant and such manufacturers, which is in violation of the Anti-Trust Act.[18] And in a suit for infringement of a copyright it is no defense thereto that defendant is a member of a combination which violates the Anti-Trust Act.[19]

See also Johns-Pratt Co. v. Sachs Co. (U. S. C. C.), 176 Fed. 738; National Folding Box & Paper Co. (U. S. C. C.), 99 Fed. 985.

[17] Northwestern Consol. Mill Co. v. Callam & Son (U. S. C. C.), 177 Fed. 786. In this case it was said by the court: "The Sherman act has its own penalties for violations of any of its provisions. It contains nothing that sanctions the argument than an offender against it shall be deprived of redress for a civil injury on the plea that he has been guilty of an infraction of that act which gives a remedy to one injured in his business or property against the transgression of the law, and does not suggest that one who has taken the property, infringed the trade-mark or patent of another, or refused to pay debts because of an alleged transgression of the Sherman act by the creditors, can make that act as a defense to liability either in suits in tort or contract." Per Swan, D. J., citing Independent Baking Powder Co. v. Boorman (U. S. C. C.), 130 Fed. 726; Connolly v. Union Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679.

[18] Independent Baking Powder Co. v. Boorman (U. S. C. C.), 130 Fed. 726.

[19] Sentner v. Straus (U. S. C. C.), 130 Fed. 389.

CHAPTER XIV

SHERMAN ANTI-TRUST ACT—PROCEDURE AND DAMAGES

§ 160. Who May Sue—When Individual May—Injury to "Business or Property."
161. Who May Sue—Injunction — Right of Individual — Suit by Attorney-General.
162. Who May Sue—Right of Stockholder—Creditor.
163. Who May Sue — Right of Member of Combination.
164. Who May Sue—Municipal Corporation a "Person."
165. Who May Sue—State Not a "Person" or "Corporation."
166. Who May Sue—Right of Receiver.
167. Time of Entering into Combination as Affecting Right to Recover.
168. Jurisdiction of Courts—Generally.
169. Jurisdiction—Parties—Summoning of.
170. Jurisdiction—Parties—Summoning of — Not Restricted by Judiciary Act.
171. Jurisdiction — Exercise of Not Discretionary—Summoning Parties.
172. Jurisdiction — Extent of Judgment.
173. Sufficiency of Complaint or Petition—General Rules.
174. Sufficiency of Complaint—Rules in Force in State Where Action Brought—Practice Act.
175. Sufficiency of Complaint—Particular Cases.
§ 176. Sufficiency of Complaint—Duplicity.
177. Sufficiency of Complaint—Joinder of Defendants—Election.
178. Sufficiency of Indictment—General Rules.
179. Sufficiency of Indictment—Charging Officers, Agents or Stockholders.
180. Indictment Charging Conspiracy — Denial Under General Issue.
181. Indictment Not Conclusive —Removal Proceeding.
182. Evidence—Admissibility and Weight.
183. Evidence—As to Intent—When Essential.
184. Evidence—Burden of Proof.
185. Evidence — Presumption in Respect to Combination.
186. Evidence — Documents — Witnesses — Power of Court.
187. Witness—Examination of a "Proceeding."
188. Damages — Recovery of — Generally.
189. Damages — Nature of Action for Jury Trial.
190. Damages—Action for—Statute of Limitations — A Civil Remedy.
191. Damages—Where Payment of Higher Price Compelled.
192. Damages — Cannot Be Set off.
193. Distribution of Assets of Holding Corporation — Right to Return of Shares.

§ 160. Who May Sue—When Individual May—Injury to "Business or Property."

When the combination or conspiracy to restrain and monopolize interstate trade, which is condemned by the statute, is established an injury "done to the business or property" of "any person," by reason thereof, constitutes a cause of action.[1] And a person whose property is diminished by a payment of money wrongfully induced is injured in his property within the meaning of the provisions of this act.[2] So if defendants have by an illegal agreement and combination, in violation of the Anti-Trust Act, arbitrarily increased the price of a commodity to the consumers, the plaintiff amongst others, and made the prices excessive and unreasonable and much greater than it would have been but for such combination, and the plaintiff was compelled to pay that unreasonable and excessive price and more than its actual value because of the illegal agreement or combination, he is clearly injured in his property thereby.[3]

All that is necessary to support an action by an individual under this act is that his business or property shall have been in some way injured by reason of the illegal scheme.[4] But a conspiracy or combination though themselves unlawful cannot injure any person either in his business or property so as to give him a cause of action under the statute unless something be done to make the combination or conspiracy effective.[5]

§ 161. Who May Sue—Injunction—Right of Individual—Suit by Attorney-General.

By violating a criminal or penal statute a person, either

[1] Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160.

[2] Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. 65.

[3] United States Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 163 Fed. 701.

[4] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[5] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

natural or corporate, does not render itself liable to be sued by a private citizen unless the unlawful conduct is the proximate cause of, or results in, some special injury to the business or property of the person bringing the action.[6] An individual injured by a violation of the Anti-Trust Act cannot sue for an injunction under that act as such remedy is available to the government only. His only remedy is an action for threefold damages.[7]

The provision of the Sherman Anti-Trust Act was to limit direct proceedings in equity, to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States, and with foreign nations, to those instituted in the name of the United States under the provision of the act [8] by district attorneys of the United States, acting under the direction of the Attorney-General, thus securing the enforcement of the act so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.[9] So in another case it is said: "It has been many times decided, and no longer admits of any question or doubt, that the only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the Anti-Trust Act is the United States attorney, at the instance of the Attorney-General." [10]

[6] Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160.

[7] National Fireproofing Co. v. Mason Builders' Assn., 169 Fed. 259, 94 C. C. A. 535.

Suits in equity or injunction suits under this act by other than the government are not authorized. Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142; Greer, Mills & Co. v. Stoller, 77 Fed. 1; Pidcock v. Harrington (U. S. C. C.), 64 Fed. 821.

[8] Section 4.

[9] Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598.

[10] Metcalf v. American School Furniture Co. (U. S. C. C.), 122 Fed. 115, per Hazel, J., citing Pidcock v. Harrington (U. S. C. C.), 64 Fed. 821; Southern Indiana Expr. Co. v. United States Expr. Co. (U. S. C. C.), 88 Fed. 659; Connolly v. Union Sewer Pipe Co., 184 U. S. 547, 22 Sup. Ct. 431, 46 L. ed. 679.

In the application of the rule that a private citizen is not by this act accorded the right to an injunction, it consequently follows that in such a proceeding a Federal court cannot acquire jurisdiction of a nonresident defendant against his consent.[11]

A suit brought by the Attorney-General of the United States under the Sherman Anti-Trust Act to declare a combination of individual stockholders of competing railroad lines engaged in interstate commerce to obtain control, by means of a holding corporation, of such lines, is not an interference with the control of the States under which the railroad companies and the holding company were, respectively, organized.[12]

§ 162. Who May Sue—Right of Stockholder—Creditor.

The provision of the act allowing a person injured in his business or property by anything forbidden or declared to be unlawful to recover damages therefor was not intended to confer upon each individual stockholder an individual right of action when the wrongs sustained by all of the stockholders of a corporation could be equally well and far more economically redressed by a single suit in the name of the corporation. It was not the purpose of the act to multiply suits.[13]

In another case, however, the court after reviewing several decisions said: "While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the anti-trust act, to relief by injunction under the general equity jurisdiction of the court." Bigelow v. Calumet & Hecla Min. Co. (U. S. C. C.), 155 Fed. 869, 877, per Knappen, J., after referring to the following cases: Blindell v. Hagan (U. S. C. C.), 54 Fed. 40, 56 Fed. 696, 6 C. C. A. 86; Pidcock v. Harrington (U. S. C. C.), 64 Fed. 821; Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 50 C. C. A. 142; Southern Indiana Expr. Co. v. United States Expr. Co. (U. S. C. C.), 88 Fed. 659, 92 Fed. 1022, 35 C. C. A. 172; Metcalf v. American School Furn. Co. (U. S. C. C.), 108 Fed. 909, 113 Fed. 1020, 35 C. C. A. 172.

[11] Greer, Mills & Co. v. Stoller (U. S. C. C.), 77 Fed. 1.

[12] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 28 Sup. Ct. 436.

[13] Loeb v. Eastman Kodak Co., 183 Fed. 704, 106 C. C. A. 142; Bishop v. American Preservers' Co. (U. S. C. C.), 105 Fed. 845.

In the application, therefore, of this doctrine it has been declared that neither a stockholder nor a creditor of a corporation who claims to have sustained injury by reason of an unlawful combination can maintain a suit to recover therefor in his own name but that the action should be brought either in the name of the corporation or of its trustee in bankruptcy.[14] And in an action by a stockholder of a corporation against another corporation for damages in which it was alleged that the latter corporation had secured control of the former by purchase of its shares of stock and had managed it not for the purpose of developing its business but to prevent it from doing business by suppressing and smothering competition which it would otherwise cause to the business of the defendant until the company had gone into the hands of a receiver; that by the exercise of such control the defendant had monopolized such interstate commerce and that his injury was the rendering worthless his shares of stock, it was held that the declaration did not set forth any injury to the plaintiff resulting in a special damage peculiar to himself and distinguished in kind from that which he shared with other stockholders, and that the corporation alone or its receiver could maintain the action under the Anti-Trust Act.[15]

[14] Loeb v. Eastman Kodak Co., 183 Fed. 704, 106 C. C. A. 142.

[15] Ames v. American Telephone & Telegraph Co. (U. S. C. C.), 166 Fed. 820. The court said: "The Sherman Act does not by its terms affect the question whether an injury is in legal contemplation an injury to the corporation or an injury to the stockholder. This question must be determined upon ordinary principles of law. There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman Act as to any other violation of law. There is no indication of an intention of Congress to subject a defendant to independent suits by a multitude of stockholders for an act for which the statute affords redress to the corporation itself. The corporation has a right of action and to so interpret the act as to confer a right of action upon the stockholder also, upon the present declaration would be in effect to subject the defendant not merely to treble damages but to sextuple damages, for the same unlawful act. * * * The declaration alleges that the cable company is now in the hands of a receiver. It follows that upon recovery of damages for an injury to the corporation the fund belongs to the receiver for application to the obligations of the corporation. These obligations take precedence over the interest of the shareholder. The

In another case where the plaintiff, a stockholder in a corporation, brought a suit for equitable relief in behalf of herself and other stockholders to set aside a transfer by the majority of the stockholders of the corporate property, alleging a conspiracy in restraint of trade and commerce and also seeking to recover the damages allowed by the Anti-Trust Act, it was held that such bill was multifarious since the damages were not recoverable by her as a stockholder but as an individual, while the equitable remedy she asked for would enure in favor of all the stockholders if granted.[16]

In a later decision the facts of the case are referred to as being substantially different, it being declared that in the earlier case there is no careful consideration of the question of representation of the stockholder by the corporation in suits under the Sherman Anti-Trust Act; that the decision is confined to the ground of multifariousness and that the affirmance of the decision amounts to nothing more than an affirmation of the decision that the claim for triple damages under the act could not be joined with a stockholder's bill.[17]

§ 163. Who May Sue—Right of Member of Combination.

Where a combination is in violation of the Anti-Trust Act a court of equity will not grant relief by way of injunction to protect the rights of a member of such combination

prior recovery by a shareholder, if permitted to diminish recovery by the receiver, would result in depriving creditors of the corporation, if there are any, of the assets properly belonging to them. Moreover, the assets of the corporation are subject to disposal by proper corporate action, and the individual stockholder has no rights inconsistent with this right of the corporation. * * * The plaintiff does not contend that the right of action for treble damages is given to the stockholder and denied to the corporation. A construction of the act which makes the defendant liable to sextuple damages is certainly to be avoided. The asserted right of the stockholder is inconsistent with the right of the corporation to maintain suit upon the facts alleged in the declaration." Per Brown, J.

[16] Metcalf v. American School Furniture Co. (U. S. C. C.), 108 Fed. 909, affirmed 113 Fed. 1020, 51 C. C. A. 599.

[17] Ames v. American Telephone & Telegraph Co. (U. S. C. C.), 166 Fed. 820.

where such rights exists under contracts directly connected with the object and purpose of such unlawful combination. So where complainant, a railroad company, was a member of a combination of railroads extending through different States, the object of which was to prevent competition, and the terms of the agreement between the members provided for the pooling of the receipts of all the roads and for a division on an agreed basis, and it appeared that special rates to an exposition were fixed by a committee of the association as were also the terms of the tickets upon which the suit was based it was decided that the complainant could not obtain an injunction against ticket brokers restraining them from dealing in such tickets.[18]

§ 164. Who May Sue—Municipal Corporation a "Person."

A municipal corporation may be entitled to maintain a suit as a person injured, within the meaning of this act. So where a municipal corporation is maintaining a system of waterworks, charging for the same precisely as would a private corporation engaged in a like business, and it is injured in such business by an unlawful combination within the meaning of the Anti-Trust Act it may maintain a suit the same as a private corporation could. And the fact that the profit resulting inures to the public does not alter the fact that when so engaged it is pro hac vice a business corporation.[19] So in this connection it is determined that a city is a person within the meaning of the act and can maintain an action against a party to a combination unlawful under the act by reason of which it has been forced to pay a price for an article above what it is reasonably worth.[20]

§ 165. Who May Sue—State Not a "Person" or "Corporation."

A State is neither a "corporation" nor a "person" in the

[18] Delaware, L. & W. R. Co. v. Frank (U. S. C. C.), 110 Fed. 689.

[19] City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, affirmed, 203 U. S. 290, 27 Sup. Ct. 65, 51 L. ed. 241.

[20] Chattanooga Foundry & Pipeworks v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. 65.

sense in which these words are used in the Anti-Trust Act. This conclusion has been reached in a case where it was contended that there was a violation by a State of the Sherman Anti-Trust Act by declaring and asserting in herself the monopoly in the purchase and sale of intoxicating liquors, it being declared that by such act the State had made no contract nor entered into any combination or conspiracy.[21] So a State cannot maintain an action in equity to restrain a corporation from violating the provisions of the Sherman Anti-Trust Act on the ground that such violation by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from violations being remote and indirect and not such direct actual injury as is provided for in such act.[22] And even if the State were a "person" within the meaning of the act so as to permit one to sue it for damages thereunder because of a monopoly by it, yet in such a case no relief could be had without the State being a party and this is held to destroy the jurisdiction of the Circuit Court.[23]

§ 166. Who May Sue—Right of Receiver

While a receiver of a corporation may in certain cases properly maintain an action under the Sherman Anti-Trust Act for damages resulting to such corporation as the result of a monopoly or combination in violation of the act,[24] yet a receiver appointed by a Circuit Court but who is not vested with title to the property or choses in action of the corporation cannot maintain a suit under the Anti-Trust Act for damages in favor of the corporation.[25]

[21] Lowenstein v. Evans (U. S. C. C.), 69 Fed. 908.

A State is not a citizen within the meaning of the Constitution or the acts of Congress. Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598, citing Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 487, 39 L. ed. 231, 15 Sup. Ct. 192.

[22] Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598, construing § 7.

[23] Lowenstein v. Evans (U. S. C. C.), 69 Fed. 908.

[24] Ames v. American Telephone & Telegraph Co. (U. S. C. C.), 166 Fed. 820.

[25] Edwards v. National Window Glass Jobbers' Assn. (U. S. C. C.), 139 Fed. 795.

§ 167. **Time of Entering Into Combination as Affecting Right to Recover.**

It has been decided that acts and conduct of the defendant in which plaintiff could not have had an interest, it not then being in existence, are not material, being regarded as res inter alios acta.[26] And in a later case it is said by the court that it was of the opinion that this act gave no right of action to one who is not deprived of his existing profits, trade or commerce by the formation or action of an unlawful combination or monopoly but merely prevented from embarking upon a new enterprise by the threatening aspect of an already existing monopoly or combination.[27] In a more recent decision, however, it is declared that whether a combination was entered into before or after a plaintiff, who claims to be injured thereby, entered into business is immaterial as the statute applies to continuing combinations and it is as unlawful thereunder to prevent a person from engaging in business as it is to drive a person out of business.[28]

§ 168. **Jurisdiction of Courts—Generally.**

The fact that an act which is a violation of the Anti-Trust Law is also an offense against the law of a State does make such offense solely cognizable in the courts of the United States. This conclusion is based upon the doctrine that the same act may constitute an offense against the United States and against a State, subjecting the guilty party to punishment under the laws of each government; and may embrace one or more offenses.[29] And though the action under the statute may be brought in a district in which neither plaintiff nor defendant resides yet if the complaint is so framed as to present a cause of

[26] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[27] American Banana Co. v. United Fruit Co. (U. S. C. C.), 160 Fed. 184.

[28] Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315, rev'g 149 Fed. 933.

[29] Crossley v. California, 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. 242, citing Cross v. North Carolina, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. 47; Teal v. Felton, 12 How. (53 U. S.) 284, 292, 13 L. ed. 990.

action under the statute a defendant if "found" in such district cannot object to the jurisdiction.[30] Under section four of this act a restraining order may be issued by the court or judge without notice under the circumstances sanctioned by the established usages of equity practice.[31]

§ 169. Jurisdiction—Parties—Summoning of.

Congress has power under the United States Constitution[32] to confer upon any Federal court jurisdiction to summon the proper parties to a suit under the Anti-Trust Act, wherever residing or found within the dominion or nation, to a hearing and decree therein.[33] And under the provision of the United States statutes that the Supreme Court and the Circuit and District Courts shall "have power to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of their respective jurisdiction" [34] such a court may, in a prosecution under the Anti-Trust Act, issue process to compel defendants who are citizens of another State than the State wherein the indictment is pending to appear before it.[35] And the fact that more of the defendants may reside

[30] Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., 66 Fed. 637, 14 C. C. A. 14, 55 Fed. 851.

[31] United States v. Coal Dealers' Assn. (U. S. C. C.), 85 Fed. 252.

[32] Art. 3, §§ 1, 2.

[33] United States v. Standard Oil Co. (U. S. C. C.), 152 Fed. 290. The court said: "The United States is a party to the controversy which it involves; and the Congress had ample authority, under these provisions of the Constitution, to confer upon this or upon any inferior court of the nation jurisdiction of this suit and power to summon the proper parties to it, wherever residing or found within the dominion of the Union to a hearing and decree therein. United States v. Union Pacific R. Co., 98 U. S. 569, 25 L. ed. 143. As the Congress had the authority to enact that in this, and in other cases of this class, any Circuit Court in which the United States might bring its suit might, by process served anywhere in the United States, lawfully bring into it all the parties necessary to the adjudication of the controversies it involved, they had authority to empower such a court to bring in these parties whenever in its opinion the ends of justice should require such action, because the whole is greater than any of its parts and includes them all." Per Sanborn, J.

[34] Rev. St., § 716 (U. S. Comp. St. 1901, p. 580).

[35] United States v. Virginia-Carolina Chemical Co. (U. S. C. C.), 163 Fed. 66. It was contended in this case that the jurisdiction must already exist in order for writs to issue under this power. In regard to this the court

in a district other than that in which the court sits is not open to the adjudication or consideration of the court, as the jurisdiction conferred by Congress was not upon the court in the district where the largest number of defendants resided but upon every Circuit Court in whose district a resident defendant could be found and served with process. Such courts were not granted the power to select the court in which the United States should institute the suit.[36]

§ 170. Jurisdiction—Parties—Summoning of—Not Restricted by Judiciary Act.

The inhibition of the judiciary acts that "no civil suit shall be brought before either of said courts (the Circuit and District Courts) against any person by any original process or proceeding in any other district than that

said: "If by this is meant that jurisdiction must exist over the defendant, then the issuance of summons would be useless; but if it is meant that jurisdiction of the subject-matter must exist before summons can issue under § 716, Rev. St., then the answer is that that is precisely the condition in this case. In other words, the issuance of the summons and its service is but one step amongst others that is necessary to enable the court to exercise its jurisdiction in the pending case, of which it has jurisdiction by statute. * * * Is it not reasonable that, while Congress was devising means by which defendants in such civil suits might be served with process and brought before the courts, it also considered that subject in relation to defendants in criminal cases? Is it not a reasonable conclusion that it inserted the clause as to issuance of process in civil cases to avoid the provision of the removal act of 1888 and that it omitted to insert a clause as to defendants in criminal cases because that was then provided for under § 716, Rev. St., and further legislation on that subject was therefore unnecessary. * * * To hold otherwise, it seems, would necessarily imply that Congress was extremely careless, or purposely left a loop-hole by which such defendants could violate the Sherman Anti-Trust Act with impunity and escape prosecution and punishment." Per McCall, J.

The act does not prescribe the time or the manner in which it shall be made to appear to the court that other parties should be brought before it and, in the absence of any provision of this nature, the requisite appearance may be made at such a time and in such a way as the court, in the exercise of a sound judicial discretion, may direct or permit. United States v. Standard Oil Co. (U. S. C. C.), 152 Fed. 290.

[36] United States v. Standard Oil Co. (U. S. C. C.), 152 Fed. 290. The court said: "If it had done so each court might have selected another. It left the defendant free to commence its suit in any Circuit Court in which it could find and serve a resident conspirator." Per Sanborn, J.

whereof he is an inhabitant" [37] does not restrict the jurisdiction of the Circuit Court, nor its power to bring in parties without its district, in cases under the Sherman Anti-Trust Act, because that provision is inapplicable to instances in which exclusive jurisdiction over particular cases, or classes of cases, is created and conferred upon the courts of the United States by special acts of Congress.[38]

§ 171. Jurisdiction—Exercise of Not Discretionary—Summoning Parties.

Power being conferred by Congress upon the court in suits under this act to acquire jurisdiction of the subject-matter and of the parties, both resident and nonresident, the exercise of such power is not discretionary with the court when demanded by a complainant. In such a case the duty is imposed upon the court to summon and hear, before decision, not only every indispensable party, but every necessary party within reach of its process, every party who has an interest in the controversy, and who ought to be made a party to the suit, in order that the court may finally adjudicate the whole matter, although if he were not amenable to process, final justice might be administered between the other parties without his presence.[39]

§ 172. Jurisdiction—Extent of Judgment.

The fact that a court acquires jurisdiction by reason of the fact that the combination covers and regulates commerce which is interstate gives it no jurisdiction over

[37] Judiciary Acts March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

[38] United States v. Standard Oil Co. (U. S. C. C.), 152 Fed. 290, citing United States v. Mooney, 116 U. S. 106, 6 Sup. Ct. 304, 29 L. ed. 550; Van Patten v. Chicago, Milwaukee & St. Paul R. Co. (U. S. C. C.), 74 Fed. 981, 985–988; Atkins v. Disintegrating Co., 18 Wall. (U. S.), 272, 21 L. ed. 841; In re Louisville Underwriters, 134 U. S. 488, 493, 10 Sup. Ct. 587, 33 L. ed. 991; In re Hohorst, 150 U. S. 653, 662, 14 Sup. Ct. 221, 37 L. ed. 1211.

[39] United States v. Standard Oil Co. (U. S. C. C.), 152 Fed. 290.

that part of the combination or agreement which relates to commerce wholly within the State. Therefore a judgment perpetually enjoining defendants from maintaining a combination and from doing any business thereunder is too broad as it applies equally to commerce which is wholly within a State as well as to that which is interstate or international.[40]

§ 173. Sufficiency of Complaint or Petition—General Rules.

In a proceeding to recover the damages provided for by the act it is said that the petition should charge, and that is all that is required: (1) That the defendants have done one or more of the forbidden things; (2) that by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averments it is not subject to an exception of no cause of action although it may contain surplusage and may specify some items of damages, which may not be recoverable.[41] Again, under the Anti-Trust Act it is decided

[40] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

[41] People's Tobacco Co. v. American Tobacco Co., 170 Fed. 396, 95 C. C. A. 566, per Shelby, J. The petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections of the act, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it has sustained by such injury. Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160.

Complaint held sufficient under Sherman Anti-Trust Act. See Hale v. O'Connor Coal & Supply Co. (U. S. C. C.), 181 Fed. 267 (wherein the substantial part of the complaint is given); Ware-Kramer Tobacco Co. v. American Tobacco Co. (U. S. C. C.), 180 Fed. 160; People's Tobacco Co. v. American Tobacco Co., 170 Fed. 396, 95 C. C. A. 566 (wherein petition is given); Meeker v. Lehigh Valley R. Co., 183 Fed. 548, 106 C. C. A. 94; Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315; Pennsylvania Sugar R. Co. v. American Sugar R. Co., 166 Fed. 254, 92 C. C. A. 318; Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn., 152 Fed. 864, 81 C. C. A. 658; Loewe v. Lawlor (U. S. C. C.), 142 Fed. 216, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. ed. 488 (in the latter report the complaint is given in the margin); Ellis v. Inman, Poulsen & Co., 131 Fed. 182, 65 C. C. A. 488, rev'g 124 Fed. 956, and stating the substantial averments of the complaint.

that it is not sufficient to frame the declaration in the words of the statute but it is essential that the substance of the contracts in restraint of trade or the substantial facts which constitute the attempt to monopolize, should be set forth therein.[42] Nor in order to state a cause of action for damages under the statute is it necessary to aver an injury to an existing business, but it is necessary to state facts showing an intention and preparedness to engage in business.[43]

Where after all the specific charges in a complaint, there is a general allegation that the defendants have conspired with one another to monopolize the supply of a certain specified line of manufactured articles it is said that "this general allegation of intent covers and applies to all the specific charges in the bill, whatever may be thought concerning the proper construction of the statute, a bill in equity, is not to be read and construed as an indictment would have been read and construed a hundred years ago; but it is to be taken to mean what it fairly conveys to a dispassionate reader, by a fairly exact use of the English language." [44]

§ 174. Sufficiency of Complaint—Rules in Force in State Where Action Brought—Practice Act.

By the provision of the practice act, it is required that the practice, pleadings and forms and mode of proceeding in civil causes, other than equity and admiralty causes, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State, within which such circuit or district courts are held, any rule of

Complaint held insufficient. Rice v. Standard Oil Co. (U. S. C. C.), 134 Fed. 464; Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., 66 Fed. 637, 14 C. C. A. 14, 55 Fed. 851; Bishop v. American Preservers' Co. (U. S. C. C.), 51 Fed. 272.

[42] Cilley v. United Shoe Mach. Co. (U. S. C. C.), 152 Fed. 726.

[43] American Banana Co. v. United Fruit Co., 166 Fed. 261, 92 C. C. A. 325, aff'g 160 Fed. 184.

[44] Ware-Kramer Tobacco Co. v. American Tobacco Co., 180 Fed. 160 (U. S. C. C., 1910), quoting from Mr. Justice Holmes, in Swift v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518.

court to the contrary notwithstanding.[45] So in an action by an individual to recover the damages provided for by the act the sufficiency of the petition is to be determined by the rules in force in the State where it is brought and it need not state the facts showing a right of action with all the fullness and particularity required in an indictment charging a criminal offense, where such particularity is not required in that State.[46]

Where the universal practice in a State is that if the damages claimed are such as would usually or naturally accompany or follow or be included in the result of the injuries complained of, they may be stated and claimed in general terms, it has been held sufficient to assert in a petition that by reason of the alleged unlawful acts of the defendants the plaintiff has been damaged in a certain specified sum.[47]

§ 175. **Sufficiency of Complaint—Particular Cases.**

A conspiracy in violation of the Anti-Trust Act was held to be sufficiently charged where the complaint averred a conspiracy to prevent the plaintiff from continuing in its business of sugar refining and alleged that such result was accomplished by inducing its majority stockholder to pledge a majority of the stock as security for a loan, he also giving to the defendants the voting power attached to such stock which the defendants exercised to elect new directors and caused such directors to vote that the plaintiff should do no business.[48] So where it was alleged that the plaintiff had erected and equipped a sugar refinery, and was prepared and intended to engage in the manufacture

[45] Section 914, Rev. Stat. (U. S. Comp. St., 1901, p. 684).

[46] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774. In this case the action was brought before a Federal court sitting in Kentucky and the court decided as above, the Code of that State providing that the petition must in language "as concise as possible consistent with clearness" state "facts which constitute a cause of action." The court declared that: "by this rule the pleading in this case must be tested."

[47] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[48] Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 Fed. 254, 92 C. C. A. 318, rev'g 160 Fed. 144.

and sale of sugar when it was prevented from so doing by certain specified acts of the defendants, it was decided that the complaint was not demurrable.[49] But a proceeding to rescind a sale of the company's assets to another company cannot be sustained under the Sherman Anti-Trust Act which does not clearly set out an intent to create a monopoly, or restrain trade, or detail facts which practically result in one or the other.[50]

§ 176. Sufficiency of Complaint—Duplicity.

Where in a declaration in a civil suit under this act to recover damages it is charged in one count that the defendant entered into a contract, combination and conspiracy such charge is bad for duplicity.[51]

§ 177. Sufficiency of Complaint—Joinder of Defendants—Election.

Where several defendants are jointly charged in a complaint under the act with having entered into each of the alleged combinations and conspiracies complained of, the fact that one is charged with doing one thing and one another is not a ground for requiring an election, where all of the acts are sufficiently alleged to have been done in pursuance of a common design.[52]

§ 178. Sufficiency of Indictment—General Rules.

As to the sufficiency of the indictment it is said: "We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly and clearly set forth all the elements necessary to constitute the offense intended to be punished." [53] So in the Anti-Trust

[49] Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 Fed. 254, 92 C. C. A. 318, rev'g 160 Fed. 144.

[50] Binney v. Cumberland Ely Coffee Co. (U. S. C. C.), 183 Fed. 650.

[51] Rice v. Standard Oil Co. (U. S. C. C.), 134 Fed. 464.

[52] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774.

[53] In re Greene (U. S. C. C.), 52 Fed. 104, per Jackson, J. See United

Law the word "conspiracy" is to be interpreted independently of the preceding words, and an indictment thereunder should describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general Federal statutes.[54] But in an indictment under this act it is not necessary to allege an exact time as that of the formation of the combination, it being sufficient to allege with the required certainty the acts relied on to establish the offense, as showing the means by which it was committed.[55] And the existence of a commerce in the article need not be alleged since neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist.[56]

§ 179. Sufficiency of Indictment—Charging Officers, Agents or Stockholders.

In an indictment under this act if the officer or agent of a corporation charged with fault, be also charged with personal participation, direction or activity therein, both may be so charged jointly.[57] Where, however, individuals are indicted and all the acts and matters charged as criminal offenses are shown by the face of the indictment to have been done by a corporation but it is not alleged

States v. Nelson (U. S. D. C.), 52 Fed. 646. Compare United States v. Patterson (U. S. C. C.), 59 Fed. 280, holding that it is not necessary that an indictment under this act should set out in detail the operations supposed to constitute interstate commerce. It is sufficient to use the language of the statute.

Sufficiency of indictment under Sherman Anti-Trust Act. See United States v. Virginia-Carolina Chemical Co. (U. S. C. C.), 163 Fed. 66; United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823; In re Greene (U. S. C. C.), 52 Fed. 104; In re Corning (U. S. D. C.), 51 Fed. 205; United States v. Greenhut (U. S. D. C.), 50 Fed. 469.

[54] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823.

[55] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823.

[56] United States v. Patterson (U. S. C. C.), 59 Fed. 280.

[57] United States v. MacAndrews & Forbes Co. (U. S. C. C.), 149 Fed. 823.

what relation they have to such corporation or that their connection therewith is other than that of mere stockholders, such omission constitutes a fatal objection, as the stockholders cannot be held criminally responsible for the corporation's violation of the statute.[58]

§ 180. Indictment Charging Conspiracy—Denial Under General Issue.

A conspiracy may have continuance in time, and where the indictment consistently with the other facts alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. And under the general issue all defenses, including the defenses that the conspiracy was ended by success, abandonment, or otherwise more than three years before the finding of the indictment, are open.[59] And though the plea of the statute of limitations may be good where it confesses and avoids all that the indictment avers, it is said to be open to too many objections and difficulties to be encouraged or allowed except in clear cases.[60]

§ 181. Indictment Not Conclusive—Removal Proceeding.

While in a removal proceeding under the United States Revised Statutes [61] an indictment under the Anti-Trust Act constitutes prima facie evidence of probable cause it is not conclusive, and evidence offered by the defendant tending to show that no offense triable in the district to which removal is sought had been committed is admissible. And the exclusion of such evidence is not mere error but the denial of a right secured under the Federal Constitution.[62] And in a case in the Circuit Court where an appli-

[58] In re Greene (U. S. C. C.), 52 Fed. 104.

[59] United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1168, rev'g (U. S. C. C.) 173 Fed. 823.

[60] United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124, rev'g (U. S. C. C.), 173 Fed. 823.

[61] Section 1014.

[62] Tinsley v. Treat, United States Marshal, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. 430. The court said: "It has been repeatedly held that in

cation had been made for the removal of a person charged with an offense under this act it was said: "It admits of no question, that it is both the right and duty of this court, upon this application, to consider and determine whether the indictment pending against the petitioner in the district of Massachusetts charges either a criminal offense or one that comes within the jurisdiction of that court." [63]

§ 182. Evidence—Admissibility and Weight.

The conspiracies and combinations forbidden by the act may be shown otherwise than by direct and positive testimony of definitively formed agreements. The evidence, however, should be such as to convince the mind

such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. 'The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.' Mr. Justice Jackson, then Circuit Judge, Greene's Case, 52 Fed. 104. * * * The Constitution provides that 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where said crimes shall have been committed' (Art. III, § 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amendment VI); and in order that anyone accused shall not be deprived of this constitutional right, the judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity. Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined that probable cause existed, and such determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution. This conclusion is fatal to the order and warrant of removal, and requires a reversal of the judgment below and the discharge of appellant." Per Mr. Chief Justice Fuller.

[63] In re Greene (U. S. C. C.), 52 Fed. 104, per Jackson, J.

of the tribunal to which it is addressed that the acts denounced by the law have been committed.[64]

Where parties are charged with a violation of the Anti-Trust Act, acts of theirs and the effects of their transactions in the conduct of their business prior to the passage of the act which if done thereafter, would have constituted a violation of that law, are competent and material evidence of the purpose and probable effect of their similar transactions in that business since that date, and for that purpose they may be considered.[65] And in such an action the books of different defendants forming the alleged unlawful combination for a period both before and after its formation and the contracts between them are material and relevant evidence.[66] But a letter written by a third person, without the knowledge of a defendant and without his subsequent sanction or approval, is not admissible in evidence against such defendant charged with conspiracy, it not being shown that such person was in the alleged conspiracy or an agent of the defendant.[67] To vitiate a combination, such as the Sherman Anti-Trust Act condemns, it need not be shown that such combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.[68]

§ 183. **Evidence—As to Intent—When Essential.**

When the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires

[64] United States v. Reading Co. (U. S. C. C.), 183 Fed. 427, 454.

[65] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

[66] Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 58.

[67] Consolidated Grocery Co. v. Hammond, 175 Fed. 641, 99 C. C. A. 195.

[68] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created.[69] So it is said by Mr. Justice Holmes that "The statute gives this proceeding against combinations in restraint of commerce among the States, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.[70] But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases directs itself against the dangerous probability as well as against the complete result." [71]

§ 184. Evidence—Burden of Proof.

One who claims that he has been injured by an illegal combination in restraint of trade in violation of the Anti-Trust Act has the burden of proving the existence of such combination.[72] And where he seeks to recover damages caused by such combination the burden is also upon him to show that some actual damage has been sustained by him in consequence of such combination.[73] And every violation of the Anti-Trust Act does not give rise to a cause of action

[69] Bigelow v. Calumet & Hecla Min. Co., 167 Fed. 721, 94 C. C. A. 13, aff'g Bigelow v. Calumet & Hecla Min. Co. (U. S. C. C.), 167 Fed. 704.

[70] Citing Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N. E. 55.

[71] Swift Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276, quoted in Bigelow v. Calumet & Hecla Min. Co., 167 Fed. 721, 94 C. C. A. 13, in aff'g Bigelow v. Calumet & Hecla Min. Co. (U. S. C. C.), 167 Fed. 704.

[72] Loder v. Jayne (U. S. C. C.), 142 Fed. 1010, reversed upon other grounds in Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653.

[73] Loder v. Jayne (U. S. C. C.), 142 Fed. 1010, reversed upon other grounds in Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653.

for damages thereunder, but a plaintiff to recover must show that he has sustained damage by the violation.[74]

§ 185. Evidence—Presumption in Respect to Combination.

There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce. There is, however, a legal presumption that each of the defendants is innocent until he is proved to be guilty beyond a reasonable doubt. The burden is upon the government to make this proof and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused: and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.[75] The parties to a contract, combination or conspiracy are, however, presumed to intend the inevitable results of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute.[76]

§ 186. Evidence—Documents—Witnesses—Power of Court.

Officers and employees of corporations cannot, under the Fourth and Fifth Amendments, refuse to testify or produce books of corporations in suits against the corpora-

[74] Meeker v. Lehigh Valley R. Co., 183 Fed. 548, (C. C. A.).

[75] Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578. See United States v. American Naval Stores Co. (U. S. C. C.), 172 Fed. 455.

Compare United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177. The power to restrict competition in interstate and international commerce vested in a person or an association of persons by a contract or combination, is indicative of its character, since it is to the interest of the parties that such a power should be exercised and the presumption is that it will be.

[76] United States v. Standard Oil Co. (U. S. C. C.), 173 Fed. 177.

tions for violations of the Anti-Trust Law in view of the immunity given by the Act of February 25, 1903.[77] And the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a subpœna duces tecum.[78] So where in a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-Trust Act a witness refused to answer questions or submit books to an inspection before an examiner appointed by the court on the ground of immateriality and also pleading the Fifth Amendment and after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him, it was decided on appeal to the Supreme Court that questions under the Constitution of the United States were involved and that that court had jurisdiction of an appeal direct from the Circuit Court.[79]

But where a witness refused to answer questions or produce books in such a proceeding on the same ground and entered the same plea and the court merely overruled the objection and ordered the witness to answer the questions and produce the books, and an appeal was taken to the Supreme Court it was decided that while such an order

[77] Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 358, following Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370. See Interstate Commerce Com. v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563.

The immunity granted to a person who testifies before the grand jury in regard to an alleged violation of the Sherman Act does not extend to a prosecution against him for another offense where there is no evidence that in giving such testimony the witness revealed a single fact which will probably be necessary in establishing his guilt that cannot be obtained from other sources and was not known or in the possession of the government. United States v. Heike (U. S. C. C.), 175 Fed. 852.

Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof, who cannot refuse to produce them on the ground that they are not in their possession or under their control. Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 58. See Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. 356.

[78] Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370.

[79] Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 58.

might leave the witness no alternative except to obey or be punished for contempt it was interlocutory in the principal suit and not a final order and did not constitute a practically independent proceeding amounting to a final judgment and that an appeal would not lie to the Supreme Court.[80]

§ 187. Witness—Examination of a "Proceeding."

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify to in any proceeding under the Anti-Trust Law, it being declared in this connection that the word should receive as wide a construction as is necessary to protect the witness in his disclosures.[81]

§ 188. Damages—Recovery of—Generally.

Under the statute in order to recover damages a plaintiff must have been injured in his person or property and the injury sustained must be charged in the complaint by proper averment.[82]

Actual damages which will sustain a judgment can only be secured and must be established, not by conjectures or unwarranted estimates of witnesses but by facts from which their existence is logically and legally inferable. Speculative, remote or contingent damages cannot form the basis

[80] Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. 356. The court said, per Mr. Justice McKenna: "In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court."

[81] Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370.

[82] Meeker v. Lehigh Valley R. Co. (U. S. C. C.), 162 Fed. 354.

of a lawful judgment.[83] And there is held to be no cause of action under the Sherman Anti-Trust Act for damages sustained by the payment of excessive, unjust or unreasonable rates, the cause of action for such damages being declared to be provided for by the act to regulate commerce.[84]

Where a person has sustained damages as the result of an illegal combination in violation of the Anti-Trust Act he may recover damages therefor from an individual member of such combination without regard to whether there was any direct contract relation between him and such member.[85]

§ 189. **Damages—Nature of Action for—Jury Trial.**

The action for damages provided for by the Sherman Anti-Trust Act is one to enforce a civil remedy for a private injury and is in its nature compensatory and not an action for a penalty, nor is its nature changed by the fact that there may be a recovery in excess of the actual damages.[86] So the action to recover damages authorized by the Sherman Anti-Trust Act is held to be an action at law and the parties are held to be entitled to a jury trial.[87]

[83] Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244.

[84] Meeker v. Lehigh Valley R. Co. (U. S. C. C.), 162 Fed. 354; American Union Coal Co. v. Pennsylvania R. Co. (U. S. C. C.), 159 Fed. 278.

[85] City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, aff'd 203 U. S. 390, 27 Sup. Ct. 65, 51 L. ed. 241.

[86] City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, aff'd 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. 65, holding that the excess so recovered is in the nature of exemplary damages. The court said: "The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action." Per Lurton, J., citing upon this question, Campbell v. Haverhill, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. ed. 280; Woodward v. Alson, 12 Heisk. (Tenn.) 581; Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. ed. 109; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

[87] Meeker v. Lehigh Valley R. Co. (U. S. C. C.), 162 Fed. 354.

§ 190. **Damages—Action for—Statute of Limitations—A Civil Remedy.**

The action provided for by the Sherman Anti-Trust Act as to the recovery of damages is governed in respect to the period of limitation by the statutes of the State in which the action is brought and by the statutes in respect to civil remedies and not those in respect to penalties.[88]

§ 191. **Damages—Where Payment of Higher Price Compelled.**

Where as a result of such combinations as the act makes unlawful, one is injured by being compelled to pay a higher price for any article affected thereby, he may recover triple the amount of the damages sustained.[89]

The difference between what a person is compelled to pay as the result of an unlawful combination under this act and the reasonable price of the commodity under natural competitive conditions is an injury to his business and in an action under the act for damages his recovery may be based upon such difference. The excessive price is the natural and intended result of the combination.[90]

§ 192. **Damages—Cannot Be Set off.**

In order to recover the treble damages permitted by the Anti-Trust Act a party must bring a direct action for that purpose. He is not entitled to recover such damages by way of set-off in an action brought by the illegal combination to recover the price of goods sold by it to such party under special contracts having no direct connection with the alleged illegal arrangement or combination.[91]

[88] City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, aff'd 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. 65.

[89] Monarch Tobacco Works v. American Tobacco Co. (U. S. C. C.), 165 Fed. 774, citing Chattanooga Foundry & Pipeworks v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. 65.

[90] City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, aff'd 203 U. S. 390, 27 Sup. Ct. 65, 51 L. ed. 241.

[91] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431, aff'g 99 Fed. 354.

§ 193. **Distribution of Assets of Holding Corporation—Right to Return of Shares.**

After the affirmance of the decision in the Northern Securities Case [92] a resolution was adopted by the corporation to reduce its capital stock and to distribute the surplus of assets created by the reduction and consisting of shares of the constituent companies ratably among its stockholders. Objection to such distribution was made by complainants on the ground that the stock in one of the companies which they had delivered to the Securities Company had not been delivered in pursuance of an absolute sale but to be held in trust; that they were entitled to have their stock returned to them; that the decree in the government suit practically so adjudicated and that as they had acted in good faith, believing that the original contract was not within the provisions of the Anti-Trust Act, the doctrine of pari delicto did not apply. The Supreme Court, however, determined that the provisions in the original decree as to the return of the shares of stock transferred were merely permissive and not an adjudication that the vendors were, as a matter of right, entitled to have their original shares returned to them and that the rigor of the rule that property delivered under an executed illegal contract cannot be recovered back by any party in pari delicto cannot be relaxed by the courts where no special considerations of equity, justice or public policy are disclosed by the record, and that the question of the good faith of the parties was not material. A decree in this case ordering the return of the original shares was therefore refused on the ground that it not only would be inequitable but would tend to smother competition and thus contravene the object of the Sherman law and the purposes for which the suit was brought by the government.[93]

[92] 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[93] Harriman v. Northern Securities Co., 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. 493.

CHAPTER XV

INTERSTATE COMMERCE ACT—POOLING OF FREIGHTS, ETC.

§ 194. Pooling of Freights or Division of Earnings Prohibited—Interstate Commerce Act.
195. Pooling of Freights—"Freights" Defined.
196. Pooling of Freights—Nature and Scope of Statute.
197. What Constitutes "Pooling of Freights."
198. What Does Not Constitute "Pooling of Freights."
§ 199. Pooling of Ocean or Water Freights Not Within Statute or Within Jurisdiction of Interstate Commerce Commission.
200. Combinations to Prevent Continuous Carriage of Freight to Destination Prohibited — Interstate Commerce Act.
201. Interstate Commerce Act Not Inconsistent with Sherman Anti-Trust Act.

§ 194. Pooling of Freights or Division of Earnings Prohibited—Interstate Commerce Act.

The Interstate Commerce Act provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.[1]"

[1] Act Feb. 4, 1887, chap. 104, § 5, 24 Stat. 380, U. S. Comp. Stat., 1901, p. 3156. See Transportation of Immigrants, In re, 10 Inters. C. C. R. 13 (pooling arrangements for division of west-bound immigrant traffic); Consolidated Forwarding Co. v. Southern Pacific Co., 9 Inters. C. C. R. 182 (pooling of or division of earnings, etc., questions retained); Freight Bureau v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 6 Inters. C. C. R. 195, 198 (case of agreement tantamount to pooling freights or division of earnings); Duncan v. Atchison, Topeka & Santa Fe Rd. Co., 6 Inters. C. C. R. 85 (not an agreement, etc., for pooling freights or division of earnings); Independent Refiners' Assoc., etc., v. Western New York

§ 195. **Pooling of Freights—" Freights " Defined.**[2]

"The meaning which said defendant attaches to the word 'freights' is, in my opinion, also wrong. This meaning is expressed thus: 'The word "freights" in this clause means, not the commodity or traffic carried, but the receipts or compensation for the carriage thereof. It cannot evidently be given both meanings. If it meant only the commodity carried, it would not include passenger business. If, on the other hand, it was meant to include the receipts, it would also include compensation derived from passenger carriage.' The obvious answer to this is that the word 'freights' was not intended to include passenger traffic. Such traffic, in the nature of things cannot be pooled, because its routing depends ultimately upon the will of the passenger. Again, passenger traffic is included in the prohibition against the conventional division of earnings; and if the word 'freights' were given the meaning defendant claims for it, then the first prohibition of the section, the one against pooling freights, would be entirely useless, since its purpose would be fully accomplished by the prohibition against division of earnings. On the other hand, the pooling of freights, in the sense of distributing the commodities to be transported, among the various carriers who are to perform the service, is not reached by a prohibition against the division of earnings. Defendant quotes several authorities to the effect that the word 'freight' means the price to be paid for the carriage of goods. There can be no controversy but that the word, under certain circumstances is susceptible of that meaning. Indeed, both the Century Dictionary and Webster's Dictionary include it among their definitions, although the first definition given by the Century Dictionary is this: '(1) The cargo,

& Pennsylvania Rd. Co., 5 Inters. C. C. R. 415 (carrier by rail and carrier by pipe line; agreement not within prohibitions of section five); Express Companies, In the Matter of, 1 Inters. C. C. R. 349 (status of express companies under section five).

Competing line defined, see § 19, herein.

[2] Under Act Feb. 4, 1887, chap. 104, § 5, 24 Stat. 380, U. S. Comp. Stat., 1901, p. 3156.

or any part of the cargo of a ship; lading; that which is carried by water; in the United States and Canada, in general anything carried for pay either by water or by land; the lading of a ship, canal boat, railroad car, wagon,' etc. And the first definition given by Webster is substantially the same: '(1) That with which anything is fraught or laden for transportation; lading; cargo, especially of a ship; also of a car on a railway, or the like; as a freight of cotton; a full freight; freight will be paid for by the ton.' Defendant rightfully says that the meaning to be ascribed to the word in any given case depends upon the context, and illustrates its statement as follows: 'Thus in the sixth section, the phrase is "in every depot * * * of such carrier where passengers or freight, respectively, are received for transportation." There the word "freight," in connection with the words "are received for transportation," would mean the commodity carried. But in that sense it would not include passengers, and the result would then follow that an agreement for pooling the commodities carried if "freight" were so used, would be prohibited, while an agreement for pooling of passenger traffic would not be.' Said illustration is apt, and the deduction therefrom in harmony with what I have already shown, that passengers cannot, like commodities, be pooled for transportation, and hence passenger traffic is included in the prohibition against division of earnings, not in the prohibition against freight pools. Defendant further says, in the same connection: 'Again, the word "freight," when intended to mean the traffic or commodities carried, is comprehensive in its scope, and the singular, instead of the plural—"freights"—should be properly used in that connection.' This argument is refuted by the commerce act itself which in section seven,[3] uses the plural 'freights', in the very connection in which defendant asserts the singular, 'freight,' should be used; said last named section being as follows: 'That

[3] Act Feb. 14, 1887, chap. 104, 24 Stat. 382, U. S. Comp. Stat., 1901, p. 3159.

it shall be unlawful * * * to prevent * * * the carriage of freights from being continuous; * * * and no break of bulk shall prevent the carriage of freights from being,' etc. It should be borne in mind that railroads may pool their freights—that is, the commodities they carry—in two ways: First, by distributing the commodities between themselves for carriage; second, by dividing among themselves their aggregate earnings on the commodities carried. Obviously a prohibition against division of earnings does not include the first class of freight pools, and this explains why section five of the commerce law,[4] although adopting some of the features of section two of the Reagan bill, * * * omits the words 'or to pool the freights,' which were contained in said section two, and for the words 'by dividing,' also contained in said section two, substitutes the words 'or to divide,' thus showing that it is the purpose of the commerce law to prohibit, not only earnings pools, but also traffic pools." [5]

§ 196. **Pooling of Freights—Nature and Scope of Statute.**

By the Interstate Commerce Act [6] Congress adopting a rule of public policy prohibited pooling contracts or contracts for the pooling of freights between common carriers engaged in interstate or international commerce, but this was limited in its scope to different and competing railroads; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any

[4] 24 Stat. 380, U. S. Comp. Stat., 1901, p. 3156.

[5] Interstate Commerce Commission v. Southern Pacific Co. (U. S. C. C.), 132 Fed. 829, 838, 839, per Wellborn, Dist. J.; case is reversed in Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330.

Freight defined, see The Norman Prince (U. S. D. C.), 185 Fed. 169; John J. Sesnon Co. v. United States (U. S. C. C. A.), 182 Fed. 573, 105 C. C. A. 111 ("freight handled"); for other definitions, see Vol. 4, Words and Phrases, pp. 2973 et seq.

As to meaning of "freight" in policies of marine insurance, see Joyce on Insurance, §§ 1723, 1724.

"Pooling Contracts" defined, see § 10, herein.

[6] Act of Feb. 4, 1887, chap. 104, § 5, U. S. Comp. Stat., 1901, p. 3159.

way restricted or regulated competition, and the general provisions of the above act establish beyond cavil that from its date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.[7]

§ 197. What Constitutes "Pooling of Freights."

Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the act to regulate commerce.[8] Where a contract was entered into between railroad companies, and its evident purpose was to stifle all competition for the purpose of raising rates and by its terms all of the roads were to be operated as to through traffic, "as they should be if operated by one corporation which owned all of them," and the contract provided two modes of pooling, one by actual division of the traffic and the other by a division of the gross earnings, and the traffic one having been divided a suit was brought to enforce the second method of the pool, viz., a division of the gross earnings, or in other words, a pooling of the earnings, it was held that the contract was contrary to public policy and void; also that the illegality tainted the whole agreement and neither of the parties could successfully maintain an action thereon even though the illegal contract had been performed by one party.[9]

[7] United States v. Trans-Missouri Freight Association, 58 Fed. 58, 66, 75, 7 C. C. A. 15, per Sanborn, Cir. J., see 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540.

[8] Pooling of Freights, In re (U. S. D. C.), 115 Fed. 588, § 5 of Act of Feb. 4, 1887.

[9] Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co., 61 Fed. 993, 9 C. C. A. 659. The court said, per Caldwell, Cir. J. (at pp. 998, 999), "Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land but will leave the parties in the plight their own illegal action has placed them," citing: Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Gibbs v. Consolidated Gas Co. of Balt., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970, 6 So. 888; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Hooker v. Van-

§ 198. What Does Not Constitute "Pooling of Freights."

The fact that an initial carrier, in order to break up the practice of rebating by the connecting carrier, promises them fair treatment and carries out the promise by giving them certain percentages of its guaranteed through rate business does not amount to a pooling of freights within the meaning of the Interstate Commerce Act. In the case so holding it appeared that the Southern Pacific and other railroads published a guaranteed through rate on citrous fruits from California to the Atlantic seaboard. The shippers availing of this rate routed the goods themselves from the terminals of the initial carriers and illegally obtained rebates for the routing from the connecting carriers. To prevent this—and the action was successful—the initial carriers republished the rate, reserving the right to route the goods beyond their own terminals. On complaint of shippers the Interstate Commerce Commission ordered the initial carriers to desist from enforcing the new rule, holding it violated section three of the Interstate Commerce Act by subjecting the shippers to undue disadvantage. The Circuit Court sustained the commission, but on the ground that the routing by the carrier amounted to a pooling of freights and violated section five of the above act. It was also held, in addition to what is above stated, that: (a) As the general purpose of the act was to facilitate commerce and prevent discrimination it would not be construed so as to make illegal a salutary rule to prevent the violation of the act in regard to obtaining rebates. (b) The question of joint through rates was, under the act, one of agreement between the companies and under their control, and nothing in the act prevented an initial

derwater, 4 Denio (N. Y.), 349, and disapproving as "unsound in principle," etc., Central Trust Co. v. Ohio Cent. R. Co. (U. S. C. C.), 23 Fed. 306. Compare Nashua & Lowell Rd. Corp. v. Boston & Lowell Rd. Corp. (U. S. C. C.), 19 Fed. 804.

Pooling and traffic arrangement held void as against connecting lines discriminated against, see Missouri Pacific Ry. Co. v. Texas & Pacific Ry. Co. (U. S. C. C.), 30 Fed. 2.

carrier guaranteeing a through rate to reserve in its published notice thereof the right to route the goods beyond its own terminal. (c) A carrier need not contract to carry goods beyond its own line, or make a through rate; if it agreed so to do it might do so by such lines as it chose and upon such reasonable terms, not violative of the law, as it could agree upon, and this right did not depend upon whether it agreed to be liable for default of the connecting carrier. (d) A reservation applicable to a single business by the initial carrier, guaranteeing a through rate, of the right to route goods beyond its own terminal did not amount to an unlawful discrimination within the prohibition of the act if the business was of a special nature, like a fruit business, having nothing in common with other freight.[10]

§ 199. Pooling of Ocean or Water Freights Not Within Statute or Within Jurisdiction of Interstate Commerce Commission.

The pooling of ocean freights or of water freights of any character is not within the purview of section five of the Commerce Act, for the act prohibits pooling only as to railroads, and the pooling of traffic by a water carrier is a matter over which the Interstate Commerce Commission has no jurisdiction.[11]

[10] Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330, rev'g Interstate Commerce Commission v. Southern Pacific Co. (U. S. C. C.), 132 Fed. 829. In the court below it was held that where it appears from the findings of the Interstate Commerce Commission that the traffic of railroad carriers is pooled between the connecting lines of defendants, and that the rule which reserves to the initial carrier the right of routing is one of the essential means to said pooling arrangement and was so intended by the carriers, said rule and practice are violative of the fifth section of the Interstate Commerce Act; and it is no justification of said rule and practice that they are designed to prevent and do prevent, unlawful rebates from connecting lines to shippers. Pooling and rebates are both within the prohibitions of the Interstate Commerce Act, and one cannot be employed as a preventive of the other. Interstate Commerce Commission v. Southern Pacific Co. (U. S. C. C.), 123 Fed. 597; s. c. (U. S. C. C.), 132 Fed. 829, 847, reversed in Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330.

[11] Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., 13 Inter. Comm. Rep. 266.

§ 200. **Combinations to Prevent Continuous Carriage of Freight to Destination Prohibited—Interstate Commerce Act.**

The Interstate Commerce Act also provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous passage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act." [12]

[12] Act Feb. 4, 1887, chap. 104, § 7, 24 Stat. 382, U. S. Comp. Stat., 1901, p. 3159.

"Pooling Contracts" defined, see § 10, herein.

Section seven (above given) and section three construed together, see Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co. (U. S. C. C.), 37 Fed. 567, 621.

Law requires foreign carriers from or into the United States to conform to same regulations as govern domestic carriers for a continuous carriage or shipment. Grand Trunk Ry. Co. of Canada, In re Investigation of, 3 Inters. C. C. R. 89.

Liability cannot be escaped by carriers by breaking haul in two and calling themselves carriers on separate ends of line, and hold out to public as a through line. Brady v. Pennsylvania Rd. Co., 2 Inters. C. C. R. 131.

What constitutes continuous shipment and interstate commerce, although different and independent agencies are employed in transporting the commodity, see Cutting v. Florida Ry. & Nav. Co. (U. S. C. C.), 46 Fed. 641, citing The Daniel Ball, 10 Wall. (77 U. S.), 557, 19 L. ed. 999, and cases recognizing the doctrine therein stated.

Liability for violation of the above Interstate Commerce Act, see Act of Feb. 4, 1887, chap. 104, § 8, 24 Stat. 382, U. S. Comp. Stat., 1901, p. 3159. See also Supp., 1909, U. S. Comp. Stat., p. 1135. See Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. —, 31 Sup. Ct. 164; case affirms 168 Fed. 987, 990.

Persons damaged may make complaint to Commission or sue personally,

As to section seven above given of the Interstate Commerce Act, it is no violation thereof for a railroad company to enter into contracts with other companies for the establishment of through routes and through rates, for the continuous carriage of interstate traffic. Such contracts are in nowise inconsistent with the things forbidden by said section.[13]

§ 201. Interstate Commerce Act Not Inconsistent with Sherman Anti-Trust Act.

The Interstate Commerce Act [14] is not inconsistent with the Sherman Anti-Trust Act [15] as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce.[16]

see Act of Feb. 4, 1887, chap. 104, § 9, 24 Stat. 382, U. S. Comp. Stat., 1901, p. 3159; see also Supp., 1909, U. S. Comp. Stat., p. 1135.

Penalty for violation of above Interstate Commerce Act, see Act Feb. 4, 1887, chap. 104, § 10, 24 Stat. 382; Act March 2, 1889, chap. 382, 25 Stat. 857, U. S. Comp. Stat., 1901, p. 3160. See also Supp., 1909, U. S. Comp. Stat., p. 1135.

[13] Part of syllabus in Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co. (U. S. C. C.), 37 Fed. 567, 620.

[14] Act Feb. 4, 1887, chap. 104, 24 Stat. 382, U. S. Comp. Stat., 1901, p. 3159.

[15] See § 13, herein.

[16] United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540. The court, per Mr. Justice Peckham (*Id.*, 314, 315), said: "In our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication any authority to make it. If the agreement be legal it does not owe its validity to any provision of the Commerce Act, and if illegal it is not made so by that act. The fifth section prohibits what is termed 'pooling,' but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for by the act. The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and the short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the lan-

guage of counsel for defendants, 'without reference to the location of these points or the lines over which it is necessary for the traffic to pass,' to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to maximum or minimum of rates. Competing and non-connecting roads are not authorized by this statute to make an agreement like this one. As the Commerce Act does not authorize this agreement, argument against a repeal by implication, of the provisions of the act which it is alleged grant such authority, becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other. It is plain, also, that an amendment of the Commerce Act would not be an appropriate method of enacting the legislation contained in the Trust Act, for the reason that the latter act includes other subjects in addition to the contracts of or combination among railroads, and is addressed to the prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the Commerce Act furnishes no reason for claiming that the later statute does not apply to railroad transportation." This case was followed (the agreements being substantially the same in both cases) in United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25, which reversed 89 Fed. 1020, 32 C. C. A. 491, and (U. S. C. C.) 76 Fed. 895, which considered section five of the Interstate Commerce Act.

CHAPTER XVI

CONSTITUTIONAL LAW—FEDERAL CONSTITUTION

§ 202. Preliminary Statement.
203. Constitution and Laws of United States Supreme Law of Land—Application to Combinations, Trusts, etc.
204. Constitutional Vestment of Powers in Congress.
205. Commerce Clause of Constitution—Power of Congress.
206. Purpose of Vestment in Congress of Power to Regulate Commerce.
207. Regulation of Commerce—Extent of Interference with Private Contracts or Combinations—Interstate and Intrastate Commerce.
208. Obligation of Contract Clause Not a Limitation on Congress.
209. Impairment of Obligation of Contracts—Whether State Constitution a "Law."
210. Impairment of Obligation of Contracts — Whether "Law" Applies Only to State Legislative Enactments.
211. Impairment of Obligation of Contracts—Whether Municipal Ordinance a "Law."
212. Impairment of Obligation of Contracts—Word "Law" Does Not Apply to Judicial Decisions, etc., Unless.
213. Obligation of Contract Clause Refers to Subsequently Enacted "Law" of State.
§ 214. Same Subject—Change of Remedy or Procedure.
215. Nature of Laws Prohibited by Obligation of Contract Clause.
216. Nature of Contracts Embraced by Obligation of Contract Clause — Between What Parties.
217. Nature of Contracts—Obligation of Contract Clause Embraces Implied and Express Contracts.
218. Obligation of Contracts—Legal and Legislative Contracts — Construction of Contract—Authority of Federal Supreme Court.
219. Bridges—Exclusive Grant or Privilege—Impairment of Contract Obligation.
220. Ferry—Exclusive Grant—Impairment of Contract Obligation.
221. Railroad Charter—Provision Against Competing Lines —Impairment of Contract Obligation.
222. Telephone Company's Exclusive Grant — Impairment of Contract Obligation.
223. Electric Lighting — Exclusive Grant or Privilege—Impairment of Contract Obligation.

§ 224. Exclusive Right to Supply Gas—Impairment of Contract Obligation.
225. Water Companies—Exclusive Contracts, Grants or Privileges—Impairment of Contract Obligation.
226. Powers Reserved to the States.
227. Fifth Amendment Generally.
228. Fourteenth Amendment Generally.
229. Fourteenth Amendment—No State to Abridge Privileges or Immunities.
230. Fourteenth Amendment—Due Process Clause—Fifth Amendment.
231. Liberty to, or Freedom of Contract Generally—Fourteenth Amendment—Fifth Amendment.
232. Liberty to, or Freedom of Contract Continued—Power of Government to Restrict, Regulate or Control.
§ 233. Liberty to, or Freedom of Contract Continued—Power of Congress Under Commerce Clause to Restrict, etc.
234. Liberty to, or Freedom of Contract Continued—Police Power of States.
235. Liberty to, or Freedom of Contract Continued—Standard Oil Company's Case.
236. Liberty to, or Freedom of Contract Continued—State Statutes Prohibiting Combinations, etc.—Instances.
237. Fourteenth Amendment—Equal Protection of the Laws.
238. Same Subject—Power of Congress and of States.

§ 202. Preliminary Statement.

We shall consider in this chapter only certain provisions of the Constitution of the United States which have been before the courts in determining the lawful rights of parties therein as well as the validity of national and State prohibitions in cases of alleged monopolies, trusts, pools, and other claimed unlawful combinations, contracts in restraint of trade or restrictions upon competition which are inimical to the public welfare or to public policy.

§ 203. Constitution and Laws of United States Supreme Law of Land—Application to Combinations, Trusts, etc.

The Constitution of the United States and its constitutional laws are the supreme law of the land binding upon the judges in every State.[1] Every corporation

[1] House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 234, case affirms 227 Mo. 617; Northern Securities Co. v. United States, 193 U. S.

created by a State is, therefore, subject to the supreme law of the land, so that if a State gives a charter to a corporation and the obtaining of such charter is in fact pursuant to a combination under which it becomes the holder of stocks of the shareholders in competing, parallel

197, 344, 48 L. ed. 679, 24 Sup. Ct. 436, per Mr. Justice Harlan; Siebold, Ex parte, 100 U. S. 371, 395, 398, 399, 25 L. ed. 717, per Mr. Justice Bradley; Bank of Commerce v. New York City, 2 Black (67 U. S.), 620, 632, 633, 17 L. ed. 451, per Mr. Justice Nelson; Dodge v. Woolsey, 18 How. (59 U. S.) 331, 347, 15 L. ed. 401, per Mr. Justice Wayne; Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 381, 5 L. ed. 257, per Mr. Chief Justice Marshall.

The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws when made in pursuance of the Constitution, form the supreme law of the land. M'Culloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579.

The Constitution of the United States is, within the scope of its provisions, the supreme law of the land, and State courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the Federal court of last resort. State v. Cudahy Packing Co., 33 Mont. 179, 82 Pac. 834.

The Constitution of the United States provides (Art. VI, par. 2): "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Applied by Mr. Chief Justice Waite in Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. ed. 708, 1 Am. Elec. Cas. 253. See list of citations in Vol. 1, U. S. Comp. Stat., 1901, under this article of the Constitution, and also in 9 Fed. Stat. Ann., pp. 218 et seq.

"The Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise." The court quotes the above constitutional provision and says: "Not every act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every act of Congress that the judges are bound. This character and this force belong only to such acts as are 'made in pursuance of the Constitution.' When, therefore, a case arises for judicial determination, and the decision depends upon the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty of the court to compare the act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute." Hepburn v. Griswold, 8 Wall. (75 U. S.) 603, 611, 9 L. ed. 513, per Chief Justice Chase.

"*Law of the land,*" see Wichita Electric Co. v. Hinckley (Tex. Civ. App., 1910), 131 S. W. 1192.

railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the commerce carried on over them restrained by suppressing, competition and a trust or combination in restraint of trade is created thereby, Congress is not prevented, by the fact that the corporations or some of them are State corporations, from exerting its power under the Constitution; no State can give a corporation under its laws authority to restrain interstate or international commerce or to create a trust or combination in restraint of trade against the will of the nation as lawfully expressed by Congress.[2]

§ 204. **Constitutional Vestment of Powers in Congress.** The Constitution of the United States vests all legislative power therein granted in Congress,[3] and no department of the government of the United States has any other powers than those delegated to it by the people through the Constitution. "All the legislative power granted by the Constitution belongs to Congress, but it has no legislative power which is not thus granted." [4]

§ 205. **Commerce Clause of Constitution—Power of Congress.** The Constitution of the United States specifically and exclusively confers upon Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; [5] and this power is complete and unrestricted except by limitations in the Constitution itself.[6] By virtue also of the same power

[2] Northern Securities Co. v. United States, 193 U. S. 197, 344, 48 L. ed. 679, 24 Sup. Ct. 436.

[3] Const. U. S., Art. 1, § 1.

[4] Hepburn v. Griswold, 8 Wall. (75 U. S.) 603, 611, 9 L. ed. 513, per Mr. Chief Justice Chase, see §§ 267, 269, 270, herein.

[5] Const. U. S., Art. 1, § 8, see §§ 16, 270, herein.

Right to regulate interstate commerce is exclusively vested in Congress. Southern Railway Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. 594, case affirms 160 Fed. 332, 87 C. C. A. 284.

[6] Louisville & Nashville Rd. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct.

Congress had authority to enact the Sherman Anti-Trust Act,[7] and it may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution.[8]

§ 206. Purpose of Vestment in Congress of Power to Regulate Commerce.

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation.[9] In matters of foreign and interstate commerce there are no State lines; in such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. The welfare of the United States is constituted of the welfare of all the States, and that of the States is made greater by mutual division of their resources. This is also the purpose and the result of the commerce clause of the Constitution.[10]

265, 55 L. ed. ——, case reverses 133 Ky. 652, 118 S. W. 982. See §§ 267–270, herein.

Subject to such restrictions as are imposed by the Constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce. Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

The power of Congress is as absolute over interstate as it is over foreign commerce. Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. 190, case reverses State ex rel. Coleman v. Western Union Teleg. Co., 75 Kan. 609, 90 Pac. 299.

Power to regulate commerce between the States is absolute, except as limited by other provisions of the Constitution. Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. ——, 31 Sup. Ct. 164, aff'g 168 Fed. 987, 990.

[7] See § 13, herein.

[8] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436. Cited in Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 202, 55 L. ed. ——, 31 Sup. Ct. 164 (to the point that the power to regulate extends to and embraces contracts in restraint of trade between the States), which also cites (to same point) Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136. See § 206, herein.

[9] Railroad Co. v. Richmond, 19 Wall. (86 U. S.) 584, 22 L. ed. 173.

[10] Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. ed. ——,

§ 207. Regulation of Commerce—Extent of Interference with Private Contracts or Combinations—Interstate and Intrastate Commerce.

The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that even if valid when made Congress may by exercising its power render them invalid; and said power extends to rendering impossible the enforcement by suit of contracts between carriers and shippers although valid when made.[11] It is also held, however, that it was not intended that the power of Congress to regulate commerce should be exercised so as to interfere with private contracts not designed at the time they were made to create im-

31 Sup. Ct. —, case affirms Kansas Natural Gas Co. v. Haskell (U. S. C. C.), 172 Fed. 545. One of the allegations in this case (which involved the constitutionality of a statute of Oklahoma restricting interstate commerce in oil and natural gas) was: "That the use of the highways is a portion of the public property, and the same should be confined to those who supply all alike who may seek to be served, and because of its nature and extent and because of the enormous amount of capital needed to make practical investments *tends to create monopolies.* The business of gas transportation is a public business in interstate trade, over which Congress has never legislated, *and to permit complainant to carry out its said attempt and intent to monopolize* the natural gas of the State and transport it away without regulation by the State laws over and across the State's highways *would be to devote public property to private and exclusive use* against the principles of the Constitution of this State and of the United States, and deprive the intending purchasers of natural gas in this State from all supply whatsoever." A final decree was entered below declaring that the statute in question "is unreasonable, unconstitutional, invalid and void, and of no force and effect whatever" and a perpetual injunction was awarded against its enforcement. "The basis of the decree of the court was that expressed in its opinion ruling upon the demurrers, to wit, that the statute of Oklahoma was prohibitive of interstate commerce in natural gas, and in consequence was a violation of the commerce clause of the Constitution of the United States, and that being, as the court said, its dominant purpose, it would, if enforced against complainants, 'invade their rights as guaranteed by the Fourteenth Amendment of the National Constitution' and also the Constitution of the State. Kansas Natural Gas Co. v. Haskell, 172 Fed. 545." *Mem.*, Italics in above quotation are the author's. The question of monopoly was not, however, discussed in the opinion of the Supreme Court.

[11] Louisville & Nashville Rd. Co. v. Mottley, 219 U. S. 467, 55 L. ed. —, 31 Sup. Ct. 265, case reverses 133 Ky. 652, 118 S. W. 982.

pediments to such intercourse.[12] But Congress has no jurisdiction over combinations or agreements so far as they relate to a restraint of trade or commerce which is wholly within a State; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. Congress may, however, under the commerce clause of the Constitution enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce.[13] Again, the protection of the commerce clause extends beyond the strict lines of contract, and inseparable incidents of a transaction of interstate commerce based on contract are also interstate commerce.[14]

§ 208. Obligation of Contract Clause Not a Limitation on Congress.

The prohibition of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts [15] is held not to constitute a limitation upon the powers of Congress but only upon the States.[16]

[12] Railroad Co. v. Richmond, 19 Wall. (86 U. S.) 584, 22 L. ed. 173. See also Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co. (U. S. C. C.), 37 Fed. 567.

[13] Addyston Pipe & Steel Co. v. United States, 175 U. S. 1, 44 L. ed. 136, 20 Sup. Ct. 96. But compare "Appendix A," herein.

[14] Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 30 Sup. Ct. 649, reversing 154 Ala. 83.

That "commerce" in Federal Constitution comprehends all of the intercourse between the parties, ordinarily involved, etc, see § 16, herein.

[15] Const. U. S., Art. I, § 10, cl. 1. See Joyce on Franchises, §§ 301–340. *Contract impairment clause—validity of Mississippi Anti-Trust Statute*, § 5022 (4437). See Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. 695. See chaps. 22 et seq., herein on State statutes.

[16] Ansley v. Ainsworth, 4 Ind. Ty. 508, 69 S. W. 884. Compare, however, Hopkins v. Jones, 22 Ind. 310; Territory v. Reyburn, 1 Kan. 551.

§ 209. Impairment of Obligation of Contracts—Whether State Constitution a " Law."

This prohibition of the Federal Constitution is held to apply to the Constitution as well as to the laws of each State.[17] But it is also decided that the Constitution of a State cannot impair the obligation of a contract; [18] and that a State Constitution is not a contract within this constitutional provision.[19]

§ 210. Impairment of Obligation of Contracts—Whether " Law " Applies only to State Legislative Enactments.

Notwithstanding the decisions given under the above section it is also decided that this constitutional provision applies only to legislative enactments of the States; [20] that it is aimed at the legislative power of the State.[21]

§ 211. Impairment of Obligation of Contracts—Whether Municipal Ordinance a " Law."

A municipal ordinance not passed under legislative authority is not a law of the State within the meaning of the obligation of contract clause of the Federal Constitution.[22] But where a city is empowered by statute

[17] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; Railroad Co. v. McClure, 10 Wall. (77 U. S.) 511, 19 L. ed. 997 (a Constitution of a State admitted in this case to be a "law" within the impairment of obligation clause), cited in Turner v. Wilkes County Commrs., 173 U. S. 461, 464, 19 Sup. Ct. 464, 43 L. ed. 465; Central Land Co. v. Laidley, 159 U. S. 103, 112, 16 Sup. Ct. 80, 40 L. ed. 91; Shreveport v. Cole, 129 U. S. 36, 42, 32 L. ed. 589, 9 Sup. Ct. 210; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 673, 29 L. ed. 516, 6 Sup. Ct. 252; Louisiana v. Jumel, 107 U. S. 711, 760, 27 L. ed. 448, 2 Sup. Ct. 128 (in dissenting opinion).

This provision has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments, of a State. Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. ed. 157.

[18] Moultrie County v. Rockingham Ten-Cent Savings Bank, 92 U. S. 631, 23 L. ed. 631.

[19] Church v. Kelsey, 121 U. S. 282, 7 Sup. Ct. 897, 30 L. ed. 960.

[20] Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. ed. 363.

[21] New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. ed. 607.

[22] Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 36 L. ed. 963.

to grant exclusive franchises and to contract for a water supply its enactments are passed in a legislative capacity and constitute State laws under the obligation of contract clause.[23]

§ 212. Impairment of Obligation of Contracts—Word "Law" Does Not Apply to Judicial Decisions, etc., Unless.[24]

Generally stated this constitutional provision is not aimed at the decisions of the State courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals.[25] That is, it has no reference to judicial decisions or the acts of State tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.[26] Or to state the rule as qualified or limited, said constitutional provision has no reference to judicial decisions, or judgment of the highest court of a State, unless by its terms or necessary operation it gives effect to some provision of the State Constitution, or some legislative enactment of the State claimed to impair the contract in question.[27]

[23] American Waterworks & Guarantee Co. v. Home Water Co. (U. S. C. C.), 115 Fed. 171.

[24] See Joyce on Franchises, § 306.

[25] New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. ed. 607.

[26] Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. ed. 157, followed in Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. ed. 363.

[27] Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. ed. 1059.

When judicial decisions do not impair obligation of contract, see Baltzer v. North Carolina, 161 U. S. 240, 40 L. ed. 684, 16 Sup. Ct. 502; Olcott v. Supervisors, 16 Wall. (83 U. S.), 678, 21 L. ed. 382; City v. Lamson, 9 Wall. (76 U. S.) 477, 19 L. ed. 725; Chicago v. Sheldon, 9 Wall. (76 U. S.) 50, 19 L. ed. 594; Thomas v. Lee County, 3 Wall. (70 U. S.) 327, 18 L. ed. 177; Havemeyer v. Iowa County, 3 Wall. (70 U. S.) 294, 18 L. ed. 38; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997.

When prior construction of statute is changed by judicial decision, obligation of contract not impaired, see King v. Phœnix Ins. Co. of Brooklyn, 195 Mo. 290, 92 S. W. 892.

When change of judicial decision does not impair obligation of contract, see Swanson v. City of Ottumwa, 131 Iowa, 540, 106 N. W. 9.

§ 213. **Obligation of Contract Clause Refers to Subsequently Enacted " Law " of State.**

The contract clause of the Federal Constitution necessarily has reference only to a statute of a State enacted after the making of the particular contract in suit whose obligation is alleged to have been impaired.[28] So where the statute in question was in effect when the contract was made there is no impairment.[29] But an anti-trust State statute, applying to carrying on thereafter of prior formed trusts, has been held not to impair the obligation of contract.[30]

§ 214. **Same Subject—Change of Remedy or Procedure.**

In an early case in the Federal Supreme Court it is held that the obligation of a contract consists in its binding force on the party who makes it; that this depends upon the laws in existence when it is made; that these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.[31] In a later case

[28] Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. 234; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. ed. 1059.

[29] Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. 277, aff'g Blackstone's Estate, In re, 171 N. Y. 682, 64 N. E. 1118.

[30] State v. Missouri, K. & T. R. Co. of Texas, 99 Tex. 516, 91 S. W. 214, Acts of 1903, p. 119, chap. 94. See chaps. 22 et seq., herein, on State Anti-Trust Statutes. See § 207, herein.

[31] McCracken v. Hayward, 2 How. (43 U. S.) 608, 11 L. ed. 397, cited in Virginia Coupon Cases (Poindexter v. Greenhow), 114 U. S. 270, 304, 29 L. ed. 185, 6 Sup. Ct. 903; Connecticut Mutual Life Ins. Co. v. Cushman, 108 U. S. 51, 65, 2 Sup. Ct. 236, 27 L. ed. 648; Antoni v. Greenhow, 107 U. S. 769, 795, 810, 2 Sup. Ct. 91, 27 L. ed. 468; Louisiana v. Jumel, 107 U. S. 711, 750, 2 Sup. Ct. 128, 27 L. ed. 448; Pritchard v. Norton, 106 U. S. 124, 132, 1 Sup. Ct. 102, 27 L. ed. 104; Daniels v. Tearney, 102 U. S. 415, 419, 26 L. ed. 187; Curran v. Arkansas, 15 How. (56 U. S.) 304, 310, 14 L. ed. 705; West River Bridge Co. v. Dix, 6 How. (47 U. S.) 507, 540, 12 L. ed.

in the same court it is also determined that the ideas of the validity of a contract and of the remedy to enforce it are inseparable; and both are parts of the obligation which is guaranteed by the Constitution against the invasion.[32] Again, in a still later case it is decided that the remedy subsisting in a State when and where a contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Federal Constitution, and, therefore, void.[33] But under a subsequent decision in that court it is stated that the rule is that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. The legislature may not withdraw all remedies, and thus, in effect, destroy the contract, nor impose such new restric-

535; Planters' Bank v. Sharp, 6 How. (47 U. S.) 301, 328, 330, 332, 12 L. ed. 447.

Compare § 207, herein.

The laws which exist at the time of the making a contract, and in the place where it is made and to be performed, enter into and make part of it, This embraces those laws alike which affect its validity, construction, discharge and enforcement. Walker v. Whitehead, 16 Wall. (83 U. S.) 314, 21 L. ed. 357. See this case in note 33, below.

[32] White v. Hard, 13 Wall. (80 U. S.) 646, 20 L. ed. 685. Compare § 207, herein.

[33] Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793 (citing at p. 601): McCracken v. Hayward, 2 How. (43 U. S.) 608, 11 L. ed. 397, above considered, cited in Denny v. Bennett, 128 U. S. 489, 494, 9 Sup. Ct. 134, 32 L. ed. 491; Seibert v. Lewis, 122 U. S. 284, 294, 30 L. ed. 1161, 7 Sup. Ct. 1190; Mobile v. Watson, 116 U. S. 289, 305, 6 Sup. Ct. 398, 29 L. ed. 620; Connecticut Mutual Life Ins. Co. v. Cushman, 108 U. S. 51, 65, 2 Sup. Ct. 236, 27 L. ed. 648; Antoni v. Greenhow, 107 U. S. 769, 798, 2 Sup. Ct. 91, 27 L. ed. 468; Louisiana v. Jumel, 107 U. S. 711, 750, 27 L. ed. 448, 2 Sup. Ct. 128; Kring v. Missouri, 107 U. S. 221, 233, 27 L. ed. 506, 2 Sup. Ct. 443; Daniels v. Tearney, 102 U. S. 415, 419, 26 L. ed. 187; Brine v. Insurance Co., 96 U. S. 627, 637, 24 L. ed. 858; Low v. Blackford, 87 Fed. 406; Jones v. Great South Fireproof Hotel Co., 86 Fed. 387; The Vigilancia, 73 Fed. 457. See § 207, herein.

The remedy or means of enforcing a contract is part of that obligation of a contract which the Constitution protects against being impaired by any law passed by a State. Walker v. Whitehead, 16 Wall. (83 U. S.) 314, 21 L. ed. 357.

tions or conditions as would materially delay or embarrass the enforcement of rights under the contract, according to the course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But the legislature may change existing remedies or modes of procedure, without impairing the obligation of contracts, if a substantial or efficacious remedy remains or is provided, by means of which a party can enforce his rights under the contract.[34]

§ 215. Nature of Laws Prohibited by Obligation of Contract Clause.

The Constitution intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original contract.[35] Nor does the invalidity of the State law, as impairing the obligation of contracts, depend upon the extent of the change which the law effects in the contract. Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract impairs its obligation.[36]

§ 216. Nature of Contracts Embraced by Obligation of Contract Clause—Between What Parties.

This prohibition embraces all contracts, executed or executory, between private individuals, or a State and individuals or corporations, or between the States them-

[34] Oshkosh Water Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. 234.

When change of remedy does not impair contract obligation, see Sims v. Steadman, 62 S. C. 300, 40 S. E. 677.

Enlargement of remedies of creditors of corporation does not impair contract obligation. Converse v. Ætna National Bk., 79 Conn. 163, 64 Atl. 341.

When change of remedy impairs contract obligation, see Thompson v. Cobb, 95 Tex. 140, 65 S. W. 1090.

[35] West River Bridge Co. v. Dix, 6 How. (47 U. S.) 301, 12 L. ed. 447.

[36] Green v. Biddle, 8 Wheat. (21 U. S.) 1, 5 L. ed. 547.

selves.[37] It is held, however, that the Federal Constitution is not to be construed as intended to restrict the States in the regulation of their civil institutions adopted for internal government, and the constitutional provision forbidding the States from impairing the obligation of contracts is not to be understood to embrace other contracts than those which respect property or some object of value and confer rights which may be asserted in a court of justice.[38] But this clause does not protect ultra vires contracts; [39] nor does it give validity to contracts that are properly prohibited by statute; [40] and a simple breach of contract by a municipality does not amount to an act impairing the obligation of the contract.[41]

§ 217. Nature of Contracts—Obligation of Contract Clause Embraces Implied and Express Contracts.

This constitutional provision applies to and embraces implied as well as express contracts.[42] In a case in the Federal Supreme Court it appeared that by a State statute cities therein might erect and operate their own electric light plants, or they might grant to persons or corporations permission to erect and operate such plants for not exceeding a period of twenty years. A certain city, by ordinance adopted subsequent to the statute, granted such right for twenty years to a corporation which erected, operated and continued to operate the plant. The ordinance conferred rights, exacted obligations, fixed rates and provided for its written acceptance and the corporation so accepted it. By a later ordinance the city pro-

[37] Green v. Biddle, 8 Wheat. (21 U. S.) 1, 5 L. ed. 547.

[38] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 620, per the court.

[39] Westminster Water Co. v. City of Westminster, 98 Md. 551, 56 Atl. 990.

[40] Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 30 Sup. Ct. 134, case affirms 83 Conn. 1.

[41] Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. —, 31 Sup. Ct. —.

[42] Fisk v. Jefferson Police Jury, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329.

vided for the issue of bonds to build its own plant. In an action brought by the light company to restrain the erection of the plant during the continuance of the twenty-year term, on the ground that the ordinance violated the Federal Constitution in that it impaired the obligation of the contract existing under the ordinance granting the franchise, it was held that as such ordinance did not provide that the city would not erect its own plant no such provision could be implied. It was also decided that the fact that cities could elect under the above statute either to erect their own plants or grant franchises, could not in case of their election to grant the franchise be considered as an implied contract not to erect their own plants during the period for which the franchise was granted.[43]

§ 218. **Obligation of Contracts—Legal and Legislative Contracts—Construction of Contract—Authority of Federal Supreme Court.**

Before the Federal Supreme Court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.[44] And that court determines for itself whether an act of a State legislature amounts to a contract within the impairment of obligation clause.[45] So whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulation between indi-

[43] Joplin, City of, v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. 43, rev'g Southwestern Missouri Light Co. v. City of Joplin (U. S. C. C.), 113 Fed. 817.

[44] New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142.

[45] Sullivan v. Texas, 207 U. S. 416, 28 Sup. Ct. 215, 52 L. ed. 274, aff'g 95 S. W. 645.

The doctrine that the Federal Supreme Court possesses paramount authority when reviewing the final judgment of a State court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the State enactment, has been affirmed in numerous other cases. Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 18 Sup. Ct. 199.

viduals exclusively, the Federal Supreme Court will upon its own judgment and independently of the adjudication of the State court, decide whether there exists a contract within the protection of the Constitution of the United States.[46] Again, although decisions of the highest court of a State are not binding on the Supreme Court of the United States in determining whether a contract was made by legislative action of that State which is entitled to protection under the impairment of obligation clause of the Federal Constitution, the said Supreme Court will consider the decisions of the State court on the point in question.[47]

§ 219. **Bridges—Exclusive Grant or Privilege—Impairment of Contract Obligation.**

In the well-known Charles River Bridge case it was held that there was no exclusive privilege given to the proprietors of the bridge over the waters of Charles River above or below their bridge; no right to erect another bridge themselves, nor to prevent others from erecting one; no engagement from the State, that another should not be erected; and no understanding not to sanction competition, nor to make improvements that might diminish the amount of its income. That upon all these subjects the charter was silent; and nothing was said in it about a line of travel in which they were to have exclusive privileges, and that no words were used, from which an intention to grant any of these rights could be inferred.[48]

[46] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265.

[47] Blair v. City of Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g Govin v. City of Chicago (U. S. C. C.), 132 Fed. 848, a case concerning the extension of a street railway franchise and the effect of a subsequent general statute limiting the time within which a franchise could be granted, also holding that a repeal of a statute cannot operate to impair the obligation of contracts in existence at the time of enactment of said statute whereby grants to street railroad companies, as to the nature of the motive power used, were ratified.

[48] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773. The question of impairment of obligation of contracts and vested

A State statute, by which the State gave power to certain commissioners to contract with any persons for the building of a bridge over a certain river, and by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the State" enacting the statute; and that it should not be "lawful" for any person or persons whatsoever to erect "any other bridge over or across the said river for ninety-nine years," is a contract, whose obligation the State can pass no law to impair.[49]

§ 220. **Ferry—Exclusive Grant—Impairment of Contract Obligation.**

In case of a ferry franchise under a statute of exclusion of other ferries within a limited distance and which is also an act of general legislation it is held that it is subject to repeal by the legislature; that its hands were not tied and that it was not prevented from authorizing another ferry within the limited distance whenever in its judgment it saw fit.[50]

§ 221. **Railroad Charter—Provision Against Competing Lines—Impairment of Contract Obligation.**

Where a State legislature incorporates the stockholders of a railroad and pledges itself in the charter not to allow competing lines, its subsequent incorporation of another railroad, authorizing it to cross the track of the other and continue its road to one of its termini, does not impair the obligation of the contract with the first company; nor is the obligation of contract impaired by crossing the road.[51]

rights was raised. See Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 442, 14 L. ed. 997, 1008. See Joyce on Franchises, §§ 4, 15, 22, 138, 257, 258, 311.

[49] Bridge Proprietors v. Hoboken Company, 1 Wall. (68 U. S.) 116, 17 L. ed. 571.

[50] Williams v. Wingo, 177 U. S. 601, 20 Sup. Ct. 793, 44 L. ed. 905. See also Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. ed. 967. See Joyce on Franchises, §§ 15, 311.

[51] Richmond, Fredericksburg & Potomac Rd. Co. v. Louisa Rd. Co., 13 How. (54 U. S.) 71, 14 L. ed. 75.

§ 222. Telephone Company's Exclusive Grant—Impairment of Contract Obligation.

The acceptance of a special act giving a telephone company the exclusive right to the use of streets for its purposes for a term of years does not operate to divest the company of its vested rights under a general statute to exercise its franchises after its exclusive grant has terminated, nor can it be deprived thereof by legislative action of the State or city.[52]

§ 223. Electric Lighting—Exclusive Grant or Privilege—Impairment of Contract Obligation.

If a town council has no power, either under its charter or under the general statute law governing towns and cities, to grant an exclusive franchise for a term of years to a private corporation to use its streets for the conveyance of electricity for public use in the city, such exclusive grant is void and not a valid contract protected by the obligation of contract clause of the Constitution; and such exclusive grant does not prevent the town from granting to another corporation within the term the privilege to occupy its streets for the same purpose.[53] And although, while private persons are operating electric lighting plants for public and private use, under a grant of exclusive franchises with a number of unexpired years' duration, an ordinance is passed, by virtue of a statute empowering cities to purchase, erect and maintain such plants, whereby the issue of bonds for that purpose is authorized, still there is no impairment of the obligation of contract.[54] If the exclusive right of occu-

[52] Abbott v. City of Duluth, 104 Fed. 833, aff'd 117 Fed. 137. See Joyce on Franchises, §§ 311, 314.

[53] Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994, 7 Am. Elec. Cas. 25. See Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. ed. 257, noted under § 225, herein.

[54] State ex rel. Town of Canton v. Allen, 178 Mo. 555, 77 S. W. 868, under Fed. Const., Art. I, § 10, cl. 1, and Mo. Const., Art. 2, § 15; Rev. Stat. Mo., 1899, § 6275. See Joplin, City of, v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. 43, rev'g Southwestern Missouri Light Co. v. City of Joplin (U. S. C. C.), 113 Fed. 817. Considered under § 217, herein.

pation of city streets is granted, on certain conditions, to an electric light plant, by a city ordinance, as where it is not obligated to furnish light until it can make a certain per cent profit, the grantee must begin preparations for erecting such plant, that is, something must be done, before it can avail itself of the protection against the impairment of obligation of contract provision of the Constitution.[55]

§ 224. **Exclusive Right to Supply Gas—Impairment of Contract Obligation.**

A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of a public service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.[56] But contract rights, arising from an exclusive right to supply gas to a city and its inhabitants are not impaired by charges against the gas company occasioned by a necessary public improvement, such as a drainage system undertaken by a municipality under statutory authority.[57]

§ 225. **Water Companies—Exclusive Contracts, Grants or Privileges—Impairment of Contract Obligation.**

A contract made by a borough with a water company

When grant by city to electric light company cannot be changed or abrogated; a question of obligation of contract. See Hot Springs Electric Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761.

[55] Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 So. 810; case affirmed in 186 U. S. 401, 22 Sup. Ct. 866, 46 L. ed. 1219. Laws of Fla., chap. 4000, Act Fla., May 27, 1899, empowered city to construct and maintain its own electric light plant.

[56] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

[57] New Orleans Gas Light Co. v. Drainage Commission, 111 La. 838, 35 So. 929; case affirmed, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. 471.

for supplying the borough and its citizens with water for certain purposes cannot lawfully be impaired by the erection by the borough of its own waterworks; a statute empowering the same is unconstitutional when it tends to the avoidance or violation of existing contracts.[58] But a contract with a municipal corporation, whereby the corporation grants to the contractor the sole privilege of supplying the municipality with water from a designated source for a term of years, is not impaired, within the meaning of the contract clause of the Constitution, by a grant to another party of a privilege to supply it with water from a different source.[59] And where a water company acquires no contract right, either express or implied, or any exclusive privilege of using the streets of a village for supplying it with water, but simply, by compliance with a statute, acquires the right to be a corporation and the authority to lay its pipes in the streets of a village for a certain time and there is nothing after the expiration of that period upon which to base an implied contract, there exists no right to be protected by the Federal Constitution.[60] Again, where a city, by ordinance, in express terms and for consideration received granted exclusive rights and privileges to a company,

[58] Potter County Water Co. v. Austin Borough, 206 Pa. St. 297, 55 Atl. 991.

Obligation of contract—Grant of exclusive municipal water franchise protected. See New Orleans Water-Works Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273 (following 115 U. S. 650, 683, cited under § 224, herein), followed in St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. ed. 563, which is followed and cited in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9, 43 L. ed. 341, 19 Sup. Ct. 19, 77; cited in New Orleans Water Works v. New Orleans, 164 U. S. 471, 475, 41 L. ed. 518, 17 Sup. Ct. 161; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 663, 16 Sup. Ct. 705, 40 L. ed. 838; distinguished in New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 32, 8 Sup. Ct. 741, 31 L. ed. 607.

[59] Stein v. Bienville Water Supply Co., 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. 892.

Obligation of contract; regulation of water rates not void; ordinances of municipal corporation. See Owensboro v. Owensboro Water Works Co., 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. 82.

[60] Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. ed. 585.

for a certain term, to supply it and its inhabitants with water; with electric current for electric light and power and for all other purposes for which said current could be used except power for the operation of street railways, and it was claimed that there was a contract between the city and the complainant, the obligation of which the city had impaired, it was held that as the city had no power expressly conferred upon it to grant exclusive franchises, the exclusive features of an ordinance granting such a franchise were invalid.[61] In a case in the Federal Supreme Court a bill was brought by a trustee under a mortgage made by a waterworks company upon its plant to secure an issue of bonds, to enjoin the municipal authorities from constructing and operating a municipal water system, thereby impairing the obligation of a contract between the city and the waterworks company granting to the latter for a term of thirty years an exclusive right to maintain a waterworks system in the streets of the city. The bill, in substance, averred, and the answer admitted, that the city had procured from the legislature authority to construct and operate a municipal water plant and to issue the bonds of the city for that purpose, and that in pursuance of this legislative authority ordinances had been passed providing for the construction of such waterworks and for the issuance of bonds to provide the means, and that notice of that purpose, and that the city no longer regarded the contract with the waterworks company as binding or obligatory had been given.

The material defenses set up were, first, that the city had no power to make an exclusive contract; second, that the contract for rental of hydrants created an aggregate indebtedness prohibited by the Constitution of the State; and, third, that the waterworks company had not kept its contract in respect of the character or capacity of the plant it was to provide and maintain, and had failed in its obligation to furnish a

[61] Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. ed. —, aff'g 144 Fed. 256.

constant and abundant supply of pure and wholesome water, thus compelling the municipality to construct a system of its own for the protection of the health and property of its inhabitants. These defenses were relied upon in the answer of the city as a defense against the injunction sought by the complainant and were made the subject of a cross bill against the complainant and the water works company, praying relief against the contract as having been first broken by the company. Prior to the filing of this bill the same complainant had filed its original bill in the same court against the water-works company, praying a foreclosure of the mortgage, a default having occurred. It was held that: (a) To furnish an ample supply of pure and wholesome water is the highest police duty resting on a municipality. (b) One contracting to furnish a municipality with an ample supply of pure water must at all times maintain his ability to meet the requirements of the contract, and a continuous supply of water is a vital part of the contract. (c) The maxim that he who seeks equity must do equity applies to one affirmatively seeking relief. It does not vest a court of equity with power to impose on a defendant terms as a condition for dismissing the bill where plaintiff wholly fails to prove his case, even if defendant has filed a cross bill for defensive relief. (d) Where a water company has wholly failed to live up to its contract and the municipality has determined by ordinance to erect its own plant, a court of equity cannot, in a suit brought by the water company to restrain the municipality on the ground of impairment of contract, require the municipality to purchase any part of the plaintiff's plant as a condition for dismissing the bill. (e) The enforcement of a municipal ordinance will not be enjoined as impairing the obligation of an existing contract at the instance of a complainant who fails to show that the contract has been complied with. (f) A mortgagee of contract rights has no greater right to restrain the enforcement of an ordinance on the ground that it impairs the obligation of the contract than has

the contracting party himself. (g) When the breach justifies the abrogation of a contract otherwise protected by the contract clause of the Federal Constitution considerations of hardship, and the interests of creditors cannot prevail to set up and enforce that contract against the party having the right to treat the contract as ended. (h) Where the contractor under a municipal water supply contract wholly fails to furnish an adequate supply of pure water according to the contract the municipality has no adequate remedy at law; it may treat the contract as ended and a court of equity may enforce such rescission.[62]

§ 226. Powers Reserved to the States.[63]

The manifest purpose of the Tenth Amendment to the Federal Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people.[64] It is declared that it is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective Constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States; and that the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.[65] The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted

[62] Columbus v. Mercantile Trust & Deposit Co. of Balt., 218 U. S. 645, 31 Sup. Ct. 105, 54 L. ed. 1193.

[63] See § 271, herein.

[64] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110.

[65] Const. U. S., Amdt. Art. X.

must be such as are expressly given, or given by necessary implication.[66]

§ 227. Fifth Amendment Generally.

The first eight articles of the Federal Constitution have reference to the powers exercised by the government of the United States and not those of the States.[67] The Fifth Amendment operates exclusively in restriction of Federal power, is a limitation on Congress, and has no application to the States.[68]

§ 228. Fourteenth Amendment Generally.

The Fourteenth Amendment to the Constitution of the United States is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for

[66] Collector, The, v. Day, 11 Wall. (78 U. S.) 113, 124, 20 L. ed. 122, per Mr. Justice Nelson.

As to this provision of the Constitution, see also Northern Securities Co. v. United States, 193 U. S. 197, 344, 48 L. ed. 679, 24 Sup. Ct. 436, per Mr. Justice Harlan.

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grants from them." Turner v. Williams, 194 U. S. 279, 295, 48 L. ed. 979, 24 Sup. Ct. 719, per Mr. Justice Brewer in concurring opinion.

[67] Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. 703.

The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government. Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 507, 20 Sup. Ct. 448, 494.

[68] Barrett v. State (Ind., 1911), 93 N. E. 543, citing Capital City Dairy Co. v. Ohio, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. ed. 171 (operates solely on the national government and not on the States); Thorington v. Montgomery, 147 U. S. 490, 13 Sup. Ct. 394, 37 L. ed. 252 (operates exclusively in restriction of Federal power, and has no application to the States); Barron v. Baltimore, 7 Pet. (32 U. S.) 243, 8 L. ed. 672 (is intended solely as a limitation on the exercise of power by the Federal government, and is not applicable to the legislation of the States). See also Perdue v. State, 134 Ga. 300, 67 S. E. 810.

enforcing it is not direct legislation on the matter respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.[69] The prohibitions of this amendment also refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and whoever, by virtue of a public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the State's name and is clothed with the State's power, his act is that of the State.[70] The broad words of the Fourteenth Amendment are not, however, to be pushed to a drily logical extreme, and the courts will be slow to strike down as unconstitutional legislation of the States enacted under the police power.[71]

§ 229. Fourteenth Amendment—No State to Abridge Privileges or Immunities.

The privileges and immunities of citizens of the United States, which, under the Fourteenth Amendment to its Constitution, no State can abridge,[72] are those which

[69] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. 18. See Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383; Green v. Elbert, 63 Fed. 309, 11 C. C. A. 207.

[70] Chicago, Burlington & Quincy Rd. Co. v. Chicago, 166 U. S. 226, 14 L. ed. 979, 17 Sup. Ct. 581.

[71] Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. —, 31 Sup. Ct. 299. The court, per Mr. Justice Holmes, said: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power." *Id.*, 110.

[72] *Privileges and immunities clause of Constitution:* "No State shall make or enforce any law which shall abridge the privileges or immunities of

arise out of the nature and essential character of the national government, the provisions of its Constitution or its laws and treaties made in pursuance thereof, and it is these which are placed under the protection of Congress by this amendment.[73] These privileges or immunities are not abridged by a State enactment prohibiting monopolies, etc., for certain purposes upon penalty of a revocation of a foreign corporation's certificate of authority in case of a violation of the statute.[74]

§ 230. Fourteenth Amendment—Due Process Clause —Fifth Amendment.

Due process of law within the meaning of the Constitution of the United States[75] is secured when the laws

citizens of the United States." Const. U. S., Art. XIV, § 1. See 9 Fed. Stat. Ann., pp. 392 et seq. and cases there noted.

[73] Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 19 L. ed. 915.

[74] Attorney General v. A. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868; Laws of Mich., 1899, p. 409, No. 255. Examine Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755. Compare Gage v. State, 24 Ohio Civ. Ct. R. 724.

As to grant of exclusive rights or privileges see Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 19 L. ed. 915.

[75] *Due process clause, Fourteenth Amendment:* "Nor shall any State deprive any person of life, liberty, or property, without due process of law." Const. U. S., Art. XIV, § 1. See Joyce on Franchises, §§ 297–299; 9 Fed. Stat. Annot., pp. 416 et seq. See Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530; aff'g 81 Ark. 519, 100 S. W. 407 (not taken without due process); Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. ed. 679, 22 Sup. Ct. 431 (a case of alleged illegal combination); United States v. New York, New Haven & Hartford R. Co. (U. S. C. C.), 165 Fed. 742; People v. Dickerson 164 (Mich., 148), 17 Det. Leg. N. 1044, 129 N. W. 199.

Origin and history of this provision. See Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Due process defined. See Allyn, Appeal of, 81 Conn. 534, 71 Atl. 794.

Construction of this clause—review of leading cases. See Marchant v. Pennsylvania R. Co., 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. 894.

Exclusive privilege to supply water—Due process clause. See Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 537.

Constitutionality of Anti-Trust Statutes under due process clause. See Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. 220 (not denied); aff'g 48 Tex. Civ. App. 162, 106 S. W. 918; Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823 (clause not violated); State ex rel.

operate upon all alike and no one is subject to partial or arbitrary exercise of powers of government.[76] State regulations of fire insurance companies intended to protect the public against the evils arising from combinations of those engaged in such business, and to substitute competition for monopoly, said regulations having a real and substantial relation to that end without being essentially arbitrary, do not deprive the insurance companies of their property without due process of law nor deny them the equal protection of the laws.[77] Where the highest court of a State has held that an anti-trust statute has been violated by an agreement which amounts to a restraint of trade, the only question for the Federal Supreme Court is whether such statute so unreasonably abridges freedom of contract as to amount to a deprivation of property without due process of law within the meaning of the Fourteenth Amendment.[78]

§ 231. Liberty to, or Freedom of Contract Generally —Fourteenth Amendment—Fifth Amendment.

The Federal Constitution secures liberty to, or freedom of contract.[79] Both a liberty and a property right are

Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902, all considered elsewhere herein.

Due process clause—Fifth Amendment: "No person shall * * * be deprived of life, liberty or property, without due process of law." Const. U. S., Art. V. See 9 Fed. Stat. Annot., pp. 288 et seq. See also §§ 231–235, herein.

[76] Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. 224.

[77] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. ——, 31 Sup. Ct. 246; Ala. Code, 1896, §§ 2619, 2620, as amended; Code 1907, §§ 4954, 4955, held constitutional.

[78] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. 695; Code Miss., § 5002.

[79] Const. U. S., Art. XIV, § 1; Const. U. S., Art. V. See the following cases:

United States: Booth v. People, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. 425; aff'g 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762 (gambling contract; grain futures prohibited; State suppression); United States v. Joint Traffic Association, 171 U. S. 505, 559, 572, 43 L. ed. 259, 19 Sup. Ct. 25, rev'g 89 Fed. 1020, 32 C. C. A. 491, and (U. S. C. C.) 76 Fed. 895 (Fourteenth and Fifth Amendments); Niagara Fire Ins. Co. v. Cornell (U. S. C. C.), 110 Fed. 816 (Anti-Trust Act of Nov., 1897, chap. 79, held to deprive of

embraced within the liberty to contract.[80] Freedom of contract is, however, a qualified and not an absolute right. There is no absolute freedom to contract as one chooses. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations.[81]

liberty of contract); United States v. Trans-Missouri Association, 58 Fed. 58, 7 C. C. A. 15; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001.

Arkansas: Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001.

Kentucky: Equitable Life Ins. Society v. Commonwealth, 113 Ky. 126, 23 Ky. L. Rep. 2359, 67 S. W. 388.

Michigan: People v. Dickerson, 164 Mich. 148, 17 Det. Leg. N. 1044, 129 N. W. 199.

Missouri: McGrew v. Missouri Pac. Ry. Co., 230 Mo. 416, 132 S. W. 1076.

South Dakota: State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504, 516, 517.

Meaning of life, liberty and property in Fourteenth Amendment. See Spring Valley Water Co. v. City & County of San Francisco (U. S. C. C.), 165 Fed. 667.

See note 1, "public policy as test—underlying principle" under § 86, herein.

[80] Matthews v. People, 202 Ill. 389, 67 N. E. 28.

[81] Chicago, Burlington & Quincy Rd. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. ——; aff'g 131 Iowa, 340. The court per Mr. Justice Hughes, said: "It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 93, 25 Sup. Ct. 539; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. 277. In Allgeyer v. Louisiana, supra, the court in referring to the Fourteenth Amendment, said (p. 589): 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned" but it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Crowley v. Christensen, 137 U. S. 89, 34 L. ed. 620, 11 Sup. Ct. 13; Jacobsen v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. ed.

§ 232. Liberty to, or Freedom of Contract Continued—Power of Government to Restrict, Regulate or Control.[82]

As above stated there is no absolute freedom of contract.[83] The right of contract is a part of both the right of property and the right of liberty, but it is nevertheless subject to restriction and control, without violation of Federal or State Constitutions, by statutes enacted in such manner as to become the law of the land.[84] It may also be limited by a State statute where there are visible reasons of public policy for the limitation,[85] and the government may deny liberty of contract by regulating or forbidding every contract reasonably calculated to injuriously affect public interests. Contracts which contravene public policy cannot be made at all.[86] But freedom of, or liberty to contract should not be restricted unless it is obvious that the public will suffer by the enforcement of the contract. Nor should parties be allowed to invoke public policy merely to enable them to violate their agreements.[87] In a New York case the court says: "That a man may not contract, as he will, with respect to himself or to his property rights, demands

643. * * * The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as, for example, the regulation of commerce with foreign nations and among the several States. * * * The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review." *Id.*, 566–569.

[82] See quotation at end of § 231, herein.

[83] See § 231, herein. See also Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. ——, 31 Sup. Ct. 164; case affirms 168 Fed. 987, 990.

[84] State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941. See quotation from 219 U. S. 549, given in note under § 231, herein.

[85] Minnesota Iron Co. v. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. ed. 322.

[86] Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. ——, 31 Sup. Ct. 164; case affirms 168 Fed. 987, 990.

[87] Central New York Teleg. & Teleph. Co. v. Averill, 114 N. Y. Supp. 99, 129 App. Div. 752; judgment modified in 199 N. Y. 128, 92 N. E. 206.

the intervening of some authoritative reason founded in considerations of public policy. The denial of the right can only be reasonable, when to permit its exercise is seen to be fraught with consequences injurious to the interests of society. The State has a right to limit individual rights, when their exercise touches the public interests and, if unrestrained, would be prejudicial to order or to progress." [88] In a case in the Federal Supreme Court it is declared that: "There are some things which counsel easily demonstrate. They easily demonstrate that some combination of 'capital, skill or acts,' is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions, and to limit too much the function and power of government. By arguing from extremes almost every exercise of government can be shown to be a deprivation of individual liberty." [89]

§ 233. Liberty to, or Freedom of Contract Continued—Power of Congress Under Commerce Clause to Restrict, etc.

The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce.[90] And the provision of the Constitution regarding the liberty of the citizen is to some extent limited by the commerce clause; [91] and the

[88] Wood v. Whitehead Bros. Co., 165 N. Y. 545, 550, 59 N. E. 357, per Gray, J.

[89] National Cotton Oil Co. v. Texas, 197 U. S. 115, 128, 49 L. ed. 689, 25 Sup. Ct. 379, per Mr. Justice McKenna. Case holds that the Anti-Trust Acts of Texas of 1889, 1895, and 1899, as they then stood (decision was in 1905), were not in conflict with the Fourteenth Amendment, and did not work a deprivation of property without due process of law or impair the liberty of contract, nor deprive the defendant of the equal protection of the laws.

[90] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[91] Contained in § 8, Art. I of the Constitution of the United States,

power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally regulate to a greater or less degree commerce among the States.[92] Again, the power of Congress to regulate commerce among the States and with foreign nations is complete and unrestricted except by limitations in the Constitution itself, and an act of Congress rendering contracts in regard to interstate commerce invalid does not infringe the constitutional liberty of the citizen to make contracts. The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that even if valid when made Congress may by exercising the power render them invalid.[93]

granting Congress the power "to regulate commerce with foreign nations and among the several States, and with Indian Tribes."

[92] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136; case under Sherman Anti-Trust Act (see § 13, herein). But compare "Appendix A," herein.

[93] Louisville & Nashville Rd. Co. v. Mottley, 219 U. S. 467, 55 L. ed. —, 31 Sup. Ct. 265; case reverses 133 Ky. 652. The court, per Mr. Justice Harlan (pp. 482, 483), said: "Does the act infringe upon the constitutional liberty of the citizen to make contracts? Manifestly not. In the Addyston Pipe case, p. 228 (Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136. Case modifies 85 Fed. 271, 29 C. C. A. 141, a case as to combinations in restraint of trade and enhancement of prices), the court said, 'We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts' relating to interstate commerce. Again: 'But it has never been, and in our opinion ought not to be, held that the word [liberty] included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in the violation of an act of Congress upon the subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, *while in the exercise of its constitutional right to regulate commerce among the States.* * * * Anything which directly obstructs and thus regulates that commerce which is carried

§ 234. Liberty to, or Freedom of Contract Continued—Police Power of States.

Although the due process clause of the Fourteenth Amendment secures liberty of contract, it does not confer liberty to disregard lawful police regulations of a State established by such State for all within its jurisdiction.[94] Again, even though there is a certain freedom of contract which the States cannot destroy by legislative enactment, in pursuance whereof parties may seek to further their business interests, the police power of the States extends to and may define and prohibit, under penalties, trusts or secret arrangements by which, although there is no merger of interests through partnerships or incorporation, an apparently existing competition among

on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' * * * After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established."

Author's comment: Is the force of the last proposition stated in the text added to or detracted from by the decisions in the cases of Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. 502, and United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. 632? Exactly what difference does it make whether or not a contract in alleged "restraint of trade" was made before or after an act of Congress, such as the Sherman Anti-Trust Act, when the words "restraint of trade" are now under the above decisions, to be construed by a "resort to reason" or by the "standard of reason," and when it is also held, in the above cases, that this country has followed the line of development of the law of England, etc., and that the cases of United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, and United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 250, 19 Sup. Ct. 25, are held only authoritative by the certitude that the rule of reason was applied and they are limited and qualified so far as they conflict with the construction now given to the Anti-Trust Act of 1890.

[94] Brodnax v. Missouri, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. ed. —. "Much was said at bar about the 'liberty of contract.' In a large sense every person has that liberty. It is secured by the provision in the Federal Constitution, forbidding a State to deprive any person of liberty or property without due process of law. But the Federal Constitution does not confer a liberty to disregard regulations as to the conduct of business which the State lawfully establishes for all within its jurisdiction." *Id.*, 293, per Mr. Justice Harlan.

all the dealers in a community in one of the necessities of life is substantially destroyed, and such an enactment is not in conflict with the Fourteenth Amendment as to a person convicted of combining with others to pool and fix the price, divide the net earnings and prevent competition in the purchase and sale of grain.[95]

§ 235. **Liberty to, or Freedom of Contract Continued—Standard Oil Company's Case.**

It is held in the very recent case of the Standard Oil Company in the Federal Supreme Court that freedom to contract is the essence of freedom from undue restraint or the right to contract. Mr. Chief Justice White, who delivered the opinion of the court, said: "And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute [The Sherman Anti-Trust Act] by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom of contract was the essence of freedom from undue restraint or right to contract." Mr. Justice Harlan, in his concurring and dissenting opinion in the same case, said: "There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to

[95] Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276, aff'g State v. Smiley, 65 Kan. 240, 69 Pac. 199. See also quotation from this case in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 442, 54 L. ed. 826, 30 Sup. Ct. 695, per Mr. Justice Lurton.

governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The Supreme Law of the Land—which is binding alike upon all—upon Presidents, Congresses, the Courts and the People—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this Bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. * * * We shall do well to heed the warnings of that great jurist." In this case the following points were also determined: (a) The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable. (b) At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of trade. (c) At the time of the passage of the Sherman Anti-Trust Act,[96] the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. And (d) this country has followed the line of development of the law of England. It is further declared by Mr. Chief Justice White in that case that: "Outside of the restrictions resulting from the

[96] See § 13 herein.

want of power of an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of his want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule of the English law." [97]

§ 236. **Liberty to, or Freedom of Contract Continued —State Statutes Prohibiting Combinations, etc.—Instances.**

A State statute prohibiting combinations of insurance companies as to rates, commissions, and m nner of transacting business, is not unconstitutional as depriving the companies of their property or of their liberty of contract within the meaning of the Fourteenth Amendment.[98] The liberty of contract protected by the Four-

[97] Standard Oil Co. v. United States, 221 U. S. 1, 56, 55 L. ed. —, 31 Sup. Ct. 502 (see "Appendix A," herein); case modifies and affirms 173 Fed. 177.

[98] Carroll v. Greenwich Ins. Co., 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. 66, rev'g Greenwich Ins. Co. v. Carroll, 125 Fed. 121. The court, per Mr. Justice Holmes, who delivered the opinion in the case, said: "We pass to the question upon which the Circuit Court decided the case, namely, the constitutionality of § 1754 [Code, Iowa], * * * Whatever may be thought of the policy of such attempts, it cannot be denied in this court, unless some of its decisions are to be overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern not only statutes of the United States, Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276, but also State laws of similar import. Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. 379. * * * While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the *Fifth Amendment* it would be hard to say that a State law was void under the *Fourteenth*. It is true that by the provision in the body of the instrument Congress has power to regulate commerce, and that the act of Congress referred to in the cases cited was passed in pursuance of that power. But even if the *Fifth Amendment* were read as contemporaneous with the original Constitution, the power given in the commerce clause could not be taken to override it so far as the *Fifth Amendment* protects fundamental personal rights. *It is only on the ground that the right to combine at will is a fundamental personal right that it can be held to be protected by the Fourteenth Amendment from any abridgment by the*

teenth Amendment is not impaired by an anti-trust statute of a State prohibiting acts which are a public wrong, the object of a conspiracy and operate in restraint of trade, as in case where an agreement among retail lumber dealers was held within the prohibition of such a statute.[99]

§ 237. Fourteenth Amendment—Equal Protection of the Laws.

The equal protection clause of the Federal Constitution [1] means subjection to equal laws applying alike to

State. Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30, 36, 48 L. ed. 604, 24 Sup. Ct. 319. Many State laws which limit the *freedom of contract* have been sustained by this court, and therefore *an objection to this law on the general ground that it limits that freedom cannot be upheld.* Indeed, Mr. Dicey, in his recent work on Law and Public Opinion in England during the Nineteenth Century, indicates that it is out of the very right to make what contracts one chooses, so strenuously advocated by Bentham, that combinations have arisen which restrict the very freedom that Bentham sought to attain, and which even might menace the authority of the State. If, then, the statute before us is to be overthrown more special reasons must be assigned." Italics are ours.—The Author.

[99] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. 695; Code, Miss., § 5002. "That legislation might be so arbitrary or so irrational in depriving a citizen of freedom of contract as to come under the condemnation of the amendment may be conceded." *Id.*, 442, per Mr. Justice Lurton.

[1] *Equal protection clause:* "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." Const. U. S., Art. XIV, § 1. See Joyce on Franchises, § 300 (also Index to same under this heading); 9 Fed. Stat. Annot., pp. 538 et seq. See also the following cases:

United States: Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 558, 559, 46 L. ed. 679, 22 Sup. Ct. 431 (case of alleged illegal combination).

Indiana: Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

Missouri: State ex inf. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902 (clause not violated).

South Dakota: State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504.

Texas: Walsh, Ex parte, (Tex. Cr. App., 1910), 129 S. W. 118.

Corporation is a person within meaning of equal protection clause of Fourteenth Amendment. Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. 287, case reverses 160 Ala. 396, 49 So. 404. See also § 13, herein subdv. § 8.

Equal protection of the laws—Difference in method of determining guilt of corporations and individuals—Validity of Anti-Trust Act of Tennessee of

all in the same situation.[2] The Fourteenth Amendment will not be construed as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment.[3] Nor is such clause offended against because some inequality may be occasioned by a classification in legislation properly enacted under the police power.[4] The following propositions have been shown by repeated decisions of the Federal Supreme Court: (a) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis and therefore is purely arbitrary. (b) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. (c) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (d) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[5]

§ 238. Same Subject—Power of Congress and of States.

Assuming that even if the equal protection provision

1903. See Standard Oil Co. of Ky. v. Tennessee, 217 U. S. 413, 54 L. ed. ——, 30 Sup. Ct. 543, aff'g State v. Standard Oil Co. of Ky., 120 Tenn. 86, 110 S. W. 565.

[2] Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. 287, case reverses 160 Ala. 396, 49 So. 404.

[3] Standard Oil Co. of Ky. v. Tennessee, 217 U. S. 413, 54 L. ed. ——, 30 Sup. Ct. 543, aff'g State v. Standard Oil Co. of Ky., 120 Tenn. 86, 110 S. W. 565, under Anti-Trust Act of March 16, 1903; Laws, 1903, chap. 140.

[4] Louisville & Nashville Rd. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. 676, case affirms 127 Ky. 276.

[5] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. ed. ——, 31 Sup. Ct. 337, case affirms 170 Fed. 1023. See § 238, herein, as to subdv. (a) In above text.

of this amendment can be held to apply to the United States, it can have no broader meaning when so applied than when applied to the States.[6] The Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority; it did not deprive the States of the power to classify but only of the abuse of such power.[7] So it is declared that the Fourteenth Amendment "is unqualified in its declaration that a State shall not 'deny to any person within its jurisdiction the equal protection of the laws.' Passing on that amendment, we have repeatedly decided * * * that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems that are met in the government of human beings are different from those involved in the examination of objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws." [8]

[6] United States v. Heinze, 218 U. S. 532, 54 L. ed. 1139, 31 Sup. Ct. 98, case reverses 161 Fed. 425.

[7] Louisville & Nashville Rd. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. 671, case affirms 127 Ky. 276. See text, subdv. (a), § 237, herein.

[8] District of Columbia v. Brooke, 214 U. S. 138, 150, 29 Sup. Ct. 560, 53 L. ed. 941, case reverses 29 App. D. C. 563.

CHAPTER XVII

CONSTITUTIONAL LAW—STATE CONSTITUTIONS

§ 239. Creation of Monopolies—State Constitutions Prohibiting Monopolies Generally.
240. Alabama Constitution—Legislative Duty as to Monopolies, Combinations, etc., to Control Articles of Necessity, etc., or to Prevent Competition.
241. Alabama Constitution Continued—Effect Upon Competition—Meaning of "Unreasonably" and "Reasonable Competition."
242. Arkansas Constitution—Monopolies Prohibited.
243. Idaho Constitution—Combinations to Control Prices, Regulate Production, etc., Prohibited—Duty of Legislature.
244. Kentucky Constitution—Legislative Duty as to Trusts, Combinations, etc., to Control Prices.
245. Louisiana Constitution—Combinations, etc., to Control Prices, Unlawful—Duty of Legislature.
246. Maryland Constitution—Monopolies Prohibited.
247. Minnesota Constitution—Combinations to Control Food Products a Criminal Conspiracy—Duty of Legislature.
248. Mississippi Constitution—Duty of Legislature to Prevent Trusts, Combinations, etc.
§ 249. Montana Constitution—Combinations, Trusts, etc., to Fix Prices or Regulate Production Prohibited—Duty of Legislature.
250. Montana Constitution Continued — Necessity of Showing Intent.
251. Montana Constitution Continued — Meaning of "Trust" Therein.
252. North Carolina Constitution—Monopolies Prohibited.
253. North Dakota Constitution—Combinations to Control Prices, Cost of Exchange or Transportation Prohibited — Franchises Forfeited.
254. Oklahoma Constitution—Monopolies Prohibited—Duty of Legislature as to Combinations, Monopolies, etc.
255. South Dakota Constitution—Monopolies and Trusts Prohibited—Combinations to Control Prices, Production, Transportation, or to Prevent Competition Prohibited—Duty of Legislature.
256. Tennessee Constitution—Monopolies Prohibited.
257. Texas Constitution — Monopolies Prohibited.
258. Utah Constitution—Combinations to Control Prices, Cost of Exchange or Transportation Prohibited—Duty of Legislature.

§ 259. Washington Constitution—Monopolies and Trusts Prohibited — Combinations to Control Prices, Production, Transportation or to Prevent Competition Prohibited—Duty of Legislature.
260. Washington Constitution Continued—Its Provisions Not Self-Executing.
261. Washington Constitution Continued—Combinations of Common Carriers to Share Earnings Prohibited.
262. Wyoming Constitution—Monopolies Prohibited—Combinations to Prevent Competition, Control Productions or Prices, etc., Prohibited.
§ 263. Constitutional Provisions Prohibiting Granting Special or Exclusive Privileges, Immunities or Franchises, etc.
264. Same Subject—General Instances.
265. Constitutional Provisions Prohibiting Creation of Corporations by Special Act, etc.
266. Same Subject—General Instances.

§ 239. Creation of Monopolies—State Constitutions Prohibiting Monopolies Generally.

Monopolies may be created, but they must be called into being by the sovereign power alone. They are contrary to the genius of a free government and ought not to be encouraged by the people or countenanced by the courts except when expressly authorized by positive law. In several of the State Constitutions this principle is clearly and explicitly declared, and monopolies are positively prohibited.[1]

§ 240. Alabama Constitution—Legislative Duty as to Monopolies, Combinations, etc., to Control Articles of Necessity, etc., or to Prevent Competition.

Under the Alabama Constitution "The legislature shall provide by law for the regulation, prohibition, or reasonable restraint) of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business." [2]

[1] See Davenport v. Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249, per McLeary, J. See §§ 269, 272, herein.

[2] Ala. Const., 1901, § 103.

§ 241. Alabama Constitution Continued—Effect Upon Competition—Meaning of "Unreasonably" and "Reasonable Competition."

The above constitutional provision of Alabama has not restricted the law of competition as defined at the common law. It is aimed at combinations of capital to prevent them from making scarce articles of necessity in order to "unreasonably" increase the cost to the consumer, and also to prohibit anything which prevents "reasonable competition" in any calling or business. It does not denounce combinations of capital as such. They must "unreasonably" increase the cost in order to bring them within the purview of the section. The section is not aimed at everything which restricts competition. Its purpose is not that there shall be no restraints of competition arising from the workings of the laws of trade, but only that whatever is done in trade must leave the field open to "reasonable competition." [3]

§ 242. Arkansas Constitution—Monopolies Prohibited.

The Constitution of Arkansas provides that "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed." [4]

"The monopolies which in England became so odious as to excite general opposition, and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of indivduals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or services. The memory, and historical tradi-

[3] Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co. (U. S. C. C.), 171 Fed. 553, 561, per Jones, Dist. J.

Under § 103 of the Constitution of Alabama of 1901, to regulate competition, one man may take over all of another man's customers, and thus control a business, if it results from competition within legal limits. Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co. (U. S. C. C.), 171 Fed. 553.

[4] Const. Ark., Art. II (Declaration of Rights), § 19.

tions, of abuses resulting from this practice, has left the impression that they are dangerous to liberty, and it is this kind of monopoly, against which the constitutional provision is directed." [5]

§ 243. **Idaho Constitution—Combinations to Control Prices, Regulate Production, etc., Prohibited—Duty of Legislature.**

The Constitution of Idaho provides: "That no incorporated company, or any association of persons or stock company, in the State of Idaho, shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price, or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise." [6]

§ 244. **Kentucky Constitution—Legislative Duty as to Trusts, Combinations, etc., to Control Prices.**

Under the Kentucky Constitution "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article or to enhance the cost of any article above its real value." [7]

[5] Leon Levy, Ex parte, 43 Ark. 42, 51, per Eakin, J.

[6] Const. Idaho, Art. II (Corporations, Public and Private), § 18.

[7] Const. Ky. (Corporations), § 190. See Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755; Owen County Burley Tobacco Society v. Brumback, 32 Ky. L. Rep. 916, 107 S. W. 710. Examine Commonwealth v. Hodges, 137 Ky. 233, 125 S. W. 689.

§ 245. **Louisiana Constitution—Combinations, etc., to Control Prices, Unlawful—Duty of Legislature.**

Under the Louisiana Constitution, "It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests for the purpose of forcing up or down the price of any agricultural product or article of necessity, for speculative purposes; and the legislature shall pass laws to suppress it." [8]

§ 246. **Maryland Constitution—Monopolies Prohibited.**

The Maryland Constitution provides: "That monopolies are odious, contrary to the spirit of free government and the principles of commerce, and ought not to be suffered." [9]

§ 247. **Minnesota Constitution—Combinations to Control Food Products a Criminal Conspiracy—Duty of Legislature.**

Under the Minnesota Constitution: "Any combination of persons, either as individuals or as members or officers of any corporation, to monopolize the markets for food products in this State, or to interfere with, or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy, and shall be punished in such manner as the legislature may provide." [10]

§ 248. **Mississippi Constitution—Duty of Legislature to Prevent Trusts, Combinations, etc.**

Under the Mississippi Constitution: "The legislature

[8] Const. La., Art. 190. See New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. ed. 607.

[9] Const. of Md. (Declaration of Rights), Art. 41.

[10] Const. Minn., Art. 4 (the legislative department), § 35.

Above provision was embodied in organic law of the State in 1888, and is noted, in State v. Duluth Board of Trade, 107 Minn. 506, 515, 121 N. W. 395, as declaring, in connection with the statutes there considered, the public policy of Minnesota "with reference to combinations and agreements which tend to restrain trade, and limit, restrict or regulate the production, price and distribution of articles of trade, manufacture, or use," per Elliott, J.

shall enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare." [11]

It is declared by the court in a case in this State: "It must be observed that not all trusts, combinations, contracts, and agreements were to be prohibited, because the great lawmakers who framed the fundamental law of this commonwealth as the same is embodied in our present Constitution well knew that such legislation would be palpably trenching upon, if not absolutely violative of, the inherent rights of the citizens, and would be restrictive to an unwarranted degree of the privilege of contract which any man is entitled to enjoy under our form of government.[12] No such legislation was authorized, because no such legislation was demanded. Only such trusts, combinations, contracts and agreements were to be prevented as would be 'inimical to the public welfare.'" [13]

§ 249. **Montana Constitution—Combinations, Trusts, etc., to Fix Prices or Regulate Production Prohibited—Duty of Legislature.**

Under the Montana Constitution: "No incorporation, stock company, person or association of persons in the State of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporations, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case

[11] Const., 1890, Miss. (Art. 7, Corporations), § 198.

[12] Citing Tiedeman, Lim. Police Powers, § 244.

[13] Yazoo & Mississippi Valley Rd. Co. v. Searles, 85 Miss. 520, 528, 529, 37 So. 939, per Truly, J.

of foreign corporations prohibiting them from carrying on business in the State." [14]

§ 250. Montana Constitution Continued—Necessity of Showing Intent.

Under the terms of the above constitutional provision in Montana there must be shown a specific intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same results.[15]

§ 251. Montana Constitution Continued—Meaning of "Trust" Therein.

"It was not the purpose of the convention * * * to limit * * * the term" trust "used in the constitution * * * by any narrow definition, but to leave it to the courts to look beneath the surface, and from the methods employed in the conduct of the business, to determine whether the association or combination in question, no matter what its particular form should

[14] Const. Mont., Art. 15 (corporations other than municipal), § 20.

For statute attempting to make effective above constitutional provision and held obnoxious to the Fourteenth Amendment of the Federal Constitution and void. See State v. Cudahy Packing Co., 33 Mont. 179, 82 Pac. 834, 14 Am. St. Rep. 804.

[15] MacGinnis v. Boston & Montana Consol. Copper & Silver Min. Co., 29 Mont. 428, 75 Pac. 94. The court, per Brantly, C. J., said: "Section 20 prohibits any combination or contract which has a particular purpose, to wit, 'fixing the price or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people.' The terms 'combine' and 'form a trust' were evidently intended to be read in connection with the expression 'for the purpose,' etc., clearly implying that, in order to subject offenders to the severe penalties which the legislature might impose, there must be shown a special intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same result. That this is the meaning is clear from the enumeration of persons who may not do the prohibited acts. Corporations, stock companies, natural persons, or partnerships are all included. If the criminal intent is not a necessary ingredient of the evil denounced, then all sorts of combinations are to be deemed prohibited, even ordinary copartnerships, as coming within the letter of the prohibition. For the terms 'combine' and 'form a trust' are of equal dignity. If the former is to be regarded as modified and explained by the clause 'for the purpose,' etc., by the same rule must the latter also." *Id.*, 454.

chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way.[16] In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it or from the vice which inheres in the contract itself.[17]

§ 252. **North Carolina Constitution—Monopolies Prohibited.**

The North Carolina Constitution provides that: "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." [18]

§ 253. **North Dakota Constitution—Combinations to Control Prices, Cost of Exchange or Transportation Prohibited—Franchises Forfeited.**

Under the North Dakota Constitution: "Any combination between individuals, corporations, associations or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this State, whenever the owner or owners thereof violate this article shall be deemed annulled and become void." [19]

[16] Citing Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189.

[17] MacGinnis v. Boston & Montana Consol. Copper & Silver Min. Co., 29 Mont. 428, 455, 75 Pac. 94. See also Yazoo & Mississippi Valley Rd. Co. v. Searles, 85 Miss. 520, 538, 37 So. 939, per Truly, J.

[18] Const. N. C., Art. 1 (Declaration of Rights), § 31. See State v. Perry, 151 N. C. 661, 65 S. E. 915; Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29; Gray v. Board of Commissioners of Cumberland County, etc., 122 N. C. 471, 29 S. E. 771; Thrift v. Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427; Washington Toll Bridge Co. v. Commissioners of Beaufort, 81 N. C. 491.

Above Constitution is noted as in existence from 1776, in Ware-Kramer Tobacco Co. (U. S. C. C.), 180 Fed. 160, 170.

[19] Const. N. Dak. (Art. 7, corporations other than municipal), § 146.

§ 254. **Oklahoma Constitution—Monopolies Prohibited—Duty of Legislature as to Combinations, Monopolies, etc.**

The Oklahoma Constitution provides that: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." [20]

The Constitution of that State also provides that: "The legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination." [21]

§ 255. **South Dakota Constitution—Monopolies and Trusts Prohibited—Combinations to Control Prices, Production, Transportation, or to Prevent Competition Prohibited—Duty of Legislature.**

The South Dakota Constitution is as follows: "Monopolies and trusts shall never be allowed in this State, and no incorporated company, co-partnership or association of persons in this State shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any co-partnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor. The legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises." [22]

[20] Const. Okla., Art. II (Bill of Rights), § 32. Same in Const. Tex., Art. I (Bill of Rights), § 26.

[21] Const. Okla., Art. 5 (The Legislature, Subdv. Powers and Duties), § 44.

[22] Const. S. Dak., Art. 17 (Corporations), § 20.

§ 256. **Tennessee Constitution—Monopolies Prohibited.**

The Tennessee Constitution provides: "That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." [23]

§ 257. **Texas Constitution—Monopolies Prohibited.**

The Texas Constitution provides that: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." [24]

It is said in a Texas case that: "Everything contained in the Bill of Rights is excepted out of the general powers of government, in short there is no power in the State that can create a monopoly, for in the emphatic language of the people, speaking through their Bill of Rights, monopolies 'shall never be allowed.' " [25]

§ 258. **Utah Constitution—Combinations to Control Prices, Cost of Exchange or Transportation Prohibited—Duty of Legislature.**

The Constitution of Utah provides that: "Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any products of the soil or of any article of manufacture or commerce or the cost of exchange of transportation is prohibited, and hereby declared unlawful, and against public policy. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchises." [26]

[23] Const. Tenn., Art. I (Declaration of Rights), § 22. See Memphis, City of, v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495.

[24] Const. Tex. Art. I (Bill of Rights), § 26. See Bartholomew v. City of Austin, 85 Fed. 359, 29 C. C. A. 568; Laredo, City of, v. International Bridge & Tramway Co., 66 Fed. 246, 14 C. C. A. 1, 30 U. S. App. 110; Brenham, City of, v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

[25] Brenham, City of, v. Becker, 1 White & Wilson's Civ. Cas. (Tex. Ct. App.), § 1243.

[26] Const. Utah, Art. 12 (corporations), § 20.

§ 259. **Washington Constitution—Monopolies and Trusts Prohibited—Combinations to Control Prices, Production, Transportation or to Prevent Competition Prohibited—Duty of Legislature.**

The Constitution of Washington provides that: "Monopolies and trusts shall never be allowed in this State, and no incorporated company, co-partnership, or association of persons in this State shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise." [27]

§ 260. **Washington Constitution Continued—Its Provisions Not Self-Executing.**

The above constitutional provision of Washington is held not self-executing but limited in its operation to such interpretation as has been given it by legislative enactment.[28]

[27] Const. Wash., Art. 12 (corporations other than municipal), § 22. See Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

[28] Northwestern Warehouse Co. v. Oregon Railway & Navigation Co., 32 Wash. 218, 73 Pac. 388. "It cannot be said that the makers of the Constitution understood § 22, above quoted, to be self-executing, since they expressly provided that the legislature shall pass laws for its enforcement. Since the constitutional convention itself so interpreted the section, it is the manifest duty of the courts to adopt that interpretation. * * * The legislature has * * * construed this section of the Constitution as not being self-executing, and we think its construction the correct one. It follows that whatever rights the respondents have in the premises must be determined by the terms of the statute in so far as its terms give vital force to the constitutional provisions, and that the courts cannot enlarge upon the statutory provisions even though the legislature might possibly do so within the constitutional limitations." *Id.*, 227, 228, per Hadley, J.

As to self-executing constitutional provisions, see Joyce on Franchises, §§ 225–227.

§ 261. Washington Constitution Continued—Combinations of Common Carriers to Share Earnings Prohibited.

The Constitution of Washington also provides that: "No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this State, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying." [29]

§ 262. Wyoming Constitution—Monopolies Prohibited—Combinations to Prevent Competition, Control Productions or Prices, etc., Prohibited.

The Wyoming Constitution provides that: "Perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed. Corporations being creatures of the State, endowed for the public good with a portion of its sovereign powers, must be subject to its control." [30]

The Constitution of that State also provides that: "There shall be no consolidation or combination of corporations of any kind whatever to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare." [31]

§ 263. Constitutional Provisions Prohibiting Granting Special or Exclusive Privileges, Immunities, or Franchises, etc.

The Constitutions of many of the States prohibit the granting to corporations, etc., of any special or exclusive privileges, immunities or franchises; or the enactment of private or local or special laws for the benefit of individuals or corporations.[32] It is declared in a Pennsyl-

[29] Const. Wash., Art. 12 (corporations other than municipal), § 14.

[30] Const. Wyo. Art. 1 (declaration of rights), § 30. See Wood v. Seattle, 23 Wash. 1, 20, 62 Pac. 135.

[31] Const. Wyo., Art. 10 (corporations), § 8.

[32] Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12

vania case that: All corporate franchises are held to be special and exclusive privileges or immunities discriminative against individuals. The act of incorporation itself is a discrimination as to privileges, powers and liabilities against the natural person. The Constitution does not prohibit these special privileges as compared with individuals.[33] In an Illinois case it is also asserted that it is against the public policy of that State that any corporation shall receive a special or exclusive franchise by virtue of any special law.[34]

§ 264. Same Subject—General Instances.

This constitutional inhibition does not embrace certain statutory prohibitions against an insurance com-

L. R. A. (N. S.) 736; Const. Neb., Art. 1, § 16 (not unconstitutional); Skinner v. Garnett Gold-Mining Co. (U. S. C. C.), 96 Fed. 735; Const. Cal., Art. 1, § 21 (not unconstitutional); Gerino, Ex parte, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; Const. Cal., Art. 4, § 25, subdv. 19 (not invalid); New York, New Haven & Hfd. Rd. Co. v. Offield, 77 Conn. 417, 59 Atl. 510; Const., Art. 1, § 1 (no violation); Starr Burying Ground Assoc. v. North Lane Cemetery Assoc., 77 Conn. 83, 90, 58 Atl. 467 (not invalid); People ex rel. Healy v. Clean Street Co., 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 455; Const. Art. 4, § 22 (in conflict); Martin v. O'Brien, 34 Miss. 21. See Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265. See also other decisions under chaps. 22 et seq., herein.

County is not a "corporation" under a constitutional provision that the legislature shall not pass any local or special laws "granting to any corporation, association or individual any exclusive privileges, immunities, or franchise whatever. In all other cases where a general law can be made applicable no special law shall be enacted." Sherman County v. Simons, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. ed. 1093, following Woods v. Colfax County, 10 Neb. 552, 7 N. W. 269.

See State v. Citizens' Bank of Louisiana, 52 La. Ann. 1086, 27 So. 709. (Art. 234 of Const. of 1879, prohibits among other things the passage of "any general or special law for the benefit of such corporation" save upon conditions mentioned; held that where charter is extended the corporation takes subject to the Constitution then in force. Case was reversed in Citizens' Bank of Louisiana v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. 181.)

[33] Clark's Estate, In re, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587, relied upon in King v. Pony Gold Mining Co. (King v. Elling), 24 Mont. 470, 476, 62 Pac. 783, per Pigott, J.

[34] First Methodist Episcopal Church of Chicago v. Dixon, 178 Ill. 260, 272, 52 N. E. 887, per Boggs, J., case reverses 77 Ill. App. 166.

pany; [35] nor laws prohibiting combinations, pools, or trusts to regulate fire, lightning or storm insurance rates or premiums, with certain exceptions; [36] nor a statute which limits the amount of new business which a domestic insurance company may do yearly; [37] nor an act authorizing surety companies to become sole surety, etc.; [38] nor to statutes on the subject of building and loan associations where said statutes apply to such organizations as a class, and do not bestow any special benefit upon any individual or corporation or suspend any general law of the State for such purpose; [39] nor an act authorizing companies incorporated thereunder to acquire and operate actually existing street railroads, whether or not they are at the time being operated with legal authority; [40]

[35] People v. Commercial Life Ins. Co., 247 Ill. 92, 93 N. E. 90; Const., Art. 4, § 22.

[36] State ex rel. Crow v. Ætna Ins. Co., 150 Mo. 113, 51 S. W. 413; Const., Art. 4, § 53. See State ex rel. Crow v. Fireman's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595; Const., Art. 4, § 28.

In Greenwich Ins. Co. v. Carroll (U. S. C. C.), 125 Fed. 121, it was held that statute, prohibiting combinations, etc., between fire insurance companies, was not within prohibitions of Const., Art. 1, § 6, as to grants of special privileges and immunities; an injunction was issued and made perpetual; but case was reversed in Carroll v. Greenwich Ins. Co., 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. 66, upon point of constitutionality under the Fourteenth Amendment.

[37] Bush v. New York Life Ins. Co., 119 N. Y. Supp. 796, 135 App. Div. 447, aff'g 116 N. Y. Supp. 1056, 63 Misc 89; Const., Art. 3, § 18.

[38] King v. Pony Gold Mining Co. (King v. Elling), 24 Mont. 470, 62 Pac. 783; Const., Art. 5, § 26.

[39] Beyer v. National Building & Loan Assoc., 131 Ala. 369, 377, 31 So. 113; Const., Art. 4, § 23, which prohibits a local law from being enacted for the benefit of individuals or corporations, or the suspension of any general law for the benefit of any individual, association or corporation. In this case it was urged that the statute authorizing building and loan associations to charge more than 8 per cent *per annum* violated the above constitutional provision; the court held the point inapplicable as the statute under which the loan in question was made did not authorize such a charge, and the contract provided for 6 per cent only.

[40] Jersey City v. North Jersey St. Ry. Co., 74 N. J. L. 774, 67 Atl. 113, aff'g 73 N. J. L. 175, 63 Atl. 906. "The language of the act is in itself broad enough to include all street railways, whether or not they are operated as such with legal authority. That it was intended to include all street railways in actual operation is indicated by the use of express words including railroads operated as street railways. * * * It is urged that in substance a grant to a company organized under the Traction Act of 1893,

nor an act authorizing the formation of gas light corporations and regulating the same and empowering them to extend their main pipes to any neighboring city, town or village wherein no gas company already exists, for the purpose of supplying the same with illuminating gas, upon obtaining permission of the proper authority of

conditioned upon the assent of the existing company, amounts to an extension of the right of the existing company to occupy the street, since all it need do is to cause a traction company to be organized in its own interest and under its own control and grant its consent to that company and no other. No doubt such a result is possible. The effect is to create an exclusive privilege in the public streets and a right to lay down railroad tracks indirectly instead of directly. If the statute which authorizes and makes possible such a result is private, local or special it is in conflict with the Constitution. Is the act of 1893 of that character? Certainly not in form. The words of the statute are as general as possible. It authorizes any three persons to organize a traction company and to acquire the necessary consents. It applies to all streets and highways, and to all street railways existing at the time of the passage of the act or thereafter. To secure the right to lay tracks in the street where none exist, a route must be filed with the Secretary of State, and the consent of the proper municipal authority secured. The privileges offered by the act are open to all. No law can secure to all an equal ability to avail themselves of its privileges. The act gives all an equal opportunity. It is suggested that the privilege should be awarded in an open competition to the highest bidder, but that plan gives an advantage to the man with the longest purse. The plan offered by the law gives the advantage to him who is most diligent and expeditious in filing the route. * * * No matter how general may be the law granting rights, franchises or privileges, there must be something to constitute an acceptance of the right. * * * Upon compliance with the condition the rights become exclusive, but the source of the right is the legislative enactment, and that is none the less general because only a few have the desire or the ability to avail themselves of its privileges. All that the legislature is forbidden to do is to adopt an arbitrary standard for those who are authorized to obtain the offered privileges. * * * Numerous statutes have been sustained the object of which was to correct the defective execution of deeds or defective municipal action. * * * Such statutes operate to confer an exclusive privilege, or even to make good a title to land but the legislative power has never been doubted. * * * We think the act is constitutional." *Id.*, 781–784, per Swayze, J. The first section of the act [act March 14, 1893, § 1 (Pamph. L., p. 302; Gen. Stat., p. 3235)] authorizes corporations formed thereunder to enter upon any highways upon which any street railway or other railroad operated as a street railway is or may be constructed, and to maintain and operate it, with the consent of the owner and of the persons operating the same; to construct lines of street railway through any highway, either by extension of existing railways or by the building of new lines thereon, and to use and operate them when constructed.

such city, town or village, and giving such corporations, when permission is granted, the same rights and privileges as it had under its original organization where originally located; [41] nor an act allowing a ferry company to provide additional ferry slips; [42] nor a statute authorizing an association to establish rules regulating trade upon its grounds; [43] nor statutes for the adoption of labels, trade-marks and forms of advertising by associations or unions of workingmen, and to regulate the same; [44] and municipal corporations are not within a constitutional provision prohibiting such grant of any special or exclusive privileges, immunities or franchises; [45] nor is a grant of certain powers to a municipality relating to sewage within such a constitutional prohibition; [46] nor a statute which regulates the internal affairs of towns and counties, as such constitutional inhibition applies to private corporations only.[47] But rights granted to railroad companies as to operating a surface passenger railway may come within such a constitutional prohibition; [48] as may also an act relating to taxes for road and bridge purposes, etc.; [49] and statutes, enacted after the passage of a Constitution prohibiting the granting of

[41] Millville Improvement Co. v. Pitman, Glassboro & Clayton Gas Co., 75 N. J. L. 410, 67 Atl. 1005, aff'd 76 N. J. L. 826, 71 Atl. 1134; Act of March 14, 1879; Gen. Stat., p. 1613, pl. 30.

[42] Matter of Application of Union Ferry Co., 98 N. Y. 139.

[43] Thousand Island Park Assoc. v. Tucker, 173 N. Y. 203, 210, 65 N. E. 975; Const., Art. 3, § 18. Power to regulate trade does not authorize creation of a monopoly. *Id.*

[44] Schmalz v. Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 43 L. R. A. 86, 73 Am. St. Rep. 637, rev'g 56 N. J. Eq. 649, 39 Atl. 539; Const., Art. 4, § 7, par. 11.

[45] Commonwealth v. Emmers, 33 Pa. Super. Ct. 151; Const., Art. 3, § 7.

[46] Commonwealth v. Emmers, 221 Pa. St. 298, 70 Atl. 762; Const., Art. 3, § 7.

[47] State Board of Health v. Diamond Mills Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019, affirmed in 64 N. J. Eq. 793, 53 Atl. 1125.

[48] Long Island R. Co. v. City of New York, 199 N. Y. 288, 92 N. E. 681, aff'g 118 N. Y. Supp. 1121, 13 App. Div. 928.

[49] People ex rel. v. Fox, 247 Ill. 402, 93 N. E. 302; Art. 4, § 22.

Exemption of railroad from taxation for a certain length of time by territorial legislation is not within act of Congress, July 30, 1886, 24 Stat. 170, chap. 818. Bennett v. Nichols, 9 Ariz. 138, 80 Pac. 392.

special or exclusive privileges or immunities, which are amendatory of a special charter of an insurance company granted prior to the taking effect of said Constitution, which strike out the limitation upon corporate duration so that it shall have perpetual succession, and under which statutes it claimed a perpetual special charter, are unconstitutional within the above prohibition against the granting of special privileges, etc.[50]

§ 265. Constitutional Provisions Prohibiting Creation of Corporations by Special Act, etc.

Many of the State Constitutions contain provisions prohibiting the creation of corporations by special act, or also provide that they shall be created only under general laws, or that corporate powers shall not be increased or diminished by special laws, etc.[51] It is held in New York that, under the Constitution of that State, a discretion is vested in the legislature to determine the necessity of a special act of incorporation.[52]

§ 266. Same Subject—General Instances.

A franchise granted by the legislature to construct and maintain a dam across a river is not within the meaning of a State Constitution prohibiting the legislature from enacting any special or private law granting corporate powers or privileges except to cities.[53] Other

[50] Bank of Commerce, In re Application of, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224; Const., Art. 1, § 23.

[51] See Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736 [Const. Neb., Art. 11b (13)]; Gillespie v. Ft. Wayne & Southern R. Co., 17 Ind. 243; State v. City of Bangor, 98 Me. 114, 56 Atl. 589 (Const., Art. 4, § 14); Memphis & S. L. R. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019 (Const., Art. 11, § 8).

Increase of capital stock within prohibition of Const., Art. 11, § 13; "*create*" construed. Marion Trust Co. v. Bennett, 169 Ind. 346, 82 N. E. 782.

[52] Economic Power & Const. Co. v. City of Buffalo, 112 N. Y. Supp. 1127, 128 App. Div. 883, aff'g 111 N. Y. Supp. 443, 59 Misc. 571; Const., Art. 8, § 1. See People v. Board of Election Comm'rs of Chicago, 221 Ill. 9, 77 N. E. 321; Const., Art. 4, § 22.

[53] Southern Wisconsin Power Co., In re, 140 Wis. 245, 265, 122 N. W. 801, 809; Const., Art 4, § 31. This was held especially so where the act granting such franchise specifically provides that no corporate powers are

statutes held not to be within the constitutional prohibition against creating corporations by special acts are as follows: the grant of a franchise to an existing corporation to construct a canal and locks; [54] the regulation of railroads by certain cities acting under statute; [55] the regulation of street railway fares; [56] a grant to a water company of an exclusive right; [57] and a reclamation district is not within such a constitutional prohibition; [58] nor is a board of water works, created by statute for certain cities, a private business corporation within the meaning of the Constitution; [59] and fraternal benefit societies are held not embraced within the prohibition; [60] nor the incorporation of religious societies; [61] nor school districts, but only private or quasi public corporations; [62] so private corporations and State hospitals are distinguished in this respect; [63] and a State normal college is

granted or intended to be granted by it. It was also decided that a franchise, such as a right to build a dam across a river, may be conferred by special or private law upon an existing corporation.

When bill ratifying charter and conferring certain rights as to constructing dam, etc., held not within prohibition of Const., Art 3, § 34; McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 S. E. 1020, construing also Const., Art. 9, § 2.

[54] State v. Portland General Electric Co., 52 Oreg. 502, 98 Pac. 160, denying rehearing, 95 Pac. 722, under Const., Art. 11, § 2.

[55] Pittsburg, C., C. & St. L. Ry. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362; Const., Art. 11, § 13.

[56] Indianapolis, City of, v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Const. Art. 11, § 13.

When statute authorizing certain railroad rate is within constitutional prohibition, see People v. Public Service Commission, 125 N. Y. Supp. 1000.

[57] San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075, held not to create a corporation by special act within the prohibition of Const., Art. 4, § 31.

[58] Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Const., Art. 12, § 1.

[59] Kirch v. City of Louisville, 30 Ky. L. Rep. 1356, 101 S. W. 373; Const., § 59.

[60] Park v. Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932.

[61] St. Hyacinth Congregation v. Borucki, 141 Wis. 205, 124 N. W. 284; Const., Art. 4, § 31.

[62] State v. McCaw, 77 S. C. 351, 58 S. E. 145; Const., Art. 9, § 2.

[63] Napa State Hospital v. Dasso, 153 Cal. 698, 96 Pac. 355; Const., Art. 12, § 1.

not a corporation under such a constitutional prohibition;[64] although a parish board of education is held to be included within the meaning of the Louisiana Constitution.[65] Again, statutes, enacted after the passage of a Constitution providing that "corporations other than banking shall not be created by special act, but may be formed under general laws," which are amendatory of a special charter of an insurance company granted prior to the taking effect of said constitutional provision, and which strike out the limitation upon corporate duration so that it shall have perpetual succession, and under which statutes it claimed a perpetual special charter, are unconstitutional within the above provision against creating corporations by special act.[66]

[64] Turner v. City of Hattiesburg (Miss., 1910), 53 So. 681; Const. 1890, § 178.

[65] Board of School Directors of Madison Parish v. Coltharp (La., 1911), 54 So. 299; Const. of 1898, Art. 48.

[66] Bank of Commerce, In re Application of, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224; Const., Art. 11, § 13.

CHAPTER XVIII

FEDERAL AND STATE LEGISLATIVE POWERS—MONOPOLIES, ETC.

§ 267. Power of Congress to Prohibit Restraints Upon Competition — Railroad Corporation.
268. Legislative Powers of State Generally.
269. Federal and State Legislative Powers Distinguished.
270. Same Subject—Interstate and Intrastate Commerce.
271. Police Power—Definition and General Principles—Monopolies May Be Prohibited, etc.
272. Grant of Monopoly—Sovereign Power or State Is Source of Grant or Franchise.
§ 273. Test of Legislative Power to Grant.
274. Legislative Power of State to Grant Monopolies.
275. Monopoly Cannot Be Implied from Mere Grant—Public Grants of Franchises, Privileges, etc.—Construction Against Grantee.
276. Legislative Power of State to Prohibit Combinations, Monopolies, etc.—Anti-Trust Acts.

§ 267. Power of Congress to Prohibit Restraints Upon Competition—Railroad Corporations.

Congress with regard to interstate commerce and in the case of railroad corporations has the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition.[1]

[1] United States v. Joint Traffic Assoc., 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25. A case of validity of joint traffic agreement; decision is considered in Standard Oil Co. v. United States, 221 U. S. 1, 64 (per Mr. Chief Justice White), 91 et seq. (per Mr. Justice Harlan in concurring and dissenting opinion), 55 L. ed. —, 31 Sup. Ct. 502.

Constitutional vestment of powers in Congress. See § 204, herein.

Commerce clause of Constitution—Power of Congress. See § 205, herein.

Purpose of vestment in Congress of power to regulate commerce. See § 206, herein.

Regulation of Commerce—Extent of interference with private contracts or combinations—Interstate and intrastate commerce. See § 207, herein.

§ 268. **Legislative Powers of State Generally.**

The legislature of a State has all powers of legislation, except in so far as it may be restrained by the Constitution of the State or of the United States, expressly or by necessary implication.[2] In the construction of State statutes the legislature possesses all legislative powers not prohibited by the fundamental law, and every legislative act is presumed to be valid, nevertheless if there be a clear incompatibility between the Constitution and the act, the latter is void, and must be so declared.[3] It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies whose business is prosecuted for private emolument and advantage.[4]

§ 269. **Federal and State Legislative Powers Distinguished.**[5]

It is well settled that the government created by the Federal Constitution is one of enumerated powers;[6] it has no inherent powers of sovereignty; the enumeration of the powers granted is to be found in the Constitution of the United States and in that alone;[7] it cannot by any of its agencies exercise an authority not granted by

[2] Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. See § 269, herein. *That State legislative power unlimited except* as restricted by Federal or State Constitutions. See McGrew v. Missouri Pacific Ry. Co., 230 Mo. 416, 132 S. W. 1076.

[3] Miller v. Commonwealth, 88 Va. 618, 15 L. R. A. 441, 14 S. E. 161, 344, 979.

[4] Flint v. Stone Tracy Co., 220 U. S. 108, 55 L. ed. —, 31 Sup. Ct. 342 (a case of corporation tax as imposed by act of Congress in the Tariff Act of 1909). See opinion of Mr. Justice Day at p. 172.

[5] See Joyce on Franchises, §§ 120, 121, 137, 289; see also §§ 204–207, 268, herein.

[6] House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 234, case affirms 227 Mo. 617, 127 S. W. 305; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

[7] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

that instrument either expressly or by necessary implication, and a power may be implied when necessary to give effect to a power expressly granted.[8] In a qualified sense, however, and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law, and they may not improperly be called a body of interstate law.[9] It is also a fundamental principle beyond dispute that while the Constitution of the United States and the laws enacted in pursuance thereof, together with treaties made under the authority of the United States constitute the supreme law of the land,[10] a State may exercise all such governmental authority as is consistent with its own, and not in conflict with the Federal Constitution.[11] And while the Federal government is one of enumerated powers specified in its Constitution, State Constitutions are limitations upon and not grants of legislative power.[12] It may also be generally

[8] House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 337, case affirms 227 Mo. 617, 127 S. W. 305.

[9] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

[10] See § 203, herein.

Supremacy of Congress over State laws. See 9 Fed. Stat. Ann., pp. 221 et seq.

[11] House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 337, case affirms 227 Mo. 617, 127 S. W. 305. See § 268, herein.

[12] *Alabama:* State ex rel. Woodward v. Skeggs, 154 Ala. 249, 46 So. 268, 270; Ensley Development Co. v. Powell, 147 Ala. 300, 40 So. 137; Dorsey, In re, 7 Port. (Ala.) 293.

California: City Street Improvement Co. v. Regents' University of California, 158 Cal. 776, 778, 96 Pac. 801 (the Constitution of the State being but a restriction upon the power of the legislature, the limitation therein contained will not be extended beyond the legitimate meaning and use of the terms employed, per Henshaw, J.); Beals v. Amador County Supervisors, 35 Cal. 624; McCarthy, Ex parte, 29 Cal. 395.

Colorado: People ex rel. Rhodes v. Fleming, 10 Colo. 553, 16 Pac. 298 (Constitution not a grant of power to legislature, it is but a limitation upon legislative authority, as it is invested with plenary power for all the purposes of civil government).

Florida: Thomas v. Williamson, 51 Fla. 332, 40 So. 831 (State Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in Constitution courts have no authority to pronounce it invalid).

Illinois: Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245; Winch v. Tobin, 107 Ill. 212.

stated, in view of our republican form of government and of the powers reserved to the States or to the people under the Tenth Amendment to the Federal Constitution,[13] that the legislative powers of a State in all matters of government are sovereign over all subjects and embrace all that are not forbidden by the Constitution of the State and of the United States.[14]

Indiana: Hovey v. State, 119 Ind. 395, 21 N. E. 21.

Compare State v. Denny, 118 Ind. 449, 21 N. E. 274.

Iowa: Eckerson v. City of Des Moines, 137 Iowa, 452, 465, 115 N. W. 177; Purczell v. Smidt, 21 Iowa, 54.

Kentucky: Bullitt v. Sturgeon, 127 Ky. 332, 32 Ky. L. Rep. 215, 105 S. W. 468 (see this case in next following note); Griswold v. Hepburn, 2 Duv. (63 Ky.) 20.

Louisiana: Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182.

Maine: Winchester v. Corinna, 55 Me. 9.

Michigan: Attorney General v. Preston, 56 Mich. 177, 22 N. W. 261.

Montana: Evers v. Hudson, 36 Mont. 135, 92 Pac. 462.

Nebraska: State v. Moore, 40 Neb. 854, 59 N. W. 755.

New Hampshire: Concord Rd. v. Greeley, 17 N. H. 47.

New York: People v. Flagg, 46 N. Y. 401; Chenango Bank v. Brown, 26 N. Y. 467.

Ohio: Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

Pennsylvania: Lewis, Appeal of, 67 Pa. St. 153.

South Carolina: Lynch, Ex parte, 16 S. C. 32.

Tennessee: Stratton *v.* Morris, 5 Pick. (89 Tenn.) 497, 12 L. R. A. 70, 15 S. W. 87.

Texas: Solon v. State (Tex. Civ. App., 1908), 349; Holly *v.* State, 14 Tex. App. 505.

Utah: Salt Lake City v. Christensen Co., 34 Utah, 38, 42, 95 Pac. 523.

Vermont: Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

Virginia: Commonwealth v. Drewry, 15 Gratt. (Va.) 1.

West Virginia: Bridges v. Shallcross, 6 W. Va. 562.

Wisconsin: Bushnell v. Beloit, 10 Wis. 195.

Compare Leavenworth County Comm'rs v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Cincinnati, W. & Z. R. Co. v. Supervisors, 1 Ohio St. 77.

See also Joyce on Franchises, § 289.

[13] See § 226, herein.

[14] *United States:* Platt *v.* LeCocq (U. S. C. C.), 150 Fed. 391 (legislation does not look to the Constitution for power to act but only to see if that instrument restricts or enlarges its powers).

Alabama: Finklea v. Farish, 160 Ala. 230, 49 So. 366 (Constitution is the source of legislative power, and there are no limits to the legislative power of the State government save such as are contained in the Constitution).

California: Sheehan *v.* Scott, 145 Cal. 684, 79 Pac. 350 (includes all powers not expressly prohibited or otherwise conferred); Kingsbury v. Nye, 9 Cal. App. 574, 581, 99 Pac. 985 (legislature within its sphere of action is omnipotent, save only as its power is restricted by the Constitution).

§ 270. Same Subject—Interstate and Intrastate Commerce. [15]

The United States is a government of limited and

Colorado: People ex rel. Rhodes v. Fleming, 10 Colo. 553, 16 Pac. 298 (legislature has plenary power for all purposes of civil government).

Connecticut: Allyn's Appeal, 81 Conn. 534, 71 Atl. 794 (power of legislation vested by Constitution in General Assembly covers whole field of legitimate legislation, except as that may be limited by other provisions of that Constitution or by the Federal Constitution; subject to these exceptions any legislation is legitimate which is not inconsistent with a republican form of government); Booth *v.* Town of Woodbury, 32 Conn. 118 (legislative power is limited only by Constitution of State and of United States and by principles of natural justice).

Delaware: State v. Fountain, 6 Pen. (Del.) 520, 69 Atl. 926, 930 (legislative power is vested by Constitution in General Assembly and such grant is broad and general, and though limited by other constitutional provisions inconsistent therewith such limitations are not an enumeration of the only specific power).

Florida: Thomas v. Williamson, 51 Fla. 332, 40 So. 831 (see this case under last preceding note).

Illinois: Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245 (legislature may exercise any power not prohibited by State or Federal Constitution); Hawthorn v. People. 109 Ill. 302, 50 Am. Rep. 610 (State has supreme legislative power except so far as limited by the Constitution, State or Federal, or such as has been delegated to general government).

Indiana: State v. Goldhart, 172 Ind. 210, 87 N. E. 133 (legislature supreme except as limited by Constitution).

Iowa: McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 108 N. W. 340 (State has sovereign legislative power over all subjects except such as are reserved by the State Constitution and subject to the power delegated expressly or by necessary implication to the Federal government).

Kentucky: Bullitt v. Sturgeon, 127 Ky. 332, 32 Ky. L. Rep. 215, 105 S. W. 468 (Constitution not a delegation of powers but a limitation, and wherever it has not limited the right of the legislature to act it may act).

Missouri: State ex rel. Hensen v. Sheppard, 192 Mo. 497, 507, 91 S. W. 477 (may enact any law not prohibited by Constitution); Roberts, Ex parte, 166 Mo. 207, 65 S. W. 726 (same as preceding case).

Montana: Evers v. Hudson, 36 Mont. 135, 92 Pac. 462 (in absence of some specific prohibition in the Constitution or the use in that instrument of terms which imply a prohibition the legislative power is supreme); Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093 (in the matter of legislation the people through the legislature have plenary power except in so far as inhibited by the Constitution).

Nevada: Boyce, Ex parte, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47 (legislature has supreme power in all matters of government when not prohibited by constitutional limitations, and while powers of Federal government are

[15] See § 77, herein.

delegated powers but in respect to the powers delegated, including that to regulate commerce between the States, the power is absolute except as limited by other provi-

restricted to those delegated, those of State government embrace all not forbidden); Wallace v. City of Reno, 27 Nev. 71, 73 Pac. 628, 103 Am. St. Rep. 747, 63 L. R. A. 337 (have all powers in matters of government unless limited by Constitution).

New York: Ahern, Matter of, v. Elder, 195 N. Y. 493, 500, 88 N. E. 1059, aff'g 115 N. Y. Supp. 1108 ("subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable," per Werner, J.); People v. Young, 45 N. Y. Supp. 772, 18 App. Div. 162.

Ohio: Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564 (State's powers are sovereign except as limited and restrained by Federal and State Constitutions).

Pennsylvania: Likin's Petition, 223 Pa. St. 456, 72 Atl. 858 (whatever the people have not in their Constitution restrained themselves from doing, they, through their representatives in the legislature, may do); Commonwealth v. Mallet, 27 Pa. Super. Ct. 41 (except where Constitution has imposed limits upon the legislative power it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case.

South Dakota: Watson, In re, 17 S. Dak. 486, 97 N. W. 463 (there are no limitations on the power of the legislature except such as are imposed by the State and Federal Constitutions).

Tennessee: Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 159, 34 L. R. A. 725, 36 S. W. 1041.

Utah: State v. Lewis, 26 Utah, 120, 72 Pac. 388 (legislative power to legislate upon all subjects and for all purposes of civil government is absolute, inherent and plenary except as limited or controlled by the Federal or State Constitution); Kimball v. Grantsville City, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628 (where State has committed its whole lawmaking power to the legislature, except such as is expressly or impliedly withheld by the State or Federal Constitution, it has plenary power for all purposes of civil government, and, therefore, in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of government).

Virginia: Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342 (as to matters not ceded to the Federal Government the legislative powers of the general assembly are without limit except so far as restrictions are imposed by the State Constitution in express terms or by strong implication; State Constitution is restraining instrument only); Norfolk, City of, v. Board of Trade & Business Men's Assoc., 109 Va. 353, 63 S. E. 987; Couk & Duncan v. Skeen, 109 Va. 6, 63 S. E. 11 (legislature has full power to legislate on any subject unless prohibited by Constitution); Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401 (same as Willis case); Brown v. Epps, 91 Va. 726, 27 L. R. A. 676, 21 S. E. 119 (Constitution is restraining instrument, and legislature possesses all legislative power not prohibited by Constitution).

sions of the Constitution.[16] And whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress; [17] and no State can pass any law directly regulating or restraining interstate commerce,[18] nor exclude from its limits a corporation engaged therein,[19] for no State enactment can avail when the subject has been covered by an act of Congress acting within its constitutional powers. In such a case the act of Congress is paramount and the State law must give way.[20] No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate or international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation

Washington: State v. Clark, 30 Wash. 439, 71 Pac. 20 (absence in Constitution of specially delegated power to legislature is not a restriction).

Wisconsin: Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905 (no specific enabling provision required to enable legislature to make all laws necessary and proper to carry into execution the powers which the Constitution vests in the State government); State v. Redmon, 134 Wis. 89, 114 N. W. 137 (general declaration in Constitution of the purposes of civil government is a limitation upon legislative power, designed, at least in part, to prevent clearly unreasonable enactments restricting natural private rights).

[16] Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. —, 31 Sup. Ct. 164, case affirms 168 Fed. 987, 990. See §§ 204–207, herein.

[17] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436. See §§ 205–207, herein.

Supremacy of Congress over State laws. See 9 Fed. Stat. Ann., pp. 221 et seq.

[18] Southern Railway Co. v. King, 217 U. S. 524, 54 L. ed. 2, 30 Sup. Ct. 594, case affirms 160 Fed. 332. See Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. —, 55 L. ed. —, aff'g 172 Fed. 545.

[19] Oklahoma v. Kansas Natural Gas Co., 221 U. S. 524, 55 L. ed. —, 31 Sup. Ct. —, aff'g 172 Fed. 545.

[20] Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 486, 55 L. ed. —, 31 Sup. Ct. 272.

created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land.[21] But the fact alone that a corporation is engaged in interstate commerce does not deprive the State of power to exercise reasonable control over its business done wholly within the State.[22] Again, although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.[23] But inaction by Congress in regard to a subject of interstate commerce is a declaration of freedom from State interference.[24] And until Congress acts a State may prescribe proper police regulations in regard to matters which may properly come within the power of Congress without violating the commerce clause of the Federal Constitution, and the statutes of a State not in their nature arbitrary and which really relate to the rights and duties of all within the jurisdiction must control. This principle is held to be firmly established.[25]

[21] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436. See 9 Fed. Stat. Ann., pp. 221 et seq.

[22] McGuire v. Chicago, Burlington & Quincy Rd. Co., 121 Iowa, 340, 108 N. W. 902.

[23] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96. See Reagan v. Mercantile Trust Co., 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028, cited in Ames v. Union Pacific Ry. Co. (U. S. C. C.), 64 Fed. 165, 170.

Commerce—State control of business within jurisdiction. See Joyce on Franchises, § 369.

[24] Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. —, 55 L. ed. —, aff'g 172 Fed. 545.

[25] Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. —, 31 Sup. Ct. 275, aff'g 86 Ark. 412. See Western Union Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. —, 31 Sup. Ct. 399.

A State may in the exercise of its police power pass laws which do not interfere directly with the operations of interstate commerce.[26]

§ 271. Police Power—Definition and General Principles—Monopolies May Be Prohibited, etc.[27]

The term police power is hard to define [28] and defini-

Commerce—Power of States where Congress has not acted. See Joyce on Franchises, §§ 367, 368.

Commerce—As to exclusive or concurrent powers of Congress and the States, see the following cases: Adams Express Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972; Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 620, 622, 29 Sup. Ct. 214, 53 L. ed. 352; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. ed. 778; McLean v. Denver & Rio Grande Ry. Co., 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. 1; New York, New Haven & Hartford Rd. Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 596; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 14 Sup. Ct. 1087; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. 559; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; Robbins v. Shelby Co. Tax Dist., 120 U. S. 480, 30 L. ed. 694, 7 Sup. Ct. 592; Wabash, St. Louis & P. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 214, 7 Sup. Ct. 4; Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. 1114; Pickard v. Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826; Head Money Cases, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. 247; Mobile, County of, v. Kimball, 102 U. S. 691, 26 L. ed. 238; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Lottowanna, The, 21 Wall. (88 U. S.) 558, 22 L. ed. 654; State Freight Tax Case, 15 Wall. (82 U. S.) 232, 21 L. ed. 146; Crandall v. Nevada, 6 Wall. (73 U. S.) 35, 18 L. ed. 745; License Tax Cases, 5 Wall. (72 U. S.) 462, 18 L. ed. 497; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 713, 18 L. ed. 96; Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (59 U. S.) 421, 15 L. ed. 435; Passenger Cases, 7 How. (48 U. S.) 283, 12 L. ed. 702; License Cases, 5 How. (46 U. S.) 504, 573, 12 L. ed. 256; Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

[26] Southern Railway Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. 594; case affirms 160 Fed. 332.

[27] See § 226, herein.

[28] State v. Central Lumber Co., 24 S. Dak. 136, 12 N. W. 504, 510.

Police power is broad and plenary: Barrett v. State (Ind., 1911), 93 N. E. 543, 544, per Cox, J.

Extent, nature and definition of police power, see the following cases:

United States: Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. —, 55 L. ed. —, aff'g 172 Fed. 545 (State and interstate

tions of the police power must be taken subject to the condition that the State cannot, in its exercise, for any

commerce—distinction as to extent of police power); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. ed. —, 31 Sup. Ct. 337, aff'g 170 Fed. 1023 (a police statute may be confined to the occasion for its existence); Chicago, Burlington & Quincy Rd. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. —, aff'g 131 Iowa, 340 (where police legislation has reasonable relation to an object within governmental authority the legislative discretion not subject to judicial review); Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. —, 31 Sup. Ct. 238 (Federal courts should not strike down police regulation of State that does not clearly violate Federal Constitution, they cannot overthrow police regulations because they think it unwise or inexpedient; due process clause does not confer liberty to disregard lawful police regulations established by State for all within its jurisdiction; statute prohibiting gambling in futures); Engel v. O'Malley, 219 U. S. 128, 55 L. ed. —, 31 Sup. Ct. 105 (where subject is within police protection of State, it is not for the court to determine whether the enactment is wise or not; that is within legislative discretion. Case of commerce, burden on; private banking act of New York); Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 299, 55 L. ed. —, aff'g 22 Okla. 48 [the police power extends to all the great public needs (Canfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. 864) and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling co-operation so as to prevent failure and panic]; Columbus v. Mercantile Trust & Deposit Co. of Balt., 218 U. S. 645, 54 L. ed. 105, 31 Sup. Ct. 105 [to furnish an ample supply of pure and wholesome water is the highest police duty resting on a municipality. See this case under § 225, herein); Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. 134, aff'g 83 Conn. 1 (where a matter is clearly within the police power of a State, the details are within legislative discretion if not unreasonably and arbitrarily exercised; classification, on a reasonable basis of subjects, within the police power, is within legislative discretion, and a reasonable selection which is not merely arbitrary and without real difference does not deny equal protection of the laws within the meaning of the Fourteenth Amendment); Western Union Teleg. Co. v. Commercial Milling Co., 218 U. S. 406, 54 L. ed. 1088, 31 Sup. Ct. 59, aff'g 151 Mich. 425 (public service corporations are subject to the police regulation, even though the police power is not unlimited); Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. 644, aff'g 105 Md. 650 (police power of State particularly extends to regulating trades and callings concerning public health); Southern Railway Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. 594, aff'g 160 Fed. 332 (States may, in the exercise of the police power, pass laws in the interest of public safety, which do not interfere directly with the operations of interstate commerce); Missouri Pacific Railway Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727, rev'g 81 Neb. 15 (there are constitutional limits to what can be required of owners of railroads under the police power); Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. ed. 515, aff'g 152 Cal. 464 (tradition

purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the

and habits of the community count for more than logic in determining the constitutionality of laws enacted for the public welfare under the police power); Flaherty v. Hanson, 215 U. S. 515, 30 Sup. Ct. 179, 54 L. ed. 307, rev'g 16 N. Dak. 347 (State cannot so exert its police power as to directly hamper or destroy a lawful authority of the United States); St. Paul, Minneapolis & Manitoba Railway Co. v. Minnesota, 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1069, following Northern Pacific Railway Co. v. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341 (the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests); Houston & Texas Central Rd. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491 (commerce; regulation of railroads); Chicago, Burlington & Quincy Ry. Co. v. Drainage Commrs., 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, aff'g 212 Ill. 103, 72 N. E. 219 (removal of bridge); Mansigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127 (navigable rivers; dams); Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. ed. 1125 (Fourteenth Amendment does not deprive); Jacobson v. Massachusetts, 197 U. S. 11, 23 Sup. Ct. 358, 49 L. ed. 643 (scope and extent of power; reasonable regulation); Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276 (freedom to contract; trusts; monopolies); Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832 (foreign insurance; extent to which power may be exercised to be determined in each case); Western Union Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934 (telegraph companies); Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714 (legislative discretion as to exercise of such power); Eagle Insurance Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868 (returns by insurance companies); Brass v. Stoeser, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857 (grain warehouse act); New York v. Squires, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. 880 (regulation of carriers of electricity); Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247 (grain elevator acts); Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207 (Fourteenth Amendment does not limit); Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 9 Sup. Ct. 564 (reserved powers of States in connection with); Western Union Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. 1126 (telegraph companies); New York v. Miln, 11 Pet. (36 U. S.) 102, 9 L. ed. 648 (internal police powers of States unrestrained and exclusive); Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 678 (reservation by States).

Alabama: Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92; Van Hook *v.* City of Selma, 70 Ala. 361; American Union Teleg. Co. v. Western Union Teleg. Co., 67 Ala. 26, 42 Am. Rep. 90.

Arkansas: Dabs *v.* State, 39 Ark. 353, 43 Am. Rep. 275.

Connecticut: Allyn, Appeal of, 81 Conn. 534, 71 Atl. 794; Clark, In re, 65 Conn. 17, 40, 31 Atl. 522, 28 L. R. A. 242, per Hammersley, J.; Woodruff *v.* New York & New Eng. R. Co., 59 Conn. 63, 20 Atl. 17.

Illinois: Chicago, City of, v. Weber, 216 Ill. 304, 92 N. E. 859; Price v.

supreme law of the land.[29] The dividing line between what is, and what is not, constitutional under the police

People, 193 Ill. 114, 117, 118, 86 Am. St. Rep. 306, 61 N. E. 844, per Boggs, J.; Harman v. City of Chicago 110 Ill. 400, 51 Am. Rep. 698; Toledo, W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

Indiana: Morris v. City of Indianapolis (Ind.), 94 N. E. 705; State v. Richereek, 167 Ind. 217, 77 N. E. 1085 (banks and banking); Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390, per McCabe, C. J.

Kansas: Ratcliff v. Wichita Union Stockyards Co., 74 Kan. 1, 86 Pac. 150 (stockyards; regulation of rates); Meffert v. State Board of Med. Reg. & Exam., 66 Kan. 710, 72 Pac. 247, per Greene, J.

Louisiana: New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544, per Bermudes, C. J.

Maryland: Deems v. Mayor & Council of Baltimore, 80 Md. 173, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541, per Robinson, C. J.

Massachusetts: Commonwealth v. Alger, 7 Cush. (61 Mass.) 53, 54, 85, per Shaw, C. J.

Minnesota: State v. St. Paul, M. & M. R. Co., 98 Minn. 380, 108 N. W. 261 (safety devices at crossings).

Mississippi: Macon, Town of, v. Patty, 57 Miss. 378, 407, 34 Am. Rep. 451, per George, C. J.

Missouri: State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902; State, Star Pub. Co. v. Assoc. Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151, per Sherwood, J.; State v. Searey, 20 Mo. 439.

Montana: State v. Penny, 42 Mont. 118, 111 Pac. 727.

New Hampshire: State v. Griffin, 69 N. H. 1, 76 Am. St. Rep. 139, 39 Atl. 260, 41 L. R. A. 177, per Carpenter, C. J.

New York: People v. Murphy, 195 N. Y. 126, 88 N. E. 17, aff'g 113 N. Y. Supp. 855, 129 App. Div. 260, which reversed 113 N. Y. Supp. 854, 6 Misc. 536; People v. King, 110 N. Y. 418, 423, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. (N. S.) 293, per Andrews, J.

North Carolina: State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696, per Avery, J.

Pennsylvania: Northumberland County v. Zimmerman, 75 Pa. St. 26.

Rhode Island: State v. Dalton, 22 R. I. 77, 80, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234, per Tillinghast, J.; State v. Fitzpatrick, 16 R. I. 1, 54, 11 Atl. 767, per Durfee, J.

South Dakota: State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504, 510.

Texas: Texarkana Gas & Electric Co. v. City of Texarkana (Tex. Civ. App., 1909), 123 S. W. 213.

Washington: Seattle, City of, v. Clark, 28 Wash. 717, 69 Pac. 407, per White, J.; Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345, per Anders, J.

Wisconsin: Renz v. Kremer, 142 Wis. 1, 125 N. W. 99; Madison, City of, v.

[29] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

power of the State is picked out by gradual approach and contact of decisions on opposing sides.[30] There is however, always a difficulty in drawing the dividing line between that which is within, and that which is without, the constitutional power of the States, and the question in each specific case must be answered by the pertinent facts therein.[31] Generally speaking the police power is reserved to the States and there is no grant thereof to Congress in the Constitution.[32] Although said power belongs to, and is to be exercised by the State, still it must yield to Congress whenever it conflicts with the powers belonging exclusively to Congress.[33] The police power is one of the most essential of governmental powers, at times one of the most insistent, and always one of the least limitable of the powers of government.[34] Again, the right to exercise said power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.[35] The police power extends to all the great public needs and includes the enforcement of commercial conditions: "It may be said in a general way that the police power extends to all the great public

Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65 (gas rates); Huber v. Merkel, 117 Wis. 355, 366, 94 N. W. 354, 62 L. R. A. 589, per Winslow, J.; State v. Krentzberg, 114 Wis. 530, 537, 91 Am. St. Rep. 934, 58 L. R. A. 748, 90 N. W. 1098, per Dodge, J.

[30] Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. —, 31 Sup. Ct. 299, aff'g 22 Okla. 48, 97 Pac. 590.

[31] Engel v. O'Malley, 219 U. S. 128, 55 L. ed. —, 31 Sup. Ct. 190.

[32] Keller *v.* United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 941; Kroschel v. Monkers (U. S. D. C.), 179 Fed. 961.

Police power is inherent. State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504.

[33] Adams Express Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972, case reverses 124 Ky. 182, 87 S. W. 1111.

[34] District of Columbia v. Brooke, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. ed. 941, case reverses 29 App. D. C. 563.

[35] St. Paul, Minneapolis & Manitoba Railway Co. v. Minnesota, 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1060, following Northern Pacific Railway Co. v. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341, the question involved being almost the same.

needs.[36] It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce." [37] The following fundamental principles are not open to dispute: (a) The police power of the State, never having been surrendered by it to the Federal government, is not granted by or derived from, but exists independently of the Federal Constitution. (b) One of the powers never surrendered by, and therefore remaining with, the State is to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, safety and health, as well as to promote the public convenience and the common good. (c) It is within the power of the State to devise the means to be employed to the above ends provided they do not go beyond the necessities of the case, have some real and substantial relation to the object to be accomplished, and do not conflict with the Constitution of the United States.[38] Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State and is within legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry.[39] And although the means devised by the State legislature for the enforcement of its police regulations may not be the best that can be devised, the Federal Supreme Court cannot declare them illegal if the enact-

[36] Citing Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. 864.

[37] Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. —, 31 Sup. Ct. 299, per Mr. Justice Holmes.

[38] House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 337, case affirms 227 Mo. 617.

[39] Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714.

ment is within the power of the State, and a State is not bound to go to the full extent of its power in legislating against an evil from which it seeks to protect the public.[40] All corporations, associations and individuals, within its jurisdiction, are subject to such regulations in respect to their relative rights and duties as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution prescribe for the public convenience and the general good.[41] Again, it is for the State, keeping within the limits of its constitutional powers, to say what particular means it will prescribe for the discouragement of monopoly or combination and the encouragement of competition, in order to protect the public in such matters.[42] So a State, by virtue of its police power, has the right to enact laws prohibiting monopolies and thereby protect the public against unfair competition.[43] And an act harmless when done by one may become a public wrong when done by many acting in concert, and when it becomes the object of a conspiracy, and operates in restraint of trade, the State may prohibit it by virtue of its police power.[44] In granting an exclusive franchise to supply gas to a municipality and its inhabitants, a State legislature does not part with the police power and duty of protecting the public health, the public morals and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.[45] Again, the business of

[40] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. —, 31 Sup. Ct. 246.

[41] German Alliance Insurance Co. v. Hale, 219 U. S. 307, 55 L. ed. —, 31 Sup. Ct. 246, citing House v. Mayes, 219 U. S. 270, 55 L. ed. —, 31 Sup. Ct. 337; Jacobson v. Massachusetts, 197 U. S. 11, 27, 31, 25 Sup. Ct. 358, 49 L. ed. 643; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702.

[42] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. —, 31 Sup. Ct. 246.

[43] State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504.

[44] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 816, case affirms Retail Lumber Dealers, Assoc. v. State, 95 Miss. 337, 48 So. 1021; under Miss. Code, 1906, chap. 145, § 5002 (Laws, 1900, chap. 88). Compare Miss. Laws, 1908, p. 124, chap. 119.

[45] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6

fire insurance is of an extensive and peculiar character, concerning a large number of people; and it is within the police power of the State to adopt such regulations as will protect the public against the evils arising from the combinations of those engaged in such business, and to substitute competition for monopoly; and regulations which have a real substantial relation to that end and are not essentially arbitrary do not deprive the insurance companies of their property without due process of law.[46] Mr. Justice Harlan, who delivered the opinion of the court, holding as above stated, said: "In our opinion the statute is not liable to objection on constitutional grounds. The State—as we may infer from the words of the statute alone—regarded the fixing of insurance rates by self-constituted tariff associations or combinations as an evil against which the public should be guarded by such legislation as the State was competent to enact. This question was before the Supreme Court of Alabama, and the statute was there assailed as violating both the State and Federal Constitutions. That court held that the object of the legislature of Alabama was to prevent monopoly and to encourage competition in the matter of insurance rates, and that the statute was a legitimate exercise to that end of the police power of the State, not inconsistent with either the State or Federal Constitution.[47] The same view of the statute was taken by the State court in subsequent cases.[48] We concur entirely in the opinion expressed by the State court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar

Sup. Ct. 265; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

[46] German Alliance Insurance Co. v. Hale, 219 U. S. 307, 55 L. ed. —, 31 Sup. Ct. 246.

[47] Citing Continental Ins. Co. v. Parkes, 142 Ala. 650, 658, 659, 39 So. 204.

[48] Citing Firemen's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297; Ætna Fire Ins. Co. v. Kennedy, 161 Ala. 600, 50 So. 73.

character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." [49]

§ 272. Grant of Monopoly—Sovereign Power or State Is Source of Grant or Franchise.

Although monopolies may be created by grant still they must be called into being by the sovereign power alone.[50] A grant or franchise must have its source in or emanate from the sovereign power wherein it primarily resides, and that power alone can grant it and make possible its lawful exercises, for such legislative grant or law is a prerequisite. The source of a franchise is the State, whatever the agency employed.[51] It is, therefore,

[49] Citing Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. ed. 246, 26 Sup. Ct. 66.

[50] Davenport v. Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249. See § 274, herein.

[51] *United States:* Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274 [per Mr. Chief Justice Taney, who says: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State," quoted in whole or in part in People's Rd. v. Memphis Rd., 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844; Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22, per Barr, Dist. J.; Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 575; Purnell v. McLane, 98 Md. 589, 592, 56 Atl. 830, per Pearce, J.; State v. Scougal, 3 S. Dak. 55, 62, 44 Am. St. Rep .756, 15 L. R. A. 477, per Corson, J.]

Alabama: Uniontown, City of, v. State ex rel. Glass, 145 Ala. 471, 39 So. 814; State v. Moore & Ligon, 19 Ala. 520 (per Parsons, J., who says: "It is clear that the State is the source of all such franchises").

Colorado: Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Colo. 673,

universally recognized that the power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested, and whatever method may be adopted for their formation, and with whatever liberality the privilege of forming them may be conferred, every corporation is dependent for its existence upon the permission of the State in which it is created.[52] In the United States a corporation can only have an existence under the express law of the State by which it is created and can exercise no power or authority which is not granted to it by the charter under which it exists, or

682 (per Brazee, J., who says: "It is essential that a franchise should be created by a grant from the sovereign authority." It is a franchise which the sovereign authority alone can grant).

Idaho: Spotswood v. Morris, 12 Idaho, 360, 85 Pac. 1094 (sovereign power is necessary in order to possess or lawfully exercise the powers, privileges or franchises of a corporation).

Illinois: Wilmington Water Power Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083, per Magruder, C. J.; Chicago City Ry. v. People, 73 Ill. 541, 547 (per Story, J., who says: "Corporate franchises in the American States emanate from the government or sovereign power, and owe their existence to a grant," etc.); People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69 (per Breese, J., who says: "In this country, under our institutions, a privilege or immunity of a public nature, which could not be exercised without a legislative grant would also be a franchise. There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise"); Cain v. City of Wyoming, 104 Ill. App. 538 (a franchise must be granted by the legislature).

Louisiana: Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658 (per Blanchard, J., who says: "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant").

Maine: Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666 (private corporations exist by legislative grants conferring rights and powers for special purposes).

Minnesota: State, Clapp v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020 (same statement as Louisiana case); Blake v. Winona & St. Peter Ry. Co., 19 Minn. 418, 425.

Pennsylvania: Allegheny County v. McKeesport Diamond Market, 123 Pa. St. 164, 19 Pitts. L. J. (N. S.), 280, 46 Phila. Leg. Int. 211, 23 W. N. C. 89, 16 Atl. 619 (chartered rights from commonwealth necessary to effect purposes for which organized).

[52] Bank of California v. San Francisco, 142 Cal. 276, 279, 75 Pac. 832, 64 L. R. A. 918, per Angellotti, J.

by some other legislative act.[53] A corporation may, however, exist by prescription but such prescription presupposes a grant.[54] So it is declared that a franchise being derived from the government is always supposed to have been originally granted by the government.[55]

§ 273. Test of Legislative Power to Grant.

One of the tests of legislative power to grant franchises to particular individuals is whether such grant will promote the public good, and is such that the rights or privileges granted must be committed to a few in order to be available.[56]

§ 274. Legislative Power of State to Grant Monopolies.

The legislature of a State, in the absence of any con-

[53] Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837.

[54] Wilmington Water Power Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083, per Magruder, J.; Chicago City Ry. v. People, 73 Ill. 541, 547, per Scott, J.

"I am not here to apply the principles which have been long established in England, for the protection of ancient ferries, markets, fairs, mills, etc. In my opinion, this doctrine, in its full extent is not adapted to the condition of our country. And it is one of the most valuable traits of the common law, that it forms a rule of right, only in cases and under circumstances adapted to its principles. *In this country there are few rights founded on prescription.* The settlement of our country is comparatively recent; and its rapid growth in population and advance in improvements have prevented, in a great degree, interests from being acquired by immemorial usage. Such evidence of right is found in countries where society has become more fixed, and improvements are in a great degree stationary. But without the aid of the principles of the common law, we should be at a loss how to construe the charter of the complainants, and ascertain their rights." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 561, 562, 9 L. ed. 773, per Mr. Justice M'Lean (decided 1837). Italics are ours.

"There is no doubt," says Kent, "that corporations as well as other private rights and franchises, may exist in this country by prescription. 2 Kent's Comm., 277 (a)" * * * It may be considered well settled, that a corporation may exist in this country by *presumptive evidence.* * * * Although corporations may * * * exist in this country by common law and by reputation. * * * Yet there are comparatively but few cases where a legislative act or charter cannot be shown." Angell & Ames on Corp. (9th ed.), §§ 70, 71.

[55] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19, 36, per Hinman, J. (right to lay gas pipes in streets).

[56] Horst, Mayor, etc., v. Moses, 48 Ala. 129, 143.

stitutional prohibition, may grant an exclusive privilege or monopoly.[57] The Parliament of Great Britain and the State legislatures, except when the latter have been prevented by constitutional provisions from so doing, have always exercised the power of granting exclusive privileges or rights, even those which come within the definition of monopolies, especially so when they were necessary and proper to effectuate a purpose which had in view the public good. This is so held in the well-known Slaughter-House cases,[58] decided in 1872. The counsel therein, who argued the negative of the question there under discussion,[59] in an exhaustive brief gives the history of monopolies in England and the European continent and, as said by Mr. Justice Miller who gave the opinion of the court, "displayed a research into" that history. The court also said: "But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great Case of Monopolies, reported by Coke,[60] * * * was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against the common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? * * * *But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to*

[57] Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138; Memphis, City of, v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495; State v. Milwaukee Gaslight Co., 29 Wis. 454.

An exclusive privilege or monopoly can be granted under the usual title to incorporate a company. Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138.

[58] 16 Wall. (83 U. S.) 36, 65, 21 L. ed. 394.

[59] Which was: "Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?"

[60] 11 Reports, 85.

persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied, nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.[61] It may, therefore, be considered as established that the authority of the legislature of Louisiana to pass the present statute [62] is ample, unless some restraint in the exercise of that power be found in the Constitution of that State, or in the amendments to the Constitution of the United States adopted since the date of the decisions we have already

[61] *Mem.* Italics in text are the author's.

That part of the above quotation commencing: "But we think it may be safely affirmed that the parliament of Great Britain" and ending: "and could only have been conducted to success in that way" is quoted in City of Laredo v. International Bridge & Tramway Co., 66 Fed. 246, 248, 14 C. C. A. 1. A case of contract, by ordinance, not to exercise city's ferry franchise, for a period of years and to permit certain bridge privileges for same period; held not a monopoly.

[62] The legislature of Louisiana, on March 8, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for enclosing cattle intended for sale for slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State (a territory which, it was said—see 16 Wall. 85—contained 1,154 square miles, including the city of New Orleans and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter within those limits; and requiring that all cattle and other animals intended for sale for slaughter within that district should be brought to the yards and slaughter-houses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore and entrails, except swine. It was held that this grant of exclusive right or privilege, guarded by a proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the State legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment.

cited." [63] Where, however, an amendment to a corporate charter granted the right to lay down gas pipes through the streets and public grounds of a city and also provided that such right should be exclusive as against any and all other persons and corporations except such as might thereafter be invested by the legislature with power to use said streets for the same purpose it was determined, that so far as such amendment was a restriction upon the free manufacture and sale of gas it was a monopoly, and was unconstitutional and void.[64]

§ 275. Monopoly Cannot Be Implied from Mere Grant —Public Grants of Franchises, Privileges, etc.—Construction Against Grantee.

A monopoly cannot be implied from the mere grant of a charter to construct a work of public improvement, and to take the profits; to give such a monopoly there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works.[65] It is very well settled that in

[63] Mr. Justice Field, in his dissenting opinion, in the Slaughter-House Cases above cited, said: "It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. * * * The grant of exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual."

[64] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19. "Although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares 'that no man or set of men, are entitled to exclusive public emoluments, or privileges from the community,' to render them void. * * * While we are not called upon to question the authority and power of the legislature to grant to the plaintiffs the right to lay down their own pipes for the distribution of gas through the streets, for their own private purposes, we think, considering that the streets, subject to the public easement, are private property, that it does not possess the power to exclude others from using them for similar purposes." *Id.*, 38, 39, per Hinman, J.

[65] Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 36 Am. Dec. 374.

contracts with States or municipalities conferring powers, grants, or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred, all implications, doubts and ambiguities being resolved against the grant or privilege claimed.[66] And the rule is that public grants of franchises, powers, rights, privileges or property in which the government or public has an interest must be construed in favor of the grantor and strictly against the grantee; whatever is not clearly, plainly and unequivocally granted is withheld; nothing passes by implication except it be necessary to carry into effect the obvious intent of the grant. This rule applies in cases of doubt or ambiguity in the meaning or interpretation of language used or where the grant is susceptible of two constructions, for if the meaning is plain and clear and the intention obvious there is no room for construction. Private corporations and individuals are within the above rule,[67] which also applies to articles of association or-

[66] Bartholomew v. City of Austin, 85 Fed. 359, 364, 29 C. C. A. 568, per Pardee, Cir. J. See § 71, herein.

[67] *United States:* Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. 399, 27 Sup. Ct. 202; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 80, 26 Sup. Ct. 427 (street railroads; public rights; private rights under franchise); Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353 (exclusive rights; contract to supply water; legislative grant; obligation of contract; power of city to construct water plant); Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 41 L. ed. 1165, 17 Sup. Ct. 718, per Mr. Justice Brewer (condemnation of water supply; water companies; no exclusive privilege beyond reach of legislative action; legislative powers; municipal powers); Wisconsin Cent. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. 45 (public lands; subsidized railroad); Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838, reversing 73 Fed. 933 (consolidation of railroads; parallel and competing lines; statute; construction; charter; powers not directly contemplated; revocation; subsequent legislative restriction; vested rights); Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90 (grant to corporation of special privileges; obligation of contract; municipal gas works; contract for gas supply; municipal ordinance not a contract; legislative grant; power to revoke; reservation of); Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 802, 35 L. ed. 622 (grant of sole and exclusive privilege of supplying water; obligation of contract; municipal corporation); Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 45 Am.

ganizing a corporation under general laws which are a substitute for a charter from the legislative body.[68] Such

& Eng. R. Cas. 607, 9 Ry. & Corp. L. J. 342; 43 Alb. L. J. 328 (corporate contract; alienation of franchise; ultra vires agreement; breach of duty to public); Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. ed. 321; Turnpike Co. v. State, 3 Wall. (70 U. S.) 210, 18 L. ed. 180 (grants to corporations; no exclusive privilege; obligation of contract; unlawful charter to rival); Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173 (bank charters; waiver of sovereignty); Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997 (statutes as to insurance company; exemption from taxation; obligation of contracts; validity; impairment); Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773 (corporate franchise; obligation of contracts; impairment of; vested rights; powers expressly granted; exclusive privileges not regarded; implications as to powers of government); United States v. Arredono, 6 Pet. (31 U. S.) 691, 736, 8 L. ed. 547, 564; Central Trust Co. of New York v. Municipal Traction Co. (U. S. C. C.), 169 Fed. 308; Helena, City of, v. Helena Waterworks Co., 122 Fed. 1, 58 C. C. A. 381; Omaha Horse R. Co. v. Cable Tramway Co. (U. S. C. C.), 30 Fed. 324.

Georgia: Macon & W. R. R. Co. v. Davis, 13 Ga. 68.

Illinois: Mills v. County of St. Clair, 7 Ill. 197.

Louisiana: State of Louisiana v. Morgan, 28 La. Ann. 482.

Maine: Rockland Water Co. v. Camden & R. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388.

Michigan: People v. Detroit United Ry. Co., 162 Mich. 460, 17 Det. Leg. N. 673, 127 N. W. 748, aff'g 125 N. W. 700.

Minnesota: State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380.

Nebraska: Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802.

New Jersey: Millville Gaslight Co. v. Vineland Light & Power Co. 72 N. J. Eq. 505, 65 Atl. 504; Jersey City v. North Jersey Ry. Co., 72 N. J. L. 383, 61 Atl. 95.

New Mexico: Colorado Telephone Co. v. Fields (N. M. 1910), 110 Pac. 571.

New York: Trustees of Southampton v. Jessup, 162 N. Y. 122, 127, 59 N. E. 538, per Vann, J., case reverses 10 App. Div. 456; People v. Woodhaven Gas Co., 153 N. Y. 528, 47 N. E. 787, reversing 11 App. Div. 175.

Ohio: Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 636, per Bartley, C. J.

Pennsylvania: Emerson v. Commonwealth, 108 Pa. St. 111; Pennsylvania Ry. Co. v. Canal Commissioners, 21 Pa. St. 9, 22, per Black, C. J.

Texas: East Line & R. R. Co. v. Rushing, 60 Tex. 306, 6 S. W. 834.

[68] Oregon Railway & Navigation Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409, 5 Rd. & Corp. L. J. 364; see also Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 9 Rd. & Corp. L. J. 342, 43 Alb. L. J. 328, 45 Am. & Eng. R. Cas. 607.

rule also differs from that as to ordinary grants,[69] and one of the reasons for strict construction against the grantee is that such grants are usually prepared by those interested in them and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give.[70] The rule or principle must, however, be applied with reference to the subject-matter as a whole, and not in such a manner as to defeat the general intent of the legislature,[71] as the obvious intention of the parties, when expressed in plain and unequivocal language, cannot be ignored in a public any more than in a private grant.[72]

§ 276. Legislative Power of State to Prohibit Combinations, Monopolies, etc.—Anti-Trust Acts.

The legislature of a State may ordain that competition and not combination shall be the law of trade and may prohibit combinations to control prices as where the anti-trust acts of a State were all directed to the prohibitions of combinations to restrict trade, to in any way limit competition in the production and sale of articles, or to increase or reduce prices in order to preclude free and unrestricted competition.[73]

[69] The rule of construction of private grants, if the meaning of the words be doubtful, is, that they shall be taken most strongly against the grantor. An opposite rule prevails in cases of grants made by the sovereign power. Mills v. County of St. Clair, 7 Ill. 197.

Generally, dubious words ought to be taken most strongly against the lawmaker. United States v. Heth, 3 Cranch (7 U. S.), 399, 413, 2 L. ed. 479.

[70] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. 399, 27 Sup. Ct. 202.

[71] Moran v. Miami County, 2 Black (67 U. S.) 722, 17 L. ed. 342.

[72] People, Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 187, reversing 42 N. Y. Supp. 1071, 17 App. Div. 175, 76 N. Y. St. Rep. 1071.

[73] National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689.

Mr. Justice Field in his dissenting opinion in the Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 21 L. ed. 394, said: "The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I, by which it was declared 'that all monopolies and all commissions, grants, licenses, charters and letters-patent, to any person or persons,

bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything' within the realm or the dominion of Wales were altogether contrary to the law of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war. The common law of England, * * * condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England. * * * The common law of England is the basis of the jurisprudence of the United States." See also Patterson v. Wollmann, 5 N. Dak. 608, 617, 67 N. W. 1040, 33 L. R. A. 536, per Corliss, J.

Monopolies "had been carried to an enormous height during the reign of Queen Elizabeth; and were heavily complained of by Sir Edward Coke in the beginning of the reign of King James the first: but were in a great measure remedied by statute 21 Jac. I, chap. 3, which declares such monopolies to be contrary to law and void (except as to patents not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot); * * * In the same manner, by a constitution of the emperor Zeno, all monopolies and combinations to keep up the price of merchandise, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment." 4 Blackstone's Comm. 159.

English statute declaratory of common law.

"The statute of 21 James I, chap. 3, which declares such monopolies to be contrary to law and void, except as to patents for a limited time, and printing, the regulation of which was at that time considered as belonging to the king's prerogative, and except also certain warlike materials and manufactures, the regulations of which for obvious reasons may fairly be said to belong to the king, has always been considered as merely declaratory of the common law." Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19, 38.

The old colonial act of Massachusetts of 1641 against monopolies "is merely an affirmance of the principles of the English statute against monopolies, of 21 James I, chap. 3; and if it were now in force (which it is not) it would require the same construction." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 606, 9 L. ed. 773, per Mr. Justice Story, case decided in 1837. In Standard Oil Co. v. United States, 221 U. S. 1, 56, 55 L. ed. —, 31 Sup. Ct. — (given under "Appendix A" herein), Mr. Chief Justice White, who gives the opinion of the court, notes "an early statute of the Province of Massachusetts, that is chap. 31 of the Laws of 1778–1779, by which monopoly and forestalling were expressly treated as one and the same thing."

In 1824 it was said that: "Monopoly is also an offense against public trade, and at common law. These are scarcely noticed in the laws of the United States, or in those of Massachusetts, but in general terms. This colony early passed a law, declaring there should be no monopolies allowed,

but of such new inventions as were profitable to the country, and that for a short time. There was a similar law in Connecticut." 7 Dane's Abridg. (Ed. 1824) 38, chap. 205, art. 5. It will be seen from what is stated elsewhere herein that there are now very many constitutional and statutory prohibitions against monopolies.

CHAPTER XIX

POWERS OF MUNICIPAL CORPORATIONS—MONOPOLIES, ETC.

§ 277. Rule as to Powers of Municipal Corporations.
278. Delegation of Legislative Power to Municipalities.
279. Municipal Ordinances Must Not Conflict with Constitution.
280. Power of Municipality to Create Monopolies or to Make Contracts Tending to Create a Monopoly.
§ 281. Same Subject—Municipality May Adopt Reasonable Measures, Although Slight Inequalities Exist as to Benefits Conferred.

§ 277. Rule as to Powers of Municipal Corporations. Municipal corporations will be held to the strict exercise of their franchises as they are created solely for the public good.[1] And the principle is universal that municipal corporations possess only such general powers as are clearly conferred upon them by the sovereign power or State, with such subsidiary incidental powers as are necessary to the exercise of their well-defined powers. And the accepted adhered to rule is, that municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily all fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Implied powers are such as are necessary in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant.[2] A city has two

[1] Chicago, City of, v. Rumpff, 45 Ill. 90.

[2] Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co. (U. S. C. C.), 33 Fed. 659, 667, per Jackson, J., quoting in part from Cooley's Const. Lim., marg. p. 194. See also St. Louis v. Kaime, 180 Mo. 309, 322, 79 S. W. 140, quoting 1 Dillion on Munic. Corp. (14th ed., p. 145), and quoted in part in Detroit Citizens' Street Ry. Co. v. Detroit Ry., 171 U. S. 48, 54, 43 L. ed. 67, 18 Sup. Ct. 732, per

classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it

Mr. Justice McKenna, who adds: "Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs."

Municipal corporations can exercise only such powers as are expressly conferred by the State, or such as are necessary to carry into effect those expressly delegated. Chicago, City of, v. Rumpff, 45 Ill. 90.

Rule as to extent of, and limitations upon power of municipal corporations; see also the following cases:

United States: Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. 361.

Alabama: Bessemer, City of, v. Bessemer Waterworks, 152 Ala. 391, 44 So. 663; Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615.

Alaska: Conradt v. Miller, 2 Alaska, 433; Ketchikan Co. v. Citizens' Co., 2 Alaska, 120.

California: Platt v. City & County of San Francisco, 158 Cal. 74, 110 Pac. 304; South Pasadena, City of, v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490; Galindo v. Walter, 8 Cal. App. 234, 96 Pac. 505.

Colorado: Pueblo, City of, v. Stanton, 45 Colo. 523, 102 Pac. 512.

District of Columbia: United States v. MacFarland, 28 App. D. C. 552.

Florida: Waller v. Osborn, 60 Fla. ——, 52 So. 970; Hardee v. Brown, 56 Fla. 377, 47 So. 834; State v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358; State ex rel. Wosley v. Lewis, 55 Fla. 570, 46 So. 630; Porter v. Vinzant, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607.

Illinois: Chicago, City of, v. Weber, 246 Ill. 304, 92 N. E. 859; Loeffler v. City of Chicago, 246 Ill. 43, 92 N. E. 586; Earlville, City of, v. Radley, 237 Ill. 242, 86 N. E. 624.

Indiana: Frank v. City of Decatur (Ind., 1910), 92 N. E. 173; Elkhart, City of, v. Lipschitz, 164 Ind. 671, 74 N. E. 528; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Clark v. City of South Bend, 85 Ind. 276, 44 Am. Rep. 13.

Iowa: Bear v. City of Cedar Rapids (Iowa, 1910), 126 N. W. 324, 27 L. R. A. (N. S.) 1150; Burroughs v. City of Cherokee, 134 Iowa, 429, 109 N. W. 876.

Kentucky: Henderson v. City of Covington, 14 Bush (77 Ky.), 312.

Maine: Phillips Village Corp. v. Phillips Water Co., 104 Me. 103, 71 Atl. 474; Mayo v. Dover & Foxeroff Village Fire Co., 96 Me. 539, 53 Atl. 62.

Maryland: Schultz v. State, 112 Md. 211, 76 Atl. 592.

Michigan: Wheeler v. City of Sault Ste. Marie (Mich., 1911), 17 Det. Leg. N. 1117, 129 N. W. 685; Attorney Gen'l v. Detroit Common Council, 150 Mich. 310, 113 N. W. 1107, 14 Det. Leg. N. 643.

acts and contracts for the private advantage of the inhabitants of the city and of the city itself.[3]

§ 278. Delegation of Legislative Powers to Municipalities.

A city is the creature of the State. A municipal cor-

Mississippi: Alabama & V. Ry. Co. v. Turner (Miss., 1910), 52 So. 261; Hazelhurst, City of, v. Mayes (Miss., 1910), 51 So. 890.

Missouri: Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946; Leach v. Cargill, 60 Mo. 316; State ex rel. Case v. Wilson, 151 Mo. App. 723, 132 S. W. 625; Smith v. Berryman, 142 Mo. App. 373, 127 S. W. 129.

Montana: Palmer v. City of Helena, 40 Mont. 498, 107 Pac. 512; Davenport v. Kleinschmidt, 6 Mont. 502, 527, 13 Pac. 249.

New York: People v. Perley, 123 N. Y. Supp. 436, 67 Misc. 471.

North Carolina: Asheville Street Ry. Co. v. West Asheville Sulphur Spring Ry. Co., 114 N. C. 725, 728, 19 S. E. 697.

South Carolina: Germania Sav. Bank v. Darlington, 50 S. C. 337, 27 S. E. 846.

Texas: Brenham, City of, v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Ball v. Texarkana Water Corp. (Tex. Civ. App. 1910) 127 S. W. 1068; Paris, City of, v. Sturgeon, 50 Tex. Civ. App. 519, 112 S. W. 459; Blankenship v. City of Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805.

Virginia: Kirkham v. Russell, 76 Va. 956.

Wisconsin: Flannagan v. Buxton (Wis., 1911), 129 N. W. 642; Schneider v. City of Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

[3] Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, cited in Winona, City of, v. Botzet, 169 Fed. 321, 332, 333, 94 C. C. A. 563. See Dillon on Municipal Corp. (5th ed.), §§ 38 (26), 39 (27). See also the following cases:

United States: Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 11, 44 C. C. A. 333, 342; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 181, 40 U. S. App. 257, 276, 34 L. R. A. 518, 525; Safety Insulated Wire & Cable Co. v. Mayor, etc., of Baltimore, 66 Fed. 140, 143, 144, 13 C. C. A. 375, 377, 375.

California: San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 468, 469.

Illinois: Wagner v. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549.

Indiana: Vincennes, City of, v. Citizens' Gaslight Co., 132 Ind. 114, 126, 31 N. E. 573, 577; Indianapolis, City of, v. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403.

Louisiana: New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, 192, 7 So. 559, 560.

Massachusetts: Lynch v. City of Springfield, 174 Mass. 430, 431, 54 N. E. 871.

Minnesota: Wiltse v. City of Red Wing, 99 Minn. 255, 260, 109 N. W. 114.

poration is simply a political subdivision of the State existing by virtue of the exercise of the power of the State through the legislative department.[4] But legislatures may delegate to municipal assemblies the power of enacting ordinances relating to local matters, and such ordinances when legally enacted have the force of legislative acts.[5] And the legislature generally confers upon subordinate municipal agencies such powers of the sovereign authority as it deems shall best promote the public interests.[6] It is also held that the police power may be asserted directly by the legislature, or may in the absence of constitutional restrictions, be delegated to several municipal corporations or other agencies provided for its exercise.[7] In Tennessee legislative power cannot be delegated except in those special instances in

New Jersey: Read v. Atlantic City, 49 N. J. L. 558, 9 Atl. 759.

Pennsylvania: Commonwealth v. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136.

Washington: Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316, 325, 28 Pac. 516, 519.

[4] Worcester, City of, v. Worcester Consolidated St. Ry. Co., 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. 327, aff'g 182 Mass. 49, 64 N. E. 581. See Memphis, City of, v. Postal Teleg. Cable Co., 139 Fed. 707.

[5] New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. 161.

Legislature has the right to, and may confer power upon a municipality to pass ordinances which shall have a legislative character. Eureka v. Wilson, 15 Utah, 53, 48 Pac. 41. See also Central Passenger Ry. Co. v. Louisville Bagging Manfg. Co. (Louisville L. & Eq. Ct. Ky., 1890), 3 Am. Elec. Cas. 252, per Toney, J., case affirmed in Louisville Bagging Manfg. Co. v. Central Passenger Ry. Co., 95 Ky. 50, 23 S. W. 592.

It is "settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances." 2 Dillon on Munic. Corp. (5th ed.), § 573 (308), p. 901.

State may delegate power to its municipal corporations. McQuillin's Munic. Ordinances, § 43.

Legislative authority cannot be delegated. McQuillin's Munic. Ordinances, §§ 86–88.

[6] State ex rel. Laclede Gaslight Co. v. Murphy, 130 Mo. 10, 31 S. W. 594; see also Sinton v. Ashbury, 41 Cal. 425; Cape May, Delaware Bay & S. P. R. Co. v. City of Cape May, 59 N. J. L. 393, 36 Atl. 679.

[7] Chicago, Burlington & Quincy Rd. Co. v. Nebraska, 47 Neb. 549, 3 Am. & Eng. R. Cas. (N. S.) 573, 41 L. R. A. 481, 66 N. W. 624. See Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 50 L. R. A. 631, 65 N. E. 451.

which the Constitution itself authorizes such delegation, or those sanctioned by immemorial usage originating anterior to the Constitution and continuing unquestioned thereunder.[8] Under a Louisiana decision the authorities of a city are not invested with legal power to create corporations or to grant franchises; that can be done only by the State, although cities may concede certain privileges which are held to be "secondary franchises," instrumentalities by means of which the corporate powers granted by the charter may be exercised.[9] And where the legislature itself has, by virtue of a constitutional prohibition, no power to create a monopoly a municipal corporation has no power to do so. The legislative powers possessed by a city council are such only as are delegated by the legislature in the city charter, and the legislature can delegate no power not possessed by itself.[10]

§ 279. Municipal Ordinances Must Not Conflict with Constitution.

Ordinances of municipal corporations must be in harmony with the State Constitution and they are invalid if they are in conflict therewith and prohibitions therein restraining the exercise of any legislative act must be observed.[11]

§ 280. Power of Municipality to Create Monopolies or to Make Contracts Tending to Create a Monopoly.

The power to grant monopolies does not appertain to a municipal corporation unless upon express grant. Nor can it be claimed that a general grant of such powers as pertain to cities would include such as can only be exer-

[8] Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293.

[9] Shreve Traction Co. v. Kansas City, Shreveport & Gulf Ry. Co., 119 La. 759, 44 So. 457.

[10] Brenham v. Becker, 1 White & Willson's Civ. Cas. (Tex. Ct. App.), §§ 1243, 1244. See also Thrift v. Elizabeth City, 122 N. C. 31, 37, 30 S. E. 349, 44 L. R. A. 427, per Douglas, J.

Delegation of power to cities, towns, etc., to create corporations, or to grant franchises. See Joyce on Franchises, §§ 48, 147, 148.

[11] People v. Clean Street Co., 225 Ill. 470, 80 N. E. 298.

cised under an express grant.[12] Nor can municipal corporations confer pecuniary benefits or grant monopolies to any portion of their communities, or to individual members thereof, but must exercise their powers for purely legitimate purposes; and any contract made by such corporation with others which tends to create a monopoly is void where there exists no authority in the charter to make it.[13] Nor can the authorities of a village, possessing the usual powers only, create a monopoly.[14] "It is believed, that the result of the authorities warrants the assertion that corporate franchises, whether municipal or private, are conferred in trust for the benefit of the entire body of corporators, and must, like all other trusts, be exercised with prudence and discretion. Hence their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest of the corporation are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly." [15] Again, "All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority." [16] When privileges are granted by a city ordinance they must be open to the enjoyment of all persons similarly situated upon equal terms and conditions; and an ordinance framed so as to grant such privileges to some and refuse them on equal terms to others would be invalid for being unreasonable, oppressive and creating a monopoly.[17] It is also held that a

[12] Logan & Sons v. Pyne, 43 Iowa, 524. See next following note.

[13] Chicago, City of, v. Rumpff, 45 Ill. 90. The prohibitory Constitutions and statutes of the several States should be considered in the above connection.

Municipality cannot enact ordinances which will create a monopoly: Tugman v. City of Chicago, 78 Ill. 405. See also Illinois Trust & Savings Bk. v. Arkansas City Water Co. (U. S. C. C.), 67 Fed. 196.

[14] Gale v. Village of Kalamazoo, 23 Mich. 344.

[15] Chicago, City of, v. Rumpff, 45 Ill. 90, 96.

[16] Thrift v. Elizabeth City, 122 N. C. 31, 37, 30 S. E. 349, 44 L. R. A. 427, per Douglas, J. A case of a contract or ordinance of a city attempting to grant an exclusive privilege for construction, etc., of waterworks.

[17] Danville, City of, v. Noone, 103 Ill. App. 290.

city council has no power to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature.[18]

§ 281. **Same Subject—Municipality May Adopt Reasonable Measures, Although Slight Inequalities Exist as to Benefits Conferred.**

Although a municipal corporation cannot grant monopolies, or make, in excess of their charter powers, contracts which tend to create monopolies, still, they may validly adopt reasonable measures in support of their legal existence even though slight inequalities in the benefits conferred may result.[19]

[18] Davenport v. Kleinschmidt, 6 Mont. 502, 529, 13 Pac. 249.

[19] Chicago, City of, v. Rumpff, 45 Ill. 90. The prohibitory Constitutions and statutes of the several States should be considered in connection with charter powers of such corporations.

CHAPTER XX

FEDERAL LEGISLATION—PATENTS, COPYRIGHTS, TRADE-MARKS, AND POST ROADS ACT

§ 282. Patents—Source and Nature of—Whether Monopolies or Contracts.
283. Same Subject.
284. Patents—Police Power of States.
285. Source of Copyright—Exclusive Right or Monopoly.
286. Copyright Law Secures Exclusive Right or Monopoly.
287. Copyright—Statutory and Common-Law Right Distinguished—Exclusive Property.
288. Trade-Marks and Trade-Names—Monopoly — Exclusive Right.
§ 289. Unfair Competition—When Cannot Be Predicated Solely on Use of Trade-Name.
290. Loss of Right to Individual Appropriation—Intent of Injunction Bill to Extend Monopoly of Trade-Mark or Trade-Name.
291. Expiration of Patent—Use of General Name—Loss of Trade-Mark Rights.
292. Post Roads Act Prohibits State Monopolies in Commercial Intercourse by Telegraph.
293. Railroad Right of Way—Telegraph Line—Exclusive Contract—Monopoly.

§ 282. Patents—Source and Nature of—Whether Monopolies or Contracts.[1]

In England the crown always exercised a control over the trade of the country and though restrained by the common law and the statute of monopolies [2] within reasonable limits, the crown might grant the exclusive right to trade with a new invention for a reasonable period. The statute [3] did not create but controlled the

[1] *Contracts between owners of patents; Sherman Anti-Trust Act.* See § 134, herein.

Patents; licenses; conditions; Sherman Anti-Trust Act. See §§ 135–137, herein.

Suit by combination for infringement of patent; Sherman Anti-Trust Act; illegality of combination as defense. See § 158, herein.

[2] 21 James I, c. 3. See § 276 note 73, herein.

[3] 21 James I, c. 3.

power of the crown in granting to the first inventors the privilege of the sole working and making of new manufactures.[4] It is declared by Judge Lacombe in a case decided in the Federal Circuit Court that: "It is the policy of the law in this country, and has been enacted by Congress,[5] under the powers given to it by the Constitution, that if a man finds out something new and useful,—and publishes it to the world through the intermediation of the patent office, he shall in exchange for it, and as a compensation for doing so, receive a patent; that is, he receives a grant of a monopoly of manufacturing, selling, and using that particular invention for a certain period of time. * * * That monopoly is not a monopoly in the sense in which the word first came into the English language, where, without anything at all except the mere whim of the sovereign power, some extraordinary privileges were granted to individuals. * * * There is nothing obnoxious to law or good morals or to anything else in the fact that a patent secures to the holder of it a monopoly for a limited period of time." [6] In another case in the Federal court it is said: "Our whole patent system rests upon a constitutional provision and the statutes passed by Congress. By the Constitution,[7] Congress has the power of securing for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, and to make all laws which shall be necessary and proper for carrying into execution this power. To the Constitution and the acts of Congress, therefore, and to these sources alone, we must look for the rights and remedies of patentees. * * * A patent for a useful invention is not, under the laws of the United States a monopoly in the old sense of the

[4] Caldwell v. Vanvlissengen, 9 Hare, 415.

English Statute as to monopolies declaratory of common law. See note to § 276, herein.

[5] U. S. Rev. Stat., §§ 4883–4936; U. S. Comp. Stat., 1901, pp. 3380 et seq.; Supp., 1909, pp. 1269 et seq. See 5 Fed. Stat. Annot., pp. 417, et seq.

[6] International Tooth Crown Co. v. Hanks Dental Assoc. (U. S. C. C.), 111 Fed. 916, 917, per Lacombe, Cir. J.

[7] Art. 1, § 8.

common law. The whole patent system of the United States rests upon the basis of the constitutional provision conferring upon Congress the power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. So long as such writings and discoveries were not communicated to the public, authors and inventors had a possession of, which was equivalent to a property in, their writings and discoveries. When communicated to the public, by the common law that property was lost. In consideration that the inventor will disclose the secret of his invention, and put it in immediate practice, and afford to the public the opportunity to practice it, when it becomes public property at the expiration of the term of the patent, the government grants to the author of a new and useful invention the exclusive right in that invention for a term of years. This grant is not the exercise of any prerogative to confer upon one or more of the subjects of the government the exclusive property in that which would otherwise belong to the common right. It more nearly resembles a contract, which under the authority conferred by the Constitution, Congress authorizes to be entered into between the government and the inventor, securing to him for a limited time, the exclusive enjoyment of the practice of his invention, in consideration of the disclosure of his secret to the public, and his relinquishment of his invention to the public at the end of the term. To the legislation of Congress, and to this alone we must resort, under our form of government, for guidance as to the extent, limitations, and conditions of the respective rights of inventors and the public, and as to the forms of remedy and the remedial jurisdiction, as well as the remedy itself, under our system of patent law. So far as any inquiry may relate to the relations between the government and the grantee of letters patent of the United States, but little light can be reflected from the English decisions. Originating, as their system of patent law did, in a supposed right of the king, residing in his

royal prerogative, to create monopolies, and continued under the authority of the act of Parliament,[8] which, while prohibiting by the statute of monopolies the granting of exclusive privileges in trade, excepted letters patent for the sole working or making of any manner of new manufacture within the realm to the first and true inventors of such manufactures, it evidently rests upon a different basis from a system founded solely upon the express grant of power in a written Constitution." [9] In an earlier decision in the same court it is declared that "Patentees are not monopolists * * * no exclusive right can be granted for anything which the patentee has not invented or discovered. If he claim anything which was before known his patent is void. So that the law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful, and which was not known before. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a compensation for 'his ingenuity, labor and expense in producing it.' This, then, in no sense partakes of the character of monopoly." [10]

§ 283. Same Subject.

In a case decided in 1870 in the United States Supreme Court Mr. Justice Clifford said: "Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited time therein mentioned, the exclusive right and liberty to

[8] Of 21 James I. See § 276 note 73, herein.

[9] Attorney Gen'l v. Rumford Chemical Works, 32 Fed. 591, 602, 608, 617, per Shepley, J.; a case denying the power of the attorney general to maintain in his own name a bill in equity to cancel a patent for an invention. Compare, however, upon this point, United States v. American Bell Teleph. Co., 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. 90.

[10] Allen v. Hunter, 6 McLean (U. S. C. C.), 303, 305, 306, Fed. Cas. No. 225, p. 477.

make and use and vend to others to be used in their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." [11] Again, a patent is held to be nothing but a contract by which the government secures to the patentee the exclusive right to vend and use his invention for a few years, in consideration of the fact that he has perfected and described it and has granted its use to the public forever after. The rules for the construction of contracts apply with equal force to the interpretation of patents. The contract evidenced by a patent is effected by the acceptance by the government of a proposition made by the inventor in compliance with the statutes of the United States.[12] In a well-known treatise on the law of patents the learned author exhaustively considers the question whether a patent is a monopoly or a contract and says: "Certain modern writers upon Patent Law have asserted that the exclusive privilege conferred on an inventor is not a monopoly. Certain judges of the courts of the United States, in their decisions upon patent cases, have expressed the same opinion. Other authors and jurists have declared that the exclusive right of an inventor is not only a true monopoly, but, as is apparent from the historical sketch already given, that it is the primeval and ideal monopoly, out of the abuse of which all odious and illegal monopolies have grown. The latter is the view taken of the subject by the earlier writers, and is the doctrine generally adhered to by the British courts. * * * An investigation will disclose not only that a patent privilege is a true monopoly, but that it approaches very nearly to an odious monopoly in its restriction of the

[11] Seymour v. Osborne, 11 Wall. (60 U. S.) 516, 533, 15 L. ed. 557.

[12] O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 C. C. A. 304. See National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544.

pre-existing public right. * * * The nature of the patent privilege differs from an odious monopoly in this: that in the odious monopoly the public are deprived of some existing method of enjoying these rights, while the patent privilege prevents their exercise only in the new direction marked out by the discovery of the inventor. But in both cases the rights restricted are the same, and the effect on their enjoyment after the monopoly is granted is identical. That a patent privilege is a true monopoly, derogatory to common right, is, therefore, the correct theory concerning it considered in itself." [13]

§ 284. **Patents—Police Power of States.**

Where by the application of the invention or discovery for which letters patent have been granted by the United States, tangible property comes into existence, its use is, to the same extent as that of any other species of property, subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police; and this is so notwithstanding the exclusive right or monopoly given.[14]

§ 285. **Source of Copyright—Exclusive Right or Monopoly.**

In this country it is well settled that that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution [15] to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.[16]

[13] Robinson on Patents (ed., 1890), §§ 11, 23, 32. See also *Id.*, "§ 41, Patent Privilege a Monopoly: its contract aspect alone involved in the construction and administration of Patent Law: Two Fundamental Principles." See also to point of "contract aspect," *Id.*, §§ 42, 43.

[14] Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.

[15] Art. 1, § 8.

[16] American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct.

§ 286. Copyright Law Secures Exclusive Right or Monopoly.

The copyright statute of the United States [17] confers an exclusive right or monopoly of sale and it would seem from the essential nature of a copyright itself that there springs this principle of exclusive sale without the specially expressed grant of the statute in that respect.[18] The purpose of the copyright law is not so much the protection and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought.[19]

§ 287. Copyright—Statutory and Common-Law Right Distinguished—Exclusive Property.

The statutory copyright in the United States is not to be confounded with the exclusive property of the author in his manuscript at common law. In enacting the copyright statute Congress did not sanction an existing right but created a new one dependent on compliance with the statute. In the case enunciating these propositions the court says: "We have had such recent and frequent occasions to consider the nature and extent of the copyright laws of the United States, as the same were before

72, 52 L. ed. 208; case affirms 146 Fed. 375, citing Thompson v. Hubbard, 131 U. S. 123, 151, 33 L. ed. 76, 9 Sup. Ct. 710; Banks v. Manchester, 128 U. S. 244, 252, 32 L. ed. 425, 9 Sup. Ct. 36; Wheaton v. Peters, 8 Pet. (33 U. S.) 591, 8 L. ed. 1055.

[17] Rev. Stat. U. S., § 4952; U. S. Comp. Stat., 1901, p. 3406; Rev. Stat. U. S. (Act March 4, 1909), chap. 320, § 1, 35 Stat., 1075; U. S. Comp. Stat. Supp. 1909, p. 1289; Rev. Stat. U. S., §§ 4948 et seq.; U. S. Comp. Stat., 1901, pp. 3405 et seq., Supp. 1909, pp. 1288 et seq. See 2 Fed. Stat. Annot., pp. 255 et seq.

Contracts between holders of copyrights; Sherman Anti-Trust Act. See § 133, herein.

Suit by combination for infringement of copyright; illegality of combination as defense. See § 159, herein.

[18] Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 77 C. C. A. 607, case affirmed in 210 U. S. 339, 28 Sup. Ct. 722, 52 L. ed. 1086; Henry Bill Publishing Co. v. Smythe (U. S. C. C.), 27 Fed. 914, 916. See also *Id.* (p. 916), as to English act conferring a monopoly of sale. Davis v. Vories, 141 Mo. 234.

[19] American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. ed. 208, case affirms 146 Fed. 375.

the recent revision, which took effect July 1, 1909,[20] that it is unnecessary to enter into any extended discussion of the subject now.[21] In these cases the previous decisions of the court were cited and reviewed. As a result of the decisions of this court certain general propositions may be affirmed. Statutory copyright is not to be confounded with the common-law right. At common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common law an author had a property in his manuscript and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That the author having complied with the statute and given up his common-law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one.[22] Those violating the statutory rights of the author or proprietor are subject to certain penalties, and to the payment of certain damages, as is provided in the statute." [23]

[20] See Rev. Stat. U. S. (Act March 4, 1909), chap. 320, § 1; 35 Stat. 1075; U. S. Comp. Stat. Supp., 1909, p. 1289; Rev. Stat. U. S., § 4952; U. S. Comp. Stat., 1901, p. 3406; Rev. Stat. U. S., §§ 4948 et seq.; U. S. Comp. Stat., 1901, pp. 3405 et seq.; Supp., 1909, pp. 1288 et seq. See 2 Fed. Stat. Annot., pp. 255 et seq.

[21] Citing Bong v. Campbell Art Co., 214 U. S. 236, 29 Sup. Ct. 628, 53 L. ed. 979; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. ed. 1086, case affirms 147 Fed. 15; White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. ed. 655; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. ed. 208.

[22] Citing Wheaton v. Peters, 8 Pet. (33 U. S.) 591, 661, 8 L. ed. 1055.

[23] Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 187, 188, 30 Sup. Ct. 38, 54 L. ed. 150 (above quotation is from opinion by Mr. Justice Day).

Copyright; authors' common-law and statutory rights considered. See Wheaton v. Peters, 8 Pet. (33 U. S.) 591, 8 L. ed. 1055. "There was much

§ 288. Trade-Marks and Trade-Names—Monopoly—Exclusive Right.

A trade-mark [24] is neither an invention, a discovery, nor a writing, within the meaning of the eighth clause of the eighth section of the first article of the Constitution of the United States, which confers on Congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. Property in trade-marks has long been recognized and protected by the common law and the statutes of the several States, and does not derive its existence from the act of Congress providing for the registration of them in the Patent Office.[25] A personal trade-mark is not a subject of monopoly to the exclusion of persons having the same name.[26] A validly registered trade-mark cannot be used by anyone other than the owner, as his right is exclusive, and so even though such trade-mark is used with words explaining that the article to which it is attached is not manufactured by the owner of the trade-mark.[27] "No one can claim protection for the

contention in England as to whether the common law recognized this property in copyright before the statute of Anne; the controversy resulting in the decision in the House of Lords in the case of Donelson v. Beckett, 4 Burr, 2408, the result of the decision being that a majority of the judges, while in favor of the common-law right, held the same had been taken away by the statute. See Wheaton v. Peters, 8 Pet. (33 U. S.) 591, 656, 8 L. ed. 1055; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. 606." Mr. Justice Day in American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291, 28 Sup. Ct. 72, 52 L. ed. 208. Case affirms 146 Fed. 375.

[24] *Suit by combination for infringement of trade-mark; illegality of combination as defense.* See § 159, herein.

Trade-marks and trade-names. See State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504, 510.

[25] Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550 (in this case an act of Congress concerning trade-marks was held to be unconstitutional because too broad in its scope). See also National Biscuit Co. v. Ohio Baking Co. (U. S. C. C.), 127 Fed. 160, affirmed in Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116.

Trade-marks. Rev. Stat. U. S., 4937–4947; U. S. Comp. Stat., 1901, pp. 3401 et seq.; Supp., 1909, pp. 1275 et seq. See 7 Fed. Stat. Annot., pp. 326 et seq.

[26] Paul on Trade-Marks, § 68.

[27] Baglin v. Cusenier Co., 221 U. S. 580, 55 L. ed. ——, 31 Sup. Ct. 669. This case involved the validity of the word "Chartreuse" as a trade-mark,

exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed.[28]

§ 289. **Unfair Competition—When Cannot Be Predicated Solely on Use of Trade-Name.**

The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor as those of another, and this cannot be predicated solely on the use of a trade-name if such trade-name is invalid as a trade-mark. To do so would be to give to a trade-name the full effect of a trade-mark notwithstanding it should be or is invalid as such.[29]

§ 290. **Loss of Right to Individual Appropriation—Intent of Injunction Bill to Extend Monopoly of Trade-Mark or Trade-Name.**

The right to individual appropriation once lost is gone forever. This rule or principle has been applied where the intent of a bill, by the owners of the Hunyadi Janos Springs to enjoin the sale of artificial Hunyadi water, was to extend the monopoly of such trade-mark or trade-name as the plaintiff might have to a monopoly in a type of bitter water by preventing manufacturers from telling

etc.; and it was also held that the claim of the Carthusian Monks to an exclusive right as applied to this liqueur having frequently been sanctioned the liquidator appointed in France of the property of said Monks could not, in this country, use the word "Chartreuse" to designate the liqueur manufactured by him at Grande Chartreuse, the said Monks having validly registered that name in the United States as a trade-mark of the liqueur manufactured by them.

[28] Canal Company v. Clark, 13 Wall. (80 U. S.) 311, 323, 20 L. ed. 581, quoted in Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 454, 55 L. ed. ——, 31 Sup. Ct. 456, per Mr. Justice McKenna.

[29] Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 55 L. ed. ——, 31 Sup. Ct. 456. See Lamont, Corliss & Co. v. Hershey (U. S. C. C.), 140 Fed. 763; Russia Cement Co. v. Frauenhar (U. S. C. C.), 126 Fed. 228; see Job Printers' Union v. Kinsley, 107 Ill. 654.

Trade-name and trade-secret; when party guilty of unfair trade. See Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. ——, 31 Sup. Ct. 555, case affirms 159 Fed. 129.

the public what they were manufacturing and trying to sell.[30]

§ 291. Expiration of Patent—Use of Generic Name—Loss of Trade-Mark Rights.

On the expiration of a patent the right to make the patented article and to use the generic name passes to the public with the dedication resulting from the expiration of the patent. On the expiration of a patent one who uses a generic name, by which the articles manufactured under it are known, may be compelled to indicate that the articles made by him are made by him and not by the proprietor of the extinct patent. Where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; and where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact. In the case so holding it appeared that the Singer machines were covered by patents, some fundamental, some accessory, whereby there was given to them a distinctive character and form which caused them to be known as the Singer machines, as deviating and separable from the form and character of machines made by other manufacturers. The word "Singer" was adopted by Singer & Co., or the Singer Manufacturing Company as

[30] Saxlehner v. Wagner, 216 U. S. 75, 30 Sup. Ct. 298, 54 L. ed. 525, aff'g 157 Fed. 745, 85 C. C. A. 321.

designative of their distinctive style of machines, rather than as solely indicating the origin of manufacture. The patents which covered them gave to the manufacturers of the Singer sewing machines a substantial monopoly whereby the name "Singer" came to indicate the class and type of machines made by that company or corporation and constituted their generic description, and conveyed to the public mind the type or kind of the particular machines made by them.[31]

§ 292. Post Roads Act Prohibits State Monopolies in Commercial Intercourse by Telegraph.

The Post Roads Act is declared to amount in effect to a prohibition of all State monopolies in commercial intercourse by telegraph.[32] In a case decided in the Federal Supreme Court in 1877 [33] the State of Florida granted to the Pensacola Telegraph Company an exclusive franchise and privilege for telegraphic purposes over a certain portion of the territory of that State. In passing upon the injunction asked to restrain the Western Union Telegraph Company from constructing its lines over that territory, Mr. Chief Justice Waite said: "The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. * * * The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States and to control the transmission of all telegraphic correspondence within its own jurisdiction.[34]

[31] Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. 1002. See Singer Manufacturing Co. v. Long, 18 C. D., p. 412, 52 L. J., chap. 481, per James, L. J.

[32] Western Union Teleg. Co. v. Pennsylvania Rd. Co., 195 U. S. 540, 562, 25 Sup. Ct. 133, 49 L. ed. 312, per Mr. Justice McKenna, quoting Chief Justice Waite in Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 11, 24 L. ed. 708.

Whether Post Roads Act includes telephone companies. See Joyce on Electric Law (2d ed.), § 45.

[33] Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. ed. 708.

[34] Of July 24, 1866, 14 Stat. 221.

The statute in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce, and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege." [35]

§ 293. Railroad Right of Way—Telegraph Line—Exclusive Contract—Monopoly.[36]

A railroad company cannot validly contract to give a telegraph company the exclusive right, as against all other telegraph companies, to control its right of way, for all telegraph purposes. Such a contract cannot be enforced against another telegraph company, which has legally accepted the provisions and benefits of the Post Roads Act [37] which confers upon such accepting companies the right to construct, maintain and operate their lines over and along the military and post roads of the United States, provided the lines are so constructed and maintained as not to interfere with the ordinary travel on said military or post roads. Such an exclusive contract would, it seems, tend to cripple and prevent competition, and be void also at common law as against public policy and in restraint of trade, nor is the right to make such an exclusive contract aided by the fact that the railroad company derives its grant of right to construct and operate a railroad and telegraph line from the United States Government and is subsidized for the

[35] Italics in text are the author's.

Post Roads Act and hostile legislation. See Joyce on Electric Law (2d ed.), §§ 65–67.

[36] See Joyce on Electric Law (2d ed.), §§ 191–194a, 294.

[37] Act of Congress, July 24, 1866, chap. 230, 14 Stat. 221.

better accomplishment of both these purposes, it appearing that said exclusive contract was made subsequent to the enactment of the Post Roads Act, or that the United States Government in making said grants included a reservation of power as to future legislation.[38]

[38] *United States:* United States v. Union Pac. R. Co. & Western Union Teleg. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. ed. 319, 6 Am. Elec. Cas. 697; Mercantile Trust Co. v. Atlantic & Pacific R. Co. (U. S. C. C.), 63 Fed. 513, 910, 5 Am. Elec. Cas. (two cases) 207, 219, 227 [in this case, Ross, Dist. J., says, referring to the grant to the railroad company: "There is not a syllable in the act indicating that it was intended by Congress *to be used as an instrument for the building up or fostering any monopoly of any character*, or that it should be permitted to do any act inconsistent with the objects for which it was created" (Italics are ours)]; Pacific Postal Teleg. Cable Co. v. Western Union Teleg. Co. (U. S. C. C.), 50 Fed. 493, 50 Am. & Eng. R. Cas. 665; United States v. Union Pac. Ry. Co. (U. S. C. C.), 45 Fed. 221, 3 Am. Elec. Cas. 563; Western Union Teleg. Co. v. Baltimore & Ohio Teleg. Co. (U. S. C. C.), 23 Fed. 12, 1 Am. Elec. Cas. 721 (Post Roads Act was not discussed in this case); Western Union Teleg. Co. v. Baltimore & Ohio Teleg. Co., 19 Fed. 660, 1 Am. Elec. Cas. 623 (this case while holding the principle noted in the text, was a case of motion for preliminary injunction to restrain telegraph companies from erecting lines upon land of railroad company and to enjoin the railroad company from using the right of way for any such purpose, and from violating the provisions of an agreement made by the petitioner with the railroad company, and the relief was granted against the railroad company as to protection in the possession of a telegraph line actually constructed but not granted as to other stipulation where an adequate remedy at law existed; injunction was denied as to the telegraph companies); Western Union Teleg. Co. v. Burlington & Southwestern Ry. Co. (U. S. C. C.), 11 Fed. 1, 1 Am. Elec. Cas. 402; Western Union Teleg. Co. v. American Union Teleg. Co., 9 Biss, (U. S. C. C.), 72, Fed. Cas. No. 17,444, 1 Am. Elec. Cas. 288.

Alabama: New Orleans, Mobile & Tex. R. Co. v. Southern & Atlantic Teleg. Co., 53 Ala. 211, 1 Am. Elec. Cas. 290 (in this case the Post Roads Act was merely set forth in the pleading).

Georgia: Western Union Teleg. Co. v. American Union Teleg. Co., 65 Ga. 160, 1 Am. Elec. Cas. 306, 308, 38 Am. Rep. 781 (it was said in this case that the question whether the Post Roads Act could effect contracts executed prior to the passage was "immaterial to the issue." The controversy in this case did not arise upon any effort to displace the lines or wires established by the defendant, but upon an interference with the exclusive right to occupy).

Illinois: See St. Louis & C. R. Co. v. Postal Teleg. Co., 173 Ill. 508, 51 N. E. 382.

Nevada: Western Union Teleg. Co. v. Atlantic & Pacific States Teleg. Co., 5 Nev. 102, Allen's Tel. Cas. 428.

New Mexico: Union Trust Co. of N. Y. v. Atchison, Topeka & Santa Fe R. Co., 8 N. Mex. 327, 43 Pac. 701, 6 Am. Elec. Cas. 171.

CHAPTER XXI

STATE AND MUNICIPAL LEGISLATION OR CONTRACTS—PARTICULAR INSTANCES

§ 294. Exclusive Grants or Contracts — Monopolies Generally.
295. Booms—Logs and Logging—Monopoly.
296. Bridges—Monopoly.
297. When Contract by City, as Owner of Ferry Franchise with Bridge Company, Creates no Monopoly.
298. Electric Lighting—Exclusive Right—Contract Power of City as to.
299. Electric Lighting—Control of Streets—Exclusive Grants, etc.—Municipalities, Towns, etc.
300. Ferries—Monopolies, Exclusive Privileges, etc.
301. Ferries—Exclusive Grant—Municipal Ordinances — Delegated Authority.
302. Exclusive Right to Use Wharf for Ferry Purposes.
303. Gas—Grant by State of Exclusive Privilege or Monopoly—Police Power.
304. Gas—Grant by Municipality of Exclusive Privilege or Monopoly.
305. Municipal Lease to Private Corporation to Supply Gas —Exclusive Right — Monopoly.
306. Gas—Void Grants and Contracts—Monopoly.
307. Gas—Purchasers of Exclusive Rights.
308. Intoxicating Liquors—"Dispensary System" — Monopoly.
§ 309. Irrigation—Monopoly.
310. Market House—Contract for by City or Town—Monopoly.
311. Navigable Canal—Monopoly.
312. Omnibuses—Grant of Privilege to Run—When a Monopoly.
313. Railroads—Exclusive Privileges.
314. School Text-Book Statutes — Exclusive Privilege — Monopoly—Contracts.
315. Slaughterhouse or Market House — When Municipality or Village Cannot Create Monopoly as to.
316. Street Railways—Control of Streets—Exclusive Grants —Municipalities.
317. Telephone Companies—Exclusive Grants or Privileges.
318. Telegraph Companies—Exclusive Grants.
319. Toll Bridges — Exclusive Grants.
320. Toll Roads — Municipal Grants—Monopoly.
321. Toll Wharf — Exclusive Grant.
322. Union Label on City Printing.
323. Requirement That Only Union Labor or Union Shops Be Employed — Award of Contract.

§ 324. Warehouses—Monopoly.
325. Waterworks or Water Supply—Power of Municipality.
326. Waterworks or Water Supply—Exclusive Right of Municipality and of Private Corporation Distinguished.
327. Waterworks or Water Supply—Grant by State of Exclusive Privilege or Monopoly.
328. Waterworks or Water Supply—Grants by Municipality of Exclusive Right or Monopoly.
329. Waterworks or Water Supply—Instances of Valid Contracts by Municipality—Exclusive Privilege or Monopoly.
§ 330. Waterworks or Water Supply—Instances of Void Contracts — Exclusive Privilege or Monopoly.
331. Waterworks or Water Supply—Where no Defense That Contract Creates Monopoly.
332. Injunction Restraining Municipality—Water System.
333. Contract with State Water Company—Constitutional Law—Due Process.
334. Waterways — Exclusive Right to Collect Tolls—Monopoly.
335. Consolidation of Corporations—Exclusive Privileges—Monopoly.

§ 294. Exclusive Grants or Contracts—Monopolies Generally.[1]

A grant which gives to one person, or to an association of persons an exclusive right to buy, sell, make, or use a designated thing or commodity, or to pursue a designated employment creates a monopoly. The right to exercise the exclusive privilege need not extend to all places; the monopoly exists if it operates in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; the monopoly exists if the privilege be exclusive for a period of time.[2] A grant conferring a privilege is, however, not necessarily a grant making that privilege exclusive; grants by the State to municipal corporations, like grants to private corporations, are to be strictly construed, and the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable and not merely convenient to them, so that a grant of an exclusive privilege is invalid when made by a city in

[1] See §§ 70–74, 219–225, herein.

[2] Brenham, City of, v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

the absence of power so to do expressly conferred.[3] A contract made by a municipal corporation with a third person for the construction of a public building, a street railway, waterworks, or gas works, or for the supply of transportation, water, or any other public utility to the city and its inhabitants creates no special privilege or immunity within the meaning of a constitutional provision prohibiting the legislature from making any irrevocable grant of special privileges or immunities. One who makes such a contract to supply gas or water, etc., to a municipality may be said to acquire a monopoly of that work and a special privilege to perform it. But this special privilege or immunity does not arise by a grant to him by any law of the State. It is secured to him under his agreement to render a public service.[4]

§ 295. **Booms—Logs and Logging—Monopoly.**

The available booming extent of a stream may be such as to reasonably prevent the operation of more than one boom, so that the effect of a single location cannot well be avoided. Such circumstances would not make a monopoly but the location would become the only one upon the stream by mere force of necessity.[5]

§ 296. **Bridges—Monopoly.**

A grant by the legislature, in consideration of certain expenses to be incurred by the grantees, and in contemplation of a public benefit, of the exclusive right of erecting a bridge and taking tolls, to reimburse such expenses, within certain limits, for a limited time, is not a monopoly.[6] In the Charles River Bridge case it is said: "The

[3] Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. ed. 257, aff'g 144 Fed. 256, citing Citizens' Street Ry. Co. v. Detroit, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67, distinguishing Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. ed. 1155. See § 74, herein.

[4] Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736 (Const. Neb., Art. 1, § 16).

[5] Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 Pac. 412.

[6] Enfield Toll Bridge Co. v Hartford & New Haven Rd. Co., 17 Conn. 40, 42 Am. Dec. 716.

complainant's charter has been called a monopoly; but in no just sense can it be so considered. * * * The accommodation afforded to the public by the Charles River bridge, and the annuity paid to the college, constitute a valuable consideration for the privilege granted by the charter. The odious features of a monopoly do not, therefore, attach to the charter of the plaintiffs." [7] It was also said in the same case that: "To inquire into the validity of a solemn act of legislation is at all times a task of much delicacy but it is peculiarly so, when such inquiry is made by a Federal tribunal, and relates to the act of a State legislature. There are cases, however, in the investigation of which such an inquiry becomes a duty; and then no court can shrink, nor desire to shrink, from its performance. Under such circumstances, this duty will always be performed with the high respect due to a branch of the government, which, more than any other, is clothed with discretionary powers, and influenced by the popular will. The right granted to the Charles River Bridge Company, is, in its nature, to a certain extent, exclusive; but to measure this extent, presents the chief difficulty. If the boundaries of this right could be clearly established, it would scarcely be contended by anyone, that the legislature could, without compensation, grant to another company the whole, or any part of it. As well might it undertake to grant a tract of land, although an operative grant had been previously made for the same land. In such a case the second grant would be void, on the ground that the legislature had parted with the entire interest in the premises. As agent of the public it had passed the title to the first grantee; and having done so, it could convey no right by its second grant. The principle is the same in regard to the question under consideration. If the franchise granted to the complainants extended beyond the new bridge, it was as much above the power of the legislature to make the second grant, as it would be to grant a part

[7] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 567, 9 L. ed. 773, per Mr. Justice M'Lean. See § 219, herein.

of a tract of land for which a patent had been previously and regularly issued. The franchise, though incorporeal in legal contemplation, has body and extension; and having been granted, is not less scrupulously guarded by the principles of law than an interest in the soil. It is a substantive right in law, and can no more be resumed by the legislature, when once granted, than any other right. But would it not be unsafe, it is suggested, for the judicial authority to interpose and limit this exercise of legislative discretion? * * * It is undoubtedly the province of the legislature to provide for the public exigencies, and the utmost respect is always due to their acts; and the validity of those acts can only be questioned judicially, where they infringe upon private rights." [8]

§ 297. When Contract by City, as Owner of Ferry Franchise with Bridge Company, Creates no Monopoly.

A city owning a ferry franchise has power to contract with a bridge company not to exercise such privilege for

[8] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 559, 560, 9 L. ed. 773, per M'Lean, J. In this case it is also said that the Constitution of Massachusetts, Art. 1 (Bill of Rights), § 6, "is not an inhibition of all legislative grants of exclusive privileges. * * * It might be sufficient to say, that all the learned judges in the State court, admitted that the grant of an exclusive right to take toll at a ferry, or a bridge, or a turnpike, is not a monopoly which is deemed odious in the law; nor one of the particular and exclusive privileges, distinct from those of the community, which are reprobated in the bill of rights. All that was said by the judges opposed to a liberal interpretation of this grant, was that it tended to promote monopolies. * * * No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream, is a grant of common right." (See definitions of monopoly, §§ 8, 22, herein.) "Before such grant, had all the citizens of the State a right to erect bridges over navigable streams? Certainly they had not. It was neither a monopoly; nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before; and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly than the grant of the public stock or funds of a State for a valuable consideration. Even in the case of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give them a favorable construction, in support of the patent, as Lord Chief Justice Eyre said, *ut res magis valeat quam pereat;* Boulton v. Bull, 2 H. Bl. 463,

a long period of time and to permit for a consideration one of the ends of its bridge to be erected in certain streets and in such case no monopoly is created; especially in view of the public benefit derived.[9]

§ 298. Electric Lighting—Exclusive Right—Contract Power of City as to.[10]

Where a city has authority, under its charter, to contract for electric lights, and the power granted is without restriction, it may do so without advertising for bids and without submitting the matter to a popular vote, where the contract is reasonable as to duration, is necessary, and it is not exclusive.[11] Where a city has express or implied power to contract for lights for a specified period, the contract is not void for exclusiveness.[12]

500." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 606, 607, 9 L. ed. 773, per Mr. Justice Story, in dissenting opinion.

[9] Laredo, City of, v. International Bridge & Tramway Co., 66 Fed. 246, 14 C. C. A. 1, 30 U. S. App. 110. Period or duration of contract was twenty-five years.

[10] See Joyce on Electric Law (2d ed.), §§ 189, 231–271.

[11] Reid v. Trowbridge, 78 Miss. 542, 29 So. 167. Ten years held not an unreasonable time for duration of contract. Compare Morrow County Illuminating Co. v. Village of Gilead, 10 Ohio S. & C. P. Dec. 235.

[12] Davenport Gas & Electric Co. v. City of Davenport, 124 Iowa, 22, 98 N. W. 892. The ordinance in question authorized the plaintiff "to erect and maintain a gas, electric light," etc., plant for the period of twenty-five years. "The act applied to all cities and towns regardless of population. In very many, if not in a majority, of them, the grant of a franchise followed by its use, while not exclusive in terms, would be so in fact, because of the expense of the plant. * * * We have examined the authorities relied upon by the appellant to maintain its contention that a city may not enter into an exclusive contract for a long period of time, and find the decisions based upon the want of power either express or implied. * * * All contracts of this kind must, in their very nature, be exclusive." *Id.*, 30–32, per Sherwin, J.

"Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party. The more prominent of these cases are Minturn v. Larue, 23 How.

A contract between a city and an electric light company providing for the lighting of its streets for a term of ten years, and granting the corporation the privilege of constructing and operating in the city a commercial electric light and power plant for the purpose of furnishing light and power to the residents of the city is not invalid on the ground that it tends to create a monopoly.[13]

§ 299. **Electric Lighting—Control of Streets—Exclusive Grants, etc.—Municipalities, Towns, etc.**[14]

The paramount control of the streets and highways is primarily, in the absence of any delegation of such power, vested in the sovereign power of the State as represented by the legislature; municipal corporations are only creatures of the legislature and are, as we have stated elsewhere, confined and limited in their powers to those expressly granted to them or to those necessarily implied. To enable a municipality to grant an exclusive franchise to use the streets, it must be clothed by the legislature with a delegation of its sovereign rights, vested in such sovereign power, over streets. So a municipality, in the absence of a delegation of such power, cannot confer upon an electrical company an exclusive right to construct and maintain an electrical line upon the streets.[15]

(65 U. S.) 435, 17 L. ed. 173; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 971; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Logan v. Pyne, 43 Iowa, 524; Jackson Co. Horse Railroad v. Rapid Transit Railway Co., 24 Fed. 306; Norwich Gas Co. v. Norwich City Gas Co., 25 Conn. 19; Saginaw Gas Light Co. v. Saginaw, 28 Fed. 529; Grand Rapids Electric Light and Power Co. v. Grand Rapids Edison, etc., Gas Co., 33 Fed. 659; Gale v. Kalamazoo, 23 Michigan, 344." Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 18, 43 L. ed. 341, 19 Sup. Ct. 77, per Brown, J.

[13] Denver, City of, v. Hubbard, 17 Colo. App. 346, 68 Pac. 993.

Municipal lighting—Police and municipal powers. See 1 Joyce on Electric Law (2d ed.), §§ 189, 231–271.

[14] See Joyce on Electric Law (2d ed.), §§ 189, 231–271.

[15] Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co. (U. S. C. C.), 33 Fed. 659. It is said by the court, per Jackson, J., that: "To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves* the assertion *and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the State can confer *exclusive*

It is held that if a town council has no power to grant an exclusive franchise for a number of years for the use of its streets by a private corporation for the conveyance of electricity for public use in the city, such exclusive grant would be void and would not prevent the town from granting to another corporation within said term the privilege of occupying the streets for the same purpose.[16] And in 1890 it was decided in Massachusetts that under the then existing statutes no power existed in cities and towns to construct and maintain electric lighting plants to furnish light for the public streets and not only for this but to supply the inhabitants of the same with such lights.[17] In Maine, prior to 1895 the legislature reserved to itself the right, in each instance, to determine whether the public good demanded that franchises, such as the right to use the streets to supply cities or towns with gas or electricity should be granted at all to anyone, and where such franchises had been previously granted and lawfully exercised in a given place to determine whether or not it would be for the public good to permit indiscriminate or destructive competition. But in 1905 the legislature modified its policy to the extent that:—In towns where no gas or electric company was supplying or was authorized to supply, gas or electric light, new corporations organized thereunder could supply either gas or electricity by first obtaining the statutory permit from the municipal officers, and without special legislative authority. But that:—In towns where a gas or electric company was supplying, or was authorized to supply, either or both kinds of light, another corpora-

rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in *trust* for the *public at large"*; an exclusive right was granted for fifteen years. See § 316, herein.

Powers of municipal corporations. See §§ 277–281, herein.

Delegation of power—municipal, quasi-municipal and subordinate agencies. See Joyce on Franchises, §§ 185–203.

[16] Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

[17] Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421. But compare 1 Joyce on Electric Law (2d ed.), § 244.

tion, organized under the general law, could not operate until the legislature had determined whether the public good required it, and had authorized it, just as it did prior to 1895; and it is held in that State that where a person, firm, or corporation, is already authorized to do an electric lighting business in a town, another corporation, organized under the laws of 1895, could not lawfully do a gas lighting business in the same town, until specially authorized by the legislature, and that the result was not different, even if the electric light company had not done or was not doing business as such, although it is also decided that the permissive rights given by the laws of 1885, "regulating the erection of posts and lines for the purposes of electricity" were not franchises.[18] If a statute relates wholly to the erection and maintenance, by municipal corporations, of electric appliances for lighting public streets and places it is exclusive in that it does not authorize the erection of poles and appliances by a private electric light company.[19]

§ 300. **Ferries—Monopolies, Exclusive Privileges, etc.** Under a North Carolina decision public ferries are not monopolies, but franchises granted in consideration of public services. They may be exclusive, but are simply licenses revocable at will.[20] So in the same State the right

[18] Twin Village Water Co. v. Damariscotta Gaslight Co., 98 Me. 325, 56 Atl. 1112.

Under the provision of § 1, chap. 102, of the Public Laws of 1895, that no corporation organized thereunder "shall have authority, without special act of the legislature, to make, generate, sell, distribute or supply gas or electricity, or both, for any purpose, in or to any city or town, in or to which another company, person or firm, are making, generating, selling, distributing or supplying, or are authorized to make, generate, sell, distribute or supply gas or electricity, or both, without the consent of such other company, person or firm," *it is held:* that authority in one company to supply either gas or electricity, or both, is prohibitive of the right of another company to supply either, unless by consent or by special legislative authority. Twin Village Water Co. v. Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112.

[19] State, Myers v. Hudson Co. Elec. Co., 60 N. J. L. 350, 37 Atl. 618, N. J. Pub. L., 1894, p. 477.

[20] Spease Ferry, In re, 138 N. C. 219, 50 S. E. 625. See the following cases:

to operate a public ferry is a public franchise, a license or gratuity subject to legislative control, otherwise if the grant were so exclusive as to amount to a monopoly it would be within the prohibition of the Constitution.[21] Again, a statute which confers upon a private corporation the exclusive right of transporting passengers across a navigable river for a distance of six miles from a certain point opposite a large trading town, in consideration of a reduction, by one-half, of the former toll rates paid by the residents of defined parts of two counties, while full rates are to be paid by all others is obnoxious to a constitutional inhibition against monopolies.[22] Where a party has his option to set up a franchise, such as that of a ferry, at one place or another, with an exclusive right within a given distance of either, and he elects his situation, he cannot afterwards remove the same, although his privilege has been destroyed without any fault or

Arkansas: Murray v. Menefee, 20 Ark. 561 (privilege exclusive so long as terms complied with).

Kentucky: Combs v. Sewell, 23 Ky. L. Rep. 169, 60 S. W. 933 (under Ky. Stat., § 1820, when order granting another ferry right not void even though privilege described as "exclusive").

Missouri: Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809, aff'g 108 Mo. 550, 17 S. W. 884 (city ordinance granting exclusive privilege for term of years valid as mere temporary license even though void under Mo. Const., Art. 4, § 53).

North Dakota: Patterson v. Wollmann, 5 N. Dak. 608, 67 N. W. 1040, 33 L. R. A. 536 (nature of privilege is exclusive; statute granting same for certain term not within prohibition of Const., § 20, prohibiting granting privileges or immunities to special classes, etc.).

Pennsylvania: Bridgewater Ferry Co. v. Sharon Bridge Co., 145 Pa. St. 404, 29 Wkly. N. C. 141, 22 Pitts. L. J. (N. S.) 143, 48 Phila. Leg. Int. 516, 22 Atl. 1039 (construction of certain statutes relating to exclusive use of ferry or bridge franchises within limited distance).

Tennessee: Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626 (when legislature has power to grant rival ferry franchise over one not expressly exclusive).

West Virginia: Hostler v. Marlowe, 44 W. Va. 707, 30 S. E. 146 (extent of inclusion and exclusion of grant of ferry franchise since W. Va. Act of March 25, 1882).

As to ferries; nature, extent and instances of rights granted. See Joyce on Franchises, pp. 1050, 1051.

[21] Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

[22] Washington Toll Bridge Co. v. Commissioners of Beaufort, 81 N. C. 491.

negligence on his part, to the other place where he might have chosen his location, and then claim the exclusion to which he might, had he so elected, have been entitled from the latter place.[23]

§ 301. Ferries—Exclusive Grant—Municipal Ordinances—Delegated Authority.

In 1838, the legislature of the Territory of Iowa authorized a certain Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi river, at the town of Dubuque, for the term of twenty years; and enacted further, that no court or county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. In 1840, Fanning was authorized to keep a horse-ferry boat instead of a steamboat. In 1847, the General Assembly of the State of Iowa passed an act to incorporate the city of Dubuque, the fifteenth section of which enacted that the "city council shall have power to license and establish ferries across the Mississippi river, from said city to the opposite shore, and to fix the rates of the same." In 1851, the mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire (whose agent Bogg was) to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions. It was held that the right granted to Fanning was exclusive of such a license as this; that the prohibition to license another ferry did not extend to the legislature, nor to the city council, to whom the legislature had delegated its power; and that it was not necessary for the city council to act by an ordinance in the case. Corporations can make contracts through their agents without the formalities which the old rules of law required.[24]

[23] Mills v. County of St. Clair, 7 Ill. 197.

[24] Fanning v. Gregoire, 16 How. (57 U. S.) 524, 14 L. ed. 1043, cited in Williams v. Wingo, 177 U. S. 601, 603, 20 Sup. Ct. 793, 44 L. ed. 905; Wheeling & Belmont Bridge v. Wheeling Bridge Co., 138 U. S. 287, 292, 34 L. ed. 967, 11 Sup. Ct. 301; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 374, 377, 27 L. ed. 419, 2 Sup. Ct. 257; Conway v. Taylor's Executors, 1 Black (66 U. S.), 603, 630, 634, 17 L. ed. 191; Minturn v. Larue,

§ 302. Exclusive Right to Use Wharf for Ferry Purposes.

The legislature may grant the exclusive right to hold and use the end of a wharf for ferry purposes.[25]

§ 303. Gas—Grant by State of Exclusive Privilege or Monopoly—Police Power.

An exclusive privilege or monopoly to make and vend gas may be granted when such grant does not violate any constitutional provision.[26] So the legislature may, in the absence of a constitutional prohibition, grant an exclusive right to a private corporation to manufacture and sell gas within a municipal corporation, even though it may create a monopoly and prevent competition and operate to the public detriment.[27] And a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares "That all freemen, where they form a social compact, are equal and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." [28] Again, a State statute which grants and vests exclusive permission and authority to and in a gas company to lay pipes, etc., in the streets by and with per-

23 How. (64 U. S.) 435, 437, 16 L. ed. 574. Case of municipal charter, ferry regulation and grant not exclusive; the difference is pointed out between charter in this case and those grants which are exclusive.

[25] Broadway & Locust Point Ferry Co. v. Hankey, 31 Md. 346.

[26] Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138.

[27] State v. Milwaukee Gaslight Co., 29 Wis. 454.

[28] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. ed. 510.

A grant of an exclusive right to manufacture and supply gas to a city given by charter to a corporation is invalid as contrary to a constitutional provision "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public service." Citizens' Gaslight Co. v. Louisville Gas Co., 81 Ky. 263, 5 Ky. L. Rep. 72; Const. (Bill of Rights), § 3.

mission of the common council is not unconstitutional and void either as creating a monopoly or as creating a corporation by special act.[29] In granting the exclusive franchise to supply gas to a municipality and its inhabitants, a State legislature does not part with the police power and duty of protecting the public health, the public morals, and the public safety, as one or the other may be involved in the exercise of that franchise by the grantee.[30]

§ 304. Gas—Grant by Municipality of Exclusive Privilege or Monopoly.

A city may grant a privilege to lay gas pipes, etc., to supply the city with gas along certain streets for a term the period of duration of which is not unreasonable and may contract with the grantee for the supply of gas to the city and such a grant is held not to confer a monopoly for supplying the city with gas nor to confer an exclusive right to the use of the streets.[31] But a right granted for fifteen years by a city council to lay gas pipes in the city streets is held not exclusive.[32] And the right of a municipality to grant an exclusive right to gas and electric companies to occupy and use the city's streets and alleys is denied in Oklahoma.[33]

[29] People v. Bowen, 30 Barb. (N. Y.) 24.

[30] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265.

[31] Vincennes, City of, v. Citizens' Gaslight Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485. The grant was for twenty-five years.

Powers of municipal corporations; monopolies; exclusive rights. See §§ 277–281, herein.

Control of streets by city. See § 299, herein.

[32] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19.

[33] Territory v. DeWolfe, 13 Okla. 454, 74 Pac. 98.

"But aside from these general considerations, the decided weight of judicial authority is against the right of the common council * * * to confer upon complainant the exclusive franchise which the ordinance * * * attempted to grant. Thus in Dillon on Municipal Corporations (2d ed.), § 547, it is said: 'A general grant of power in the charter of a city to cause it to be lighted with gas, while it carries with it, by implication, all such powers as are clearly necessary for the exercise of the authority expressly conferred, does not authorize the city council to grant to any person or corporation an *exclusive* right to use the streets of the city for the purpose

§ 305. Municipal Lease to Private Corporation to Supply Gas—Exclusive Right—Monopoly.

Where gas works are the property of a city, acting in its business and not in its governmental capacity, and it has by statute a right to lease such works, it may, through the city council, lease them to a private corporation for a long period of time and give to the lessee the exclusive right to supply the residents with gas and covenant in its lease that it will do no act itself, by ordinance or otherwise, which will in any way interfere with, limit, restrict or imperil the exclusive right so vested in the lessee. Such a lease confers no monopoly, in respect to private lighting, upon the lessee, nor is it against public policy.[34] It is also held in this case that if a city engages in the business of supplying its citizens with light in the streets and public places it acts as a business corporation, as no municipal obligation so to do exists. "In regard to the conferring of a monopoly, the appellants cite the provisions in the lease that 'the city of Philadelphia agrees that during the term of this contract it will do nothing by ordinance or otherwise which will in any way inter-

of laying down gas pipes for a term of years, and thereafter until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use exclusive for a *determinate* future period,' citing the well-considered case of the State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, which has not only been followed in Ohio (see Cincinnati Street Rd. Co. v. Smith, 29 Ohio St. 291), but recognized with approval by the Supreme Court of the United States (see New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659, 29 L. ed. 516, 6 Sup. Ct. 252). To the same effect see Dillon on Munic. Corp. (2d ed.), §§ 61, 548, 549; Cooley's Const. Lim., Marg., pp. 38, 207, 208; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19 (this case has been *qualified* in so far as it denied to the legislature itself the power to grant an exclusive franchise, but in respect to the city's power to do so it has not been questioned); Saginaw Gaslight Co. v. Saginaw, 28 Fed. 529; Richmond County Gaslight Co. v. Middletown, 59 N. Y. 228." Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Co. (U. S. C. C.), 33 Fed. 659, per Jackson, J.

[34] Bailey v. City of Philadelphia, 184 Pa. St. 594, 41 Wkly. N. C. 529, 39 Atl. 494, 63 Am. St. Rep. 812, 39 L. R. A. 837. Duration of contract was thirty years.

fere with, or limit, restrict or imperil this exclusive right hereby vested in the said United Gas Improvement Company, its successors or assigns,' and claim that this creates a monopoly which is void on the ground of public policy. To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may in dealing with it make such terms as in its discretion it deems best for its interest. * * * But in the provision of the lease now under consideration the city does not assume to grant any franchise. It could not do so if it would. What the city does is to covenant that it will do no act in derogation of the right of the lessee under the grant to operate the gas works and supply the city and the citizens with light therefrom. The franchise of the lessee to furnish light is not derived from the city but from the legislature, and whether it is exclusive or not at present, or shall be exclusive or not in the future, does not and will not depend on the city, but on the legislature. All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned, shall be limited or interfered with. This was clearly within its powers in dealing with its business property." [35]

§ 306. **Gas—Void Grants and Contracts—Monopoly.** It is held in an early case that the State has no authority to grant the sole and exclusive privilege of making or vending illuminating gas or any commodity, as such a grant is void as a monopoly.[36] A provision contained in a contract between a town board of improvement and a gas company that no other gas or electric light company

[35] *Id.*, 605, 606, per Mitchell, J.

[36] St. Louis Gaslight Co. v. St. Louis Gas, Fuel & Power Co., 16 Mo. App. 52, held void under common law and under Const. of 1820 of Mo., Art. 13, § 20, providing "That no title of nobility, hereditary emolument, privilege, or distinction, shall be granted."

shall have the consent of such board to extend its mains or to lay its pipes or conductors within the town during the term of agreement is void as tending to create a monopoly.[37]

§ 307. Gas—Purchasers of Exclusive Rights.

The exercise of a charter right in purchasing the right of another to occupy the city streets and supply it with gas does not give the purchaser an exclusive right, even though said purchaser had also a grant from the city council to use the city streets for laying gas pipes.[38]

§ 308. Intoxicating Liquors—"Dispensary System"—Monopoly.

The control of the sale of liquor within a county under the "dispensary system" of North Carolina is not such a monopoly as contemplated by the inhibition contained in the Constitution of that State.[39]

§ 309. Irrigation—Monopoly.

While under an irrigation statute the person making the first application for the use of water is given an exclusive right to the water, so long as he applies it to the beneficial use, and is granted, therefore, in a certain sense, a monopoly of the use of the water which he has been allowed to appropriate, still, this monopoly or privilege, while exclusive in its nature, is not a special privilege or immunity a grant of which is within a constitutional prohibition. The privilege granted is not "special." [40]

[37] Parfitt v. Ferguson, 38 N. J. Supp. 466, 3 App. Div. 176.

[38] Norwich Gaslight Co. v. Norwich Gas Co., 25 Conn. 19. "Could it aid such a corporation in a claim to an exclusive right to use the public highways, that it was also authorized to purchase the effects of same person who had formerly been engaged in the same business?" *Id.*, 33, per Hinman, J.

[39] Guy v. Board of Commissioners of Cumberland County, etc., 122 N. C. 471, 29 S. E. 771. See also Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; Garsed v. City of Greensboro, 126 N. C. 159, 160, 35 S. E. 254; State v. Aiken, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 221.

[40] Farmers' Canal Co. v. Frank, 72 Neb. 136, 157–160, 100 N. W. 286; Const., § 15, Art. 3.

§ 310. Market House—Contract for, by City or Town —Monopoly.

It is within the power of a city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions, the sale of fish at other places, it appearing that under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. A contract of such a character does not contravene a constitutional provision prohibiting perpetuities and monopolies.[41] In a Michigan case a contract was made between one Gale and the municipal corporation, under and by the terms of which the former agreed to erect a suitable market building for the town, and place the same under the control of the president and trustees of the village for ten years at a stipulated rent. The president and trustees agreed that, during the continuance of the contract, there should be no other public market. It was held, Judge Cooley delivering the opinion of the court, that this contract was invalid; that the governing authority could not abdicate any of its legislative powers, nor preclude itself from meeting in the proper way, emergencies as they might arise; and that the contract created or vested a monopoly.[42]

§ 311. Navigable Canal—Monopoly.

The legislature may charter a company to construct a work of public improvement such as a navigable canal along the valley of a stream, and no such monopoly is created thereby as to exclude chartering a company to construct a railroad along the same valley.[43]

[41] State v. Perry, 151 N. C. 661, 65 S. E. 915. See § 315, herein.

[42] Gale v. Kalamazoo, 23 Mich. 344, principle of case applied by Jackson, J., in Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Light & Fuel Gas Co. (U. S. C. C.), 33 Fed. 659. See § 315, herein.

[43] Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 36 Am. Dec. 374.

§ 312. **Omnibuses—Grant of Privilege to Run—When a Monopoly.**

A city cannot grant an exclusive privilege to one person to solely run omnibuses in the city where such grant is not expressly authorized by the city charter and it tends to create a monopoly.[44]

§ 313. **Railroads—Exclusive Privileges.**

A statute which authorizes any railroad company which may have acquired more than three-fourths of the capital stock of any other railroad company to take the outstanding stock by condemnation proceedings, if necessary, upon a judicial finding that such an acquisition will be for the public interest, does not confer exclusive privileges upon any set of men in violation of a state constitutional provision "that no man or set of men are entitled to exclusive public emoluments or privileges from the community." Such a statute is for the benefit of all railroads to which its terms may apply. "Railroad companies constitute a peculiar class of artificial persons which can properly be invested with special privileges of a kind calculated to promote the public good." [45] And a statute which provides that no person shall acquire title by adverse possession to lands of a railroad corporation, where such lands lie within the limits of the roadway of such corporation as shown by the recorded survey, does not grant a special privilege to a private corporation contrary to a constitutional provision prohibiting grants of such privileges. The exception is not a grant of a privilege to a private corporation, but an exception of land set apart for public use and is within the range of legislative authority.[46]

§ 314. **School Text-Book Statutes—Exclusive Privilege—Monopoly—Contracts.**

It is held in Alabama that a statute authorizing the

[44] Logan & Sons v. Pyne, 43 Iowa, 524.

[45] New York, New Haven & Hartford R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510, quotation per Baldwin, J.

[46] Dronin v. Boston & Maine Rd. Co., 74 Vt. 343, 52 Atl. 957; Const., Art. 7, chap. 1.

adoption and establishment of a uniform series of text-books to be used in the public free schools of the State, and conferring upon the publishers of the book adopted by the State Text-Book Commission the exclusive privilege of supplying said books, does not violate the provisions of the Constitution of that State against monopolies, since the purpose of the statute was not to confer any pecuniary benefit upon the State or school officials or publishers, but to confer a benefit upon the public.[47] It is decided in Tennessee that: (1) The "Uniform Text-book Act" of that State which authorizes the selection and adoption, through a commission, of a uniform series of text-books for the public schools of the State, and provides for conveniently furnishing the same to patrons at reasonable prices, and for the enforcement under penalties, of the use in the public schools of the particular books adopted is a constitutional and valid statute. (2) That feature of the act does not render it obnoxious to the constitutional provisions against monopoly and special class legislation which authorizes a commission appointed by the governor to select and adopt a uniform series of text-books for the public schools of the State, and to contract with the publisher or publishers who will furnish the books cheapest to provide and sell them at fixed prices to patrons of the schools, and which provides further for the enforcement, under penaltics, of the use in the public schools of the particular books thus adopted. (3) The privilege which a publisher acquires under a contract with the State to furnish the patrons of the public schools with a uniform series of text-books, to be used therein, is not of a monopolistic nature, where the purchaser obtains that privilege in open and free competition with all other publishers by consenting to furnish the books at a less price than others. (4) If it be a monopoly, it is one for the benefit of the State and its citizens and not prohibited by the Constitution. (5) The monopoly prohibited by the Constitution is a privilege farmed

[47] Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345; Act March 4, 1903 (Acts 1903, p. 167).

out to the highest bidder or conferred because of a favoritism to the donee, and not one awarded to the lowest bidder or for the convenience and benefit of the public.[48] Under a Washington decision it is within the power of the legislature to enact laws authorizing boards of education to enter into contracts providing for the exclusive use of certain text-books during a limited period of time and contracts made under such statutes are not unconstitutional on the ground of being creative of a monopoly and therefore opposed to public policy.[49] In a Minnesota case it is said that: "An exclusion directed against the use of any particular class of books in the public schools, or a refusal of the State to purchase them is in no legal sense a restriction upon the right of the owner to sell, or any interference with his right of property therein." [50] In Mississippi where, as a result of competitive bidding in conformity with the law, a contract for copyrighted school books is based upon a bid below the normal cost of production, such contract, whether made with the State or any of its statutory agencies, is not a monopoly or trust under a statute which makes the doing of that which shall destroy or attempt to destroy competition in the manufacture or sale of a commodity by offering the same for sale at a price below the normal cost of production, a trust, or combine.[51] In an Indiana case it is asserted that: "The statute is not within the constitutional provision directed against monopolies. * * * There is no exclusion of bidders, no limitation of the right to furnish school books to the people of the State to any class; on the contrary, all who are prepared to supply such books as the statute makes the standard are invited to compete for the contract. No special privilege is granted to anyone, no right denied to anyone, for all are invited to enter the field as competitors. * * * If no copyrighted books

[48] Leeper v. State, 103 Tenn. 500, 63 S. W. 962, 48 L. R. A. 167 (Acts, 1899, chap. 205).

[49] Rand, McNally & Co. v. Hartrauft, 29 Wash. 591, 70 Pac. 77.

[50] See Curryer v. Merrill, 25 Minn. 1, 7, 33 Am. Rep. 450, per Cornell, J.

[51] Johnson Publishing Co. v. Mills, 79 Miss. 543, 31 So. 101.

can be bought, then new discoveries and new methods, however important, may be denied the children of our common schools, and this without sufficient reason, for no rule of law prohibits the purchase for public use of articles protected by letters patent or by copyright. * * * We conclude our discussion of this phase of the subject by affirming, that the statute cannot be considered as creating a monopoly, because it does require that a certain class of books shall be used, and in doing this does favor some publishers to the exclusion of others." [52]

§ 315. Slaughterhouse or Market House—When Municipality of Village Cannot Create Monopoly as to.

Where a municipality has no authority to pass an ordinance granting an exclusive right for a specified period to the owners of a designated building for the slaughtering of all animals intended for sale and consumption within the city, and such ordinance or contract tends to creates a monopoly, it is void.[53] Nor can a village, possessing the usual powers only, create a monopoly giving to a certain person the right to build and control a market house.[54]

§ 316. Street Railways—Control of Streets—Exclusive Grants—Municipalities.

The authority to make use of the public streets of a city for railroad purposes primarily resides in the State and is part of the sovereign power; and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a "franchise," must always proceed from that source, whatever may be the agency through which it is conferred.[55] And if a

[52] State ex rel. Clark v. Haworth, 122 Ind. 462, 470–472, 23 N. E. 946, 7 L. R. A. 240, per Elliott, J.

[53] Chicago, City of, v. Rumpff, 45 Ill. 90. See § 310, herein.

[54] Gale v. Village of Kalamazoo, 23 Mich. 344.

[55] Adee v. Nassau Electric R. Co., 72 N. Y. Supp. 992, 1000, 65 App. Div. 529, per Woodward, J., case affirmed (mem.) 177 N. Y. 548, 69 N. E. 1120. See also Beekman v. Third Ave. Rd. Co., 153 N. Y. 144, 152, 47 N. E. 277, per O'Brien, J.; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 305. See § 299, herein.

city has no power, either inherent or derived from the legislature to confer an exclusive privilege to construct and operate a street railway within its limits it cannot validly make such grant: "Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it." [56] Again, a city cannot in the absence of power grant by ordinance a franchise in perpetuity or exclusive franchise to a street railway company and even if it has such power it may be precluded by a constitutional provision prohibiting the "making any irrevocable grant of special privileges or immunities.[57] In Florida it has been held that, under the statute of that State conferring upon cities a general control over streets, a city has no power to grant an exclusive privilege to a street railway company to use all the streets for the construction and operation of its line for a number of years.[58] It is decided in a Missouri case that the city of St. Louis was given no power, under its charter, to grant to a street railway company an exclusive right to the use of its streets.[59] A grant by the municipal authorities of the right to construct a street railway to be operated by "animal power only," and providing that the city shall not, for a period of thirty years, grant any privileges to any other corporation "which will impair or destroy the rights and privileges herein granted," has been held not to preclude such authorities from making another grant, before the expiration of the time, to another company, of the right to construct a street railway to be operated by other means than animal power.[60] But a city has power to

[56] Citizens' St. Ry. Co. v. Detroit Ry., 171 U. S. 48, 55, 43 L. ed. 67, 18 Sup. Ct. 732.

[57] Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; Const., Art. 1, § 23.

[58] Florida Central & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692, 7 Am. & Eng. R. Cas. (N. S.) 686.

[59] Grand Ave. Ry. Co. v. People's Ry. Co., 132 Mo. 34, 33 S. W. 472.

[60] Teachout v. Des Moines Broad Gauge St. Ry. Co., 75 Iowa, 722, 38 N. W. 145.

grant a franchise for a street railway along a street upon which there is a street railway operated under an existing franchise, when the charter of said city provides that "no exclusive franchise or privilege shall be granted for the use of any street, alley or highway or other public place or any part thereof," and all ordinances granting franchises prior to the adoption of such charter provide that the franchises thereby granted shall not be deemed exclusive.[61] And the exclusive right to construct and operate a horse railway in a city is not infringed by constructing a road in the same city, to be operated by steam.[62] Again, an ordinance granting a franchise for the construction of a system of street railways, which authorizes the grantees to acquire existing railway lines and surrender their franchises, for the purpose of operating a new system under the proposed franchise, does not violate a State Constitution prohibiting monopolies and trusts, by reason of the fact that portions of the existing lines in operation, and which may be absorbed under the proposed ordinance, are parallel and competing lines, which the grantees of the new franchise would thus be enabled to combine and consolidate.[63] While a city is exercising legislative power delegated to it by the State in granting franchises to street railway corporations to use and occupy city streets, still they are not grants of corporate powers or privileges contrary to a constitutional provision prohibiting the enacting of any special or private law granting corporate powers or privileges. They are not franchises essential to corporate existence, and granted as part of the organic act of incorporation, but are such as may be sold and assigned, if assignable, or lost by forfeiture, and yet not thereby affect the corporate existence of the street railway.[64]

[61] Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

[62] Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Colo. 673.

[63] Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

[64] Linden Land Co. v. Milwaukee Electric Ry. & Light Co., 107 Wis. 493, 83 N. W. 851.

§ 317. Telephone Companies—Exclusive Grants or Privileges.

Where a municipality has not by ordinance or contract attempted to give an exclusive right to the use of its streets to a telephone company to whom it had granted an easement therein, its refusal to grant the same rights to another telephone company under its charter empowering it to authorize or prohibit the use of electricity in or upon any of its streets would not raise any question as to the violation of the State Constitution prohibiting the passing of any law granting "to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." [65] But a franchise or right by contract given by a city to a telephone company for the exclusive use of the streets for a period of five years is illegal where it is provided by statute that no council shall have power to grant to any person "an exclusive right of exercising within the municipality any trade or calling, or to impose a special tax on any person exercising the same, or to require a license to be taken out for exercising the same unless authorized or required by statute so to do." [66] Again, where a State law authorized a telephone company to lay conduits in the streets of any city in which it maintained its lines, providing that such conduits or ducts should not interfere with the ordinary use of the streets by the public, and that their construction should be subject to municipal regulation it was held that the company had no right to lay conduits or ducts for its exclusive use and under its exclusive control.[67]

§ 318. Telegraph Companies—Exclusive Grants.

Although it is not within the power of a State to grant

[65] State (ex rel. Spokane & British Columbia Teleph. & Teleg. Co.) v. City of Spokane (1901), 24 Wash. 53, 63 Pac. 1116. See American Teleph. & Teleg. Co. v. Morgan County Teleph. Co., 138 Ala. 597, 36 So. 178. See § 292, herein.

[66] Robinson, In re, v. City of St. Thomas, 23 Ont. Rep. 489.

[67] State, Southern N. E. Teleph. Co. v. Tervers, 71 Conn. 657, 42 Atl. 1083.

an exclusive right to a telegraph company as against a corporation deriving its rights under an act of Congress,[68] still the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment, and this applies to telegraph companies;[69] and exclusive franchises may be conferred upon individuals or corporations by the legislature where no restriction upon this power is imposed by the State Constitution except as to particular privileges specified therein.[70] Again, where the Constitution of a State empowers the legislature to grant exclusive privileges and franchises for a limited period, it is declared that no serious question can arise but that such State possesses the absolute right to confer such privileges upon a telegraph corporation created by it to construct and operate its lines within its borders; that the exclusiveness of a privilege often constitutes the only inducement for corporate undertakings; that it has been a common practice in all the States to encourage enterprises having for their object the promotion of the public good, such as the construction of bridges, turnpikes, railroads, and canals, by granting, for limited periods, exclusive privileges in connection with them; and that such rights so far from being encroachments upon any rights or powers of the United States are held to constitute contracts within the protection of the Federal Constitution.[71] An agreement between a State, which is the owner of a railroad, and a telegraph company, by which

[68] Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. ed. 708. See § 292, herein.

[69] Western Union Teleg. Co. v. Call Pub. Co., 181 U. S. 92, 101, 102, 45 L. ed. 765, 21 Sup. Ct. 561, per Mr. Justice Brewer, a case as to unjust discrimination in charges. The telegraph company claimed that the services it rendered were a matter of interstate commerce, over which Congress had sole jurisdiction with the right to alone prescribe rules and regulations; that Congress had not prescribed any regulations; that there was no national common law; that the statute or common law of the State was wholly immaterial.

[70] California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398.

[71] Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 16, 24 L. ed. 708, per Mr. Justice Field in dissenting opinion.

the latter agrees to erect and equip a line of telegraph, upon poles already in place, to be used entirely by the State, the cost of the line and equipment, wherever it is not already in place, to be paid by the State, simply gives the State the exclusive use of such line, the ownership being in the telegraph company.[72]

§ 319. **Toll Bridges—Exclusive Grants.**

A grant of a right to erect and keep up a toll bridge to the exclusion under penalty of all other bridges or ferries within a certain distance does not preclude a grant to a railroad company of a right to carry passengers over their bridge even though said bridge is within the prohibited limits.[73]

§ 320. **Toll Roads—Municipal Grant—Monopoly.**

An ordinance of a police jury of a parish authorizing a plank road company to construct, maintain and operate a toll road in the parish upon the site of a free road or public highway which was then and had been for many years a toll road does not contravene a constitutional provision as conferring a monopoly upon said company.[74]

§ 321. **Toll Wharf—Exclusive Grant.**

The legislature may grant to a single individual or association the exclusive right to erect and keep a public toll wharf within certain prescribed limits, as such an improvement is beneficial to the public.[75]

[72] Western Union Teleg. Co. v. Atlantic R. Co., 91 U. S. 283, 23 L. ed. 350.

[73] McRee v. Wilmington & Raleigh Rd. Co., 47 N. C. 186. See also Washington Toll Bridge Co. v. Commissioners of Beaufort, 81 N. C. 491.

Toll bridges; legislature may grant franchises for. See Joyce on Franchises, § 145.

Toll bridges; power of police juries over. See Joyce on Franchises, § 201.

[74] St. Joseph Plank Road v. Kline, 106 La. 325, 30 So. 854; Const., Art. 48.

[75] Martin v. O'Brien, 34 Miss. 21, nor contrary to Const., Art. 1, § 1, "that no man or set of men are entitled to exclusive," etc., privileges.

As to right of exclusive occupation of wharf and public use thereof. See Thousand Islands Steamboat Co. v. Visgar, 83 N. Y. Supp. 325, 86 App. Div. 126. See Davidson, The (U. S. D. C.), 122 Fed. 1006.

§ 322. Union Label on City Printing.

A city has no power to pass an ordinance requiring all city printing to bear a union label, where such an ordinance is clearly in conflict with the spirit, purpose and letter of the charter. It is also void as class legislation, contrary to public policy and the Constitution because plainly discriminative in its character: such ordinances tend to create a monopoly, are class legislation, discriminative in their character; they prevent parties from an equal enjoyment of their property and business and deprive persons of their property rights, in violation of the Constitution, by restricting trade and the free use of property on equal terms with others.[76] And a municipal corporation has no power to adopt an ordinance providing that all of a designated kind of work shall be given exclusively to persons of a specified class, even though it is not required by its charter to let contracts for public work to the lowest bidders, and though clothed as to such matters with the broadest discretionary powers. Such an ordinance tends to encourage monopoly and defeat competition, is ultra vires and illegal, and all contracts made in pursuance thereof are void.[77] Nor can a board of supervisors require bidders on a printing contract to use a union label, as such a requirement is unlawful and against public policy as tending to create a monopoly by restricting competition to a certain class of printers.[78]

§ 323. Requirement That Only Union Labor or Union Shops Be Employed—Award of Contract.

A city cannot by ordinance require that only union labor be employed upon public improvements as such requirement restricts competition, discriminates between classes of citizens and increases the art of the work, espe-

[76] Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S. W. 815. The court cites and considers numerous cases.

[77] Atlanta, City of, v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; case of "an ordinance requiring the union label of the Allied Printing Trades Council on all city printing."

[78] People ex rel. Single Paper Co., Ltd., v. Edgcomb, 98 N. Y. Supp. 965, 112 App. Div. 604.

cially so where by the Constitution and laws of the State any man has the right to employ a workman to perform labor for him whether such workmen are or are not members of a labor union and any workman has the right to contract for the performance of labor irrespective of the question of whether or not he belongs to a labor union.[79] So a city had no power to adopt a resolution which restricts the rights of the public and tends to a limitation of the general right of the city officials to contract for printing, where such resolution excludes all persons or corporations from contracting with the city, not of a specified class, and such fact tends to create a monopoly.[80] Nor can a city validly provide by ordinance that contracts for city printing be awarded to a specified class such as union shops only, as such an ordinance tends to create a monopoly.[81]

§ 324. **Warehouses—Monopoly.**

A monopoly in the warehouse business in a locality is not shown by the fact that the business was restricted to locations upon the lands of a railway company, when it further appears that for years various persons owned and operated warehouses thereon, among them one of the plaintiffs, and that the right was open to the plaintiffs to engage in the business upon the same terms and with like facilities as were enjoyed by existing warehouses.[82]

§ 325. **Waterworks or Water Supply—Power of Municipality.**

It is held that the erection of waterworks to supply a city and its inhabitants with water is one of the legiti-

[79] Fiske v. The People ex rel. Raymond, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291, work was curbing, grading, etc., of streets or avenues.

[80] Paterson Chronicle Co. v. Mayor, etc., of Paterson, 66 N. J. L. 129, 48 Atl. 589. Printing limited to offices and newspapers recognizing the Typographical Union, etc.

[81] Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556.

[82] Northwestern Warehouse Co. v. Oregon Railway & Navigation Co., 32 Wash. 218, 73 Pac. 388; Const. Wash., Art. 12, § 22, quoted under § 259, herein.

mate and ordinary powers of a municipal corporation and the exercise of this power within the limits of its charter needs no enabling act by the legislature.[83] But it is also decided that a municipality has no implied power from the mere fact of its creation to engage in the business of supplying its citizens with water for pay. It cannot do so except by express legislative authority.[84] Although an attempt by a city to make exclusive a franchise for waterworks may be invalid, still the valid part of the grant may be enforced.[85]

§ 326. Waterworks or Water Supply—Exclusive Right of Municipality and of Private Corporation Distinguished.

An exclusive right in a municipal corporation to operate waterworks is distinguished from such an exclusive right held by a private corporation, in this, that in the former case the right is exercised by and for the people, not for profit but for the public welfare, and the correction of its oppressions and abuses of its management is in their hands; while in the latter case, the right is exercised for private gain, with every incentive to oppress those who, under a contract giving an exclusive right or monopoly to a water company to furnish a city with water for a term of years, would be powerless to relieve themselves if the contract should be held valid.[86] While a municipal corporation, being a mere agent of the State, stands

[83] Memphis, City of, v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495. See § 328, herein.

Powers of municipal corporations; monopolies, etc. See §§ 277–281, herein.

[84] White v. City of Meadville, 177 Pa. St. 643, 35 Atl. 695. See § 328, herein.

Franchise to construct waterworks can be conferred only through direct or delegated authority from the State, and it is quasi-public in its nature. Washburn Waterworks Co. v. City of Washburn, 129 Wis. 73, 80, 108 N. W. 194, per Kerwin, J.

[85] Gadsden, City of, v. Mitchell, 145 Ala. 137, 40 So. 557. See Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[86] Brenham, City of, v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143, distinguished in Waco Water & Light Co. v. City of Waco (Tex. Civ. App., 1894), 27 S. W. 675. See also Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75.

in its governmental or public character, in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation, still such a corporation in respect of its private or proprietary rights and interests, may be entitled to constitutional protection.[87]

§ 327. Waterworks or Water Supply—Grant by State of Exclusive Privilege or Monopoly.

The State legislature has the power in the absence of a constitutional provision forbidding it, to grant an exclusive privilege to a city or to a water company for a long period of time to erect waterworks and such grant is not a monopoly.[88] And the right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests, and as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property.[89]

§ 328. Waterworks or Water Supply—Grant by Municipality of Exclusive Right or Monopoly.

It is held that a city may, without violating a constitutional provision against perpetuities and monopolies,

[87] New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. ed. 943.

[88] Memphis, City of, v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495. Duration of grant was thirty years.

[89] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 679, 680, 29 L. ed. 525, 6 Sup. Ct. 273; per Harlan, J., case controlled by New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

grant by ordinance a privilege to a water company of constructing and operating waterworks within the city in order to supply the public and the city with water for a long period of time.[90] And the laws of Mississippi, as construed by its highest court, do not prevent a municipality from granting an exclusive water supply franchise for a limited period during which it cannot erect and operate its own water system; and under the constitutional limitation that the legislative power to alter, amend and repeal charters of corporations must be exercised so that no injustice shall be done to stockholders, an act of the legislature authorizing the municipality to erect its own water system would not amount to repealing the exclusive features of an existing legal franchise.[91] But it is also decided that an exclusive right granted by a city to a water company which would cut off future competition in supplying the city with water for a long period of time tends to enhance the price of an article of necessity and constitutes a monopoly.[92]

It is also held that a municipal corporation could bind itself by such contracts only as it was authorized by statute to make. It has no power to grant exclusive privileges to put mains, pipes and hydrants in its streets, nor can it lawfully, by contract, deny to itself the right to exercise the legislative powers vested in its common council. In dealing with municipal corporations parties are chargeable with knowledge of their powers.[93] So, under a North Carolina decision, a city ordinance or contract attempting to grant any exclusive privilege for the construction of waterworks and to use its streets for any purpose is within a constitutional prohibition against monopolies and perpetuities even though such grant be made as an

[90] Bartholomew v. City of Austin, 85 Fed. 359, 29 C. C. A. 568.

[91] Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660.

[92] Brenham, City of, v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143. Period was twenty-five years. See Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75.

[93] Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 26 N. Y. St. R. 364.

incentive or inducement to the establishment and maintenance of works contributing to the health, comfort or convenience of the public.[94] And it is decided in Montana that a city council cannot grant an exclusive right to a water company to sell to the city all the water it needs for certain purposes for a long period of time as such a grant creates a monopoly.[95]

§ 329. Waterworks or Water Supply—Instances of Valid Contracts by Municipality—Exclusive Privilege or Monopoly.

An agreement by a city to pay the taxes assessed against the property of a water-supply company, in excess of a certain amount as part of the consideration of a supply of water, is not invalid on the ground that it gives the particular company an advantage over similar companies that might wish to do business in the city, and, therefore, tends to create a monopoly.[96] "The proposition, boldly stated, gets down to this: The plaintiff has made a contract with the city on terms so favorable that other companies cannot compete with it. If this constitutes a monopoly, the courts will be under the duty of scrutinizing contracts with municipalities with great care. We cannot assent to the views of counsel in respect to this claim; no exclusive rights were conferred upon the plaintiff. The city was authorized to contract for a water supply. To the extent that the contract of the city to take its supply of water from the plaintiff, and pay for it, gave the plaintiff an advantage over others desiring to do business of a like nature, it is a necessary and legitimate result of the right of contract." [97] A contract, however, with a city for a water supply for a term of years but which does not exclude the city from contracting with others for additional

[94] Thrift v. Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

[95] Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

[96] Luddington Water Supply Co. v. City of Luddington, 119 Mich. 480, 5 Det. L. N. 891, 78 N. W. 558.

[97] *Id.*, 489, 490, per Montgomery, J.

water supply nor affect the rights of other persons to supply water to the inhabitants of the city does not create a monopoly.[98]

In a suit in the Federal Supreme Court there was involved the constitutionality of a city ordinance fixing the water rates to be charged and collected by a water company; prior thereto the city had made a contract with a water company which was ratified by the legislature and it was urged that said enactment violated the constitutional provision of the State permitting the formation of corporations under general laws but prohibiting their creation by special act except for municipal purposes. The court considered this point at some length, and determined that, at the time of making the contract and of the subsequent passage of the ratifying act, it was established by the decisions of the highest court of the State wherein the contract was made that the State Constitution permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the legislature; that this law entered into the contract in question as confirmed by the subsequently enacted statute and could not be affected by subsequent decisions, although the court stated that the subsequent decisions had not been uniform it declined to reconcile them.[99]

§ 330. Waterworks or Water Supply—Instances of Void Contracts—Exclusive Privilege or Monopoly.

The right to furnish water for public and domestic use within a city is a public service and should at all times remain open to the control of the city council for the benefit of the public. And a contract which would place the matter beyond the control of the city council

[98] Waco Water & Light Co. v. City of Waco (Tex. Civ. App., 1894), 27 S. W. 675.

[99] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 571–576, 44 L. ed. 886, 20 Sup. Ct. 736, case affirms Los Angeles City Water Co. v. City of Los Angeles (U. S. C. C.), 88 Fed. 720.

for a long period of time, is in the nature of an attempt to create a monopoly, a power which the city council never possesses except when delegated in clear, unmistakable terms.[1] So a grant by ordinance of an exclusive right to furnish all the water required for municipal purposes at a minimum rate fixed in the contract for a long period of time, and which right is in effect such that it cannot be abridged by any other person no matter at what rate or on what terms, within said period, he may wish to supply the city with water, constitutes a monopoly which the city has no power to grant notwithstanding the grant does not exclude others from selling water to private citizens.[2] And an exclusive privilege granted to a water company by a city by a contract binding itself not to grant the same right to any other person during a certain number of years, said contract to continue without limit after the expiration of said period unless terminated by the election of the city to purchase, constitutes a "perpetuity or monopoly." [3] Again, an agreement of a county made with a certain person to grant him an exclusive right of way to lay piping for supplying a town with water is within a constitutional prohibition against creating monopolies even though such agreement together with the obligation to pay a specified sum of

[1] Illinois Trust & Savings Bank v. Arkansas City Water Co. (U. S. C. C.), 67 Fed. 196, citing the following cases.

United States: Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Minturn v. Larne, 23 How. (64 U. S.) 435, 16 L. ed. 574; Omaha Horse R. Co. v. Cable Tramway Co. (U. S. C. C.), 30 Fed. 324; Saginaw Gaslight Co. v. City of Saginaw (U. S. C. C.), 28 Fed. 529, 540; Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co. (U. S. C. C.), 24 Fed. 306.

Illinois: Chicago, City of, v. Kumpff, 45 Ill. 90.

Iowa: Logan v. Pyne, 43 Iowa, 524.

Michigan: Gale v. Village of Kalamazoo, 23 Mich. 344.

Minnesota: Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913.

New York: Richmond County Gaslight Co. v. Town of Middletown, 59 N. Y. 228.

Ohio: State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

[2] Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249. Period of duration of grant was twenty years.

[3] Hartford Fire Ins. Co. v. City of Houston (Tex. Civ. App., 1908), 110 S. W. 973.

money constituted the consideration of a contract with the county whereby works were to be erected for supplying water for county purposes.[4]

§ 331. Waterworks or Water Supply—When no Defense That Contract Creates Monopoly.

It is no defense by a city that its contract with a water company created a monopoly where the former has received, in settlement of its suit against the water company for loss of its property by fire occasioned by failure to furnish water to extinguish it, moneys to indemnify insurance companies for moneys paid by them on loss of the property, as such payment will be held as money received for the benefit of such insurance companies, and the illegality of the contract cannot be availed of where the case stands against the city irrespective of the claimed illegal contract.[5]

§ 332. Injunction Restraining Municipality—Water System.

It is a valuable feature of equity jurisdiction to anticipate and prevent threatened injury, and an injunction may properly be issued to restrain a municipality from erecting its own water system during the continuance of an exclusive franchise owned by a water company.[6]

§ 333. Contract with State Water Company—Constitutional Law—Due Process.

Where the charter of a water company is not exclusive, and is subject to repeal, alteration or amendment at the will of the legislature, no deprivation of property without due process of law or impairment of the obligation of a contract can arise from an act of the legislature empowering the city to erect its own waterworks. Where the legislature of a State authorizes a city to erect its own waterworks, but on condition that it purchases

[4] Edwards County v. Jennings, 89 Tex. 618, 35 S. W. 1053.

[5] Hartford Fire Ins. Co. v. City of Houston, 102 Tex. 317, 116 S. W. 36, reversing (Tex. Civ. App., 1908), 110 S. W. 973.

[6] Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660.

the plant of a company then supplying it, at a valuation to be fixed by judicial proceedings as provided in the act, and the water company institutes proceedings under the act, it cannot thereafter claim that because certain incorporeal rights, franchises and possible future profits were not allowed for in fixing the valuation, that its property was taken without due process of law, and, changing its position, cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.[7]

§ 334. Waterways—Exclusive Right to Collect Tolls—Monopoly.

A statute which relates to the excavation of public waterways and creates liens upon the State tide lands filled in under contract, is not invalid or contrary to a constitutional provision prohibiting monopolies and the granting of special privileges to any citizen, by reason of that part of the act granting to the waterway company the exclusive right to control the waterway and collect tolls, where such provision is a separable part of the act, and, if it fails, it does not affect such portion of the act as relates to certificates and liens for the improvements.[8]

§ 335. Consolidation of Corporations—Exclusive Privileges—Monopoly.[9]

As we have stated elsewhere it is a general proposition that all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy of the State and are therefore unlawful, all agreements and contracts tending to create monopolies and prevent proper competition are by the common law

[7] Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. 553.

[8] Seattle & Lake Washington Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845; Const., Art. 1, § 12, and Art. 12, § 22.

[9] See §§ 390 et seq., herein.

illegal and void, and a State Constitution which provides that the general assembly shall pass no local or special law for "granting to any corporation, association or individual any special or exclusive privilege or franchise whatever," [10] is a clear declaration that the public policy of such State is opposed to all exclusive and monopolistic franchises and powers, of whatever kind or character, and this applies to contracts whereby one corporation attempts to acquire control of another corporation, coupled with a pretended purchase of the stock of the latter, and such contracts are mere nullities and the title to such stock never passed from the sellers.[11] So the privilege conferred by an act authorizing the consolidation of a railroad company with any street surface railroad company although exceptional, is not an exclusive one within a constitutional prohibition against the grant of exclusive privileges, etc., to any corporation.[12] And a statute authorizing the consolidation of gas companies is not within the prohibition of the Constitution of Illinois.[13] But the consolidation of street railroads has been held to create an illegal monopoly when made in violation of the New York stock corporation law.[14]

[10] Section 22, Art. 4, Const. 1870 of Ill.

[11] Dunbar v. American Teleph. & Teleg. Co., 238 Ill. 456, 486, 487, 87 N. E. 521. See also the following cases:

Illinois: Distilling & Cattle Feeding Co. v. People ex rel. Maloney, 156 Ill. 448, 41 N. E. 188; Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166, 39 N. E. 651.

Michigan: Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89, 106 N. W. 868; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102.

New Jersey: Compare Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723.

New York: People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062.

Rhode Island: Compare Oakdale Manufacturing Co. v. Jarst, 18 R. I. 484, 28 Atl. 973.

Texas: San Antonio Gas Co.v. State, 22 Tex. Civ. App. 118, 54 S. W. 289.

[12] Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047, aff'g 54 N. Y. Supp. 1030, 35 App. Div. 381; Const., Art. 3, § 18.

[13] People v. People's Gaslight & Coke Co., 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; Const. Art. 4, § 22.

[14] Continental Securities Co. v. Interborough Rapid Transit Co. (U. S. C. C.), 165 Fed. 946.

CHAPTER XXII

POWER OF STATE—POLICE POWER GENERALLY

§ 336. Police Power of State—Restraining Right of Contract Generally.
337. Police Power of State—As to Contracts and Combinations in Restraint of Trade Generally.
338. Police Power of State—Prevention of Discrimination.
339. Police Power of State—Prohibiting Giving of Rebates.
340. Police Power of State—Corporations—Limitations in Federal Constitution—Fourteenth Amendment.
§ 341. Police Power of State—Foreign Corporations — Fourteenth Amendment.
342. Power of State to Provide Mode and Means of Procedure to Enforce Statutes —Power of Supreme Court of United States.
343. Power of Legislature as Affected by Constitutional Provision Requiring Passage of Laws.

§ 336. Police Power of State—Restraining Right of Contract Generally.

In the reasonable exercise of the police power for the protection of the public health, safety, morals and welfare States may restrain the general right of contract.[1]

The police power extends to many subjects which affect the general welfare and public interest. In the absence of such power, the citizen would have the absolute authority to contract and the power to hold property as he might deem proper, but under that power the State may enact valid laws requiring each citizen to so conduct himself and so use his property as not to unnecessarily injure others. Of such a character are laws forbidding pools, combinations, trusts and other statutes, of a similar nature and which are founded upon those police powers which are the inherent rights of sovereignty.[2]

[1] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, citing Standard Oil Co. v. State, 117 Penn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; American Express Co. v. Southern Indiana Express Co., 167 Ind. 292, 78 N. E. 1021; Adams Express Co. v. State, 161 Ind. 328, 67 N. E. 1033.

[2] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends." [3]

§ 337. Police Power of State—As to Contracts and Combinations in Restraint of Trade Generally.

Contracts which have a tendency to suppress competition are contrary to public policy and are subject to public control under the police power.[4]

"That State legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and furnish monopolies is not open to question." [5] So it is said in a case in Kansas that combinations having for their object the restraint of trade by the prevention of competition are inimical to public policy, their contracts in furtherance of their object nonenforceable, and their agreements of confederacy, followed by acts in prosecution of their purpose, rightful subjects of restrictive and Federal legislation.[6] So it is within the police power of the State to adopt such regulations as will protect the public against the evils resulting from combinations of

[3] Smiley v. Kansas, 196 U. S. 447, 457, 49 L. ed. 546, 25 Sup. Ct. 276, quoted in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 695, 54 L. ed. 826.

[4] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[5] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 29 Sup. Ct. 220, 53 L. ed. 417, per Mr. Justice Day, citing National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689; Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. ed. 546.

[6] State v. Smiley, 65 Kan. 240, 69 Pac. 199, affirmed 196 U. S. 447, 25 Sup. Ct. 289, 49 L. ed. 546.

those engaged in the business of fire insurance and to substitute competition for monopoly, and regulations which have a real, substantial relation to that end and are not essentially arbitrary do not deprive the insurance companies of their property without due process of law.[7] The court said in this case: "We concur entirely in the opinion expressed by the State court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." [8] And while an individual may not be interfered with in regard to a fixed trade rule not to purchase from competitors a State may prohibit more than one from entering into an agreement not to purchase from certain described persons even though such persons be competitors and the agreement be made to enable the parties thereto to continue their business as independents.[9]

In Illinois it has been decided that such legislation as is in force in that State has not abrogated the common-law rule with respect to combinations and conspiracies

[7] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. ed. —.

[8] Per Mr. Justice Harlan, citing Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 26 Sup. Ct. 66, 50 L. ed. 246.

[9] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826.

in restraint of trade and that it is not necessary to look to this legislation alone to find the public policy of the State with respect thereto.[10]

§ 338. **Police Power of State—Prevention of Discrimination.**

The prevention of discrimination in particular localities, in prices of commodities in general use "for the purpose of destroying the business of a competitor" by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the State. As to such an act it is said: "If the State has not the power to protect its people from the acts of those who have for their 'purpose' the destruction of the business of a competitor, in order that the wrongdoer may have a monopoly, its powers are much more limited than we supposed. * * * When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared to be criminal, we can find but little trouble in arriving at the conclusion that the statute is within the power of the legislature and is therefore valid." [11]

§ 339. **Police Power of State—Prohibiting Giving of Rebates.**

At common law traders, manufacturers and common carriers have the right to give rebates to their patrons and customers in order to secure and retain their business. But where the purpose of rebates is the stifling of competition or with the object of controlling, fixing and maintaining prices it is within the power of the legislature to enact laws preventing the same.[12]

§ 340. **Police Power of State—Corporations—Limitations in Federal Constitution—Fourteenth Amendment.**

Commerce purely intrastate is a subject as entirely

[10] People v. Aachen & Norwich Fire Ins. Co., 126 Ill. App. 636.

[11] State v. Drayton, 82 Neb. 254, 117 N. W. 768, per Reese, J.

[12] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

under the control of the State as is the delegated control over interstate commerce exercised by the United States. The power exercised in such case is the police power reserved to the States. The limitation upon its exercise contained in the Federal Constitution is found in the Fourteenth Amendment, whereby no State may make any law by which a citizen is deprived of life, liberty or property without due process of law. A like limitation upon the legislative power will be found in the Constitution of each State.[13] There is, however, said to be nothing in the Federal Constitution which prevents the enactment of a statute prohibiting the making of all contracts in restraint of trade whether reasonable or unreasonable.[14] So it is said that the Fourteenth Amendment does not interfere with the police power of the State and its exercise for the purpose of defining, limiting, governing or destroying trusts, monopolies and combinations in restraint of trade.[15] And all corporations, associations and individuals, within the jurisdiction of a State, are subject to such regulations, in respect of their relative rights and duties, as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution prescribe for the public convenience and the general good.[16] So in a case in Mississippi the court says: "We uphold and maintain in its full integrity the doctrine which recognizes the right of the State, in the exercise of its reserved police power, to restrict the power of cor-

[13] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 695, 54 L. ed. 826, holding in action by the State in equity that the anti-trust statute of Mississippi (Miss. Code, § 5002) is not unconstitutional as abridging the liberty of contract as against retail lumber dealers uniting in an agreement, which the State court decided was within the prohibition of the statute, not to purchase any materials from wholesale dealers selling direct to consumers in certain localities.

[14] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[15] State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

[16] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 317, 31 Sup. Ct. 246, 55 L. ed. ——, per Mr. Justice Harlan, citing Jacobson v. Massachusetts, 197 U. S. 11, 27, 31, 25 Sup. Ct. 358, 49 L. ed. 643; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 297, 19 Sup. Ct. 465, 43 L. ed. 702; House v. Mayes, 219 U. S. 270, 31 Sup. Ct. 337, 55 L. ed. ——.

porations to contract without certain prescribed limits, and which forbids that such power should ever be so abridged or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the general well-being of the State.[17]

§ 341. Police Power of State—Foreign Corporations—Fourteenth Amendment.

The right of a State to impose conditions upon the privilege of doing business by foreign corporations is not affected by the Fourteenth Amendment of the Federal Constitution, and that amendment presents no obstacle to the enforcement of a statute providing for the exclusion of foreign corporations violating it from doing any business within the State.[18] And the provision of the United States Constitution that no State shall pass any law which will impair the obligations of a contract,[19] is not violated by a statute which provides for the forfeiture of a franchise of a foreign corporation for violation of the anti-trust laws of the State, such provision of the Constitution having no application to a license issued by a State to a foreign corporation to do business therein for the reason that when it accepts the license it impliedly, at least, agrees to transact such business under and in obedience to the laws of the State in the same manner as a domestic corporation should transact similar business and that if it violates the laws of the State, then it will thereby forfeit its rights to such license, in the same manner that the domestic corporations would forfeit their rights by offending against the laws.[20]

The fact that licenses granted to a foreign corporation were issued prior to the enactment of an anti-trust act does not affect the liability of the corporation for a vio-

[17] Yazoo & Mississippi Valley R. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715.

[18] Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89, 106 N. W. 868.

[19] Art. 1, § 10.

[20] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

lation of such act, because the enactment of such statutes is but the exercise of the police power of the State which cannot be contracted away or surrendered by legislation.[21]

§ 342. Power of State to Provide Mode and Means of Procedure to Enforce Statutes—Power of Supreme Court of United States.

Since States have the power to prevent monopolies and unlawful combinations in restraint of trade they may also provide the procedure and determine the methods and means by which such laws may be made effectual subject only to the limitations, both in civil and criminal cases, that such procedure must not work a denial of fundamental rights or conflict with constitutional provisions.[22]

Though a State has no power to prevent the carrying on of interstate trade, it may nevertheless authorize courts to forfeit the charters of either a domestic or foreign corporation for a misuser of the powers granted, as where a corporation violates the anti-trust laws of the State. Statutes of such a character are not violative of the United States Constitution.[23] And in construing State anti-trust acts the rule controls that the fixing of punishment for crime and penalties for unlawful acts is within the police power of the State and that the Supreme Court of the United States cannot interfere with State legislation in fixing fines, or judicial action in imposing them, unless so grossly excessive as to amount to deprivation of property without due process of law.[24]

§ 343. Power of Legislature as Affected by Constitutional Provision Requiring Passage of Laws.

In Mississippi it is declared that the constitutional

[21] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[22] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g (Tex. Civ. App.) 106 S. W. 918.

[23] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[24] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g (Tex. Civ. App.) 106 S. W. 918; and citing Coffey v. Harlan County, 204 U. S. 659, 27 Sup. Ct. 305, 51 L. ed. 666.

provision requiring the legislature to pass laws to prohibit "trusts, combinations, contracts and agreements inimical to the public welfare" neither confers nor limits its power which exists by virtue of the general grant of legislative powers and that the expression might be stricken from the Constitution and laws without affecting the validity of such an act.[25]

[25] State v. Jackson Cotton Oil Co., 95 Miss. 6, 48 So. 300.

CHAPTER XXIII

STATE STATUTES—CONSTITUTIONALITY AND CONSTRUCTION GENERALLY

§ 344. State Statutes — Constitutionality of Generally.
345. Constitutionality — Liberty of Contract—Due Process of Law.
346. Constitutionality — Class Legislation — Liberty of Contract.
347. Constitutionality — Discrimination.
348. Constitutional Provision Requiring Legislature to Enact Laws—Not a Repeal of a Prior Law.
349. Contract Prior to Passage of Act Does Not Render It Unconstitutional.
350. Construction — General Rules.
351. Construction—As to Intent of Legislature.
352. Construction—Where Part of Act Unconstitutional.
353. Construction—Rule as to Title and Body of Act.
354. Construction—Rule as to Statutes in Pari Materia.
355. Construction—Rule as to Statutes in Pari Materia—Special and General Statute—Excepted Class.
§ 356. Construction—Rule as to Additional and Descriptive Words.
357. Word "Arrangement" Construed.
358. Word "Combination" Construed.
359. Words "Commodity" and "Convenience" Construed—Personal Services Not—Telephone Service Is.
360. Word "Court" Construed.
361. Words "In Restraint of Trade" Construed.
362. Word "Monopoly" Construed.
363. Word "Person" Construed—Whether Corporations Included.
364. Words "Real Value" Construed.
365. Word "Trade" Construed.
366. Application of Statute Generally.
367. Penalty Provisions of Act—Review by United States Supreme Court.
368. Territorial Legislation — Power of Congress—Delegation of Power to Subordinate Bodies.

§ 344. State Statutes—Constitutionality of Generally.

As we stated in the preceding chapter a State may in the exercise of the police power vested in it and subject to constitutional restrictions both Federal and State pass statutes affecting the general welfare and public interest.

A State legislature may legislate in regard to contracts which suppress or tend to suppress competition and to adopt such regulations and restrictions as will protect the public against the evils resulting from contracts, combinations or other arrangements which have such a result and are in restraint of trade. This power of the State is recognized by the courts and as a general rule statutes passed in the exercise of such power have been held constitutional.[1] A State statute may be constitutional even though it prohibits the making of all contracts in restraint of trade including those that are reasonable as well as those that are unjust and unreasonable.[2]

§ 345. Constitutionality—Liberty of Contract—Due Process of Law.

Anti-trust laws are not unconstitutional as depriving anyone of due process of law because so vague and indefinite as not to advise a citizen prosecuted under them

[1] *Illinois:* Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738, construing Ill. Act, June 11, 1891; Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166, 39 N. E. 651.

Kansas: State v. Smiley, 65 Kan. 240, 69 Pac. 199, aff'd, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. ed. 546.

Michigan: Bingham v. Brands, 119 Mich. 255, 77 N. W. 940, construing 3 How. Stat., § 9354 j.

Missouri: Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 713, 106 Am. St. Rep. 452.

Ohio: State v. Gage, 72 Ohio St. 210, 73 N. E. 1078; State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464, construing 93 O. L., p. 143.

South Carolina: State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

Tennessee: State v. Witherspoon, 115 Tenn. 138, construing Acts, 1903, chap. 140; State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Texas: State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951, construing Anti-Trust Act of 1899 (Acts, 26th Leg., chap. 146); Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S. W. 27; Honck v. Anheuser-Busch Brewing Assoc., 88 Tex. 184, 30 S. W. 869; San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S. W. 289, construing Tex. Rev. Stat., Art. 5313; Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936.

See also cases cited in the preceding chapter, this chapter, and the subsequent chapter.

[2] State ex rel. Hadley, Att'y Gen'l., v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

of the nature of the acts constituting a violation of the law, where the objection is based on the mere fact that they denounce and prohibit acts which are "reasonably calculated" or which "tend" to accomplish the prohibited results.[3]

As to statutes forbidding pools, combinations and trusts operating as a denial of due process of law it is said in a case in Missouri that while the Fourteenth Amendment prevents illegal infringements upon the liberty of the citizen to contract or the depriving him of his property or the imposing of restraints and burdens upon him without due process of law yet that amendment has never been held to prevent the legislature from the exercise of the general police power of the State; that such statutes are enacted for the purpose of restraining the unbridled liberty of the citizen in his conduct and use of his property; and that no such reasonable restraint imposed by statute has ever been held unconstitutional because it deprived the citizen of his life, liberty or property without due process of law but that upon the other hand the courts have uniformly held all such laws to be a wise, just and valid exercise of the police powers of the State.[4]

§ 346. Constitutionality—Class Legislation—Liberty of Contract.

Class legislation is said to be of two kinds, namely, that in which the classification is natural and reasonable and that in which the classification is arbitrary and capricious; the former is generally recognized as constitutional and valid while the latter is generally condemned as unconstitutional and invalid.[5]

[3] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g (Tex. Civ. App.) 106 S. W. 918.

[4] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[5] State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Nebraska Laws, 1897, chap. 79, held unconstitutional both as violating clause of Federal Constitution as to liberty of contract and as denying equal protection of the laws in that it excepted labor organizations from its operation. Niagara Fire Ins. Co. v. Cowell (U. S. C. C.), 110 Fed. 816.

In Nebraska an act entitled "An act to prohibit unfair commercial discrimination between different sections, communities or localities, or unfair competition, and providing penalties therefor" is not in violation of the Constitution being neither class legislation nor an interference with freedom of contract, the act not preventing persons and corporations dealing in commodities in general use from selling them at such price as such person or corporation may see fit to demand.[6]

In South Dakota an act prohibiting unfair competition and discrimination has been held to be constitutional and not subject to the objection that by reason of an arbitrary classification it denies the defendant equality under the law in violation of the Federal and State Constitutions[7] or that it denies any person, natural or artificial, his constitutional right to freely contract.[8]

[6] State v. Drayton, 82 Neb. 254, 117 N. W. 768, construing Act of April 3, 1907, chap. 157, Laws, 1907, § 1 of which provided as follows: "Any person, firm, company, association or corporation, foreign or domestic, doing business in the State of Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this State, by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful."

[7] Section 1, Art. 14, of the Federal Constitution; §§ 2, 18, Art. 6, of S. Dak. Const.

[8] State v. Central Lumber Co., 24 S. Dak. 136, 123 N. W. 504, construing Sess. Laws S. D., 1907, chap. 131, p. 196, § 1 of which provided as follows: "Any person, firm, or corporation, foreign or domestic, doing business in the State of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities or cities of this State, by selling such commodity at a lower rate in one section, community or city, or any portion thereof than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community or city, after equalizing the distance from the point of production, manu-

Where a statute in Tennessee [9] prohibited all trusts, combinations and agreements made with a view to lessen or which tended to lessen full and free competition or which tended to advance, reduce or control the price of any product or article except such as might be entered into by the owners in reference to "agricultural products or live-stock while in the possession of the producer or raiser" it was held that such classification was not arbitrary and capricious but natural and reasonable. The court declared that differently expressed the act left farmers and stock raisers free to make such transactions as they might choose and was even otherwise allowable in relation to their farm products and live stock while yet in their possession but visited the prescribed punishment on them and on all other persons for all other transactions that were calculated to impair free competition in trade and to influence the price of domestic or imported articles. And it was further said that it was wholly impracticable, not to say impossible for them, as individuals, and while each one retained the possession of his farm products or live stock, to conduct dealings in relation thereto that would or could seriously impair competition and injuriously affect prices, and that if they, the better to accomplish that end, by mutual consent placed their commodities under the control of a common agency, and subjected them to agreed rules and schedules, they thereby surrendered the possession contemplated by the act and were no longer of the excepted class, but of the other one, and subject to all the penalties laid upon it.[10]

In Indiana it has been decided that an anti-trust act of that State [11] prohibiting contracts and combinations in restraint of trade and to prevent free competition neither authorizes the confiscation of property, nor denies the

facture or distribution and freight rates therefrom shall be deemed guilty of unfair discrimination."

[9] Tenn. Acts, 1897, chap. 94.

[10] State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

[11] Acts, 1899, p. 257, §§ 3884–3888; Burns, 1908.

equal protection of the laws, nor constitutes class legislation.[12]

§ 347. Constitutionality—Discrimination.

An anti-trust law is not subject to the objection that it is unconstitutional in that it unjustly discriminates against property by embracing commodities only and does not include labor which may also become the subject of a pool or combination.[13]

§ 348. Constitutional Provision Requiring Legislature to Enact Laws—Not a Repeal of a Prior Law.

A constitutional provision requiring the legislature to enact laws to prevent pools, trusts and combinations created to depreciate below its real value any article or to enhance the cost of any article above its real value confers upon the legislature the power and discretion to determine the need of future legislation upon the subject. Such a provision only forbids trusts, pools and combinations to depreciate an article below its real value or to enhance its cost above its real value.[14]

So in Kentucky a constitutional provision that "it shall be the duty of the general assembly, from time to time, as necessity may require, to enact such laws as may

[12] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[13] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. The court said: "While it is true those statutes are limited in their scope and operation to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits, yet it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same general or natural classification of rights, or things, and have never been so recognized by the common law, or by legislative enactments. They stand upon entirely different footings and the laws pertaining to the one are entirely different from those pertaining to the other. * * * This classification of the laws regarding labor and property has always been recognized by all nations in all ages; and those laws which apply to the one have never been considered or looked upon as being special and class legislation because they do not embrace both." Per Woodson, J.

[14] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755, construing Const., § 198 and Act of May 20, 1890 (Ky. Stats., 1903, § 3915; Commonwealth v. Grinstead & Tinsley, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, 21 Ky. Law. Rep. 1444.

be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value" was construed as not repealing a statute providing that any corporation or individual who shall become a member of, or a party to, or in any way interested in, any pool, trust, combination, or agreement for the purpose of regulating the price or limiting the production of any article of property, shall be deemed guilty of the crime of conspiracy, and punished therefor, it being declared that such requirement of the Constitution is not a grant of power and does not impliedly prohibit the legislature from going beyond the duty enjoined.[15]

§ 349. **Contract Prior to Passage of Act Does Not Render It Unconstitutional.**

The fact that a contract has been made prior to the passage of an anti-trust statute by the terms of which it is illegal does not render the statute unconstitutional where such contract is a continuing one. The continuation of the acts under the contract after it has been declared illegal becomes a violation of the act. No one can have any vested right which he can claim to be exempt from the lawful exercise by the State of its police powers. Every one holds his property rights subject to such lawful exercise.[16]

§ 350. **Construction—General Rules.**

In construing anti-trust statutes the following general rules as to the interpretation to be put upon legislative acts control. Of these the most important is said to be that resort must be had to the language of the act itself; and that language alone, to gather the legislative purpose

[15] Commonwealth v. Grinstead & Tinsley, 108 Ky. 59, 22 Ky. Law Rep. 377, 55 S. W. 720, construing § 198 of the Constitution and provisions of Act of May 20, 1890, Ky. Stats., §§ 3915, 3917.

See also Commonwealth v. Bavarian Brewing Co., 112 Ky. 925, 23 Ky. Law Rep. 2334, 66 S. W. 1016.

[16] Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

if that language is unambiguous and that in such a case resort is not allowable to any other source of information to learn what the lawmaking department intended, or as to what evils they proposed remedying. If, however, the legislature has enacted two or more statutes which from their wording appear to be inconsistent, or if the statute under consideration appears to be in conflict with a provision of the Constitution, State or Federal, there is an ambiguity, for it is always to be presumed that the legislature intended its enactments to become valid and enforceable laws. Repeals by implication also are not favored, it being presumed that if the legislature had by an act intended to repeal a prior statute it would so have expressed it as to leave no doubt of its purpose. Therefore when two statutes bearing on the same subject appear on their face to be so inconsistent with each other, the court in construing them should first seek to harmonize them if possible so as to allow both to stand. If, however, this cannot be done without violence to some part of the language employed in one or both statutes then they should be so construed that both will stand so far as possible and where any part of either is irreconcilable with any part of the other the latest stands, while the inconsistent part of the power is deemed to have been repealed. In case of an ambiguity because of the uncertainty of the words employed, or because of an apparent conflict in statutes, or between a statute and the Constitution, the courts are then permitted to look beyond the words of the particular statute as to the legislative purpose. Such methods of construction are always for the sole purpose of arriving at the legislative intention.[17]

A statute forbidding combinations in restraint of trade is held to be in aid of the common law and therefore to be strictly construed.[18] But it has been decided that penal

[17] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703.

[18] Home Telephone Co. v. Granby & Neosho Telephone Co., 147 Mo. App. 216, 126 S. W. 773.

statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed and nothing will be taken as intended that is not clearly expressed.[19]

In Nebraska in construing a statute prohibiting contracts in restraint of trade which statute was said to be almost a literal copy of the Sherman Act, changing only its field of operations, the court referred to two decisions of the United States Supreme Court [20] saying that by such decisions the Sherman Act was held to embrace and declare to be illegal every contract, combination or conspiracy of whatever form, or whatever nature, and whoever may be parties to it which directly or necessarily operated in restraint of trade without regard to whether such contract was a reasonable or unreasonable restraint of trade and declared that this was the proper construction to put upon the Nebraska statute.[21]

§ 351. **Construction—As to Intent of Legislature.**

All the language of a statute must be considered in its construction and such an interpretation placed upon any word thereof as was within the evident intent of the legislature.[22] So in construing an anti-trust statute the Supreme Court of Tennessee says: "It is also a familiar canon of construction of statutes that they must be so construed, if it can be done without violence to the evident intent of the legislature, so as to avoid any conflict

[19] State v. International Harvester Co., 79 Ark. 517, 96 S. W. 119, wherein it is said that this principle has been so often declared that it is elemental and citing Hughes v. State, 6 Ark. 131; Grace v. State, 40 Ark. 97; Stout v. State, 43 Ark. 414; Casey v. State, 53 Ark. 334, 14 S. W. 90; Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; Little Rock & Ft. S. Railway Co. v. Offenheimer, 64 Ark. 271, 43 S. W. 150; State v. Lancashire Fire Ins. Co., 66 Ark. 466, 51 S. W. 633; State v. Arkadelphia Lumber Co., 70 Ark. 329, 67 S. W. 1011; Brown v. Haselman, 79 Ark. 213, 95 S. W. 136; Sutherland on Statutory Inter., § 208.

[20] United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. ed. 679.

[21] State v. Adams Lumber Co., 81 Neb. 392, 116 N. W. 302.

[22] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276.

with the Constitution of the State or of the United States; and that every intendment, when the statute has been formally enacted, must be made in favor of its validity, and that, where it is subject to two constructions, that must be given which will sustain it rather than that which will defeat it." [23] And it is not necessary that the body of an anti-trust act shall declare that a thing shall be done with a specific intent, when the doing of that thing by the force of its character and effects discloses a situation upon which the law engrafts an intent and purpose, and which could have no other purpose. Contracts or combinations which could have no other effect than to restrain free competition, or which have such tendency, will be deemed to have been so intended, and that purpose need not be declared in the act.[24]

§ 352. Construction—Where Part of Act Unconstitutional.

An entire act is not rendered unconstitutional by the presence therein of provisions which are unconstitutional where the latter can be eliminated without affecting the rest of the act. So where some of the provisions of an anti-trust act were construed as an attempt by the State to exercise a prerogative of Congress to regulate interstate commerce the court held that as such provisions could be eliminated, a cause of action existing independent thereof could be maintained.[25]

§ 353. Construction—As to Title and Body of Act.

Although the title to an anti-trust act declares the subject-matter of the statute to be the prohibition of contracts or combinations "intended to prevent free competition in business," the body of the act, in defining the contracts and combinations prohibited, need not designate them as "intended to prevent free competition in business," the necessary effect thereof being to prevent

[23] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015, construing Acts, 1903, chap. 140.

[24] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[25] State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

such competition. These words in the title are nothing more than a legal definition of an unlawful combination at common law, a declaration of the effect of the prohibited combinations, as a matter of law, to which the law supplies the intent. If it appears upon the face of the body of the act that the doing of the things prohibited have a direct tendency, if done, to restrain free competition, the law supplies the intent of the title.[26] And an anti-trust act is not invalid because of an omission to mention penalties in the title.[27]

§ 354. Construction—Rule as to Statutes in Pari Materia.

Two or more anti-trust statutes enacted at different sessions of the legislature, on the same subject, are to be treated in pari materia, and the court must presume that the legislature intended all the enactments to constitute a consistent treatment of the subject within constitutional limitations. In such a case the statutes should be read in conjunction with the State and Federal Constitutions, and the several enactments will be treated as a harmonious consistent system, in preference to supposing that, literally construed, one is repugnant to the others and some enactments in consequence wholly fail.[28]

Statutes in pari materia are to be construed together and repeals by implication are not favored. If a later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope but the two will be construed together so far as the first still stands. Where, however, the legislature has passed two statutes upon the same subject, the latter covering the entire matter in the first and also additional provisions, the last act supersedes the former act and repeals it by implication.[29]

[26] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[27] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[28] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755.

[29] State v. Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874.

In the application of this general rule it was decided in a case in Nebraska that the anti-trust act of 1897, known as the "Gondring Act" was repealed by implication by the anti-trust act of 1906, known as the "Junkin Act," except as to the first section thereof defining trusts.[30] And the anti-trust act of 1891 in Illinois did not repeal section forty-six of the criminal code. By the latter section it was made a criminal offense to conspire to do an illegal act injurious to public trade whether any act was done to effect the object of the conspiracy or not while by the anti-trust act of 1891 it was made a criminal offense to enter into an agreement to regulate or fix the price of any article of merchandise or commodity manufactured, mined, produced or sold within the State. Between these enactments there was held to be no repugnancy since there is a distinction between a conspiracy to an illegal act and the actual performance of that act, it being declared that the conspiracy to do the act is one crime and the doing of the act another.[31] So in Kansas the act of 1897 [32] did not repeal the act of 1889,[33] it being said that the two statutes have much in common but that inasmuch as several subjects mentioned in the earlier act are omitted in the second one the legislature must be deemed to have intended them to stand together.[34]

§ 355. Construction—Rule as to Statutes in Pari Materia—Special and General Statute—Excepted Class.

In a case in Nebraska the proposition was maintained by defendants that where there is found a special statute dealing with a particular subject and also a general statute broad enough in its terms to include the matters covered by the special statute, as well as other matters, the general statute will be held to apply to all matters not specifically covered by the special statute, and, as to such

[30] State v. Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874.

[31] Chicago, Wilmington & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75.

[32] Kan. Gen. Stat., 1909, §§ 5142 et seq.

[33] Kan. Gen. Stat., 1909, §§ 5185 et seq.

[34] State v. Glenn Lumber Co., 83 Kan. 399, 111 Pac. 484.

matters, the special statute alone will apply. The court, however, held the correct rule to be that unless it appears from its terms that an act applying to a certain class of persons is meant to cover all inhibitions and regulations affecting them, a later general act applying to all persons, and prohibiting in general terms the acts specified in the former act, as well as a number of other acts and purposes, defining new crimes and prescribing new penalties, and giving new civil remedies, will not be held to except the persons embraced in the former act from the operation of the latter.[35] And in applying this doctrine the court held that the acts of 1887 and 1897 prohibiting combinations by grain dealers and others to fix the price of grain did not except such dealers from the operation of the later general anti-trust acts of 1897 and 1905, applying to all illegal combinations to fix prices.[36]

§ 356. Construction—Rule as to Additional and Descriptive Words.

It is a general rule of statutory construction that the meaning of additional and general descriptive words is confined to the class to which the preceding specific words belong. This rule has been applied in a case in Arkansas under an anti-trust statute which prohibited combinations from regulating or fixing "the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever." The court held in this case that the regulation of railroads and the fixing of rates for the transportation of freight and passengers had been provided by numerous other acts; that questions affecting transportation had always been the subject of separate and independent legislation in the State that the anti-trust act did not purport to deal with the subject of such transportation and the fixing of rates therefor

[35] State v. Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874, citing 1 Lewis' Sutherland Statutory Construction, p. 528; 1 Kent, Commentaries, 462.

[36] State v. Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874.

and that the case was a plain one for the application of the rule ejusdem generis. And the court said in this case: "It would be a violent presumption, indeed, to say that the legislature in this vague and indefinite manner attempted to deal with a subject which so vitally affects the welfare of the people and a proper solution of which has ever been one of the gravest concern and perplexity. It seems evident to us that the framers of the act intended that the act 'or any article or thing whatsoever' should take their meaning from the things specifically mentioned before, and that when so construed the allegations of the complaint do not constitute a violation of the terms of the act." [37]

§ 357. Word "Arrangement" Construed.

Where a State statute declares "every contract, agreement, arrangement or combination" whereby a "monopoly * * * is created," etc., "to be against public policy, illegal and void," the word "arrangement" is held to mean something different from a "contract" or "agreement" or a "combination." It may include each and all of these things and more. "The usual and ordinary meaning of the word 'arrangement' is 'a setting in order'; but the better and fuller meaning of the word as used in the statute is that given in the 'New English Dictionary' edited by James A. H. Murray. It is there defined as: 'The disposition of measures for the accomplishment of a purpose; preparation for successful performance.' It is further defined in the same dictionary as: 'A structure or combination of things in a particular way for any purpose.' " [38]

§ 358. Word "Combination" Construed.

Under a statute prohibiting any "combination of capital, skill or acts by two or more" the word "com-

[37] State ex rel. Means v. Chicago, R. I. & P. Ry. Co. (Ark., 1910), 128 S. W. 555, per Hart, J., construing Ark. Acts, 1905, p. 1.

[38] People v. American Ice Co., 120 N. Y. Supp. 443; Consol. Laws N. Y., chap. 20, §§ 340-346 (Gen'l Business Laws); s. c. (upon points as to pleading, etc.), 120 N. Y. Supp. 41. 135 App. Div. 180.

bination" is construed as meaning union or association, and if there be no union or association by two or more of their "capital, skill or acts" there can be no combination.[39] The court said in this case: "When we consider the purposes for which the 'combination' must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is presented for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." [40]

§ 359. Words "Commodity" and "Convenience" Construed—Personal Services Not—Telephone Service Is.

The term "commodity" as used in a statute relating to an unlawful combination, pool or trust to control the price or limit the quantity of any article of merchandise, or commodity manufactured, mined, produced or sold within the State does not include personal services, either skilled or unskilled.[41]

In Missouri it has been provided by statute that "If any two or more * * * corporations who are engaged in buying or selling any * * * commodity, convenience * * * or any article or thing whatsoever, shall enter into any * * * agreement * * * or understanding * * * to limit competition in such trade, by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or party to such * * * combination, confederation, association or understanding * * * it shall be in violation of this article." [42] This statute is held to be in aid of the

[39] Gates v. Hooper, 90 Tex. 563, 39 S. W. 1079, rev'g 39 S. W. 186.

[40] Per Denman, J.

[41] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276.

[42] Section 8978, R. S. 1899, Ann. St. 1906, § 8978.

common law and therefore not to be strictly construed and in this view it is declared that it is proper to treat telephone service as a convenience or commodity being bought and sold. In this case the court was called upon to determine the validity of a contract stipulating that each of two telephone companies should have the exclusive right to transmit over its lines all messages coming from the lines of the other which were destined to points on lines of the connecting company and not reached by the lines of the initial carrier, and it was decided that such contract was in violation of the above statute in that in respect to such messages neither company was permitted to buy the commodity or convenience of telephone service from any company other than the party to the contract.[43]

§ 360. Word "Court" Construed.

Under a statute authorizing the "court" to assess a fine, the word, "Court" is construed as not intended as a

[43] Home Telephone Co. v. Granby & Neosho Telephone Co., 147 Mo. App. 216, 126 S. W. 773. The court said: "It is very true that under the contract either one of the parties thereto are free to sell their service to whomsoever they will. The right to sell the convenience or commodity of telephone service is not sought to be restrained by the contract. However this may be it is otherwise as to the right of either company to buy the convenience or commodity of telephone service for the purpose of transmitting messages which originate on or pass from the lines of one company and are destined to points on the lines of the other not reached by the initial carrier. * * * It is entirely clear that such an arrangement as that portrayed above operates to limit competition in respect to such commodity or convenience as telephone service as is proffered or available for the transmission of messages in the territory occupied by these companies and attempts to confer a complete monopoly on each of the contracting parties with respect thereto. As the contract assures to each company the exclusive right to transmit all messages, or, in other words, furnish the service for all messages originating on or passing from the lines of the other destined to points on its own lines and not reached by lines of the initial carrier, this of course requires that the initial carrier shall not buy such service to the same end from any other company not a party to the contract. The arrangement therefore falls within the very words of the statute and is subject to its inhibition. The exclusive privilege referred to, if valid, will confer a complete monopoly on the two contracting companies with respect to the business mentioned and prohibit either from buying like service of all other companies for the reason that they are not parties to the contract and the contract is therefore void." Per Nortoni, J.

designation of the presiding judge in his distinctive functions but rather as a collective word indicating the tribunal before which the conviction might be had and including both judge and jury. This conclusion is reached in a case involving the construction of a statute authorizing the assessment by the "Court" of a fine of one hundred dollars and which was claimed to be in violation of a constitutional provision that no fine in excess of fifty dollars should be laid on any citizen unless "assessed by a jury of his peers who shall assess the fine at the time they find the fact." [44]

§ 361. Words " In Restraint of Trade " Construed.

Upon the question of the construction of the clause "in restraint of trade" it is said in a late case in Mississippi: "What does this statute mean when it prohibits 'contracts in restraint of trade'? Does it mean that any contract which in any way restrains trade shall be illegal? If so broad a meaning should be given to the statute as this, it would involve a destruction and disaster to the commercial world never dreamed of by its authors and not comprehended within the evil intended to be rectified. * * * A contract in reasonable restraint of trade was valid before the enactment of the statute, where its design and purpose is not to create a monopoly and such contract is valid now 'where it is such only as to afford a fair protection to the interest of the party in favor of whom it is given and not so large as to interfere with the interest of the public.'" [45]

§ 362. Word " Monopoly " Construed.

Where in a statute "combinations" for the "creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life"

[44] State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

[45] Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General (Miss., 1911), 54 So. 670, per Mayes, C. J., construing Miss. Code, § 5002, as amended by Laws, 1908, p. 124.

are abolished,[46] the word "monopoly" as above used does not include all present existing means of carrying on a business or doing a particular thing generally, or in a particular place or locality, and the right to possess, or own, or control all means for doing that thing in that place in the future. That strict meaning does not apply, but covers an exclusive privilege to carry on a traffic or complete control of a business in a certain locality.[47]

§ 363. Word "Person" Construed—Whether Corporations Included.

Although the word "person" as used in a statute may and frequently does include corporations yet this is not true in all cases even though by statute or code it is declared that the word "person" includes a corporation. In the construction of a statute involving the question whether it does or not, it must always be determined by ascertaining the legislative intention to be found by the aid of the context and purpose of the act.[48]

So where an anti-trust act mentioned in the first section both persons and corporations, in the second, corporations only, in the third, persons only and again in the fourth, both persons and corporations it was declared that the word "persons" in the third section was not intended to include corporations.[49]

§ 364. Words "Real Value" Construed.

The words "real value" as used in a constitutional or statutory provision in regard to the increasing or diminishing of the prices of articles are construed as meaning the same as market value, at a sale under normal conditions, unaffected by any combination of producers or deal-

[46] Section 7, N. Y. Stock Corp. Law, Laws, 1890, p. 1069, chap. 564, amended by Laws, 1892, p. 1828, chap. 688.

[47] Continental Securities Co. v. Interborough Rapid Transit Co. (U. S. C. C.), 165 Fed. 945.

[48] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015, construing Acts, 1903, chap. 140.

[49] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015, construing Acts, 1903, chap. 140.

ers whose object is to create an abnormal condition in the market.[50]

§ 365. **Word "Trade" Construed.**

In construing an act entitled "An act to declare unlawful trusts and combinations in restraint of trade and products" it has been decided that the word "trade" should not be construed as used in the narrower and perhaps usual sense as referring to the business of selling or exchanging some tangible substance or commodity for money or the business of dealing by way of sale or exchange in commodities but rather in the broader sense as meaning any occupation or business carried on for subsistence or profit. And it was decided that since by giving it the latter construction it would fairly embrace and cover a provision of the act with reference to the business of insurance and render such provision valid while by giving it the narrower meaning it would render the provision invalid, the broader meaning should be adopted.[51]

The court said upon this question: "The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title. Here a term is employed in the title which, if given the broader meaning, would render the provision in question valid, while by giving it the narrower and perhaps more common meaning, it would render the provision invalid. Which of these should be adopted? The mere generality of the title to an act does not render it objectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled. Titles of a very general nature have been adopted in the legislation of this State, and

[50] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, construing § 198, Ky. Const., requiring the general assembly to enact laws to prevent combinations to depreciate below its real value any article or to enhance the cost of any article above its real value.

[51] In Re Pinkney, 47 Kan. 89, 27 Pac. 179.

their use has been encouraged and sustained. * * * That the broader meaning of the word 'trade' was the one intended by the legislature is manifest from the incorporation of the insurance provision in the body of the act. The meaning given by the legislature to the terms for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title. * * * How can it be said that the business of insurance is foreign to the title of this act, when the subject, expressed in the title, taken in its broadest sense, and the one intended by the legislature would embrace such business? How can anyone be misled as to this provision by the use of the word 'trade' when the leading lexicographers and writers employ the word in a sense which is comprehensive enough to include the provision? The fact that the narrower meaning of the word is the one most frequently used will not justify the court in restricting the meaning which the legislature intended it should have." [52]

§ 366. **Application of Statute Generally.**

A State statute which prohibits any corporation from creating or entering into any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix prices or to maintain such prices, when so regulated and fixed, or to fix or limit the amount or quantity of any article of manufacture is applicable to individuals and partnerships as well as to corporations; it contemplates the existence of at least two or more corporations, individuals

[52] Per Johnston, J.

or partnerships, so as to agree or combine with each other to do the prohibited acts set forth in the statute; it is intended to preclude secret agreements to accomplish the things condemned by the enactment, or to deceive and mislead the public by an apparent competition when as a fact there is none. Such a statute, however, is not broad enough to prohibit one corporation, in good faith, in the legitimate pursuit of its business, from purchasing the assets of another corporation in a similar business, and if such a statute is to be construed as prohibiting corporations from purchasing in good faith the assets of another corporation, it would apply with equal force to the rights and powers of individuals.[53]

§ 367. **Penalty Provisions of Act—Review by United States Supreme Court.**

Where the penalty provisions of a statute are clearly separable and are not invoked, the United States Supreme Court is not called to determine whether the penalties are so excessive as to amount to a deprivation of property without due process of law and thus render the statute unconstitutional in that State.[54]

§ 368. **Territorial Legislation—Power of Congress—Delegation of Power to Subordinate Bodies.**

Territories are portions of the United States not yet created into States and Congress has the power to dispose of and make all needful rules and regulations therein, having complete legislative authority over the people inhabiting the territories and all the departments of the territorial government. Subordinate bodies may be delegated the right to legislate for a territory or Congress may restrict all such legislation to itself. Where power is conferred upon a territory to legislate it has only such authority as has been granted but in so far as legislation is exercised by the body to which it is delegated, such

[53] State (Crow, Att'y Gen'l) v. Continental Tobacco Co., 177 Mo. 1, 32, 75 S. W. 737, Laws Mo., 1897, p. 208; see Act, 1899.

[54] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826.

body acts by virtue of Federal authority and its legislation is Federal legislation. These principles are stated in a case in Oklahoma in which it was claimed that an act of the territorial legislature to prevent combinations, pools or trusts to fix or regulate prices or to prevent or restrict competition which was passed several months after the Sherman Anti-trust Act [55] was not a valid and enforceable act inasmuch as Congress had legislated upon that subject and that its legislation was exclusive so far as the territorial legislature was concerned, in that it could pass no act covering the same field which could stand concurrently with the Federal legislation upon the subject. It was, however, decided that under the authority conferred upon the Territory of Oklahoma by the Organic Act [56] providing "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," and placing the legislative power in the governor and legislative assembly, the legislative power for self-government, was subject to a few specified limitations, quite as extensive as that of a State, and that the territorial act was not repugnant to nor in conflict with the Federal act or any other constitutional or congressional limitation and was a valid and existing statute of the territory.[57]

[55] Act Cong., July 2, 1890, chap. 637, 26 Stat. 209 (U. S. Comp. Stat., 1901, p. 3200).

[56] Act of May 2, 1890, chap. 182, 26 Stat. 84.

[57] Territory v. Long Bell Lumber Co., 22 Okla. 890, 99 Pac. 911. The court quoted from opinion in Clinton v. Englebrecht, 13 Wall. (U.S.) 434, 20 L. ed. 659, as follows: "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress" and said: "This in our judgment is a correct statement of the rule involved, and the determination of the extent to which Congress has granted to the territory of Oklahoma to legislate must be ascertained from a construction of the powers specifically granted in section 6 of the Organic Act. * * * There is nothing in the Federal Act prescribing or prohibiting to the legislative authority of the territory the right to legislate upon this identical subject, nor is the same contained in any act of Congress to which our attention has been called. Per Dunn, J.

CHAPTER XXIV

STATE STATUTES—PARTICULAR CONSTITUTIONAL AND STATUTORY PROVISIONS

§ 369. Constitutional Provision Prohibiting Consolidation of Parallel and Competing Lines of Railroad.
370. Combination to Fix or Limit the Price or Premium for Insuring Property Prohibited.
371. Statute Prohibiting Condition of Sale Not to Sell Goods of Any Other Person.
372. Statute Forbidding Discrimination in Prices for Petroleum.
373. Purchaser from Combination —Statute Relieving from Liability.
§ 374. Provisions as to Punishment —Fine or Imprisonment—Forfeiture of Charter—Revocation of Permit.
375. Statute Permitting Pooling by Farmers of Farm Products.
376. Exception in Statute—Sale of Good Will of Business—Agricultural Products or Live Stock.
377. Donnelly Anti-Trust Act—New York.

§ 369. Constitutional Provision Prohibiting Consolidation of Parallel and Competing Lines of Railroad.

In a constitutional provision prohibiting the consolidation of "parallel or competing" lines of railroad the conjunction "or" is used to co-ordinate the two words which it connects as equivalent, the one of the other. Such a provision is construed as having in view the commercial relations the lines bear to each other and the preservation of competition, and the word parallel is not to be construed in its strict sense.[1]

So a constitutional provision prohibiting any railroad company from consolidating with any other railroad company owning or having under its control a parallel or competing line is sufficient to forbid a consolidation of railroad companies whose lines are in fact parallel or competing,

[1] State ex inf. Attorney-General v. Terminal Railroad Association, 182 Mo. 284, 81 S. W. 395.

tracking the State through its length or breadth. The formation, however, of a corporation for the purpose of providing, by means of a common track and terminus ample and convenient connections and accommodations within a city for all railroads which enter or may enter it and for all individuals and companies doing business with such railroads does not violate such act.[2] The court said: "If the Merchants' Terminal Company can deliver the cars which are loaded on the switch at the manufacturer's establishment to one railroad only that railroad has a practical monopoly of the business of that manufacturer. But if the whole terminal system is open to the shipper he may invite bids on his freight and employ the railroad that will take it at the lowest rate. That is the system that this respondent has established and it is bound to serve all railroad companies approaching St. Louis on the same terms. * * * We gather from the information that all along the lines of the terminal tracks, intersecting the city from north to south, from east to west, and belting it on the west, there are manufacturing and other business concerns with switch tracks or spurs into their premises, which enable the shipper to load the cars on the switch tracks on his premises and have them delivered to any railroad that reaches the city. A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff." [3]

But a constitutional provision prohibiting the consolidation of parallel and competing lines of railroads and not referring to street railways will be construed as referring to railroads in the sense in which that word is

[2] State ex inf. Attorney-General v. Terminal Railroad Association of St. Louis, 182 Mo. 284, 81 S. W. 395, construing § 17, Art. 12, of the Mo. Constitution.

[3] Per Valliant, J.

ordinarily understood and not as including street railways, and this construction is strengthened where another provision of the same article of the Constitution specifically refers to street railways. It was said in this case that ordinarily when we speak of a railroad we mean a railroad over which freight and passengers are transported from one town or city to another and that when we speak of those roads on which passengers are transported over the streets of a town or city we call them street railways.[4]

§ 370. Combination to Fix or Limit the Price or Premium for Insuring Property Prohibited.

In the application of the doctrine as to the power of the State to pass regulations in the exercise of the police power and to prescribe, within constitutional limits, the particular means of enforcing such regulations it has been determined that provisions imposing on all insurance companies who are in connection with a tariff association, in violation of the statute, a liability to be recovered by the insured of twenty-five per cent in excess of the amount of the policy [5] are not unconstitutional under the Fourteenth Amendment as depriving such companies of their property without due process of law or denying them the equal protection of the laws.[6] The court said: "Much stress is placed by the insurance company on that clause of the statute allowing the insured to recover, in addition to the actual loss or damage suffered, twenty-five per cent of the amount of such loss or damage, if the company before or at the time of the trial belonged to or was connected with a tariff association that fixed rates; we do not think that this provision is in excess of the power of the State. As a means to effect the object of

[4] Scott v. Farmers' & Merchants' National Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 385, reversing (Tex. Civ. App.) 66 S. W. 485, 67 S. W. 343.

[5] §§ 2619, 2620 of the Code of Alabama as amended by §§ 4954, 4955 of the Code of 1907.

[6] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. ed.

the statute—the discouragement of monopoly or combination and the encouragement of competition in the matter of insurance rates—the State adopted the regulation here in question. It was for the State, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters. The court certainly cannot say that the means here adopted are not, in any real or substantial sense, germane to the end sought to be attained by the statute. Those means may not have been the best that could have been devised, but the court cannot, for any such reason, declare them illegal or beyond the power of the State to establish. So far as the Federal Constitution is concerned, the State could forbid, under penalty, combinations to be formed within its limits, by persons, associations or corporations engaged in the business of insurance, for the purpose of fixing rates. But it is not bound to go to that extent in its legislation. It may, in its discretion, go only so far as to impose upon associations or corporations acting together in fixing rates, a liability to pay to the insured, as part of the recovery, a certain per cent beyond the actual loss or damage suffered, if, before or at the time of the suit on the contract of insurance, it is made to appear that the company or corporation sued is part of or connected with a tariff rate association. Such a provision manifestly tends to discourage monopoly or combination and to encourage competition in a business in the conduct of which the general public is largely interested." [7]

[7] Per Mr. Justice Harlan.

As to violation of statute as to insurance combinations in Missouri by a club, see State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

Statutes as to insurance combinations. Section 1 of the Missouri Act of 1897 (Laws, 1897, p. 208), prohibiting among other things combinations to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm or to maintain said price when so fixed or regulated was held not to be unconstitutional as depriving insurance companies of their property, life or liberty without due process of law. State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

So it was determined that the provision of the Iowa Code of 1897,[8] prohibiting combinations of insurance companies as to rates, commissions and manner of transacting business was not unconstitutional as depriving the companies of their property or of their liberty of contract within the meaning of the Fourteenth Amendment and that the auditor of the State would not be enjoined from enforcing the provisions of the statute.[9] The court also said: "Equally without basis on which to rest is the contention that the statute violates the clause of the Fourteenth Amendment, forbidding a State to 'deny to any person within its jurisdiction the equal protection of the laws.' We will assume for the purposes of this case, that this company is within the jurisdiction of the Federal court so as to entitle it to claim the benefit of that provision of the Fourteenth Amendment.[10] We are yet clearly of the opinion that the statute does not, within the meaning of the Constitution, deny the insurance company the equal protection of the laws. The statute applies only to associations or corporations that unite in fixing the rates of insurance to be charged by each constituent member of the combination. Looking at the evil to be remedied that was such a classification as the State could legally make. It is neither unreasonable nor arbitrary within the rule that a classification must rest upon some difference indicating 'a reasonable and just relation to the act in respect of which the classification is proposed.' The legislature naturally directed its enactment against insurance companies or corporations which before or at the time of trial were found to be members of the insurance tariff association that fixed rates. No principle of classification required it to include insurance associations that were free to act, in the matter of rates, upon the merits of each application for insurance, unaffected by any agreement or arrange-

[8] Section 1754.

[9] Carroll v. Greenwich Ins. Co., 199 U. S. 401, 26 Sup. Ct. 66, 50 L. ed. 246.

[10] Blake v. McClung, 172 U. S. 239, 260, 19 Sup. Ct. 165, 38 L. ed. 432.

ment with other companies. All insurance companies, persons, or corporations engaged in the business of insurance as agent or otherwise with associations, persons or corporations which acted together in fixing rates are placed by the statute upon an equality in every respect and, therefore, it cannot rightfully be contended that the plaintiff in error is denied the equal protection of the laws. Whatever 'liberty of contract' they had must have been exercised in subordination to any valid regulations the State prescribed for the conduct of their business. Statutes that apply equally to all of the same class and under like conditions cannot be held to deny the equal protection of the laws; for, as this court has adjudged 'the equal protection of the laws is a pledge of the protection of equal laws' to all under like circumstances." [11]

And in a case in Arkansas it is decided that an anti-trust act providing that "any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual * * * who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding * * * to fix or limit * * * the price or premium to be paid for insuring property against loss or damage by fire * * * shall be deemed and adjudged guilty of a conspiracy to defraud" does not apply to pools or combinations formed outside of the State and not intended to affect, and which do not affect, persons, or property, or prices of insurance within the State.[12]

§ 371. Statute Prohibiting Condition of Sale Not to Sell Goods of Any Other Person.

It is a valid exercise of the police power of a State to provide that a person, firm or corporation shall not make

[11] Per Mr. Justice Harlan, citing Yick Wo v. Hopkins, 118 U. S. 356, 367, 6 Sup. Ct. 1064, 29 L. ed. 220; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; Leon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. ed. 1145.

[12] State v. Lancashire Fire Ins. Co., 66 Ark. 466, 51 S. W. 633.

it a condition of the sale of goods that the purchaser shall not sell or deal in the goods of any other person, firm or corporation. Such an act is held not to be in violation of the United States Constitution or of the Declaration of Rights in the Constitution of Massachusetts.[13]

So in Massachusetts it has been provided by statute as follows: "A person, firm, corporation, or association of persons doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons; but the provisions of this section shall not prohibit the appointment of agents or sale agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares or merchandise." In construing this statute the words "exclusive sale" were held to mean a selling within a prescribed territory, to the exclusion of all other persons, so that in the designated place the purchaser who makes such a contract with the original seller will have the control of the market for resale. And it was decided that a contract that the purchaser shall sell the goods of the seller, and shall not sell the goods of any other person is not permitted by the terms of the statute.[14]

But in giving this statute such a construction it has been held that it does not prohibit a sale at a reduced rate in consideration of an agreement to sell the vendor's goods alone.[15] So it has been held lawful under this

[13] Commonwealth v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968.

But it has been decided that a statute making it a criminal offense to make it a condition of the sale of goods "that the purchaser shall not sell or deal in the goods * * * of any other person, firm, corporation or association of persons" is one which is highly penal and to be strictly construed. Commonwealth v. Strauss, 188 Mass. 229, 74 N. E. 308, followed in Butterick Publishing Co. v. Fisher, 203 Mass. 122, 89 N. E. 189, construing Mass. R. L., chap. 56, § 1.

[14] Commonwealth v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968.

[15] Butterick Publishing Co. v. Fisher, 203 Mass. 122, 89 N. E. 189.

statute to make an inducement by way of giving a discount from the regular price if the purchaser will handle the seller's goods exclusively.[16] The language of the statute is held not to include such cases but to refer to a sale, a condition of which is that there shall be no sale of the goods of others and to dealing which makes it impossible for one to buy certain goods to sell again unless he agrees at the same time to sell these exclusively. Such an absolute agreement on the part of the purchaser is a condition precedent to the consummation of a prohibited sale.[17]

§ 372. Statute Forbidding Discrimination in Prices for Petroleum.

In the exercise of the police power which is vested in the legislature it has been decided that a law is constitutional which forbids discrimination in the prices charged for petroleum or any of its products and that the inclusion in the statute of articles not subject to classification with articles which are so subject does not render the enactment invalid as to the articles properly subject to classification. In this case which was a prosecution under the statute for discrimination in the price of kerosene it was held that kerosene was one of the commodities subject to special classification and that, being the only one in which the complaint charged discrimination, the right of the defendant to plead any improper inclusion in the statute of other articles was denied.[18]

[16] Commonwealth v. Strauss, 188 Mass. 229, 74 N. E. 308.

[17] Per Knowlton, C. J.

[18] State ex rel. Young v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527. Upon the question of the validity of the statute the court said: "In determining the validity of the statute, we have to consider whether petroleum and its products possess, in themselves, or in the manner in which they may be placed upon the market as articles of commerce, any peculiar characteristics which furnish a legitimate reason for singling them out for the purpose of regulation, to the exclusion of other articles used for similar purposes. In determining this question we judicially note all facts of common knowledge presumably considered by the legislature when the law was enacted, and inquire whether there existed, at the time of and before the act was passed, practices in this class which were inimical to the public welfare and properly the subject of remedial legislation. We have no

§ 373. Purchaser from Combination—Statute Relieving from Liability.

An anti-trust act making the sale of any article by any individual company or corporation transacting business within the State contrary to its provisions unlawful and relieving the purchaser of liability for the unpaid part of the purchase money and authorizing him to recover money paid does not affect sales made in another State between citizens thereof and of citizens of the State where such statute is in force though the sale was completed by delivery in the latter State as such a transaction constitutes a part of interstate commerce.[19]

§ 374. Provisions as to Punishment—Fine or Imprisonment—Forfeiture of Charter—Revocation of Permit.

A statute providing for the punishment by fine of "any corporation, company, firm or association of persons," found guilty of violating that statute and for the punishment by fine or imprisonment, or by both fine and imprisonment, of any "president, manager, director or

difficulty upon this question. Petroleum is taken from the earth in a manner peculiar to itself. The refined oil is handled as no other product. Its production and distribution have caused more legislative investigations, and have been the subject of greater legal combats, in recent years, than any other article of commerce. We think it is more unique, and justifies special regulation much more, than many of the other articles as to which legislation was sustained in the cases above cited. The public policy, not only of Minnesota, but of all the States and the Federal government, is to restrain monopolies and to encourage competition. Everywhere are found laws prohibiting pools and combinations in restraint of trade. Here we have one of the principal products of petroleum, kerosene, which it is claimed in the complaint, can be so handled by a powerful corporation that competition can be stifled without resort to either pool or combination. The complaint charges defendant discriminates in its prices for the purpose of destroying the business of its competitors, and has and does prevent legitimate competition. We are advised of no other article or product of commerce, except other petroleum oils, as to which such a practice prevails. The demurrer admits these allegations. All these conditions were before the legislature and furnished the motive for the legislation. The classification was neither fanciful nor arbitrary, but proper and necessary to meet the peculiar conditions surrounding the distribution of these primary products of petroleum." Per O'Brien, J.

[19] Frank A. Menne Factory v. Harback, 85 Ark. 278, 107 S. W. 991, construing Anti-Trust Act, Jan. 23, 1905.

other officer or agent, or receiver of any corporation, company, firm, partnership, or any corporation, company, firm or association, or member of any corporation, firm or association, or any member of any company, firm or other association, or any individual," is construed as manifestly intended to provide for the punishment of artificial persons or combinations by a fine, and for the punishment of natural persons by fine or imprisonment, or by both fine and imprisonment. And to effectuate that intention it is decided that the word "person" as used in the first part of the section, will be rejected as a mere inaccuracy, while the words "any corporation," and the words following them, where first repeated in the second part of the section, will be treated as governed by the word "of" just as they are where they first occur.[20]

In Missouri it has been decided that an anti-trust statute which provides, in case of a violation of its terms for a fine and forfeiture of the charter of the corporation violating and for fine and imprisonment in the case of a person is not violative of the Fourteenth Amendment to the Constitution of the United States, in that while the same acts are denounced the punishment imposed upon corporations is greater and different from that imposed upon individuals.[21]

[20] Commonwealth v. Grinstead & Tinsley, 108 Ky. 59, 22 Ky. Law Rep. 377, 55 S. W. 720, construing Ky. Stats., § 3917.

[21] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. The court said: "If the contention of counsel for respondents is sound, then any individual could form an unlawful combination in restraint of trade with any corporation, and when proceeded against for such unlawful conduct either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same but different. And we might add that, if their position is tenable, then the legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit, ergo, there is no punishment the legislature could provide except a fine against each. Such a contention regarding the proposition here involved if followed to its logical conclusion would lead to an absurdity, and, at the same time, shows the unsoundness of respondent's contention." Per Woodson, J.

A statute prohibiting unfair competition and discrimination and which provides that any person, firm or corporation violating the act shall be subject to a fine and also providing in addition that in case a corporation is guilty of violating the act the court may annul the charter or revoke the permit of such corporation and may permanently enjoin it from transacting business within the State is not unconstitutional on the ground that the provision regarding forfeiture is an additional punishment to that imposed upon individuals and amounts to a denial of the equal protection of the law.[22]

In Ohio the act of April 19, 1898, depriving trusts and prohibiting them under penalties by a valid exercise of the police power, authorized the punishment by fine and imprisonment of a person who is an active member of, and assists in carrying out the purposes of, an association formed to prevent competition in the sale of an article of merchandise.[23]

The fact that by statute or code a crime or public offense is defined as "an act or omission forbidden by law and to which is annexed, upon conviction, either of the following punishments * * * (3) Fine" does not require that a statute in order to state an offense must use the word "forbid" or other express word of prohibition. So where a statute defines unlawful discrimination and competition and provides that "any person, firm or corporation violating the provisions" of the act "shall upon conviction thereof be fined" states an offense though the statute nowhere "forbids" the act in express terms, the presenting of a punishment for the commission of the acts specified being held to be a sufficient prohibition or forbidding.[24]

§ 375. Statute Permitting Pooling by Farmers of Farm Products.

A statute which authorizes the pooling of farm products

[22] State v. Central Lumber Co. (S. D., 1909), 123 N. W. 504.
[23] State v. Gage, 72 Ohio St. 210, 73 N. E. 1078.
[24] State v. Central Lumber Co. (S. D., 1909), 123 N. W. 504.

for the purpose of grading, classifying and selling in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually has been construed as not in conflict with a constitutional provision requiring the legislature to prevent all pools, trusts and combinations created to depreciate below its real value any article or to enhance the cost of any article above its real value. Such an enactment is construed as having for its purpose the enabling of farmers to combine their resources and place their property in the hands of an agent selected by them, to the end that better prices might be obtained and not for the purpose of enhancing the price of an article above its real value.[25]

So in Kentucky by act of March 21, 1906,[26] and of March 13, 1908,[27] a pooling by farmers of farm products raised by them was authorized. This act has been held to be constitutional and not to violate the Federal anti-trust act of July 2, 1890,[28] known as the Sherman Law, such acts having no relation to interstate commerce but being confined in their operation to products grown and pooled in the State and to sales therein.[29]

And the provision of this act making it unlawful for the owner of pooled products to violate his pooling contract by selling his part of such products without the consent of the agent of the pooling parties is within the power of the legislature, there being no limitation in the Constitution.[30] Nor does this provision deprive the seller of the equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution.[31]

[25] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755; Owen County Burley Tobacco Society v. Brumback, 32 Ky. Law Rep. 916, 107 S. W. 710.

[26] Ky. Laws, 1906, chap. 117.

[27] Ky. Laws, 1908, chap. 8.

[28] Act of July 2, 1890, chap. 647; 26 Stat. 209 U. S.; p. Com Stat., 1901, p. 3200.

[29] Commonwealth v. Hodges, 137 Ky. 233, 125 S. W. 689.

[30] Commonwealth v. Hodges, 137 Ky. 233, 125 S. W. 689.

[31] Commonwealth v. Hodges, 137 Ky. 233, 125 S. W. 689.

And it has been decided that such an act is not violative of the Fourteenth Amendment to the Federal Constitution on the ground that it is class legislation it being declared that that amendment does not prohibit the State from enacting any measure it chooses favorable to any class of persons within its jurisdiction and that its effect is to act automatically upon the laws of the State raising other classes to the same level as that enjoyed by the favored class, securing to all the same benefits.[32]

By this statute it was also made an offense for persons to buy products from a party to such a contract knowing that he was violating his contract, and this provision was construed as not interfering with such person's rights under the Constitution to acquire property or as depriving him of the equal protection of the law in violation of the Fourteenth Amendment.[33]

§ 376. Exception in Statute—Sale of Good Will of Business—Agricultural Products or Live Stock.

A statute prohibiting contracts by which one is restrained from exercising a lawful profession, trade or business but containing an exception that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or a part thereof so long as the buyer or any person deriving title to the good will from him carries on a like business therein" is to be construed as meaning that the agreement to refrain from carrying on the business must be auxiliary and collateral to a sale of the good will of the business and that the transaction must involve more than a bare agreement to refrain.[34]

But in a case in the United States Supreme Court the question of the constitutionality of an act which contains an exception therein is considered. In this case the

[32] Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755.

[33] Commonwealth v. Hodges, 137 Ky. 233, 125 S. W. 689.

[34] Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713, construing § 3927 of Rev. Codes, 1899.

Illinois Trust Act of 1893 which by one of its sections provided that: "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser" was before the court for construction and it was declared that the act was repugnant to the Constitution of the United States, unless this section could be eliminated, leaving the rest of the act in operation, and the court after considering the other provisions in connection therewith determined that the statute must be regarded as an entirety and must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who were not embraced by such section.[35] In regard to this exception the court said: Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State. We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.[36] And in

[35] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431.

[36] Per Mr. Justice Harlan.

Texas in construing a similar statute [37] the Supreme Court of that State followed this decision, saying that it recognized the superior authority of the Supreme Court of the United States upon this question and in obedience to its decision would hold that in so far as the law of 1895 came within the terms of the above case it was invalid.[38]

§ 377. Donnelly Anti-Trust Act—New York.

In New York it is declared that the general purpose of the Donnelly Anti-Trust Act [39] is to destroy monopolies in the manufacture, production and sale within the State of commodities in common use and that in this respect it is little more than a codification of the common law upon the subject and is to be construed with reference thereto.[40]

[37] Anti-Trust Law, 1895, Rev. Stat., Articles 5313–5315.

[38] State v. Shippers' Compress Warehouse Co., 95 Tex. 603, 69 S. W. 58, aff'g (Tex. Civ. App.) 67 S. W. 1049.

[39] Laws, 1899, chap. 690.

[40] Matter of Jackson, 57 Misc. R. (N. Y.) 1, 107 N. Y. Supp. 799, citing Matter of Davies, 168 N. Y. 89, 101, 61 N. E. 118; Matter of the Application of the Attorney-General v. Consolidated Gas Co., 56 Misc. R. (N. Y.) 49, 106 N. Y. Supp. 407.

CHAPTER XXV

STATE STATUTES—VIOLATIONS—GENERAL PRINCIPLES

§ 378. Contracts and Combinations—Legality and Illegality—General Principles.
379. Intention as Affecting—Presumption as to.
380. All Provisions of Contract Should Be Considered—Presumption as to Legality.
381. Mere Form of Association or Combination Not Controlling Test of Legality.
382. Combination to Carry Out Restrictions Prohibited—Where Combination May so Operate—Result Is Immaterial—Each Case Controlled by Own Facts.
383. Where Contract Legal But One of Several Links in Combination.
384. Where By-Laws of Association Show Illegality.
385. Where Contract or Combination Involves Interstate Commerce—Not Subject to State Anti-Trust Law.
386. Where Contract Made or Combination Formed Outside of State.
387. Combination Formed Before Passage of Statute.
388. Foreign Corporations Subject to State Anti-Trust Law.
389. What Constitutes a Trust—Texas Statute.

§ 378. Contracts and Combinations—Legality and Illegality—General Principles.

In a case in Illinois it is declared that the object of both the Federal statutes and those of that State, as to contracts in restraint of trade, is to prohibit the formation of all trusts and combinations and to remove all obstructions in restraint of trade and free competition and that it is not the purpose of such laws to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business.[1] "Combinations are not per se illegal, any more than are contracts, agreements, and understandings generally; but when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the

[1] Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313, aff'g 124 Ill. App. 599.

prohibition of the anti-trust statute. * * * The effect upon competition furnishes a reasonably accurate test for cases which arise under the general language of the statute." [2]

As to the construction of such statutes it has been declared by the California Supreme Court that the tendency of its modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade and that it is not every limitation on absolute freedom of dealing that is prohibited. And it was said that the provisions of the code making void every contract by which one is restrained from exercising a lawful profession, trade or business were to be construed in the light of these principles.[3] A combination or conspiracy the main purposes and effects of which are to foster the trade and increase the business of those who make and operate it, and which only indirectly and remotely restricts competition in trade or business, is not a "combination and conspiracy in restraint of trade" within the meaning and intent of the Minnesota statute.[4] But an agreement the purpose and effect of which are directly to restrain trade and hinder competition in the sale or purchase of a commodity is against public policy and void and punishable, and this applies in the case of a statute prohibiting a "trust" or "combination" of such a character so that the latter is not unconstitutional.[5] And though a contract may not be illegal on its face as being in violation of an anti-trust act yet if all the evidence is consistent only with an unlawful purpose on the part of all the parties it is decided that its illegality should not be submitted to the jury.[6]

In order to violate a State statute prohibiting monop-

[2] State v. Duluth Board of Trade, 107 Minn. 506, 543, 121 N. W. 325; Laws, 1899, p. 487, chap. 359; R. L. 1905, § 5168.

[3] Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, construing §§ 1673–1675, Cal. Civ. Code.

[4] State v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395; Laws, 1899, chap. 359, p. 487; R. L., 1905, § 5168.

[5] State v. Jackson Cotton Oil Co., 95 Miss. 6, 48 So. 300.

[6] Detroit Salt Co. v. National Salt Co., 134 Mich. 103, 96 N. W. 1.

olies it is not necessary that a complete monopoly be effected. It is sufficient if the acts tend to that end and to deprive the public of the advantages which flow from free competition.[7]

§ 379. Intention as Affecting—Presumption as to.

Courts will conclusively presume that it was the intention of parties to a combination to prevent competition where the contracts executed must necessarily have that effect, it being a well-established principle that they will be presumed to have acted with intent to produce the result which the nature of the act necessarily or reasonably does produce, or tends to produce.[8] And the fact that the intent of the members of a combination or the parties to an agreement may not have been to violate an anti-trust statute is immaterial where their practices in connection therewith have been in violation of the provisions of the act so as to in fact constitute the parties to such combination or agreement a trust within the meaning thereof.[9] So a combination, contract, or understanding, the direct and necessary effect of which is to stifle or restrict competition in trade or business violates the Minnesota anti-trust statute whatever may have been the intention of the parties.[10]

§ 380. All Provisions of Contract Should Be Considered—Presumption as to Legality.

All the provisions of a contract should be considered and construed with reference to controlling provisions and principles of law. Until the contrary appears it is assumed that a contract is made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful. But when it appears from a contract and the

[7] Bigelow v. Calumet & Hecla Mining Co. (U. S. C. C.), 155 Fed. 869.

[8] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

[9] State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

[10] State v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395, Laws, 1899, chap. 359, p. 487; R. L., 1905, § 5168.

circumstances under which it was made, and from its purposes, operation and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes, or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts.[11]

§ 381. Mere Form of Association or Combination Not Controlling Test of Legality.

The mere form of an association or combination, or the terms of the contract or rules adopted by it will not be the absolute test whether it is in violation of an anti-trust act, but in cases where the illegality may not be apparent on the surface the courts will look beneath the surface, and, from the methods employed in the conduct of the business and the various acts done in pursuance of the arrangement determine, no matter what its particular form may be or the constituent elements, whether the combination is a violation of the statute.[12]

§ 382. Combination to Carry Out Restrictions Prohibited—Where Combinations May So Operate—Result Is Immaterial—Each Case Controlled by Own Facts.

Where the statute denounces combinations to carry out restrictions in trade or commerce if a combination is made which may so operate the statute has been violated no matter what the result may be and it is immaterial that the immediate result of the combination may have been a reduction in prices. The law does not look to results in such cases. The object of statutes of this character is to guard the commerce and trade of the State so that it may flow in its regular channels subject to the law of supply and demand and untrammeled by combinations of men or corporations which can at will control their course. The fact that by a combination a rate has

[11] Stewart & Brother v. Stearns & Culver Lumber Co., 56 Fla. 570, 48 So. 19.

[12] Yazoo & Mississippi Valley R. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715.

been fixed lower than one that has prevailed carries with it the power and ability to establish higher rates, and the existence of a combination possessing such power is a violation of the statute.[13] In determining whether a contract is in violation of a statute prohibiting contracts, combinations or trusts tending to lessen competition in, or to control the price of, commodities, each case alleged to fall within the statute must be controlled by its own peculiar facts and circumstances. The court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as part of a scheme to destroy or impede competition and control supply and prices. A contract may be unlawful as a part of a scheme to create such a result, though standing by itself and independent of any such scheme it might be lawful. And it is said that though the immediate effect of a trust or combination may be really beneficial to the public in improving the quality of the goods or service and reducing the price, yet if it has inherent capability or natural tendency to injure the public, then competition is stifled and control and supply of prices secured, and it is obnoxious to the statute. The main general test should be whether the contract, trust or combination is monopolistic in purpose or natural tendency. If so it unreasonably affects competition and prices to the detriment of the public and is obnoxious to the statute.[14] So where the gist of the offense denounced by statute against pooling is that the purpose of the pool is to enhance the value of the article pooled above its real value and the design of the poolers is to so enhance the value of their product, or where, whatever their design, such is the natural effect of their action, and such as was necessarily foreseen because of its obviousness, the offense is complete.[15]

[13] San Antonio Gas Co. v. Texas, 22 Tex. Civ. App. 118, 54 S. W. 289.

[14] Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973, per Mr. Justice Jones.

[15] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

§ 383. **Where Contract Legal But One of Several Links in Illegal Combination.**

Though a contract standing alone might be legal yet where it is one of several contracts all of which are links and necessary links in an illegal combination which is intended to work and does work serious public injury and unduly raises prices so long as it holds together such contract will be regarded as illegal.[16]

§ 384. **Where By-Laws of Association Show Illegality.**

The fact that several of the agreements contained in the rules of a club considered by themselves are not illegal is immaterial where they are merely steps to effect the accomplishment of an illegal object.[17]

So where the by-laws of an association are intended and are well calculated to prevent full and free competition in the purchase and sale of articles of legitimate traffic, to influence the prices thereof and thereby to injuriously affect trade and commerce they will be regarded as within the operation of a statute prohibiting and declaring unlawful "all trusts, pools, contracts, arrangements or combinations" since whether they are regarded as a contract, an arrangement, a combination or a trust, one or all, it is said that they partake of the nature of all of them.[18] And where the by-laws of a master plumbers' association, chartered as a non-profit association, in effect punished competition between its members by imposing a penalty upon a successful competitor and the purchase of supplies by the members was limited to purchases from those who complied with the rules of the association and the purchase of materials from members only, it was decided that an anti-trust statute forbidding combinations preventing or intending to prevent "full and free competition in the production, manu-

[16] Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

[17] Hunt v. Riverside Co-operative Club, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420.

[18] Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

facture, or sale of any article of legitimate traffic" was violated.[19] And a statute making unlawful any contract in restraint of trade or which tends to limit or control the supply or market price of any article or which limits or interferes with open and free competition in the production, purchase or sale of any commodity,[20] is violated by an organization, the constitution and by-laws of which regulate the credit to be allowed its members, discriminates in the price to be paid for produce against persons not members, controls the delivery of goods and provides a penalty by fine and suspension for offending and defaulting members.[21]

§ 385. Where Contract or Combination Involves Interstate Commerce—Not Subject to State Anti-Trust Law.

Where a contract affects and involves interstate commerce it has been decided that it is not subject to the anti-trust law of a State. This doctrine is asserted in a case in Texas where a contract made in that State for the shipment of goods from another State to the buyer a resident in Texas was assailed on the ground of its being violation of both State and Federal anti-trust acts. The courts upon the question of the contract being violative of the State act said that even if the transaction in question were granted to be in violation of the anti-trust statutes of the State, it could not be held to be illegal and void because the act did not apply to interstate transactions.[22] And in an earlier case in the same State a similar conclusion is reached,[23] the court saying: "It is to be presumed that the legislature of Texas intended to exercise its authority to make laws within the scope

[19] Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

[20] Minn. Laws, 1899, chap. 359.

[21] Ertz v. Produce Exchange Co., 82 Minn. 173, 84 N. W. 743, 51 L. R. A. 825, 83 Am. St. Rep. 419.

[22] Moroney Hardware Co. v. Goodwin Pottery Co. (Tex. Civ. App., 1909). 120 S. W. 1088.

[23] Albertype Co. v. Gust-Fiest Co., 102 Tex. 219, 114 S. W. 791.

of its power under the Constitution of this State and of the United States, and that it was not the purpose of that body to embrace contracts of this class in the terms of the anti-trust laws. We are of opinion that there is evidence of that purpose in this language found in the title of the act, 'An act to define, prohibit and declare illegal trusts, monopolies and conspiracies in restraint of trade, and to prescribe penalties for forming or being connected with such trusts, monopolies and conspiracies and to provide for the suppression of the same and to promote free competition in the State of Texas.' The declared purpose of the law does not reach subjects beyond the power of the State to regulate." [24]

In a case in Tennessee, however, it is decided that a combination is none the less a violation of an anti-trust law of a State though it may incidentally affect interstate commerce.[25]

§ 386. Where Contract Made or Combination Formed Outside of State.

Although an agreement to violate the anti-trust law of a State may be made outside the State, if the parties thereto or their agents execute it, or attempt to do so, within the State, they are under the jurisdiction of the State and their conviction for such acts is not without due process of law.[26]

§ 387. Combination Formed Before Passage of Statute.

The fact that a combination may have been formed before the passage of an anti-trust act is immaterial if it is in active existence thereafter. The statute is not to be considered as having a retroactive effect or an ex post facto operation, but as only applicable to offenses occur-

[24] Per Mr. Justice Brown.

[25] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

[26] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed., aff'g (Tex. Civ. App.) 106 S. W. 918.

ring after its enactment. The offense does not consist in the formation and existence of the combination before the law went into effect but in the persistence of the parties in it after it has become unlawful.[27] The court said in this connection: "That such is the correct interpretation of such statutes is held by the Supreme Court of the United States in United States v. Trans-Missouri Freight Association.[28] But it is said that this interpretation of the statute would render it unconstitutional as impairing the obligation of a valid contract. The answer is that the State may, in the exercise of its police power, prohibit the continuance in the future of those things already in existence which are so injurious to the rights and interests of its citizens generally as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. The same power which may upon sufficient occasion, destroy other property of the citizen to secure the general welfare, may, to the same end, destroy the binding obligation of contracts. The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere, and therefore the mere objection that the exercise of that power impairs the obligation of a contract does not reach the true question, which is whether or not the attempted exercise is within the scope of the power exercised." [29]

§ 388. Foreign Corporations Subject to State Anti-Trust Laws.

It may be stated generally that foreign corporations do not come into a State as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations

[27] State v. Missouri, Kansas & Texas Ry. Co., 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783.

[28] 166 U. S. 342, 41 L. ed. 1007, 17 Sup. Ct. 540.

[29] Per Williams, J.

formed in this State, and have no other or greater powers.[30]

§ 389. **What Constitutes a Trust—Texas Statute.**

In order to constitute a trust within the meaning of the Revised Statutes of Texas [31] there must be a "combination of capital, skill or acts by two or more." The word "combination" as there used "means union or association. If there be no union or association by two or more of their 'capital, skill or acts' there can be no 'combination' and hence no 'trust.' When we consider the purposes for which the 'combination must be formed to come within the statute, the essential meaning of the word 'combination' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is where the parties in the particular case designed the united cooperation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. In the case stated in the petition there is no 'combination.' The plaintiff bought defendant's goods together with the good will of his business, both of which were subjects of purchase and sale, and in order to render the sale of the good will effectual the seller agreed that he would not for one year thereafter do a like business in that town. This was but a kind of covenant or warranty that the purchaser should have the use and benefit of such good will during that year, for it is clear that if the seller had immediately engaged in a like business at the same place the purchaser would have had no benefit therefrom. By this transaction neither the capital, skill nor acts of the parties were brought into any kind of union, association, or cooperative action. The purchaser became the owner of the things sold and the seller was, by the terms of the

[30] Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738, per Mr. Justice Magruder.

[31] Rev. Stat., Art. 5313; Rev. Civ. Stat. Tex., 1895, Title CVIII.

contract, restrained from doing a thing which if done would have defeated in part the effectiveness of the sale." [32]

[32] Gates v. Hooper, 90 Tex. 563, 565, 39 S. W. 1079, per Denman, Assoc. J. (construing and applying Rev. Stat., Art. 5313; Rev. Civ. Stat. Tex., 1895, Title CVIII, which was repealed by the Anti-Trust Law, Laws Tex., 1903, p. 119, Chap. XCIV, which was amended as to venue, penalties and fees by Laws of Tex. 1909, p. 281. The repealing law of 1903, however, defines a trust as a "combination of capital, skill or acts by two or more," etc.). The above text is quoted nearly in full in State (Crow, Att'y Gen'l) v. Continental Tobacco Co., 177 Mo. 1, 34, 75 S. W. 737, per Fox, J. That word combination in above statute means union or association. See Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394, 34 S. W. 919.

CHAPTER XXVI

STATE STATUTES—VIOLATIONS—PARTICULAR CONTRACTS AND COMBINATIONS

§ 390. Consolidation of Several Corporations—Transfer of Property to One.
391. Contract Between Rival Corporations Each Obtaining Interest in Other.
392. Where Statute or Charter Permits Consolidation of Corporations.
393. Purchase of Assets of Corporations.
394. Mining Corporation — Purchase by, of Stock in Another Mining Corporation.
395. Contracts Between Common Carriers—Consolidation of Railroad Companies—Parallel and Competing Lines.
396. Contract Between Railroad Company and Palace Car Company.
397. Merger of Street Railways.
398. Contracts Between Railroad Companies and Express or Transfer Companies—Exclusive Right.
399. Car Service Association Merely Agent of Several Railroads.
400. Agreements Between Steamboat Companies.
401. Contracts Between Manufacturer and Purchaser Not to Resell Below Certain Price—Proprietary Medicines—Uniform Jobbing Price.
402. Exclusive Rights—Contracts Between Vendor and Purchaser—When a Violation.
§ 403. Exclusive Rights—Contracts Between Vendor and Purchaser—When Not a Violation.
404. Exclusive Contract—Sale of By-Product — Distinguished From Sale of Entire Output.
405. Contract Giving Exclusive Right to Sell Goods on Certain Premises.
406. Agreement Restraining Purchaser Using Premises for Certain Purpose.
407. Agreement Between Agent of Seller and Purchasers—Coal Oil.
408. Contracts Between Principal and Agent.
409. Sale of Business and Good Will—Contracts Not to Engage in Competition.
410. Sale of Business and Good Will—Contracts Not to Engage in Competition—Exception in Statute as to.
411. Sale of Business and Good Will—Laundry Not a Manufacturing Establishment.
412. Agreement to Refrain from Entering Into Business.
413. Agreements Between Brewers—Not to Sell to One Indebted—To Raise Price.
414. Agreement Between Brick-

layers' Union and Mason and Builders' Association.
§ 415. Associations of Cattle Owners, Buyers and Sellers—By-Laws and Rules.
416. Agreement Between Cotton Seed Oil Manufacturers—Withdrawal of Agent by One.
417. Corporation Composed of Crushed Granite Dealers—Agreement as to Bluestone.
418. Consolidation of Gas Companies—Agreements Between.
419. Agreement Limiting Right to Buy Grain.
420. Agreement Between Ice Companies.
421. Agreements Between Insurance Companies or Agents to Fix Rates.
422. Agreements Between Lumber Dealers.
423. Contracts Between Proprietors of Newspapers and Job Printing Establishments.
424. Contracts Between Newspaper Publisher and Carriers.
425. Agreements Between Packing Companies to Control Price of Meat.
426. Contracts in Respect to Patented Articles.
§ 427. Agreements Between Physicians—Schedule of Prices.
428. Physicians—Dissolution of Partnership — Agreement Not to Practice.
429. Agreements Between Dealers in Plumbers' Supplies and Master Plumbers—Plumbers' Association.
430. Agreements Between Publishers—Price at Retail—Not to Sell to Certain Class.
431. Association for Distributing News.
432. Agreement Between Retailers Not to Purchase from Certain Wholesalers.
433. Agreements Between Salt Manufacturers.
434. Contracts Relating to Telephone Service.
435. Telegraph Companies—Service of Is Not a Commodity.
436. Agreement Between Theatrical Owners or Managers—Plays Not Commodities.
437. Combination to Induce Employees to Break Contracts with Employers.
438. Undertaking by Corporations to Induce Employees to Trade with Another.
439. Contract to Instruct in Treatment of Scalp and Hair—To Use Only Certain Remedies.

§ 390. Consolidation of Several Corporations—Transfer of Property to One.

Under a statute declaring any combination guilty of the crime of conspiracy where its object is to regulate, control or fix the price of merchandise or to limit in any way the output of any articles, if contracts are entered into for the consolidation of several corporations or interests engaged in the same line of business for the pur-

pose of controlling the market and suppressing competition, it is decided that it is immaterial upon the question of the invalidity of the contract that no effort has in fact been made to control, raise or fix the price of the article in the market, and that such contract is void both under the statute and independent thereof.[1]

In Minnesota a statute forbids entering into any pool, trust, agreement, combination or understanding whatsoever with others in restraint of trade, or to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use, or to prevent or limit competition in the purchase and sale of such articles.[2] Under this statute it has been decided that an agreement between several corporations, competitors in business, and the stockholders of each, providing for the transfer to one of said corporations of all the property of the others, in return for which the corporation taking title agrees to issue to each stockholder an amount of its capital stock in proportion to his interest, and containing agreements as to the future selection of directors and distribution of dividends is only a nominal purchase and sale of the properties and is a pooling or combination of interests within the meaning of the statute.[3]

But a statute which prohibits one competing corporation from buying out the stock of another competing corporation has been held to have no application to a contract where one of the contracting parties is a corporation and the other an individual. Thus it was so held where a contract was entered into between an individual owning a local telephone system and a corporation which maintained a long distance line, the terms of which contract provided for a connection between the two lines.[4]

[1] Merchants' Ice & Cold Storage Co. v. Rohrman, 138 Ky. 530, 128 S. W. 599.

[2] Section 5168, Minn. R. L., 1905.

[3] State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 623.

[4] Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General (Miss., 1911), 54 So. 670, construing Miss. Code of 1906, § 5005, as amended by the Laws of 1910, p. 222.

Where a monopoly in violation of a statute has been created by a corporation by the consolidation of several other corporations and companies, a corporation subsequently organized as its successor and composed to a large extent of the same interests, to which all of the property so acquired is conveyed will not be regarded as an innocent purchaser so as to enable it to enforce the monopolistic contracts of its predecessor on the theory that it was not guilty of any impropriety.[5]

§ 391. Contract Between Rival Corporations Each Obtaining Interest in Other.

A contract between two corporations who are engaged in the same line of business by which each obtains an interest in the other and its profits has been construed, where it is not illegal upon its face, as, being an illegal restraint of trade or commerce, or as bringing about a monopoly or enhancing prices either at common law or under a statute forbidding such agreements or contracts.[6]

§ 392. Where Statute or Charter Permits Consolidation of Corporations.

Where by the laws of a State domestic corporations may consolidate and either a domestic or foreign corporation may acquire and hold either by subscription, purchase or otherwise stock in any domestic corporation,[7] it has been decided in Alabama that a domestic light and power corporation may acquire stock in a competing

[5] Merchants' Ice & Cold Storage Co. v. Rohrman, 138 Ky. 530, 128 S. W. 599. The court said: "As an illustration of the ingenuity in devising plans to evade the law against monopolies and combinations this is a fair example. Here an effort is made to accomplish by indirect methods what would be in another shape easily marked for condemnation. * * * If this kind of subterfuge were allowed there would be little use in trying to check monopolies or put the seal of condemnation upon contracts to control the market. It would only be necessary when any corporation or concern had obtained control of the market to dispose of its holdings to another and new corporation, thus evading the law and making legal an obnoxious transaction. There is no merit in this contention." Per Carroll, J.

[6] Fechteler v. Palm Bros. Co., 133 Fed. 462, 66 C. C. A. 336.

[7] Code of Alabama, 1907, §§ 3481, 3640.

corporation and that by so doing there is not created a monopoly such as is condemned by the common law or the statute of that State.[8] The court said: "It is thus manifest that the legislature, in view of the industrial and business conditions of our people, believed the good from such combinations would outweigh the evil that might result, and relied upon the exercise of the power to regulate their rates which is vested in the State and its subordinate municipal agencies, as ample safeguard for the public weal against all combinations which its laws allowed. It did not and does not view such combinations and holdings as evils but rather as promotive of the public good. * * * Light and power companies are incorporated under the general laws, and derive their power and franchises from the State and though a consolidation between them might result in exclusive business control of a particular territory, it does not give any monopoly there in a legal sense, since anyone is free to obtain a charter for a like purpose, and can compete with them there, if the municipal authorities, to whose control the whole matter is really committed, think it to the public interest to allow the use of the streets and roads for that purpose. Consolidation of enterprises thus engaged, authorized by the legislature, or the control of two corporations so engaged by the same individual, when permitted by the law does not constitute such a monopoly as is condemned by the common law, even were our statutes controlling that matter here out of the way." [9]

And where a statute authorized the formation of a corporation thereunder for "the construction or purchase and maintenance of mills, gins, cotton compresses" and other purposes and a charter to a compress company expressed the purpose of the corporation in the very language of the statute it was decided that it could not be said that the purposes for which it was organized, as expressed in the charter, furnished any evidence of an

[8] Henry L. Doherty & Co. v. Rice (U. S. C. C.), 186 Fed. 204, decided under the above statutes and §§ 7579, 7580, of Code of Alabama.

[9] Per Jones, J.

intention to violate the law.[10] It was contended in this case that the acquiring by such a corporation, on the same day, of six compresses, showed an intention in obtaining the charter to prevent competition in violation of the anti-trust act by acquiring control of compresses in different parts of the State. The court, however, said: "The corporation could lawfully do anything expressed in the charter, and might lawfully buy all of the compresses that it purchased. * * * In determining the question of intention, we must consider as true every fact which can be fairly inferred from the evidence, and we are of opinion that the acquisition, on the same day, of six compresses, situated in localities distant from each other, will support the inference that the purpose of the promoters in organizing the corporation was to acquire these properties, and if the facts show that in doing so they have violated the law, then we are of opinion the evidence would justify the conclusion that their intention in forming the corporation was to accomplish the unlawful purpose. It is not unlawful for the corporation to buy all of the properties that it acquired nor was it unlawful for it to acquire them all at the same time, and we see nothing in that fact which tends to show that the object at the time of organizing the corporation was to do a lawful act to effect an unlawful purpose." [11]

In New York it has been decided that a gas company whose certificate of incorporation authorizes it, as provided in the Stock Corporation Law,[12] to "purchase, acquire, hold and dispose of the stock, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations" has power to make a contract to purchase the stock and bonds of a company owning a franchise which, if operated adversely to or in rivalry with the power company might be ruinous to its busi-

[10] State v. Shippers' Compress & Warehouse Co., 95 Tex. 603, 69 S. W. 58, aff'g (Tex. Civ. App.) 67 S. W. 1049.

[11] Per Brown, J.

[12] Section 40 (Laws of 1890, chap. 564, as amended by Laws of 1892, chap. 688).

ness, and to pay therefor with stock and bonds issued by it. And it was decided that such a contract was not obnoxious to another provision in the Stock Corporation Law [13] as being a combination with another company for the creation of a monopoly or the unlawful restraint of trade, or the prevention of competition in a necessary of life, especially where it is not shown that the purchasing company does not intend to use the plant or exercise the franchise acquired under the purchase. And it was also held that it did not effect a practical consolidation of two corporations contrary to the method pointed out by the statute.[14]

§ 393. **Purchase of Assets of Corporation.**

An anti-trust law prohibiting any corporation, partnership or individual or other association of persons whatsoever from creating, entering into or becoming "a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, merchandise, commodity, convenience * * * or to maintain said price," is not broad enough to prohibit one corporation, in good faith, in the legitimate pursuit of its business, from purchasing the assets of another corporation in a similar business.[15] The court said: "Its terms are applicable to individuals and partnerships, as well as corporations; its condemnation is as pronounced against the individual as it is against the corporation; hence it follows, if this statute is to be construed, as prohibiting corporations from purchasing, in good faith, the assets of another corporation, it must be applied with equal force to the rights and powers of individuals.[16]

[13] Section 7.

[14] Rafferty v. Buffalo City Gas Co., 37 App. Div. (N. Y.) 618, 56 N. Y. Supp. 288.

[15] State ex inf. Crow v. Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737, construing Act, 1897, p. 208.

[16] Per Fox, J.

§ 394. Mining Corporation—Purchase by, of Stock in Another Mining Corporation.

Where a mining corporation obtained control of another similar corporation, by purchasing stock and obtaining proxies, for the purpose of suppressing competition between two otherwise competing companies and creating a monopoly, such control was held to be violative of a statute prohibiting combinations for the purpose and with the intent of establishing and maintaining, or attempting to establish or maintain a monopoly. And the fact that by another statute such purchasing company was given power to purchase and own stocks in other mining corporations did not make lawful the monopolistic control so obtained.[17]

§ 395. Contracts Between Common Carriers—Consolidation of Railroad Companies—Parallel and Competing Lines.

In the case of common carriers it is said that contracts between them to prevent competition are prima facie illegal, that the burden is on the carrier to remove the presumption and that until it is removed the agreement goes down before the presumption.[18]

A constitutional provision that "no railroad * * * or managers of any railroad corporation shall consolidate the stock, property, or franchises of such corporation with * * * or in any way control any railroad corpora-

[17] Bigelow, Calumet & Hecla Mining Co. (U. S. C. C.), 155 Fed. 869, construing Pub. Acts, Mich., 1899, p. 409, No. 255, as supplemented by Pub. Acts, Mich., 1905, p. 507, No. 329; Pub. Acts, Mich., 1905, pp. 153, 154, No. 105.

As to mining contracts being a violation of Sherman Anti-Trust Act, see § 153, herein.

[18] Chicago, Indianapolis & Louisville Ry. Co. v. Southern Indiana Ry. Co., 38 Ind. App. 234, 70 N. E. 843.

As to violations of Sherman Anti-Trust Act by railroad companies, See § 151, herein.

The question whether a merger of railroad lines is invalid as being in violation of Article XVII, § 4, of the Constitution of Pennsylvania, forbidding railroad companies owning parallel or competing lines from being consolidated can only be raised in a proper proceeding by the Commonwealth. Tibby Brothers Glass Co. v. Pennsylvania Railroad Co., 219 Pa. St. 430, 68 Atl. 975.

tion owning or having under its control a parallel or competing line" is held to clearly evince that control in any manner and to any extent was intended to be prohibited provided it was such as is calculated to enable the one railroad by means of a contract or agreement for an interference in the other's affairs to keep down competition between them. The manner and extent of the control are declared to be immaterial.[19]

In Washington it has been declared that constitutional and statutory provisions against the consolidation of parallel and competing transportation lines are founded upon principles of public policy, the intention being to preserve to the public existing facilities offered by competing companies so that their efficiency shall not be impaired by bringing them under a common ownership and control. And in this case it was decided that such provisions were not violated by an arrangement between two railroad companies operating competing lines between Spokane and Seattle in that State, whereby each subscribed for one-half of the capital stock of a new and distinct railroad corporation and contributed one-half of the cost of constructing a new railroad from Spokane to Portland, Oregon, opening up and serving new territory, each road continuing its individual identity and control.[20]

In Georgia it is decided that the competition the defeating or lessening of which the provision of the Constitution [21] so far as applicable to railroad companies, was

[19] Gulf, Colorado & Santa Fe Ry. Co. v. State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849, construing § 5 of Art. 10 of the Texas Constitution.

[20] State ex rel. Cascade R. R. Co. v. Superior Court, 51 Wash. 346, 98 Pac. 739. The court said: "It is difficult to understand how transportation facilities can be impaired when two existing, separate and independent corporations, each of which continues its individual identity, organization, and control, subscribe for the capital stock of a newly created corporation and thereby aid in building a railroad which opens and serves additional territory. It would appear that the creation of the new corporation, instead of curtailing the transportation facilities already enjoyed by the public, would increase the same." Per Crow, J.

[21] Par. 4, § 2, Art. 4 (Civil Code, § 5800, providing that: "The general

designed to prevent, was competition between lines of railroad viewed with reference to their general business in and through the territory traversed by them, and not competition which might incidentally exist at mere points or particular places. So it was decided that a combination of railroad lines, whatever the form adopted for bringing it about, is not violative of this provision of the Constitution, even though it might lessen or defeat competition, at some point or points, if, as a general result of the combination, the public at large, as distinguished from the people of special or particular communities, was in consequence benefited.[22]

Whether or not the combination of any two given lines of railroad would be contrary to a provision of the Georgia Constitution prohibiting any combination of corporations which tends to lessen competition in their respective business,[23] is a question which cannot be settled under any rule of universal application but one which must be determined in each case upon its own peculiar facts and circumstances.[24]

In New York the provision of the Railroad Law of 1890,[25] in substance enacting that in cities having a population of eight hundred thousand or more a street surface railroad corporation might make an intertraffic contract to carry a passenger for a continuous trip and for a single fare not exceeding five cents has been held not to apply to such a contract made in 1895, in a city not shown to have then had such a population, by a corporation organized in 1885, operating a street surface

assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective business, or to encourage monopoly; and all such contracts and agreements shall be illegal and void.").

[22] State v. Central of Georgia Railway Co., 109 Ga. 716, 35 S. E. 37, 48 L. R. A. 351.

[23] Const., Par. 4, § 2, Art. 4 (Civil Code, § 5800).

[24] State v. Central of Georgia Railway Co., 109 Ga. 716, 35 S. E. 37, 48 L. R. A. 351.

[25] Laws, 1890, chap. 565, §§ 101, 103, 105.

railroad prior to April, 1889, a considerable portion of which was not in 1895 in the city, being the successor of a similar railroad which had been operated for twenty years. And it was held that it or its lessee might charge, for a continuous trip, a fare in excess of five cents.[26]

In an early case in New Hampshire in which it appeared that two railroads had entered into a contract or arrangement whereby each should retain sixty per cent of its gross earnings between all competing points of their respective routes and Boston, to pay running expenses, and the remaining forty per cent of such gross earnings should constitute a common fund, to be equally divided between said roads, it was held that such contract came within the inhibition of an act of that State entitled "An act to prevent railroad monopolies" and which prohibited the consolidation of rival and competing lines or the running and operating of any railroad by a rival and competing line under any business contract, lease or other arrangement and provided that each railroad must be run by its own officers and agents and dependent for support on its own earnings.[27]

§ 396. Contract Between Railroad Company and Palace Car Company.

A contract between a railroad company and a palace car company by which the latter was given the exclusive right for a period of fifteen years to operate sleeping cars over the lines of the former is not violative of an anti-trust act forbidding any combination or agreement to fix or maintain any standard or figure whereby the cost of transportation shall be in any manner affected or established, there being no provision in such contract that the charges should be maintained as they were then fixed, or fixing any standard of charges by which either company should be governed, and there being no provi-

[26] Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & West End R. R. Co., 23 App. Div. (N. Y.) 29, 48 N. Y. Supp. 665.

[27] Morrill v. Boston & Maine Railroad, 55 N. H. 331, construing Act of 1867, chap. 8.

sion for a pooling or combining of rates between such companies but each being at liberty to prescribe its own charges and to change them at pleasure. The only restriction or reference to charges was that the sleeping car company should not charge more for its service on those lines than it did on competing lines. And such contract was held not to "create or carry out restrictions in the free pursuit of a business authorized or permitted" by the laws of the State since such provision does not create a new business for any person, nor does it give a new right in the property of others, but its object is to prevent interference with business authorized and carried on in accordance with the laws of the State. The right to have sleeping cars attached to passenger trains was not authorized to be pursued on a railroad without the consent of the owner and since no business right existed it could not be restricted. And it was also decided that under such contract the direction of the "affairs" of neither of the corporations was brought under the control of the other; nor were the affairs of both corporations brought under the management of another corporation or person: nor did either of them acquire the shares or certificates of stock or bonds of the other, nor did the contract transfer to either company any "franchise or other rights, or the physical properties" of the other company within the provisions of the act prohibiting monopolies.[28]

§ 397. Merger of Street Railways.

In New York it has been decided that the provisions of the Stock Corporation Law [29] or of the Laws of 1899,[30]

[28] Ft. Worth & Denver City Ry. Co. v. State, 99 Tex. 34, 87 S. W. 336, construing §§ 1, 2, 3, of Anti-Trust Law of March 31, 1903 (Acts, 28th Leg., p. 119).

[29] Section 7, providing that "No domestic stock corporation and no foreign corporation doing business in this State shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

[30] Chap. 690, providing that "Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or

designed to prevent combinations and monopolies in restraint of trade do not forbid the merger of street railways, since the legislature by various enactments upheld by the courts has expressly authorized the merger of such corporations under certain conditions. The court declared that the policy of the State toward such corporations had been illustrated by a continued series of enactments regulating and controlling them to a minute degree and permitting the leasing, merger or contracts for the use of parallel or competing street railways and railroads and that in the face of those enactments and that control it seemed to be a violent warping of the intention of the legislature to attempt to apply such provisions to the railroads of the State.[31]

In a case, however, decided in the United States Circuit Court, the conclusion was reached that under these circumstances there was a combination to create a monopoly within the prohibition of section seven of the Stock Corporation Law.[32]

§ 398. Contracts Between Railroad Companies and Express or Transfer Companies—Exclusive Right.

Where it is provided by statute that every railroad

sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void."

[31] Matter of Interborough-Metropolitan Co., 125 App. Div. (N. Y.) 804, 111 N. Y. Supp. 186.

[32] Burrow v. Interborough-Metropolitan Co. (U. S. C. C.), 156 Fed. 389. The court said: "On the facts alleged in the bill, which the demurrer admits, it is difficult to see how the monopoly shown by them could be more complete. By it every surface street railroad and every elevated railroad and every subway railroad in the boroughs of Manhattan and the Bronx are combined in one management and control. No one can go up or down town in New York, without using one of these roads unless he takes a carriage or walks. It is as absolute a monopoly of the means of the transportation of passengers in New York as can be imagined which is not legally exclusive." Per Holt, J.

company operating a railroad within the State shall furnish reasonable and equal facilities and accommodations, and upon reasonable and equal rates, to all corporations and persons engaged in the express business,[33] and by an anti-trust act a trust is defined as "a combination of capital, skill or acts by two or more persons, firms or corporations," [34] any combination of the kind denounced by the anti-trust act, the carrying out of which would limit or narrow the scope of business express companies are permitted to carry on by the former act, is necessarily one to create or carry out a restriction in the free pursuit of business, within the meaning of the anti-trust act prohibiting such restriction. So a contract which showed by its terms that its purpose was to secure to certain express companies, so far as it was within the power of the parties to do so, the exclusive right to do an express business upon the railroad, and to exclude other express companies from the enjoyment of like right, was held to be a violation of the statute.[35]

A rule or regulation by a carrier of passengers whereby it gives to a transfer company the privilege of soliciting the patronage of its passengers upon its trains does not create a monopoly and is not violative of an anti-trust law which provides as follows: "A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons, or either two or more of them * * * to create or carry out restriction in the free pursuit of any business authorized or permitted by the laws of this State." [36] The court said: "It is, we think, sufficient answer to this contention, that the rule or regulation of appellees by which Green was permitted to solicit the patronage of its passengers to the exclusion of appellant did not 'create or carry out restrictions in the free pursuit of any business authorized or permitted

[33] Tex. Rev. Stat., Art. 4540.

[34] Tex. Anti-Trust Act of 1903.

[35] State v. Missouri, Kansas & Texas Ry. Co., 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783.

[36] Lewis v. Weatherford, Mineral Wells & Northwestern Ry. Co., 36 Tex. Civ. App. 48, 81 S. W. 111.

by the laws of this State, because the only restriction imposed is with respect to the transaction of appellant's business, on appellee's passenger trains which he is nowhere authorized or permitted by the laws of this State to engage in. It is therefore not a restriction upon the free pursuit of his lawful business. In the sense that the regulation prevents appellant from securing the patronage of appellee's passengers it may be said to be a restriction upon his business. But the least reflection will show that if this construction of the law were to be adopted a very large per cent of the everyday contracts in the business world, such as those of leasing, of agency, of service and the like would be reprobated, a result never dreamed of by the legislators who enacted the statute." [37]

§ 399. **Car Service Association Merely Agent of Several Railroads.**

A car service association which is but merely the agent and employee of various railroads joining such association the main purpose of which is to prove of benefit to consignor, carrier, and consignee by expediting the transportation of freight, facilitating its delivery and insuring prompter and more satisfactory service for all but which has no authority to control the management of the business of the railroads as to fix the charges it may assess is not within the operation of a statute prohibiting trusts or combinations between two or more persons, firms or corporations by which any other person than themselves, their proper officers, agents and employees, shall, or shall have the power to, dictate or control the management of business.[38]

§ 400. **Agreements Between Steamboat Companies.**

Where defendants were rival steamboat companies organized under the Act of 1854 in New York,[39] and had

[37] Per Speer, J.

[38] Yazoo & Mississippi Valley R. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715.

[39] Laws of 1854, p. 518, chap. 232.

been competing for the transportation of passengers and for public traffic for some years, the rivalry and competition between them being very severe and keen, and the result of which would be for the benefit of the public, suddenly came together and made an agreement for the purpose of running the boats of their respective lines for joint and mutual benefit or account, thus making a complete union of the interests of the two companies, at all events, providing for a joining of the companies for the protection of certain supposed mutual interests it was decided that such combination was in violation of the act entitled "An act for the incorporation of companies to navigate the lakes and rivers" and providing that "No such company shall combine with any other company formed under this act for any purpose." [40]

§ 401. Contracts Between Manufacturer and Purchaser Not to Resell Below Certain Price—Proprietary Medicines—Uniform Jobbing Price.

An agreement between a manufacture of goods and a customer that the latter will not resell its goods at a less price than that fixed by the former has been held in Kentucky not to be in violation of an anti-trust act of that State prohibiting any combination to fix or regulate prices or to limit production.[41]

And an agreement between the manufacturers of proprietary medicines and an association of wholesale dealers in such articles to sell their goods at a uniform jobbing price for fixed quantities to such dealers only as would conform to the manufacturer's price list in making sales of goods, has been held in New York not to establish a monopoly on the part of the members of the asso-

[40] Watson v. Harlem & New York Navigation Co., 52 How. Prac. (N. Y.) 348.

As to violations of Sherman Anti-Trust Act by owners of vessels, see § 152, herein.

[41] Commonwealth v. Grinstead, 111 Ky. 203, 23 Ky. Law Rep. 590, 63 S. W. 427, 56 L. R. A. 709, decided under Ky. Stats. 3915.

As to violations of Sherman Anti-Trust Act by manufacturers of proprietary medicines, see § 138, herein.

ciation, where all wholesale dealers have the right to purchase goods from the manufacturers upon the same terms as the members of the association, upon undertaking to maintain the prices established by the manufacturers. And such agreement was also declared not to be unlawful as in restraint of trade or against public policy, although it did away with competition among dealers as to prices, where it placed no restriction upon them as to the quantities that they might be able to sell or the territory within which they might transact business.[42]

§ 402. Exclusive Rights—Contracts Between Vendor and Purchaser—When a Violation.

Where by the terms of a contract a carriage manufacturer was to ship all of its vehicles to a certain party and to permit its goods to be handled by no other persons within the State except at a certain place, and the person to whom they were shipped was to handle no goods of the same character from any other factory, to sell the goods so shipped at specified prices free of all expense to the shipper and there was no clause as to agency or retention of title in the shipper it was held that the contract was not one creating an agency but was to be treated as an agreement entered into by the parties, intended to govern and control contemplated future purchases and sales and was in violation of the statute against trusts and conspiracies against trade.[43]

And where a contract was entered into between a brewing company and a dealer by the terms of which the former agreed to give the dealer the sole representation and sale of its products in a certain locality, to furnish such products at a fixed price and to furnish a storage vault and delivery wagon and the dealer agreed to fur-

[42] Park & Sons Company v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, aff'g 54 App. Div. 223, 66 N. Y. Supp. 615.

[43] Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288. Compare Clark v. Cyclone Woven Wire Fence Co., 22 Tex. Civ. App. 41, 54 S. W. 392.

nish a suitable place for the erection of the vault, free of any rental charges, to use his best endeavors in the interest of the brewing company and to handle no other beer than that of such company during the term of the contract, except upon the latter's written permission, it was decided that the effect of such contract was to create and "carry out restrictions in trade" and "to prevent competition" in the "sale and purchase" of "commodities" within the terms of the anti-trust act making combinations, trusts or agreement which so operated illegal.[44]

And where a statute forbids any combination or agreement to limit the price of a commodity, under a contract by which a packer agreed to sell to a competitor all the case oysters which he should pack during certain months of the year except three car loads per month, half of his output, and that he would be bound as to the price which he would charge for such car loads by the price fixed by the purchaser of the other half, and the price could thus be arbitrarily fixed without any reference to the state of the market, and each party was to sell at the same price, no matter what the supply or demand might be, the court declared that the contract was a "plain combination and agreement between competing manufacturers not to sell anywhere, to anybody, the commodity (oysters) for a less price than that at which the other sells. The appellee cannot sell except at prices fixed by the appellant, and these prices may be fixed arbitrarily, without regard to the market in any way, the appellant nowhere agreeing that it should be controlled by the demand and supply." [45]

Again, under a statute declaring void all contracts designed in any manner to prevent or restrict free competition in the production or sale of any agricultural article or commodity, a contract to sell lambs, wherein

[44] Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S. W. 27, decided under the Act of March 30, 1899, followed in Fuqua Hinkle & Davis v. Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 35 L. R. A. 241, reversing (Tex. Civ. App.) 36 S. W. 479, in which a similar contract was construed.

[45] Barataria Canning Co. v. Joulian, 80 Miss. 555, 31 So. 961, per Whitfield, C. J.

the buyer agrees not to buy any other lambs, in certain counties, prior to the date fixed for delivery, has been held void.[46]

§ 403. Exclusive Rights—Contracts Between Vendor and Purchaser—When Not a Violation.

In a statute providing that all contracts by persons who "control the output" of an article of merchandise, made to prevent competition "in the importation or sale of articles" imported into the State, the parties referred to by the act are not those who control the output of a single factory or a single town, the statute being directed against monopoly. So a contract by which a person agreed to sell all the sash weights it should make during "the remainder of the year" to another, was held not to be void as being in violation of such an act.[47]

So an agreement between a vendor and purchaser of whisky that the former would not sell any liquor of the same kind in three cities in which the purchaser was engaged in business until the latter had closed out his purchase was held in Texas not to be a violation of the statute forbidding combinations "to fix or limit the amount or quantity of any article" or "to regulate or fix the price of any article." [48] The provisions of the statute against limitations on the amount or quantity of an article was construed as not referring to the amount to be sold in or supplied to any particular community or territory but to the amount or quantity in existence, that is, to what is generally called the supply or output.[49]

And a contract entered into between a photographic company and a grocery company by which the former was to furnish the latter with trading tickets each of

[46] Bingham v. Brands, 119 Mich. 255, 77 N. W. 940, decided under 3 How. Stat., § 9354j. The court said: "By the terms of this contract, the plaintiffs were restrained from purchasing lambs in Genesee and Shiawassee counties. The contract had the effect to restrict free competition in those counties and falls within the very terms of the statute." Per Long, J.

[47] Over v. Byram Foundry Co., 37 Ind. App. 452, 77 N. E. 302.

[48] Tex. Anti-Trust Law, 1899 (Acts of 1899, p. 246).

[49] Norton v. Thomas & Sons Co., 99 Tex. 578, 91 S. W. 780.

which entitled its holder to a photo art calendar when traded out and countersigned by the grocery company which agreed to dispose of such tickets as soon as possible, and by which the photographic company agreed not to sell to any other grocery company in that locality such trading tickets without the consent of the other party to the contract has been held not to be in violation of a statute prohibiting trusts, monopolies and conspiracies in restraint of trade.[50]

Again, where the manufacturer of pianos who was located in Massachusetts agreed with a firm in Memphis, Tennessee, that the latter should have, to the exclusion of all others, the right to sell pianos of the former's manufacture in certain territory contiguous to Memphis, in Arkansas, West Tennessee and North Mississippi, it was declared that the legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment. The court said: "Indeed there is no law, Federal or State, that requires a person to sell his goods against his will, to any other person, or to send agents abroad to seek business, or even to compel him to employ agents in the conduct of his business. These are matters of private judgment and discretion, which belong to every citizen by the laws of nature; they are rights inherent in every freeman, which no human law can rightly supersede or impair." [51]

And a contract by which one corporation agrees and binds itself to buy all its raw materials from and to sell all its manufactured product to another corporation is not in violation of an act prohibiting pools, trusts and combinations in the absence of any allegation or evidence that the contract tended to produce a monopoly, or was in restraint of trade, or enabled the parties thereto, or either of them, to monopolize the market or that it had anything to do with commerce. A party asserting that

[50] Forrest Photographic Co. v. Hutchinson Grocery Co. (Tex. Civ. App., 1908), 108 S. W. 768.

[51] Houck & Co. v. Wright, 77 Miss. 476, 27 So. 616.

such a contract is illegal and void must by proper averments and competent evidence show such invalidity.[52]

And where a contract was for the sale of twenty-one fence machines and certain pickets and granted to a person the right to build, weave, and construct nine fences in a specified territory under letters patent and such person was bound to purchase the wire and pickets, or stays, and machines used in building the fences under said patent from the other party to the contract, it was decided that there was not a combination against trade and intended to prevent competition within the meaning of an anti-trust act of Texas.[53]

So contracts entered into by the manufacturer of a certain brand of saleratus and soda with jobbers and dealers in that commodity, by the terms of which the manufacturer agreed to sell the brand manufactured by it to such jobbers and dealers at a reduced price in consideration of their agreement not to sell it or different brands of the same article manufactured by other persons at less than a stipulated price have been held not illegal as to rival manufacturers of saleratus and soda, who do not allege that such contracts were entered into with their customers, or with any person other than the regular customers of the first mentioned manufacturer, or that the customers of such rival manufacturers had been induced thereby to break any existing contracts with them. Such contracts were held not to be violative of a New York statute [54] declaring illegal contracts restraining or preventing competition in the supply or price of any commodity of common use for the support of life and health.[55]

§ 404. **Exclusive Contract—Sale of By-Product—Distinguished from Sale of Entire Output.**

A distinction is made between a corporation engaged

[52] Heimbuecher v. Goff, Hower & Co., 119 Ill. App. 373.

[53] Clark v. Cyclone Woven Wire Fence Co., 22 Tex. Civ. App. 41, 54 S. W. 392.

[54] Chap. 716, Laws of New York, 1893.

[55] Walsh v. Dwight, 40 App. Div. (N. Y.) 513, 58 N. Y. Supp. 91.

in a particular line of business, which enters into a combination to dispose of all of its products to a competitor for the purpose of enabling the competitor to fix prices and control the markets and one which in the course of its principal business incidental thereto disposes of a by-product or commodity in which it does not deal.[56]

Thus it was so held in a case in Minnesota where the defendant gaslight company was a corporation engaged in the business of manufacturing gas for use by the citizens of St. Paul. The gas was manufactured from soft coal, and one of the residual products thereof was coke, which the company accumulated in large quantities. It was not engaged in buying, selling or dealing in coke or other like fuel. It entered into a contract with defendant coal company, by which it agreed to sell and deliver to that company all its accumulations of coke, and specially agreed not to sell or dispose of the same, or any part of it, to any other person or company. The court held that as the coke accumulated by the gaslight company was a mere incident, a by-product, resulting from the conduct of its principal business, the agreement to sell its entire output to defendant coal company was not an unlawful combination, nor a violation of any law of the State.[57]

§ 405. Contract Giving Exclusive Right to Sell Goods on Certain Premises.

A statute prohibiting a combination "to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws" of the State is construed as having reference to restrictions upon such business competition as a person is entitled under the laws of the State, to enter into, and does not include the case of an agreement giving one an exclusive right to sell goods upon the premises of another. The court said in

[56] State ex rel. Berryhill v. St. Paul Gaslight Co., 92 Minn. 467, 100 N. W. 216.

[57] State ex rel. Berryhill v. St. Paul Gaslight Co., 92 Minn. 467, 100 N. W. 216.

this case: "Were any restrictions created or carried out in the contract under consideration against the free pursuit of any business which the law gave others the right to engage in? Did others have the right under the law to demand of the appellant that they be permitted to sell goods upon its premises? The right to sell goods upon the premises of another is not given by law but by the consent of the owner. The latter has the right to say who shall or who shall not use his premises for any such purpose. The right to give an exclusive contract for the purpose of any business is involved in every lease." [58]

But in a case in Texas an action was brought upon a contract by which a coal mining company owning land upon which there was a camp called Thurber leased to one Lawson, for a term of five years, premises for the purpose of selling liquor. By the terms of the contract the company was not, during the term of the lease, to permit any other person than Lawson to sell liquor upon any lands owned or occupied by it; was to issue checks to its employees and to redeem such checks as Lawson might receive for liquor; and was to receive as rental for such premises two-thirds of the net profits. The agreement disclosed upon its face that it was "the purpose of this lease to confirm to said Lawson the exclusive privilege" of selling liquor upon the company's lands during its term. The court held that there was a combination the purpose of which was to create and carry out a restriction in the sale of liquors at Thurber and also to prevent competition in the sale and purchase thereof and that the contract created a trust within the meaning of the statute and was void.[59]

§ 406. Agreement Restraining Purchaser Using Premises for Certain Purpose.

An agreement, in connection with a sale of property, which the vendor could devote to a given purpose or

[58] Redland Fruit Co. v. Sargent, 51 Tex. Civ. App. 619, 113 S. W. 330, per Hodges, J.

[59] Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919.

not, by which the vendee is put under a restraint against employing it for such purposes, the vendor having a business which he is interested in protecting, is not in violation of an anti-trust act aimed at combinations formed for the purpose of restricting the output or enhancing the price of goods.[60] The court said: "An agreement prohibiting the use of a particular piece of property in a specific business, or prohibiting one of the parties from engaging in a competitive business for a reasonable time, and within a limited area, if not larger than necessary to protect the other, is a valid and enforceable agreement." [61]

§ 407. Agreement Between Agent of Seller and Purchaser—Coal Oil.

Where an agent acting under directions from his principal to procure the countermand of orders for coal oil given to a rival concern gave to one, who had given such an order, a certain quantity of coal oil as an inducement for him to countermand such order, which was done there was held to be a violation of the State anti-trust act prohibiting combinations to lessen competition as such agreement was made by the agent to protect the oil of his employer from competition with that of the rival company and with a view of lessening full and free competition in the sale of coal oil.[62]

§ 408. Contracts Between Principal and Agent.

In a case in Texas it was decided that it was not the purpose of a statute prohibiting a "combination of capital, skill or acts" by two or more persons for certain

[60] Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80, aff'g 71 Fed. 659, and construing Laws Mich., 1889, Act No. 225.

[61] Per Linton, J., citing American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634; Navigation Co. v. Windsor, 87 U. S. (20 Wall.) 64, 22 L. ed. 315; Gibbs v. Gas Co., 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553; Stines v. Bowman, 25 Ohio St. 580, 583; Hubbard v. Miller, 27 Mich. 15; Association v. Starkey, 84 Mich. 80, 47 N. W. 604; Timmerman v. Dener, 52 Mich. 34, 17 N. W. 230.

[62] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

purposes [63] to interpose any obstacle to a principal's contracting with his agent with reference either to the terms or the subject-matter of the agency. So the court held that there was no violation of the above statute in the case of a contract by which a windmill company gave to a firm the exclusive right for a year to sell windmills manufactured by the former in certain named counties and by which such firm agreed to thoroughly and fairly canvass the territory; not to sell above or below certain prices; not to keep in stock or engage in the sale of any other windmill goods; and to make weekly returns of sales and monthly settlements. The title to the windmills shipped to such firm was to remain in the manufacturer until a bona fide sale had been made. The court held that by such contract the relation of principal and agent was created,[64] and said: "In the case before us it was entirely within the discretion of the principal, before as well as after the contract was signed, as to how many of its windmills it would send into the named territory, as well as to decline to sell for less than the net price, or permit its agent to sell for others. It controlled them all, and therefore there was no union or association of otherwise independent, separate and possibly competing 'capital, skill, or acts' and hence no combination. We therefore answer the question certified in the negative. If the title to the windmills had passed by the contract and shipment, thus establishing the relation of vendor and vendee, instead of principal and agent, between the parties thereto, a different result might have been reached." [65]

§ 409. Sale of Business and Good Will—Contracts Not to Engage in Competition.

A statute the purpose and effect of which is to prevent "competition in selling or fixing the price or preventing competition in buying" is not violated by an agreement of one selling a local mercantile business, not to engage

[63] Tex. Acts, 1889, chap. 117, p. 141.

[64] Welch v. Phelps & Bigelow Wind Mill Co., 89 Tex. 653, 36 S. W. 71.

[65] Per Denman, J.

therein in competition with the vendee in that vicinity. Such a contract when reasonable in its scope and as to duration and territory cannot lend itself to the formation of trusts and monopolies unless shown to be one of many similar contracts tending to engross that particular business in a given territory. If such contracts were held invalid it would not tend to accomplish the purpose of the statute but would operate to destroy the "good will" which one has built up in his business by rendering it valueless and unsalable if its possession to the vendee cannot be guaranteed by the seller agreeing not to engage in the same business in the same place in competition with his vendee.[66]

So in a case in Minnesota it was decided that a contract not to engage in the same business within a certain limited territory, a distance of ten miles around a certain village, for a limited time, entered into by the seller of a business as a part of the consideration was not void as being in restraint of trade and in violation of a statute construed as having application to those combinations, conspiracies and trusts which had for their purpose the restraint of trade or commerce or which tended to limit or control the supply of any article, commodity or utility, or to limit, control or raise the market price of such article and which interfere with open and free competition.[67]

So a contract for the sale of a business of selling fish, a commodity practically limitless, and its good will, limited as to time and territory and made for a valuable consideration, restraining the vendor from further prosecution of the business is not in general restraint and does not tend to create a monopoly either at common law or under the anti-trust statute of a State which has been construed as but little more than a codification of the common law upon the subject. Such a contract is as-

[66] Wooten v. Harris, 153 N. C. 43, 68 S. E. 898.

As to contracts in purchase of good will and business being a violation of the Sherman Anti-Trust Act, see § 130, herein.

[67] Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168, decided under Laws, 1899, chap. 359.

signable, is enforceable by the assignee, and the fact that the assignee of the vendee subsequently purchased the business and good will of rival dealers in fish and made similar respective contracts with them does not make the original contract invalid. And where the vendor, after selling his business, formed a corporation with other persons, who either knew of the sale, or had similar restrictive covenants with the vendee, and the corporation continued the fish business, the court restrained the vendor, the corporation and its incorporators, from continuing that business pendente lite, and also restrained certain defendants who were not parties to the original contract nor bound to the vendee by restrictive contracts, from carrying on the fish business in conjunction with the defendants definitely restrained.[68]

And in Arkansas it has been decided that the anti-trust act of 1905,[69] was not violated by an agreement between several local insurance agencies, having no authority to fix the price or premium to be paid for insuring property, to transfer their business and good will to another and also not to engage in the same business for a limited time and within a limited space, the declared object of such agreement being to decrease the expenses of the several agencies and there being no evidence showing that it was a combination for the purpose of fixing or regulating the price of insurance, or that it could have that effect.[70]

And where one of two partners in the drug business sold his half interest to the other, agreeing to convey his good will therein to the remaining partner and also not

[68] Booth & Co. v. Seibold, 37 Misc. R. (N. Y.) 101, 74 N. Y. Supp. 776.

[69] Ark. Acts, 1905, p. 1.

[70] Bloom v. Home Insurance Agency, 91 Ark. 367, 121 S. W. 293. The court said: "The purpose and aim of this contract was not to stifle competition. Its object was to sell and transfer a business and the good will of that business. To maintain that good will in its integrity as a thing of value, it was essential that the vendor should not solicit and thus destroy that custom and trade which he had sold. It was therefore not invalid for the vendor to agree, for the purpose of protecting the vendee in his purchase of that good will, to abstain from engaging in the business within a limited space and for a limited time." Per Frauenthal, J.

to engage in the drug business at such place so long as the purchaser continued to engage in business there, it was decided that as the contract pleaded and proven was not unlimited as to time and place and was of a reasonable character that it was not invalid either at common law or under the Texas anti-trust acts existing prior to the act of 1903. And it was held that as the contract was entered into several years prior to the passage of the latter act and had become executed at that time such act could not be held to apply to it.[71]

In another case where a physician sold his home and his good will as a practicing physician, agreeing not to practice medicine within a radius of ten miles of the place in which he was practicing, it was decided that such agreement was not invalid either at common law or under the statute relating to combinations in restraint of trade.[72]

Again, where a person bought another's goods together with the good will of his business and the seller agreed that he would not for one year thereafter do a like business in the same town and to use every effort to secure for the buyer all the patronage and custom that he had

[71] Crump v. Ligon, 37 Tex. Civ. App. 172, 84 S. W. 250.

[72] Wolff v. Hirschfield, 23 Tex. Civ. App. 670, 57 S. W. 572, decided under Rev. Stats., Art. 5313. The court said: "In the case of Gates v. Hooper, we entertained upon the subject the view of appellant's counsel, but they were not approved by the Supreme Court. Gates v. Hooper, 90 Tex. 563. It was there declared that a transaction of this character was valid, for the reason that it was not a combination of persons, and that it was the sale of the 'good will' which was a subject of purchase and sale, that is to say, property. See also Beach on Monopolies, § 18. There is some difference between this and the case of Gates v. Hooper, as pointed out by appellant, in that the sale there was of a stock of goods and the good will of the mercantile business connected therewith. Here the sale was of defendant's home, together with his good will as a practicing physician within certain limits, the property not necessarily having connection with the practice sold. But, as both, or either, of these were valid subjects of sale, we do not regard that there is any substantial difference in the cases. If, as the authorities hold, the practice of a physician is a thing of value, and as such is a proper subject of a contract of sale, a sale thereof with such contract restrictions as are reasonably necessary to make the sale effectual, would not, under the ruling in Gates v. Hooper, fall within the prohibition of our statute." Per James, C. J.

enjoyed, there was held to be no "trust" or "combination" within the meaning of an anti-trust act making unlawful any "trust" and defining a trust as "a combination of capital, skill or acts," to carry out restriction in trade, to limit or reduce production, increase, reduce or control prices and to prevent competition.[73]

Under a Michigan statute denominated as one prohibiting "certain trust combinations" and providing that all contracts the purpose, object or intent of which shall be in any manner to prevent or restrict free competition in the sale of any article or commodity produced by mining, manufacture, agriculture or any other branch of business or labor shall be illegal and void and containing an exception therein as to contracts for the sale of the good will of a trade or business,[74] it has been decided that a contract for the purchase of the business and good will of a corporation is valid which by its terms provides that the seller will not engage in the same or a like kind of business "in the territory or the immediate vicinity of the territory" dealt in by the purchaser.[75]

But where three out of four firms engaged in the lumber business in a certain place bought out the other firm and an agreement was entered into that neither such firm nor either of the members thereof should go back into said business within the limits of such city for a period of ten years from the date of the agreement, and the object of such agreement being to prevent competition, it was decided that though the contract was valid and binding at common law it was invalid under the statute prohibiting contracts to carry out restrictions in trade or to prevent competition.[76]

§ 410. **Sale of Business and Good Will—Contracts Not to Engage in Competition—Exception in Statute as to.**

Under a statute making invalid all contracts or agree-

[73] Gates v. Hooper, 90 Tex. 563, 39 S. W. 1079, rev'g 39 S. W. 186.

[74] 3 How. Ann. St., § 9354j.

[75] Davis v. A. Booth & Co., 131 Fed. 31, 65 C. C. A. 269, modifying order 127 Fed. 875.

[76] Corner v. Burton-Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969.

ments by which any person agrees not to engage in any trade or business whether reasonable or unreasonable, partial or general, limited or unlimited, excepting, however, any such contract where the only object is to protect the vendee or transferee or the good will of the trade or business sold and transferred for a valuable consideration in good faith and without any intent to create, build up, establish or maintain a monopoly, it has been decided that in transferring all their interests as stockholders of a corporation to complainant and in stipulating not to engage in a certain business in the city where the sale was made for five years the defendant vendors were within such exception.[77] The court said: "Technically, the sale to the corporation did carry the good will to it, but the stockholders who constituted the corporation became the real owners of the business and the good will in proportion to their shares, for they were the owners of the artificial body which they were permitted to erect. That this may have been a qualified right, so far as control is concerned, may be admitted, but such as it was they attempted to sell it to the complainant, and we are of the opinion that it was within the exception of the statute, reasonably construed. In this we are aware that we are at variance with the view taken by the learned court of California, and it is not without hesitation that we have felt constrained to reach a different conclusion. Counsel seek to distinguish that case from the present, but we think that it cannot fairly be distinguished. We cannot disapprove of the logic of that opinion, if its premises be admitted, but we think that it may reasonably be said that a stockholder in a corporation has such an interest in its business and good will within this statute, as to make a purchaser of interest and good will a transferee of the same, which appears inconsistent with the view taken in that case." [78]

In the California case referred to by the court the

[77] Buckhout v. Witner, 157 Mich. 406, 122 N. W. 184, decided under § 6, Act No. 329, Pub. Acts 1905.

[78] Per Hooker, J.

Civil Code provided that: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." By the following section it was provided as follows: "One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." [79] In this case it was alleged that defendant who was a stockholder in the plaintiff corporation had sold his stock therein and his interest in the good will of the business and agreed not to engage in the same business in such city or county, and it was declared that a stockholder cannot transfer the good will of the corporation as he has no vendible interest therein and that the contract was not within the exception of the statute but was in restraint of trade and void.[80]

And under a statute prohibiting contracts restraining anyone from exercising a lawful vocation but permitting in the case of the sale of the good will of a business or of the dissolution of a partnership a contract not to carry on a similar business within a certain county or city it has been decided that, where there was a dissolution of a partnership and a contract reciting the sale by the retiring partner of the good will and business, an agreement entered into at a subsequent date reciting the sale by defendant to plaintiff of abstract books, iron safe and letter press for a certain sum and stipulating as a further consideration that plaintiff should give defendant the free use of the abstract books and should keep them in defendant's office and that defendant should not compile abstracts or engage in the abstract business was in violation of the statute, the partners not being partners at the time of the subsequent agreement, and the sale not

[79] Cal. Civ. Code, §§ 1673, 1674.

[80] Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94.

being one of good will, as it was sold by the first agreement and there was no mention thereof in the subsequent one.[81]

§ 411. Sale of Business and Good Will—Laundry Not a Manufacturing Establishment.

A laundry is not a manufacturing establishment within the meaning of the provision of an anti-trust act prohibiting contracts, agreements or combinations between persons engaged in the "manufacture or sale of any article of commerce" for the purpose of fixing the price or limiting the amount, or to suspend or cease the sale or manufacture of such products. So such provision was not violated by a contract for the sale of the business and good will of a laundry which as part consideration for the purchase price stipulated that the vendors should not engage in the laundry business in said city for a period of five years.[82] The court said: "The contract in question forbids the defendants from engaging in a particular business, in a single city, for a limited time. It is supported by a valuable and sufficient consideration. The restriction imposed is reasonably necessary for the protection of the plaintiff's interests and is not an undue interference with, or impairment of, the rights of the public." [83] And it was decided that an agreement of such a character as the above, not being within the inhibition of the statute, might in a proper case be enforced by injunction.

§ 412. Agreement to Refrain from Entering Into Business.

A contract whereby one who contemplates entering into a certain business at a certain place, refrains from doing so and agrees not to do so in the future is in violation of a statute making void every contract by which

[81] Prescott v. Bidwell, 18 So. Dak. 64, 99 N. W. 93, decided under §§ 1277, 1278, 1279, of the Rev. Civ. Code.

[82] Downing v. Lewis, 56 Neb. 386, 76 N. W. 900.

[83] Per Sullivan, J.

one is restrained from exercising a lawful profession, trade or business except in the case of the sale of the good will of a business.[84]

§ 413. Agreements Between Brewers—Not to Sell to One Indebted—To Raise Price.

An agreement between brewers that they will not sell to any person who is in debt to any one of them until such debt has been paid has been held to violate a statute denouncing any agreement, arrangement or combination made with a view to lessen full and free competition in the importation, manufacture or sale of any article.[85] The court said in this case: "By such understanding and agreement between the brewers, no brewer would sell to a person indebted to another brewer for beer, and consequently the party indebted was deprived of the right of having them to compete for his trade. He was deprived of the benefit of competition and left at the mercy of his particular creditor who could impose any price he saw fit. Suppose the retail dealers at any place were to enter into an agreement that they would not sell to anyone who was indebted for goods to either of the others, would not the effect be that the debtor would be confined to the one merchant and subject to any extortion he might conclude to impose? It would not be contended, at least it ought not, that a lawful agreement could be made that but one member of the whole number could sell to certain persons or classes of persons. Yet the effect of the agreement is as broad as that. When the others agree not to sell to the debtor of the creditor member, they deprive the debtor of the right to buy of any other than the creditor. The agreement imposes a penalty upon a condition which is not unlawful, but merely unfortunate. The effect and tendency of such agreements are wrong and are not only under the ban of the statute aforesaid, but they are against public policy." [86]

[84] Webb Press Co. v. Bierce, 116 La. 905, 41 So. 203.

[85] Heim Brewing Co. v. Belinder, 97 Mo. App. 64.

[86] Per Ellison, J.

Where a statute forbids any arrangement, agreement or understanding for the purpose of regulating or controlling, or fixing the price of any merchandise, or property of any kind, a combination among brewers, to increase the price of beer to the extent of the war tax therein and which has for its purpose the throwing the entire burden of the tax upon the purchasers, by raising the price of an intoxicant, violates the statute even though the law does not favor the increased use of intoxicants.[87]

§ 414. Agreement Between Bricklayers' Union and Mason and Builders' Association.

An agreement between a bricklayers' union and a mason builders' association, whereby the members of the latter were to include in their contracts for building, all cutting of masonry, interior brickwork, installing of concrete blocks, all of certain designated fireproofing work, and were not to lump or sublet the installation, if the work in connection therewith was bricklayers' work as recognized by the trade; the men employed upon the construction of the walls to be given the preference and which provided that no members of the bricklayers' union should work for anyone not complying with the rules and regulations agreed to, has been held not to be a contract, agreement or combination to create a monopoly "in the manufacture, production or sale * * * of any article or commodity of common use" within the meaning of a statute making contracts or combinations of this character illegal and void.[88]

[87] Commonwealth v. Bavarian Brewing Co., 23 Ky. L. Rep. 2334, 66 S. W. 1016.

[88] National Fireproofing Co. v. Mason Builders' Assn., 169 Fed. 259, 94 C. C. A. 535, construing N. Y. Laws, 1899, p. 1514, chap. 690, which provides as follows: "Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production

§ 415. Associations of Cattle Owners, Buyers and Sellers—By-Laws and Rules.

A statute making unlawful any trust or combination for the purpose of creating or carrying out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of the State,[89] is violated by an association of persons and corporations engaged in the business of buying and selling live stock and practically controlling that business at the place of operation, which has a by-law forbidding its members to buy or sell live stock for others without charging a commission therefor of at least fifty cents a head.[90]

But where a voluntary association formed for the mutual benefit of its members, in the business of buying and selling cattle on the market, adopted a rule, or a by-law, prohibiting one another from dealing in the market, either with non-members engaged in the same business or with others who dealt with such non-members, and they enforced it by other rules and by-laws making its violation punishable by fine or expulsion from the association it was held that because such rules, or by-laws, operated directly on the members of the association alone, and only indirectly and remotely on those outside

or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation, is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void."

[89] Kan. Laws, 1897, chap. 265, § 1; Gen. Stat., 1901, § 7864.

[90] State v. Wilson, 73 Kan. 343, 84 Pac. 737. The court said in this case: "The business of buying and selling cattle is one permitted by the laws of this State. An agreement among the members of an association which practically controls this business at a great commercial center that they will make no purchases or sales for others without charging as a commission for their services at least fifty cents for each head of cattle handled obviously creates a restriction in the full and free pursuit of that business. It also seemingly creates a restriction in commerce." Per Mason, J.

In Kansas, chap. 158 of the Laws of 1891 (Gen. Stat., 1901, §§ 2439–2441), prohibiting combinations to prevent competition among persons engaged in buying and selling live stock was superseded by the general Anti-Trust Law of 1897 (Laws, 1897, chap. 265; Gen. Stat., 1901, §§ 7864–7874); State v. Wilson, 73 Kan. 343, 84 Pac. 737.

As to violations of Sherman Anti-Trust Act by associations of cattle dealers, see § 149, herein.

of it, the latter did not have sufficient interest to maintain an action of injunction to restrain the association from the enforcement of the penal provisions in question. And the court said that there were many statutory provisions condemnatory of what are called trusts and monopolies but that none of them gave a right of action in equity to individuals who did not on general equitable principles already possess it. The court then referred to a statute which it declared would seem to interdict membership in the association so long as it maintained the by-laws in question,[91] but that it was entirely penal in character and its provisions enforceable only by criminal prosecution; that equity does not give a private right of action to an individual for the doing of a wrongful act, merely because the statute has denounced the act as a crime and that the enactment of a statute for the suppression of a public wrong does not vest in the individual a right of action to suppress it.[92]

And a statute prohibiting the entering into of any pool, trust or combination to control or limit the trade in any article or thing or to limit competition in such trade by refusing to buy from or sell to any person or corporation any such article for the reason that such person or corporation is not a member of or a party to such pool, trust or combination is not violated by a by-law of a live stock exchange providing for the expulsion of a member who has been proved guilty of a violation of commercial honesty and forbids its members from having any further dealings with him. The object of such a statute is to promote the public welfare, and not to outlaw harmless combinations or those which are beneficial in their nature. And the enforcement of such a by-law would tend to inspire confidence and to increase and not to limit competition and trade.[93]

[91] Kan. Laws, 1891, chap. 158, § 2.

[92] Downes v. Bennett, 63 Kan. 653, 66 Pac. 623, 55 L. R. A. 560, 88 Am. St. Rep. 256.

[93] Gladish v. Kansas City Live Stock Exchange, 113 Mo. App. 726, 89 S. W. 77.

§ 416. Contract Between Cotton Seed Oil Manufacturers—Withdrawal of Agent by One.

Under a statute making unlawful any trust, combination or contract to hinder competition in the sale or purchase of a commodity and providing that "Every contract or agreement to enter into or pursue any trust and combine, and every contract or agreement made by another with any trust and combine, or with any member of a trust and combine, for any purpose relative to the business of such trust and combine, is void, and cannot be enforced in any court," a contract entered into between two cotton seed oil manufacturers is invalid which by its terms provides for the withdrawal by one from a certain territory of its agent for the purchase of cotton seed such party to be protected from liability to the agent by the other party who agrees to furnish the former a certain amount of seed.[94]

§ 417. Corporation Composed of Crushed Granite Dealers—Agreement as to Bluestone.

Where a corporation was organized composed of several crushed granite dealers in St. Louis for the purpose of buying and selling crushed granite and the sole stockholders of such corporation were the chief officers of the individual members, and the several members of the corporation entered into separate contracts with it to sell to it all the crushed granite they produced at an agreed upon price and in case they sold to any other person a penalty of a specified amount per ton was to be paid by them it was decided in an action against one of the members to recover the penalty so provided for; that all of such contracts were links and necessary links in the combination which was illegal under the statute.[95]

An agreement between the producers of nearly the

[94] Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co., 90 Miss. 551, 43 So. 435, 8 L. R. A. (N. S.) 1053.

[95] Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

whole product of a commodity known as Hudson River bluestone and of it least ninety per cent of the whole amount sold, and a company which engages to sell all the marketable stone produced by them for the ensuing six years at prices fixed by an association composed of such producers, and to apportion the sales in specified proportions between them, no sales to be made except through the company, has been held void in New York as against public policy, in that it threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced.[96]

§ 418. **Consolidation of Gas Companies—Agreements Between.**

In New York it has been decided that the provisions of the Stock Corporation Law [97] or of the Laws of 1899,[98] prohibiting combinations to create a monopoly, or for the unlawful restraint of trade or to prevent competition were not violated by the organization of the Consolidated Gas Company of New York City by the consolidation of six other companies and its subsequent purchase of stock of other gas and electric companies under the authority of the provisions of the Stock Corporation Law [99] since the power to purchase stock of other corporations conferred by such provision must be exercised so as not to contravene the statutes against monopolies and the consolidation of public lighting companies, even if effected for the purpose of preventing competition, did not create a monopoly within the meaning of the statute, for no exclusive right was thereby attained, nor could the price of gas or electricity be arbitrarily fixed by the corporation as both of these matters were within the control of the legislature which might fix the maximum

[96] Cummings v. Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 925, 52 L. R. A. 262, 79 Am. St. Rep. 655, aff'g 15 App. Div. 602, 44 N. Y. Supp. 787.

[97] Section 7.

[98] Chap. 690.

[99] Section 40.

rate and compel the production and sale of gas to consumers.[1]

In Arkansas it has been decided that the anti-trust law of 1905 had for its object the preventing of a combination among producing competitors to fix the prices to the detriment of consumers and that an agreement by a company having a franchise to supply gas to the consumers in a certain city to purchase natural gas from another company at certain fixed prices is not a combination to fix the price of such gas within the prohibition of the act; there being no competition as to the supply of natural gas between the parties to the contract.[2]

§ 419. **Agreement Limiting Right to Buy Grain.**

An agreement entered into by all the dealers on a certain market, limiting their right, severally, to buy all the grain they otherwise might on such market, is an agreement in restraint of trade, and falls within the penal terms of an anti-trust act forbidding combinations to create or carry out restrictions in trade or commerce.[3]

§ 420. **Agreement Between Ice Companies.**

A combination in restraint of trade was held in Texas to be violative of the anti-trust statute of that State where it was shown that the appellant was a corporation authorized by its charter to manufacture and supply ice to the people of a certain city, and that subsequently another corporation, whose officers were officers of the appellant corporation and other companies in the same business in that city, was chartered for the same purpose, that no plant was erected by the latter who purchased their wagons and contracted to buy the ice manufactured by them and that the other companies after such contract was entered into would not sell their

[1] Matter of Attorney General, 124 App. Div. (N. Y.) 401, 108 N. Y. Supp. 823.

[2] Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975.

[3] State v. Smiley, 65 Kan. 240, 69 Pac. 199, affirmed 196 U. S. 447, 25 Sup. Ct. 289, 49 L. ed. 546.

ice to anyone but the latter company which furnished the public with ice at a fixed price.[4]

§ 421. Agreements Between Insurance Companies or Agents to Fix Rates.

Insurance has been held to be a commodity within the meaning of a statute prohibiting the formation of any combination to regulate or fix the price of "oil, lumber, coal * * * or any other commodity." So it was decided that a compact between local insurance agents in a city to fix the rates upon all risks therein, imposing certain penalties for taking of risks at less rates than those fixed by the association was within the inhibition of such a statute.[5]

But in Kentucky, under a statute making it unlawful to form any pool, trust, combine agreement or "for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind" or having for its object the "fixing or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold" it

[4] Crystal Ice & Mfg. Co. v. State, 23 Tex. Civ. App. 293, 56 S. W. 562.

[5] Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479. The court said in this case: "It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive legislature since the act passed, and no one has thought that the act referred to such companies. However that may be we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever. Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson in his Law Dictionary defines the word as 'convenience, privilege, profit, gain, popularity, goods, wares, merchandise.' We see no reason why in the act, the word should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law." Per Granger, J.

has been decided that it is not an indictable conspiracy within the meaning of the statute to conspire to fix insurance rates. The court in this case did not decide the question upon the meaning of the word "commodity" but upon that of "property" and decided that the latter word did not include the right to enter into a contract of insurance nor to fix the terms upon which such a contract could be made.[6] The court said in this connection: "The language used would indicate that the statute was intended to prevent pools and trusts formed for the purpose of fixing the price of merchandise and manufactured articles. Without giving undue weight to the argument that the punctuation shows the word 'property' to be qualified by the adjective 'manufactured' it seems certain that the ejusdem generis rule of construction does apply, and that property referred to in the section was property of the same general class or nature as that described previously by the words 'merchandise and manufactured articles.' And while it may be admitted that a contract, either for labor, or for indemnity against contingent loss, like an insurance contract when executed, becomes property, because it is then a chose in action, the right to enter into such contracts, which belongs to all persons capable of contracting,—as well natural persons as artificial ones authorized by their organic law to make such contracts,—would hardly be considered to be included by the word 'property' unless that word were used in a much broader sense than it is customarily used by lawyers or in statutes".[7]

In one of the earlier cases involving the application of an anti-trust statute to insurance companies it was decided that foreign insurance companies doing business in a State, that combines to control and increase the rates of insurance on property within a city in the State violate the provisions of an act entitled "an act to declare unlawful trusts and combinations in restraint of

[6] Ætna Insurance Co. v. Commonwealth, 106 Ky. 864, 21 Ky. Law Rep. 503, 51 S. W. 624, 45 L. R. A. 355.

[7] Per DuRelle, J.

trade and products and to provide penalties therefor" and that local agents who attempt to and do enforce such combined rates are subject to prosecution under the provisions of the act.[8]

§ 422. Agreements Between Lumber Dealers.

An agreement between retail lumber dealers, whereby one dealer agrees to "protect" the other by asking a higher price than the other for the same bill of lumber submitted to both for prices is in violation of a statute prohibiting contracts in restraint of trade. And an agreement made by a number of retail lumber dealers in a county to sell lumber and building materials within the county at certain fixed prices and to divide territory is illegal and void as in restraint of trade and competition and will be enjoined.[9]

§ 423. Contracts Between Proprietors of Newspapers and Job Printing Establishments.

Where the proprietor of a newspaper and a job printing plant entered into a contract with the proprietors of a rival newspaper and job printing plant located in the same town by which he agreed to discontinue the publication of his paper and to do no job work or printing of any kind within the county for a term of five years in consideration of which he was to receive from the other parties to the contract one-half of the moneys received by them for the publication of legal notices during such term it was decided that the contract was not a violation of a statute prohibiting any contract by which anyone was prohibited from exercising a lawful profession, trade or business, but that it was a sale by such person of the good will of his business and came within the exception in such statute that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county,

[8] State v. Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 54 Am. St. Rep. 152, decided under chap. 257 of Kan. Laws of 1889.

[9] State v. Adams Lumber Co., 81 Neb. 392, 116 N. W. 302.

city or a part thereof so long as the buyer or any person deriving title to the good will from him carries on a like business therein." [10]

§ 424. Contracts Between Newspaper Publisher and Carriers.

A contract between a publisher of a newspaper and its carriers which imposes upon the latter as the condition of their being retained in its service a requirement that they shall not act as carriers for a rival newspaper which is on the eve of entering into competition with it has been held to be no violation of an anti-trust statute.[11] The court said: "That this was not a restriction of competition among the carriers is apparent, since they were in no manner in competition with each other. Nor was any other publisher a party to this transaction. Respondent simply declined to compete with itself. No one was concerned in this agreement, so far as the petition states, except respondent and its agents. In other words, attempt is made to allege an agreement to which there was, in legal effect, but one party. If the anti-trust statute does not prohibit the refusal of a single individual to sell, save to customers of his choice, or to sell at all [12] neither for a stronger reason does it deprive respondent of the right to withdraw the power to represent it in selling its paper from those who refuse to protect its interests by refraining from aiding its competitors." [13]

§ 425. Agreements Between Packing Companies to Control Price of Meat.

Where it appeared that certain packing companies had entered into an agreement for the purpose of controlling and maintaining the prices of dressed beef and

[10] Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 613, decided under § 3927 of Rev. Code, 1899.

[11] Staroske v. Pulitzer Pub. Co. (Mo., 1911), 138 S. W. 36, construing Rev. Stat., 1899, § 8978.

[12] Whitwell v. Continental Tobacco Co., 125 Fed. 461, 60 C. C. A. 290, 64 L. R. A. 689.

[13] Per Blair, C.

pork in certain cities within the State; that they formed an association which met once a week for the purpose of discussing and fixing the list prices to be charged and agreed at these meetings to maintain such prices under a penalty for each violation of the agreement; that the cooler managers gave rebates in money or beef in many instances, stating that they could not, however, sell at less than the fixed prices which were given to them each week and the rebates being given to circumvent the others in the combine: that such managers had advised the buying by their customers of a quantity of meat, saying the price would increase on a certain day, which it did; that after meat which had been in the coolers a certain length of time, and known as "concession meat" was allowed to be sold at a price less than that fixed after other cooler managers had examined and agreed thereto; and that all of said combinations were abandoned after the attorney general had begun the initiatory steps in the prosecution it was decided that the law against pools, trusts, agreements and combinations to regulate or fix the price of any article was violated and that under the circumstances a judgment of ouster might be given but that the ends of justice would be satisfied by the imposition of a fine and the payment of all costs in the case.[14]

§ 426. Contracts in Respect to Patented Articles.

In Wisconsin a statute providing that any foreign corporation which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity or to control or fix the price of any commodity shall have its authority to do business in the State canceled and annulled,[15] as not extending to contracts made in reference to the sale of a patented

[14] State ex inf. Crow v. Armour Packing Co., 173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515, followed in State ex inf. Crow v. Swartzchild & Sulzberger Co., 173 Mo. 394, 73 S. W. 1132.

As to violations of Sherman Anti-Trust Act by dealers in fresh meat, see § 148, herein.

[15] Wis. Laws, 1905, chap. 506, § 1770g.

article.[16] The court said: "While, under the patent laws, a patent creates a monopoly, it is not a monopoly of what existed before and belonged to others, which is the true idea of a monopoly, but it is a monopoly of what did not exist before and what belongs to the patentee. In consequence it does not create an odious monopoly, and the rights of patentees thereunder are to be liberally construed." [17]

§ 427. Agreement Between Physicians—Schedule of Prices.

A statute relating to an unlawful combination, pool or trust to control the price or limit the quantity of any article of merchandise or commodity is aimed at unlawful combinations in restraint of trade, and does not prohibit physicians from associating themselves together for the purpose of agreeing upon a schedule of prices to be charged for their professional services.[18]

[16] Butterick Publishing Co. v. Rose, 141 Wis. 533, 124 N. W. 647.

[17] Per Barnes, J., quoting from 30 Cyc. 816.

As to contracts between owners of patents and between owners and licensees under the Sherman Anti-Trust Act, see §§ 134–137.

[18] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276. The court said: "The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold, or produced as merchandise. This is a strained and unnatural construction, and gives to the word 'commodity' a meaning which is perhaps admissible, but is not the commonly accepted one. * * * The statute in question was aimed at unlawful conspiracies or combinations in restraint of trade, and was manifestly not intended to cover labor unions. It is the right of miners, citizens, laborers, or professional men to unite for their own improvement or advancement or for any other lawful purpose, and it has never been held, so far as we are able to discover, that a union for the purpose of advancing wages is unlawful under any statute which has been called to our attention. * * * And it would be a strained and unnatural conclusion to hold that a statute aimed at pools and trusts should be held to include agreements as to prices for labor because the word 'commodity' is used therein. As the right to combine for the purpose of securing higher wages is recognized as lawful at common law, a statute enacted to prohibit pools and trusts should not be held to apply to combinations to fix the wages for labor, unless it clearly appears that such was the legislative intent. Whatever of doubt there may be regarding the power of the legislature to do so, we do not think that the act in question covers combinations to fix the labor price whether that labor be skilled or unskilled." Per Deemer, J.

§ 428. Physician—Dissolution of Partnership—Agreement Not to Practice.

Where two physicians practicing their profession in a certain city, as copartners, entered into a written contract for the dissolution of their copartnership, one purchasing the property of the copartnership and the other agreeing not to practice medicine in the vicinity of such city, it was held that such contract was invalid and in violation of the statute prohibiting contract by which one is restrained from exercising a lawful profession, trade or business of any kind except in the case of the sale of the good will of a business when the seller may agree not to carry on a similar business within a specified county, city or town, so long as the buyer continues in business or in the case of the dissolution of a partnership when an agreement may be made that none of them shall carry on a similar business within the same city or town where the partnership business has been transacted. The court declared that the contract was not within the first provision as it was not limited to a time during which the plaintiff should carry on a like business and that the second provision was to be construed as not meaning that any one of them would refrain from carrying on a similar business that they might agree that none of them would do so.[19]

§ 429. Agreements Between Dealers in Plumbers' Supplies and Master Plumbers—Plumbers' Association.

Where all the wholesale dealers in plumbers' supplies and a large majority of the master plumbers of Detroit and its suburbs organized a club, the rules of which provided that the wholesalers should sell to no one not a master plumber, and should sell to members at prices fixed by a certain list and charge nonmembers a higher price than members; that members would buy all their supplies of the wholesale members, and in figuring estimates on jobs would be governed by the price list sup-

[19] Hulen v. Earel, 13 Okla. 246, 73 Pac. 927, construing Wilson's Revised Statutes, §§ 819, 820, 821.

plied by the club, and submit their estimates to the secretary of the club before putting in their bids it was held that the club constituted a combination in restraint of trade within the Michigan Anti-trust Act of 1889.[20]

And in a case in Missouri where an agreement was entered into between a plumbers' association and manufacturers and dealers whereby supplies would only be sold by the latter to members of the association who were in turn to boycott any dealer who sold to one not a member, there was held to be an illegal conspiracy in violation of the statute and that it was competent for the court to restrain the parties to the agreement from keeping its terms or demanding that they be kept and thus leave them or each of them free to deal or not to deal with appellant who was injured by their refusal to do so.[21]

§ 430. Agreements Between Publishers—Price at Retail—Not to Sell to Certain Class.

An agreement between publishers representing ninety-five per cent of the books published in the United States, and ninety per cent of the business done in the book trade, that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such net copyrighted books and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers and jobbers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price or whose name would be given to them by the association as one who cut such prices; and that evidence should not be required by the bookseller or jobber in order to restrain him from selling to one who had been blacklisted but that all that should

[20] Hunt v. Riverside Co-Operative Club, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420.

[21] Walsh v. Association of Master Plumbers, 97 Mo. App. 280.

be required to govern his action and to prevent him from selling to such persons should be that the name had been given to him by the association as one who cut such prices is construed as an agreement which while purporting to secure to the owner and publisher of copyrighted books the monopoly permitted by Federal law, may, and as practically construed by the parties does operate in fact so as to prevent the sale of books of any kind or at any price to any dealer who resells, or is suspected of reselling, copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not. Such an agreement undertakes to interfere with the free pursuit of a lawful business in which a monopoly is not secured by the Federal statute, that is, of dealing in books which are not protected by copyright. And this agreement was held by the New York Court of Appeals to be in violation of the laws of that State enacted to prevent monopolies in articles or commodities of common use and to prohibit restraint of trade or commerce.[22]

§ 431. News Association for Distributing.

A statute prohibiting any pool, trust, agreement, or combination "to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever or the price or premium to be paid for insurance of property" or to fix or limit the production of the things whose price may not be regulated or fixed [23] has been held to have no application to a corporation formed for the purpose of gathering and distributing news, the business of which is held to be one of personal service, an occupation. And it was decided that

[22] Straus v. American Publishers' Association, 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, aff'g 85 App. Div. 446, 83 N. Y. Supp. 271, 50 N. Y. Supp. 1064, and decided under the Anti-Monopoly Act of 1899 (Laws, 1899, chap. 690).

As to violations of Sherman Anti-Trust Act by holders of copyrights, see § 133, herein.

[23] Mo. Rev. Stat., 1899, § 8965.

there was no element of property "affected with a public interest which could furnish a basis for the charge of a monopoly."[24]

§ 432. **Agreement Between Retailers Not to Purchase from Certain Wholesalers.**

An agreement between retailers not to purchase from wholesale dealers who sell direct to consumers within prescribed localities amounts to a conspiracy in restraint of trade within the meaning of the anti-trust statute of Mississippi "intended to hinder competition" in the production, importation, manufacture, transportation, sale or purchase of a commodity." [25]

§ 433. **Agreements Between Salt Manufacturers.**

Where a contract was entered into by which one of the parties agreed to purchase their entire demands of salt from the other at the list prices of the latter for a period of two years, that they would not purchase any other salt from any other parties and would not import or cause to be imported or bring any salt to the Pacific Coast of North America other than such salt as they might purchase from such other party and to discourage in any possible manner any such shipments or importations of salt by any other parties, it was decided that such contract was in violation both of the Sherman Anti-Trust Act [26] and also of a provision of the Civil Code of California providing as follows: "Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by the next two sections, is to that extent void," [27] which

[24] State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. But compare, as to charge of monopoly, Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.

[25] Retail Lumber Dealers' Assoc. v. State (Miss., 1909), 48 So. 1021, case affirmed in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826; Code Miss., 1906, chap. 145, § 5002 (Laws, 1900, chap. 88); compare Laws Miss., 1908, p. 124, chap. 119.

[26] Act Cong., July 2, 1890.

[27] Cal. Civ. Code, § 1673.

referred to agreements not to carry on a similar business in cases of a sale of the good will of a business and of a sale by a partner in anticipation of a dissolution of partnership.[28]

In another case plaintiff agreed to sell to defendant all the salt it manufactured. The contract contained a provision whereby it was possible for defendant, upon payment of a certain sum as rental, to stop the manufacture of salt by plaintiff. Its president, who made the contract with defendant, knew that defendant controlled many other salt producers, and was engaged in an attempt to control the salt market through contracts with producers. He also assisted defendant in its attempt so to control the market. Prior to the making of the contract sued upon, the parties had prepared another contract, which was rejected because counsel advised that it was illegal. All the evidence was inconsistent with a legitimate sale of salt, except the denials of plaintiff's president, and these were qualified by the facts admitted. The court held that a verdict should have been directed for defendant on the ground that the contract was illegal.[29] This was decided under a statute making illegal all contracts or agreements entered into or knowingly assented to, the purpose, object or intent of which shall be to restrict or regulate the amount of production or the quantity of any article or to regulate, control or fix the price thereof or to restrict or prevent free competition therein.[30]

Again, where a contract was entered into by which one of the parties, Getz, Bros. & Co. agreed to purchase their entire demands of salt from the other, The Federal Salt Co., at the list prices of the latter for a period of two years, that they would not purchase any other salt from any other parties and would not import or cause to be

[28] Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114.

[29] Detroit Salt Co. v. National Salt Co., 134 Mich. 103, 96 N. W. 1. One judge dissented, being of the opinion that there was sufficient evidence consistent with legality to raise a question for the jury.

[30] 3 Mich. Comp. Laws, § 11377.

imported or bring any salt to the Pacific Coast of North America other than such salt as they might purchase from the party of the second part and to discourage in any possible manner any such shipments or importations of salt by any other parties and upon the same date another contract was entered into by the same parties by which Getz Bros. & Co. sold all salt in transit to San Francisco to The Federal Salt Co. in consideration of ten thousand dollars, it was decided in an action upon two checks for five thousand dollars each, given for such sum, that the checks with the contracts formed parts of one transaction and were to be construed together and that the contract being an entire one and illegal both under the Sherman Anti-trust Act [31] and the provisions of the Civil Code,[32] no action could be maintained upon the checks.[33]

§ 434. Contracts Relating to Telephone Service.

Where two telephone companies entered into a contract by the terms of which each party agreed to transmit all messages destined to points on the lines of the other party not reached by its own system or wires to and over the lines owned or controlled by the other party and also agreed not to enter into any contract with any other person, firm or corporation whereby any of the rights, privileges or advantages acquired by either party to the contract might be impaired, it was decided in a recent case in Missouri that such contract was not in restraint of trade or one tending to create a monopoly but that it appeared from the facts of the case that the object of such contract was to foster competition as between such companies and a rival company.[34]

A contract between a long distance telephone company which did not operate at a certain place and an individual

[31] Act Cong., July 2, 1890.

[32] Cal. Civ. Code, § 1673.

[33] Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114.

[34] Home Telephone Co. v. Sarcoxie Light and Telephone Co. (Mo., 1911), 139 S. W. 108.

owning a local telephone system which operated a local system at such place by the terms of which a connection between the two lines was provided for, the local system in consideration therefor agreeing that it would not extend its lines so as to conflict with the business or interests of the other, would not make any connection with any other lines, would not extend its lines outside of the county, and would give its long distance business exclusively to the other has been held not to be in violation of a code provision [35] which makes unlawful as a trust and combine any "combination, contract, understanding, or agreement, expressed or implied, between two or more corporations, or firms, or associations of persons, or between one or more of either with one or more of the others" in "restraint of trade" or to "monopolize, or attempt to monopolize, the production, control, or sale of any commodity, or the prosecution, management or control of any kind, class or description of business." [36] The court construed the provisions as to contracts in restraint of trade and in regard to monopoly as meaning those contracts that were invalid and against public policy before the enactment of the statute. As to this particular contract it was said: "What is unreasonable about it in the absence of proof showing that it was designed for the purpose of stifling competition or creating a monopoly? These two companies were not competitors. This contract bears every mark of a contract entered into in good faith and only for the purpose of affording a fair protection to the interests of the party in whose favor it was made, and not so wide in its scope and operation as to interfere with the interests of the public. * * * The contract promoted the efficiency of both systems, and made both of greater use to the public as well as more valuable to the owners. If the contention that this contract is illegal is to prevail, the court must hold that while either of these systems could lawfully

[35] Miss. Code of 1906, § 5002, as amended by the Laws of 1908, p. 124.

[36] Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General (Miss., 1911), 54 So. 670.

purchase the other, and stipulate that the selling system would not engage in business for a reasonable period of time and within a territory reasonably necessary for the protection of the purchasing company, yet when they do the lesser thing of only buying and selling the right to use the long distance in connection with the local business, leaving both systems to manage and control their business without interference with the other, the lesser contract is illegal. The contract * * * was not in violation of the law. It was based upon a valuable consideration to both systems and was not inimical to the public interest in any way." [37]

§ 435. **Telegraph Companies—Service of Is Not a Commodity.**

In New York it has been decided that a telegraph company does not manufacture, produce or sell a commodity or article in common use such as is within the prohibition of the anti-trust act of that State,[38] it being declared that in the popular and received import of the word a "commodity" is a tangible article and that in view of the laws of the State relating to telegraph companies, it would be wresting the meaning to a particular purpose to hold that the service or labor of transmitting a telegram is such a commodity as is contemplated by the act.[39]

§ 436. **Agreement Between Theatrical Owners or Managers—Plays Not Commodities.**

In New York it is decided that entertainments and plays of the stage are not articles or commodities of common use.[40]

The court declared in this case that plays and entertainments of the stage are not articles or useful commodities of common use and that the business of owning, leasing and controlling theaters, and producing plays therein is not trade. This conclusion was reached where

[37] Per Mayes, C. J.
[38] Laws, 1899, chap. 690.
[39] Matter of Jackson, 57 Misc. R. (N. Y.) 1, 107 N. Y. Supp. 799.
[40] People v. Klaw, 55 Misc. R. (N. Y.) 72, 106 N. Y. Supp. 341.

it appeared that persons who owned or controlled theaters throughout the country arranged for booking transactions at their theaters so as to enable companies to save expense by making continuous tours without retracing their steps; had agreed not to produce in their theaters attractions controlled by rival interests and only such attractions as agreed not to play in any city where they had a theater and binding parties by booking contracts to play in their theaters in cities where they had them or to remain out of such cities and not to play in certain cities during specified periods of time and not to play in other theaters in the United States and Canada during the theatrical season covered by such booking contracts.

§ 437. Combination to Induce Employees to Break Contracts with Employers.

Where there is a combination of two or more persons to injure one in his trade, by inducing his employees to break their contracts with him or to decline to longer continue in his employment it is decided that such combination is, if it results in damage, actionable, and that a former member of such an illegal combination, whose connection with it was severed before the filing of the suit, will not be denied the protection of a court of equity against an illegal act of such combination because of his previous connection therewith. These principles were announced in a case where the complaint alleged that the defendants formed a combination among the employing printers to control and fix the price of printing done in the city of Atlanta, and, because the plaintiff refused to affiliate with the combination, they wrongfully interfered with its business and maliciously induced its employees to break their contracts with it and refuse to continue in its employment to its injury and damage.[41]

§ 438. Undertaking by Corporations to Induce Employees to Trade with Another.

An undertaking on the part of a corporation to endeavor

[41] Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137.

to induce its employees to trade with another is not a violation of a law prohibiting the formation of trusts and monopolies.[42]

§ 439. **Contract to Instruct in Treatment of Scalp and Hair—To Use Only Certain Remedies.**

Under the Missouri statute declaring all agreements between persons which tend to lessen full and free competition in the manufacture and sale of any article, product or commodity, and all agreements under the terms of which it is stipulated, agreed and understood that persons doing business in the State shall not sell or offer for sale any particular article or commodity and shall not sell or offer for sale any competing commodity, to be against public policy and void, it has been decided that where a contract was made by which one party agreed to instruct the other party thereto in a method of treatment of the scalp and hair, the latter agreeing not to use any remedies but plaintiff's while treating patients by a common method to which the former had no exclusive right, such agreement was intended and adapted to prevent the use of any remedy on the hair except plaintiff's was unlimited in respect of territory or time and was in contravention of the statute.[43]

[42] Redland Fruit Co. v. Sargent, 51 Tex. Civ. App. 619, 113 S. W. 330.

[43] Pope-Tumbo v. Bedford, 147 Mo. App. 692, 127 S. W. 426, decided under Mo. Rev. Stat., 1899, § 8966.

CHAPTER XXVII

STATE STATUTES—PROSECUTION—REMEDIES AND DEFENSES

§ 440. Parties Defendant — Who Subject to Prosecution.
441. Remedy Provided by Statute Exclusive.
442. Statutes Providing for Punishment—Fine—Imprisonment.
443. Liability Where Agreement Legal When Made—Effect of Subsequent Statute.
444. Statute Construed by Highest Court of State—Review by United States Supreme Court.
445. Annulment of Charter—Forfeiture of Franchise—Right of Stockholder to Enforce.
446. Application to Annul Charter—Granting of in Discretion of Court.
447. Foreign Corporation—Ouster of—When Court no Discretion.
448. Foreign Corporations—Nature of Right to Transact Business—Ouster of.
449. Foreign Insurance Company—Authority of Insurance Commissioner to Revoke Certificate.
450. Suit for Injunction by Person Injured—Defense.
451. Violation of Law as Preventing Relief Against Ordinance — Ceasing Violations.
452. Action for Damages—Person Injured by Conspiracy.
§ 453. Action by Party to Illegal Contract or Combination.
454. Enjoining Acts Done After Combination Declared Illegal.
455. That Corporation a Foreign One Is no Defense.
456. That Price Not Raised Is no Defense.
457. No Defense That Complete Monopoly Not Obtained.
458. Motives of Those Instigating Suit Are Immaterial.
459. Good Motives or Intent no Defense Where Statute Violated.
460. Illegality of Combination or Contract as Defense—Independent of Statute—Collateral Contract.
461. Illegality of Combination or Contract as Defense—Where Permitted by Statute.
462. Illegality of Combination or Contract as Defense Continued—Instances.
463. Illegality of Combination or Contract as Defense—Action for Rent.
464. Illegality of Combination or Contract as Defense—Contract Made Prior to Statute.
465. Illegality of Combination or Contract as Defense—Where Statute Prescribes no Mode of Procedure for Determining Illegality.

§ 466. Combination to Raise Price —Defense That Law Does Not Favor Increased Sale of Article.

§ 467. Illegality of Association as Defense to Action by for Penalty.

§ 440. Parties Defendant—Who Subject to Prosecution.

Where a large body of men combine for a particular purpose and agree between themselves to adopt a uniform course of conduct and in pursuance of such agreement the body of men so combined, or a considerable number of them, though acting separately in each transaction, pursue the course of conduct agreed upon, the law will presume that the acts committed were the result of the agreement, and will hold all those who entered into the combination and agreement as instigators, aiders and abettors of the acts and therefore responsible not only each for his own act, but each for the acts of each other and for all.[1]

And the object of a combination being against public policy and illegal the individual members thereof are liable for the combined acts of all and defendants cannot be relieved from the legal effect of their acts by reason of the fact that the organization was voluntary and that no articles of association were reduced to writing. The fact that the agreement for an illegal combination is not a formal written agreement is immaterial, since a verbal understanding or agreement or a scheme not embodied in writing but evidenced by the acts of the parties is sufficient.[2]

And in a prosecution for forming a pooling combination in violation of a statute, the conspirators may be indicted either jointly or severally. Or, if they combine under a corporate name, and the corporation executes the purpose

[1] State ex rel. Hadley v. Kansas City Live Stock Exchange, 211 Mo. 181, 109 S. W. 675.

[2] Chicago, Milwaukee & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75, and citing Ford v. Chicago Milk Shippers' Assn., 155 Ill. 166, 39 N. E. 651; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; United States v. Barrett (U. S. C. C.), 65 Fed. 62.

of the conspiracy, then the corporation may be indicted, either alone, or jointly with those or any of them entering into the conspiracy.[3]

And in a case in Kentucky it is declared, that although a corporation did not have an existence when an alleged pooling conspiracy was entered into, yet that if it was created by the conspirators for the purpose of executing their agreement, and did so, it becomes a party to the unlawful scheme, and is answerable for the acts of those conceiving or entering into it.[4]

So corporations, and their officers and agents, who conceive, effect and carry out a conspiracy can both be considered and counted in the two or more necessary to constitute an unlawful conspiracy. This is declared to be the rule independent of statute and to be founded upon principle and in furtherance of sound public policy.[5]

It is not necessary that the State proceed against all the members of a conspiracy and the indictment may be against a part of them only, it being said that there are often good reasons for such action.[6]

§ 441. **Remedy Provided by Statute Exclusive.**

Where a right is created by statute and a remedy for its violation is given by the same statute that remedy is exclusive unless the statute says otherwise. This doctrine is announced and applied in construing anti-trust statutes in Missouri.[7] The first section of this act denounces every pool, trust, agreement, combination, etc., to regulate, control or fix the price of any article therein referred to, or to limit the amount of any product or commodity to be produced, as illegal. By the next two

[3] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

[4] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

[5] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

[6] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

[7] Mo. Rev. Stat., 1899, §§ 8978–8981.

sections it is made the duty of the attorney general and the prosecuting attorneys to take certain action to prevent the violation of the statute and restrain those who should violate it. These two sections were construed as intended for the correction and prevention of such unlawful acts by proceedings in court in the name of the State. By the section next following a person injured by such unlawful act is given a remedy which is by a suit for damages wherein he may "recover threefold the damages by him sustained and the costs of the suit, including a reasonable attorney's fee" and the court declared that if defendants were guilty of violating the act as was contended by the plaintiff and the latter was injured thereby, the remedy for such injury was by an action for damages under the section above referred to. In this case, however, it was decided in a suit at law under that section, wherein marginal deposits had been made on sales of grain for future delivery, that if a proper showing were made, as of insolvency of the parties or fraud, or the like, a court of equity might hold the marginal deposits to prevent their dissipation while the suit was pending.[8]

In Mississippi the remedy for discrimination in rates by telephone companies is held not to be under the anti-trust laws of the State but to exist under the statutes conferring jurisdiction upon the Railroad Commission.[9]

§ 442. Statutes Providing for Punishment—Fine—Imprisonment.

Under a statute providing that a violation of the statute shall subject the offender to a prosecution by indictment and in other sections providing for the punishment of the offender by fine and that the fine imposed for a violation "may" be recovered by an action of debt in the name of the people it has been decided that the word "may" is used in a permissive sense and that the State has the

[8] Albers Commission Co. v. Spencer, 205 Mo. 105, 103 S. W. 523, 11 L. R. A. (N. S.) 1003.

[9] Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General (Miss., 1911), 54 So. 446.

right to either prosecute by indictment or may bring an action of debt to recover the fine imposed.[10]

And where a State anti-trust law fixed penalties at five thousand dollars a day and, after verdict of guilty for over three hundred days a defendant corporation was fined over one million, six hundred thousand dollars, the United States Supreme Court declared that the fine was not so excessive as to amount to deprivation of property without due process of law, where it appeared that the business was extensive and profitable during the period of violation and that the corporation had over forty million dollars of assets and had declared dividends amounting to several hundred per cent.[11]

An anti-trust act providing that it shall be the duty of the Secretary of State to address to the president, secretary or treasurer of each incorporated company doing business in the State a letter of inquiry as to whether such corporation "has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of the act, and to require an answer under oath" and that, on refusal of the corporation to make the required oath, the prosecuting attorney shall proceed against the corporation "for the recovery of the money forfeit provided for" in the act has been construed as not imposing a penalty upon such corporation or its officers for failure to make such answer or declaring that such failure shall constitute a public offense.[12]

In New York it has been decided that a proceeding against an alleged unlawful combination instituted by the attorney general under the authority of the Anti-Monopoly Act of 1899 [13] was not too late because the

[10] Chicago, Wilmington & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75.

[11] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g (Tex. Civ. App.), 106 S. W. 918.

[12] State v. International Harvester Co., 79 Ark. 517, 96 S. W. 119, construing Anti-Trust Act of Jan. 23, 1905, § 7, and distinguishing People v. Butler Street Foundry, 201 Ill. 236, 66 N. E. 349.

[13] Laws, 1899, chap. 690.

combination had been formed before the proceeding was commenced and even before the statute was passed, since the act was a substantial re-enactment of an earlier statute, and, according to the Statutory Construction Law, must be construed as a continuation thereof, and as it aimed to prevent the consummation and maintenance of unlawful combinations, it reached those already formed but which were still maintained and in the process of construction.[14]

§ 443. Liability Where Agreement Legal When Made —Effect of Subsequent Statute.

Even though it would be giving a penal statute a retroactive effect to make it apply to an unlawful agreement executed prior to the passage thereof by a defendant's predecessor in interest, a defendant is subject to conviction for violating the act after its enactment by making itself a party to and carrying out its illegal provisions. Though an agreement may have been legal when made yet being a continuing one, persons acting thereunder in carrying out its provisions after it is declared to be illegal bring themselves within the terms of the act.[15]

§ 444. Statute Construed by Highest Court of State— Review by United States Supreme Court.

Where the highest court of a State has decided that an agreement or contract amounts to a restraint of trade within the meaning of an anti-trust act of that State the only question for the United States Supreme Court to consider is whether such statute so unreasonably abridges freedom of contract as to amount to deprivation of property without due process of law within the meaning of the Fourteenth Amendment. This doctrine is stated in a case of a writ of error to the Supreme Court of the

[14] Matter of Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, rev'g 55 App. Div. 245, 67 N. Y. Supp. 492.

[15] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g (Tex. Civ. App.) 106 S. W. 918.

As to violations by combinations entered into before passage of Sherman Anti-Trust Act (Act of July 2, 1890), see § 127, herein.

State of Mississippi in which the latter court had construed an agreement between retail dealers in lumber not to purchase from wholesale dealers who sold direct to consumers within prescribed localities.[16]

So in an earlier case the United States Supreme Court determined that it would not inquire whether the finding of the jury was against the evidence but would take the facts as found and consider only whether the State statute was violative of the Federal Constitution. The power in a State court to determine the meaning of a State statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.[17]

§ 445. **Annulment of Charter—Forfeiture of Franchise—Right of Stockholder to Enforce.**

In Missouri under the laws of that State authorizing and directing the attorney general to institute civil proceedings by information in the nature of quo warranto against any corporation to annul its charter and forfeit its franchises wherever it has so conducted itself as to violate the anti-trust laws of the State it is decided that the Supreme Court of the State has jurisdiction and may, upon trial, if the corporation is found guilty, make a decree of forfeiture and may also in addition impose penalties for such violations of the law as it may deem proper. Such a proceeding is a civil one and not a criminal one within the meaning of the Constitution and laws of the State over which such court has no jurisdiction. And it is immaterial that the conduct of the corporation was a violation of the criminal laws of the State by which it and its officers are rendered amenable to the penalties and punishments therefor.[18]

[16] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826. See also Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276, wherein the same doctrine is announced; National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689.

[17] Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276.

[18] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. The court said: "This, however, does not proceed upon the theory that the

And likewise in New York it is declared that in an action by the people against a foreign corporation for a violation of the various State statutes prohibiting monopolies in restraint of trade, the court may decree a forfeiture of a license to do business there granted by the Secretary of State pursuant to provisions of the General Corporation Law, on proof of a systematic, willful and continuous violation of the laws of State, it being said that a special act of the legislature is not necessary to annul the license of a foreign corporation.[19]

But so far as the public right is concerned a stockholder, though the facts pleaded may be sufficient to show the existence of a trust in violation of the law, has no standing to enforce a forfeiture of the charter of the corporation. And so far as his individual interest may be affected he has no standing to ask that the corporation be wound up and its assets distributed for illegal transactions where it appears that he has participated in the illegal transactions or has been guilty of laches in acting.[20]

§ 446. Application to Annul Charter—Granting of in Discretion of Court.

In New York the granting of an application, made under the Code of Civil Procedure,[21] for leave to annul the charter of a corporation for a violation of the laws in regard to combinations to create monopolies and in restraint of trade rests in the sound discretion of the court. It is not given as a matter of right, but depends upon whether public interests require the action to be brought.[22]

corporation has been guilty of a crime and that it is being punished therefor; but upon the idea that there is an implied or tacit agreement on the part of every corporation by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the State in the manner before suggested." Per Woodson, J.

[19] People v. American Ice Co., 135 App. Div. (N. Y.) 180, 120 N. Y. Supp. 41.

[20] Coquard v. National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20.

[21] Section 1798.

[22] Matter of Attorney General, 124 App. Div. (N. Y.) 401, 108 N. Y. Supp. 823.

And in Kansas it has been decided that where a foreign corporation is transacting business under a license granted by the State and violates the anti-trust laws of the State the license and right to prosecute business within the State may be forfeited and set aside and such corporation wholly ousted from the State, or it may be prohibited from engaging in specific practices which are contrary to the laws of the State. And where in such a case a corporation has by its conduct become liable to a complete ouster the court may, in its discretion, make a limited or qualified order of ouster prohibiting certain specific acts, and retain jurisdiction and control of the parties for the purpose of making further orders in the premises should just and proper cause arise therefor in the future.[23]

§ 447. Foreign Corporation—Ouster of—When Court no Discretion.

Under a statute providing that every foreign corporation admitted to transact business in the State that is guilty of entering into any pool, trust, agreement, combination or understanding in restraint of trade, within the State, shall thereafter be prohibited from continuing its business therein,[24] the court has no discretion after the corporation is found guilty in an action begun and prosecuted under such statute to grant any other or different judgment than one prohibiting the corporation from continuing its business within the State.[25] The court said in this case: "The legislature had the right to determine what the penalty should be or they might have left it to the court to fix the penalty and determine the character of the judgment. They said in clear and explicit terms that a foreign corporation, found guilty of entering into a pool or combination in restraint of trade, 'shall be prohibited from continuing its business in the State.' What ground is there for saying that the court may disregard this direction? It seems very clear

[23] State v. International Harvester Co., 81 Kan. 610, 106 Pac. 1053.
[24] Minn. R. L. 1905, §§ 5168, 5169.
[25] State v. Creamery Package Mfg. Co. (Minn., 1911), 132 N. W. 268.

that the legislature did not intend that the court should have any discretion in regard to the punishment. It would have been easy to have used words indicating that the court might exercise its discretion but difficult to express more clearly the idea that the whole matter of the penalty was taken from the court and determined by the legislature. We cannot avoid the conclusion that we could be justly accused of legislating, were we to hold that, notwithstanding the plain language of the statute, the court may impose a less punishment, or render a judgment that would permit defendant's continuing its business within the State. We do not feel warranted in holding that the word 'shall' should be construed as 'may' in this case. It is quite apparent that the legislature meant 'shall.' The statute is mandatory in its terms, and there is nothing that leads us to believe that it was not intended to be mandatory in effect. We hold that the trial court had no power or discretion to modify the judgment as requested." [26]

§ 448. **Foreign Corporations—Nature of Right to Transact Business—Ouster of.**

Foreign corporations do business in a State not by right but by comity and the State may at its pleasure revoke the privilege which it has granted to such corporations. And it is decided that provisions of an anti-trust act for ousting corporations by civil action from the exercise of powers and privileges which have been abused is declaratory of the common law.[27]

The privilege granted to a foreign corporation to do business within a State may be revoked at pleasure. The revocation of such permission is not the infliction of a penalty nor the deprivation of a right. The privilege is like any other license and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense. So it has been decided

[26] Per Bunn, J.

[27] State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

that the action under an anti-trust law for ousting a foreign corporation from the exercise of powers and privileges which it has abused is no more criminal than is an action for damages resulting from the commission of a crime, but is a civil action both in substance and form.[28]

So it is said in a case in Missouri that a plaintiff cannot shut off an investigation of its corporate organization and purpose upon the plea of comity due it as a foreign corporation, the doctrine upon this subject being clear that no rights are conceded to a corporation of a sister State which are denied by law to a domestic corporation, or which are contrary to the laws or public policy of the State into which the foreign corporation enters for business.[29]

But where a corporation is legally organized and is doing business in a State other than that of its incorporation, the condemnation of an anti-combination or anti-trust statute does not apply to the method of its organization, but denounces and prohibits the unlawful acts as a legal existing corporation. And where the purchase by such foreign corporation of the plants or assets of another corporation is made in good faith, and in the legitimate management of its business such transaction is not unlawful.[30]

Where the complaint in an action against a foreign corporation for violation of the State statutes against monopolies in restraint of trade is framed upon the theory that the people are entitled to relief both by way of injunction and by the cancellation of the license to do business in the State and contains appropriate allegations bearing upon the right to such relief, the court, on a motion to strike out allegations of the complaint, will not determine the relief to which the people may become entitled on proof of the facts stated, when the question

[28] State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449, construing § 4 of the Neb. Anti-Trust Act (Comp. Stat., 1899, chap. 91a).

[29] National Lead Co. v. Grate Paint Store Co., 80 Mo. App. 247.

[30] State (Crow, Attorney General) v. Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737, Anti-Combination Statute, Laws Mo., 1897, p. 208.

is not free from doubt, but that question will be left to the trial court.[31]

Where a statute provides that a foreign corporation found guilty of entering into a combination or agreement in restraint of trade shall be prohibited from continuing its business in the State [32] a judgment rendered in pursuance of such statute will not operate to prevent such a corporation from doing an interstate business within the borders of such State.[33]

§ 449. Foreign Insurance Company—Authority of Insurance Commissioner to Revoke Certificate.

The authority of an insurance commissioner to revoke the certificate of a foreign insurance company permitting it to transact business within the State is controlled and limited by the statutes vesting power of revocation in him, and he cannot revoke for a cause other than that specified. So where such an officer was authorized to revoke such a certificate only in case a company should transfer an action to the Federal court, or in the case of the insolvency of the company the fact that a company was a member of an illegal combination in violation of the statute was held not to be a ground upon which the certificate could be revoked, and it was decided that the commissioner could be enjoined from taking such action.[34]

§ 450. Suit for Injunction by Person Injured—Defense.

In a case in Missouri the doctrine is stated that when a defendant is called into court to answer the consequence of his unlawful conduct as in case of violation of the anti-trust laws whereby a plaintiff has been made to suffer, it is no defense for him to say that he was constrained

[31] People v. American Ice Co., 135 App. Div. (N. Y.) 180, 120 N. Y. Supp. 41.

[32] Minn. R. L., 1905, §§ 5168, 5169.

[33] State v. Creamery Package Mfg. Co. (Minn., 1911), 132 N. W. 268.

[34] Liverpool & London & Globe Ins. Co. v. Clunie (U. S. C. C.), 88 Fed. 160.

to do the unlawful act for fear of losing the custom of a large trade or group of traders, but when he is called into a court of equity to show cause why he should not be enjoined from yielding to such restraint, and it appears that the influence which is pressing him is an unlawful influence and it is within the power of the court to prevent it, equity will not leave him under the unlawful constraint and at the same time enjoin him from yielding to it, but it will exert its power to remove the cause and then there will be no occasion for an injunction.[35]

§ 451. Violation of Law as Preventing Relief Against Ordinance—Ceasing Violations.

In a case in Illinois an action was brought by a gas company against a city in that State to restrain the enforcement of an ordinance fixing the price of gas, on the ground that the low price practically amounted to taking of property without compensation and that the ordinance impaired contract rights. The case was tried on these questions, but they were ignored by the court, which decided adversely to the company, although the master had reported that the rates were confiscatory, on the single ground that the company had for a period violated the anti-trust law of Illinois and thereby was not entitled to relief. The United States Supreme Court decided that although parties making an agreement, unlawful by the anti-trust act of Illinois, may while the agreement is in force be subject to its penalties, yet whenever they cease to act under the agreement the penalties also cease. And it was held that as the case had been tried on one theory and decided on another, and injustice had probably resulted, the judgment should be reversed and sent back so that the terms and duration of the alleged agreement might be ascertained and taken into consideration in determining the case.[36]

[35] State ex rel. Hadley v. Kansas City Live Stock Exchange, 211 Mo. 181, 109 S. W. 675.

[36] Peoria Gas & Electric Co. v. Peoria, 200 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. 713.

§ 452. **Action for Damages—Person Injured by Conspiracy.**

In New York it is a misdemeanor under the law for two or more persons to conspire to commit an act injurious to trade or commerce,[37] and a civil action is maintainable by one who suffers injury as the result of a conspiracy forbidden by the criminal law, to recover the damages which he has sustained at the hands of the parties to the combination.[38]

Where a combination is prohibited and made criminal by statute, each act in furtherance of the object of the combination is unlawful, and any person suffering special injury on account of any of such acts has a right of action to recover the damages sustained by him. And it is said that it makes no difference whether such acts if done by an individual not in the combination might have been lawful and a person suffering therefrom would be without remedy. The statute makes such acts when done by agreement or combination of several unlawful and for that reason a right of action follows.[39]

A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action.[40]

§ 453. **Action by Party to Illegal Contract or Combination.**

Where an anti-trust statute is violated by an organization, the constitution and by-laws of which regulate the credit to be allowed its members, discriminate in the price to be paid against persons not members, control the delivery of goods and provide a penalty by fine and suspension for offending and defaulting members, the fact that a dealer was a member of such organization

[37] Penal Code, § 168, subd. 6.

[38] Kellogg v. Sowerby, 190 N. Y. 370, 83 N. E. 47, rev'g 114 App. Div. 916, 100 N. Y. Supp. 1123.

[39] Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145, 77 S. W. 373, per Kellogg, J.

[40] Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

and participated in the adoption of its constitution and by-laws is held not to prevent him from maintaining an action against such association and its members for damages caused by the boycotting by them of his business after he was suspended for violation of such by-laws. The acts complained of having been performed after he ceased to be a member and without his consent, he is not in pari delicto.[41] The court said: "It does not follow that, because plaintiff was at one time a member of the illegal combination with intent to injure in this manner defaulting members, after ceasing to be a member he must suffer without redress at the hands of his former co-conspirators. It is immaterial whether the plaintiff voluntarily set in motion the proceedings which caused his suspension desiring in good faith to withdraw from the association, or whether he was expelled for reasons beyond his control; the result is the same. There is nothing in the record to charge the plaintiff with acting in bad faith,—that he induced the boycott upon his business, thus laying the foundation for an action in damages. Under the conditions disclosed the law presumes good faith on his part, and will treat him as a reformer, and entitled to all the benefits of the reformation. The application of the principle invoked by respondent would place a burden upon reformation and a premium upon wrongdoing." [42]

But in Michigan it has been decided that a local insurance agent who was a party to a compact within the provision of the Code against the formation of combinations to regulate the price of commodities [43] cannot recover damages from the other members of the compact, and the insurance company, for the withdrawal of the agency from him because of his violation of the compact agreement, where the withdrawal is in pursuance of a provision of the compact imposing such penalty

[41] Ertz v. Produce Exchange Co., 82 Minn. 173, 84 N. W. 743, 51 L. R. A. 825, 83 Am. St. Rep. 419.

[42] Per Lewis, J.

[43] McClain's Code, § 5454.

for a violation of its provisions, and the company has the right to withdraw its agency at pleasure. The court declared that he lost nothing but agencies which the compact gave him and as the compact was illegal, he lost nothing but an illegal business, made so by a conspiracy to which he was a party.[44]

§ 454. **Enjoining Acts Done After Combination Declared Illegal.**

Members of a combination, who after such combination has been declared unlawful by the highest court in the State for the purpose of carrying out the objects of such illegal combination, spy upon another person's business, thereby seriously injuring it, will be enjoined from persisting in such espionage. Thus it was so held in the case of a combination which had been entered into to prevent the plaintiffs from purchasing books with which they could carry on their business except upon such terms as were imposed by the corporation which constituted the combination.[45]

§ 455. **That Corporation a Foreign One Is no defense.**

The fact that an unlawful pool, trust or conspiracy in restraint of trade is not formed in the State in which it is attempted to do business in pursuance thereof does not relieve the parties thereto from the operation of the laws of the latter State. So it is said in a case in Missouri that all business conducted in pursuance of such an agreement draws to it those illegal elements wherever transacted and that it is wholly immaterial where the unlawful conspiracy was entered into, or the means by which it was formed, if as a matter of fact the commodities affected by such agreement are sold in pursuance thereof in a State where such contracts are prohibited.[46]

[44] Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

[45] Straus v. American Publishers' Assn., 92 App. Div. (N. Y.) 350, 86 N. Y. Supp. 1091.

[46] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

The object of a statute being to prevent the formation of combinations to regulate and fix prices or to limit the amount of production within the State by corporations or by individuals or by individuals doing business in the State, it is held to be a matter of indifference whether such corporations are organized for transacting or conducting business within such State or not. If a corporation doing business in the State violates the provisions of the statute it is amenable to the terms thereof whether or not it was organized to transact or conduct business in the State. So an indictment has been held sufficient though it failed to allege that the defendants were incorporated under the laws of the State in which the prosecution is conducted or under the laws of some other State or county, an allegation that they were incorporated being sufficient.[47]

A foreign corporation which enters into a combination within a State which is forbidden by the laws of that State must stand upon the same footing as a domestic corporation. It is subject to all the penalties provided by the laws of such State without regard to the place of its origin.[48]

While the legislature of a State has no extraterritorial power to punish crime, yet if a foreign corporation doing business within a State, enters into or becomes a member of a pool or trust, beyond the limits of such State, to fix the price of property therein, then the crime put in motion in the foreign State becomes complete when committed within the State in pursuance of the conspiracy formed in the foreign State. And this rule applies to corporations.[49]

[47] Chicago, Wilmington & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75.

[48] Chicago Wall Paper Mills v. General Paper Co., 147 Fed. 491, 78 C. C. A. 607.

[49] International Harvester Co. v. Commonwealth, 30 Ky. Law Rep. 716, 99 S. W. 637. The court said in this case: "If a foreign corporation doing business in this State enters into or becomes a member of a pool or trust beyond the limits of this State, then the crime is clearly committed beyond the limits of this State, unless the pool or trust is to fix the prices of

Where a pooling conspiracy to raise prices is entered into beyond the jurisdiction of the State in which the statute is in force, the fact alone of such conspiracy is held not to be punishable in that State, whatever its purpose may be. If, however, the conspirators, in furtherance of their scheme, carry it into effect in such State then the offense has been committed there. The conspiracy without regard to the time when and place where it was entered into becomes the efficient cause of a result in that State, the culmination of which rounds out a completed act beginning with such conspiracy and ending with its accomplishment.[50]

But in construing an Illinois statute prohibiting the formation of any pool, trust or combination to regulate or fix the price, or to fix or limit the amount or quantity, of any article or commodity,[51] and which further provided that "any purchase of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment," it was decided that the fact that a corporation selling merchandise in Illinois had been formed for purposes which were prohibited by such act was no defense to a suit for

property in this State, in which event the crime put in motion in the foreign State took effect and became complete in Kentucky. If the conspiracy is formed in another State to harm or destroy property in this State, the crime becomes complete when the property is destroyed, and the courts of this State would have the right to punish all of the conspirators, even though but one of them crossed the line and destroyed the property, provided he was acting in pursuance of the conspiracy." Per Nunn, J.

[50] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352. The court said: "It is the one continuous act. It is like the case where the shot being fired without the State takes effect in the State, resulting in homicide. The actor may be without the jurisdiction of the courts of this State, and so was his act alone in discharging his gun, but when the result in this State constitutes an offense here, the whole transaction being necessarily one act, is cognizable by the courts of this State as if every part of the act transpired here. So it is not material where the conspiracy was entered into if the fact to be investigated is the result." Per O'Rear, J.

[51] Ill. Anti-Trust Act of June 11, 1891 (Laws, 1891, pp. 206, 207).

the price of such merchandise unless it appeared that such corporation was formed within that State.[52]

§ 456. That Prices Not Raised Is no Defense.

Upon the question of whether a combination exists in violation of a statute it is not material that prices of the article or articles manufactured or handled have not been increased, and the fact that such is the case is no defense. The question is not have prices been increased but is it within the power of the alleged combination to raise them. Evidence that they have not been raised would in no way tend to disprove the fact that a combination has been formed to control or regulate prices or prevent competition. The combination instead of raising prices might lower them and thus by the latter method more effectively than by the former prevent or stifle competition. And having it in its power to lower them it might when competition had been overcome and competitors driven out of business, then increase them after having accomplished the result which the statute was intended to avert.

So it is said: "The material consideration in the case of such combinations is as a general thing, not that prices are raised, but that it rests in the power or discretion of the trust or corporation, taking all the plants of the several corporations, to raise prices at any time, if it sees fit to do so. It does not relieve the trust of its objectionable features, that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors." [53]

§ 457. No Defense That Complete Monopoly Not Obtained.

The members of a conspiracy are not relieved from

[52] Chicago Wall Paper Mills v. General Paper Co., 147 Fed. 491, 78 C. C. A. 607, citing People v. Butler Street Foundry Co., 201 Ill. 236, 66 N. E. 349.

[53] Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738, per Mr. Justice Magruder.

criminal liability therefor by the fact that the effect of the combination was not to give the members of the combination a complete monopoly of the trade in the commodity affected in the territory in which such commodity was sold.[54]

§ 458. Motives of Those Instigating Suit Are Immaterial.

When an action is brought in the name of the State for the purpose of preventing a violation of such a statute the questions whether such action was well brought and is maintainable depend upon the pleadings and the evidence introduced in support thereof and not upon the motives inspiring those at whose instance the governor was induced to order the suit to be filed, or the arguments presented to him to that end.[55]

§ 459. Good Motives or Intent no Defense Where Statute Violated.

Good motives on the part of those who enter into a combination in restraint of trade do not save it from the condemnation of the law. The fact that the parties to an agreement of such a character may have honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties.[56]

So it has been held proper to instruct the jury in a prosecution for conspiracy to the effect that it is immaterial how or in what manner a conspiracy may be formed so long as it sufficiently appears from the evidence that it was formed for an unlawful purpose.[57]

So in the case of an agreement between brewers that

[54] Chicago, Wilmington & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75.

[55] Trust Company of Georgia v. State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

[56] Kellogg v. Sowerby, 190 N. Y. 370, 83 N. E. 47, rev'g 114 App. Div. 916, 100 N. Y. Supp. 1123.

[57] People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712.

they would not sell to any person who was in debt to any one of them the court said that it did not affect the character of the agreement proven that the brewers only intended a worthy purpose since intention does not avail when the effect is within the statute.[58]

§ 460. Illegality of Combination or Contract as Defense—Independent of Statute—Collateral Contract.

Independent of any statute upon the subject where a claim is not dependent upon an illegal or unlawful transaction it will not be defeated merely because in the course of business illegal acts were committed as in such a case the claim does not originate nor is it dependent upon the unlawful acts. If, however, a claim arises from and is a share of the profits resulting from such a transaction to which the claimant was a party, it will not be enforced.[59]

As bearing upon the latter proposition it was held in a case in Texas that a contract being void as in violation of an anti-trust act neither of the parties could base a cause of action or counterclaim thereon and that therefore it was error for the trial court to allow, over plaintiff's objection, the pleading or proof of any fact or facts tending to support a defendant's counterclaim based thereon.[60]

At common law it is no defense to an action upon a contract which is in itself legal and valid that the plaintiff is a trust, combination or monopoly in restraint of trade. So though a corporation is a trust or monopoly as defined by the laws of a State, its independent or collateral contracts are held to be just as valid and enforceable as are the contracts of any other person or

[58] Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691.

[59] Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

As to violation of Sherman Anti-Trust Act (Act of July 2, 1890) as defense to actions on contracts and for infringement of patents, trade-marks and copyrights, see §§ 155–159, herein.

[60] Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919.

corporation unless the common-law rule has been changed by statute. So in a case in Michigan it was decided that the defense that a foreign corporation is an illegal combination or trust within the meaning of the law of that State [61] is not available in an action of assumpsit for money had and received for the benefit of the plaintiff, in a transaction untainted by illegality.[62]

So in a late case in Indiana in which this question arose the court said: "It follows that where the sale is in no way connected with the illegal character of the selling corporation, but one made in the regular course of business, resting upon a valid and independent consideration, it is no defense to an action for the goods sold that the plaintiff is an unlawful combination, since the sale is collateral to the illegality of the combination." [63]

With respect to a contract which is independent of an illegal combination, and is merely incident to other

[61] Act No. 255; Pub. Acts, 1899; Act No. 329, Pub. Acts, 1905.

[62] International Harvester Co. v. Circuit Judge, 163 Mich. 55, 127 N. W. 695. The court said: "We are here dealing with a corporation that is alleged to be a 'trust' or monopoly; one, however, which as it appears by its articles of incorporation was lawfully organized for a legitimate purpose and business, under the laws of Wisconsin. It has complied with the laws of this State regulating foreign corporations. It comes into a court of this State, and sues upon an independent collateral contract, made with defendant, an agent, in this State—a contract in no way tainted with the illegality of the alleged trust or combination, and one not prohibited by our statute. Can the defense here sought to be imposed be maintained? Assuming, as contended, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that the defendant could refuse to pay for goods bought by him under special contract with plaintiff. The illegality of such combination and 'trust' would not prevent the plaintiff corporation from selling goods that it obtained from its constituent companies or either of them. It could pass title by sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of articles or products." The court referred to the statutes of the State and said there was not a word in them which gave a purchaser of goods the right to plead them as a defense.

See also Chicago Wall Paper Mills v. General Paper Co., 147 Fed. 491, 494, 78 C. C. A. 607.

[63] Bessire & Co. v. Corn Products Mfg. Co. (Ind. App., 1911), 94 N. E. 353, per Adams, J.

and innocent purposes, one who voluntarily and knowingly deals with parties so combined, cannot on the one hand take the benefit of his bargain and on the other defend against the contract on the ground of the illegality of the combination.[64]

§ 461. Illegality of Combination or Contract as Defense—Where Permitted by Statute.

In Kansas it has been decided the provision of a statute that when actions are begun in that State it shall be lawful in defense thereto to plead in bar or in abatement that the plaintiff, or any other person interested in the prosecution of the case, is a member or agent of an unlawful combination or trust, applies to actions which will promote the purposes of the unlawful combination or trust, or which grow out of the same, or some contract or business transaction thereof but was not intended to deprive the plaintiff of the right to resort to the courts for the protection of property, rights and interests in no way connected with such combination or trust.[65]

This doctrine is well stated in a case in the United States Circuit Court where in an action upon a note given to a corporation it was set up in defense that the corporation was a member of a combination which violated the laws of Kansas forbidding certain combinations and providing that any contract or agreement in violation of such laws should be void and unenforceable and that when any civil action should be commenced it should be lawful to plead in defense thereof a violation of the provisions of the act or that the cause of action grew out of any business transaction in violation of the act.[66] The court decided that as the transaction out of which the contracts grew was entirely innocent and lawful at common law it was no defense to allege that the de-

[64] Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915, citing Dennehy v. McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

[65] Barton v. Mulvane, 59 Kan. 313, 52 Pac. 883.

[66] Kan. Laws, 1897, chap. 265, p. 481.

fendant was a member of an illegal combination unless it might be sufficient by virtue of the provisions of the act and that such provisions were not intended to refer to the case of a contract with a member of a combination when such contract was entirely disassociated from the relation of a member of an unlawful combination to such combination.[67]

Under an anti-trust act prohibiting trusts for the purpose of carrying out restrictions in the full and free pursuit of a lawful business and permitting in a civil suit a defense of a violation by the plaintiff of the act, an association of live stock dealers which had a by-law forbidding its members to buy or sell live stock for others for

[67] Boatmen's Bank v. Fritzlein (U. S. C. C.), 175 Fed. 183. The court said: "If the contracts were made in furtherance of the object or purpose of the unlawful combination, then it is clear they may not be enforced, for, in such case, the prohibition of the law attaches to them and makes them unlawful. While to all contracts made with the express intent of furthering the object and purpose of that by law prohibited, and while to all contracts which from their very nature will be presumed to have been made with such intent, the direct or necessary effect of which is to further the purpose of that which is in violation of law, the prohibition of the law attaches and renders nonenforceable, yet the prohibition of the law does not extend and attach to all contracts the enforcement of which may indirectly or incidentally further the object and purpose of that which is by law prohibited. And the reason for the rule is plain and easy of comprehension. For example, I may not either directly or indirectly employ another to commit a crime or violate the law, for to do so encourages the commission of crime and law breaking, and, if I do so, the person employed by me may not enforce his contract for compensation against me. But, if I borrow money from another, or employ him to perform for me a special service, I may not defend against the enforcement of my contract against me, by alleging and offering to prove the person I contracted with to be a member of a band of counterfeiters and made his money in such unlawful business, or that he obtained the special knowledge necessary to perform the service which I employed him to perform for me in the pursuit of an unlawful or criminal occupation. It is sufficient that my contract with him be legal, although the borrowed money I am compelled to repay, or the sum I may be required to pay him for his service, may benefit him and may be by him employed in furtherance of his unlawful occupation and thus indirectly and incidentally further such unlawful pursuit by him. And this for the reason that courts of justice will not inquire into the character, reputation or business of parties litigant before them except in so far as the nature of the controversy presented involves such inquiry." Per Pollock, J.

less than a certain commission was held to be in violation of the act and it was decided that a person who had entered into a contract with a member of the association to pay a commission so exacted could set up in defense to a suit on the contract, the fact that it was void, as being within the terms of the act. And a note and mortgage, a part of the consideration of which was based upon such transaction, were likewise held to be void.[68]

In Oklahoma it is provided by the anti-trust act as follows: "Any person purchasing provisions, feed, material, articles of merchandise, or any commodity from any individual, firm, partnership or corporation, transacting business in violation of the provisions of this act, such person so purchasing shall not be liable for the price or payment of any such article or commodity and may plead this act as a defense in any suit for price or payment." [69] In an action by a corporation in which this statute was relied upon as a defense and the plaintiff denied that the contract for the goods or merchandise was made in Oklahoma the court decided that there being a similar statute in Missouri which was also pleaded in defense [70] under the laws of comity between different States, the provisions of the Missouri statute not being contrary to the public policy of Oklahoma such defense might be pleaded as a bar to recovery there to the same effect as in the State of Missouri. In this case the question also arose whether the contract might not be a Minnesota one as to which the court said that as the laws of that State had neither been pleaded nor proved they were presumed to be the same as were in force in Oklahoma.[71]

In order to fix the statutory penalty of disability to collect a debt a defendant cannot stop merely by showing the combination to be unlawful at common law but he must show that it is unlawful under the statute.[72]

[68] State v. Wilson, 73 Kan. 343, 84 Pac. 737.
[69] See chap. 83, § 6739–6743, Wilson's Rev. & Ann. St. Okla. 1903.
[70] Section 8970, Rev. Stat., Mo., 1899; Am. St., 1906, p. 4153.
[71] Wagner v. Minnie Harvester Co., 25 Okla. 558, 106 Pac. 969.
[72] Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691.

§ 462. Illegality of Combination or Contract as Defense Continued—Instances.

Where notes are executed for articles purchased under and in pursuance of the terms of a contract which is a violation of a State anti-trust act prohibiting contracts in restraint of trade, then the provisions in restraint of trade contained in such contract become part of the consideration, tainting the transaction and rendering the notes void.[73]

And where an action upon a contract is brought for the price of goods sold and such contract is void under an anti-trust statute such contract will not support a defense claimed for damages for a breach thereof.[74]

And where a contract is in violation of the laws of a State prohibiting the formation of trusts and monopolies and a plaintiff's cause of action as stated shows that he is undertaking to recover upon such contract or damages for its breach the objection on this ground is one which may be availed of at any stage of the proceedings as it goes to the substance of the petition.[75]

But in an action against an ice company for damages for breach of a contract to deliver ice at a stipulated price during the season it has been decided that attorney's fees cannot be recovered under an anti-trust law, which permits of such a recovery in cases of a violation of the act, by showing that the reason the company violated its contract was that it had entered into an unlawful combination with another ice company and contracted to deliver its entire output to the latter. When such failure occurred the breach was complete and the cause of action arose. The formation of the trust or combination in such a case is collateral to the contract and the acts of the company in violating it. The cause or motive of the breach is not the foundation of the right of action and such cause cannot be inquired into.[76]

[73] Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288.
[74] Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 5 S. W. 804.
[75] Redland Fruit Co. v. Sargent, 51 Tex. Civ. App. 619, 113 S. W. 330.
[76] Crystal Ice Co. v. Wylie, 65 Kan. 104, 68 Pac. 1086.

So in a recent case in Colorado it is decided that one who has tortiously assumed possession of the properties of a corporation, cannot defend his possession by the plea that the corporation was organized in pursuance of an unlawful combination to restrain competition nor upon the ground that the corporation has purchased stock in other corporations in violation of the statute.[77]

And where the existence of a trust or combination in violation of law is set up as a defense to a claim it is proper to refuse to submit such defense to the jury on evidence merely that there was an association of persons in the same line of business as the plaintiff which met for social purposes and the discussion of the best methods of carrying on their business, it also appearing in evidence that the association did not fix prices or adopt any regulations which would tend to keep down competition.[78]

So it is no defense to an action upon a contract of sale between a retailer and his customer that there is a contract between the plaintiff and the one who manufactured the goods sold, which is void as being in contravention of the anti-trust law, since such illegality could not affect the contract between the plaintiff and defendant because it is collateral to it.[79]

And where in an action for goods sold and delivered the defendants sought to avail themselves of the defense that the plaintiff was an unlawful trust or combine in violation of the statute it was held that as the pleas did not set up any facts from which the court could see that if proven the unlawful trust or combination existed and failed to show that the sale of the goods was in furtherance of, or connected with, the unlawful combination, if any such existed, or that the goods were sold at unreasonable prices produced by any unlawful combination, they did not set up a good defense.[80]

[77] Buckhorn Plaster Co. v. Consolidated Plaster Co., 47 Colo. 516, 108 Pac. 27.

[78] Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 S. W. 1049.

[79] Houck & Co. v. Wright, 77 Miss. 476, 27 So. 616.

[80] Wiley & Drake v. National Wall Paper Co., 70 Ill. App. 543.

And where a firm contracted with another firm, whereby all corn and oats purchased at a certain place should be on joint account, and in a suit by the members of the first firm against the other for a partnership accounting the defense was that the contract was illegal under the Code as one to stifle competition [81] and one of the defendants testified that he so understood the contract, but plaintiffs denied that they had such understanding, and it appeared that the parties had not always paid the same price for grain, and had at times been competitors, and that one of the defendants was father-in-law of one of the plaintiffs, and, knowing the son-in-law's firm was of limited means proposed the agreement, it was held that the evidence did not show a contract illegal under the statute.[82]

Though any device by which stockholders of a corporation seek to avoid the liability imposed upon them by law is void as to creditors yet such proposition is not applicable in a suit against a subscriber to a corporation who failed and refused to become a stockholder.[83]

§ 463. Illegality of Combination or Contract as Defense—Action for Rent.

Where in an action of assumpsit to recover for rent alleged to be due under a lease for the use and occupation of a certain strawboard mill owned by appellee it was set up in defense that the lease was not made in good faith, with the intent and purpose of passing to the lessee the possession of the premises described but on the contrary was adopted by the lessor and lessee as a mere shift or device, gotten up for the purpose of limiting the production of strawboard and fixing its price in violation of the laws of the State, the court held that it was satisfied that such was the case, that the lease was not made in good faith, with the expectation of use and occupation by the lessee but was a mere form adopted to evade

[81] Iowa Code, § 5060.

[82] Wilson v. Morse, 117 Iowa, 581, 91 N. W. 823.

[83] Hastings Industrial Co. v. Baxter, 125 Mo. App. 494, 102 S. W. 1075.

the law and to enable the lessor to receive the stipulated rent per month for shutting down its mill and allowing it to remain idle and that it was in violation of the statute entitled "An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases." [84]

But where in an action for the rent due on the lease of a salt plant, the defense was that the lease was executed as a part of a plan of a certain trust to limit the production of salt, raise the price and create a monopoly, which the lessor knew, and that the defendant was acting for the trust in taking the lease, and not for himself, it was decided that defendant could not show that the trust was the real principal in the transaction unless he coupled it with an attempt to show the lessor's participation in the scheme.[85]

A corporation sued for the rent of a distillery, cannot escape liability upon the ground that it is engaged in a combination to create a monopoly of commodities in violation of the statute, when there is no evidence that the landlord was a party to the combination.[86]

[84] American Strawboard Co. v. Peoria Strawboard Co., 65 Ill. App. 502, decided under Act approved June 11, 1891.

[85] Hartz v. Eddy, 140 Mich. 479, 103 N. W. 852.

[86] Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 120 App. Div. (N. Y.) 237, 105 N. Y. Supp. 264, affirmed 193 N. Y. 551, 86 N. E. 564. The court said: "It must be borne in mind that the plaintiff in making the lease did not in any way become a party to the illegal combination or participate to any extent in any scheme to avoid the statute by controlling the manufacture or sale of the commodity referred to. The lease was the only contract which it made with the defendant. It could just as well be contended that a contractor who had built the distillery for the defendant, with knowledge of its purpose, was not entitled to recover the contract price or that a farmer who had sold his corn to the defendant, knowing its purpose in buying it, could not recover the price agreed to be paid, as it can that the plaintiff is not entitled to recover in this action. The plaintiff, as we have already seen, took no part in the illegal combination; could derive no benefit from it nor from the incorporation of the defendant or the carrying out of its purpose, had nothing to do with regulating the quantity of alcohol and spirituous liquors to be produced, or the price to be charged; and, therefore, this contract is clearly distinguishable from those where premises are leased to be used for an immoral purpose." Per McLaughlin, J.

§ 464. Illegality of Combination or Contract as Defense—Contract Made Prior to Statute.

Where a suit was brought by a foreign corporation to recover the value of a typewriting machine and an answer in abatement was filed alleging that prior to the commencement of the action the plaintiff had entered into an agreement, contract and combination with other manufacturers of typewriting machines in violation of the anti-trust act of the State it was decided that as the contract sued upon was entered into and performed by the plaintiff, and the amount thereof was due and payable, nearly two years before the anti-trust law took effect, such act had no application to the contract of sale sued upon. The court said that the law was prospective, and not retrospective and was not intended to, and did not, affect contracts previously made, nor their enforcement.[87]

§ 465. Illegality of Combination or Contract as Defense—Where Statute Prescribes no Mode of Procedure for Determining Illegality.

Where a defendant in an action for the price of goods seeks to avail himself of the defense that the plaintiff is a member of an unlawful trust or combination and the statute does not prescribe any method of procedure for determining such fact, it is decided that before a defendant can avail himself of such defense there should be an adjudication of a competent tribunal, in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination in the sense contemplated by the statute.[88] The court said: "This is in accord with the ordinary rules of statutory construction. The practical working of any other rule could not fail to emphasize the justice and necessity of so holding in cases similar to the

[87] Sterling Remedy Co. v. Wyckoff, Seamans & Benedict, 154 Ind. 437, 56 N. E. 911, citing Security Savings & Loan Assn. v. Elbert, 153 Ind. 198, 54 N. E. 753; Equitable Loan & Investment Assn. v. Peed, 153 Ind. 697, 54 N. E. 1096; National Home Building & Loan Assn. v. Black, 153 Ind. 701, 55 N. E. 743; United States Saving & Loan Co. v. First Methodist Protestant Church, 153 Ind. 702, 55 N. E. 743.

[88] Lafayette Bridge Co. v. City of Streator (U. S. C. C.), 105 Fed. 729.

one at bar. It cannot be insisted that the decision in one case would be binding or even persuasive in any other case. Each suit to recover purchase money, in which the statute is pleaded by way of defense, would call for a separate and distinct determination of the legal status of the plaintiff thereby making the claim for purchase money merely an incidental issue. This would be true even if the amount involved were but five dollars and the case were before a justice of the peace. The result would depend upon the varying conditions of each case as affected by the skill of lawyers, the bias of jurors and other attendant circumstances. This would inevitably lead to such confusion as would force Federal courts to so construe the statutes as to protect the due and regular administration of justice from unconscionable prolixity and irreconcilable adjudications." [89]

And in a case in Montana it was decided that one suing as a private citizen was not entitled to present through the medium of a civil action, and try the issue whether a corporation constituted a monopoly in violation of the penal code rendering it liable to punishment and a forfeiture of its franchises and property, but that the determination of such issue as an independent ground of relief must be had, if at all, by the State, and in its own behalf through the attorney general, since it was no concern of plaintiff as a private citizen if the State neglected or waived its right to so act.[90]

But in a case in Missouri it is decided that the validity of corporate organization may be collaterally assailed where the unlawful conspiracy exists in the articles of association of the corporation.[91]

§ 466. Combination to Raise Price—Defense That Law Does Not Favor Increased Sale of Article.

Under a statute making unlawful all agreements for

[89] Per Kohlsaat, J.

[90] MacGinnis v. Boston & Montana Consolidated Copper & S. M. Co., 29 Mont. 428, 75 Pac. 89.

[91] Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

the purpose of controlling the price of any article and which makes no exceptions, it is no defense to a prosecution for making an agreement to raise the price of an article that the law does not favor the increased use of such article. Thus it was so held where there was a combination of a number of brewers to raise the price of beer to the extent of the war tax thereon.[92]

§ 467. **Illegality of Association as Defense to Action by for Penalty.**

Where the by-laws of an association are void as in violation of an anti-trust statute such association cannot recover a penalty from a member for a violation of such by-laws.[93]

[92] Commonwealth v. Bavarian Brewing Co., 112 Ky. 925, 23 Ky. Law Rep. 2334, 66 S. W. 1016.

[93] Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 516.

CHAPTER XXVIII

STATE STATUTES—PLEADING

§ 468. Rule as to Certainty.
469. General Rule — Indictment or Information in Language of Statute Sufficient.
470. Legal Conclusions.
471. Joinder of Defendants.
472. Not Necessary to Allege Combination in a Position to Control Market.
473. Necessity of Averring Intent, Purpose or Effect.
474. Averring Terms of Agreement—Particular Articles Subject of.
475. Conspiracy — Means by Which to Be Effectuated Need Not Be Charged.
§ 476. Conspiracy—Averring Names of Persons to Be Injured.
477. In Proceeding by Information to Forfeit Corporate Franchise.
478. Complaint in Action to Restrain—New York.
479. Necessity of Averring Acts to Be in Restraint of Trade.
480. Rule as to Party Seeking to Enforce Forfeiture — Defense That Member of Illegal Combination.
481. Complaint to Recover Penalty.

§ 468. Rule as to Certainty.

An indictment under the anti-trust act of a State must, as in all other cases, be sufficiently definite in its statement of the conspiracy and the object to be effected as to give the defendant notice of the particular crime with which he is charged and to so describe and identify the offense that the judgment in such case can be relied upon in another for the same thing, as a former acquittal or conviction.[1]

§ 469. General Rule—Indictment or Information in Language of Statute Sufficient.

It is a general rule that an indictment or information is sufficient which sets out the offense in the language of the statute except where the facts constituting the offense

[1] State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

are not sufficiently set out in the statute so as to advise the defendant of the nature of charge against him so that he can properly prepare his defense and is not placed at a disadvantage at the conduct of the trial on his part. This rule was applied in the case of an information under a statute in Kansas [2] making unlawful any combinations made with a view or which tended "to prevent full and free competition in the importation, transportation or sale of articles imported into this State, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material * * * or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles." In this case the information went somewhat beyond the bare letter of the statute and stated the name of one of the parties to the unlawful agreement and mentioned the specific commodity the cost of which was designed to be affected. It was, however, contended that the information was defective in that it did not contain a statement of the character of the agreement to which the defendant was alleged to have been a party or the means by which the control of the price was sought to be accomplished. The court, however, decided that it was not necessary to specify this and that the information was sufficient.[3]

[2] Kans. Gen. Stat., 1909, § 5118.

[3] State v. Glenn Lumber Co., 83 Kan. 399, 111 Pac. 484. The court said: "We cannot agree, however, that it is necessary for the State to specify the precise nature of the agreement, or do more than to characterize it as one intended and adapted to accomplish the results described in the statute. Such a requirement would go far to render the law ineffective, since it would often be difficult or impossible for the prosecutor to ascertain with certainty the details of the combination complained of. On the other hand, a case could hardly arise under this statute in which an accused person could be seriously hampered in his defense by the omission of an information to describe with exactness the nature of the agreement forming the basis of the charge." Per Mason, J.

This decision was followed in State v. Monarch Portland Cement Co. 83 Kan. 808, 111 Pac. 487.

Information or indictment in language of statute sufficient: People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712; State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

Where the language of the statute is sufficiently descriptive of an offense to enable a person to know the offense charged, an indictment will be sufficient which follows the language of the statute.[4]

So upon the question of the sufficiency of an indictment for a violation of an anti-trust act in Tennessee [5] it was said that the indictment followed and was in the language of the act and that it was generally true that an indictment for a statutory offense which substantially follows the statute is sufficient.[6]

So under a statute prohibiting any combination for the purpose of regulating the price or limiting the production of any article of property it is decided that, as the words of the statute are descriptive of the offense, an indictment which follows the language of the statute is sufficient, it not being necessary to allege the means adopted to effect the object of the combination, the offense being complete, if a defendant enters into an agreement with another for the purpose of fixing the price of any merchandise.[7]

§ 470. Legal Conclusions.

In the application of the general rule that legal conclusions should not be stated it has been decided that allegations that the defendants are contriving and conspiring to obtain exclusive control of the wholesale and jobbing trade in patent medicines, to control the price at which such goods shall be sold, and to destroy and prevent competition between wholesale and jobbing druggists, are held to be conclusions of law not admitted by demurrer.[8]

[4] International Harvester Co. v. Commonwealth, 30 Ky. Law Rep. 716, 99 S. W. 637.

[5] Tenn. Acts, 1903, chap. 140.

[6] State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

[7] Commonwealth v. Grinstead & Tinsley, 108 Ky. 59, 22 Ky. Law Rep. 377, 55 S. W. 720.

[8] Park & Sons Company v. National Wholesale Druggists' Assn., 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, aff'g 54 App. Div. 223, 66 N. Y. Supp. 615.

§ 471. Joinder of Defendants.

One corporation may be joined with another in a proceeding by the State by information in the nature of quo warranto to forfeit the franchises of such corporations for violation of the anti-trust laws.[9]

Where conspiracy in violation of a statute is charged it is not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one. The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information charges a party with having entered into such a conspiracy with others, not made defendants, it is sufficient in the pleading to refer to the latter as "persons unknown." [10]

In Kansas it has been decided that an information drawn under the anti-trust laws of that State, wherein the offenses charged consist of many sales of commodities made in violation of a provision of the statute [11] is not fatally defective because in its introductory statement several combinations, associations, trusts and corporations are mentioned generally of which the defendant is averred to have been a member when the alleged sales were made.[12]

[9] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[10] People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712. In this case the Sacramento Butchers' Protective Assn. was made defendant and also Western Meat Co. and its manager, O'Keefe, who was convicted, and it was claimed that the information was defective in that it failed to disclose the identity of the persons referred to therein as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and composing said Sacramento Butchers' Protective Association, the names of whom are unknown except as herein stated."

[11] Section 2435, Gen. Stat. Kan., 1901.

[12] State v. International Harvester Co., 79 Kan. 371, 99 Pac. 603. The court said: "It was deemed necessary when the statute was drawn to use language broad enough to cover every conceivable combination through which the interdicted acts could by any reasonable possibility be perpetrated. It was thereby made necessary for the pleader, in drawing an information like the one under consideration, to be somewhat general in the use of terms to designate the combination to which the defendant belonged. It may also be said that the parts of the information specially complained of are not the parts which charge the offense of which the defendant is accused, but they constitute a mere statement, introductory and preliminary to the charge. Such matters of inducement need not be

§ 472. **Not Necessary to Allege Combination in a Position to Control Market.**

The object of a statute being to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, if the purpose of a combination is to restrict trade or destroy competition in the sale and purchase of "merchandise, produce or any commodity" as declared in the statute or if such combination tends to restrict trade or prevent free competition therein it is against the letter and object of the law and it is not necessary to allege in order to state the offense denounced by statute that the defendants or any of the persons referred to in an information as being connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates.[13]

§ 473. **Necessity of Averring Intent, Purpose or Effect.**

In charging offenses against corporations under an anti-trust statute the rule prevails that where the offense with which the corporation is charged is the violation of a positive statute, the only intent necessary to the commission of the offense is the intent to do the prohibited act and this corporations will be held to have when they act through their authorized agents and officers.[14]

Under the Kentucky statute it has been held essential in order to show that a combine, agreement or undertaking is unlawful, to state facts showing that it was entered into for the purpose of increasing the price of

averred so definitely and with that degree of certainty required in the charging part of the pleading (1 Bouv. Law Dict., p. 1024). It seems clear from these introductory allegations that the defendant at the time the alleged sales were made had entered into one or more of the prohibited organizations. This is sufficient; whether it belonged to one of such organizations or all of them is immaterial." Per Graves, J.

[13] People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712.

[14] Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

the article above its real value, or depreciating the price below its real value.[15]

§ 474. Averring Terms of Agreement—Particular Articles Subject of.

Under a statute making it a criminal offense to enter into a trust, combination or agreement made with a view to lessen or which tends to lessen full and free competition in the transportation and sale of articles imported into the State or in the manufacture or sale of articles of domestic growth and which tend to control the price or cost to the consumer of any product or article it is decided that an indictment which utterly fails to state the terms of the agreement or arrangement entered into by the parties and the particular articles imported or of domestic manufacture or growth, the price of which such agreement, arrangement or conspiracy tended to control and lessen or advance is fatally defective.[16]

[15] Stahr v. Hickman Grain Co., 132 Ky. 496, 116 S. W. 784, citing Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703; American Tobacco Co. v. Commonwealth (Ky.), 115 S. W. 754.

An indictment under the statute prohibiting pools, trusts and other combinations or agreements to fix the price, or to limit the amount of merchandise or article or property of any kind should allege that the purpose or effect of the alleged combination or pool was to enhance the articles named above their real value, or to depreciate the price below its real value. Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S. W. 703, 131 Ky. 768, 115 S. W. 755, holding an indictment for violation of Ky. Act, May 20, 1890 (Ky. Stats., 1903, § 3915) to be insufficient.

[16] State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852. The indictment in this case charged that the defendant "as president, director and agent of the Southern Seating & Cabinet Company, in Madison County, Tennessee" did unlawfully, knowingly and feloniously carry out the terms of the agreement, combination and conspiracy entered into by the Southern Seating & Cabinet Company with the American School Furniture Company, made with a view to lessen, and which tended to, and did lessen, full and free competition in the importation and sale of articles imported into the State and the manufacture and sale of articles of domestic growth and of domestic raw material, and which tended to and did advance and control the price and cost of such product and article to the consumer and buyer. The court held that this was insufficient for the reasons stated in the text. The court said: "The indictment would apply to imported articles as well as domestic articles, and to domestic manufactured articles equally with articles of raw material. It would apply equally to any one of the hundreds of articles of commerce which are imported into the State,

But in New York in an action for violation of a statute prohibiting monopolies or trusts while it may be necessary for the plaintiff to plead a contract relied upon, yet it is decided that it is not required to set forth copies or all of the terms thereof but is only required to allege the effect of the provisions thereof so far as material, not to the contract, but to the issues presented for trial which requires merely that the terms and provisions of the contract be sufficiently stated to show a violation of the statute. And if the defendant desires a copy of such contract so referred to its remedy is by a motion for a bill of particulars, and not to make the complaint more definite and certain.[17]

The charge in a bill that the action of a railroad company was due to an agreement between the defendant and other carriers at a certain meeting the terms of which are unknown to the complainant, but whose tenor was to restrain trade and commerce, and in violation of the laws of the State and of the United States, has been held to be broad enough to let in full evidence as to what was done at that meeting and what policies were outlined, and what division, if any, was made of the traffic at that place and the terms of that division and the circumstances connected with it.[18]

§ 475. Conspiracy—Means by Which to Be Effectuated Need Not Be Charged.

An information charging a conspiracy at common

or which are here manufactured or otherwise produced. It clearly, for these reasons, fails to give the defendant any notice of the nature of the charge against him, or of the particular crime with which he is accused, and is held to answer, so that he could with intelligence prepare his defense. * * * The indictment should charge the particular article, whether imported or of domestic manufacture and growth, in relation to which the contract, arrangement and agreement between the parties is made, and the effect of such arrangement upon the price of such articles. Without a statement of these facts the defendant will be put to trial without presentment or indictment and will be denied his constitutional right to know the nature and cause of the accusation against him." Per Mr. Justice Shields.

[17] People v. American Ice Co., 135 App. Div. (N. Y.) 180, 120 N. Y. Supp. 41.

[18] Post v. Railroad, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

law to control the price of an article in a certain city is sufficient where it alleges that the defendants unlawfully designed to prevent open competition, unlawfully agreed not to sell the article at less than fixed prices and not to sell to each other's customers and agreed to and did raise prices with intent to control the price of such article generally in said city.[19]

In an indictment for conspiracy under an anti-trust act the averments as to the conspiracy and the object to be effected should be so definite and direct as to give the defendant notice of the particular crime with which he is charged and so describe and identify the offense that the judgment in such case can be relied upon in another prosecution for the same thing, as a former acquittal or conviction.[20]

The gist, however, of the crime of conspiracy is in its formation for an unlawful purpose and the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of such conspiracy. Such acts are mere probative facts and an information therefore is not insufficient because the dates upon which the acts of the alleged conspirators committed in the prosecution of such conspiracy occurred are definitely stated and fixed therein.[21]

And in a prosecution for conspiracy in violation of an anti-trust act it is said that the means by which the unlawful agreement and conspiracy was intended to be effectuated or the evidence tending to prove the unlawful agreement need not be set out and that it is sufficient to charge in the indictment the existence and object of the conspiracy, without any statement of the means intended to be used in its accomplishment, the means being only matters of evidence to prove the fact of conspiracy.[22]

[19] State v. Erickson, 54 Wash. 472, 103 Pac. 796.

[20] State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

[21] People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712.

[22] State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852, citing 3 Whart. Crim. Law, § 1345; 1 Eddy on Combinations, p. 226, § 350; Rex v. Eccles, 1 Leach, 274; Rex v. Gill & Henry, 2 B. & Ald. 204; People v. Richards,

Again, a charge that a conspiracy was formed unlawfully, fraudulently, maliciously, wrongfully and wickedly to do an illegal act, though not in the language of the statute has been construed as in effect charging the conspiracy to have been formed with a fraudulent or malicious intent wrongfully and wickedly to do an illegal act injurious to the public and to be sufficient.[23]

§ 476. Conspiracy—Averring Names of Persons to Be Injured.

In an indictment for conspiracy in violation of an anti-trust statute where it is the object of the corporation to injure any particular person or corporation specifically, the indictment should aver the name of the particular person or corporation to be injured, but where the object is to injure any and all persons who may come within the range of the operation of the conspiracy it is only necessary to aver that the purpose or effect of the conspiracy was to injure the public.[24]

So in an indictment, under the Mississippi Code of 1892,[25] it was decided that the indictment should aver that the effect of the trust was to injure either the public or any named person or corporation in the State. And in this case where it was claimed that there was a trust between fire insurance companies, it was declared that this should be distinctly and directly charged and not argumentatively though the court said that it was doubtless true, that from the very nature of a fire insurance trust as to rates, the only injury possibly predicable of its action would be the destruction of competition as to rates.[26]

§ 477. In Proceeding by Information to Forfeit Corporate Franchise.

In a proceeding by the State by information in the

1 Mich. 216, 51 Am. Dec. 75; State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719.

[23] Chicago, Wilmington & Vermillion Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, aff'g 114 Ill. App. 75.

[24] Fire Insurance Companies v. State, 75 Miss. 24, 22 So. 99.

[25] Section 1007.

[26] Fire Insurance Companies v. State, 75 Miss. 24, 22 So. 99.

nature of quo warranto to forfeit the franchise of a corporation for misuser, nonuser or usurpation of corporate powers and such misuser, nonuser, or usurpation consists in the formation of and entering into a pool, trust or combination in violation of the laws of the State all that is necessary to state in the information is a general allegation of facts constituting the same. The proceeding being a civil one the facts are not required to be stated with the same technical strictness with which crimes must be charged.[27] The court said in this case: "When the State challenges the authority of a corporation to do certain things, it must either deny the charge, or, if it is exercising the authority complained of, then it must justify its conduct by showing that it possesses that power and authority under its charter; and the State is not required to allege and prove the facts constituting the mode or manner in which it is violating the law and usurping powers not granted to it by its charter." [28]

§ 478. **Complaint in Action to Restrain—New York.**

In an action in the courts of New York State under the laws of that State to restrain an alleged unlawful combination in restraint of trade, and to recover damages it has been decided that the complaint does not state a cause of action if it fails to show that the defendants were incorporated for or unlawfully combined with other persons or corporations to advance or control prices or trade, or to discriminate between dealers, or regulate competition, or that one defendant appointed the other defendant its sole selling agent for such purposes.[29]

[27] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

[28] Per Woodson, J.

[29] Locker v. American Tobacco Co., 121 App. Div. (N. Y.) 443, 106 N. Y. Supp. 115, affirmed, 195 N. Y. 565, 88 N. E. 289, holding that mere allegations showing that a corporation, with allied corporations, controls ninety per cent of a certain trade and had appointed a sole selling agent in the State do not, standing alone, show an illegal combination, and that the mere fact that one defendant controlling ninety per cent of the trade, has appointed a sole selling agent in the State who has refused to sell goods to plaintiff, does not show a violation of the State statute (Laws, 1899, chap. 690), for it is the inherent right of every person to refuse to maintain

And it has been decided that a complaint, in an action for a violation of State statutes prohibiting monopolies in restraint of trade, which merely alleges that the defendant had repeatedly violated the statutes of the State without setting forth any specific acts would be insufficient on demurrer.[30]

Although in a complaint in an action to restrain an alleged unlawful combination in restraint of trade it is alleged that one defendant manufacturing certain goods controls the business of other manufacturers and producers, it will be presumed that such control was lawful in the absence of an averment of an unlawful combination between them.[31]

§ 479. Necessity of Averring Acts to Be in Restraint of Trade.

Under a statute providing that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this State, is hereby declared to be illegal" an indictment should allege that the acts complained of were in restraint of trade within such State.[32]

§ 480. Rule as to Party Seeking to Enforce Forfeiture —Defense That Member of Illegal Combination.

In the application of the rule that a party seeking to enforce a forfeiture must set forth in his pleading every fact necessary to show that he is entitled to it and that nothing is to be taken by implication but the pleading is to be strictly construed, it has been decided that, where defendant who was sued upon an account for merchandise

trade relations with any other person for any reason or for no reason, and what one may do of his own right he may do through an agent.

[30] People v. American Ice Co., 135 App. Div. (N. Y.) 180, 120 N. Y. Supp. 41.

[31] Locker v. American Tobacco Co., 121 App. Div. (N. Y.) 443, 106 N. Y. Supp. 115, affirmed, 195 N. Y. 565, 88 N. E. 289.

[32] Howell v. State, 83 Neb. 448, 120 N. W. 139, holding a count of an indictment not to charge the commission of an offense where it did not so allege.

alleged to have been sold in another State, set up in defense that at the time plaintiff sold said merchandise he had become a party to a trust to fix the price thereof in the State where defendant resided and had sold said merchandise in that State to defendants at the price so fixed but failed to allege that plaintiff was transacting business within such State when it sold the merchandise to defendant, the answer was insufficient.[33]

§ 481. **Complaint to Recover Penalty.**

A complaint against an insurance company seeking to recover a penalty for a violation of an anti-trust law,[34] which alleges, substantially in the language of the act, that the defendant, while engaged in business in the State, became and was "a member of a pool, trust, agreement, combination, confederation, or understanding with the corporations engaged in similar business, to regulate or fix the price or premiums for insuring property," etc., is held not to be demurrable for failure to allege that such pool, trust, agreement, etc., was formed for the purpose or had the effect of influencing the company's business in the State, it being declared that the remedy in case the complaint is indefinite or uncertain, is a motion to make it more specific and certain.[35]

[33] Frank A. Menne Factory v. Harback, 85 Ark. 278, 107 S. W. 991.
[34] Ark. Acts, 1899, p. 50.
[35] State v. Ætna Fire Ins. Co., 66 Ark. 480, 51 S. W. 638.

CHAPTER XXIX

STATE STATUTES—EVIDENCE

§ 482. Proof of Illegality — Evidence of Circumstances in Connection with Making of Contract—Acts of Parties—Declarations.
483. Evidence as to Intent.
484. Same Subject — Positive Evidence Not Required.
485. Letters as Evidence of Conspiracy — Statements of Parties.
486. Combination to Raise Prices —Evidence to Show Reason for Increase—Rebuttal of.
487. By-Laws of Association or Corporation as Evidence.
488. Presumption as to Innocence.
489. Burden of Proof—Illegality of Contract—Partnership Accounting.
§ 490. Sufficiency of Evidence—Proof of Conspiracy to Raise Prices.
491. Sufficiency of Evidence—Time of Entering Into Conspiracy.
492. Damages — Conspiracy — Erroneous Exclusion of Evidence as to Intent to Injure.
493. Evidence of Disloyalty as Tending to Prove Non-Existence of Trust.
494. Requiring Production of Books and Documents.
495. Compelling Witness to Testify—Immunity Statute.
496. Taking of Testimony Before Trial — Examination of Witnesses — Constitutionality of Statute.

§ 482. Proof of Illegality—Evidence of Circumstances in Connection with Making of Contract—Acts of Parties—Declarations.

In determining whether a written contract is unlawful, as being in restraint of trade and in violation of the anti-trust laws, it is competent to show the circumstances attending the making of the contract, the object in view and the construction placed upon it by the parties, as evidenced by their dealings under it.[1]

So in a case in Missouri it was said in this connection: "Of course there was no written agreement forming the trust, for that was 'inexpedient' and might make the

[1] Detroit Salt Co. v. National Salt Co., 134 Mich. 103, 96 N. W. 1.

members liable to prosecution under the trust laws, as the president of the club well and wisely remarked when the club was formed. When people set out to do acts that are either mala in se or mala prohibita; they do not put up a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may be of the same character, and while such laws are penal in their nature and should be strictly construed [2] nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct written evidence, for in this respect they are like all other frauds." [3]

Where the testimony establishes a conspiracy the acts and declarations of a coconspirator made in furtherance of the common design are admissible against all of the conspirators and this is held to be true although such person was not alleged to be in the conspiracy, if it appears from the evidence that he was a party thereto.[4]

So a pooling conspiracy to raise prices in violation of the statute may be proved either by witnesses who heard it, or who produce documentary evidence of it, or by circumstances from which it may be inferred.[5]

And in a case in Illinois it is said: "It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties." The court then continued as to the case before it and said: "In the present case each of six corporations engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized,

[2] Citing State ex rel. Walker v. Talbot, 123 Mo. 69, 27 S. W. 366; State ex rel. Crow v. Bland, 144 Mo. 534, 46 S. W. 440.

[3] State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363, per Marshall, J.

[4] San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S. W. 289.

[5] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business," and it did all this with the knowledge and understanding, that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all." [6]

So it is the right of corporations to apply to legislative bodies for legislation in their behalf and it is also the right of the State to prove that such legislation was sought and obtained in the furtherance of an unlawful design to restrain trade and stifle competition in violation of the statute. This is a circumstance to be proved like any other to establish a violation.[7]

§ 483. **Evidence as to Intent.**

Where the offense consists in doing a certain thing prohibited by statute, the only intent necessary to be shown, in order to convict, is the intent to do the prohibited thing.[8]

Under a constitutional provision prohibiting combinations or contracts "for the purpose" of "fixing the price or regulating the production of any article of trade or commerce, or of the product of the soil, for consumption by the people" it has been decided that to subject offend-

[6] Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738, per Mr. Justice Magruder.

[7] San Antonio Gas Co. v. Texas, 22 Tex. Civ. App. 118, 54 S. W. 289.

[8] Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, citing 8 Am. & Eng. Encyc. of Law (2d ed.), pp. 290, 291; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; State v. Missouri, Kansas & Texas Ry. Co., 99 Tex. 516, 91 S. W. 214.

ers to penalties for a violation thereof there must be shown a specific intent to do the prohibited act or that the association or combination necessarily tends to accomplish the same result.[9]

Under a statute which forbids entering into any pool, trust, agreement, combination or understanding whatsoever in restraint of trade [10] an intent of parties to form such a combination is shown by evidence that the corporation subsequently carried on the business in the name of the old concerns which transferred their property to it, and placed traveling agents in the field who pretended to compete with each other, but in fact secretly agreed upon prices.[11]

When the unlawful intent to form a combination in restraint of trade in violation of a statute is established, the character and extent of the former competition between the parties to such combination is immaterial.[12]

§ 484. Same Subject—Positive Evidence Not Required.

In a prosecution for violation of an anti-trust act prohibiting any combination to fix, regulate or control prices it is not necessary to sustain a conviction that there should be positive evidence that a combination or conspiracy was formed and that the purpose of it was to fix, regulate or control prices. So in a prosecution of manufacturers of harvesting machinery it was said in this connection: "A rule of evidence like this would in almost every case operate to defeat the execution of the law as it would be difficult, if not impossible, in many cases to introduce witnesses who could testify that such a combination was formed and that its purpose was to fix or control prices. It will be sufficient to show, as was done in this case, that two or more separate and independent concerns were selling the same line of ma-

[9] MacGinnis v. Boston & Montana Consolidated Copper & S. M. Co., 29 Mont. 428, 75 Pac. 89.

[10] Section 5168, Minn. R. L., 1905.

[11] State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 623.

[12] State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 623.

chinery or the same article in competition with each other, and that it was being sold at a price fixed by each, whether the price was the same or different, and to further show by circumstances that the several concerns so engaged formed a combination, pool, or trust for the purpose of selling the product of their respective factories or establishments, and thereafter the machinery or article was sold by a central agency or corporation owning or representing the various plants at a price fixed by it, or by its constituent parts. When the formation of the trust or combination is thus shown, it will be presumed to have been organized for the purpose of fixing, controlling and regulating prices. There are many cases in which the intention to violate the law is a necessary ingredient in the offense, but the commonwealth is not required to show by direct evidence the existence of the intent. A rule of evidence like this would defeat in a majority of cases the ends of justice, as it is not often that persons who contemplate violating the law make known in advance their purpose in such a way as that it can be proven against them, and so, to meet conditions like this, the law presumes that persons of accountable years intended to do that which they did do and will infer from the act that the intention to commit existed." [13]

§ 485. Letters as Evidence of Conspiracy—Statements of Parties.

In a prosecution for conspiracy to create a monopoly in the sale of a certain article, letters written by one of the parties to the agreement a few days thereafter, showing on their face that they were written in furtherance of the conspiracy, are admissible against a defendant who was absent when they were written.[14]

And in a prosecution for violation of an anti-trust act prohibiting combinations to restrain trade, to increase,

[13] International Harvester Co. v. Commonwealth (Ky. C. A., 1911), 138 S. W. 248.

[14] State v. Erickson, 54 Wash. 472, 103 Pac. 796.

reduce, control, or establish prices for commodities or to prevent competition, evidence has been held admissible of statements made by the president of the defendant corporation in an address made to a meeting composed of local agents and dealers in the commodity.[15]

Thus in such a case it was held no error to permit a witness to testify that at such a meeting he heard the president of the defendant corporation state in an address that the combination of which the defendant was a member had obtained control of ninety-five per cent of the capital used in the manufacture of harvesting machinery; that a majority of the companies heretofore engaged in that business were already in the combination and they hoped to get the remainder and that the company expected to make prices uniform and so manage the business that both the companies and their agents would make more money than they had done.[16]

§ 486. **Combination to Raise Prices—Evidence to Show Reason for Increase—Rebuttal of.**

Where it is shown that the price of an article controlled by an alleged pooling combination to raise prices has increased to a certain per cent since the formation of the combination, the defendant may introduce evidence to show that the price of materials and labor entering into the production of such article have, during the same period, increased to an equal or greater extent. So in a prosecution under the Kentucky statute against pooling conspiracies to raise prices where there was an alleged combination for the purpose of enhancing the price of harvesting machinery and there was evidence to show that the price for such machinery had increased five per cent since the formation of the alleged combination, it was held that defendant might show that the price of materials and labor had increased more than five per cent during the same period.[17]

[15] State v. International Harvester Co., 79 Kan. 371, 99 Pac. 603.

[16] State v. International Harvester Co., 79 Kan. 371, 99 Pac. 603.

[17] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126

But where the inference of guilt as to increasing the price of an article has been rebutted by evidence of an advance in the price of labor and material entering into the manufacture of the article the State may also be permitted to show in rebuttal that such advance in labor and material was not sufficient to justify the advance in the price or to show in other ways by pertinent facts and circumstances that the advance was not attributable to market conditions or the increased cost of labor and material.[18]

§ 487. **By-Laws of Association or Corporation as Evidence.**

In a prosecution against a corporation composed of several firms or corporations for conspiracy its by-laws are properly admissible in evidence in behalf of the people not only for the purpose of disclosing the identity of the members of the corporation but also to show its nature and purposes. If the by-laws tend in any manner to disclose the criminal conspiracy charged they are held to be competent evidence for that purpose. And in a case where such by-laws were admitted in evidence it was declared that even if they failed to show, or contained nothing to disclose the conspiracy charged, then they were clearly harmless as evidence and their admission into the record could have had no prejudicial effect upon the rights of the defendant.[19]

§ 488. **Presumption as to Innocence.**

While it may not be a technically correct legal proposition that in a civil action there cannot be a presumption in favor of the innocence of parties who are proved to have been guilty of illegal acts for a number of years and up to a very short time before the commencement of an action, yet it is declared that it may to a certain

S. W. 352, decided under Act of May 20, 1890 (Acts, 1889–1890, chap. 1621; Ky. Stat., § 3915).

[18] International Harvester Co. v. Commonwealth (Ky. C. A., 1911), 138 S. W. 248.

[19] People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712.

extent be correct as applied to a particular case. Thus in a case in Nebraska it appeared that for several years prior to the taking effect of an act, the defendants had been engaged, through the means of an association which they had formed for that purpose, in a systematic course of conduct made unlawful by that act. In forming that association and becoming members thereof, they had agreed to continue to promote its objects until they severed their relations with it. In this case the court decided that in the absence of evidence showing affirmatively that they had taken the necessary steps to sever their connection with the association before or at the time the act took effect, the presumption would obtain against them that the action, brought soon after the act took effect, to enjoin a continuation of the association and restrain the defendants from carrying out its purposes, was necessary and proper for the enforcement of the act.[20]

§ 489. Burden of Proof—Illegality of Contract—Partnership Accounting.

Under a statute providing that any partnership or individual creating any trust, pool or combination with any other corporation, partnership, association, or individual to regulate or fix the price of any article of merchandise or commodity, shall be guilty of a conspiracy, it is decided that where in a suit for a partnership accounting, defendants claim the contract of partnership illegal under the statute, but it is not so on its face, the burden is on the defendants to show the alleged illegality.[21]

[20] State v. Omaha Elevator Co., 75 Neb. 637, 654, 110 N. W. 874. The court said: "By the terms of their agreement in forming this association they were to continue as its members and assist in those methods until certain things specified in their agreement were done by them to terminate their connection with the association. Under these circumstances, it devolved upon them to affirmatively show that they had done those things necessary to terminate their connection with the association, and that there was no necessity for the interposition of the court, in the method pointed out by the act itself, to prevent a continuance of those things which the act made unlawful." Per Sedgwick, C. J.

[21] Willson v. Morse, 117 Iowa, 581, 91 N. W. 823.

§ 490. Sufficiency of Evidence—Proof of Conspiracy to Raise Prices.

In a prosecution for an alleged violation of a statute against pooling conspiracies to raise prices it is not sufficient merely to prove such a combination and an increase in price but it is also necessary to show that the general conditions affecting the market of that commodity were normal and that but for the combination complained of the competition would have been fair, that is, natural and usual. Upon proof of such facts the burden then shifts to the defense to show such exceptional conditions affecting such commodity as naturally tended to produce the increase in market price which the prosecution has proven.[22]

In a prosecution for an alleged violation of a statute against pooling conspiracies to raise prices it has been decided that a prima facie case is established where it is shown that there has been a combination among all or any of the producers of a commodity of merchandise by which its output is restricted or controlled alone by the confederates in the scheme; that the market price of the article was then materially enhanced; that the conditions affecting commerce in general are normal; and that the competition otherwise than for the combination complained of would be fair.[23]

§ 491. Sufficiency of Evidence—Time of Entering Into Conspiracy.

Under the Kentucky statute prohibiting combinations to fix, regulate or control prices it is not necessary that the commonwealth should prove that the combination was entered into within a year before the finding of the indictment, it being sufficient to show that it was entered into previous to the indictment and was in existence one year before the indictment was returned.[24] The

[22] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

[23] International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S. W. 352.

[24] International Harvester Co. v. Commonwealth (Ky. C. A., 1911), 138 S. W. 248.

court said in this case: "When the formation of a pool, trust, or combination is established to fix, regulate, or control prices, or to limit the production of an article, its existence is a continuing offense, and it is a violation of law in every place in this State in which it attempts to do or carry on business." [25]

§ 492. **Damages—Conspiracy—Erroneous Exclusion of Evidence as to Intent to Injure.**

Where the parties to a combination act in the honest belief that a third party is to join in the agreement, such fact tends to disprove any intent to injure him whatever may be said of the agreement as to others. So where upon the trial of an action brought by the owners and operators of a grain elevator against an association of elevator owners and a number of railroad companies to recover damages alleged to have been caused by an alleged conspiracy between the defendants to prevent the plaintiffs from competing with other owners of grain elevators in the business of elevating grain at the same port, the trial court excluded evidence, offered by the railroad companies, that the contracts between the association and the companies were executed by the officers of the companies in the belief that the plaintiffs would come into the association and take their share of the business, and, therefore, would not be prejudiced by the contracts, it was decided that the exclusion of such evidence was erroneous, since there could have been no conspiracy to injure the plaintiffs if the officers of the railroad companies, when they entered into the contracts, acted under the belief that the plaintiffs themselves would be members of the elevator owners' association and evidence of such belief was relevant and material upon the issue of a conspiracy.[26]

[25] Per Carroll, J., citing International Harvester Co. v. Commonwealth, 124 Ky. 543, 99 S. W. 637, 30 Ky. Law Rep. 716.

[26] Kellogg v. Sowerby, 190 N. Y. 370, 83 N. E. 47, rev'g 114 App. Div. 916, 100 N. Y. Supp. 1123.

§ 493. Evidence of Disloyalty as Tending to Prove Non-Existence of Trust.

The fact that parties to a trust are treacherous to each other and in the desire for business violate the trust agreement and transact business at a less figure than that agreed upon for the particular article, commodity or service does not in any way tend to disprove the existence of the trust since it is said that it is the experience of all lawful as well as unlawful associations that some of the members will violate the common agreement for a selfish purpose.[27]

§ 494. Requiring Production of Books and Documents.

A statute providing that in a proceeding against corporations charged with a violation of the anti-trust laws of the State the court may require the defendants to produce certain books and papers and that if in pursuance of an order to that effect they are not produced then it shall be the duty of the court upon proper motion to strike out the pleadings of such defendants as are in default and proceed to render judgment against them is not unconstitutional as being a denial of due process of law. In the case in which this conclusion is reached the defendants produced the books and papers ordered but assailed the constitutionality of the statute both at the time the order was made and also on appeal. The court said: "Counsel for respondents have not pointed out nor suggested in what manner, nor have we been able to see how, a threatened judgment of ouster could or did in any conceivable way deprive any of the respondents of their property without due process of law, either within or without the meaning of the State and Federal Constitutions. They were clearly served, and were in court, appeared and resisted the right and authority of the court to make the order. This was a 'hearing' and due process of law within those constitutional provisions. And if, after such hearing respondents had

[27] State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

seen proper to disobey the order and thereby have suffered judgment by default to have been rendered against them, that would have been their privilege and fault and not the fault of the law; and if upon the other hand they should obey the order, as they did in this case, then the trial would proceed in due course to final judgment upon the merits, as was done here." [28]

A State statute requiring corporations to produce books and papers, and creating a presumption of fact as to bad faith and untruth of a defense by reason of suppression of material evidence does not deny due process of law; nor does an order of the court based on such a statute striking out the answer of a defendant corporation which has refused to produce material evidence deny due process and condemn him unheard.[29]

An order made pursuant to a statute in a suit for penalties for violations of a State anti-trust law requiring a corporation to produce books and papers does not deny due process of law because thereunder the State may elicit proof not only as to the liability of the corporation but also proof in its possession relevant to its defense.[30]

§ 495. Compelling Witnesses to Testify—Immunity Statute.

A statute which provides that in a proceeding by the State against a corporation for violation of the anti-trust acts witnesses may be compelled to testify and the defendants required to produce books and papers against themselves is not violative of the Fifth Amendment to the United States Constitution where the statute in such cases grants the witness immunity from prosecution.[31]

[28] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902, per Woodson, J.

[29] Hammond Packing Co. v. State of Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530, aff'g 81 Ark. 519, 100 S. W. 407, 1199.

[30] Hammond Packing Co. v. State of Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530, aff'g 81 Ark. 519, 100 S. W. 407, 1199.

[31] State ex rel. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

The constitutional privilege that a person shall not be required to give evidence or to be a witness against himself is one of great value to the citizens. The authorities, however, both State and national, recognize the rule that when the testimony sought cannot be used as a basis for or in aid of a prosecution which might be followed by fine or imprisonment or involve a penalty or forfeiture, by reason of an immunity statute, the reason of the rule ceases and the privilege cannot be claimed. Immunity statutes must be given a reasonable construction and not a strained and artificial one, and when the court can clearly see that a person is fully protected from the effect of his testimony he should be required to give evidence, even though it may show him to have been guilty of criminal offense. In order, however, that a statute requiring a person to give evidence which might tend to incriminate him may be held valid, the immunity afforded must be broad enough to protect him against future punishment for the offense to which the evidence relates.[32]

But a State cannot by statute grant immunity to a witness from prosecution by the United States for a violation of a Federal statute, or prevent the testimony given by him under compulsion of the statute from being used against him in a prosecution by the United States. And the absence of such immunity from prosecution by the United States, does not necessarily invalidate a State statute under the Fourteenth Amendment. So it was decided that provisions in a Kansas anti-trust law, as construed by the highest court of that State, compelling witnesses to testify as to violations of the act, and granting immunity from prosecution for violations testified to, were not void under the Fourteenth Amendment, because immunity from Federal prosecution was not granted.[33]

[32] People v. Butler Street Foundry, 201 Ill. 236, 66 N. E. 349, per Mr. Justice Hand.

[33] Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. ed. 234, aff'g State v. Jack, 69 Kan. 387, 76 Pac. 911, which was followed in In re Bell, 69 Kan. 855, 76 Pac. 1129.

In a statute granting immunity from criminal prosecution by reason of anything "truthfully disclosed" either in the affidavit required by the act or in any testimony, the words "truthfully disclosed" are not to be construed as a condition upon which immunity is to be granted.[34]

§ 496. Taking of Testimony Before Trial—Examination of Witnesses—Constitutionality of Statute.

The State when a litigant, not to establish a mere right of property, but a cause of public justice, is not limited by the Constitution to the procedure that ordinarily prevails in controversies between individuals, but has the power through the legislature to authorize testimony to be taken in order to aid its attorney general in attempting to enforce its policy as a political community and to promote the general welfare by proceedings in the courts of justice.[35]

And the court further determined that such statute did not infringe upon personal liberty without due process of law and did not come within the express or implied prohibition of the State or Federal Constitutions, it being declared that the application could only be made by the attorney-general in behalf of the State, representing all citizens, as a party to an action to be prosecuted for the common welfare, that there was reasonable protection against danger of abuse, that no vested right was interfered with, that due process of law does not require

[34] People v. Butler Street Foundry Co., 201 Ill. 236, 66 N. E. 349. The court said that the words amounted to no more than this: "that if, in making the affidavit, in order to state the truth it becomes necessary to disclose a violation of the statute, there shall be no prosecution against the party making the affidavit, or the corporation on whose behalf it is made by reason of such disclosure. In other words, the statute requires the answer to the letter of inquiry of the Secretary of State to be made under oath, which answer the statute assumes, when made, will be truthful, and it then declares, if in making such affidavit it is disclosed that the statute has been violated, the person making the affidavit, and the corporation on whose behalf it is made shall be protected from punishment by reason of the disclosures contained therein." Per Mr. Justice Hand.

[35] Matter of Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, rev'g 55 App. Div. 245, 67 N. Y. Supp. 492.

that testimony cannot be taken by a judge unless it is to be read in court provided that the sovereign power needs it in order to enforce its own laws through judicial proceedings, and that means of testing the rights of a witness under the statute were afforded by the laws of the State and that the courts are open and a motion may be made to protect any of his substantial rights.[36]

And the proceeding authorized by the Anti-Monopoly Act of 1897 in New York [37] for the examination of witnesses before the commencement of the action was also decided not to be a special proceeding within the meaning of the provisions of the Code of Civil Procedure.[38]

The Anti-Monopoly Act of New York State [39] requiring any justice of the Supreme Court upon application by the attorney general to grant an order for the examination before the justice or a referee appointed by him of a person whose testimony is by the attorney general deemed material and necessary to prepare his complaint or prepare for trial of an action about to be instituted by him under the act was construed by the Court of Appeals as not imposing non-judicial duties upon judicial officers and it was determined that its constitutionality could not be successfully assailed upon that ground. It was declared that the duties so imposed are judicial in character because incidental to a judicial proceeding; that they are judicial in form, because, although the language used is mandatory on its face, a justice is not required to grant the order as a matter of course, but may exercise the judicial function of deciding whether the application makes out a case pursuant to the statute and authorizes the order according to its provisions; that they are judicial in substance, because the object of the act is to "secure testimony" in relation to violations

[36] Matter of Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, rev'g 55 App. Div. 245, 67 N. Y. Supp. 492.

[37] Laws, 1897, chap. 383.

[38] Matter of Attorney General, 155 N. Y. 441, 50 N. E. 57, dismissing Matter of Attorney General's Appeal, 22 App. Div. 285, 47 N. Y. Supp. 883.

[39] Laws, 1899, chap. 690.

thereof and while the testimony can only be used by the attorney general to prepare his complaint or prepare for trial, either use is a judicial purpose incidental to a judicial proceeding about to be instituted thereunder and within the power of the legislature to intrust to the Supreme Court or its judges.[40]

A statute providing that in proceedings thereunder for violation of its provisions as to combinations, monopolies and trusts, the court shall, upon the filing of a statement by the attorney general in writing setting forth the name or names of any officer, director or employee without the jurisdiction of the State courts, whose testimony he desires to take, issue a notice in writing directed to the attorney or attorneys of record in said cause requiring such attorney or attorneys to have such person or persons at the place named in the application, at the time fixed then and there to testify has been construed as providing in legal effect that notice to an attorney of record should be notice to the client in the particular matter in hand and to in no way infringe upon the rights of an attorney nor to be out of line with the underlying theory that an enrolled attorney is an officer of the court and may have duties assigned to him as such officer.[41] The court declared: "An attorney at law is first of all an officer of the court. As such officer and not otherwise, he moves and lives and has his being. His very authority to pursue his historic and honorable profession springs from an act of the law and of the court, and may be terminated by the same authority and his duties are circumscribed and prescribed by law. In the due and orderly administration of justice through the courts it is the duty of an attorney at law to assist the court. If rectus in curia he is by the same token amicus curiæ." [42]

[40] Matter of Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, rev'g 55 App. Div. 245, 67 N. Y. Supp. 492.

[41] State ex inf. Hadley v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

[42] Per Lawren, J., construing Mo. Rev. Stats., 1899, §§ 8983, 8984.

CHAPTER XXX

LABOR OR TRADE UNIONS

497. Right of Workingmen to Organize.
498. Right of Workingmen to Organize — Expression of Courts.
499. Labor Union—Presumption as to Being Law-Abiding Body.
500. Right to Organize Extends to Labor Whether Physical or Intellectual.
501. Right of Workingmen to Strike.
502. Right to Strike—Limitations on.
503. Picketing — Legality of — General Rule.
504. Picketing—Decisions Holding Unlawful.
505. Picketing—When Unlawful.
506. Picketing—Whether Lawful Depends on Facts and Circumstances — Rule as Supported by Authority.
507. Picketing—No Injunction to Protect.
508. Picketing—Ordinances as to Valid.
509. Right to Strike—Refusal to Work with Non-Union Man — Massachusetts Rule.
510. Right to Strike—Refusal to Work with Non-Union Man—Pennsylvania Rule.
511. Right to Strike—Refusal to Work with Non-Union Man—New York Decisions.
§ 512. Right to Strike—Refusal to Work with Non-Union Man—Other Decisions.
513. Right to Strike—Refusal to Work with Non-Union Man—Conclusion.
514. Use of Persuasion by Strikers.
515. Use of Persuasion — Employees Under Contract.
516. Use of Violence, Threats or Intimidation by Strikers.
517. Threats — Intimidation — What Constitute.
518. Boycotts Generally.
519. Boycott Circulars — When Held Legal.
520. Boycott Circulars — When Held Illegal.
521. Boycott Circulars—Constitutional Provision as to Freedom of Speech.
522. Contracts Between Employer and Employee.
523. Contracts Between Employer and Employee Continued.
524. Officers—Power of Trade Union's Board of Directors or Committee to Contract.
525. Injunction — Sufficiency of Complaint for Threatened Injury to Persons and Property — New York Code.
526. Parties — Process — Service —Injunction.
527. Injunction—Right to in New York.

§ 528. Injunction to Restrain Payment of Strike Benefits—Specific Performance.
529. Injunction—Evidence of Unlawful Acts of Members During Strike.
530. Injunction — No Defense That Act a Crime.
531. Injunction — Question of Law and Fact.
532. Preliminary Injunction — When Vacated as to Union but Permitted to Stand as to Individual Members but Not so as to Prevent Peaceful Picketing.
533. Injunction — Contempt — Nature of Proceeding.
534. Constitutional Law — Congress no Power to Make It a Criminal Offense for Carrier to Discharge Employee Because Member of Labor Union — Fifth Amendment — Contract —Interstate Commerce.
§ 535. Statute Prohibiting Discharge of Employee Because Member of Labor Union.
536. Statute as to Becoming Member of Labor Union —Condition of Employment.
537. Statute Prohibiting Granting of Injunction Against Union.
538. Statute as to Suits Against Unincorporated Associations.
539. Statute as to Labels and Stamps.
540. Legality of Union as Affected by Constitution of Union.

§ 497. Right of Workingmen to Organize.

A workingman has the right to fix a price upon his labor, and to refuse to work at a less price. He may refuse to work for a certain individual or firm or he may prescribe the terms upon which he will work. The courts have generally recognized this right in the individual and have declared that what he may do in this respect several individuals may combine to do. And the doctrine is now generally accepted as settled that workingmen may lawfully combine for the purpose of fixing and maintaining a rate of wages and for the betterment of their condition generally.[1]

[1] *United States:* National Fireproofing Co. v. Mason Builders' Assn., 169 Fed. 259, 94 C. C. A. 535; Wabash R. Co. v. Hannahan (U. S. C. C.), 121 Fed. 563.

California: Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027.

Connecticut: State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28.

Illinois: Wilson v. Hey, 232 Ill. 389, 83 N. E. 928.

Massachusetts: Pickett v. Walsh, 192 Mass. 572, 580, 78 N. E. 753, 6 L. R. A. (N. S.) 1067.

§ 498. Right of Workingmen to Organize—Expressions of Courts.

In a case in New York it is said that the organization of workingmen is not against any public policy but must be regarded as having the sanction of the law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation or of maintaining such rate. An organization for such purposes is in this case spoken of as proper and praiseworthy and perhaps to fall within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily.[2]

And it was said by Judge Taft: "It is of benefit to them and the public that laborers should unite. They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor, than when dealing singly with rich employers, because the necessities of the single employee, may compel him to accept any terms offered." [3]

And in one of the earlier cases it was also said: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many

Michigan: Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Minnesota: State v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 28.

Missouri: Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997.

New Jersey: Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465.

New York: Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730; National Protective Assoc. of Steam Fitters & Helpers v. Cumming, 170 N. Y. 315, 63 N. E. 369; Schlang v. Ladies' Waist Makers' Union, 124 N. Y. Supp. 289, 67 Misc. R. 221.

Extent of right to combine against receiver: United States v. Weber (U. S. C. C.), 114 Fed. 950.

[2] Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496, aff'g Curran v. Galen, 77 Hun, 610, 28 N. Y. Supp. 1134.

[3] Thomas v. Cincinnati, N. O. & T. Ry. Co. (U. S. C. C.), 62 Fed. 803, 817.

different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is not a crime for any number of persons, with a lawful object in view, to associate themselves together and agree that they will not work for, or deal with a certain man or classes of men, or work under a certain price or with certain conditions." [4]

And in a leading case decided in Michigan,[5] it is said: "Laborers have the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is damnum absque injuria, for they have only exercised their legal rights." [6]

So in a recent case it is said that workingmen have, in the absence of a contract, the absolute right, no public duty forbidding, to prescribe the terms upon which they will work for anyone. They have the right to refuse to work unless these terms are accepted and contractual relations thereby created. And they may do this severally or in combination, in a union or out of it. So long as they either individually or collectively through their labor unions, direct their efforts solely to the control of their own labor and to formulating plans for bettering its condition and to prescribing the terms upon which it may be had that will not interfere illegally with the rights of others they are within the bounds of the law. The right of every man in this country to dispose of his own labor as he chooses, so long as he does not contravene any duty to the public nor interfere with the legal

[4] Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, per Chapman, C. J.

[5] Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

[6] Per Grant, C. J.

rights of others, is both fundamental and axiomatic. And what they can lawfully do acting singly they can lawfully do conjointly, each and all having a like interest to conserve and promote.[7]

And in another case it is said that the right of workingmen to unite for their own protection is undoubted, and so is their right to strike peaceably because of grievances.[8]

And again, in Missouri the court says: "The authorities seem to be uniform in holding that individuals have a perfect legal right to form labor organizations for the protection and promotion of the interest of the laboring classes, and deny the power to enjoin members of such organizations from peaceably withdrawing from the service of the employer." [9]

And again in another case it is declared: "The right of labor to organize for its mutual benefit and protection is as well settled and determined by law as the right of capital to organize for the same purpose. That one may resort to the voluntary association of individuals without incorporation and the other to articles of incorporation is wholly immaterial, provided the voluntary association be one for lawful purposes and be conducted in lawful manner. That such associations may be secret in character, may have and enforce by-laws, and act through officers and agents cannot longer be disputed. Their members may stand together, may accumulate funds for the support of those of their number not employed, may unite with other unions, may advise with their officers and others as to their interests and employment, may expel those who refuse obedience to the authority of the association's laws and may individually or collectively peaceably leave their employer's service when the terms thereof become unsatisfactory to them." [10]

[7] Meier v. Speer (Ark., 1910), 132 S. W. 988, per Wood, J.

[8] Irving v. Joint District Council (U. S. C. C.), 180 Fed. 896.

[9] Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 444, 114 S. W. 997, 1002.

[10] Hitchman Coal & Coke Co. v. Mitchell (U. S. C. C.), 172 Fed. 963, per Dayton, J., citing Thomas v. C., N. O. & T. P. Ry. Co. (U. S. C. C.),

§ 499. **Labor Union—Presumption as to Being Law-Abiding Body.**

A labor union has the same right as an individual to threaten to do that which it may lawfully do, and, until as an association it is presumptively shown to have acted unlawfully, it is entitled to be regarded as a law-abiding body.[11]

§ 500. **Right to Organize Extends to Labor Whether Physical or Intellectual.**

In the application of the doctrine that laboring men may combine for the purpose of regulating their wages it has been decided that such combinations are legal whether the labor is physical or intellectual, and that an agreement or combination for the purpose of fixing and determining the value of wages or other charges for personal services is not within the terms of a statute prohibiting any "combination and conspiracy in restraint of trade." So it is decided that a rule of a board of trade which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for non members, and providing penalties for the violation of such rule does not violate such a statute.[12]

So in Iowa it is decided that a statute of that State is aimed at unlawful combinations in restraint of trade and does not prohibit physicians from associating themselves together for the purpose of agreeing upon a schedule of prices to be charged for their professional services.[13]

62 Fed. 803; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

[11] Russell & Sons v. Stampers & Gold Leaf Local Union, No. 22, 107 N. Y. Supp. 303, 57 Misc. 96, case of motion to continue a preliminary injunction granted in an action against labor unions for damage to plaintiff's business.

[12] State v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395, decided under chap. 359, p. 487, Laws, 1899; R. L., 1095, § 5168.

[13] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276, decided under Iowa Code, § 5060.

§ 501. Right of Workingmen to Strike.

In the application of the doctrine that workingmen may organize for the purpose of fixing and maintaining a rate of wages it has also been generally held that in order to make effective the purpose of their organization, they are within the lawful exercise of their rights in combining to leave the service of their employer and may so leave and refuse to return to work until their demands are complied with. And their action in initiating the strike being lawful it does not become unlawful by its continuance unless accompanied by acts of violence or intimidation.[14]

So where a manufacturing corporation required its employees, members of a labor union, to increase the amount of their work, without any increase in their compensation, by doing work for another manufacturer of like goods whose employees, belonging to the same union, had stopped work in consequence of a strike or lockout in their factory, the former employees, by declining to do the additional work and quitting work themselves when required to do it by their employers, were

[14] *United States:* Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315. Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500; Delaware, L. & W. R. Co. v. Switchmen's Union of North America (U. S. C. C.), 158 Fed. 541. See Wabash R. Co. v. Hannahan (U. S. C. C.), 121 Fed. 563.

California: Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Parkinson Co. v. Building Trades Council of Santa Clara County, 154 Cal. 581, 98 Pac. 1027.

Connecticut: State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28.

Indiana: Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788.

Massachusetts: Pickett v. Walsh, 192 Mass. 572, 580, 78 N. E. 753, 6 L. R. A. (N. S.) 1067.

Minnesota: Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477.

Missouri: Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997.

New Jersey: Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

seeking to aid their fellow members of the union in a peaceable way which was justifiable and permissible.[15]

And an employer has no right to demand reasons for employees quitting work and this rule applies to a body of men, organized for purposes beneficial to themselves, who refuse to work. "The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society." [16]

§ 502. Right to Strike—Limitations on.

Organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute. In other words, a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the striker's demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best.[17] Workingmen have a right

[15] Searle Manufacturing Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438.

[16] *Id.*, 321, per Parker, Ch. J.; National Protective Assoc. of Steam Fitters & Helpers v. Cumming, 170 N. Y. 315, 321, 63 N. E. 369, aff'g 53 App. Div. 227.

[17] Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067. See as supporting the proposition the following cases:

United States: Loewe v. California State Confederation (U. S. C. C.), 139 Fed. 71; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Rd., 54 Fed. 730, 19 L. R A. 387; Casey v. Cincinnati Typographical Union (U. S. C. C.), 45 Fed. 135, 12 L. R. A. 193.

Connecticut: State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Illinois: Purington v. Hincliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824.

Maryland: My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752.

Michigan: Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Minnesota: Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, overuling Bohn Manufacturing Co. v. Hollis, 54 Minn. 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

New Jersey: Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

to refuse to work and to strike where their purpose is to secure better terms of employment to themselves or to have a grievance redressed provided the object is not to inflict injury upon others or to gratify malice. A peaceable and orderly strike not to harm others, but to improve their own condition, is not in violation of law.[18]

Some strikes by labor unions are held illegal as where one was set on foot to force the employer to pay a fine, imposed upon him by the union of which he was not a member, for not giving the union all his work.[19]

And in a case in Massachusetts it is decided that where a labor union combines to enforce a rule that grievances between an individual member of the union and his employer, which grievances are not common to the members as a class, shall be decided by the employees and that decision enforced by a strike on the part of all, is illegal and that the employer is entitled to an injunction restraining the defendants from combining together to further such a strike and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including the payment of strike benefits and putting the employer on an unfair list.[20]

§ 503. Picketing—Legality of—General Rule.

It may be stated generally that picketing in reasonable numbers and in a peaceful manner for purposes of observation only of the employer's premises from the high-

Pennsylvania: Purvis v. Local No. 500, United Brotherhood of Carpenters, 214 Pa. St. 348, 63 Atl. 585.

Virginia: Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

Wisconsin: Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1.

England: Temperton v. Russell [1893], 12 B. 715.

Contra, Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440. See also 54 Minn. 233, above noted.

[18] National Protective Assoc. of Steam Fitters & Helpers v. Cumming, 170 N. J. 315, 321, 63 N. E. 369, aff'g 53 App. Div. 227.

[19] Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

[20] Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457.

ways or streets in its vicinity and endeavoring by agreement, persuasion or appeal only to prevent other persons from becoming employees of the plaintiff employer will be permitted by the courts.[21]

So in a case in the Circuit Court of Appeals, in which an injunction had been granted against labor unions restraining the use by them of persuasion and picketing it was said by the court that it thought that the decree as to picketing and persuasion went beyond the line. And in this connection it was said: "The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of persuasion and picketing as such should not be included in the decree." [22]

And in another case it was decided that acts of sympathizers with labor unions, consisting in picketing a store declared "unfair" by the unions, circulating near it printed cards asking union men to keep away from it, and endeavoring to keep them and the public away by

[21] Searle Manufacturing Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438. See also as supporting the text: Pope Motor Car Co. v. Keegan (U. S. C. C.), 150 Fed. 148; Union Pac. R. Co. v. Ruef (U. S. C. C.), 120 Fed. 102; State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Foster v. Retail Clerks' Protective Assn., 78 N. Y. Supp. 860, 39 Misc. R. (N. Y.) 48; Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. (N. Y.) 605.

[22] Iron Moulders' Union v. Allis-Chalmers Co., 116 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, per Baker, J.

persuasion and peaceable means only are not illegal and that the further commission of such acts would not be enjoined at the suit of the proprietors of the store. And it was held in this case that the motive with which such acts were done was immaterial.[23]

§ 504. Picketing—Decisions Holding Unlawful.

While as we have stated in the preceding section the weight of authority supports the doctrine that picketing is lawful when simply confined to a patrolling in reasonable numbers for purposes of observation and the use merely of persuasion and appeal to induce other workmen not to enter the service of such employer yet there are some cases which seem to regard picketing, in any way, as unlawful.

So in a case in California it is said: "The public's rights are invaded the moment the means employed are such as are calculated to and naturally do, incite to crowds, riots and disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw in Commonwealth

[23] Foster v. Retail Clerks' Protective Assn., 78 N. Y. Supp. 860, 39 Misc. R. (N. Y.) 48.

v. Hunt,[24] 'The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume.' If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats and there may be intimidations and there may be molesting, and there may be obstructing, without there being any express words used by which a man should show violent threats toward another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business, through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public." [25] And a similar view has been expressed in some other cases.[26]

§ 505. Picketing—When Unlawful.

While the courts are not in complete harmony as to whether picketing for the purposes expressed in the two preceding sections are lawful yet there may be said to be no conflict of opinion as to the proposition that picketing when accompanied by acts of violence, threats or intimidation is unlawful and may be enjoined.[27]

[24] 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

[25] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, per Henshaw, J.

[26] Atchison, T. & S. F. Ry. Co. v. Gee (U. S. C. C.), 139 Fed. 582; Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; Jonas Glass Co. v. Glass Bottle Blowers' Assn., 72 N. J. Eq. 653, 66 Atl. 953.

[27] Allis-Chalmers Co. v. Iron Moulders' Union (U. S. C. C.), 150 Fed. 155; Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500; Southern Ry. Co. v. Machinists' Local Union (U. S. C. C.), 111 Fed. 49; Beaton v. Tarrant, 102 Ill. App. 124; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Butterick Publishing Co. v. Typographical Union, 100 N. Y. Supp. 292, 50 Misc. R. (N. Y.) 1; Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. (N. Y.) 605.

Picketing; when unlawful; when will be enjoined.

See also the following cases:

United States: Debs, In re, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092; Union Pacific R. Co. v. Rueff (U. S. C. C.), 120 Fed. 102; United States

So where workmen quit the service of their employer, and, as a means of inducing him to accede to their demands, establish pickets at or near the approaches of his premises for the purpose of inducing others from remaining in or entering into his employment, they and their confederates will be enjoined from the keeping of patrols, when such patrols resort to intimidation or any manner of coercion to prevent others from entering into or re-

v. Haggerty (U. S. C. C.), 116 Fed. 510; United States v. Weber (U. S. C. C.), 114 Fed. 950; Allis-Chalmers Co. v. Reliable Lodge (U. S. C. C.), 111 Fed. 264; Southern R. Co. v. Machinists' Local Union, No. 14 (U. S. C. C.), 111 Fed. 49; Otis Steel Co. v. Local Union No. 218 of Cleveland, etc. (U. S. C. C.), 110 Fed. 698; Reese, In re, 107 Fed. 942, 47 C. C. A. 87; Reese, In re (U. S. C. C.), 98 Fed. 984; United States v. Sweeney (U. S. C. C.), 95 Fed. 434; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, Nos. 1 and 3 (U. S. C. C.), 90 Fed. 608–614; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Mackall v. Ratchford (U. S. C. C.), 82 Fed. 41; Wire Company v. Murray (U. S. C. C.), 80 Fed. 811; Elder v. Whitesides (U. S. C. C.), 72 Fed. 724; United States v. Elliott (U. S. C. C.), 64 Fed. 27–31; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; United States v. Alger (U. S. C. C.), 62 Fed. 824; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (U. S. C. C.), 60 Fed. 803; Hagan v. Blindell, 56 Fed. 696, 6 C. C. A. 86; United States v. Workingmen's Amalgamated Council (U. S. C. C.), 54 Fed. 994, 26 L. R. A. 158; Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co. (U. S. C. C.), 54 Fed. 730, 19 L. R. A. 387, 5 Inters. Com. R. 522; Blindell v. Hagan (U. S. C. C.), 54 Fed. 40; Cœur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner (U. S. C. C.), 51 Fed. 260, 19 L. R. A. 382; Casey v. Typographical Union (U. S. C. C.), 45 Fed. 135, 12 L. R. A. 193; United States v. Kane (U. S. C. C.), 23 Fed. 748.

Connecticut: State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Massachusetts: Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

Michigan: Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Missouri: Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106.

New Jersey: Barr v. Essex Trades Council, 53 N. J. Eq. 101–111, 30 Atl. 881, 884.

Pennsylvania: Murdock v. Walker, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678.

Vermont: State v. Dyer, 67 Vt. 690, 32 Atl. 814; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Virginia: Crump's Case, In re, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

maining in the service of their late employer, to the irreparable damage of his business.[28]

And where, for six months after a strike of plaintiff's employees, it appeared that the picketing of his factory was constantly unlawful, by reason of the use of abusive, offensive and even indecent epithets by the pickets to the actual or the prospective employees, who at the same time were frequently jostled and crowded by the pickets on and along the public walk leading to plaintiff's factory, and sometimes subjected to more serious violence, it was held that the plaintiff was entitled to an injunction against such of the defendants as personally participated in such overt and unlawful acts and to recover damages.[29]

§ 506. Picketing—Whether Lawful Depends on Facts and Circumstances—Rule as Supported by Authority.

Whether picketing is lawful or unlawful, depends in each particular case upon the conduct of the pickets themselves. The fact that they are serving under appointment and instructions from their union adds nothing to their rights and privileges as affecting third persons. Under no circumstances have pickets the right to employ force, menaces, or intimidation of any kind in their efforts to induce nonstriking workmen to quit, or to prevent those about to take the strikers' places to refrain from doing so; neither have they the right, as pickets or otherwise, to assemble about the place in such numbers or in such manner as to impress workmen employed, or contemplating employment, with fear and intimidation.[30]

[28] Jones v. Van Winkle Gin & Machine Work, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848.

[29] Jones v. Maher, 116 N. Y. Supp. 180, 62 Misc. R. (N. Y.) 388, aff'd 125 N. Y. Supp. 126, holding that he was entitled to recover damages for the amount paid by him for counsel fees and the amount paid for guards about his factory and for maintaining there a commissariat for feeding and caring for his employees to protect them from the unlawful efforts of the pickets.

[30] Karges Furniture Co. v. Amalgamated Woodworkers' Local Union,

And in another case it is said that employees who think they have a grievance against their employer for a discharge of a fellow employee may not only leave his employment themselves but by picketing may peaceably attempt to persuade other workmen not to enter his employment and even to persuade their fellow workmen still remaining in the service to leave and join in the strike; but their efforts to attain such result must be confined to acts of peaceable persuasion and if they extend to violence, threats or even verbal abuse, they thereby become unlawful.[31]

§ 507. **Picketing—No Injunction to Protect.**

The right of a voluntary association, engaged in supporting a strike, to freedom in the labor market, so that the association can readily employ pickets and other agents in carrying on its industrial warfare, is held not to be a proper subject of protection by injunction. This conclusion was reached on an application for an injunction by striking machinists, the bill alleging that they had maintained a quiet system of picketing in the streets near the machine shops of the defendants and that defendants, in combination, were interfering by intimidation, threats, violence and arrests with the pickets of the complainants.[32]

§ 508. **Picketing—Ordinances as to Valid.**

It is a valid exercise of the police power vested in a municipality to provide by ordinance that it shall be a misdemeanor for a person to be guilty of "picketing" for the purpose of intimidating, threatening and coercing the employees of another.[33]

165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, per Hadley, J., citing Beaton v. Tarrant, 102 Ill. App. 124; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Murdock, Kerr & Co. v. Walker, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678.

[31] Jones v. Maher, 116 N. Y. Supp. 180, 62 Misc. R. (N. Y.) 388, aff'd in 125 N. Y. Supp. 1126.

[32] Atkins v. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

[33] Williams, In re, 158 Cal. 550, 111 Pac. 1035.

§ 509. Right to Strike—Refusal to Work with Non-Union Man—Massachusetts Rule.

It is settled in Massachusetts that a defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or of business.[34]

The members of a labor union cannot by a strike refuse to work with another workman for an arbitrary cause, since the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals applies.[35]

So a labor union cannot force other workmen to join it by refusing to work if workmen are employed who are not members of such union.[36]

And it is established in Massachusetts that it is not legal for an employer, even where he wishes to do so, to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the union.[37]

§ 510. Right to Strike—Refusal to Work with Non-Union Man—Pennsylvania Rule.

In Pennsylvania also it is decided that an agreement by a number of persons that they will by threats and strikes deprive a mechanic of the right to work for others, merely because he does not choose to join a particular union, is a conspiracy to commit an unlawful act, which conspiracy may be restrained. Under the Declaration of Rights of the Constitution of Pennsylvania, the right

[34] Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, citing Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Walker v. Cronin, 107 Mass. 555.

[35] Pickett v. Walsh, 192 Mass. 572, 582, 78 N. E. 753, 6 L. R. A. (N. S.) 1067.

[36] Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 349.

[37] Pickett v. Walsh, 192 Mass. 572, 582, 78 N. E. 753, 6 L. R. A. (N. S.) 1067.

of a workman to the free use of his hands is a right which neither the legislature or a trade union can take from him, and one which it is the duty of courts to protect. In the case holding as above stated members of an incorporated trade union, members of an unincorporated trade union, and non-union men were all working on a large and expensive building. After the building had progressed to a critical stage in its construction, a strike was ordered by the unincorporated union and two-thirds of the men quit work. The managers of the unincorporated union called upon the contractors and an arrangement was entered into that if the incorporated union men were discharged the strike would be called off. This arrangement was carried out and work was resumed, non-union men being continued on. Subsequently the unincorporated union men announced that they would pursue the same course in future and drive every member of the incorporated union into the unincorporated union. It was held that a court of equity would interfere by injunction to protect the members of the incorporated union.[38] It was said in this case: "Trade unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property which courts are bound to restrain. It is utterly subversive of the letter and spirit of the Declaration of Rights. If such combination be in accord with the law of the trades union, then the law and the organic law of the people of a free commonwealth cannot stand together; one or the other must go down." [39]

[38] Erdman v. Mitchell, 207 Pa. St. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783.

[39] Per Dean, J.

See also People v. McFarlin, 43 Misc. 591, 89 N. Y. Supp. 527.

§ 511. Right to Strike—Refusal to Work with Non-Union Man—New York Decisions.

In New York it is difficult to harmonize the decisions upon this question not only between the higher and lower courts but even the expressions of opinion in the two leading cases decided in the Court of Appeals. Thus in a case decided in the Appellate Division it is held that a distinction is made between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case the action of the combination is primarily for the betterment of its fellow members. In the second case such action is primarily to impoverish and crush another by making it impossible for him to work there or, so far as may be possible, anywhere. The difference is between combination for welfare of self and that for the persecution of another. The primary purpose of one may necessarily but incidentally be a discharge of an outsider; the primary purpose of the other is such discharge and, so far as possible, an exclusion from all labor in his calling. Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another. The law views an injury arising from competition differently from an injury done in persecution.[40]

So the continued expression, by the members of a laborers' union of their refusal to work with the members of another union, occurring under circumstances which would naturally result in causing the common employer to dismiss the latter, does not amount to a conspiracy to prevent employment under all circumstances nor to an unlawful coercion and hence it was decided that a preliminary injunction obtained by members of the latter union against the former should be vacated.[41]

[40] Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. (N. Y.) 605, per Jenks, J.

[41] Reform Club of Masons & Plasterers L. A. 706 v. Laborers' Union Protective Society, 29 Misc. R. (N. Y.) 247, 60 N. Y. Supp. 388.

And in the Court of Appeals it is decided that a labor union may refuse to permit its members to work with fellow servants who are members of a rival organization, may notify the employer to that effect and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive such as a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed.[42]

In this connection, however, it is said in an earlier case decided by the New York Court of Appeals: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would in the language of Mr. Justice Barrett [43] 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate.' " [44]

[42] National Protective Assoc. of Steam Fitters & Helpers v. Cumming, 170 N. Y. 315, 63 N. E. 369, aff'g 53 App. Div. 227.

See Wunch v. Shankland, 69 N. Y. Supp. 349, 59 App. Div. 482; Reform Club of Masons & Plasterers L. A. 706, Knights of Labor of City of New York v. Laborers' Union Protective Soc., 60 N. Y. Supp. 388, 29 Misc. 247; Tallman v. Gaillard, 57 N. Y. Supp. 419, 27 Misc. R. 114.

[43] In People ex rel. Gill v. Smith, 5 N. Y. Cr. Rep. 513.

[44] Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496, aff'g Curran v. Galen, 77 Hun, 610, 28 N. Y. Supp. 1134.

And in another case the Appellate Division has decided that no individual or association of individuals has any right, wantonly, so to interfere with a man in the exercise of his craft, business or profession, and where it appears that the only motive inducing such interference is to prevent a particular individual from making his living, irrespective of other considerations, a court of equity will entertain jurisdiction of the matter, where no adequate remedy exists at law.[45]

And in another case in this State it is declared that where the main purpose of the strikers was to obtain a closed shop that such purpose was not to better the condition of the workmen but to deprive other men of the opportunity to exercise their right to work and to drive them from an industry in which, by labor, they had acquired skill and which they had a right to pursue to gain a livelihood without being subjected to the doing of things which might be disagreeable or repugnant. And it was decided that such purpose was unlawful and the court granted a temporary injunction restraining all acts of violence and threats of bodily injury and also all picketing and patrolling which it was declared, though lawful when not accompanied by violence and intimidation, became unlawful where in aid of an unlawful object.[46]

Again, where a labor union ordered a strike against a company, not upon any question of wages, but merely because the company had refused to agree to employ only union men and had declined to abandon a piecework or premium system which it had adopted, the court refused to vacate a preliminary injunction restraining the union and its members from interfering with the business and using threats and force inducing employees to leave the service of the company, preventing others from taking service with it and also keeping away customers.[47]

[45] Davis v. United Portable Hoisting Engineers, 51 N. Y. Supp. 180, 28 App. Div. (N. Y.) 396.

[46] Schwarcz v. International Ladies' G. W. Union, 124 N. Y. Supp. 918, 68 Misc. R. (N. Y.) 528.

[47] Davis Machine Co. v. Robinson, 84 N. Y. Supp. 837, 41 Misc. R. (N. Y.) 329.

§ 512. Right to Strike—Refusal to Work with Non-Union Man—Other Decisions.

In a case in New Jersey where the members of a labor union threatened their employers that unless they discharged a certain man they would leave their services thus leaving them without the means of executing their contracts and such person was discharged by two employers after receipt of such threat and there was testimony that he was pursued from one employer to another with the determination to force him to join the union and that by this means it was hoped to strip him of his means of livelihood unless he did so it was decided that in an action by him against the union a judgment in his favor was justified.[48]

And in another case in Missouri where it appeared that as soon as the agents of a trades union learned that a certain man had obtained work they would notify his employer to discharge him on pain of a strike and would extort from the employer a heavy fine for having hired him and that if the contractor refused to discharge him or to pay the fine then a strike would be ordered preventing him from completing his contracts, it was declared that a sort of duress was thus employed and that procuring the employee's dismissal from various employments and preventing him from following his trade were illegal and it was decided that the members of such union were liable in damages to the employee.[49]

§ 513. Right to Strike—Refusal to Work with Non-Union Man—Conclusion.

It will be seen from the decisions referred to in the four preceding sections that the courts are not in harmony upon this question. While it would seem that the weight of authority is against the proposition that a

[48] Ruddy v. United Association of Journeymen Plumbers (N. J. L., 1910), 75 Atl. 742.

See State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

Compare Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

[49] Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995.

strike is legal when the purpose is to persuade an employer to discharge an employee because he is a non-union man yet the better view seems to be that expressed in the National Protective Association v. Cummings,[50] and in Mills v. United States Printing Co.,[51] in which the doctrine is favored that a combination of members of a labor union to secure the exclusive employment of its members by a refusal to work with none others is primarily for the betterment of the fellow members of the union and is lawful.

§ 514. Use of Persuasion by Strikers.

The current of authority is that a court of equity will not enjoin employees who have quit the service of their employer from attempting to persuade, by proper argument, others from taking their places, so long as they do not resort to intimidation or obstruct the public thoroughfares.[52]

The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. So, in a contest between employees and employers on the one hand to secure higher wages, and on the other to resist it, arguments and persuasion to win support and co-operation from others are proper to either side, provided they are of a character

[50] 170 N. Y. 315, 63 N. E. 369, aff'g 53 App. Div. 227, 65 N. Y. Supp. 946.

[51] 91 N. Y. Supp. 185, 99 App. Div. (N. Y.) 605.

[52] Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477.

to leave the persons solicited feeling at liberty to comply or not, as they please.[53]

But it is said in a case in New Jersey that although employees have the right whenever they choose to leave their employment yet that when they do they have no right to interfere in the slightest degree with the efforts of the employer to fill their places.[54]

§ 515. Use of Persuasion—Employees Under Contract.

The right of strikers to use persuasion to induce others to leave the employ of their employer is held to cease in those cases where the persons upon whom such persuasion is used are under contract to serve such employer for a definite length of time. Under such circumstances, since each party to such a contract has a property right in it if either breaks it he does a wrong for which the other is entitled to a remedy, and it is decided that strikers seeking to procure the breaking of such a contract may be enjoined.[55]

[53] Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, per Hadley, J., who further said: "The decided cases are not in harmony with respect to the right to persuade, but the clear weight of authority is to the effect that so long as a moving party does not exceed his absolute legal rights, and so does not invade the absolute rights of another, he may do as he pleases, and may persuade others to do like him."

[54] Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188.

[55] Iron Moulders' Union v. Allis-Chalmers Co., 116 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

Injunction lies to restrain a malicious violation of contracts by ordering a strike because of refusal to recognize the union or its walking delegate. Beattie v. Callanan, 81 N. Y. Supp. 413, 82 App. Div. 7.

While contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, still they may become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those

So where non-union men are employed under a contract not to join any union the court will restrain interference with the employer's business by which it is sought to induce his employees to join a union, where such acts operate to injure his business and unless restrained may result in his ruin.[56]

And in case of persons under a contract to work it is decided that a strike or combination not to work, in violation of that contract, to secure something not due to them under that contract, would be a combination interfering without justification with the employer's business.[57]

In an action by a master to enjoin the wrongful prevention of his servants from carrying out their contracts of employment, it is held that the complaint should be detailed, certain and specific, giving facts and circumstances, including time and place of each alleged act of coercion, the name of the person coerced if known, the manner in which he was coerced and the manner in which and the extent to which it affected or impeded the master's right to conduct his business in a lawful way.[58]

§ 516. Use of Violence, Threats and Intimidation by Strikers.

Though workingmen may combine for the purpose of leaving the service of their employer and may refuse to return to work until their demands are complied with

the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal contracts in restraint of trade because those of the former classes do. United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 69, 7 C. C. A. 15, 24 L. R. A. 73, case reversed in 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, per Sanborn, Cir. J., a case, under the Act of July 2, 1890, 26 Stat. 209, chap. 647, Rev. Stat. Supp. 762, of restraint of interstate commerce, construction of the statute and monopoly.

[56] Flaccus v. Smith, 199 Pa. St. 128, 48 Atl. 894.

[57] Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, citing Aberthaw Construction Co. v. Cameron, 194 Mass. 208, 80 N. E. 478.

[58] Badger Brass Mfg. Co. v. Daly, 137 Wis. 601, 119 N. W. 328.

yet in the conduct and maintenance of a strike they must conduct themselves in a peaceable and orderly manner, having a due and proper regard for the right of the employer, of other workingmen and of the public in general. They must refrain from acts of violence towards others such as assaulting workingmen who have taken or are contemplating the taking of their places. Not only this but also they must not resort to threats and intimidation; and they should not collect in such crowds in the streets as to seriously interfere with travel upon the streets or to prevent access to and egress from the employer's premises. If strikers commit any of these acts then the protection of a court of equity by way of injunction may be invoked.[59]

Labor unions may refuse to work for any particular employer and may obtain employment for their members by solicitation and promises of support in trade and otherwise, but in the accomplishment of their purpose they must proceed only by lawful and peaceable means and they have no right to make war on other persons.[60]

So acts of intimidation or threatened injury by union men to induce men to leave employment accompanied with acts of assault upon non-union men who refuse to join the union and establishing camps of armed men near the employer's works is such an unlawful invasion of the employer's rights as well as of the rights of the non-union employees as to constitute an irreparable injury justifying an injunction against such acts.[61]

[59] *United States:* Knudsen v. Benn (U. S. C. C.), 123 Fed. 636; United States v. Weber (U. S. C. C.), 114 Fed. 950.

Indiana: Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788.

Minnesota: Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477.

New Jersey: Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188.

New York: Beattie v. Callanan, 73 N. Y. Supp. 518, 67 App. Div. 14; Master Horseshoers' Protective Assn. v. Quinlivan, 82 N. Y. Supp. 288, 83 App. Div. 459.

[60] Wilson v. Hey, 232 Ill. 389, 83 N. E. 928.

[61] Reinecke Coal Min. Co. v. Wood (U. S. C. C.), 112 Fed. 477.

And in a case in New York it is decided that where the members of labor unions conspire for an unlawful purpose and for its accomplishment make use of violence and threats of bodily injury, they should be restrained by the order of the court during the pendency of an action for a permanent injunction, not only from acts of violence but from all picketing and patrolling which, though not unlawful in themselves, become unlawful when resorted to in aid of an unlawful object.[62]

So members of labor unions and sympathizers with such unions were enjoined from entering a store, declared to be "unfair," for the purpose of interfering with trade or customers; from interfering, from obstructing access to it by any physical means; from so acting as to collect in front of or adjacent to it crowds calculated to obstruct travel upon the streets or sidewalks near it, and from using threats, violence or intimidation with the intent of preventing travelers or intending customers from entering the store and trading there.[63]

And it is decided that every attempt by force, threat or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay is an act of wrong and oppression and any and every combination for such a purpose is an unlawful conspiracy. The law will protect the victim and punish the movers of any such combination.[64]

In a recent case in Massachusetts it is decided that in case of a strike by members of a labor union they may be enjoined from inducing others, who did not strike and who are members of such union, to leave their work by threats of imposing fines upon them in accordance with a by-law of such union.[65]

[62] Schwarez v. International Ladies G. W. Union, 68 Misc. R. (N. Y.) 528, 124 N. Y. Supp. 968.

[63] Foster v. Retail Clerks' Protective Assn., 78 N. Y. Supp. 860, 39 Misc. R. (N. Y.) 48.

[64] Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

[65] Willicut & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 397. Two judges, however, dissented from the above conclusion saying that they

Where, in an action against unincorporated labor unions for threatened injury to the person and property of plaintiff, the proof showed that acts of violence and intimidation were committed upon plaintiff's employees by members of one or the other of the defendant labor unions, but no conspiracy was established nor any ratification by either of the defendant unions of the acts complained of, it was held that an injunction should only be continued against such of the members of each of the defendant unions who could be named and identified as having committed said acts of violence and intimidation.[66]

§ 517. **Threats—Intimidation—What Constitute.**

The language or conduct which will constitute the unlawful threats or means to intimidate, need not be such as induce a fear of personal injury. Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property, are equivalent to threats.[67]

To constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the strikers is intimidating. And this may be shown by all the circumstances of the case, by the methods of the

could not convince themselves that the defendants should be enjoined from imposing or threatening to impose fines upon those members of their organization, who, by continuing to work for the plaintiff, had under the rules to which they had themselves assented, become liable to such imposition.

[66] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 97 (case of motion to continue a preliminary injunction granted in an action against labor unions for damages to plaintiff's business; injunction continued as to part of defendants and otherwise denied). See Reform Club of Masons & Plasterers' L. A. 706, Knights of Labor of City of N. Y. v. Laborers' Union Protective Soc., 60 N. Y. Supp. 388, 29 Misc. 247.

[67] State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28, per Hall, J., citing State v. Donaldson, 32 N. J. L. 151; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Rogers v. Everts, 17 N. Y. Supp. 264; O'Neil v. Behanna, 182 Pa. St. 236, 37 Atl. 843.

strikers, their numbers, and their devices such as the nature of circulars issued by them.[68]

§ 518. **Boycotts—Generally.**

It may be stated generally that the boycotting of one who refuses to accede to the demands of a labor union is held to be unlawful where the means used to prevent persons from dealing with the person boycotted are threatening in their nature, and tend naturally to overcome, by fear of loss of property, the will of others, and compel them to do what they would not otherwise do, though unaccompanied by actual violence or threats of violence.[69]

And the circumstances of each particular case must be resorted to in order to determine what amounts to intimidation, threatened injury or coercion which constitute the essential elements of a boycott.[70]

Injunction will lie to restrain a combination of persons from attempting to ruin a person's business by bringing to bear upon his customers and employees intimidating and coercive means.[71]

As to injunctions in boycott cases it is said in a case in

[68] Foster v. Retail Clerks' Protective Assn., 78 N. Y. Supp. 860, 39 Misc. R. (N. Y.) 48.

[69] Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

That boycott is unlawful when force, threats, or intimidation is used see the following cases:

United States: Loewe v. California State Federation of Labor (U. S. C. C.), 139 Fed. 71.

Minnesota: Gray v. Building Trades Council, 91 Min. 171, 97 N. W. 663, 63 L. R. A. 753.

Missouri: Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997.

New Jersey: Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465.

New York: Cohen v. United Workers of America, 72 N. Y. Supp. 341, 35 Misc. R. 748.

England: See Quinn v. Leathem (1901), App. Cas. 495, 70 L. J. P. C. 76, 85 Law T. 289, 50 Wkly. Rep. 139, 65 J. P. 708.

[70] Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753.

[71] Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Minnesota: "In restraining boycotts, the authorities proceed on the theory that they are unlawful interferences with property rights. The Constitution of our State guarantees liberty to every citizen, and a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; and the rights so guaranteed are fundamental, and can be taken away only by the law of the land, or interfered with, or the enjoyment thereof modified, only by lawful regulations adopted as necessary for the general public welfare." [72]

As bearing upon this question it has been held in New York that threats against manufacturers to withdraw all union men and end all business relations, unless the demands of the union are complied with, constitute no crime, but where the manufacturers are threatened with business annihilation by the malicious use of the boycott, compelling would be customers to desist from purchasing through fear, induced by threats, that if they do purchase the full power of the union will be used against them to their destruction, then the action of the members of the union co-operating therein is held to be illegal.[73]

And in another case in New York it is decided that a trade union has no right to call a strike in the shops of other employers of labor for no other reason than because they deal with certain persons, and such persons when so boycotted may have an injunction to restrain the members of such union from causing other manufacturers by threats of strikes to cease manufacturing goods for them.[74]

In New Jersey it is declared that a boycott in whatever form it assumes is unlawful and that therefore attempts by members of a labor union to compel an employer to accede to the demands of the union as to the mode of doing his business by persuading or inducing others not to deal with him is unlawful and will be enjoined.[75]

[72] Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, per Brown, J.

[73] People v. McFarlin, 89 N. Y. Supp. 527, 43 Misc. R. (N. Y.) 591.

[74] Schlang v. Ladies Waist Makers' Union, 124 N. Y. Supp. 289, 67 Misc. R. (N. Y.) 221.

[75] Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465.

In another case in New Jersey it has been held that equity does not undertake to grant injunction in strike or boycott cases unless complainant has shown substantial pecuniary loss in respect to his property and business for which an action at law is an inadequate remedy, or where he has shown that he has been deprived of his right to make a living and that the mere fact that defendants in combination, by means of intimidation or criminal violence, interfere with the free flow of labor to an employer, does not give the employer the right to equitable relief, in the absence of his showing that his remedy at law was inadequate.[76]

Under the definition given to a "boycott" in the California Supreme Court as being an organized effort to persuade or coerce which may be legal or illegal, according to the means employed, the issuance of an injunction in that State is dependent upon the circumstance whether the means employed, or threatened to be employed, are legal or illegal.[77]

In a case in Pennsylvania it is said that an employer of workmen has the right to invoke, for the protection of his property, the bill of rights against a labor union which seeks to coerce him in such a way that he would be compelled to employ only union workmen, to submit himself to the control of the union, and to put himself within its power to dictate to him the number of hours to constitute a day's work in his mill, the compensation to be paid therefor, the time of payment thereof, and the selection of his employees. And the coercive acts which the courts will enjoin may be without threats or commission of violence or personal injury. And in this case it was decided that declarations by officers of the union that they intended to drive the employer out of business unless he unionized his mill, followed by notices to customers of the employer not to use the latter's material under threats of strikes in the customers' own estab-

[76] Atkins v. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

[77] Pierce v. Stablemen's Union (Cal. S. C., 1909), 103 Pac. 324.

lishments constituted such coercion as would be enjoined.[78]

§ 519. Boycott Circulars—When Held Legal.

In a recent case in California it was decided that it was not unlawful to send written notices to contractors employing union labor that plaintiff had been declared unfair and that union men could not work for it or handle material supplied by it until further notice.[79] It was said in this case: "There are authorities on both sides of this question, but I think that those which would answer it in the negative have the better reason. The contractors were working in harmony with the unions (as indeed the plaintiff had previously done) and fair dealing required that the council, representing and acting for the unions, should protect such contractors from any loss they might incur if left in ignorance of the action it had taken. If they had not sent the notices some of those contractors who felt constrained to stop dealing with plaintiff when informed that it had been declared unfair might have purchased material which they would not have used, and it is only upon the assumption that such purchases would have been made, that the plaintiff can base a claim that it was damaged by the notices. But can plaintiff make such a claim as a ground for equitable relief? It seems very clear that it cannot; for with full knowledge that it had been declared unfair and of all the consequences flowing from that declaration, it would not have been justified in selling material to a contractor employing union men without disclosing a fact so essential to his freedom of contract. And if good faith and fair dealing imposed an equal obligation upon the plaintiff and the council to inform the contractors of what the plaintiff knew, it is difficult to see what right of plaintiff was infringed by the sending of the notices. Their only effect

[78] Purvis v. United Brotherhood, 214 Pa. St. 348, 63 Atl. 385, 112 Am. St. Rep. 757.

[79] Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027.

was to enable the contractors and plaintiff to conduct their future dealings on equal terms." [80]

In one of the leading cases decided in Minnesota where an injunction had been granted restraining the defendants "from notifying such customers or prospective customers that plaintiffs are unfair," it was decided on appeal that the court below was not justified in making such an order and it was said: "If a notification to such customers, actual or prospective, that plaintiffs are 'unfair' portends injury to them or plaintiffs, and such as to bring the case within the rule against boycotting, it was properly made a part of the temporary injunction.[81] Whether such a notification would in any case amount to a threat or intimidation must be determined from all the facts and circumstances of each particular case. Such notice might have special significance in a particular case, and have no meaning in another. But the complaints before us, by which we are controlled in determining the case, there being no finding other than in effect that their allegations are true, contain no allegations that the mere notification of customers that plaintiffs are 'unfair' has any special significance, that it portended injury, or was intended as a threat or intimidation, and for this reason we hold that the court below was not justified in making this an element of the injunctional order." [82]

In a case in New York it is decided that merchants will not be permitted to restrain garment workers from sending circulars to the customers of the merchants, alleged to have seriously affected their business and likely to cause them irreparable damage, where the circulars are not shown to contain any threats or intimidation.[83]

And the employees of a publishing company on strike

[80] Per Beatty, C. J.

[81] Citing Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

[82] Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, per Brown, J.

[83] Cohen v. United Garment Workers, 72 N. Y. Supp. 341, 35 Misc. R. (N. Y.) 748. See also Sinsheimer v. United Garment Workers, 28 N. Y. Supp. 321, 77 Hun (N. Y.), 217.

and the local labor unions of which they were members were held to be within their legal rights in publishing circulars setting forth the circumstances of the strike and requesting their friends to withhold their patronage from the company. And in this case it was decided that an injunction would only be granted against resorting to threats, intimidation, force or fraud in their relations with the customers of the publishing company and that the publication of the circulars would not be restrained upon the ground that they contained innuendoes of a libelous character.[84]

But where one of defendants at a meeting of a labor union said: "We must ruin the business of" complainant and moved the appointment of a committee and the other defendant seconded the motion and a circular was distributed reciting certain alleged facts by way of inducement and ending "Therefore we appeal to every member, to every religious and justly thinking person, to only buy goods" from others and defendants put up posters with the words: "Scab Labor! Don't Patronize (the complainant)! Scab Labor! 556 Cortlandt Avenue," it was held that such words did not violate the provision of the New York Penal Code [85] that if two or more persons conspire to prevent another from exercising a lawful calling by force, threats or intimidation each is guilty of a misdemeanor, since no force, threat, or intimidation was used or threatened by the defendants.[86]

§ 520. Boycott Circulars—When Held Illegal.

Members of a union may cease patronizing anyone when they regard it for their interest to do so, but they have no right to compel others to break off business relations with one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person; and notices which excite fear or reasonable apprehension of others that their busi-

[84] Butterick Publishing Co. v. Typographical Union, 100 N. Y. Supp. 292, 50 Misc. R. (N. Y.) 1.

[85] Section 168, subd. 5.

[86] People v. Radt, 71 N. Y. Supp. 846.

ness will be injured unless they do break off such relations or cease patronizing another are wrong and unlawful.[87]

Where it appeared that after certain employees had left plaintiff's service, notices were circulated and published by defendants as follows: "Organized Labor and Friends: Don't drink scab beer!" followed by a designation of certain named beers as "unfair" and also other notices were published stating "Guard Your Health by Refusing to Drink Unfair Beer;" it was held that this amounted to what would be termed a boycott, and that such acts tended fairly to obstruct the business of the complainant and it was the duty of the court to restrain the defendants from such acts.[88]

And where there were many circulars relative to the strike of plaintiff's employees, which was ordered by the defendant, a lodge of a machinists' union, posted and widely distributed and these circulars bore the names of defendant's officers and were obviously designed to prevent other workmen from entering plaintiff's employment it was held that the jury might properly infer that the defendant promoted the distribution.[89]

§ 521. Boycott Circulars—Constitutional Provision as to Freedom of Speech.

Where the Constitution of a State provides that "every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty," it has been decided that a labor union, even though the persons composing it are insolvent, will not be enjoined from issuing a circular in which a certain employer is characterized as "unfair" and which calls upon all laboring and all persons in sympathy with organized labor to withdraw their patronage from such person.[90] The court said: "The language here employed

[87] Wilson v. Hey, 232 Ill. 389, 83 N. E. 928.

[88] Seattle Brewing & Malting Co. v. Hansen (U. S. C. C.), 144 Fed. 1011.

[89] Patch Manufacturing Co. v. Protection Lodge, 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 765.

[90] Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127.

seems too clear to admit of doubt or argument. * * * It is impossible to conceive the idea that the individual has an absolute right to publish what he pleases, subject to the restriction mentioned, and at the same time to entertain the idea that a court may prevent him from doing so. The two ideas cannot possibly co-exist." [91]

In a case in Michigan, however, it was decided that, although under the Constitution every person is entitled to "freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right and that the publication of a libel would not be enjoined, the distribution of a boycotting circular should be enjoined.[92] The court said: "If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word 'boycott' and they all evidently understood it as the defendants interpreted it by their conduct and acts." [93]

§ 522. Contracts Between Employer and Employee.

It may be stated as a general rule that an employer and employee may lawfully contract in reference to the price to be paid the workmen and in respect to the terms of employment. And this right of contract is generally recognized as between an employer of labor and a labor union.[94]

But while an individual employer may lawfully agree with a labor union to employ its members only, such an

[91] Per Holloway, J.

[92] Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

[93] Per Grant, C. J.

[94] People v. Marcus, 97 N. Y. Supp. 322, 110 App. Div. (N. Y.) 255, aff'd 185 N. Y. 257, 77 N. E. 1073.

agreement when participated in by all or a large portion of employees in any community, so as to become oppressive by operating generally upon the craftsmen in the trade, and imposing upon them a penalty for refusing to join the favored union, is held to be against public policy and void.[95] So in this case it was so held in respect to an order issued by a building trades' employers' association to its members forbidding the employment of artisans who did not at once become members of a particular union, it appearing that such association was made up of nearly all prominent building contractors and such order practically affected the whole building trade in the locality.

Again, an employer may lawfully contract with his employees to buy their labor upon terms other than the union ones and in order that the union may not be a disturbing element in the conduct of his business may bind his employees not to become members of the union, and where the members of such union are, under these circumstances, guilty of an unlawful conspiracy in seeking to persuade such employees to break the contract and join the union, equity may intervene to enjoin the continuance of such conduct.[96]

§ 523. Contracts Between Employer and Employee Continued.

A contract between employers and a labor union whereby the former agreed, for a certain period, to employ and retain only members of the union in good standing, and the latter, for the same period, bound themselves to furnish the services of its members, is held not to be violative of public policy. And in such a case a promissory note given by the employers as collateral security, to be applied as liquidated damages for the violation of such contract, is a valid and enforceable instrument.[97]

[95] McCord v. Thompson-Starrett Co., 113 N. Y. Supp. 385, 129 App. Div. (N. Y.) 130, order aff'd 198 N. Y. 587, 92 N. E. 1090.

[96] Hitchman Coal & Coke Co. v. Mitchell (U. S. C. C.), 172 Fed. 963.

[97] Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292,

And an agreement between employers to have no further dealings with certain labor unions or organizations and to require each person presenting himself to any party to such agreement to sign, as a condition of his employment, an agreement that he is not and during the period of his employment will not become a member of such unions does not constitute an unlawful conspiracy against such unions.[98]

Again, an agreement between a mason builders' association and a bricklayers' union providing that the members of the mason builders' association must include in their contracts for building all cutting of masonry, interior brickwork, the paving of brick floors, the installing of concrete blocks, the brickwork of the damp proofing system and all fireproofing floor arches, slabs, partitions, furring and roof blocks, and that they shall not lump or sublet the installation, if the labor in connection therewith is bricklayers' work as recognized by the trade, the men employed upon the construction of the walls to be given the preference and also providing that no members of these bricklayers' unions shall work for anyone not complying with the rules and regulations herein agreed to has been held not to be within a statute providing that every contract, agreement or arrangement whereby a monopoly in the manufacture, production or sale of any article or commodity is or may be created, established or maintained is illegal and void.[99]

But an agreement sought to be exacted from carpenter contractors, that they must agree to purchase materials only from factories approved by the union is held to be against public policy and harmful to the community because it restrains competition and freedom of trade in articles of common necessity.[1]

111 Am. St. Rep. 730, rev'g Jacobs v. Cohen, 90 N. Y. Supp. 854, 99 App. Div. 481.

[98] Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500.

[99] National Fireproofing Co. v. Mason Builders' Assn., 169 Fed. 259, 94 C. C. A. 535, decided under N. Y. Laws, 1899, p. 1514, chap. 690.

[1] People v. McFarlin, 89 N. Y. Supp. 527, 43 Misc. R. (N. Y.) 591.

§ 524. Officers—Power of Trade Union's Board of Directors or Committees to Contract.

The 1904 convention of the International Printing Pressman and Assistants' Union instructed its board of directors to "negotiate" with the Typothetæ for an eight-hour workday. The convention of 1905 instructed the board of directors to secure "if possible" a workday of eight hours; and the convention of 1906 instructed its board of directors "to secure a renewal of the agreement" then existing, which provided for a nine-hour day "with the declaration as to whether the eight-hour day would be agreed to." The directors under this authority executed a contract with the Typothetæ renewing the existing contract, and providing for a nine-hour day until January 1, 1909, and an eight-hour day thereafter during the life of the contract. The convention of 1907 refused to ratify this contract until the provision for an open shop was stricken out, and an amendment was inserted providing for nine hours' pay for the eight-hour day, to which the Typothetæ refused to agree. It was held that the board of directors of the union under the instructions given them by the convention of 1906 had no power to determine within what time after the expiration of the existing contract the eight-hour day should be inaugurated, and that the agreement so made was not binding on the union unless ratified.[2] In this case a suit was brought to prevent the violation of, and practically to enforce, the specific performance of an alleged agreement between two voluntary associations, namely, the United Typothetæ of America and the International Printing Pressmen and Assistants' Union of North America. The complainants were members of the Typothetæ, and brought the suit on behalf of themselves and as representatives of the Typothetæ, and the defendants were such as representatives of the union; the purpose of the agreement was to establish "between the employing printers of the United States and their pressmen and feeders uniform shop practices and fair scales of wages,

[2] Syllabus in A. R. Barnes & Co. v. Berry (U. S. C. C.), 157 Fed. 883.

settlement of all questions arising between them, and the abolition of strikes, sympathetic or otherwise, lockouts and boycotts and providing also as to the number of hours which should constitute a week's work during the life of the contract and other provisions as to arrangements as to half-holidays and overtime "without overtime cost to the employer" and the right of the employer to "a forty-eight hour week fifty-two weeks in the year, except where legal holidays intervene." Committees of the two associations signed the contract which was ratified by a special convention of the Typothetæ, but this was subsequently repudiated by an annual convention in 1907 which action was approved by the men of the union upon a referendum vote directing that an "eight-hour day" be inaugurated by the union on a certain day in November, 1907. The complainants claimed, and the defendants denied, that the committee of the union was authorized by the convention of 1906 to make the contract without ratification by a convention of the union; and the questions in controversy were: (1) Had the committee of the union full and final authority to make the contract? (2) If so, could the performance thereof be enforced indirectly by enjoining the officers of the union from paying strike benefits, and from doing anything in furtherance of strikes? [3] Upon appeal to the Circuit Court of Appeals the case below was affirmed and it was held that the so-called contract between the International Printing Pressmen and Assistants' Union and the United Typothetæ of America, signed by the directors of each of such associations on January 8, 1907, for the purpose of governing the relations between the members of the two as employers and employees, was invalid and not binding for want of authority on the part of the directors of the union to execute the same. It was designed to take the place of a prior agreement between the parties which was to expire by limitation May 1, 1907, but contained certain provisions differing therefrom. Such prior contract had been similarly negoti-

[3] As to second point, see § 528, herein.

ated, subject to ratification by each association, and had been so ratified. The new agreement was also ratified by the Typothetæ, but the directors of the union assumed to have authority to conclude the contract. The minutes of the last preceding convention of the association at which their authority was given showed, however, that their negotiations as to some of the matters covered by the agreement were to be reported to the next annual convention for its action, and such convention, which met in June following, voted to ratify the contract only subject to certain changes, which were never made.[4]

§ 525. Injunction—Sufficiency of Complaint for Threatened Injury to Persons and Property—New York Code.

A complaint sets forth a cause of action for threatened injury to person and property, where after alleging that defendants, certain unincorporated labor unions, had entered into an unlawful conspiracy by abuse, intimidation, threats and violence to coerce and intimidate the other employees of the plaintiff and to induce them to leave and to force plaintiff to accede to the demands of said union; and further alleges that, with intent to injure and destroy plaintiff's business and property, the defendant unions are committing and intend to continue to commit acts of intimidation, abuse and violence against plaintiff and its employees, and recites alleged acts of such character already committed at the instigation of defendant unions, their officers and members.[5]

§ 526. Parties—Process—Service—Injunction.

In an action against unincorporated labor unions for threatened injury to the person and property of plaintiff,

[4] A. R. Barnes & Co. v. Berry, 169 Fed. 225, 94 C. C. A. 501 (the last part of the text from "the case below was affirmed and it was held" is the syllabus to 169 Fed. 225, 94 C. C. A. 501).

[5] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 96, case of motion to continue a preliminary injunction granted in an action against labor unions for damage to plaintiff's business.

after the discharge by it of certain members of such labor unions following a strike, the defendants are properly made parties to the action, under the New York Code of Civil Procedure, by service upon their officers.[6]

§ 527. Injunction—Right to in New York.

In New York the only mode of redress open to parties generally, for injuries occasioned to them through the voluntary combination of others engaged in similar employments with a view of influencing and controlling the general conduct and management of such trade or employment is prosecution under the Penal Code;[7] and unless some injury has been inflicted on the person or some right of property has been invaded, destroyed or prejudiced, an injunction will not lie.[8]

§ 528. Injunction to Restrain Payment of Strike Benefit—Specific Performance.

Where a contract between the International Printing Pressmen and Assistants' Union and the United Typothetæ of America attempted to regulate the length of the

[6] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 96, case of motion to continue a preliminary injunction granted in an action against labor unions for damage to plaintiff's business.

[7] Section 168.

[8] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 97 (case of motion to continue a preliminary injunction granted in an action against labor unions for damage to plaintiff's business; "all members of the defendant unions who can be named and identified as having committed acts of violence or intimidation should be enjoined. In other respects the motion to continue injunction order denied.") § 580 of the Penal Law of New York (source is Penal Code, § 168) in defining and providing for the punishment of conspiracy provides (in subdivs. 5, 6) as follows: "If two or more persons conspire * * * 5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or, 6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor." Birdseye's Cumming & Gilbert's Consol. Law N. Y., p. 3848, Laws, 1909, chap. 8, Art. LIV.

workday, but did not fix the term of service nor prevent the members of the union from withdrawing from the service of the Typothetæ at any time whether with or without cause, the contract having been repudiated by the union, the courts had no power by injunction to restrain the officers of the union from paying strike benefits to members from a fund raised for that purpose in order indirectly to compel enforcement of the contract, and prevent the success of strikes inaugurated to compel the granting immediately of an eight-hour day.[9] "The strike benefit fund is created by moneys deposited by the men with general officers for the support of themselves and families in times of strikes, and the court has no more control of it than it would have over deposits made by them in the banks, and the attempt to enforce specific performance of the agreement by enjoining the officers from performing their functions cannot be entertained. The court will not by indirect methods compel the men to continue in the service of the Typothetæ and work nine hours a day. The agreement only requires that, if they work at all, they shall work nine hours a day. There is no agreement that they shall continue in the service of the Typothetæ." [10]

§ 529. **Injunction — Evidence of Unlawful Acts of Members During Strike.**

The unlawful acts of one or more members of a labor union during a strike do not ipso facto bind the union; conclusive proof should appear upon which to base the charge that the defendant associations, as such, promoted or ratified the acts complained of; and, while such proof may be circumstantial where a conspiracy is alleged, the circumstances should be those that amount to direct proof.[11]

[9] Syllabus in A. R. Barnes & Co. v. Berry (U. S. C. C.), 157 Fed. 883, aff'd 169 Fed. 225, 94 C. C. A. 501, for statement of this case see § 524, herein.

[10] *Id.*, 889, per Thompson, Dist. J.

[11] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 96; case of motion to continue a preliminary

§ 530. **Injunction—No Defense That Act a Crime.**

In a proceeding for an injunction against a labor union, the fact that certain of the acts charged amount to crimes, or threatened crimes, is not a reason why equity will refuse to restrain them; while equity will not attempt to restrain the commission of a crime as such, the fact that an act threatening irreparable injury to property rights is of itself criminal does not deprive a court of equity of its right and power to enjoin its commission. And likewise in such a case while equity will not generally enjoin against a trespass as such yet when the acts committed and threatened are in the nature of a continuing trespass, working irreparable injury, they may be enjoined.[12]

§ 531. **Injunction—Question of Law and Fact.**

In an action against unincorporated labor unions for threatened injury to the person and property of plaintiff, the question whether acts of violence and intimidation committed upon employees of plaintiff by members of the defendant unions, were committed in the interest and for the benefit of said unions is one of law and not of fact.[13]

§ 532. **Preliminary Injunction—When Vacated as to Union but Permitted to Stand as to Individual Members but Not so as to Prevent Peaceful Picketing.**

Where an employer, alleging unlawful coercion, intimidation and threats by its employees, brings an action against the officers and members of the union, seeking an injunction restraining them from acts of interference and assault, and a preliminary injunction is granted, and on a motion to vacate such injunction, the alleged unlaw-

injunction granted in an action against labor unions for damage to plaintiff's business.

[12] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324.

[13] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 96; case of motion to continue a preliminary injunction granted in an action against labor unions for damage to plaintiff's business.

ful acts are denied and there is a great conflict in the affidavits upon the subject and the charges consist of statements that must from their nature have been made on information and belief, or statements claimed to have been made by members of the union which they emphatically deny, the preliminary injunction will be vacated as to the union but permitted to stand as to the individual defendants, modified, however, so as not to prevent them from peacefully picketing in reasonable numbers, for the purpose of observation only, the plaintiff's premises from the highways or streets in its vicinity and endeavoring by agreement, persuasion or appeal only, to prevent other persons from becoming employees of plaintiff, nor from peaceably assembling at any place or places in their city and with permission for future application by plaintiff to reinstate the injunction upon future change of circumstances.[14]

But an injunction granted, in an action against an unincorporated labor union for threatened injury to the person and property of plaintiff, against the officers and members of the defendant labor unions is binding upon each and every member though service thereof was made only upon the officers.[15]

§ 533. **Injunction—Contempt—Nature of Proceeding.** In the case of officers of a labor union it has been decided that if they countenance acts of intimidation and refrain from using the means which they possess for preventing these acts they will be regarded as violating an injunction against such acts. And where the officers of such a union caused an injunction order to be read at a meeting of members on two or three occasions but it appeared from the proof that these meetings could not be attended by all the members and that no such notice

[14] Searle Manufacturing Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438.

[15] Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 57 Misc. 96; case of motion to continue preliminary injunction granted in an action against labor unions for damage to plaintiff's business.

was given of the purpose of the meetings as would apprise members of the fact that any matter of special importance was to be considered or brought to their attention it was decided that the mere fact of the reading of the order was not of itself the measure of the duty of the officers in the matter of obeying the order of the court.[16]

In the United States Circuit Court it has been decided that a proceeding to punish members of certain labor unions for conspiracy to violate injunction orders is to be regarded as a criminal proceeding within the meaning of the provision of the Revised Statutes [17] that "no pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture." [18] And under the decision in this case the above exemption may be claimed either when the testimony is given or at the time when the evidence thus obtained is first sought to be used, contrary to the statute.

In the application of the doctrine that the primitive authority of the court in cases of criminal contempt is not for the purpose of vindicating the criminal law but to enable the court to enforce obedience to its commands and that the authority to punish for such a contempt resides exclusively with the court offended it was decided in a case in New York that where respondents, with others, as officers of a labor union, so acted as to further the commission of acts of violence and intimidation upon the part of members of the union during the course of a labor dispute, which acts it was the duty of such officers to endeavor to prevent according to the court's mandate, and, after successive appeals to the Appellate Division

[16] In re McCormick; Typothetæ v. Typographical Union, 117 N. Y. Supp. 70, 132 App. Div. (N. Y.) 921, aff'd 196 N. Y. 571, 90 N. E. 1161.

[17] Section 860, Rev. Stat. U. S. (U. S. Comp. Stat., 1901, p. 661).

[18] Hammon Lumber Co. v. Sailors' Union of the Pacific (U. S. C. C.), 167 Fed. 809.

and the Court of Appeals, resulting in affirmance in each instance of an order adjudging defendants guilty of criminal contempt, the court was asked to direct the execution of its sentence of fine and imprisonment, it might, upon the petition for clemency of the respondents directed to be imprisoned and upon payment of the fines imposed, stay the issuance of process for the imprisonment of the petitioners.[19]

A proceeding to punish a labor union and certain of its officers and members for contempt in the willful violation of an injunction order granted in the action need not be entitled, under the New York practice, in the name of the people but may be entitled in the cause in which the order violated was made.[20]

§ 534. Constitutional Law—Congress no Power to Make It Criminal Offense for Carrier to Discharge Employee Because Member of Labor Union—Fifth Amendment—Contract—Interstate Commerce.

It is held in a comparatively recent case in the Federal Supreme Court that (a) it is not within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employee simply because of his membership in a labor organization; and a provision to that effect in the United States statutes [21] concerning interstate carriers, is an invasion

[19] Typothetæ v. Typographical Union No. 6, 126 N. Y. Supp. 967, 66 Misc. R. (N. Y.) 484, order aff'd 122 N. Y. Supp. 975, 138 App. Div. 293.

[20] Typothetæ v. Typographical Union, 117 N. Y. Supp. 144.

[21] Act of June 1, 1898, 30 Stat. 424, § 10, chap. 370; U. S. Comp. Stat., 1901, p. 3205, *Id.*, Suppl., 1909, p. 1213. The tenth section upon which the prosecution in this case was based was in the following words: "That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization, or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization, or who shall require any employee or any person seeking employment, as a condition of such employ-

of personal liberty, as well as of the right of property guaranteed by the Fifth Amendment to the Constitution of the United States, and is, therefore, unenforceable as repugnant to the declaration of that Amendment that no person shall be deprived of liberty or property without due process of law. (b) While the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restrictions as the common good or general welfare may require, it is not within the functions of government—at least in the absence of contract—to compel any person in the course of his business, and against his will, either to employ, or be employed by, another. An employer has the same right to prescribe terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an arbitrary and unjustifiable interference with liberty of contract. (c) Quære, and not decided whether it is within the power of Congress to make it a criminal offense against the United States for either an employer engaged in interstate commerce, or his employee to disregard, without sufficient notice or excuse, the terms of a valid labor contract. (d) The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed, but the rules prescribed must have a real and substantial relation to, or connection with, the commerce regulated, and as that relation does not exist between the member-

ment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

ship of an employee in a labor organization and the interstate commerce with which he is connected the provision of the Act of Congress above considered cannot be sustained as a regulation of interstate commerce and as such within the competency of Congress. (e) The power to regulate interstate commerce while great and paramount cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution. (f) The provision of the above statute is severable, and its unconstitutionality may not affect other provisions of the act or provisions of that section thereof.[22]

§ 535. Statute Prohibiting Discharge of Employee Because Member of Labor Union.

A statute is unconstitutional as destroying freedom of contract within the meaning of the Federal Constitution where it prohibits the discharge of an employee because he is a member of a labor union.[23]

§ 536. Statute as to Becoming Member of Labor Union —Condition of Employment.

A statute providing that "It shall be unlawful for any person, firm or corporation to make or enter into any

[22] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. 277. Mr. Justice McKenna and Mr. Justice Holmes, dissenting, cited in McLean v. Arkansas, 211 U. S. 539, 545, 53 L. ed. —, 29 Sup. Ct. 206 (where Mr. Justice Day says: "That the Constitution of the United States, in the Fourteenth Amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business against hostile State legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation"); Berea College v. Kentucky, 211 U. S. 45, 68, 53 L. ed. 81, 29 Sup. Ct. 33, in dissenting opinion of Mr. Justice Harlan (to liberty against hostile legislation); Hitchman Coal & Coke Co. v. Mitchell (U. S. C. C.), 172 Fed. 963, 966 (contract not to become members of labor union as condition precedent to employment); Watson v. St. Louis, I. M. & S. Ry. Co. (U. S. C. C.), 169 Fed. 942, 945 (power of Congress over relation of master and servant; carriers in interstate commerce); United States v. Wells-Fargo Express Co. (U. S. C. C.), 161 Fed. 606, 612 (to point "d" in above text); Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220 (U. S. C. C.), 159 Fed. 500, 516 (as to liberty of contract as to employer and employee).

[23] State ex. rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098.

agreement, either oral or in writing, by the terms of which any employee of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become a member of a labor organization, or shall promise or agree to become or continue a member of a labor organization" [24] is unconstitutional as depriving a person of his "life, liberty or property without due process of law." [25] The court said: "The obvious purpose of the Nevada statute just quoted is to invade and control the discretion of the employer in selecting his men. * * * The term 'life, liberty and property' as used in the Federal Constitution embraces every right which the law protects. They include not only the right to hold and enjoy, but also the means of holding, enjoying, acquiring and disposing of property. The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one's subsistence, to live and to support wife and family. The right of master and servant to enter into contracts to agree upon the terms and conditions under which the one will employ and the other labor, is property. The master has the right to fix the terms and conditions upon which he is willing to give employment; the servant has the right to fix the terms and conditions upon which he will labor, and any statute which curtails and limits that right deprives the party affected of his property and, in the same measure, of his liberty." [26]

[24] Nev. Laws of 1903, p. 207, chap. 111.

[25] Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.) 159 Fed. 500.

[26] Per Farrington, J., citing, in this connection: Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 50 L. R. A. 748, 19 Am. St. Rep. 934; Coffeyville & Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; Railway Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628.

A statute is unconstitutional where it restrains liberty of contract by prohibiting an intended employee from joining a labor organization as a condition precedent to employment.[27]

§ 537. **Statute Prohibiting Granting of Injunction Against Union.**

An act prohibiting the granting of restraining orders against a combination in the case of a controversy between employers and employees if construed to prohibit the court from granting an injunction against a labor union to prevent further illegal interference with the business of a former employer is void not only as violative of one's constitutional right to acquire, possess, enjoy and protect property but is also obnoxious to constitutional provisions against special or class legislation.[28]

§ 538. **Statute as to Suits Against Unincorporated Associations.**

A statute authorizing the maintenance of suits by or against unincorporated voluntary associations, clubs or societies [29] has been held in Michigan to be a legitimate exercise of the legislative power and not to be void as affording a double remedy because the right to proceed against individual members of the association is preserved, nor void as class legislation directed against organized labor, its scope not being limited in such manner. And under this statute it was decided that a bill in equity would lie in a proper case to enjoin an unincorporated labor organization from interfering with or intimidating complainant's employees.[30]

[27] People v. Marcus, 97 N. Y. Supp. 322, 110 App. Div. 255, aff'd in 185 N. Y. 257, 77 N. E. 1073.

[28] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Goldberg & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145.

[29] 3 Mich. Comp. Laws, §§ 10025, 10026.

[30] United States Heater Co. v. Iron Moulders' Union, 129 Mich. 354, 88 N. W. 889.

§ 539. **Statute as to Labels and Stamps.**

A statute entitled "An act to protect manufacturers from the use of counterfeit labels and stamps" and which by its first section extends to "any person, association or union" will be construed as contemplating unincorporated associations or unions and as protecting trade unions in the use of labels for trade union purposes.[31]

§ 540. **Legality of Union as Affected by Constitution of Union.**

Where the constitution of a trade union as a whole is not illegal, it will not be deprived of the protection of the law for what would otherwise be its rights if in some incident or particular the purposes which it expresses are unlawful.[32]

[31] Tracy v. Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.
[32] Tracy v. Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

APPENDIX A

THE STANDARD OIL COMPANY OF NEW JERSEY ET AL. *v.* THE UNITED STATES

(221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. 502)

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

Argued March 14, 15, 16, 1910; restored to docket for reargument April 11, 1910; reargued January 12, 13, 16, 17, 1911.—Decided May 15, 1911.

HEADNOTES [1]

The Anti-trust Act of July 2, 1890, chap. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.

The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-Trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants.

Allegations as to facts occurring prior to the passage of the Anti-Trust Act may be considered solely to throw light on acts done after the passage of the act.

The debates in Congress on the Anti-Trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation.

While debates of the body enacting it may not be used as means for interpreting a statute, they may be resorted to as a means of ascertaining the conditions under which it was enacted.

The terms "restraint of trade," and "attempts to monopolize," as used in the Anti-Trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adop-

[1] Headnotes, Opinion and Dissenting Opinion are official; L. ed. and Sup. Ct. citations are not in original.

tion of the act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the act.

The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable.

The early struggle in England against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution.

At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of, trade.

At the time of the passage of the Anti-Trust Act the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. Mogul Steamship Co. v. McGregor, 1892, A. C. 25.

A decision of the House of Lords, although announced after an event, may serve reflexly to show the state of the law in England at the time of such event.

This country has followed the line of development of the law of England, and the public policy has been to prohibit, or treat as illegal, contracts, or acts entered into with intent to wrong the public and which unreasonably restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices.

The Anti-Trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it.

The Anti-Trust Act contemplated and required a standard of interpretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibitions.

The word "person" in § 2 of the Anti-Trust Act, as construed by reference to § 8 thereof, implies a corporation as well as an individual.

The commerce referred to by the words "any part" in § 2 of the Anti-Trust Act, as construed in the light of the manifest purpose of that act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce.

The words "to monopolize" and "monopolize" as used in § 2 of the Anti-Trust Act reach every act bringing about the prohibited result.

Freedom to contract is the essence of freedom from undue restraint on the right to contract.

In prior cases where general language has been used, to the effect that reason could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-Trust Act, the unreasonableness of the acts under consideration was pointed out and those cases are only authoritative by the certitude that the rule of reason was applied; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, and United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25; limited and qualified so far as they conflict with the construction now given to the Anti-Trust Act of 1890.

The application of the Anti-Trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects dehors its authority as to render the statute unconstitutional. United States v. E. C. Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249, distinguished.

The Anti-Trust Act generically enumerates the character of the acts prohibited and the wrongs which it intends to prevent and is susceptible of being enforced without any judicial exertion of legislative power.

The unification of power and control over a commodity such as petroleum, and its products, by combining in one corporation the stocks of many other corporations aggregating a vast capital gives rise, of itself, to the prima facie presumption of an intent and purpose to dominate the industry connected with, and gain perpetual control of the movement of, that commodity and its products in the channels of interstate commerce in violation of the Anti-Trust Act of 1890, and that presumption is made conclusive by proof of specific acts such as those in the record of this case.

The fact that a combination over the products of a commodity such as petroleum does not include the crude article itself does not take the combination outside of the Anti-Trust Act when it appears that the monopolization of the manufactured products necessarily controls the crude article.

Penalties which are not authorized by the law cannot be inflicted by judicial authority.

The remedy to be administered in case of a combination violating the Anti-Trust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power.

The constituents of an unlawful combination under the Anti-Trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever; and a dissolution of the offending combination should not deprive the constituents of the right to live under the law but should compel them to obey it.

In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity.

173 Fed. Rep. 177, modified and affirmed.

THE facts, which involve the construction of the Sher-

man Anti-Trust Act of July 2, 1890, and whether defendants had violated its provisions, are stated in the opinion.

Mr. John G. Johnson, and *Mr. John G. Milburn*, with whom *Mr. Frank L. Crawford* was on the brief, for appellants.

Mr. D. T. Watson, also for appellants.

The Attorney General and *Mr. Frank B. Kellogg*, with whom *Mr. Cordenio N. Severance* was on the brief, for the United States:

Mr. Chief Justice White delivered the opinion of the court.

The Standard Oil Company of New Jersey and 33 other corporations, John D. Rockefeller, William Rockefeller and five other individual defendants prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4, of the Act of July 2, 1890, chap. 647, p. 209, known as the Anti-Trust Act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about twelve thousand pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering one hundred and seventy pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Stand-

ard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio and sixty-two other corporations and partnerships, as also seven individuals were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several States and Territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, viz: John D. Rockefeller, William Rockefeller and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

"That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interest through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various States for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several States, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partner-

ships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870, a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards become participants in the illegal combination and either transferred property to the corporation or to individuals to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question the following results were brought about: *a*.That the combination, in addition to the refineries in Cleveland which it had acquired as previously stated, and which it had either dismantled to limit production or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or

limited partnerships affiliated therewith, or some being left in the name of the orginal owners who had become stockholders in the Standard Oil Company of Ohio and thus members of the alleged illegal combination. *b.* That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey. *c.* That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement, by which various independent firms, corporations, limited partnerships and individuals engaged in purchasing, transporting, refining, shipping and selling oil and the products thereof among the various States turned over the management of their said business, corporations and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion

thereof, became parties to the agreement. This list is in the margin.[1]

[1] 1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.
Acme Oil Company, Pennsylvania.
Atlantic Refining Company of Philadelphia.
Bush & Co. (Limited).
Camden Consolidated Oil Company.
Elizabethport Acid Works.
Imperial Refining Company (Limited).
Charles Pratt & Co.
Paine, Ablett & Co.
Standard Oil Company, Ohio.
Standard Oil Company, Pittsburg.
Smith's Ferry Oil Transportation Company.
Solar Oil Company (Limited).
Sone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2d. The following individuals, to wit:

W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, Jr., estate of Josiah Macy, William H. Macy, Jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardwell, W. G. Warden, Joseph L. Warden, Warden, Frew & Co., Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York, George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company.
Baltimore United Oil Company.
Beacon Oil Company.
Bush & Denslow Manufacturing Company.
Central Refining Co. of Pittsburg.
Chesebrough Manufacturing Company.
Chess Carley Company.
Consolidated Tank Line Company.
Inland Oil Company.
Keystone Refining Company.
Maverick Oil Company.

The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corporations in various States, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which of course in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of $3,000,000 and the latter a capital stock of $5,000,000, subsequently increased to $10,000,000 and $15,000,000 respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individ-

National Transit Company.
Portland Kerosene Oil Company.
Producers' Consolidated Land and Petroleum Company.
Signal Oil Works (Limited).
Thompson & Bedford Company (Limited).
Devoe Manufacturing Company.
Eclipse Lubricating Oil Company (Limited).
Empire Refining Company (Limited).
Franklin Pipe Company (Limited).
Galena Oil Works (Limited).
Galena Farm Oil Company (Limited).
Germania Mining Company.
Vacuum Oil Company.
H. C. Van Tine & Company (Limited).
Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

uals and copartnerships, who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various States and Territories of the United States as aforesaid, to transfer their property situated in said several States to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania and Ohio, and other corporations organized or acquired by said trustees from time to time. * * *" For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling, and shipping of oil," as per a list which is excerpted in the margin.[1]

[1] *List of Corporations the Stocks of Which Were Wholly or Partially Held by the Trustees of Standard Oil Trust,*

	Capital Stock.	S. O. trust ownership.
New York State:		
Acme Oil Company, manufacturers of petroleum products.	$300,000	Entire.
Atlas Refining Company, manufacturers of petroleum products.	200,000	Do.
American Wick Manufacturing Company, manufacturers of lamp wicks.	25,000	Do.
Bush & Denslow Manufacturing Company, manufacturers of petroleum products.	300,000	50 per cent.
Chesebrough Manufacturing Company, manufacturers of petroleum.	500,000	2,661–5,000
Central Refining Company (Limited), manufacturers of petroleum products.	200,000	1–67.2 per ct.
Devoe Manufacturing Company, packers, manufacturers of petroleum.	300,000	Entire.
Empire Refining Company (Limited), manufacturers of petroleum products.	100,000	80 per cent.

The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself

	Capital Stock.	S. O. trust ownership.
New York State (*cont.*):		
Oswego Manufacturing Company, manufacturers of wood cases.	100,000	Entire.
Pratt Manufacturing Company, manufacturers of petroleum products.	500,000	Do.
Standard Oil Company of New York, manufacturers of petroleum products.	5,000,000	Do.
Sone & Fleming Manufacturing Company (Limited), manufacturers of petroleum products.	250,000	Do.
Thompson & Bedford Company (Limited), manufacturers of petroleum products.	250,000	80 per cent.
Vacuum Oil Company, manufacturers of petroleum products.	25,000	75 per cent.
New Jersey:		
Eagle Oil Company, manufacturers of petroleum products.	350,000	Entire.
McKirgan Oil Company, jobbers of petroleum products.	75,000	Do.
Standard Oil Company of New Jersey, manufacturers of petroleum products.	3,000,000	Do.
Pennsylvania:		
Acme Oil Company, manufacturers of petroleum products.	300,000	Do.
Atlantic Refining Company, manufacturers of petroleum products.	400,000	Do.
Galena Oil Works (Limited), manufacturers of petroleum products.	150,000	86¼ per cent.
Imperial Refining Company (Limited), manufacturers of petroleum products.	300,000	Entire.

was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a

	Capital Stock.	S. O. trust ownership.
Pennsylvania (*cont.*):		
Producers' Consolidated Land and Petroleum Company, producers of crude oil.	1,000,000	$\frac{65}{132}$ per cent.
National Transit Company, transporters of crude oil.	25,455,200	94 per cent.
Standard Oil Company, manufacturers of petroleum products.	400,000	Entire.
Signal Oil Works (Limited), manufacturers of petroleum products.	100,000	38¾ per cent.
Ohio:		
Consolidated Tank-Line Company, jobbers of petroleum products.	1,000,000	57 per cent.
Inland Oil Company, jobbers of petroleum products.	50,000	50 per cent.
Standard Oil Company, manufacturers of petroleum products.	3,500,000	Entire.
Solar Refining Company, manufacturers of petroleum products.	500,000	Do.
Kentucky:		
Standard Oil Company, jobbers of petroleum products.	600,000	Do.
Maryland:		
Baltimore United Oil Company, manufacturers of petroleum products.	600,000	5,059–6,000
West Virginia:		
Camden Consolidated Oil Company, manufacturers of petroleum products.	200,000	51 per cent.
Minnesota:		
Standard Oil Company, jobbers of petroleum products.	100,000	Entire.
Missouri:		
Waters-Pierce Oil Company, jobbers of petroleum products.	400,000	50 per cent.

transfer of the stock held by the trust in 64 of the companies which it controlled to some of the remaining 20 companies, it having controlled before the decree 84 in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the Attorney-General of Ohio instituted contempt proceedings in the quo warranto case based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time also proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

"That during the third period of said conspiracy and in pursuance thereof the said individual defendants operated

	Capital Stock.	S. O. trust ownership.
Massachusetts:		
Beacon Oil Company, jobbers of petroleum products.	100,000	Entire.
Maverick Oil Company, jobbers of petroleum products.	100,000	Do.
Maine:		
Portland Kerosene Oil Company, jobbers of petroleum products.	200,000	Do.
Iowa:		
Standard Oil Company, jobbers of petroleum products.	600,000	60 per cent.
Continental Oil Company, jobbers of petroleum products.	300,000	62½ per cent.

through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; "so that the business and objects of said company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and to hold, purchase, mortgage, and convey real estate and personal property outside the State of New Jersey.'"

The capital stock of the company — which since March 19, 1892, had been $10,000,000—was increased to $110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its com-

mon stock to the amount of $97,250,000. The bill contained allegations referring to the development of new oil fields, for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors; the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly in-

ferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-Trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the district in which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the Anti-Trust Act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on non-resident defendants or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the averments of the bill of complaint, particularly those which related to acts alleged to have been done by the combination prior to the passage of the Anti-Trust Act and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by

quoting a summary on the subject made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or of their purpose, intent or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5 to 10, 1909, under the expediting act of February 11, 1903, before a Circuit Court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-Trust Act, "except as evidence of their (the defendants') purpose, of their continuing conduct and of its effect." (173 Fed. Rep. 177.)

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under § 2 of the Anti-Trust Act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these 38 corporate defend-

ants being held to be parties to the combination found to exist.[1]

The bill was dismissed as to all other corporate defendants, 33 in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."[2]

The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said 37 subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Oil Company, and the 37 subsidiary corporations were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end that our attention may be completely concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that in consequence of the presence within the district of the Waters-Pierce Oil Company, the court, under the authority of § 5 of the Anti-Trust Act, rightly took jurisdiction over the cause and properly

[1] Counsel for appellants says: "Of the 38 (37) corporate defendants named in section 2 of the decree and as to which the judgment of the court applies, four have not appealed, to wit: Corsicana Refining Co., Manhattan Oil Co., Security Oil Co., Waters-Pierce Oil Co., and one, the Standard Oil Co. of Iowa, has been liquidated and no longer exists."

[2] Of the dismissed defendants 16 were natural gas companies and 10 were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, 7 in number, were: Florence Oil Refining Co., United Oil Co., Tidewater Oil Co., Tide Water Pipe Co. (L't'd), Platt & Washburn Refining Co., Franklin Pipe Co. and Pennsylvania Oil Co.

ordered notice to be served upon the non-resident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon acts occurring prior to the passage of the Anti-Trust Act,—whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill,—we think by no possibility in the present stage of the case can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the passage of the Anti-Trust Act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts the opposing contentions pressed in the argument are numerous and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which by being disposed of would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the first and second sections of the Anti-Trust Act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an

inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects that it is asserted that the existence of the principal corporate defendant—the Standard Oil Company of New Jersey—with the vast accumulation of property which it owns or controls, because of its infinite potency for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime to which that proof is addressed, there may be found acts of wrongdoing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business or of the methods and habits of dealing which, even if wrong, were commonly practiced at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years, a duty difficult to rightly perform and, even if satis-

factorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-Trust Act. We shall therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the Anti-Trust Act by the text, and after discerning what by that process appears to be its true meaning we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this we shall then approach the facts. Following this course we shall make our investigation under four separate headings: First. The text of the first and second sections of the act originally considered and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts, and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person

who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States v. Trans-Missouri Freight Association, 166 U. S. 318, 41 L. ed. 1007, 1020, 17 Sup. Ct. 540, 550, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein con-

templated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-Trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

" 'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making,working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, chap. 85.)"

Hawkins thus defined them:

" 'A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby the subject in

general is restrained from the freedom of manufacturing or trading which he had before.' (Hawk. P. C. bk. 1, chap. 29.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI, chap. 14, as follows:

"Whatsoever person or persons * * * shall engross

or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in East India Company v. Sandys, Skin. 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F. B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing;' and that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is 'engrossing' *ex rei natura*, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and whosoever hath the sole trade to any country, hath the sole trade of buying and selling the produce of that country, at his own price, which is an 'engrossing.'"

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some

of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance * * * whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C. J., in Mitchel v. Reynolds (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

From the development of more accurate economic conceptions and the changes in conditions of society it came

to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, chap. 71, enacted in 1772, and statute of 7 and 8 Victoria, chap. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this

freedom to trade and contract is clearly shown by the decision in Mogul Steamship Co. v. McGregor (1892), A. C. 25. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-Trust Act, it serves reflexly to show the exact state of the law in England at the time the Anti-Trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778–1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we

have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject or many judicial decisions which illustrate it would unnecessarily prolong this opinion. We append in the margin a note to treatises, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.[1]

It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. 379, and Shawnee Compress Co. v. Anderson, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. ed. 865; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive

[1] Purdy's Beach on Private Corporations, vol. 2, pp. 1403 *et seq.*, chapter on Trusts and Monopolies; Cooke on Trade and Labor Combinations, App. II, pp. 194–195; Am. & Eng. Ency. Law, 2d ed., article "Monopolies and Trusts," pp. 844 *et seq.*

of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.[1]

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal." As there is no room for dispute that the statute was intended to

[1] Swearingen v. United States, 161 U. S. 446, 40 L. ed. 765, 16 Sup. Ct. 562; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. 456; Keck v. United States, 172 U. S. 446, 19 Sup. Ct. 254, 43 L. ed. 505; Kepner v. United States, 195 U. S. 100, 126, 49 L. ed. 114, 24 Sup. Ct. 797.

formulate a rule for the regulaton of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows

that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, * * *" By reference to the terms of § 8 it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which

produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract

was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it

to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained —the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are United States v. Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, and United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or

agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for as established by all of the numerous decisions of this court which have applied and en-

forced the Anti-Trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the Freight Association Case and before the decision in the Joint Traffic Case, the case of Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. 40, was decided, the opinion being delivered by Mr. Justice Peckham, who wrote both the opinions in the Freight Association and the Joint Traffic cases. And, referring in the Hopkins Case to the broad claim made as to the rule of interpretation announced in the Freight Association Case, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the Joint Traffic Case this statement was expressly reiterated and approved and illustrated by example; like limitation on the general language used in Freight Association and Joint Traffic cases is also the clear result of Bement v. National Harrow Co., 186 U. S. 70, 92, 46 L. ed. 1058, 22 Sup. Ct. 747, and especially of Cincinnati Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. 208.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the

principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

If it be true that there is this identity of result between the rule intended to be applied in the Freight Association Case, that is, the rule of direct and indirect, and the rule of reason which under the statute as we construe it should be here applied, it may be asked how was it that in the opinion in the Freight Association Case much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met, for if it be now deemed that the Freight Association Case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it became necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the Freight Association Case, especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the Hopkins Case and in Cincinnati Packet

Company v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. ed. 428.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the Anti-Trust Law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-Trust Law aside from the contention as to the Freight Association and Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the defendants are concerned they are all embraced under two headings:—

a. That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is based upon the decision in United States v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 390, 15 Sup. Ct. 325. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in

connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice. United States v. Northern Securities Co., 193 U. S. 197, 334, 48 L. ed. 679, 24 Sup. Ct. 436; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. ed. 488; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518; Montague v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. 307; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. ed. 865.

b. Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which is essentially necessary to the well-being of society and which it is insisted is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to

this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

We come then to the third proposition requiring consideration, viz:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio;

2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the Supreme Court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust and which came therefore to

be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the situation as it existed at the time of the entry of the decree below, since during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation of course had somewhat changed, a change which when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin.[1]

[1] Section 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil and Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company, of California, Standard Oil Company, of Indiana, Standard Oil Company, of Iowa, Standard Oil Company, of Kansas, Standard Oil Company, of Kentucky, Standard Oil Company, of Nebraska, Standard Oil Company, of New York, Standard Oil Company, of Ohio, Swan and Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company, have entered into

Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by the

and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the States, in the territories and with foreign nations, in violation of section 2 of the Anti-Trust Act.

* * * * * * * * *

SECTION 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than $90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations and stock in other corporations as follows:

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Anglo-American Oil Company, Limited	£1,000,000	£999.740
Atlantic Refining Company	$5,000,000	$5,000,000
Borne-Scrymser Company	200,000	199,700
Buckeye Pipe Line Company	10,000,000	9,999,700
Chesebrough Manufacturing Company, Consolidated	500,000	277,700
Colonial Oil Company	250,000	249,300
Continental Oil Company	300,000	300,000
Crescent Pipe Line Company	3,000,000	3,000,000
Eureka Pipe Line Company	5,000,000	4,999,400
Galena-Signal Oil Company	10,000,000	7,079,500
Indiana Pipe Line Company	1,000,000	999,700
Lawrence Natural Gas Company	450,000	450,000
Mahoning Gas Fuel Company	150,000	149,900
Mountain State Gas Company	500,000	500,000
National Transit Company	25,455,200	25,451,650
New York Transit Company	5,000,000	5,000,000
Northern Pipe Line Company	4,000,000	4,000,000
Northwestern Ohio Natural Gas Company	2,775,250	1,649,450
Ohio Oil Company	10,000,000	9,999,850
People's Natural Gas Company	1,000,000	1,000,000
Pittsburg Natural Gas Company	310,000	310,000
Solar Refining Company	500,000	499,400
Southern Pipe Line Company	10,000,000	10,000,000
South Penn Oil Company	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines	3,500,000	3,500,000
Standard Oil Company (of California,	17,000,000	16,999,500
Standard Oil Company (of Indiana)	1,000,000	999,000
Standard Oil Company (of Iowa)	1,000,000	1,000,000
Standard Oil Company (of Kansas)	1,000,000	999,300

proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the

Name of company.	Total capital stock.	Owned by National Transit Company.
Standard Oil Company (of Kentucky)	1,000,000	997,200
Standard Oil Company (of Nebraska)	600,000	599,500
Standard Oil Company (of New York)	15,000,000	15,000,000
Standard Oil Company (of Ohio)	3,500,000	3,499,400
Swan and Finch Company	100,000	100,000
Union Tank Line Company	3,500,000	3,499,400
Vacuum Oil Company	2,500,000	2,500,000
Washington Oil Company	100,000	71,480
Waters-Pierce Oil Company	400,000	274,700

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

Connecting Gas Company	$825,000	$412,000
Cumberland Pipe Line Company	1,000,000	998,500
East Ohio Gas Company	6,000,000	5,999,500
Franklin Pipe Company, Limited	50,000	19,500
Prairie Oil and Gas Company	10,000,000	9,999,500

That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that State, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the States of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in Section 2, are engaged in the various branches of the business of producing, purchasing and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other States, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the States and territories of the United States, the District of Columbia and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various States and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the States and territories of the United States, in the District of Columbia and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, *1*, the conduct of the persons or corporations who were mainly instrumental in bringing about the extension

of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; *2*, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things

impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inference which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measures of relief would result from restraining the doing of such acts in the future. Swift v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518. But in a case like this, where the condition which has been brought

about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation in so far as it held the stock of the various corporations, recited in §§ 2 and 4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the

stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To make this command effective § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporation or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock and until it was consummated, the defendants named in § 1, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership

in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad: *a.* Because it was not sufficiently specific and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. New Haven R. R. v. Interstate Commerce Commission, 200 U. S. 404, 50 L. ed. 515, 26 Sup. Ct. 272. Besides it is said that the restraint imposed by § 6—even putting out of view the consideration just stated—was moreover calculated to do injury to the public and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in

use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest it was obviously right. We think that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation but by all the subsidiary companies until the dissolution of the combination by the transfer of the stocks in accordance with the decree should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to

the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

Mr. Justice Harlan concurring in part, and dissenting in part.

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce—all in violation of what is known as the Anti-Trust Act of 1890, 26 Stat. 209, chap. 647. The evidence in this case overwhelmingly sustained that view and led the Circuit Court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while arfirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow that because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New

Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement *to restrain commerce* among the States if such restraint be not "undue."

In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the Anti-Trust Act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the National Government could not, by legislation, regulate the domestic trade carried on wholly within the several States; for power to regulate such trade remained with, because never surrendered by, the States. But, under authority expressly granted to it by the Constitution, Congress could

regulate commerce among the several States and with foreign states. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law devised by the fathers for the safety of the Government and for the protection and security of the essential rights inhering in life, liberty and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might not be dominated by vast combinations and monopolies having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890 in these words (the italics here and elsewhere in this opinion are mine):

"SEC. 1. *Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make *any such contract or engage in any such combination or conspiracy*, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. *Every* contract, combination in form of trust *or otherwise*, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia; or with foreign nations, or between the Dis-

trict of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any *such* contract or engage in any *such* combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, chap. 647.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the Trans-Missouri Freight Case. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540. The question there was as to the validity under the Anti-Trust Act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules and regulations in respect of freight traffic over specified routes. Two questions were involved: first, whether the act applied to railroad carriers; second, whether the agreement the annulment of which as illegal was the basis of the suit which the United States brought. The court held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said:

"The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute. unless it can be said that an agreement, no mat-

ter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by this act. * * * Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. * * * While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All* combinations which are *in restraint of trade or commerce* are prohibited, whether in the form of trusts or *in any other form whatever.*" United States v. Freight Assn., 166 U. S. 290, 312, 324, 326, 41 L. ed. 1007, 17 Sup. Ct. 540.

The court then proceeded to consider the second of the above questions, saying: "The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreason-*

able restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. * * * By the simple use of the term 'contract in restraint of trade,' *all* contracts of that nature, whether valid or otherwise, would be included, and *not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. * * * If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. * * * To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. * * * But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. * * * The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unrea-

sonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government,* and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This *we cannot and ought not to do.* * * *

"If the act ought to read, as contended for by defendants, *Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable.* Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found *in its statutes,* and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts.* If the law prohibits any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature."

I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight Case in order to show beyond question, that the point was there urged by counsel that the Anti-Trust Act condemned *only* contracts, combinations, trusts and conspiracies that were in *unreasonable* restraint of interstate commerce, and that

the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "*every* contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress determined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Still more; in reponse to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen, "*we cannot* and *ought not* to do."

It thus appears that fifteen years ago, when the purpose of Congress in passing the Anti-Trust Act was fresh in the minds of courts, lawyers, statesmen and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the Freight Association Case. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain

interstate commerce to a *reasonable* extent. The public press, magazines and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent and scope of the Anti-Trust Act had been judicially determined by this court, and that the only question remaining open for discussion was the wisdom of the policy declared by the act—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies to have the court declare illegal, under the Anti-Trust Act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the Government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the Anti-Trust Act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the Joint Traffic Case. Among other things, the court said: "Upon comparing that agreement [the

one in the Joint Traffic Case, then under consideration, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25] with the one set forth in the case of United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, the great similarity between them suggests that a similar result should be reached in the two cases" (p. 558). Learned counsel in the Joint Traffic Case urged a reconsideration of the question decided in the Trans-Missouri Case contending that "the decision in that case [the Trans-Missouri Freight Case] is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust statute has been received by the public with surprise and alarm." They suggested that the point made in the Joint Traffic Case as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U. S. 559, 43 L. ed. 259, 283, 19 Sup. Ct. 25, 28) that "the report of the Trans-Missouri Case clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

The question whether the court should again consider the point decided in the Trans-Missouri Case, 171 U. S. 573, 43 L. ed. 259, 289, 19 Sup. Ct. 25, 33, was disposed of in the most decisive language, as follows: "Finally, we are asked to reconsider the question decided in the Trans-Missouri Case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice.

While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri Case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri Case. The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White [in the Freight Case] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by

some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention,* it could hardly be expected that our opinion should now change from that already expressed."

These utterances, taken in connection with what was previously said in the Trans-Missouri Freight Case, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the Anti-Trust Act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempts to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the Freight Association Case was referred to: In Bement v. National Harrow Co., 186 U. S. 70, 92, 46 L. ed. 1058, 22 Sup. Ct. 747, the court said: "It is true that it has been held by this court that the act (Anti-Trust Act) included any restraint of commerce, whether *reasonable or unreasonable*"—citing United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540; United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25; Addyston Pipe &c. Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96. In Montague v. Lowry, 193 U. S. 38, 46, 48 L. ed. 608, 24 Sup. Ct. 307, which involved the validity, under the Anti-Trust Act, of a certain association

formed for the sale of tiles, mantels, and grates, the court referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination in restraint of interstate trade or commerce in violation of the Anti-Trust Act. In Loewe v. Lawlor, 208 U. S. 274, 297, 52 L. ed. 488, 28 Sup. Ct. 301, all the members of this court concurred in saying that the Trans-Missouri, Joint Traffic and Northern Securities cases "hold in effect that the Anti-Trust Law has a broader application than the prohibition of restraints of trade unlawful at common law." In Shawnee Compress Co. v. Anderson (1907), 209 U. S. 423, 432, 434, 52 L. ed. 865, 28 Sup. Ct. 572, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In United States v. Addyston Pipe Company, 85 Fed. Rep. 271, 278, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, said that according to the decision of this court in the Freight Association Case, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In Chesapeake & Ohio Fuel Co. v. United States (1902), 115 Fed. Rep. 610, 619, the Circuit Court of Appeals for the Sixth Circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the Trans-Missouri, the Joint Traffic and the Addyston Pipe and Steel Co. cases: "In the exercise of this right, Congress has seen fit to prohibit *all* contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but *all* contracts and combinations are declared illegal if in restraint of trade or commerce among the States." As far

back as Robbins v. Shelby Taxing District, 120 U. S. 489, 497, 30 L. ed. 694, 7 Sup. Ct. 592, it was held that certain local regulations, subjecting drummers engaged in both interstate and domestic trade, could not be sustained by reason of the fact that no discrimination was made among citizens of the different States. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed *at all.*" Under this view Congress no doubt acted, when by the Anti-Trust Act it forbade *any* restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained *at all* by combinations, trusts or monopolies, but must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also Minnesota v. Barber, 136 U. S. 313, 326, 34 L. ed. 455, 10 Sup. Ct. 862; Brimmer v. Rebman, 138 U. S. 78, 82, 83, 34 L. ed. 862, 11 Sup. Ct. 213.

In the opinion delivered on behalf of the minority in the Northern Securities Case, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436, our present Chief Justice referred to the contentions made by the defendants in the Freight Association Case, namely, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said: "Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited *any* contract in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*" One of the Justices who dissented in the Northern Securities Case in a separate opinion, concurred in by the minority, thus referred to the Freight and Joint Traffic cases: "For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association case. * * * Size has nothing to do with the matter. A monopoly

of 'any part' of commerce among the States is unlawful."

In this connection it may be well to refer to the adverse report made in 1909, by Senator Kelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill offered in the Senate and which proposed to amend the Anti-Trust Act in various particulars. That report contains a full, careful and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these: "The Anti-Trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. * * * And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of People v. Sheldon, 139 N. Y. 264, 34 N. E. 785, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, *the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' * * * To amend the Anti-

Trust Act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity." The result was the indefinite postponement by the Senate of any further consideration on the proposed amendments of the Anti-Trust Act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the Anti-Trust Act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason," or "the light of reason." It is more than once intimated, if not suggested, that if the Anti-Trust Act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court was delivered by a Justice of wide experience as a judicial

officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the Trans-Missouri Case delivered the opinion in the Joint Traffic Association Case, and the Association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the Justice who expressed the views of the court, or of the ability of the profound, astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words, would amount to "judicial legislation"? Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the Anti-Trust Act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the "rule of reason." In effect the court says, that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have

the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 28 Sup. Ct. 616, the court had occasion to determine the meaning and scope of the original Safety Appliance Act of Congress passed for the protection of railroad employees and passengers on interstate trains. 27 Stat. 531, § 5, chap. 196. A particular construction of that act was insisted upon by the interstate carrier which was sued under the Safety Appliance Act; and the contention was that a different construction, than the one insisted upon by the carrier, would be a harsh one. After quoting the words of the act, Mr. Justice Moody said for the court: "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.* * * * It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard.

Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." And at the present term of this court we were asked, in a case arising under the Safety Appliance Act, to reconsider the question decided in the Taylor Case. We declined to do so, saying in an opinion just now handed down: "In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving in interstate traffic, as open to further discussion here. *If the court was wrong in the Taylor Case the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper.* This court ought not now to disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule." C., B. & Q. Ry. Co. v. United States, 220 U. S. 559, 55 L. ed. —, 31 Sup. Ct. 612. When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Anti-Trust Act as would allow reasonable restraints of interstate commerce, this court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce

among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the Anti-Trust Act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words

of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, in my judgment—if we look to the future—the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanancy of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and co-ordinate departments—legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Constitution was ordained and established in order to accomplish the objects stated in its Preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that government can constitutionally exercise the powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "*judicial legislation*," read words into the Anti-Trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act,

as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend* legislative enactments. "What is termed the policy of the Government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." Hadden v. Collector, 5 Wall. (72 U. S.) 107, 18 L. ed. 518. Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.

After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the People of the United States—the source of all National power—shall, in their own time, upon reflection and through the legislative department of the

Government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The Supreme Law of the Land—which is binding alike upon all—upon Presidents, Congresses, the Courts and the People—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this Bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 6 Sup. Ct. 524. We shall do well to heed the warnings of that great jurist.

I do not stop to discuss the merits of the policy embodied in the Anti-Trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-Trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

UNITED STATES OF AMERICA v. AMERICAN TOBACCO COMPANY

AMERICAN TOBACCO COMPANY v. UNITED STATES OF AMERICA

(221 U. S. 106, 55 L. ed. —, 31 Sup. Ct. 632)

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Nos. 118, 119. Argued January 3, 4, 5, 6, 1910; restored to docket for reargument April 11, 1910; reargued January 9, 10, 11, 12, 1911.—Decided May 29, 1911.

HEADNOTES

Headnotes are official; L. ed. and Sup. Ct. citations are not in original

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. 502, followed and reaffirmed as to the construction to be given to the Anti-Trust Act of July 2, 1890, chap. 647, 26 Stat. 209; and *held* that the combination in this case is one in restraint of trade and an attempt to monopolize the business of tobacco in interstate commerce within the prohibitions of the act.

In order to meet such a situation as is presented by the record in this case and to afford the relief for the evils to be overcome, the Anti-Trust Act of 1890 must be given a more comprehensive application than affixed to it in any previous decision.

In Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. —, 31 Sup. Ct. 502, the words "restraint of trade" as used in § 1 of the Anti-Trust Act were properly construed by the resort to reason; the doctrine stated in that case was in accord with all previous decisions of this court, despite the contrary view at times erroneously attributed to the expressions in United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, and United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. 25.

The Anti-Trust Act must have a reasonable construction as there can scarcely be any agreement or contract among business men that does not directly or indirectly affect and possibly restrain commerce. United States v. Joint Traffic Association, 171 U. S. 505, 568, 43 L. ed. 259, 19 Sup. Ct. 25.

The words "restraint of trade" at common law, and in the law of this country at the time of the adoption of the Anti-Trust Act, only embraced acts, contracts, agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and Congress intended

that those words as used in that act should have a like significance; and the ruling in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. ——, 31 Sup. Ct. 502, to this effect is re-expressed and reaffirmed.

The public policy manifested by the Anti-Trust Act is expressed in such general language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind.

The record in this case discloses a combination on the part of the defendants with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-Trust Act; and the subject-matters of the combination and the combination itself are not excluded from the scope of the act as being matters of intrastate commerce and subject to State control.

In this case the combination in all its aspects both as to stock ownership, and as to the corporations independently, including foreign corporations to the extent that they became co-operators in the combination, come within the prohibition of the first and second sections of the Anti-Trust Act.

In giving relief against an unlawful combination under the Anti-Trust Act the court should give complete and efficacious effect to the prohibitions of the statute; accomplish this result with as little injury as possible to the interest of the general public; and have a proper regard for the vested property interests innocently acquired.

In this case the combination in and of itself, and also all of its constituent elements, are decreed to be illegal, and the court below is directed to hear the parties and ascertain and determine a plan or method of dissolution and of recreating a condition in harmony with law, to be carried out within a reasonable period (in this case not to exceed eight months), and, if necessary, to effectuate this result either by injunction or receivership.

Pending the achievement of the result decreed all parties to the combination in this case should be restrained and enjoined from enlarging the power of the continuation by any means or device whatever.

Where a case is remanded, as this one is, to the lower court with directions to grant the relief in a different manner from that decreed by it, the proper course is not to modify and affirm, but to reverse and remand with directions to enter a decree in conformity with the opinion and to carry out the directions of this court with costs to defendants.

164 Fed. Rep. 700, reversed and remanded with directions.

The Attorney General and *Mr. James C. McReynolds*, for the United States.

Mr. John G. Johnson, *Mr. DeLancey Nicoll* and *Mr. Junius Parker*, with whom *Mr. William J. Wallace* and *Mr. W. W. Fuller* were on the brief, *Mr. William M. Ivins* also filing a brief, for the American Tobacco Company and all the other defendants except the Imperial Tobacco

Company (of Great Britain and Ireland), Limited, United Cigar Stores Company and R. P. Richardson, Jr., & Co., Inc.

Mr. William B. Hornblower, with whom *Mr. John Pickrell, Mr. William W. Miller,* and *Mr. Morgan M. Mann,* were on the brief for appellee, the Imperial Tobacco Company.

Mr. Sol M. Stroock, for the United Cigar Stores Company.

Mr. Charles R. Carruth, Mr. Charles J. McDermott, Mr. C. B. Watson, Mr. James T. Morehead and *Mr. A. J. Burton* for R. P. Richardson, Jr., & Company, Inc., appellee, submitted.

Mr. W. Bourke Cockran, by leave of the court, submitted a brief as *amicus curiæ.*

Mr. Thomas Thacher and *Mr. J. Parker Kirlin,* by leave of the court, submitted a brief as *amici curiæ* on certain questions common to this case and other pending causes.

Mr. Chief Justice White delivered the opinion of the court.

Mr. Justice Harlan concurred in part and dissented in part.

INDEX

[References are to Sections]

A

ACTION,
by individual under Sherman Anti-Trust Act; injury to "business or property" 160
for injunction; Sherman Anti-Trust Act 161
right of creditor; Sherman Anti-Trust Act 162
right of stockholder; Sherman Anti-Trust Act 162
right of member of combination; Sherman Anti-Trust Act 163
by municipality; Sherman Anti-Trust Act 164
by receiver; Sherman Anti-Trust Act 166
Sherman Anti-Trust Act; time of entering into combination as affecting right to recover 167
See Damages; Injunction; Parties; Pleading; Procedure; Remedies.

ACTUAL DAMAGES,
must be established—Sherman Anti-Trust Act 188

ACTUS CONTRA ACTUM 61

ADMISSIBILITY,
of evidence. See Evidence.

ADVERSE POSSESSION,
statute prohibiting acquisition of railroad lands by, grants no special privilege, etc 313

AGENT,
of corporation and corporation cannot form unlawful combination 124
charging of in indictment; Sherman Anti-Trust Act 179
car service association merely agent of several railroads 399
of seller and purchaser; contracts between; violation State statute 407
and principal; contracts between; violation State statute 408
agreement for withdrawal of; cotton seed oil manufacturers 416
of insurance companies—agreements as to rates 421

"AGGREGATE,"
"monopolize" synonymous with 50

AGRICULTURAL PRODUCTS,
exception in statute as to 376

[References are to Sections]

ALABAMA,
Constitution; legislative duty as to monopolies, combinations, etc., to control articles of necessity, etc., or to prevent competition 240
Constitution continued; effect upon competition; meaning of "unreasonably" and "reasonable competition" 241

ALLEGATIONS. See Complaint; Indictment; Pleading.

AMENDMENTS,
to Wilson Tariff Act 14
to charter of gas company; right to lay pipes; monopoly 274

ANSWER, See Pleading.

ANTI-TRUST ACTS. See Sherman Anti-Trust Act; Statutes; Wilson Tariff Act.

APPEAL,
to United States Supreme Court; Anti-Trust cases .....note, 14

AREA,
covered; reasonableness as to of contract in restraint of trade 108

ARKANSAS,
Constitution; monopolies prohibited 242

"ARRANGEMENT,"
construed 357

ARTIFICIAL LIGHT,
not part of essential functions of State to provide 268

ASSETS,
of holding corporation; distribution of; right to return of shares 193
of corporations; purchase of; violation State statutes 393

ASSIGNMENT,
of right to manufacture by owners of letters patent 136

ASSOCIATION,
defined .....note, 13
of cattle dealers; violation; Sherman Anti-Trust Act 149
of producers of coal and coke; Sherman Anti-Trust Act 154
regulation of; Alabama Constitution 240
where by-laws of show illegality 384
by-laws of as evidence 487

ATTORNEY GENERAL,
assistant to authorized; enforcing trust and interstate commerce laws .....note, 14

[References are to Sections]

ATTORNEY GENERAL—*Continued.*
certificate of; Anti-Trust cases.....note, 14
suit by for injunction; Sherman Anti-Trust Act..... 161

ATTORNEY'S FEE,
recovery of under Sherman Anti-Trust Act..... 13

AVERMENTS. See Complaint; Indictment; Pleading.

BAKERIES,
pooling of.....note, 10, 46

BANANA TRADE,
conspiracy affecting.....note, 117

BANK,
charters; waiver of sovereignty.....note, 275
deposits and checks; police power.....note, 271

BIDS,
contract by city for electric lights without advertising for bids.... 298

BILL OF RIGHTS. See Constitutional Law.

BLACKLIST,
defined..... 30

BLUESTONE,
agreements between producers of..... 417

BOARD,
of education; parish board; act as to held special act..... 266
of waterworks; act as to not special act..... 266
of trade; contracts as to quotations; Sherman Anti-Trust Act.... 150

BOOKS,
combinations of holders of copyrights..... 133
of defendants as evidence; violation Sherman Anti-Trust Act.... 182
of corporations; officers cannot refuse to produce; violation Sherman Anti-Trust Act..... 186
requiring production of; State statutes..... 494
See School Books.

BOOMS,
when not a monopoly..... 295

[References are to Sections]

BOROUGH,
exclusive contract with water company; impairment contract obligation 225

BOYCOTT,
defined and considered 30
essential elements of 32
origin of practice ..... note, 33
secondary boycott defined 34
and strike distinguished 43
See Labor or Trade Unions.

BOYCOTTING,
defined and considered 33

BREACH,
of contract collateral to illegal agreement; Sherman Anti-Trust Act 155, 156
of contract by municipality not an act impairing obligation of contract 216

BREWERS,
agreements between not to sell to one indebted; to raise price 413

BRICKLAYERS' UNION,
and mason and builders' association; agreements between 414

BRIDGES,
exclusive grant or privilege; impairment of contract obligation ... 219
removal of; police power ..... note, 271
when grant exclusive to certain extent 296
when not a monopoly 296
Charles River Bridge case 296
exclusive right to take toll at, not monopoly ..... note, 296
when contract by city, as owner of ferry franchise, with bridge company creates no monopoly 297
See Toll Bridges.

BROKERS,
action by member of combination against ticket brokers; Sherman Anti-Trust Act 163

BUILDING AND LOAN,
associations; statutes as to held constitutional 264

BURDEN OF PROOF,
Sherman Anti-Trust Act 184
illegality of contract; partnership accounting 489
See Evidence.

[References are to Sections]

BUSINESS,
size of not necessarily illegal; monopoly 79
sale of; contract not to engage in ..... note, 88
covenant not to carry on; reasonableness of for court 103
contract for purchase of; validity dependent on reasonableness ... 106
conducted by means of large number of stores 126
size or extent of not alone test of violations; Sherman Anti-Trust Act 126
good will; purchase of; violations; Sherman Anti-Trust Act 130
exception in statute as to sale of good will of 376
and good will; sale of; contracts not to engage in competition 409
and good will; sale of; contracts not to engage in competition; exception in statute 410
and good will; sale of; laundry not a manufacturing establishment 411
agreement to refrain from entering into 412

"BUSINESS OR PROPERTY,"
injury to; Sherman Anti-Trust Act; when individual may sue 160

BY-LAWS,
of association showing illegality 384
and rules of association; cattle owners, buyers and sellers 415
of association or corporation as evidence 487

CANAL. See Navigable Canal.
franchise for, held not to preclude railroad franchise 70
franchise as to held not special act 266

CAPITAL STOCK,
of railroad company; condemnation of; when no exclusive privilege granted 313

CARRIER,
newspaper publishers; contracts between 424
See Common Carrier; Freights; Interstate Commerce Act; Pooling of Freights; Railroads.

CAR SERVICE,
association merely agent of several railroads; violation State statutes 399

CAST-IRON PIPES,
combination of manufacturers of; Sherman Anti-Trust Act 143

CATTLE,
owners, buyers and sellers; associations of; by-laws and rules 415

[References are to Sections]

CATTLE DEALERS,
association of; violations; Sherman Anti-Trust Act..... 149

CERTIFICATE,
of foreign insurance company; revocation of..... 449

CHARLES RIVER BRIDGE. See Bridges.

CHARTER,
of corporation a contract ..... note, 21
monopoly as essential feature of.....70, 71
grants of, strictly construed 71
when grant of exclusive 72, 73
when grant of is not exclusive 74
for railroad; impairment of contract obligation; provision against competing lines 221
of fire insurance company; act as to held special act 266
of gas company; amendment to; right to lay gas pipes; monopoly. 274
from mere grant of a monopoly not implied..... 275
articles of association substitute for..... 275
bank charters; waiver of sovereignty..... note, 275
statute as to forfeiture of..... 374
permitting consolidation of corporations..... 392
annulment of; violation State law..... 445
application to annul; granting of in discretion of court..... 446

CIRCUIT COURTS,
anti-trust cases given precedence in..... note, 14
summoning parties; Sherman Anti-Trust Act.....169, 170

CIRCULARS. See Labor or Trade Unions.

CITIZEN,
when may sue under Sherman Anti-Trust Act..... 160
cannot sue for injunction under Sherman Anti-Trust Act 161

CITY. See Municipality.

CIVIL CONSPIRACY,
defined 4

CLASS LEGISLATION. See Constitutional Law.

CLOSED SHOP,
defined 37

COAL,
legally capable of being engrossed..... 5
right of company to fix prices of; Sherman Anti-Trust Act..... 154
companies; contracts between; Sherman Anti-Trust Act..... 154

[References are to Sections]

COAL OIL,
agreement; purchaser of and agent of seller 407

COKE,
contracts between producers of coal and coke; Sherman Anti-Trust Act 154

COLLATERAL,
where restraint is; Sherman Anti-Trust Act 82
contract collateral to illegal agreement; Sherman Anti-Trust Act 155, 156

COLLUSION,
conspiracy synonymous with ..... note, 4

COLONIAL ACT,
of Massachusetts of 1641 construed ..... note, 276

COMBINATION,
defined 1
word not possessed of accurate legal meaning 1
construed 358
of insurance companies to fix rates ..... note, 12
holding corporations 29
and monopolies; distinctions 48
distinguished from sale 55
and conspiracy synonymous; Sherman Anti-Trust Act 56
See Interstate Commerce Act; Pooling of Freights; Labor or Trade Unions; Monopolies; Particular Combinations; Pooling; Sherman Anti-Trust Act; Statutes; Trade; Trust.
twofold remedy against unlawful; Sherman Anti-Trust Act. See "Appendix A."

COMMERCE,
defined and considered 16
with foreign nations defined 16
telephone an instrument of ..... note, 16
electric light an article of ..... note, 16
intercourse by telegraph is ..... note, 16
business of carrier as part of ..... note, 16
power to regulate applies to what ..... note, 16
intercourse through mails as ..... note, 16
insurance contracts and policies ..... note, 16
intrastate commerce defined 17
internal commerce defined ..... note, 17
wholly within State; Congress no jurisdiction over 77
interstate or foreign; direct and necessary effect upon competition; Sherman Anti-Trust Act 80, 81

[References are to Sections]

COMMERCE—*Continued.*
power of Congress as to 110, 111
purpose of Sherman Anti-Trust Act 113
Sherman Anti-Trust Act not inconsistent with Interstate Commerce Act 114, 201
in Sherman Anti-Trust Act construed 115
not synonymous with "trade"; Sherman Anti-Trust Act 115
clause of Federal Constitution; power of Congress 205
purpose of vestment in Congress of power to regulate 206
regulation of; extent of interference with private contracts or combinations; interstate and intrastate commerce 207
clause; power of Congress under to restrict liberty to or freedom of contract 233
jurisdiction of Congress over 270
Federal and State powers as to distinguished 270
Post Roads Act prohibits State monopolies in commercial intercourse by telegraph 292
interstate transactions of telegraph companies 318

COMMISSION MERCHANTS,
association of; Sherman Anti-Trust Act 149

COMMODITIES,
defined 18
corporate franchise as ..... note, 18
combinations to control prices of; monopolies 65, 66
contracts restraining competition in generally 89, 90
See Commodity.

COMMODITY,
defined 18
insurance as ..... note, 18
corporate franchise as ..... note, 18
does not include personal services ..... note, 18
telegraph service is not 435
construed 359
See Commodities.

COMMON CARRIER,
agreement to maintain rates; injunction; Sherman Anti-Trust Act ..... note, 8
business of as part of trade or commerce; interstate commerce ..... note, 16
regulation of; Alabama Constitution 240
violation by; Sherman Anti-Trust Act 151
contracts between owners of vessels; Sherman Anti-Trust Act 152
combinations to share earnings prohibited; Washington Constitution 261
interstate commerce act; pooling of freights 194, 201

[References are to Sections]

COMMON CARRIER—*Continued.*
contracts between; consolidation of railroad companies; parallel and competing lines 395
See Freights; Interstate Commerce Act; Pooling of Freights; Railroads.

COMMON LAW,
conspiracy defined ..... note, 3
actionable conspiracy at 4
conspiracy to commit offense against United States not felony at ..... note, 64
personal service not subject of monopoly at 69
contracts in restraint of trade; when valid and invalid 83
English statute as to monopolies declaratory of ..... note, 276
patent whether a monopoly in old sense of 282, 283
right and statutory right as to copyrights distinguished 287
protects property in trade-marks 288
exclusive contract between railroad and telegraph company; monopoly 293
effect upon interstate transactions of telegraph companies 318
See Contracts in Restraint of Trade.
monopolies unlawful at. See "Appendix A."

COMMUNICATION,
through mails as commerce ..... note, 16

COMPETENCY,
of evidence. See Evidence.

COMPETING LINE,
defined and considered 19
provision in railroad charter as to; impairment of contract obligation 221

COMPETITION,
defined 2
"the life of trade" ..... note, 2
contracts void which tend to prevent 65
restraint of and monopoly distinguished 68
not every contract illegal which tends to restrict 68
what degree of restraint of essential; monopoly 68
direct and necessary effect upon; interstate or foreign commerce; Sherman Anti-Trust Act 80, 81
in commodities; contracts restraining; generally 89
public policy favors ..... note, 89
contracts preventing void ..... note, 90
contract between public service corporations to stifle held void 92
degree of; contracts in restraint of trade 99, 100
what degree of permissible; contracts in restraint of trade 101
Sherman Anti-Trust Act enacted to foster 112
natural effect of 125

[References are to Sections]

COMPETITION—*Continued.*
monopolies to control prohibited; Alabama Constitution 240, 241
monopolies to control prohibited; South Dakota Constitution.... 255
combinations to control prohibited; Washington Constitution.... 259
combinations to control prohibited; Wyoming Constitution..... 262
power of Congress to prohibit restraints upon competition; railroad corporations 267
unfair competition; when cannot be predicated solely on use of trade-name..... 289
city ordinance as to union label on city printing, etc.; when a monopoly..... 322
contracts not to engage in; sale of business and good will..... 409
contracts not to engage in. See Business; Good Will.
contracts to restrain; public policy, etc. See "Appendix A."

COMPLAINT,
Sherman Anti-Trust Act; sufficiency of; general rules..... 173
under Sherman Anti-Trust Act; sufficiency of; rules in force in State where action brought; Practice Act..... 174
Sherman Anti-Trust Act; sufficiency of; particular cases..... 175
Sherman Anti-Trust Act; duplicity..... 176
Sherman Anti-Trust Act; joinder of defendants; election..... 177
to recover penalty..... 481
in action to restrain; New York..... 478
See Pleading.

"CONCENTRATE,"
"monopolize" synonymous with..... 50

CONCLUSIONS OF LAW,
pleading 470

CONDEMNATION,
under Sherman Anti-Trust Act..... 13
of water supply; no exclusive privilege beyond recall ..... note, 275
of capital stock. See Railroads.

CONDITION,
of sale not to sell goods of any other person; statute prohibiting.. 371
in patent licenses; Sherman Anti-Trust Act..... 135
in licenses; particular ones; patents; Sherman Anti-Trust Act.... 136

CONDUITS,
in city streets; statutory grant to telephone company; no exclusive right 317

CONGRESS,
no jurisdiction over commerce wholly within State..... 77
power of generally; Sherman Anti-Trust Act..... 110

[References are to Sections]

CONGRESS—*Continued.*
power to regulate commerce; what it includes 111
competent for it to vest jurisdiction under Sherman Anti-Trust Act 111
purpose in passing Sherman Anti-Trust Act 112
power to confer jurisdiction to summon parties 169
acts of supreme law of land; application to combinations, trusts, etc 203
constitutional vestment of powers in 204
power of; commerce clause of Constitution 205
purpose of vestment in Congress of power to regulate commerce .. 206
regulation of commerce; extent of interference with private contracts or combinations; interstate and intrastate commerce 207
obligation of contract clause not a limitation on 208
Fifth Amendment to Federal Constitution a limitation on power 227
of power of under commerce clause to restrict liberty to or freedom of contract 233
Fourteenth Amendment; equal protection of the laws; power of Congress and of States 238
power of to prohibit restraints upon competition; railroad corporations 267
inactive; subject of interstate commerce; power of States 270
jurisdiction of over commerce 270
supremacy of over State laws ..... note, 270
power of; territorial legislation 368
See Post Roads Act; Statutes.
debates in; Sherman Anti-Trust Act. See "Appendix A."

CONNIVANCE,
conspiracy synonymous with ..... note, 4

CONSIDERATION,
of contract in restraint of trade 104

CONSOLIDATION,
of parallel and competing lines of railroad prohibited 369
of corporations; transfer of property to one 390
of corporations; statute or charter permitting 392
parallel and competing lines of railroad; violation State statutes ... 395
street railways; violation State statute 397
of gas companies; violations State statute 418
of railroads. See Railroads.

CONSOLIDATION OF CORPORATIONS. See Corporations.

CONSPIRACY,
defined 3, 20
defined and considered ..... note, 57
at common law defined ..... note, 3
persons injured by have action at law for 4

[References are to Sections]

CONSPIRACY—*Continued.*
synonymous with collusion or connivance.....note, 4
corporations amenable for.....note, 13
in restraint of trade defined..... 20
boycott as..... 30
and combination synonymous; Sherman Anti-Trust Act..... 56
in restraint of trade and contract in restraint of trade distinguished 57
means substantially same as contract; Sherman Anti-Trust Act note, 57
exclusive combination not necessarily a conspiracy..... 59
combination of ship owners held not..... 59
nature elements essentials, or test of..... 59–64
combination or confederation and unlawful design or means employed..... 60
what essential to offense of..... 60
motive or intention..... 61
gravamen of offense of..... 62
gist of offense of.....note, 62
overt acts; New York..... 63
to commit offense against or to defraud United States; overt acts 64
against United States; when overt act may be done anywhere; when crime complete.....note, 64
to commit offense against United States not felony at common law note, 64
to defraud United States; overt act; indictment.....note, 64
test or essentials of generally; Sherman Anti-Trust Act..... 84
Sherman Anti-Trust Act; test or essentials of; overt acts..... 85
to do acts in another jurisdiction..... 85
may have continuance; Sherman Anti-Trust Act..... 119
indictment charging; denial under general issue; Sherman Anti-Trust Act..... 180
See Indictment; Sherman Anti-Trust Act.

CONSPIRATOR. See Conspiracy.

CONSTITUTION,
of State cannot impair obligation of a contract..... 209
of State not a contract..... 209
of Alabama; legislative duty as to monopolies, combinations, etc., to control articles of necessity, etc., or to prevent competition.. 240
of Alabama continued; effect upon competition; meaning of "unreasonably" and "reasonable competition"..... 241
of Arkansas; monopolies prohibited..... 242
of Idaho; combinations to control prices, regulate production, etc., prohibited; duty of legislature..... 243
of Kentucky; legislative duty as to trusts, combinations, etc., to control prices..... 244
of Louisiana; combinations, etc., to control prices unlawful; duty of legislature..... 245
of Maryland; monopolies prohibited..... 246

[References are to Sections]

CONSTITUTION—*Continued.*
of Minnesota; combinations to control food products a criminal conspiracy; duty of legislature 247
of Mississippi; duty of legislature to prevent trusts, combinations, etc 248
of Montana; combinations, trusts, etc., to fix prices or regulate production; duty of legislature 249
of Montana continued; necessity of showing intent 250
of Montana continued; meaning of "trust" therein 251
of North Carolina; monopolies prohibited 252
of North Dakota; combinations to control prices, cost of exchange or transportation prohibited; franchises forfeited 253
of Oklahoma; monopolies prohibited; duty of legislature as to combinations, monopolies, etc 254
of South Dakota; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature 255
of Tennessee; monopolies prohibited 256
of Texas; monopolies prohibited 257
of Utah; combinations to control prices, cost of exchange or transportation prohibited; duty of legislature 258
of Washington; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature 259
of Washington continued; its provisions not self-executing 260
of Washington continued; combinations of common carriers to share earnings prohibited 261
of Wyoming; monopolies prohibited; combinations to prevent competition, control production or prices, etc., prohibited 262
provisions prohibiting granting special or exclusive privileges, immunities or franchises, etc 263, 264
provisions prohibiting creation of corporation by special act, etc 265, 266
of States and United States; legislative powers under 269, 270
of State; ordinances of municipality must not conflict with 279
of States. See Constitutional Law; State.
of United States. See Constitutional law; Federal Constitution.

CONSTITUTIONAL LAW,
Federal Constitution; preliminary statement 202
Constitution and laws of United States supreme law of land; application to combinations, trusts, etc 203
constitutional vestment of powers in Congress 204
commerce clause of Constitution; powers of Congress 205
purpose of vestment in Congress of power to regulate commerce 206
regulation of commerce; extent of interference with private contracts or combinations; interstate and intrastate commerce 207
obligation of contract clause not a limitation on Congress 208
impairment of obligation of contracts; whether State Constitution a "law" 209

[References are to Sections]

CONSTITUTIONAL LAW—*Continued.*
impairment of obligation of contracts; whether "law" applies only to State legislative enactments..... 210
impairment of obligation of contracts; whether municipal ordinance a "law"..... 211
constitutionality Sherman Anti-Trust Act..... 111
impairment of obligation of contracts; whether municipal ordinance a "law"..... 211
obligation of contract clause refers to subsequently enacted law of State..... 213
subsequently enacted statute changing remedy or procedure; impairment of obligation clause..... 214
nature of laws prohibited by obligation of contracts clause..... 215
nature of contracts embraced by obligation of contracts clause; between what parties..... 216
nature of contracts; obligation of contracts clause embraces implied and express contracts..... 217
obligation of contracts; legal and legislative contracts; construction of contract; authority of Federal Supreme Court..... 218
bridges; exclusive grant or privilege; impairment of contract obligation..... 219
exclusive grant; ferry; impairment contract obligation..... 220
railroad charter; provision against competing lines; impairment of contract obligation..... 221
telephone company's exclusive grant; impairment of contract obligation..... 222
electric lighting; exclusive grant or privilege; impairment of contract obligation..... 223
exclusive right to supply gas; impairment of contract obligation.. 224
water companies; exclusive contracts, grants or privileges; impairment of contract obligation..... 225
obligation of contract..... 225
powers reserved to the States..... 226
Federal Constitution; Fifth Amendment generally..... 227
what first eight articles of Federal Constitution refer to..... 227
Federal Constitution; Fourteenth Amendment; generally..... 228
Fourteenth Amendment to Federal Constitution; no State to abridge privileges or immunities..... 229
Fourteenth Amendment; due process clause; Fifth Amendment.. 230
Fourteenth Amendment; Fifth Amendment; liberty to or freedom of contract; generally..... 231
liberty to or freedom of contract continued; power of government to restrict, regulate or control..... 232
liberty to or freedom of contract continued; power of Congress under commerce clause to restrict..... 233
liberty to or freedom of contract continued; police power of States 234
liberty to or freedom of contract continued; Standard Oil Company's case..... 235
liberty to or freedom of contract continued; States statutes prohibiting combination, etc.; instances..... 236

[References are to Sections]

CONSTITUTIONAL LAW—*Continued.*
Fourteenth Amendment; equal protection of the laws..... 237
Fourteenth Amendment; equal protection of the laws; power of Congress and of States..... 238
creation of monopolies; State Constitutions prohibiting monopolies; generally..... 239
State Constitutions..... 239–267
Alabama Constitution; legislative duty as to monopolies, combinations, etc., to control articles of necessity, etc., or to prevent competition..... 240
Arkansas Constitution; monopolies prohibited..... 242
Idaho Constitution; combinations to control prices, regulate production, etc., prohibited; duty of legislature..... 243
Alabama Constitution; legislative duty as to trusts, combinations, etc., to control prices..... 244
Louisiana Constitution; combinations, etc., to control prices unlawful; duty of legislature..... 245
Maryland Constitution; monopolies prohibited..... 246
Minnesota Constitution; combinations to control food products a criminal conspiracy; duty of legislature..... 247
Mississippi Constitution; duty of legislature to prevent trusts, combinations, etc..... 248
Montana Constitution; combinations, trusts, etc., to fix prices or regulate production prohibited; duty of legislature..... 249
Montana Constitution continued; necessity of showing intent.... 250
Montana Constitution; meaning of "trust" therein..... 251
North Carolina Constitution; monopolies prohibited..... 252
North Dakota Constitution; combinations to control prices, cost of exchange or transportation prohibited; franchises forfeited.. 253
Oklahoma Constitution; monopolies prohibited; duty of legislature as to combinations, monopolies, etc..... 254
South Dakota Constitution; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature..... 255
Tennessee Constitution; monopolies prohibited..... 256
Texas Constitution; monopolies prohibited..... 257
Utah Constitution; combinations to control prices, cost of exchange or transportation prohibited; duty of legislature..... 258
Washington Constitution; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature..... 259
Washington Constitution continued; its provisions not self-executing..... 260
Washington Constitution continued; combinations of common carriers to share earnings prohibited..... 261
Wyoming Constitution; monopolies prohibited; combinations to prevent competition, control production or prices, etc., prohibited..... 262
constitutional provisions prohibiting granting special or exclusive privileges, immunities or franchises..... 263, 264

[References are to Sections]

CONSTITUTIONAL LAW—*Continued.*
constitutional provisions prohibiting creation of corporation by special act, etc. 265, 266
Federal and State legislative powers distinguished. 270
Federal and State legislative powers distinguished; interstate and intrastate commerce. 270
patent system rests on Federal Constitution and Acts of Congress 282
street railways; contracts with municipality; special privilege or immunity; monopoly. 294
special privilege or immunity; municipal contracts generally. 294
Massachusetts; exclusive privileges. note, 296
when ferries would be a monopoly. 300
when statute would be unconstitutional as granting monopoly as to ferry. 300
Kentucky Bill of Rights not violated; grant of exclusive right to supply gas. 303
irrigation monopoly or privilege not "special" within prohibition of Constitution. 309
when no exclusive privilege granted by statute authorizing condemnation of capital stock of railroad. 313
when no special privilege granted by statute as to acquisition of railroad lands. 313
prohibiting enactment of special, etc., laws; street railway grants. 316
city's power to grant exclusive franchise to street railway company; special privileges, etc. 316
grants of special privileges or immunities to telephone companies. 317
toll road; when not a monopoly. 320
due process; contract with State; water company. 333
special privileges when not granted as to public waterways. 334
State statutes generally. 344
State statutes; due process of law; liberty of contract. 345, 346
State statutes; class legislation. 346
State statutes; discrimination. 347
constitutional provision requiring legislature to enact laws construed. 348
contract made prior to passage of act does not render it unconstitutional. 349
State statutes; construction; general rules. 350
State statutes; as to intent of legislature. 351
where part of State statute unconstitutional. 352
as to title and body of State statute. 353
rule as to statutes in pari materia. 354, 355
State statutes; rule as to additional and descriptive words. 356
constitutional provision prohibiting consolidation of parallel and competing lines of railroad. 369
statute as to examination of witnesses before trial. 496

CONSTRUCTION,
of grants to municipal corporations. 294
of statute as to electric lighting. 299

[References are to Sections]

CONSTRUCTION—*Continued.*
of statutes. See Constitutional Law; Statutes.
of Sherman Anti-Trust Act. See Sherman Anti Trust Act.
of Sherman Anti-Trust Act in light of reason. See "Appendix A."
of "person" in Sherman Anti-Trust Act. See "Appendix A."

CONTEMPT,
of court; same act may be crime and 111

CONTINGENT DAMAGES,
not a basis for judgment; Sherman Anti-Trust Act 188

CONTINUANCE,
conspiracy under Sherman Anti-Trust Act may have 119

CONTRACT,
defined and considered 21
in restraint of trade defined 23
and conspiracy mean substantially same; Sherman Anti-Trust Act ..... note, 57
in restraint of trade; analogous to monopolize 58
tending to prevent competition void 65
nature of condemned by Sherman Anti-Trust Act ..... note, 80
not to engage in business 88
test of legality of contract under Sherman Anti-Trust Act 120
essentials of to constitute; violations Sherman Anti-Trust Act .. 124
violations Sherman Anti-Trust Act; what constitute; generally .. 125
entered into before passage of Sherman Anti-Trust Act 127
between holders of copyrights; violations; Sherman Anti-Trust Act 133
between owners of patents; Sherman Anti-Trust Act 134
as to proprietary medicines; Sherman Anti-Trust Act 138
between manufacturers; generally; Sherman Anti-Trust Act 140
as to manufacturers within a State 141
as to quotations; board of trade; Sherman Anti-Trust Act 150
between common carriers; Sherman Anti-Trust Act 151
between owners of vessels; Sherman Anti-Trust Act 152
as to mining; Sherman Anti-Trust Act 153
between coal companies; Sherman Anti-Trust Act 154
with combination; voluntary purchaser; illegality of combination no defense; Sherman Anti-Trust Act 155, 156
with combination; when illegality of combination a defense; Sherman Anti-Trust Act 157
for pooling freights; action on 197
Federal Constitution; regulation of commerce; extent of interference with private contracts 207
impairment of obligation of; whether State Constitution a "law" 209
State Constitution cannot impair obligation of 209
impairment of obligation of; whether "law" applies only to State legislative enactments 210

[References are to Sections]

CONTRACT—*Continued.*
impairment of obligation of; whether municipal ordinance a "law" 211
impairment of obligation of; word "law" does not apply to judicial decisions, etc. 212
clause of Federal Constitution refers to subsequently enacted law of State 213
impairment of obligation clause; subsequently enacted statute changing remedy or mode of procedure 214
nature of laws prohibited by obligation of contracts clause 215
ultra vires not protected by obligation of contracts clause 216
breach of by municipality not an act impairing obligation of contract 216
prohibited by statute not protected by obligation of contracts clause 216
nature of embraced by obligation of contracts clause; between what parties 216
implied and express embraced by obligation of contracts clause 217
obligation of; legal and legislative contracts; construction of contract; authority of Federal Supreme Court 218
obligation; impairment of; bridges; exclusive grant or privilege 219
obligation; impairment of; exclusive grant; ferry 220
obligation; impairment of; railroad charter; provision against competing lines 221
obligation; impairment of; telephone company's exclusive grant 222
obligation; impairment of; exclusive grant or privilege; electric lighting 223
obligation; impairment of; exclusive right to supply gas 224
exclusive contracts; water companies; impairment contract obligation 225
obligation of; constitutional law 225
liberty to or freedom of; generally; Fourteenth Amendment; Fifth Amendment 231
liberty to or freedom of construed power of government to restrict, regulate or control 232
liberty to or freedom of continued; power of Congress under commerce clause to restrict 233
liberty to or freedom of continued; police power of States 234
liberty to or freedom of continued; Standard Oil Company's case 235
liberty to or freedom of continued; State statutes prohibiting combinations, etc.; instances 236
with States or municipalities; construction of 275
power of municipality to make contracts tending to create monopoly 280
whether patent a monopoly or contract 282, 283
municipality; constitutional law; special privilege, etc.; monopoly 294
by city as owner of ferry franchise with bridge company, when it creates no monopoly 297
with city for electric lighting; when not void for exclusiveness 298
power of city as to electric lighting; exclusive right 298

[References are to Sections]

CONTRACT—*Continued.*
effect of duration of, on grant or contract as to electric lighting by city..... 298
by municipality with grantee of exclusive gas privilege..... 304
and grants of exclusive privilege or monopoly; when void as to gas supply..... 306
for market house by city or town; monopoly..... 310
providing for exclusive use of certain text-books in schools..... 314
by city with telephone company for exclusive right for period of years..... 317
exclusive right of State under contract with telegraph company.. 318
award of by city printing to specified class; a monopoly..... 323
city cannot contract away its legislative powers..... 328
by city as to water supply; instances of valid and void contracts; exclusive rights; monopoly..... 329, 330
when no defense that it creates monopoly; water supply..... 331
with State; water company; constitutional law; due process..... 333
between employer and employees; combination to induce breaking of..... 437
in restraint of trade. See Contracts in Restraint of Trade; Restraint of Trade.
in violation of State statute. See Exclusive Contract; Exclusive Grants; Labor or Trade Unions; Licenses; Sherman Anti-Trust Act; State Statutes; Violations.
obligation of. See Constitutional Law.
to restrain competition, etc.; public policy. See "Appendix A."
liberty or freedom of. See "Appendix A."

CONTRACTS IN RESTRAINT OF TRADE,
defined..... 23
distinction between State Anti-Trust Act and..... 52
distinction between contracts per se in restraint of trade and contracts which tend to destroy competition and create monopolies 53
distinctions; conspiracy in restraint of trade and contracts in restraint of trade..... 57
analagous to "monopolize"..... 58
intrastate and interstate; Sherman Anti-Trust Act.....77, 80, 81, 82
reasonable and unreasonable restraints; Sherman Anti-Trust Act 83
public policy as test; generally..... 86
nature essentials or test..... 86–109
public policy as test; general and partial restraint of trade..... 88
when enforceable.....note, 88
public policy as test; contracts tending to create monopolies; useful commodities..... 89
not tested by prices that result..... 89
public policy as test; contracts affecting articles of prime necessity 90
what contracts not void as against public policy..... 91
public policy test; public service corporations..... 92, 93
effect of changed conditions as to trade, commerce, etc.; public policy; English courts..... 94

[References are to Sections]

CONTRACT IN RESTRAINT OF TRADE—*Continued.*
effect of changed conditions as to trade, commerce, etc.; public policy; Federal courts 95
effect of changed conditions as to trade, commerce, etc.; public policy; State courts 96
extent of illegality of; new rule 97
restraint need not be complete nor amount to a criminal offense .. 97
effect of State statute upon illegality of 98
test of legality of; Sherman Anti-Trust Act 120
essentials of in order to constitute violations Sherman Anti-Trust Act 124
purpose of law in prohibiting 99, 100
restraint of trade; monopolies; degree of competition 99, 100
restraint need not be complete nor effect a monopoly 100
contract in effect transferring good will and custom 101
what degree of competition permissible 101
circumstances are to be considered in determining legality of restraint 102
doctrine of common law 102
whether contract is in restraint of trade is question for court 103
where contract is one of a system of contracts; reasonable and unreasonable restraints 107
reasonableness as to territory or area covered 108
test of reasonableness; fair protection to covenanter 109
power of Congress; generally; Sherman Anti-Trust Act 111
consideration of 104
motive 105
reasonable and unreasonable restraints generally 106
and conspiracy in restraint of trade distinguished 57
See Constitutional Law; Sherman Anti-Trust Act; State Constitutions.

"CONVENIENCE,"
construed 359

COPPER,
contracts between miners and refiners; Sherman Anti-Trust Act .. 153

COPYRIGHTS,
contracts between holders of; violations; Sherman Anti-Trust Act 133
suit for infringement of; illegality of combination as defense; Sherman Anti-Trust Act 159
source of; exclusive right or monopoly 285
law as to secures exclusive right or monopoly 286
purpose of law as to 286
statutory and common-law right distinguished; exclusive property 287

CORPORATIONS,
to what extent persons ..... note, 13
whether word "person" includes 363

[References are to Sections]

CORPORATIONS—*Continued.*
are persons within Sherman Anti-Trust Act..... 114
a person within meaning of equal protection clause of Federal Constitution.....note, 237
amenable for conspiracy.....note, 13
franchise of as commodity.....note, 18
charter of or contract.....note, 21
character of franchise to..... 70
charters and franchises of strictly construed..... 71
contracts in restraint of trade; public service corporations; public policy test..... 92
and agent of cannot form unlawful combination..... 124
violations by; stockholders not criminally liable..... 128
holding majority of stock of another corporation; violation Sherman Anti-Trust Act..... 131
exchange of stores of stock-holding corporation; violations Sherman Anti-Trust Act..... 132
State not under Sherman Anti-Trust Act..... 165
charging officers, agents or stockholders of in indictment; Sherman Anti-Trust Act..... 179
officers and employees of cannot refuse to testify; violation Sherman Anti-Trust Act..... 186
cannot refuse to produce books; violation Sherman Anti-Trust Act..... 186
distribution of assets of holding corporation; right to return of shares..... 193
county not one.....note, 263
constitutional provisions prohibiting the creation of by special act 265, 266
power of creating is one appertaining to sovereignty..... 272
may exist by prescription..... 272
can only exercise powers granted..... 272
private corporations exist by legislative grant.....note, 272
State legislative power to grant exclusive privileges to..... 274
municipality not invested with power to create..... 278
delegation by legislature of power to create..... 278
franchises conferred for entire body of corporators..... 280
consolidation of; exclusive privileges; monopoly..... 335
police power of State; limitations in Federal Constitution; Fourteenth Amendment..... 340
police power of State over foreign corporations; Fourteenth Amendment..... 341
statute as to forfeiture of charter of..... 374
by-laws of as evidence..... 487
foreign corporation subject to State Anti-Trust Laws..... 388
consolidation of several; transfer of property to one; violation State statutes..... 390
each obtaining interest in the other; violation State statutes..... 391
where statute or charter permits consolidation..... 392
purchase of assets of; violation State statutes..... 393

[References are to Sections]

CORPORATIONS—*Continued.*
purchase by mining company of stock; violation State statute... 394
composed of crushed granite dealers; agreements..... 417
officers and agents; indictment of..... 440
annulment of charter; forfeiture of franchise; right of stockholder to enforce..... 445
undertaking by to induce employees to trade with another..... 438
granting of application to annul charter is in discretion of court.. 446
foreign corporation; ouster of; when court no discretion..... 447
foreign corporation; nature of right to transact business; ouster of 448
foreign insurance company; authority of insurance commissioner to revoke certificate..... 449
proceeding by information to forfeit franchise of; pleading..... 477
no defense that corporation a foreign one..... 455
requiring production of books and documents of; State statutes.. 494
See Foreign Corporations.

COTTON SEED OIL,
manufacturers; agreements; withdrawal of agent by one..... 416

COUNTY,
not a corporation.....note, 263

COURTS,
jurisdiction under Sherman Anti-Trust Act..... 13
jurisdiction; generally; Sherman Anti-Trust Act..... 168
jurisdiction of under amendments to Wilson Tariff Act..... 14
question for; whether contract is in restraint of trade..... 103
question for; reasonableness of covenant not to carry on business. 103
"combination in the form of trust" synonymous with "pooling" 51
jurisdiction under Sherman Anti-Trust Act; competent for Congress to confer..... 111
same act may be crime and contempt of..... 111
power of as to witnesses; violation Sherman Anti-Trust Act.... 186
as to statutes enacted in exercise of police power.....note, 271
word "law" does not apply to decisions of impairment of obligation of contracts..... 212
construed..... 360
granting of application to annul charter is in discretion of..... 446
ouster of foreign corporation; when no discretion..... 447
order by requiring production of books and documents; State statutes..... 494
See Federal Supreme court; United States Supreme Court cannot inflict unauthorized penalties. See "Appendix A."
jurisdiction of Federal Circuit Court. See "Appendix A."

COVENANT,
not to carry on business; reasonableness of for court..... 103
motive of covenantee not test of validity..... 105

[References are to Sections]

COVENANT—*Continued.*
in lease by city of its gas works not to interfere with lessee's exclusive right 305

COVENANTER,
fair protection to; contract in restraint of trade; test of reasonableness 109

CREDIT,
by-laws of association as to 384

CREDITOR,
right to sue under Sherman Anti-Trust Act 162

CRIME,
same act may be crime and contempt of court 111

CRIMINAL CONSPIRACY,
defined ..... note, 3

D

DAMAGES,
under Sherman Anti-Trust Act 13
amendments to Wilson Tariff Act 14
Sherman Anti-Trust Act; right of stockholder 162
Sherman Anti-Trust Act; sufficiency of complaint or petition; general rules 173
Sherman Anti-Trust Act; how sufficiency of pleading determined 174
Sherman Anti-Trust Act; burden of proof 184
speculative, remote or contingent not basis for a judgment; Sherman Anti-Trust Act 188
actual must be established; Sherman Anti-Trust Act 188
from individual member of combination; Sherman Anti-Trust Act 188
recovery of generally; Sherman Anti-Trust Act 188
Sherman Anti-Trust Act; not an action for penalty 189
Sherman Anti-Trust Act; nature of action for; jury trial 189
action for a civil remedy; statute of limitations; Sherman Anti-Trust Act 190
action for; Sherman Anti-Trust Act; where payment of higher price compelled 191
cannot be set off; Sherman Anti-Trust Act 192
statutes as to construed 266
action for caused by conspiracy ..... note, 63
action for; person injured by conspiracy 452
erroneous exclusion of evidence as to intent to injure 492

[References are to Sections]

DAMNUM ABSQUE INJURIA,
ferry franchise not exclusive; grant to other ferries..... 74

DAMS,
navigable waters; police power..... note, 271

DEAL,
or traffic synonymous..... note, 26

DECISIONS,
of courts; word "law" does not apply to; impairment of obligation of contracts..... 212

DECLARATION,
Sherman Anti-Trust Act; sufficiency of; general rules..... 173
See Complaint; Petition; Pleading.

DECLARATIONS,
of parties as evidence.....482, 485

DEFENDANTS,
joinder of..... 471
joinder of; complaint; Sherman Anti-Trust Act; election..... 177
service of notice on under Sherman Anti-Trust Act. See "Appendix A."

DEFENSE,
that lease a monopoly; suit on..... 68
generally; violations of Sherman Anti-Trust Act..... 129
combination of labor unions..... 139
contract with combination; voluntary purchaser; illegality of combination no defense; Sherman Anti-Trust Act.....155, 156
when illegality of combination is; contract with; Sherman Anti-Trust Act..... 157
illegality of combination as; suit for infringement of trade-marks; Sherman Anti-Trust Act..... 159
illegality of combination as; suit for infringement of patent; Sherman Anti-Trust Act..... 158
illegality of combination as; suit for infringement of copyright; Sherman Anti-Trust Act..... 159
when no defense that contract creates monopoly; water supply.. 331
to suit for injunction by person injured..... 450
to action by party to illegal contract or combination..... 453
that corporation a foreign one not..... 455
that price not raised is not..... 456
that complete monopoly not obtained is not..... 457
motives of those instigating suit are immaterial..... 458
good motives or intent no defense where statute violated..... 459
illegality of contract or combination as; independent of statute; collateral contract..... 460

[References are to Sections]

DEFENSE—*Continued.*
illegality of combination or contract as; where permitted by statute 461
illegality of combination or contract as continued; instances 462
illegality of combination or contract as; action for rent 463
illegality of combination or contract as; contract made prior to statute 464
illegality of combination or contract as; where statute prescribes no mode of procedure for determining illegality 465
that law does not favor increased sale of article; combination to raise price 466
illegality of association as defense to action by for penalty 467
that member of illegal combination; party seeking to enforce forfeiture; pleading 480

DEFINITION,
"arrangement" 357
association ..... note, 13
blacklist 30
boycott 31, 32
boycotting 33
civil conspiracy 4
closed shop 37
combination 1, 358
commerce 16
commerce with foreign nations 16
commodities 18
commodity 18, 359
competing line 19
competition 2
conspiracy 3, 20
conspiracy in restraint of trade 20
"convenience" 359
contract 21
contract in restraint of trade 23
"court" 360
due process ..... note, 230
engrossing 5
exclusive right or privilege defined 6
forestalling 7
freights 195
holding corporation 29
in restraint of trade or commerce 24
intercourse ..... note, 16
internal commerce ..... note, 17
interstate commerce 16
intrastate commerce 17
labor organization 38
labor union 38
legal strike 42

[References are to Sections]

DEFINITION—*Continued.*
monopolist..... 9
monopolize..... 22
"monopolize." See "Appendix A."
monopoly; Sherman Anti-Trust Act..... 22
monopoly..... 8, 66, 362
open shop..... 40
parallel line..... 19
"person"..... 363
"person." See "Appendix A."
"person" or "persons;" Sherman Anti-Trust Act..... 13
picket..... 35
police power..... 271
pooling..... 10
regrating..... 11
restraint..... 24
restraint of trade..... 24
secondary boycott..... 34
strike..... 41, 43
"To monopolize." See "Appendix A."
trade..... 25, 365
trade and manufacture.....note, 25
trade union..... 38, 44
trading or mercantile business.....note, 25
traffic..... 26
transportation..... 27
transportation within the State..... 28
trust..... 12, 29
union shop..... 45

DELEGATED POWER,
grant of exclusive right to ferry; municipal ordinance..... 301

DELEGATION,
of legislative powers to municipality..... 278

DELEGATION OF POWER,
as to control of streets..... 299
control of streets by city; street railways; exclusive grants..... 316

DENIAL,
under general issue; indictment charging conspiracy; Sherman Anti-Trust Act..... 180

DINGLEY ACT,
provisions of as to trusts..... 14

DISCRIMINATION,
prevention of; police power of State..... 338

[References are to Sections]

DISCRIMINATION—*Continued.*
in prices for petroleum; State prohibiting 372
in rates; remedy for in Mississippi 441

"DISPENSARY SYSTEM,"
not a monopoly 308

DISSOLUTION. See Partners; Partnership.

DISTINCTIONS AND SYNONYMS,
generally 46–54
distinctions; monopolies resulting from grant or contract 46
distinctions; monopolies and engrossing 47
distinctions; monopolies and combinations 48
distinctions; exclusive privileges and monopoly 49
"monopolize" used in statute synonymous with "aggregate" or "concentrate" 50
"combination in the form of trust" used in statute synonymous with "pooling" 51
distinction between State anti-trust statute and contracts in restraint of trade 52
distinction between contracts per se in restraint of trade and contracts which tend to destroy competition and create monopolies 53
distinctions; combination and sale; Sherman Anti-Trust Act 55
"combination" and "conspiracy" synonymous; Sherman Anti-Trust Act 56
"to monopolize"; power to raise prices or exclude competition distinguished 67
monopoly and restraint of competition distinguished 68

DISTRICT ATTORNEYS,
suits by under Sherman Anti-Trust Act 161

DISTRICT COURT,
summoning parties; Sherman Anti-Trust Act 169, 170

DOCUMENTS,
as evidence; violation Sherman Anti-Trust Act 186
requiring production of; State statutes 494

DOMESTIC COMMERCE. See Intrastate Commerce.

DONNELLY ANTI-TRUST ACT,
New York 377

DOOR CHECKS,
patented; combination of; manufacturers 134

DRUGS,
contracts as to proprietary medicines 138

[References are to Sections]

DUE PROCESS,
defined ..... note, 230
clause; regulations by State of fire insurance companies 230
clause; history of ..... note, 230
clause; Fourteenth Amendment; exclusive privilege to supply water ..... note, 230
Fourteenth Amendment; Fifth Amendment 230, 234
State statutes as depriving of 345
See Constitutional Law.

DUPLICITY,
complaint under Sherman Anti-Trust Act 176

DURATION OF GRANT. See Contracts; Exclusive Privilege.

E

EARNINGS,
combinations of common carriers to share prohibited; Washington Constitution 261
pooling of; Interstate Commerce Act. See Interstate Commerce Act; Pooling of freights.

EFFECT,
necessity of averring; charging offense 473

ELECTION,
joinder of defendants; complaint; Sherman Anti-Trust Act 177

ELECTRIC CURRENT,
ordinance granting exclusive right to supply 225

ELECTRIC LIGHT,
an article of commerce ..... note, 16
company excluded; when contract; contract void as monopoly ... 306
ordinance granting exclusive right for 225

ELECTRIC LIGHTING,
powers of cities and towns as to 298, 299
right vested in city excludes lighting by private corporation 299
exclusive grant or privilege; impairment of contract obligation ... 223
exclusive right; contract power of city as to 298

ELECTRIC LIGHT PLANT,
ordinance granting right to erect; subsequent erection of plant by city; impairment contract 217

EMPLOYEES,
of corporations cannot refuse to testify; violation Sherman Anti-Trust Act 186

[References are to Sections]

EMPLOYEES—*Continued.*
combination to induce to break contract with employer..... 437
undertaking by corporation to induce to trade with another..... 438

EMPLOYERS,
combination to induce employees to break contract with..... 437

ENACTMENTS. See Congress; Constitutional Law; Ordinances; Sherman Anti-Trust Act; Statutes.

ENGLAND. See Statutes.

ENGLISH,
statute as to monopolies declaratory of common law.....note, 276

ENGROSSING,
defined 5
old offense no longer known to law; an offense at common law in Rhode Island.....note, 5
and monopolies; distinctions 47

EQUAL PROTECTION CLAUSE,
Fourteenth Amendment..... 237

EQUITY,
may enjoin violations of Sherman Anti-Trust Act..... 116
restraining order; jurisdiction to issue; Sherman Anti-Trust Act.. 168
bill in not construed as an indictment..... 173
rule that he who seeks equity must do equity applied; contract to supply water 225
when no adequate remedy at law; enforcing exclusive water contract..... 225
power of to impose terms as condition for dismissing bill..... 225
See Injunction.

EVIDENCE,
exemptions from testifying; perjuries excepted; enforcing trust and interstate commerce laws..... note, 14
books of defendants as; violation Sherman Anti-Trust Act..... 182
admissibility and weight of; Sherman Anti-Trust Act 182
of acts and transactions; violation; Sherman Anti-Trust Act..... 182
letter as; violation Sherman Anti-Trust Act..... 182
as to intent; when essential; violation Sherman Anti-Trust Act... 183
burden of proof; Sherman Anti-Trust Act..... 184
presumption in respect to combination; Sherman Anti-Trust Act 185
documents; witnesses; power of court; Sherman Anti-Trust Act.. 186
presumptions as to source of franchise..... 272
presumption as to intent; violation of State statutes..... 379
presumption as to legality of contract..... 380

[References are to Sections]

EVIDENCE—*Continued.*
proof of illegality; evidence of circumstances in connection with making of contract; acts of parties; declarations 482
as to intent 483
positive evidence as to forming of conspiracy and of purpose not necessary 484
letters as evidence of conspiracy; statements of parties 485
combination to raise prices; evidence to show reason for increase; rebuttal of 486
by-laws of association or corporation as 487
presumption as to innocence 488
burden of proof; illegality of contract; partnership accounting ... 489
sufficiency of; proof of conspiracy to raise prices 490
sufficiency of; time of entering into conspiracy 491
damages; conspiracy; erroneous exclusion of evidence as to intent to injure 492
of disloyalty as tending to prove nonexistence of trust 493
requiring production of books or documents 494
compelling witnesses to testify; immunity statutes 495
taking of testimony before trial; examination of witnesses; constitutionality of statute 496

EXAMINATION,
of witness before grand jury a "proceeding;" Sherman Anti-Trust Act 187

EXCEPTION,
in statute as to labor organizations ..... note, 346
in statute as to agricultural products or live stock 376
in statute as to sale of good will of business 376
in statute; contracts on sale of business and good will 410
See Statutes.

EXCHANGE,
of shares of stock-holding corporation; violations Sherman Anti-Trust Act 132
of cattle dealers; Sherman Anti-Trust Act 149

EXCLUSIVE,
derivation of word 6

EXCLUSIVE COMBINATION,
not necessarily a conspiracy 59

EXCLUSIVE CONTRACT,
between telephone and telegraph company void 92
to supply water; when no breach 225
water supply; when no adequate remedy at law for enforcing 225
monopoly; railroad right of way; telegraph line 293
sale of by-product distinguished from sale of entire output 404
See Contracts; Exclusive Franchise; Exclusive Grant; Exclusive Privilege; Exclusive Rights.

[References are to Sections]

EXCLUSIVE FRANCHISE,
to gas company; legislature does not part with police power..... 271
instances of grants of.....note, 6

EXCLUSIVE GRANT,
when charter or franchise is.....72, 73
when franchise or charter is not..... 74
bridges; impairment of contract obligation..... 219
ferry; impairment of contract obligation..... 220
to telephone company; impairment of contract obligation..... 222
to supply gas; impairment of contract obligation..... 224
water companies; impairment contract obligation..... 225
constitutional provision prohibiting.....263, 264
to water company; not special act..... 266
contract to supply water; legislative grant; obligation of contract; power of city to construct plant.....note, 275
or contracts; monopolies; generally..... 294
or contracts; electric lighting..... 298, 299
patents..... 282, 283
of right to use end of wharf for ferry purposes..... 302
by State to supply gas to municipality..... 303
to street railways by city..... 316
telephone companies..... 317
to telegraph companies by State restricted by Post Roads Act.... 318
to erect, etc., toll bridges..... 319
for ferries..... 319
by State for toll; wharf..... 321
See Exclusive Contract; Exclusive Franchise; Exclusive Privilege; Exclusive Rights.

EXCLUSIVE PRIVILEGE,
defined..... 6
to printing company; statute granting construed..... note, 8
ordinance granting to waterworks company..... note, 8
and monopoly; distinctions..... 49
right to supply light or heat; statute granting construed..... 71
what essential to power to grant..... 71
must be no doubt as to validity..... 71
franchises strictly construed..... 71
when charter or franchise confers.....72, 73
when charter or franchise does not confer..... 74
when not conferred by contract; restraint of trade..... 99
bridges; impairment of contract obligation..... 219
power of municipality to grant must be expressly conferred; monopoly..... 294
implied power of municipality to grant; monopoly..... 294
ferries..... 300
to make and vend gas; police power..... 303
by city; grant to supply gas for term of years; contract with grantee..... 304

[References are to Sections]

EXCLUSIVE PRIVILEGE—*Continued.*
grant by city of, or monopoly to supply gas..... 304
grants of and contracts as to gas supply; when void; monopoly... 306
constitutional provisions prohibiting granting of 263, 264
power to grant ..... note, 274
of supplying water; obligation of contract; municipal corporation note, 275
grant of by municipality..... 280
patents 282, 283
or right; copyrights.....285, 286, 287
of right to take toll at ferry or bridge not a monopoly..... 296
to run omnibuses; when a monopoly..... 312
when not granted by statute authorizing condemnation of capital stock of other railroads..... 313
monopoly; school text-book statutes as to uniform series; contracts 314
a monopoly; power of State to grant, to water company..... 327
a monopoly; power of city to grant, to water company..... 328
monopoly; consolidation of corporations..... 335
See Exclusive Contract; Exclusive Franchise; Exclusive Grants; Exclusive Rights.

EXCLUSIVE PROPERTY. See Exclusive Contract; Exclusive Franchise; Exclusive Privilege; Exclusive Rights; Copyright Patents.

EXCLUSIVE RIGHT,
defined 6
not conferred by franchise to canal company..... 70
to public franchises not favored..... 71
to supply gas; franchise a contract..... 72
when charter or franchise grants.....72, 73
when charter or franchise does not confer..... 74
monopoly; Sherman Anti-Trust Act..... 78
as to patents.....282–284
as to copyrights.....286, 287
as to trade-marks and trade-names.....288–290
electric lighting; contract for by city; when not void for exclusiveness..... 298
electric lighting; contract power of city as to..... 298
of telephone company under contract with city for term of years.. 317
in city street; when telephone company has no; conduits..... 317
ferries 300
to ferry; municipal ordinance; delegated authority..... 301
covenant by city in lease of its gas works not to interfere with lessee..... 305
no monopoly; municipal lease to private corporation to supply gas..... 305
contract with town giving exclusive right to gas company when void as monopoly..... 306
to supply gas; purchasers of..... 307

[References are to Sections]

as to slaughter-house or market-house; monopoly by city or village 315
to occupation of wharf; public use 321
of State under contract with telegraph company 318
to control waterway and collect tolls not a monopoly 334
contracts between railroad company and express or transfer companies 398
contracts between vendor and purchaser; when violation of State statute 402
contracts between vendor and purchaser; when not violation State statute 403
to sell goods on certain premises; contracts giving 405
See Exclusive Contract; Exclusive Franchise; Exclusive Grants; Exclusive Privilege.

EXECUTED CONTRACT,
defined 21
See Contracts.

EXEMPTIONS,
from testifying; perjuries excepted; enforcing trust and interstate commerce laws ..... note, 11
from taxation; insurance companies; statutes construed ... note, 275
of railroad from taxation ..... note, 264
of witnesses. See Evidence; Witnesses.

EXPRESS,
wagons; combination of individuals driving 126
company and railroad company; contracts; exclusive right 398
company liability as transportation company ..... note, 27

EXTENT,
or size of business not alone test of violation of Sherman Anti-Trust Act 126

F

FARES,
contracts between railroads as to; Sherman Anti-Trust Act 151
of street railway; regulation as to not special act 266
See Railroads.

FARMERS,
organizations of; Sherman Anti-Trust Act 139
statutes as to pooling by of farm products 375

FARM PRODUCTS,
statutes as to pooling of 375
See State Statutes; Statutes.

[References are to Sections]

FEDERAL,
and State legislative powers distinguished 269
and State legislative powers distinguished; interstate and intrastate commerce 270
government has no inherent powers of sovereignty 266

FEDERAL CONSTITUTION,
preliminary statement 202
and laws supreme law of land; application to combinations, trusts, etc 203
constitutional vestment of powers in Congress 204
commerce clause of; powers of Congress 205
purpose of vestment in Congress of power to regulate commerce .. 206
obligation of contract clause not a limitation on Congress 208
regulation of commerce; extent of interference with private contracts or combinations; interstate and intrastate commerce 207
impairment of obligation of contracts; whether State Constitution a law 209
impairment of obligation of contracts; whether "law" applies only to State legislative enactments 210
exclusive grant; ferry; impairment of contract obligation 220
railroad charter; provision against competing lines; impairment of contract obligation 221
telephone company's exclusive grant; impairment of contract obligation 222
electric lighting; exclusive grant for; impairment of contract obligation 223
exclusive right to supply gas; impairment of contract obligation 224
water companies; exclusive contracts, grants or privileges; impairment of contract obligation 225
powers reserved to the State 226
purpose of Tenth Amendment 226
Fifth Amendment; generally 227
what powers first eight articles refer to 227
what privileges and immunities of citizens include .....note, 227
Fourteenth Amendment; generally 228
Fourteenth Amendment; no State to abridge privileges or immunities 229
impairment of obligation of contracts; whether municipal ordinance a "law" 211
impairment of obligation of contracts; word "law" does not apply to judicial decisions 212
obligation of contract clause refers to subsequently enacted law of State 213
subsequently enacted statute changing remedy or mode of procedure; impairment of obligation clause 214
nature of laws prohibited by obligation of contracts clause 215
nature of contracts embraced by obligation of contracts clause; between what parties 216

[References are to Sections]

FEDERAL CONSTITUTION—*Continued.*
nature of contracts; obligation of contracts clause embraces implied and express contracts 217
obligation of contracts; legal and legislative contracts; construction of contract; authority of Federal Supreme court 218
bridges; exclusive grant or privilege; impairment of contract obligation 219
Fourteenth Amendment; due process clause; Fifth Amendment..230
Fourteenth Amendment; Fifth Amendment; liberty to or freedom of contract; generally 231
liberty to or freedom of contract continued; power of government to restrict, regulate or control 232
liberty to or freedom of contract continued; power of Congress under commerce clause to restrict 233
liberty to or freedom of contract continued; police power of States 234
liberty to or freedom of contract continued; Standard Oil Company's case 235
liberty to or freedom of contract continued; State statutes prohibiting combinations, etc.; instances 236
Fourteenth Amendment; equal protection of the laws 237
Fourteenth Amendment; equal protection of the laws; power of Congress and of States 238
limitations on police power of State; corporations 340
See Constitutional Law.

FEDERAL COURTS. See Courts; Circuit Court; Federal Supreme Court; United States Circuit Courts; United States Supreme Court.

FEDERAL LEGISLATION,
patents, copyrights, trade-marks and Post Roads Act 282–293
See Sherman Anti-Trust Act; Wilson Act.

FEDERAL SUPREME COURT,
authority of; obligation of contracts; legal and legislative contracts; construction of contract 218
question for where State court has decided as to violation of an anti-trust statute 230
See United States Supreme Court.

FERRIES,
are merely licenses 300
not monopolies but may be exclusive 300
when grant of exclusive right exists; when municipal ordinance not necessary; delegated authority 301
exclusive privilege to ..... note, 6
franchise not exclusive; damnum absque injuria 74
exclusive grants 319
exclusive grant; impairment of contract obligation 220
company and statute as to acquiring additional slips constitutional 264

[References are to Sections]

FERRIES—*Continued.*
when contract by city, as owner of ferry franchise with bridge company creates no monopoly 297
grant of exclusive right to take toll not a monopoly ..... note, 296
owner of; when cannot change location and claim same exclusive right 300
exclusive right to use end of wharf for ferry purposes 302

FIFTH AMENDMENT,
Federal Constitution; generally 227
what privileges and immunities of citizens include ..... note, 227
due process clause ..... note, 230
liberty to or freedom of contract; generally 231–236
See Constitutional Law.

FINE,
statutes as to 374
statutes providing for 442
See Penalty.

FIRE INSURANCE,
companies; statutes regulating; due process of law 230
company; act as to charter held special act 266
regulating business of; police power 271

FOOD PRODUCTS,
combinations as to; Minnesota Constitution 247

FOREIGN CARRIERS,
regulations as to; Interstate Commerce Act ..... note, 200
See Common Carriers; Railroads.

FOREIGN COMMERCE,
direct and necessary effect upon competition in; Sherman Anti-Trust Act 80, 81
fair regulation of business; indirect or incidental effect upon competition in; Sherman Anti-Trust Act 82
power of Congress over 205
purpose of vestment in Congress of power to regulate 206
See Commerce; Congress.

FOREIGN CORPORATIONS,
statute as to revocation of certificate does not violate Fourteenth Amendment 229
police power of State; Fourteenth Amendment 341
subject to State Anti-Trust Laws 388
ouster of; when court no discretion 447
nature of right to transact business; ouster of 448
authority of insurance commissioner to revoke certificate of foreign insurance company 449
no defense that corporation is 455
See Corporations.

[References are to Sections]

FOREIGN COUNTRIES,
Sherman Anti-Trust Act does not extend to acts done in 117
that combinations were formed in is immaterial; Sherman Anti-Trust Act 129

FOREIGN NATIONS,
commerce with defined 16

FORESTALLING,
defined 7
an offense no longer known to law ..... note, 5
derivation of word 7

FORFEITURE,
of license under Texas Anti-Trust Act ..... note, 8
under Sherman Anti-Trust Act 13
amendments to Wilson Tariff Act 14
of charter of corporation; statute as to 374
of franchise; violation State law 445
See Charter; Franchise; Pleading; Remedies.

FOURTEENTH AMENDMENT,
to Federal Constitution; prohibitory on States only 228
to Federal Constitution; generally 228
no State to abridge privileges or immunities 229
statute for revoking certificate of foreign corporation does not violate 229
due process clause; Fifth Amendment 230
liberty to or freedom of contract; generally 231–236
statute prohibiting combinations of insurance companies not violative of 236
equal protection of the laws; power of Congress and of States 238
statute void; violation of ..... note, 249
does not deprive State of police power ..... note, 271
limitations on police power of State; corporations 340
police power of State over foreign corporations 341
State statutes as violating 345
statutes as to insurance combinations 370
statute as to pooling of farm products does not violate 375
See Constitutional Law; State Statutes; Statutes.

FRANCHISE,
of corporation as commodity ..... note, 18
to private corporation; character of 70
monopoly as essential feature of 70, 71
grants of strictly construed 71
to a contract; exclusive right to supply gas 72
when grant of exclusive 72, 73
when grant of is not exclusive 74
not exclusive for ferry; damnum absque injuria 74
by municipality to water company exclusive 225

[References are to Sections]

FRANCHISE—*Continued.*
forfeited; North Dakota Constitution..... 253
constitutional provisions prohibiting granting exclusive... 263, 264
held not special act..... 266
to gas company exclusive; legislature does not part with police power..... 271
presumption as to source of..... 272
sovereign power of State is source of grant of..... 272
test of legislative power to grant..... 273
grants of where public interested; construction of..... 275
alienation of; ultra vires agreement; breach of duty to public note, 275
municipal corporations held to strict exercise of..... 277
municipality not invested with powers to grant..... 278
conferred for entire body of corporators..... 280
forfeiture of; violation State law..... 445
proceeding by information to forfeit; pleading..... 477
See Exclusive Franchise; Exclusive Grants; Grants.

FRATERNAL BENEFIT SOCIETY,
act as to not special act..... 266
See Constitutional Law; Contracts.

FREEDOM OF CONTRACT. See "Appendix A."
See Constitutional Law; Contracts.

FREIGHTS,
defined..... 195
combination of ship owners to keep up rate of..... 59
pooling of prohibited; Interstate Commerce Act..... 194
when railroads may pool..... 195
in marine policies; meaning of.....note, 195
pooling of; nature and scope of Interstate Commerce Act..... 196
action on contract for pooling of..... 197
what constitutes pooling of; under Interstate Commerce Act..... 197
what does not constitute pooling of; Interstate Commerce Act... 198
of ocean or water lines; pooling of not within Interstate Commerce Act..... 199
combinations to prevent continuous carriage of to destination prohibited by Interstate Commerce Act..... 200
what constitutes continuous shipment.....note, 200
See Railroads.

FRESH MEAT,
violations by dealers in; Sherman Anti-Trust Act..... 148

G

GAS,
companies; construction of grants to..... 71
exclusive right to supply; franchise a contract..... 72

[References are to Sections]

GAS—*Continued.*
statute restricting interstate commerce in natural gas construed note, 206
exclusive right to supply; impairment of contract obligation..... 224
companies; act as to formation of held constitutional..... 264
company; exclusive franchise to; legislature does not part with police power..... 271
pipes; right to lay; amendment to corporate charter; monopoly... 274
municipal gas works; ordinance not a contract; power to revoke note, 275
municipal contracts as to, conferring special privilege, etc., or monopoly; constitutional law 294
company precluded from doing gas lighting business where another company empowered to do electric lighting..... 299
grant by State of exclusive privilege or monopoly; police power.. 303
grant by municipality of exclusive privilege or monopoly..... 304
municipal lease to private corporation to supply gas; exclusive right; no monopoly..... 305
lease of exclusive right to supply gas made by city in its business capacity 305
lease by city of its gas works with covenant not to interfere with lessee's exclusive right..... 305
contract with town as to gas excluding other gas and electric light companies when void as monopoly..... 306
grants and contracts; when void as exclusive or as monopoly.... 306
purchasers of exclusive rights..... 307
companies; consolidation of; agreements between..... 418
companies consolidation of..... 335

GENERAL ISSUE,
denial under; indictment charging conspiracy; Sherman Anti-Trust Act 180
See Pleading.

GOODS,
when illegality of combination a defense to action for price of; Sherman Anti-Trust Act 157
when illegality of combination no defense to action for price of; Sherman Anti-Trust Act 155, 156
See Defenses.

GOOD WILL,
and custom; contract transferring..... 101
and business; purchase of; violations Sherman Anti-Trust Act... 130
exception in statute as to sale of..... 376
and business; sale of; contracts not to engage in competition..... 409
and business; sale of; contracts not to engage in; exception in business..... 410
and business; sale of; laundry not a manufacturing establishment 411

[References are to Sections]

GRAIN,
warehouse act; police power..... note, 271
agreements limiting right to buy..... 419

GRAND JURY,
examination of witness before is a "proceeding"; Sherman Anti-Trust Act 187
See Witnesses.

GRANITE,
agreement between crushed granite dealers..... 417

GRANTS,
to municipal corporations; strict construction..... 294
to construct navigable canal; when no monopoly..... 311
by city of exclusive privilege to run omnibuses; when a monopoly 312
See Exclusive Franchise; Exclusive Grant; Exclusive Privilege; Exclusive Right.

GRATES,
association dealing in; Sherman Anti-Trust Act..... 146

H

HAIR,
contract to instruct in treatment of; to use only certain remedies.. 439

HEALTH,
police power as to public health..... note, 271
See Police Power.

HOLDING CORPORATION,
defined 29
exchange of shares of stock; violations Sherman Anti-Trust Act.. 132
distribution of assets of; right to return of shares..... 193
See Corporations.

HOSPITAL,
State hospital; act as to not special act..... 266

I

ICE,
companies; agreements between 420

IDAHO,
Constitution; combinations to control price, regulate production, etc., prohibited; duty of legislature..... 243

[References are to Sections]

ILLEGALITY,
of combination no defense to contract with; voluntary purchaser; Sherman Anti-Trust Act 155, 156
of combination; when defense to contract with; Sherman Anti-Trust Act 157
of combination as defense to suit for infringement of patent; Sherman Anti-Trust Act 158
of combination as defense to suit for infringement of trade-mark or copyright; Sherman Anti-Trust Act 159
See Defenses; State Statutes.

IMMUNITIES,
constitutional provisions prohibiting granting of 263, 264
statutes; compelling witnesses to testify 495
of citizens. See Fourteenth Amendment.

IMPAIRMENT,
of obligation of contracts. See Constitutional Law; Contracts; Federal Constitution.

IMPLIED POWERS,
of municipality 277
See Municipality.

IMPORT TRADE,
trusts in restraint of; amendments to Wilson Tariff Act 14

IMPRISONMENT,
statutes as to 374
statutes providing for 442

INDIAN TRIBES,
commerce with defined ..... note, 16

INDICTMENT,
fact of conspiring must be charged against all conspirators; doing of overt acts ..... note, 64
overt act; conspiracy to defraud United States ..... note, 64
Sherman Anti-Trust Act; allegation of purpose ..... note, 80
conspiracy must be sufficiently charged ..... note, 64
denial of allegation as to conspiracy and continuance of; Sherman Anti-Trust Act 85
Sherman Anti-Trust Act; allegation of time of formation of combination 178
sufficiency of; general rules; Sherman Anti-Trust Act 178
sufficiency of; Sherman Anti-Trust Act; charging officers, agents or stockholders 179
charging conspiracy; denial under general issue; Sherman Anti-Trust Act 180
prima facie evidence of probable cause 181

[References are to Sections]

INDICTMENT—*Continued.*
not conclusive; Sherman Anti-Trust Act; removal proceeding.... 181
rule as to certainty..... 468
in language of statute sufficient..... 469
averring purpose or effect..... 473
averring terms of agreement; particular articles subject of..... 474
averments as to conspiracy and object to be effected..... 475
conspiracy; averring names of persons to be injured..... 476
of conspirators may be either joint or several..... 440
of corporations, officers and agents..... 440
necessity of averring acts to be in restraint of trade..... 479
See Information; Pleading.

INDIVIDUAL,
when may sue under Sherman Anti-Trust Act; injury to "business or property" 160
cannot sue for injunction; Sherman Anti-Trust Act..... 161
only remedy under Sherman Anti-Trust Act is for damages..... 161
See Parties.

INFORMATION,
in language of statute sufficient..... 469
joinder of defendants 471
not necessary to allege combination is in position to control market 472
conspiracy; means by which to be effectuated need not be charged 475
to forfeit corporate franchise..... 477
of patent; suit by combination; illegality of combination as defense; Sherman Anti-Trust Act..... 158
of copyright; suit for; illegality of combination as defense; Sherman Anti-Trust Act 159
of trade-marks; suit for; illegality of combination as defense; Sherman Anti-Trust Act 159
See Indictment; Pleading.

INJUNCTION,
carriers' agreement; to maintain rates..... note, 8
exclusive grant to slaughter-house..... note, 8
against continuance of alleged conspiracy..... note, 63
against violations of Sherman Anti-Trust Act..... 116
under Sherman Anti-Trust Act; what sufficient to show..... 80
individual cannot sue for under Sherman Anti-Trust Act..... 161
suit by attorney-general; Sherman Anti-Trust Act..... 161
when none to protect rights of member of combination; Sherman Anti-Trust Act..... 163
mortgagee as party to obligation of contract..... 225
when not granted to enforce exclusive contract to supply water.. 225
bill; intent of, to extend monopoly or trade-mark or trade-name; loss of right to individual appropriation..... 290
to restrain telegraph company from erecting lines on railroad right of way ..... note, 293

[References are to Sections]

INJUNCTION—*Continued.*
suit for by person injured; defense 450
against acts done after combination declared unlawful 454
See Labor or Trade Unions.

INNOCENCE,
presumption as to 488

IN PARI MATERIA,
rule as to statutes 354, 355
See State Statutes; Statutes.

INSTRUCTION,
in treatment of scalp and hair; contract as to; to use only certain remedies 439

INSURANCE,
making of contract of an incident of commercial intercourse note, 16
as commodity ..... note, 18
meaning of "freight" in marine policies ..... note, 195
State regulations of fire insurance companies; due process of law .. 230
companies; statute prohibiting combinations; not violation of Fourteenth Amendment 236
companies; prohibitory statutes as to held constitutional 264
act as to charter of fire insurance company held special act 266
fire insurance; police power; regulation 271
foreign insurance; police power as to ..... note, 271
companies; exemption from taxation; statutes construed ... note, 275
combination to fix or limit the price or premium to be paid for insuring property prohibited 370
companies; combination of to fix rates ..... note, 12
companies or agents of; agreements to fix rates 421
foreign insurance company; authority of insurance commissioner to revoke certificate 449

INSURANCE COMMISSIONER,
authority of to revoke certificate of foreign insurance company ... 449

INTENT,
as element or essential of offense of conspiracy 61
monopolies; motive; "to monopolize" power to raise prices or exclude competition distinguished 67
allegation of purpose; indictment; Sherman Anti-Trust Act . note, 80
contracts in restraint of trade 105
evidence as to; when essential; violation Sherman Anti-Trust Act 183
necessity of showing; under terms of Montana Constitution 250
expressed in grant as affecting construction 275
of legislature; construction of State statutes 351
as affecting violation of State statutes; presumption as to 379
motives of those instigating suit are immaterial 458

[References are to Sections]

INTENT—*Continued.*
good, no defense where statute violated 459
necessity of averring; charging offense 473
evidence as to 483
positive evidence as to purpose of conspiracy not necessary 484
to injure; erroneous exclusion of evidence as to 492
See Motive.

INTERCOURSE,
through mails is commerce ..... note, 16
by telegraph is commerce ..... note, 16
includes means by which trade carried on ..... note, 16
See Commerce.

INTERSTATE COMMERCE,
defined and considered 16
railroad equipment instrument of ..... note, 16
telephone an instrument of ..... note, 16
what included in transaction ..... note, 16
sending liquors from one State to another ..... note, 16
transportation as test of ..... note, 16
intercourse by telegraph is ..... note, 16
when it begins ..... note, 16
restraint under Sherman Anti-Trust Act refers to 77
or foreign commerce; direct and necessary effect upon competition; Sherman Anti-Trust Act 80, 81
power of Congress; generally; Sherman Anti-Trust Act 110
test of legality of contract or combination affecting 120
attempt to monopolize; where chief object is to increase trade 121
attempt to monopolize; where separate parts of scheme lawful 122
what term includes 123
power of Congress over; commerce clause of Constitution 205
purpose of vestment in Congress of power to regulate 206
in oil and natural gas; statutes restricting construed ..... note, 206
regulation of; extent of interference with private contracts or combinations 207
power of Congress to restrict contracts in regard to 233
power of Congress to prohibit restraints upon competition; railroad competition 267
Federal and State legislative powers distinguished 270
contract or combination involving; not subject to State Anti-Trust Laws 385

INTERSTATE COMMERCE ACT,
not inconsistent with Sherman Anti-Trust Act 114
pooling of freights or division of earnings prohibited 194
pooling of freights; freights defined 195
when railroads may pool freights 195
pooling of freights; nature and scope of statute 196
what constitutes "pooling of freights" 197

[References are to Sections]

INTERSTATE COMMERCE ACT—*Continued.*
what does not constitute pooling of freights 198
pooling of ocean or water freights not within Interstate Commerce Act 199
combinations to prevent continuous carriage of freight to destination prohibited 200
persons damaged by violation may make complaint to commission or sue personally ..... note, 200
what constitutes continuous shipment ..... note, 200
liability of carrier for violation of ..... note, 200
penalty for violation ..... note, 200
not inconsistent with Sherman Anti-Trust Act 201
enforcing trusts and; exemptions from testifying; perjuries excepted ..... note, 14
See Commerce; Sherman Anti-Trust Act.

INTERSTATE COMMERCE COMMISSION,
pooling of ocean or water freights not within jurisdiction of 199
See Interstate Commerce Act.

INTIMIDATION. See Labor or Trade Unions.

INTOXICATING LIQUORS,
"Dispensary System" not a monopoly 308

INTRASTATE COMMERCE,
defined 17
Congress no jurisdiction over combinations affecting only 77
Federal and State legislative powers distinguished 270
See Commerce; Constitutional Law; Federal Constitution; Statutes.

IRON PIPES,
combination; manufacturers of; Sherman Anti-Trust Act 143

IRRIGATION,
monopoly or privilege not "special" within constitutional prohibition 309

J

JOBBERS,
combination of 140
contracts between manufacturer and 140
and manufacturers of tobacco; combination of; Sherman Anti-Trust Act 144

JOB PRINTING,
establishment and newspapers; contracts between 423

[References are to Sections]

JOINDER,
of defendants; complaint; Sherman Anti-Trust Act; election.... 177
of defendants..... 471
See Parties; Pleading.

JUDGMENT,
extent of; Sherman Anti-Trust Act..... 172

JUDICIAL DECISIONS,
word "law" does not apply to; impairment of obligation of contracts..... 212

"JUDICIAL LEGISLATION"..... 83a
See "Appendix A"; Courts.

JUDICIARY ACT,
not restrictive of right to summon parties; Sherman Anti-Trust Act..... 170
See Courts.

JURISDICTION,
under amendments to Wilson Tariff Act..... 14
under Sherman Anti-Trust Act..... 13
of courts under Sherman Anti-Trust Act; competent for Congress to confer..... 111
of courts; generally; Sherman Anti-Trust Act..... 168
summoning of parties; Sherman Anti-Trust Act..... 169
summoning parties; not restricted by Judiciary Act; Sherman Anti-Trust Act..... 170
exercise of not discretionary; summoning of parties; Sherman Anti-Trust Act..... 171
under Sherman Anti-Trust Act; extent of judgment..... 172
of interstate commerce commission; pooling of ocean or water freights not within..... 199
of Congress over commerce..... 270
of Federal Circuit Court. See "Appendix A."
See Courts.

JURY TRIAL,
action for damages; Sherman Anti-Trust Act..... 189

K

KENTUCKY,
Constitution; legislative duty as to trusts, combinations, etc., to control prices..... 244

[References are to Sections]

L

LABEL. See Labor or Trade Unions; Union Label.

LABOR. See Labor or Trade Unions; Union Labor.

LABOR COMBINATIONS,
within prohibition of Sherman Anti-Trust Act..... 76
See Labor or Trade Unions.

LABOR ORGANIZATION,
defined..... 38
exception in statute as to.....note, 346
See Labor or Trade Unions.

LABOR OR TRADE UNIONS,
conspiracy defined.....note, 3
boycott defined..... 31
essential elements of boycott..... 32
boycotting defined..... 33
secondary boycott defined..... 34
picket defined..... 35
picketing defined..... 36
closed shop defined..... 37
defined and considered..... 38
lockout defined..... 39
open shop defined..... 40
strike defined..... 41
legal strike defined..... 42
boycott and strike distinguished..... 43
union shop defined..... 45
acts and combinations of; Sherman Anti-Trust Act..... 139
city requirement as to employment only of members of..... 323
right of workingmen to organize..... 497
right of workingmen to organize; expressions of courts..... 498
presumption as to being law-abiding body..... 499
right to organize extends to labor whether physical or intellectual. 500
right of workingmen to strike..... 501
right to strike; limitations on..... 502
picketing; legality of; general rule..... 503
picketing; decisions holding unlawful..... 504
picketing; when unlawful..... 505
picketing; whether lawful depends on facts and circumstances; rule as supported by authority..... 506
picketing; no injunction to protect..... 507
picketing; ordinance as to valid..... 508
right to strike; refusal to work with non-union man; Massachusetts rule..... 509
right to strike; refusal to work with non-union man; Pennsylvania rule..... 510

[References are to Sections]

LABOR OR TRADE UNIONS—*Continued.*
right to strike; refusal to work with non-union man; New York decisions. . . . 511
right to strike; refusal to work with non-union man; other decisions. . . . 512
right to strike; refusal to work with non-union man; conclusion. . 513
use of persuasion by strikers. . . . 514
use of persuasion; employees under contract. . . . 515
use of violence, threats or intimidation by strikers. . . . 516
threats; intimidation; what constitute. . . . 517
boycotts generally. . . . 518
boycott circulars; when held legal. . . . 519
boycott circulars; when held illegal. . . . 520
boycott circulars; constitutional provision as to freedom of speech 521
contracts between employer and employee. . . . 522
contracts between employer and employee continued. . . . 523
officers; power of trade unions, board of directors or committee to contract. . . . 524
injunction to restrain strike. . . . 502, 516
injunction; picketing 503, 505, 507
injunction; strike; refusal to work with non-union men. . . . 510, 511
injunction; strike; use of persuasion to induce. . . . 515
injunction; boycott. . . . 518
injunction; boycott circulars. . . . 519, 520
injunction; contracts between employer and employee; labor unions. . . . 522
injunction; sufficiency of complaint for threatened injury to persons or property; New York Code. . . . 525
injunction; parties; process; service. . . . 526
injunction; right to in New York. . . . 527
injunction; to restrain payment of strike benefits; specific performance. . . . 528
injunction; evidence of unlawful acts of members during strike. . . 529
injunction; no defense that act a crime. . . . 530
injunction; question of law and fact. . . . 531
preliminary injunction; when vacated as to union but permitted to stand as to individual members but not so as to prevent peaceful picketing. . . . 532
injunction; contempt; nature of proceeding. . . . 533
constitutional law; Congress no power to make it a criminal offense for carrier to discharge employee because member of labor union; Fifth Amendment; contract; Interstate Commerce 534
statute prohibiting discharge of employee because member of union. . . . 535
statute as to becoming member of labor union; condition of employment. . . . 536
statute prohibiting granting of injunction against union. . . . 537
statute as to suits against unincorporated associations. . . . 538
statute as to labels and stamps. . . . 539
legality of union as affected by Constitution of union. . . . 540

[References are to Sections]

LANDS,
of railroad company; acquisition of; not a special privilege..... 313

LAUNDRY,
not a manufacturing establishment..... 411

LAW,
question of for court; whether contract is in restraint of trade.... 103
whether State Constitution a "law"; impairment of obligation of contracts..... 209
whether word applies only to legislative enactments; impairment of obligation of contracts..... 211
whether municipal ordinance a law; impairment of obligation of contracts..... 211
word does not apply to judicial decisions; impairment of obligation of contracts..... 212
when no adequate remedy at; enforcing exclusive water contract.. 225

"LAW OF THE LAND,"
construed..... 203

LEASE,
stipulation in claimed to be in restraint of trade.....note, 12
suit on; defense that a monopoly and void..... 68
by city of its gas works with covenant not to interfere with lessee's exclusive right..... 305
by municipality in business capacity of exclusive right to supply gas..... 305
by city to private corporation to supply gas; exclusive right; no monopoly..... 305

LEGAL STRIKE,
defined..... 42
See Labor or Trade Unions.

LEGISLATION. See Congress; Judicial Legislation; Legislature; State Statutes; Statutes.

LEGISLATIVE,
powers of States generally..... 268
powers; Federal and State distinguished..... 269
powers; Federal and State distinguished; interstate and intrastate commerce..... 270
power; police power; definitions and general principles; monopolies may be prohibited, etc..... 271
grant; private corporations exist by.....note, 272
power to grant franchise; test of..... 273
power of State to grant monopolies..... 274

[References are to Sections]

LEGISLATIVE—*Continued.*
power to prohibit combinations, monopolies, etc.; Anti-Trust Laws. . . . 276
powers; delegation of to municipality . . . 278

LEGISLATIVE DISCRETION,
nonjudicial interference . . . 296
See Legislature; Statutes.

LEGISLATIVE POWERS,
cannot be abdicated; contract for market house with city precluding others . . . 310
See Legislature; Statutes.

LEGISLATURE,
of State; powers of generally . . . 268
powers of; Federal and State distinguished . . . 269
powers of; Federal and State distinguished; interstate and intrastate commerce . . . 270
police powers of . . . 271
private corporations exist by grant . . . note, 272
power of to grant franchise; test of . . . 273
power of to grant monopolies . . . 274
powers which it may delegate to municipality . . . 278
cannot delegate power not possessed by it . . . 278
grant of exclusive right to use end of wharf for ferry purposes . . . 302
in granting exclusive right or monopoly to supply gas, etc., does not part with police power . . . 303
See State Statutes.
power and duty of. See Constitutions.
exclusive grants by. See Exclusive Grants.
enactments of. See State Statutes; Statutes.

LETTER,
as evidence; violation Sherman Anti-Trust Act . . . 182
as evidence of conspiracy . . . 485
See Evidence.

LIABILITY,
of purchaser from combination; statute relieving from . . . 373

LIBERTY,
life, liberty and property; meaning of in Fourteenth Amendment. 231
See Constitutional Law; Fourteenth Amendment.

LIBERTY TO CONTRACT. See "Appendix A."
See Contracts.

LICENSE,
case under Texas Anti-Trust Act to forfeit . . . note, 8
condition in; patents; Sherman Anti-Trust Act . . . 135

[References are to Sections]

LICENSE—*Continued.*
patents; particular conditions in; Sherman Anti-Trust Act..... 136
patents; right to modify terms of..... 137
ferry as; not monopolies..... 300

LIFE,
liberty and property; meaning of; Fourteenth Amendment..note, 231
See Constitutional Law; Fourteenth Amendment.

LIGHTING,
not part of essential functions of State to provide for..... 268
See Electric Lighting; Gas.

"LIGHT OF REASON" DECISIONS,
Sherman Anti-Trust Act..... 83a
Sherman Anti-Trust Act. See "Appendix A."..... 83a

LIMITATIONS,
plea of statute of; indictment under Sherman Anti-Trust Act.... 180
statute of; action for damages; Sherman Anti-Trust Act..... 190
See Statutes.

LIQUID DOOR CHECKS,
patented; combination of manufacturers..... 134

LIQUORICE PASTE,
combinations; manufacturers of; Sherman Anti-Trust Act..... 145

LIQUORS,
sending of from one State to another embraced in interstate commerce.....note, 16
See Intoxicating Liquors.

LITIGATION,
under Sherman Anti-Trust Act..... 13
See Sherman Anti-Trust Act.

LIVE STOCK,
exception in statute as to..... 376

LOCKOUT,
defined..... 39

LOGS AND LOGGING,
boom when not a monopoly..... 295

LOUISIANA,
Constitution; combinations, etc., to control prices unlawful; duty of legislature..... 245

[References are to Sections]

LUMBER,
dealers; agreements between 422

M

MACHINES,
patented; combinations of manufacturers 134
See Patents.

MAGNITUDE,
of business not necessarily illegal; monopoly 79

MAILS,
intercourse through as commerce .....note, 16

MANTELS,
association dealing in; Sherman Anti-Trust Act 146

MANUFACTURERS,
combination of; patented machines 134
contracts as to; Sherman Anti-Trust Act 140
contracts as to within a State 141
contracts of generally; Sherman Anti-Trust Act 140
of shingles; combinations; Sherman Anti-Trust Act 142
of iron pipes; combinations; Sherman Anti-Trust Act 143
and jobbers; tobacco; combination of; Sherman Anti-Trust Act.. 144
of liquorice paste; combination; Sherman Anti-Trust Act 145
of tiles, mantels and grates; association; Sherman Anti-Trust Act 146
refiners of sugar; violations; Sherman Anti-Trust Act 147
and purchaser; proprietary medicines; contracts as to sale price of 401
of cotton seed oil; agreement for withdrawal of agent 416
of salt; agreements between; violation State statute 433
liquid door checks patented; combination of 134

MANUFACTURING,
contracts generally; Sherman Anti-Trust Act 140
within a State; contracts as to 141

MARKET HOUSE,
contract for by city or town; monopoly 310
or slaughterhouse; where city or village cannot create monopoly.. 315

MARYLAND,
Constitution; monopolies prohibited 246

MASON AND BUILDERS,
association and bricklayers' union; agreements between 414

[References are to Sections]

MASTER PLUMBERS,
association held unlawful 384
and dealers in plumbers' supplies; agreements between 429

MATCHES,
corporation to control manufacture or sale 89

MEASURE OF DAMAGES. See Damages.

MEAT,
agreements between packing companies to control price of; violation State statutes 425
violations by dealers in; Sherman Anti-Trust Act 148

MEDICINES,
contracts as to proprietary medicines; Sherman Anti-Trust Act.. 138

MERGER. See Consolidation.
of street railways; violation State statute 397

MINES. See Mining.

MINING,
contracts as to; Sherman Anti-Trust Act 153
contracts between coal companies; Sherman Anti-Trust Act 154
corporation; purchase by of stock in another 394

MINNESOTA,
Constitution; combinations to control food products a criminal conspiracy; duty of legislature 247

MISDEMEANOR,
under Sherman Anti-Trust Act 13

MISSISSIPPI,
Constitution; duty of legislature to prevent trusts, combinations, etc 248

MODIFICATION,
of terms of patent licenses 137

MONOPOLIES,
defined 66
under Sherman Anti-Trust Act defined 22
construed 362
what involved in meaning of 78
denounced by Sherman Anti-Trust Act; what is 77
idea of not confined to grants of privileges 46
resulting from grant or contract; distinctions 46
and engrossing; distinctions 47

[References are to Sections]

MONOPOLIES—*Continued.*
and combinations; distinctions 48
and exclusive privileges; distinctions 49
"monopolize" used in statute synonymous with "aggregate" or "concentrate" 50
nature essentials or test of 65–74
what idea of includes; creation of 65
restraint of competition; control of productions; commodities and prices 65, 66
"to monopolize"; power to raise prices or exclude competition distinguished; motive 67
what degree of restraint of competition essential 68
and restraint of competition distinguished 68
effect of personal service or occupation 69
as essential features of charters or franchises; whether such grant exclusive in nature 70, 71
not favorites with courts or people ..... note, 71
when grants of charters or franchises are exclusive 72, 73
when grants of charters or franchises are not exclusive 74
and unlawful restraint; Sherman Anti-Trust Act; what is embraced generally 75
exclusive right; Sherman Anti-Trust Act 78
size or magnitude of business; Sherman Anti-Trust Act 79
inseparable consequences of ..... note, 89
object of patent laws 135
statute prohibiting does not abridge privileges or immunities of citizens 229
how created 239
may be prohibited, etc.; police power 271
grant of; sovereign power or State is source of grant or franchise 272
legislative power to grant 274
cannot be implied from mere grant; public grants of franchises, privileges, etc.; construction against grantee 275
legislative power to prohibit 276
municipality no power to create 278
power of municipality to create or to make contracts tending to create 280
statute of in England 282
unlawful at common law. See "Appendix A."
See Sherman Anti-Trust Act.

MONOPOLIST,
defined 9

MONOPOLIZE,
defined 22
synonymous with "aggregate" or "concentrate" 50
contract in restraint of trade analagous to 58
Sherman Anti-Trust Act; what monopoly must affect 123

[References are to Sections]

MONOPOLIZE—*Continued.*
"to monopolize" construed. See "Appendix A."
"attempts to monopolize"; origin of. See "Appendix A."

MONTANA,
Constitution; combinations, trusts, etc., to fix prices or regulate production; duty of legislature 249
Constitution continued; necessity of showing intent 250
Constitution continued; meaning of "trust" therein 251

MORTGAGEE,
as party to injunction; obligation of contracts 225

MOTIVE,
as element or essential of offense of conspiracy 61
monopolies; "to monopolize" power to raise prices or exclude competition distinguished 67
contracts in restraint of trade 105
of those instigating suit are immaterial 458
good no defense where statute violated 459
See Intent.

MUNICIPAL CORPORATION. See Municipality.

MUNICIPALITY,
a "person"; Sherman Anti-Trust Act 164
breach of contract by not an act impairing obligation of contract 216
exclusive grant for electric lighting void; not protected by obligation of contract clause 223
exclusive contract by borough with water company; impairment contract obligation 225
exclusive water franchise 225
ordinances granting rights to water companies; impairment contract obligation 225
police power of; water supply 225
powers granted to as to sewage constitutional 264
contract with; construction of 275
rule as to powers of 277
held to strict exercise of franchises 277
implied powers of 277
has two classes of powers 277
no power to create monopoly 278
a creature of the State 278
delegation of legislative powers to 278
police power may be delegated to 278
not invested with powers to grant franchises 278
not invested with power to create corporations 278
power conferred upon to pass ordinances 278
powers which legislature may delegate 278
ordinances of must not conflict with State Constitution 279

[References are to Sections]

MUNICIPALITY—*Continued.*
cannot confer pecuniary benefits 280
power of to create monopolies or to make contracts tending to create a monopoly 280
grant of exclusive privileges by 280
power to create or to make contracts tending to create monopolies; may adopt reasonable regulations 281
construction of grants to 294
power to grant exclusive privilege must be expressly conferred; monopoly 294
express or implied power to grant exclusive privilege; monopoly .. 294
contracts conferring special privilege, etc., or monopoly; constitutional law 294
as owner of ferry franchise; contract by, with ferry company; no monopoly created 297
ordinance authorizing contract for electric lights by city; validity of 298
contract power of; electric lighting; exclusive rights 298
control of streets; electric lighting; exclusive grants 298, 299
power of to furnish electric lights 299
right vested in to furnish electric lights; exclusive as against private corporation 299
ordinance; exclusive ferry right; delegated authority 301
legislative grant of exclusive right to supply gas within 303
grant by, of exclusive privilege or monopoly to supply gas 304
contract for supply of gas with grantee from city of exclusive privilege 304
business and governmental capacity 305
lease of its gas works with covenant not to interfere with lessee's exclusive right 305
lease by to private corporation to supply gas; exclusive right; no monopoly 305
acting in business capacity may lease exclusive right to supply gas 305
contract for market house; monopoly 310
grant of exclusive privilege to run omnibuses; when a monopoly .. 312
or village; when cannot create monopoly as to slaughterhouse or market house 315
control of streets; street railways; exclusive grants 316
telephone companies; exclusive grants or contracts 317
contract by, with telephone company for exclusive right for period of years 317
grant by to operate toll road; not a monopoly 320
ordinance requiring union label on city printing; when a monopoly 322
ordinance requiring that only union labor or union shops be employed 323
power of as to waterworks or water supply 325
exclusive right of, and of private corporation as to water supply or waterworks distinguished 326
cannot contract away legislative powers; water supply; exclusive right or monopoly 328

[References are to Sections]

MUNICIPALITY—*Continued.*
power of city to grant exclusive right or monopoly to water company..... 328
instances of valid and void contracts by, as to water supply, etc.; exclusive rights; monopoly..... 329, 330
no defense by that contract creates monopoly..... 331
injunction restraining; water system..... 332
legislation or contracts of; particular instances..... 294–335
See Ordinances.

MUNICIPAL ORDINANCE. See Ordinance.

N

NATURAL GAS,
statute restricting interstate commerce in construed.....note, 206

NAVIGABLE CANAL,
when no monopoly..... 311

NAVIGATION,
included in term "commerce"..... 16

NECESSARIES OF LIFE,
combination by sugar refiners; Sherman Anti-Trust Act..... 147
combinations of dealers in fresh meat..... 148
State Constitutions as to monopolies, etc., to control same....240, 262

NECESSITY,
combinations as to articles of; Alabama Constitution..... 240

NEWS,
association for distributing..... 431

NEWSPAPERS,
and job printing establishments; contracts between..... 423
publisher and carriers; contracts between..... 424

NORMAL COLLEGE,
act as to not special act..... 266

NORTH CAROLINA,
Constitution; monopolies prohibited..... 252

NORTH DAKOTA,
Constitution; combinations to control prices, cost of exchange or transportation prohibited; franchises forfeited..... 253

[References are to Sections]

NOTICE,
service of on defendants under Sherman Anti-Trust Act. See "Appendix A."

O

OBLIGATION OF CONTRACT. See Constitutional Law; Contracts; Federal Constitution.

OFFENSES. See the particular offense.

OFFICERS,
charging of in indictment; Sherman Anti-Trust Act..... 179
of corporation cannot refuse to testify; violation Sherman Anti-Trust Act..... 186

OIL,
statute restricting interstate commerce in construed.....note, 206

OKLAHOMA,
Constitution; monopolies prohibited; duty of legislature as to combinations, monopolies, etc..... 254

OMNIBUSES,
grant of privilege to run when a monopoly..... 312

OPEN SHOP,
defined..... 40

ORDERS,
requiring production of books and papers; State statutes..... 494

ORDINANCE,
granting exclusive privilege to waterworks company.....note, 8
whether a "law"; impairment of obligation of contracts..... 211
granting right to erect electric light plant; subsequent erection of plant by city; impairment contract..... 217
enforcement of; obligation of contract..... 225
granting exclusive right supplying electric current..... 225
regulating water rates; obligation of contract.....note, 225
not a contract; gas works.....note, 275
power conferred upon municipality to pass..... 278
of municipality must not conflict with State Constitution..... 279
granting privileges; essentials to validity of..... 280
violation of law as preventing relief against..... 451
See Municipality; Police Jury.

OVERT ACTS,
conspiracy; New York..... 64

[References are to Sections]

OVERT ACTS—*Continued.*
conspiracy to commit offense against United States..... 64
conspiracy to defraud United States; indictment.....note, 64
place of doing; conspiracy; when crime complete.....note, 64
conspiracy; Sherman Anti-Trust Acts..... 85
See Conspiracy.

P

PACKING,
companies; agreements to control price of meat; violations State statutes..... 425

PALACE CAR,
company; contract between railroad company and; violation State statute..... 396
See Railroads.

PAPERS,
requiring production of; State statutes..... 494
See Evidence; Witnesses.

PARALLEL,
and competing lines; consolidation; violation State statute..... 395
defined and considered..... 19
lines of railroad. See Railroads.

PARISH,
board of education; act as to held special act..... 266

PARLIAMENT,
of Great Britain; grant of exclusive privileges by..... 274

PARTIES,
summoning of under Sherman Anti-Trust Act..... 13
summoning of; amendments to Wilson Tariff Act..... 14
fact of conspiring must be charged against all conspirators; doing of overt acts; indictment.....note, 64
summoning of; jurisdiction; Sherman Anti-Trust Act..... 169
summoning of; jurisdiction not restricted by Judiciary Act; Sherman Anti-Trust Act..... 170
summoning of; exercise of jurisdiction not discretionary; Sherman Anti-Trust Act..... 171
joinder of defendants; complaint; election; Sherman Anti-Trust Act..... 177
mortgagee as party to injunction; obligation of contracts..... 225
defendant; who subject to prosecution for violation State statute. 440
joinder of defendants..... 471
declarations and statements of as evidence..... 482, 485

[References are to Sections]

PARTNERSHIPS,
regulation of; Alabama Constitution 240
dissolution of; physicians; agreement not to practice 428
accounting; illegality of contract; burden of proof 489

PATENTS,
contracts between owners of; violations; Sherman Anti-Trust Act 134
licenses; conditions in generally; Sherman Anti-Trust Act 135
condition in license as to price 136
licenses; particular conditions in Sherman Anti-Trust Act 136
right to modify terms of licenses 137
suit by combination for infringement of; illegality of combination as defense; Sherman Anti-Trust Act 158
system rests on Federal Constitution and acts of Congress 282
source and nature of; whether monopolies or contracts 282, 283
police power of States 284
expiration of; use of general name; loss of trade-mark rights 291
as monopoly for public good ..... note, 296
contracts in respect to articles protected by; violations State statutes 426

PECUNIARY BENEFITS,
municipality cannot confer 280

PENALTY,
violating Sherman Anti-Trust Act 13
by amendments to Wilson Tariff Act 14
action for damages not an action for penalty; Sherman Anti-Trust Act 189
for violation of Interstate Commerce Act ..... note, 200
duty of legislature to enforce laws by; Utah Constitution 257
statute as to 374
statutes providing for 442
complaint to recover 481
not authorized by law; Sherman Anti-Trust Act. See "Appendix A."

PERJURY,
enforcing trusts and interstate commerce laws ..... note, 14

PERMIT,
to do business; statute as to revocation of 374

PERPETUITIES,
prohibited; Oklahoma Constitution 254
prohibited; Tennessee Constitution 256
prohibited; Texas Constitution 256
prohibited; Wyoming Constitution 262

[References are to Sections]

PERSON,
word defined in Sherman Anti-Trust Act..... 13
to what extent corporation is.....note, 13
corporations are within Sherman Anti-Trust Act..... 114
municipal corporation a "person"; Sherman Anti-Trust Act.... 164
State not under Sherman Anti-Trust Act..... 165
corporation is; within meaning of equal protection clause of Federal Constitution.....note, 237
construed; whether corporations included..... 363
in Anti-Trust Act, 1890, construed. See "Appendix A."

PERSONAL SERVICES,
not commodity.....note, 18
not subject of monopoly at common law..... 69

PERSUASION,
use of by strikers. See Labor or Trade Unions.

PETITION,
Sherman Anti-Trust Act; sufficiency of; general rules..... 173
See Pleading.

PETROLEUM,
combination of refiners of..... 132

PHYSICIANS,
agreements between as to schedule of prices..... 427
dissolution of partnership; agreement not to practice..... 428

PICKET,
defined..... 35
See Picketing.

PICKETING,
defined and considered..... 36
when lawful and unlawful..... 36
See Labor or Trade Unions.

PIPES,
combination of manufacturers of; Sherman Anti-Trust Act..... 143

PLAYS,
not commodities..... 436

PLEA,
denial under general issue; indictment charging conspiracy; Sherman Anti-Trust Act..... 180
statute of limitations; indictment under Sherman Anti-Trust Act 180

[References are to Sections]

PLEADING,
bill multifarious; action for damages; Sherman Anti-Trust Act.. 162
Sherman Anti-Trust Act; sufficiency of complaint or petition; general rules..... 173
Sherman Anti-Trust Act; sufficiency of complaint; rules in force in State where action brought; Practice Act..... 174
Sherman Anti-Trust Act; sufficiency of complaint; duplicity..... 176
Sherman Anti-Trust Act; sufficiency of complaint; joinder of defendants; election..... 177
indictment; Sherman Anti-Trust Act; sufficiency of; general rules 178
indictment; Sherman Anti-Trust Act; charging officers, agents or stockholders..... 179
indictment charging conspiracy; Sherman Anti-Trust Act; denial under general issue..... 180
indictment not conclusive; removal proceeding..... 181
rule as to certainty; indictment..... 468
general rule; indictment or information in language of statute sufficient..... 469
rule as to legal conclusions..... 470
joinder of defendants..... 471
not necessary to allege combination is in position to control market 472
necessity of averring intent, purpose or effect..... 473
averring terms of agreement; particular articles subject of..... 474
conspiracy; means by which to be effectuated need not be charged 475
conspiracy; averring names of persons to be injured..... 476
in proceeding by information to forfeit corporate franchise..... 477
complaint in action to restrain; New York..... 478
necessity of averring acts to be in restraint of trade..... 479
rule as to party seeking to enforce forfeiture; defense that member of illegal combination..... 480
complaint to recover penalty..... 481
allegations of facts prior to passage of Sherman Anti-Trust Act. (see "Appendix A").
See Complaint; Indictment.

PLEDGE,
of stock; pleading combination; Sherman Anti-Trust Act..... 175

PLUMBERS,
supplies; agreements between master plumbers and dealers in.... 429

POLICE JURY,
ordinance authorizing toll road; not a monopoly..... 320

POLICE POWER,
defined..... 271
of municipality; water supply..... 225
of States; liberty to or freedom of contract..... 234
when must yield to Congress..... 271
business of fire insurance..... 271

[References are to Sections]

POLICE POWER—*Continued.*
not parted with by grant of exclusive right to supply gas, etc..... 303
cannot be contracted away..... 271
of States; power of Federal courts.....note, 271
is broad and plenary.....note, 271
distinction as to extent of; State and interstate commerce..note, 271
may be delegated to municipality..... 278
property under letters patent within control of..... 284
legislature does not part with; exclusive franchise to gas company 271
of State; restraining right of contract; generally..... 336
of State; as to contracts and combinations in restraint of trade; generally..... 337
of State; prevention of discrimination..... 338
of State; prohibiting giving of rebate..... 339
of State; corporations; limitations in Federal Constitution; Fourteenth Amendment..... 340
of State; foreign corporations; Fourteenth Amendment..... 341
of State to provide mode and means of procedure to enforce statutes; power of Supreme Court of United States..... 342
legislature as affected by constitutional provision requiring passage of laws..... 343
combination to fix or limit the price or premium to be paid for insuring property prohibited..... 370
statute prohibiting condition of sale not to sell goods of any other person..... 371

POLICIES,
of insurance as articles of commerce.....note, 16
of marine insurance; meaning of "freight" in.....note, 195

POOLING,
defined..... 10
contracts between competing corporations void..... 10
of bakeries.....note, 10, note, 46
term "combination in the form of trust" synonymous with..... 51
arrangement for division of west bound immigrant traffic..note, 194
of farm products; statutes as to..... 375
See Combinations.

POOLING OF FREIGHTS,
a division of earnings prohibited; Interstate Commerce Act..... 194
freights defined..... 195
when there may be by railroads..... 195
nature and scope of Interstate Commerce Act..... 196
what constitutes; Interstate Commerce Act..... 197
what does not constitute; Interstate Commerce Act..... 198
of ocean or water lines not within Interstate Commerce Act..... 199
action on contract for..... 197
combinations to prevent continuous carriage of freight to destination prohibited by interstate commerce act..... 200
See Freight; Interstate Commerce Act; Pooling of Freights.

[References are to Sections]

POST ROADS ACT,
prohibits State monopolies in commercial intercourse by telegraph 292
whether includes telephone companies 292
exclusive contract between railroad and telegraph company; monopoly 293
does not build up or foster monopoly ..... note, 293
restrictions of upon State; telegraph companies 318
telegraph companies; exclusive grants by State 318

POWERS,
reserved to the States; Tenth Amendment to Federal Constitution 226
of Federal Government; Fifth Amendment to Federal Constitution; generally 227
of municipality; as to control of streets; delegation of power 298, 299
of municipal corporations. See Municipality; Congress; Legislature; State.

PRACTICE,
agreement not to; physicians; dissolution of partnership 428
upon remanding case. See "Appendix A."

PRACTICE ACT,
procedure under Sherman Anti-Trust Act 174

PREMISES,
exclusive right to sell goods on 405
agreements restraining purchaser from certain use of 406

PRESCRIPTION,
few rights founded on in this country 272
corporation may exist by 272

PRESUMPTION,
in respect to combination; Sherman Anti-Trust Act 185
as to source of franchise 272
as to intent; violation of State statutes 379
as to legality of contract 380
as to innocence 488
as to labor union being a law-abiding body 499
See Evidence.

PRICE,
condition in patent license as to 136
proprietary medicines; contracts as to 138
of shingles; combination of manufacturers 142
combinations as to; manufacturers 140
liquorice paste; combinations; Sherman Anti-Trust Act 145
of meat; combination by dealers; Sherman Anti-Trust Act 148
of coal; right of company to fix; Sherman Anti-Trust Act 154
for petroleum; statute prohibiting discrimination in prices for ... 372
State Constitutions prohibiting combinations to control 240–262

[References are to Sections]

PRINCIPAL AND AGENT,
contracts between; violation State statute..... 408

PRINTING,
award of city printing to specified class; a monopoly..... 323
See Union Label.

PRINTING COMPANY,
statute construed as exclusive grant to.....note, 8

PRIVATE CORPORATION,
character of franchise to..... 70
exists by legislative grant.....note, 272
See Corporations; Franchise.

PRIVILEGES AND IMMUNITIES,
of citizens. See Fourteenth Amendment.

PROBABLE CAUSE,
indictment, prima facie evidence of..... 181

PROCEDURE,
under Sherman Anti-Trust Act..... 13
under amendments to Wilson Tariff Act..... 14
action under Sherman Anti-Trust Act; Practice Act..... 174
subsequent statute changing mode of; impairment of obligation of contract..... 214
power of State to provide mode and means of to enforce statutes; power of Supreme Court of United States..... 342
See Pleadings.

PROCEEDING,
examination of witness before grand jury a "proceeding"; Sherman Anti-Trust Act..... 187

PROCEEDINGS. See Procedure.

PROCESS,
under Sherman Anti-Trust Act..... 13
to compel attendance of witnesses; Sherman Anti-Trust Act.... 169
service of notice under Sherman Anti-Trust Act. See "Appendix A."
See Procedure.

PRODUCTION,
contracts to control; monopolies..... 65–66
contracts for limitation of..... 89

PROOF,
burden of; Sherman Anti-Trust Act..... 184
See Burden of Proof; Evidence.

[References are to Sections]

PROPERTY,
due process of law 230
life, liberty and property; meaning of in Fourteenth Amendment 231
See Fourteenth Amendment.

PROPRIETARY MEDICINES,
contracts as to; Sherman Anti-Trust Act 138
contracts between manufacturer and purchaser as to sale price of 401

PUBLIC IMPROVEMENT,
when navigable canal no monopoly 311

PUBLIC POLICY,
combinations against which tend to create monopoly 65
as test generally; contracts in restraint of trade 86
determined by Constitution, laws and judicial decisions..note, 86
as test; contracts in restraint of trade; degree of injury to public. 87
as test; contracts in restraint of trade; general and partial restraint 88
as test; contracts in restraint of trade; tending to create monopolies; useful commodities 89
favors competition in trade .....note, 89
as test; contracts in restraint of trade; affecting prime articles of necessity 90
what contracts in restraint of trade not void as against 91
as test; contracts in restraint of trade; public service corporations 92, 93
effect of changed conditions as to trade, commerce, etc.; contracts in restraint of trade; English courts 94
effect of changed conditions as to trade, commerce, etc.; contracts in restraint of trade; Federal courts 95
effect of changed conditions as to trade, commerce, etc.; contracts in restraint of trade; State courts 96
contracts against may be prohibited 232
exclusive contract between railroad and telegraph company; monopoly 293
lease by city of its gas works; exclusive right; monopoly 305
as to illegal contract to restrain competition, etc. See "Appendix A."
See Police Power.

PUBLIC SERVICE,
corporations; public policy as test; contracts in restraint of trade 92, 93
exclusive contract between telephone and telegraph company void 92
subject to exercise of police power .....note, 271

PUBLIC UTILITIES,
municipal contracts as to, conferring special privileges, etc., or monopoly; constitutional law 294

[References are to Sections]

PUBLIC WATERWAYS. See Waterways.

PUBLISHERS,
combination of holders of copyrights 133
of newspapers and job printing establishments; contracts between 423
of newspapers and carriers; contracts between 424
agreements between; price at retail; not to sell to certain class .. 430

PUNISHMENT,
statutes as to 374
statutes providing for 442
See Penalty.

PURCHASE,
of good will and business; violations Sherman Anti-Trust Act .. 130

PURCHASERS. See Vendee; Vendor.

PURPOSE,
of Sherman Anti-Trust Act 112
necessity of averring; charging offense 473
of conspiracy; positive evidence as to not necessary 484
See Intent; Motive.

Q

QUESTIONS FOR COURT,
whether contract is in restraint of trade 103
reasonableness of covenant not to carry on business 103

QUOTATIONS,
contracts as to; board of trade; Sherman Anti-Trust Act 150

R

RAILROAD,
equipment instrument of interstate commerce ..... note, 16
competing line defined 19
holding corporations; combination in restraint of trade 29
consolidation of competing lines; Sherman Anti-Trust Act 81
companies; when may combine 93
companies; exclusive right by to telegraph company 93
companies; combination to better terminal facilities; Sherman Anti-Trust Act 151
companies; combination of stockholders to obtain control of; Sherman Anti-Trust Act 132
companies; purchase by one of stock of another; Sherman Anti-Trust Act 151

[References are to Sections]

RAILROAD—*Continued.*
companies; violations Sherman Anti-Trust Act..... 151
companies; suit against by attorney general; not interference with control of States..... 161
pooling of freights; Interstate Commerce Act..... 194–201
when may pool freights..... 195
charter; provision against competing lines; impairment of contract obligation..... 221
company; grant of rights to; constitutionality..... 264
regulation as to; not special act..... 266
corporations; power of Congress to prohibit restraints upon competition..... 267
police power as to; constitutional limits.....note, 271
consolidation of; powers not directly contemplated; revocation; vested rights .....note, 275
right of way; telegraph line; exclusive contract; monopoly..... 293
acquisition of lands of; not a special privilege, etc..... 313
of capital stock of other railroads..... 313
statute authorizing condemnation of capital stock of other railroads; when no exclusive privilege granted..... 313
consolidation of..... 335
constitutional provision prohibiting consolidation of parallel and competing lines..... 369
consolidation of parallel and competing lines; violation State statutes..... 395
contract between palace car company and; violations State statute..... 396
and express or transfer companies; contracts; exclusive right.... 398
car service association merely agent of; violation State statute.. 399
pooling of freights. See Freights; Carriers; Common Carriers; Interstate Commerce Act; Pooling.

RAILWAY. See Common Carriers; Railroad.

RATES,
combination of insurance companies to fix.....note, 12
of transportation; purpose of Sherman Anti-Trust Act as to.... 112
for transportation; contract between railroads; Sherman Anti-Trust Act..... 151
for insurance; statutes as to..... 370
for insurance; agreements to fix..... 421
discrimination in; remedy for in Mississippi..... 441

"REAL VALUE,"
construed..... 364

REASONABLE,
restraint of trade. See Contracts in Restraint of Trade; Restraint of Trade; Sherman Anti-Trust Act.

[References are to Sections]

"REASONABLE COMPETITION,"
in Alabama Constitution construed 241

REBATE,
prohibiting giving of; police power of State 339
See Freights; Interstate Commerce Act; Pooling of Freights.

REBATING. See Freights; Interstate Commerce Act; Pooling of Freights.

REBUTTAL,
of evidence to show reason for increase of prices 486
See Evidence.

RECEIVER,
right to sue under Sherman Anti-Trust Act 166

RECLAMATION DISTRICT,
act as to not special act 266

RECOVERY,
of damages under Sherman Anti-Trust Act 13
See Damages.

REFINERS,
of sugar; violations; Sherman Anti-Trust Act 147
of copper; contracts between; Sherman Anti-Trust Act 153

REGRATING,
defined 11
an offense no longer known to law ..... note, 5
of commerce. See Commerce; Constitutional Law; Federal Constitution; Interstate Commerce; Intrastate Commerce.

RELIGIOUS SOCIETIES,
act incorporating not a special act 266

REMANDING CASE. See "Appendix A."

REMEDY,
penalty for violation of Interstate Commerce Act ..... note, 200
persons damaged by violation Interstate Commerce Act .. note, 200
subsequent statute changing impairment of obligation of contract 214
when no adequate remedy at law; enforcing water contract 225
provided by statute are exclusive 441
statutes providing for punishment; fine; imprisonment 442
liability where agreement legal when made; effect of subsequent statute 443
annulment of charter; forfeiture of franchise; right of stockholder to enforce 445

[References are to Sections]

REMEDY—*Continued.*
application to annul charter; granting of in discretion of court.. 446
ouster of foreign corporation; when court no discretion..... 447
foreign corporations; nature of right to transact business; ouster of..... 448
suit for injunction by person injured; defense..... 450
violation of law as preventing relief against ordinance; ceasing violations..... 451
action for damages; person injured by conspiracy..... 452
action by party to illegal contract or combination..... 453
enjoining acts after combination declared unlawful..... 454
that corporation a foreign one is not defense..... 455
that price not raised is no defense..... 456
that complete monopoly not obtained is not defense..... 457
motives of those instigating suit are immaterial..... 458
good motives or intent no defense where statute violated..... 459
illegality of combination as defense; independent of statute; collateral contract..... 460
illegality of combination or contract as defense; where permitted by statute..... 461
illegality of combination or contract as defense continued; instances..... 462
illegality of combination or contract as defense; action for rent.. 463
illegality of combination or contract as defense; contract made prior to statute..... 464
illegality of combination or contract as defense; where statute prescribes no mode of procedure for determining illegality.... 465
combination to raise price; defense that law does not favor increased sale of article..... 466
illegality of association as defense to action by, for penalty..... 467
twofold under Sherman Anti-Trust Act. See "Appendix A."
See Damages; Defenses.

REMOTE DAMAGES,
not basis of judgment; Sherman Anti-Trust Act..... 188
See Damages.

REMOVAL PROCEEDING,
indictment not conclusive; Sherman Anti-Trust Act..... 181

RENT,
action for; illegality of combination or contract as defense..... 463

RESTRAINT,
defined..... 24
See Contracts in Restraint of Trade; Sherman Anti-Trust Act.

RESTRAINT OF TRADE,
conspiracy in defined..... 20
contract in defined..... 23

[References are to Sections]

RESTRAINT OF TRADE—*Continued.*
defined 24
holding corporations 29
distinction between Anti-Trust statute and contracts in 52
"restrictions in trade" in statute not synonymous with 54
power of Congress as to 110
purpose of Sherman Anti-Trust Act 112, 113
scope of Sherman Anti-Trust Act 113
construction of Sherman Anti-Trust Act; generally 114
in Sherman Anti-Trust Act construed 115
question of reasonableness or unreasonableness; violations Sherman Anti-Trust Act 118
See Contracts in Restraint of Trade; Sherman Anti-Trust Act; Trade.
origin of. See "Appendix A."
See Contracts in Restraint of Trade.

"RESTRICTIONS IN TRADE,"
in statute not synonymous with "restraint of trade" 54
See Contracts in Restraint of Trade.

RETAILERS,
agreements between not to purchase from certain wholesalers 432

REVISION,
by United States Supreme Court; Anti-Trust cases .....note, 14

REVOCATION,
of permit to do business; statute as to 374

RIGHT OF WAY,
of railroad; telegraph line; exclusive contract; monopoly 293

"RULE OF REASON" DECISION,
Sherman Anti-Trust Act 83a
Sherman Anti-Trust Act. See "Appendix A." 83a

S

SALE,
combination distinguished from 55
of good will and business; violation of Sherman Anti-Trust Act .. 130
contract of collateral to illegal agreement; Sherman Anti-Trust Act 155, 156
condition of not to sell goods of any other person; statute prohibiting 371
of good will and business; exception in statute as to 376
See Business; Good Will; State Statutes; Vendor.

[References are to Sections]

SALT,
manufacturers; agreements between; violation State statute.... 433

SCALP,
contract to instruct in treatment of; to use only certain remedies 439

SCHEME,
when separate elements of are lawful; Sherman Anti-Trust Act.. 122

SCHOOL DISTRICTS,
act as to not special act..... 266

SCHOOL TEXT-BOOK STATUTES,
exclusive privileges; monopoly; contracts..... 314
statutes as to uniform series of; exclusive privileges; monopolies; contracts..... 314

SCOPE,
of Sherman Anti-Trust Act..... 113

SECONDARY BOYCOTT,
defined..... 34
See Boycott; Boycotting; Labor or Trade Unions.

SEIZIN,
under Sherman Anti-Trust Act..... 13

SET-OFF,
damages recoverable under Sherman Anti-Trust Act cannot be.. 192
See Damages.

SEWAGE,
power to municipality as to constitutional..... 264

SEWER PIPE,
contract for; voluntary purchaser; illegality of combination no defense; Sherman Anti-Trust Act..... 156

SHARES,
right to return of; distribution of assets of holding corporation.. 193

SHERMAN ANTI-TRUST ACT,
construction and application of; control of sugar refineries.note, 8
provisions of..... 13
what essential to violation of..... 15
terms and definitions involved in meaning and application of.... 15
commerce under defined and considered..... 16
interstate commerce under defined and considered..... 16
word commerce in construed..... 16
intrastate commerce defined..... 17

[References are to Sections]

SHERMAN ANTI-TRUST ACT—*Continued.*
commodity under defined 18
competing line under defined 19
conspiracy under defined 20
contract under defined 21
monopolize defined 22
monopoly defined 22
contract in restraint of trade defined 23
in restraint of trade or commerce defined 24
trade defined 25
traffic under defined 26
transportation under defined 27
trust under defined 29
holding corporation under defined 29
distinctions; combination and sale 55
"combination" and "conspiracy" synonymous 56
distinctions; conspiracy in restraint of trade and contract in restraint of trade 57
"in restraint of trade" synonymous with "trade or commerce". 58
"conspiracy" as used in means substantially same as contract note, 57
"trade" and "commerce" synonymous 58
"contract in restraint of trade" analogous to "monopolize" 58
object of 75
unlawful restraints and monopolies; what is embraced generally .. 75
nature, essentials or test under 75–85
labor combinations within prohibition of 76
regulation or restraint of commerce, intrastate, interstate or foreign 77
monopoly; exclusive right 78
monopoly; size or magnitude of business 79
injunction under; what necessary to show 80
direct and necessary effect upon competition in interstate and foreign commerce 80, 81
nature of contract condemned by ..... note, 80
allegation of purpose in indictment ..... note, 80
consolidation of competing railroads 81
where restraint only collateral 82
fair regulation of business; indirect or incidental effect upon competition in interstate or foreign commerce 82
reasonable and unreasonable restraints 83
the "rule of reason" and "light of reason" decisions 83a
"rule of reason" and "light of reason" decision. See "Appendix A." 83a
reasonable and unreasonable restraints. See "Appendix A." 83a
test or essentials of conspiracy generally 84
test or essentials of conspiracy; overt acts 85
object of 101
power of Congress; generally 110
constitutionality of act 111

[References are to Sections]

SHERMAN ANTI-TRUST ACT—*Continued.*
competent for Congress to vest jurisdiction under 111
purpose of 112
scope of act 113
construction of act; generally 114
not inconsistent with Interstate Commerce Act 114
what embraced by 114
corporations are persons 114
sections one and two make illegal two different things 114
construction of act; "commerce" and "restraint of trade" construed 115
equity may enjoin violations of 116
construction of act; should not be narrow or forced 116
does not extend to acts done in foreign countries 117
question of reasonableness or unreasonableness of restraint; violations of 118
conspiracy under may have continuance 119
test of legality of contract or combination 120
where chief object is to increase trade 121
where separate elements of scheme lawful 122
suit by government; what necessary to show 123
violations; what essential to constitute 123
what monopoly must affect; "monopolize" construed 123
violations; essentials of contracts in order to constitute 124
violations; what constitute; generally 125
violations; all facts and circumstances to be considered 125
violations; size or extent of business not alone a test 126
violations; combinations entered into before passage of act 127
violations; by combinations; stockholder not criminally liable ... 128
defenses; generally 129
violations; purchase of business and good will 130
where corporation holds majority of stock of another corporation 131
exchange of shares of stock; holding corporation 132
contracts between holders of copyrights 133
contracts between owners of patents 134
patents; licenses; conditions; generally 135
patents; licenses; particular conditions 136
patents; right to modify terms of licenses 137
proprietary medicines; contracts as to 138
acts and combinations of labor organizations 139
manufacturing and other contracts; generally 140
contracts as to manufactures within a State 141
manufacturers of shingles 142
manufacturers of iron pipes 143
tobacco manufacturers and jobbers 144
manufacturers of liquorice paste 145
association dealing in tiles, mantels and grates 146
sugar refining companies 147
dealers in fresh meat 148
association of cattle dealers 149

[References are to Sections]

SHERMAN ANTI-TRUST ACT—*Continued.*
by board of trade; contracts as to quotations 150
railroad companies 151
owners of vessels 152
mining contracts 153
contracts between coal companies 154
contract with combination; voluntary purchaser; illegality of combination no defense 155, 156
contract with combination; when illegality of combination a defense; 157
suit by combination for infringement of patent; illegality of combination as defense 158
suit by combination for infringement of trade-mark or copyright; illegality of combination as defense 159
who may sue; when individual may; injury to "business or property" 160
who may sue; injunction; right of individual; suit by attorney general 161
who may sue; right of stockholder; creditor 162
who may sue; right of member of combination 163
who may sue; municipal corporation a "person" 164
who may sue; State not a "person" or "corporation" 165
who may sue; right of receiver 166
time of entering into combination as affecting right to recover ... 167
jurisdiction of courts; generally 168
jurisdiction; parties; summoning of 169
jurisdiction; parties; summoning of; not restricted by Judiciary Act 170
jurisdiction; exercise of not discretionary; summoning parties ... 171
jurisdiction; extent of judgment 172
sufficiency of complaint or petition; general rules 173
sufficiency of complaint; rules in force in State where action brought; Practice Act 174
sufficiency of complaint; particular cases 175
sufficiency of complaint; duplicity 176
sufficiency of complaint; joinder of defendants; election 177
sufficiency of indictment; general rules 178
sufficiency of indictment; charging officers, agents or stockholders 179
indictment charging conspiracy; denial under general issue 180
indictment not conclusive; removal proceeding 181
evidence; admissibility and weight of 182
evidence as to intent; when essential 183
evidence; burden of proof 184
evidence; presumption in respect to combination 185
evidence; documents; witnesses; power of court 186
examination of witness a "proceeding" 187
damages; recovery of; generally 188
damages; nature of action for; jury trial 189
action for damages; a civil remedy; statute of limitations 190
action for damages; where payment of higher price compelled ... 191

[References are to Sections]

SHERMAN ANTI-TRUST ACT—*Continued.*
damages; cannot be set off. 192
distribution of assets of holding corporation; right to return of shares. 193
Interstate Commerce Act not inconsistent with. 201
Congress power to enact by virtue of commerce clause of Constitution. 205
statute as to pooling of farm products does not violate 375
remedy twofold. See "Appendix A."
should be construed in light of reason. See "Appendix A."
service of notice under. See "Appendix A."

SHINGLES,
association; manufacturers of; Sherman Anti-Trust Act 142

SHIPOWNERS,
combinations between to obtain monopoly of tea trade 59
contracts between; Sherman Anti-Trust Act 152
See Steamboat.

SIZE,
of not necessarily illegal; monopoly 79
or extent of business not alone test of violation of Sherman Anti-Trust Act 126

SLAUGHTERHOUSES,
exclusive grant to ..... note, 8
or market house; when city or village cannot create monopoly ... 315

SOUTH DAKOTA,
Constitution; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition; duty of legislature 255

SPECIAL ACTS,
instances 265, 266
constitutional provisions as to 265, 266
See Statutes.

SPECIAL PRIVILEGES OR IMMUNITIES. See Constitutional Law; Statutes.

SPECULATIVE DAMAGES,
not recoverable; Sherman Anti-Trust Act 188
See Damages.

STATE,
not a "person" or "corporation" under Sherman Anti-Trust Act 165
a "person" or "corporation"; Sherman Anti-Trust Act 165
Constitutions prohibiting monopolies; generally 239

[References are to Sections]

STATE—*Continued.*
Constitution of Alabama; legislative duty as to monopolies, combinations, etc., to control articles of necessity, etc., or to prevent competition. . . . 240
Constitution of Alabama construed; effect upon competition; meaning of "unreasonably" and "reasonable competition" . . . 241
Constitution of Arkansas; monopolies prohibited . . . 242
Constitution of Idaho; combinations to control prices, regulate production, etc., prohibited; duty of legislature . . . 243
Constitution of Kentucky; legislative duty as to trusts, combinations, etc., to control prices . . . 244
Constitution of Louisiana; combinations, etc., to control prices unlawful; duty of legislature . . . 245
Constitution of Maryland; monopolies prohibited . . . 246
Constitution of Minnesota; combinations to control food products a criminal conspiracy; duty of legislature . . . 247
Constitution of Mississippi; duty of legislature to prevent trusts, combinations, etc. . . . 248
Constitution of Montana; combinations, trusts, etc. to fix prices or regulate production; duty of legislature . . . 249
Constitution of Montana continued; necessity of showing intent 250
Constitution of Montana continued; meaning of "Trust" therein 251
Constitution of North Carolina; monopolies prohibited . . . 252
Constitution of North Dakota; combinations to control prices, cost of exchange or transportation prohibited; franchises forfeited . . . 253
Constitution of Oklahoma; monopolies prohibited; duty of legislature as to combinations, monopolies, etc. . . . 254
Constitution of South Dakota; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature . . . 255
Constitution of Tennessee; monopolies prohibited . . . 256
Constitution of Texas; monopolies prohibited . . . 257
Constitution of Utah; combinations to control prices, cost of exchange or transportation prohibited . . . 258
Constitution of Washington; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature . . . 259
Constitution of Washington continued; its provisions not self-executing . . . 260
Constitution of Washington continued; combinations of common carriers to share earnings prohibited . . . 261
Constitution of Wyoming; monopolies prohibited; combinations to prevent competition, control production or prices, etc., prohibited . . . 262
Constitutional provisions prohibiting granting special or exclusive privileges, immunities or franchises, etc. . . . 263, 264
constitutional provisions prohibiting creation of corporation by special act, etc. . . . 265, 266
hospitals; act as to not special act . . . 266

[References are to Sections]

STATE—*Continued.*
legislative powers of; generally 268
Federal and State legislative powers distinguished 269
power of as to subject of interstate commerce when Congress inactive 270
Federal and State legislative power distinguished; interstate and intrastate commerce 270
laws; supremacy of Congress over ..... note, 270
police power; definition and general principles 271
sovereign power or State is source of grant or franchise; grant of monopoly 272
legislative power to grant monopolies 274
contract with; construction of 275
municipality a creature of 278
Constitution; municipal ordinances must not conflict with 279
grant by of exclusive privilege or monopoly to make and vend gas, etc.; police power 303
legislative grant of exclusive privilege or monopoly to supply gas, etc 303
grant of exclusive right to use end of wharf for ferry purposes 303
control of streets; street railways; exclusive grants 316
contract by with telegraph company; exclusive right of State 318
power of, to grant exclusive privilege to water company; monopoly 327
contract with; water company; due process; constitutional law .. 333
and municipal legislation or contracts; particular instances .. 294–335
See Post Roads Act; State Statutes; Statutes.

STATEMENTS,
of parties as evidence 482, 485

STATE NORMAL COLLEGE,
act as to not special act 266

STATE STATUTES,
police power of State; restraining right of contract; generally 336
police power of State as to contracts and combinations in restraint of trade; generally 337
police power of State; prevention of discrimination 338
police power of State; prohibiting giving of rebate 339
police power of State; corporations; limitations in Federal Constitution; Fourteenth Amendment 340
police power of State; foreign corporations; Fourteenth Amendment 341
power of State to provide mode and means of procedure to enforce statutes; power of Supreme Court of United States 342
power of legislature as affected by constitutional provision requiring passage of laws 343
constitutionality of generally 344
constitutionality; liberty of contract; due process of law 345
constitutionality; class legislation; liberty of contract 346

[References are to Sections]

STATE STATUTES—*Continued.*
exception as to labor organizations.....note, 346
constitutionality; discrimination..... 347
constitutional provision requiring legislature to enact laws construed..... 348
contract made prior to passage of act does not render it unconstitutional..... 349
construction; general rules..... 350
penal statutes strictly construed..... 350
construction; as to intent of legislature..... 351
where part of act unconstitutional..... 352
as to title and body of act..... 353
rule as to statutes in pari materia..... 354, 355
rule as to additional and descriptive words..... 356
word "arrangement" construed..... 357
word "combination" construed..... 358
words "commodity" and "convenience" construed; personal service not; telephone service is..... 359
word "court" construed..... 360
words "in restraint of trade" construed..... 361
word "monopoly" construed..... 362
word "person" construed; whether corporations included..... 363
words "real value" construed..... 364
word "trade" construed..... 365
application of generally..... 366
penalty provisions of act; review by United States Supreme Court..... 367
territorial legislation; power of Congress; delegation of power to subordinate bodies..... 368
combination to fix or limit the price or premium for insuring property prohibited..... 370
prohibiting condition of sale not to sell goods of any other person. 371
prohibiting discrimination in prices for petroleum..... 372
relieving purchaser from combination from liability..... 373
as to punishment; fine or imprisonment; forfeiture of charter; revocation of permit..... 374
permitting pooling by farmers of farm products..... 375
exception in as to sale of good will of business; agricultural products or live stock..... 376
Donnelly Anti-Trust Act; New York..... 377
violations; contracts and combinations; legality and illegality; general principles..... 378
violations; intention as affecting; presumption as to..... 379
violations; all provisions of contract should be considered; presumption as to legality..... 380
mere form of association or combination not controlling test of legality..... 381
combination to carry out restrictions prohibited; when combination may so operate; result is immaterial; each case controlled by own facts..... 382

[References are to Sections]

STATE STATUTES—*Continued.*
violation; where contract legal but one of several links in illegal combination. . . . 383
violations; where contract or combination involves interstate commerce; not subject to State Anti-Trust law. . . . 385
violations; where contract made or combination formed outside of State. . . . 386
violations; combination formed before passage of statute. . . . 387
foreign corporations subject to State Anti-Trust laws. . . . 388
what constitutes a trust; Texas statute. . . . 389
violations; consolidation of several corporations; transfer of property to one. . . . 390
violations; contracts between rival corporations each obtaining interest in other. . . . 391
permitting consolidation of corporations. . . . 392
violations; purchase of assets of corporations. . . . 393
violations; purchase by mining corporation of stock. . . . 394
violations; consolidation parallel and competing lines railroad. . . . 395
violations; contract between railroad and palace car company. . . . 396
violations; merger of street railways. . . . 397
violations; contracts between railroad companies and express or transfer companies; exclusive right. . . . 398
violations; car service association merely agent of several railroads. . . . 399
violations; agreements between steamboat companies. . . . 400
violations; contracts between manufacturer and purchaser not to sell below certain price; proprietary medicines; uniform jobbing price. . . . 401
exclusive rights; contracts between vendor and purchaser; when a violation. . . . 402
exclusive rights; contracts between vendor and purchaser; when not a violation. . . . 403
violation; exclusive contract; sale of by-product distinguished from sale of entire output. . . . 404
violations; contract giving exclusive right to sell goods on certain premises. . . . 405
violations; agreement restraining purchaser using premises for certain purposes. . . . 406
violations; agreement between agent of seller and purchaser; coal oil. . . . 407
violations; contracts between principal and agent. . . . 408
sale of business and good will; contracts not to engage in competition. . . . 409
violations; sale of business and good will; contracts not to engage in competition; exception in statute as to. . . . 410
violations; sale of business and good will; laundry not a manufacturing establishment. . . . 411
violations; agreement to refrain from entering into business. . . . 412
violations; agreements between brewers not to sell to one indebted; to raise price. . . . 413

[References are to Sections]

STATE STATUTES—*Continued.*
violations; agreements between bricklayers' union and mason and builders' association..... 414
violations; associations of cattle owners, buyers and sellers; by-laws and rules..... 415
violations; agreement between cotton seed oil manufacturers; withdrawal of agent by one..... 416
violations; corporation composed of crushed granite dealers; agreement as to bluestone..... 417
violations; consolidation of gas companies; agreements between. 418
violations; agreements limiting right to buy grain..... 419
violations; agreements between ice companies..... 420
violations; agreements between insurance companies or agents to fix rates..... 421
violations; agreements between lumber dealers..... 422
violations; contracts between proprietors of newspapers and job printing establishments..... 423
violations; contracts between newspaper publishers and carriers. 424
violations; agreements between packing companies to control the price of meat.....425
violations; contracts in respect to patented articles..... 426
violations; agreements between physicians; schedule of prices.... 427
violations; physicians; dissolution of partnership; agreement not to practice..... 428
violations; agreements between dealers in plumbers' supplies and master plumbers; plumbers' association..... 429
violations; agreements between publishers; price at retail; not to sell to certain class..... 430
violations; association for distributing news..... 431
violations; agreements between retailers not to purchase from certain wholesalers..... 432
violations; agreements between salt manufacturers..... 433
violations; contracts relating to telephone service..... 434
violations; telegraph companies; service of is not a commodity.. 435
violations; agreements between theatrical owners or managers; plays not commodities..... 436
violations; combination to induce employees to break contract with employees..... 437
violations; undertaking by corporations to induce employees to trade with another..... 438
violations; contract to instruct in treatment of scalp and hair; to use only certain remedies..... 439
requiring production of books and papers..... 494
compelling witnesses to testify; immunity statutes..... 495
examination of witnesses before trial; constitutionality of..... 496
See Defenses; Evidence; Pleading; Remedies; Statutes.

STATUTE,
granting special privilege to printing company void.....note, 6
granting exclusive privilege to construed.....note, 8

[References are to Sections]

STATUTE—*Continued.*
"Uniform Text Book Act" construed.....note, 8
as to receipt and transmission of telegraph messages.....note, 16
distinctions; monopolies resulting from grant or contract..... 46
distinctions; monopolies and combinations..... 48
word "monopolize" is synonymous with "aggregate" or concentrate"..... 50
term "combination in the form of trust" is synonymous with "pooling"..... 51
as to monopolies; construction generally..... 46
distinction between State Anti-Trust statute and contracts in restraint of trade..... 52
distinctions; "restrictions in trade" in statute not synonymous with restraint of trade..... 54
granting rights strictly construed..... 71
history of country and the law; should not close eyes to in construing..... 95
of State; effect of upon illegality of contract in restraint of trade 98
construction of; territorial limits..... 117
as to dams construed..... 266
restricting interstate commerce construed.....note, 206
whether "law" applies only to; impairment of obligation of contracts..... 210
prior construction of changed by judicial decision; obligation of contract not impaired.....note, 212
obligation of contract clause refers to subsequently enacted law of State..... 213
nature of laws prohibited by obligation of contracts clause..... 215
contracts prohibited by not protected by obligation of contracts clause..... 216
exclusive grant; bridge; impairment contract obligation..... 219
powers reserved to; Tenth Amendment to Federal Constitution.. 226
Anti-Trust; constitutionality under due process clause....note, 230
prohibiting combinations, etc.; liberty to or freedom of contract; instances..... 236
validity of Anti-Trust Act of Tennessee of 1903.....note, 237
void; violation Fourteenth Amendment..... 249
permitting surety company to become sole surety held constitutional..... 264
as to insurance companies; prohibitory; held constitutional..... 264
as to building and loan associations held constitutional..... 264
as to acquiring and operating street railways constitutional..... 264
as to formation of gas companies held constitutional..... 264
as to ferry company acquiring additional slips constitutional.... 264
powers to municipality held constitutional..... 264
as to taxes; constitutionality..... 264
granting rights to railroad company; constitutionality..... 264
constitutional provisions prohibiting the creation of corporations by special act..... 265, 266
in exercise of police power; generally..... 271

[References are to Sections]

STATUTE—*Continued.*
construed; exemption from taxation; insurance companies.note, 275
grants strictly construed 275
English statute as to monopolies declaratory of common law.note, 276
Colonial Act of Massachusetts of 1641 construed.....note, 276
patent system rests on Acts of Congress under Constitution..... 282
of monopolies in England 282
copyright statute of United States..... 286
common law and statutory rights as to copyrights distinguished.. 287
of several States protect property in trade-marks..... 288
property in trade-marks does not derive existence from acts of Congress..... 288
Post Roads Act prohibits State monopolies in commercial intercourse by telegraph..... 292
construction of as to electric lighting..... 299
when unconstitutional as granting monopoly as to ferry..... 300
not void as creating corporation by special act; exclusive right or monopoly to supply gas, etc..... 303
acquisition railroad corporation's lands; not a special privilege... 313
when no special privilege granted by in authorizing acquisition of railroad lands..... 313
authorizing railroad company to take capital stock of other railroads by condemnation; no exclusive privilege granted..... 313
providing for uniform series of school text-books; exclusive privileges; monopoly; contracts..... 314
as to special, etc., laws; street railways; exclusive grants to..... 316
prohibiting grants of exclusive rights by city; contract when void 317
violations; where by-laws of associations show illegality..... 384
providing for punishment; word "may" construed..... 442
liability where agreement legal when made; effect of subsequent statute..... 443
construed by highest court of State; review by United States Supreme Court..... 444
of State requiring production of books and papers..... 494
of State compelling witnesses to testify; immunity statutes..... 495
as to examination of witnesses before trial; constitutionality of statute..... 496
giving exclusive rights. See Exclusive Grants; Federal Legislation; Interstate Commerce Act; See Labor or Trade Unions; Post Roads Act; Sherman Anti-Trust Act; State Statutes; Wilson Tariff Act, Amendments to.

STATUTE OF LIMITATIONS,
plea of; indictment under Sherman Anti-Trust Act..... 180
action for damages; Sherman Anti-Trust Act..... 190

STEAMBOAT,
companies; agreements between; violation State statute..... 400
See Shipowners.

[References are to Sections]

STOCK,
in corporation; majority of held by another corporation; violations Sherman Anti-Trust Act 131
exchange of shares of; holding corporation; violations of Sherman Anti-Trust Act 132
pledge of; pleading combination; Sherman Anti-Trust Act 175
right to return of; distribution of shares of holding corporation .. 193
purchase by mining corporation of; violation State statute 394
See Corporations.

STOCKHOLDERS,
not criminally liable for violation by corporation 128
of railroad companies; combination of to obtain control; Sherman Anti-Trust Act 132
of railroads; contracts between to obtain control; Sherman Anti-Trust Act 151
charging of in indictment; Sherman Anti-Trust Act 179
right of to enforce forfeiture of franchise; annulment of charter .. 445
See Corporations.

STREET RAILWAYS,
construction of grants to 71
companies; statutes as to operating; constitutional 264
regulation as to fares not special act 266
public rights; private rights under franchise ..... note, 275
constitutional law; contract; municipality 294
consolidation of 335
merger of; violation State statutes 397
See Railroads.

STREETS,
municipal control of, electric lighting; exclusive contract or monopoly 298, 299
control of, where vested 299
use of to lay pipes, etc., for exclusive gas supply 304
control of; street railways; exclusive grants; municipalities 316
exclusive grant to use. See Electric Lighting; Exclusive Grant; Gas; Street Railways; Telegraph Companies; Telephone Companies; Waterworks.

STRIKE,
defined 41
legal strike defined 42
and boycott distinguished 43
See Labor or Trade Unions.

SUBPŒNA DUCES TECUM,
proceeding under Sherman Anti-Trust Act 186
See Evidence; Procedure.

[References are to Sections]

SUBPŒNAS,
under Sherman Anti-Trust Act 13
under amendments to Wilson Tariff Act 14
See Evidence; Procedure.

SUBWAYS,
in city streets; statutory grants to telephone company; no exclusive right 317

SUFFICIENCY,
of evidence. See Evidence.

SUGAR,
refining companies; violations; Sherman Anti-Trust Act 147

SUIT,
by individual under Sherman Anti-Trust Act; injury to "business or property" 160
by attorney general; Sherman Anti-Trust Act 161
right of creditor; Sherman Anti-Trust Act 162
right of stockholder; Sherman Anti-Trust Act 162
right of member of combination; Sherman Anti-Trust Act 163
by municipality; Sherman Anti-Trust Act 164
by receiver; Sherman Anti-Trust Act 166
Sherman Anti-Trust Act; time of entering into combination as affecting right to recover 167
See Action; Injunction; Pleading.

SUMMONING,
parties under Sherman Anti-Trust Act 13
of parties; jurisdiction; Sherman Anti-Trust Act 169
of parties; not restricted by Judiciary Act; Sherman Anti-Trust Act 170
of parties; exercise of jurisdiction not discretionary; Sherman Anti-Trust Act 171
See Parties; Witnesses.

SUPREME COURT,
appeal to and revision by; Anti-Trust cases ..... note, 14
summoning parties; Sherman Anti-Trust Act 169
See Federal Supreme Court; United States Supreme Court.

SURETY COMPANY,
statute permitting to become sole surety constitutional 264

SYNONYMS, See Distinctions and Synonyms.

[Reference are to Sections]

T

TAXES,
statutes as to; constitutionality 264
statutes exempting insurance companies from construed...note, 275

TEA TRADE,
combination of shipowners to obtain monopoly of 59

TELEGRAPH,
intercourse by is commerce .....note, 16
and telephone company; exclusive contract between void 92
company; exclusive right to by railroad company 93
companies; police power .....note, 271
Post Roads Act prohibits State monopolies in commercial intercourse by telegraph 292
railroad right of way; telegraph line; exclusive contract; monopoly 293
exclusive right of State under contract with 318
interstate commercial transactions affected by common law 318
exclusive grants by State Post Roads Acts 318
service; contracts as to; violation State statutes; service not a commodity 435

TELEPHONE,
an instrument of commerce .....note, 16
and telegraph company; exclusive contract between void 92
company; exclusive grant to; impairment of contract obligation.. 222
companies; whether Post Roads Act includes 292
company; conduits in city streets; statutory grants; no exclusive right 317
companies; exclusive grants or privileges 317
service as a "convenience" 359
service; contracts relating to; violations State statute 434

TENNESSEE,
Constitution; monopolies prohibited 256

TENTH AMENDMENT,
to Federal Constitution; powers reserved to the States 226

TERMINAL,
facilities; contracts between railroads to better; Sherman Anti-Trust Act 151
See Railroads.

TERMS. See Definitions; Words and Phrases.

TERRITORIAL,
legislation; power of Congress; delegation of power to subordinate bodies 368

[References are to Sections]

TERRITORY,
covered; reasonableness as to of contract in restraint of trade... 108

TESTIFYING,
exemptions from; perjuries excepted; enforcing trust and interstate commerce laws.....note, 14
See Evidence; Witnesses.

TESTIMONY. See Evidence; Witnesses.

TEXAS,
Constitution; monopolies prohibited..... 257

TEXT-BOOK,
statutes as to uniform series of in schools; exclusive privilege; monopoly; contracts..... 314

THEATERS,
agreements between owners or managers of..... 436

THREATS,
use of by strikers. See Labor or Trade Union.

TICKET BROKERS,
action by member of combination against..... 163

TILES,
association dealing in; Sherman Anti-Trust Act..... 146

TIME,
of formation of combination; allegation as to; Sherman Anti-Trust Act..... 178
of entering into conspiracy; sufficiency of evidence..... 491

TOBACCO,
combination of jobbers and manufacturers of; Sherman Anti-Trust Act..... 144

TOLL,
exclusive right to at ferry or bridge not a monopoly.....note, 296
exclusive right to control waterway and collect, not a monopoly.. 334

TOLL BRIDGES,
exclusive grants..... 319

TOLL ROADS,
municipal grant; not a monopoly..... 320

TOLL WHARF,
legislature may grant exclusive right for..... 321

[References are to Sections]

"TO MONOPOLIZE,"
test of meaning of 67

TOWN,
delegation of powers to 278
when may provide for market house; monopoly 310
board; contract giving exclusive right to gas company when void as monopoly 306
See Municipality.

TRADE,
defined 25
construed 365
and commerce synonymous; Sherman Anti-Trust Act 58
restraint of; exclusive combination; unlawfulness 59
nature, essentials or test; contracts in restraint of 86–109
contracts in restraint of; public policy as test 86
contracts in restraint of; public policy as test; degree of injury to public 87
where chief object of agreement is to increase; Sherman Anti-Trust Act 121
board of; contracts as to quotations; Sherman Anti-Trust Act ... 150
controlled in England by the crown; statute of monopolies 282
restraint of. See Contracts in Restraint of Trade; Restraint of Trade.
reasonable or unreasonable restraint of. See Contracts in Restraint of Trade; Sherman Anti-Trust Act.

TRADE-MARK,
suit for infringement of; illegality of combination as defense; Sherman Anti-Trust Act 159
existence of property in, not derived from acts of Congress 288
protected by common law and statutes of States 288
monopoly; exclusive rights 288
nature of 288
personal one not a subject of monopoly 288
extent of exclusive right or monopoly therein 288–291
intent of injunction bill to extend monopoly of; loss of right to individual appropriation 290
loss of right; expiration of patent; use of general name 291

TRADE-NAMES,
monopoly; exclusive rights 288
when unfair competition cannot be predicated on use of 289
when party guilty of unfair trade ..... note, 289
intent of injunction; bill to extend monopoly of; loss of right to individual appropriation 290

TRADE-SECRET,
when party guilty of unfair trade ..... note, 289

[References are to Sections]

TRADE UNION,
defined 38, 44
blacklist defined 30
See Labor or Trade Unions.

TRAFFIC,
defined 26

TRAFFIC ARRANGEMENT,
held void 197
See Freights; Interstate Commerce Act; Pooling of Freights.

TRAFFIC RATES,
contracts between railroads; Sherman Anti-Trust Act 151

TRANSFER,
company and railroad company; contracts; exclusive right 398

TRANSPORTATION,
defined 27
within the State defined 28
purpose of Sherman Anti-Trust Act as to rates of 112
contracts as to rates for; Sherman Anti-Trust Act 151
prohibited; North Dakota Constitution 253
monopolies to control prohibited; South Dakota Constitution ... 255
combinations to control prohibited; Utah Constitution 257
combinations to control prohibited; Washington Constitution ... 259
not part of essential functions of State to provide 268

TREATMENT,
of scalp and hair; contracts as to; to use only certain remedies 439

TRUST,
defined 12
Sherman Anti-Trust Act 13
meaning of in Montana Constitution 251
what constitutes; Texas statute 389

U

ULTRA VIRES,
contracts not protected by obligation of contracts clause 216

UNFAIR COMPETITION,
when cannot be predicated solely on use of trade-name 289

"UNIFORM TEXT-BOOK ACT,"
construed ..... note, 8
exclusive privileges; monopoly; contracts 314

[References are to Sections]

UNIONIZE,
shops; combinations to; Sherman Anti-Trust Act..... 139
See Labor or Trade Unions.

UNION LABEL,
on city printing; when a monopoly..... 322
See Labor or Trade Unions.

UNION LABOR,
city requirement that only union labor be employed..... 323
See Labor or Trade Unions.

UNION MEN,
combination to compel employment of; Sherman Anti-Trust Act 139
See Labor or Trade Unions.

UNIONS. See Labor or Trade Unions.

UNION SHOP,
defined..... 45
city requirement that only union shops be employed..... 323
See Labor or Trade Unions.

UNITED STATES,
conspiracy to commit offense against; overt acts..... 64
conspiracy to defraud; overt act; indictment.....note, 64
conspiracy against; place of doing overt act; when crime complete
note, 64
conspiracy to commit offense against not felony at common law
note, 64
government no inherent powers of sovereignty..... 269
powers of. See Constitutional Law; Federal Constitution.

UNITED STATES ATTORNEY,
suits by under Sherman Anti-Trust Act..... 161

UNITED STATES CIRCUIT COURTS,
Anti-Trust cases given precedence in.....note, 14

UNITED STATES CONSTITUTION,
legislative powers under.....269, 270
See Federal Constitution.

UNITED STATES SUPREME COURT,
appeal to and revision by; Anti-Trust cases.....note, 14
authority of; obligation of contracts; legal and legislative contracts; construction of contract..... 218
review by of decision of State court..... 367
review by; statute construed by highest court of State..... 444
See Federal Supreme Court.

[References are to Sections]

UNREASONABLE,
restraint of trade. See Contracts in Restraint of Trade; Restraint of Trade; Sherman Anti-Trust Act.

UNREASONABLY,
in Alabama Constitution construed 241

UTAH,
Constitution; combinations to control prices, cost of exchange or transportation prohibited; duty of legislature 258

V

VENDEE,
action against; when illegality of combination no defense; Sherman Anti-Trust Act 155, 156
action against; when illegality of combination a defense; Sherman Anti-Trust Act 157
of exclusive right to supply gas; rights of 307
See Business; Good Will; State Statutes.

VENDOR,
and purchaser; contracts between; exclusive rights; when violation of State statute 402
and purchaser; contracts between: exclusive rights; when not violation of State statute 403
and purchaser; sale of by-product distinguished from sale of entire output 404
and purchaser; agreement restraining purchaser from certain use of 406
agreement between purchaser and agent of; coal oil 407
See Business; Good Will; State Statutes.

VESSELS,
contracts between owners of; Sherman Anti-Trust Act 152
See Shipowners; Steamboats.

VILLAGE,
authorities cannot create monopoly 280
or city; when cannot create monopoly as to slaughter or market house 315
See Municipality; Town.

VIOLATIONS,
Sherman Anti-Trust Act; what essential to constitute 123
Sherman Anti-Trust Act; injunctions against 123
Sherman Anti-Trust Act; essential of contracts in order to constitute 124
Sherman Anti-Trust Act; what constitute; generally 125

[References are to Sections]

VIOLATIONS—*Continued.*
Sherman Anti-Trust Act; size or extent of business not alone test 126
Sherman Anti-Trust Act; combinations entered into before passage of act 127
Sherman Anti-Trust Act; by combinations; stockholder not criminally liable 128
Sherman Anti-Trust Act; defenses; generally 129
Sherman Anti-Trust Act; purchase of business and good will 130
Sherman Anti-Trust Act; where corporation holds majority of stock of another corporation 131
Sherman Anti-Trust Act; exchange of share of stock; holding corporation 132
Sherman Anti-Trust Act; contracts between holders of copyrights 133
Sherman Anti-Trust Act; contracts between owners of patents .. 134
Sherman Anti-Trust Act; patents; licenses; conditions; generally 135
Sherman Anti-Trust Act; patent licenses; conditions in generally 135
Sherman Anti-Trust Act; particular conditions in patent licenses 136
Sherman Anti-Trust Act; right to modify terms of patent licenses 137
Sherman Anti-Trust Act; contracts as to proprietary medicines .. 138
Sherman Anti-Trust Act; acts and combinations of labor organizations 139
Sherman Anti-Trust Act; contracts between manufacturers 141
Sherman Anti-Trust Act; combinations; manufacturers of shingles 142
Sherman Anti-Trust Act; combination; manufacturers of iron pipes 143
Sherman Anti-Trust Act; combination; tobacco manufacturers and jobbers 144
Sherman Anti-Trust Act; combinations; manufacturers of liquorice paste 145
Sherman Anti-Trust Act; association dealing in tiles, mantels and grates 146
Sherman Anti-Trust Act; sugar refining companies 147
Sherman Anti-Trust Act; dealers in fresh meat 148
Sherman Anti-Trust Act; association of cattle dealers 149
Sherman Anti-Trust Act; board of trade; contract as to quotations 150
Sherman Anti-Trust Act; railroad companies 151
Sherman Anti-Trust Act; owners of vessels 152
Sherman Anti-Trust Act; mining contracts 153
Sherman Anti-Trust Act; contracts between coal companies 154
of statute as to insurance combinations ..... note, 370
of statute; forfeiture of charter of corporation 374
of State statutes; contracts; combinations; legality and illegality; general principle 378
of State statute; intention as affecting; presumption as to 379
of State statute; all provisions of contract should be considered; presumption as to legality 380
of State statutes; mere form of association or combination not controlling test of legality 381

[References are to Sections]

VIOLATIONS—*Continued.*
of State statutes; combinations to carry out restrictions prohibited; where combination may so operate; result is immaterial; each case controlled by own facts 382
of State statutes; where contract legal but one of several links in illegal combination 383
of State statutes; where by-laws of association show illegality ... 384
of State statutes; where contract or combination involves interstate commerce; not subject to State Anti-Trust Law 385
of State statutes; where contract made or combination formed outside of State 386
of State statute; combination formed before passage of statute .. 387
of State statute; what constitutes a trust; Texas statute 389
of State statute; foreign corporations subject to State Anti-Trust Laws 388
of State statutes. See particular violations; Remedies; State Statutes.

VOLUNTARY PURCHASER,
contract with combination; illegality of combination no defense; Sherman Anti-Trust Act 155, 156

W

WAREHOUSES,
when monopoly in business of not a monopoly 324

WASHINGTON,
Constitution; monopolies and trusts prohibited; combinations to control prices, production, transportation or to prevent competition prohibited; duty of legislature 259
Constitution continued; its provisions not self-executing 260
Constitution continued; combinations of common carriers to share earnings prohibited 261

WATER,
instance of exclusive grant of right to furnish ..... note, 6
company; sale of exclusive agency of for a flume company .. note, 8
exclusive contracts; grants or privileges, impairment of contract obligation 225
supply; police power of municipality 225
ordinance regulating water rates; obligation of contract .... note, 225
exclusive privilege to supply; due process clause of Fourteenth Amendment ..... note, 230
exclusive contract to supply; when no breach 225
companies; construction of grants to 71
company; exclusive grant to; not special act 266
not part of essential functions of State to provide 268
supply of; police power ..... note, 271

[References are to Sections]

WATER—*Continued.*
exclusive privilege to supply; obligation of contract; municipal corporation.....note, 275
supply; condemnation of; no exclusive privilege beyond recall note, 275
contract to supply; exclusive right; power of city to construct plant.....note, 275
See Waterworks.

WATERWAYS,
exclusive right to collect tolls and control waterway; not a monopoly..... 334
See Water; Waterworks.

WATER WORKS,
company; ordinance granting exclusive privilege to.....note, 8
maintained by municipality; business injured by unlawful combination; action by municipality; Sherman Anti-Trust Act..... 164
act as to board of not special act..... 266
municipal contracts as to, conferring special privilege or immunity or monopoly; constitutional law..... 294
or water supply; power of municipality..... 325
or water supply; exclusive right of municipality and of private corporation distinguished..... 326
or water supply; grant by State of exclusive privilege or monopoly 327
or water supply; grant by municipality of exclusive right or monopoly..... 328
or water supply; instances of valid and void contracts by city; exclusive rights; monopoly..... 329, 330
or water supply; when no defense that contract creates monopoly 331
or water supply; injunction restraining municipality..... 332
See Water; Waterways.

"WAY,"
in statute providing for punishment construed..... 442

WEIGHT,
of evidence. See Evidence.

WHARF,
grant of exclusive right to use end of, for ferry purposes..... 302
right to exclusive occupation of, and public use.....note, 321
See Toll Wharf.

WILSON TARIFF ACT,
amendments to..... 14

WITNESSES,
power to summon; Sherman Anti-Trust Act..... 169
power of court as to; violation Sherman Anti-Trust Act..... 186

[References are to Sections]

WITNESSES—*Continued*.
examination of a "proceeding"; Sherman Anti-Trust Act..... 187
compelling of to testify; State statutes; immunity statutes..... 495
See Evidence.

WORDS AND PHRASES,
"Any part" in Sherman Anti-Trust Act. See "Appendix A."
"Attempts to monopolize." See "Appendix A."
civil conspiracy defined..... 4
closed shop defined..... 37
"combination in the form of trust" used in statute synonymous with "pooling"..... 51
"commerce" in Sherman Anti-Trust Act..... 115
commerce with foreign nations defined..... 16
competing line defined..... 19
conspiracy in restraint of trade defined..... 20
contract in restraint of trade defined..... 23
"contract in restraint of trade" analogous to "monopolize"; Sherman Anti-Trust Act..... 58
due process.....note, 230
exclusive right..... 6
holding corporation defined..... 29
"in restraint of trade" synonymous with "trade or commerce"; Sherman Anti-Trust Act..... 58
in restraint of trade or commerce defined..... 24
in restraint of trade..... 361
interstate commerce defined..... 15
intrastate commerce defined..... 17
labor organization defined..... 38
labor union defined..... 38
law of the land..... 203
legal strike defined..... 42
"monopolize" used in statute synonymous with "aggregate" or "concentrate"..... 50
"monopolize"; Sherman Anti-Trust Act..... 123
"monopolize." See "Appendix A."
open shop defined..... 40
parallel line defined..... 19
"real value" construed..... 364
"reasonable competition" in Alabama Constitution..... 241
restraint of trade defined..... 24
"restraint of trade" in Sherman Anti-Trust Act..... 115
"restraint of trade." See "Appendix A."
"restrictions in trade" not synonymous with "restraint of trade" 54
"to monopolize"..... 67
"to monopolize." See "Appendix A."
"trade" and "commerce" synonymous; Sherman Anti-Trust Act 58
trade and manufacture.....note, 25
trade union defined..... 38
trading or mercantile business defined.....note, 25

[References are to Sections]

WORDS AND PHRASES—*Continued.*
transportation companies construed.....note, 27
transportation within the State defined..... 28
union shop defined..... 45
"unreasonably" in Alabama Constitution..... 241
See Definitions.

WORKINGMEN. See Labor or Trade Unions.

WYOMING,
Constitution; monopolies prohibited; combinations to prevent competition, control production or prices, etc., prohibited.... 262