TOBACCO TRUST DECISION

BY THE U. S. CIRCUIT COURT

Opinions Handed Down by Judge Lacombe, in Which the American Tobacco Company is Declared to Be a Corporation in Restraint of Competition and Therefore Guilty of Violating the Sherman Act, and the Dissenting Opinion of Judge Ward, Who Dissents From the Verdict of the Majority.

Following is the full text of the opinion of Judge Lacombe, presiding in the United States Circuit Court of New York, in the case against the American Tobacco Company, in which the defendant company was held to be a corporation acting in restraint of trade and therefore in violation of the Sherman anti-trust act, and the dissenting opinion of Judge Ward.

The United States of America vs. The American Tobacco Company, et al. Before Lacombe, Coxe, Word ond Noyes, Circuit Judges.

OPINION OF JUDGE LACOMBE.

The act of July 2d, 1890, in its first section declares to be illegal "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." That declaration, ambiguous when enacted, is, as the writer conceives no longer open to construction in the inferior Federal courts. Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language 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. As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very "life of trade," it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not the majority of the community and that it intended to secure such competition against the operation of natural laws. The act may be termed revolutionary because, before its passage, the courts had recognized a "restraint of trade" which was held not to be unfair, but permissible, although it operated in some measure to resist competition. By insensible degrees, under the operation of many cases, business, manufacturing and trading alike, has more and more developed a tendency towards larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured and industrial progress assured. But 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 construed prohibits every contract or combination in restraint of competition. Size is not made 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.

Accepting this construction of the statute—as it would seem this court must accept it—there can be little doubt that it has been violated in this case. The formation of the original American Tobacco Company, which ante-date the Sherman act, may be disregarded. But the present American Tobacco Company was formed by subsequent merger of the original company with the Continental Tobacco Company and the Consolidated Tobacco Company and when that merger became complete two of its existing competitors in the tobacco business were eliminated.

What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects, on production or prices. The record in this case does not indicate that there has been any increase in the price of tobacco products to the customer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. In this connection, interesting testimony is given by one of the government's witnesses. The deponent was for many years an independent dealer and secretary of the Independent Tobacco Manufacturers' Association. He testified: "My business was conducted by me alone; I had no partner, no corporation. It had got to be a large business and if anything happened to me there was no one there to continue it. The value of the business was in a brand and I became fearsome what would happen to it if I would be disabled in any way; it would not be of much value to my estate unless some one had a knowledge of the business beyond which you cannot conduct it profitably personally. It will get so big that it requires an organization. And then, too, I was only identified as a scrap tobacco manufacturer, and going by precedent, the consuming public of tobacco changes every 10, 12 or 15 years and I have figured that might happen again, and it wouldn't use scrap tobacco and might use something else and then I would not have much business, I thought; whereas the American Tobacco Company had been in conference with me; I knew the officers and I made up my mind when a proper proposition was made to me, such as was satisfactory to me, I would be very anxious to affiliate myself with a good big tobacco organization, large enough and strong enough to take care of all conditions that might come up. I was not induced to sell out by a decrease of profits or by any unfair competition; I never had any fear they could drive me out of business." During the existence of the American Tobacco Company new enterprises have been started—some with small capital in competition with it and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, steadily increased until it has nearly doubled, while at the same time 130,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant, and at large expense, new markets for American tobacco have been opened or developed in India, China and elsewhere. But all this is immaterial; each one of these purchases of existing concerns, complained of in the petition, was a contract and combination in restraint of a competition existing when it was entered into, and that is sufficient to bring it within the ban of this drastic statute.

A large part of the record is taken up with testimony as to concealment of the relations existing between of the defendants. It is difficult to see what bearing this has on the question in controversy. If an agreement by a corporation to acquire a majority of the stock of a competing corporation is obnoxious to the statute, its vice is certainly not eradicated by the promptest publicity. If, on the other hand, such an agreement is innocent it does not become guilty merely because the parties to it keep their own counsel about their mutual transactions.

It is contended that the case at bar is not within the statute since the various combinations complained of deal primarily with manufacture, and United States vs. Knight, 156 United States, 1, is cited in support of that proposition. It seems to the writer, however, that subsequent decisions of the Supreme Court have modified the opinion in that case, and that the one at bar is as much within the statute as was the combination condemned in Loewe vs. Lawlor, 208 United States, 274. Relief under the statute should be granted against the several domestic corporations defendant.

The Imperial Tobacco Company of Great Britain and Ireland, Limited, is one of the defendants. It is a British corporation and entered into a contract with The American Tobacco Company in the City of London, where such contract was a legal and proper one. It is apparently the contention of petitioner that subsequent acts of the Imperial Tobacco Company in this country practically amount to the entering into a combination or contract of the sort specified in the statute. So far as appears the only transactions of that company here are these: It buys leaf tobacco of the American grower in very large quantities by its own independent force of purchasing employes; it does not sell its manufactured products here—indeed such products, having to pay both tariff duties and revenue tax, could not be sold here except at a loss, save in the case of a few fancy high-priced brands. It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but, if it be, this act seems not to have gone to that extent. The petition should be dismissed as to the Imperial Tobacco Company. A like disposition should be made as to the British-American Company.

As to relief. In the main brief it is prayed that the domestic defendants The American Tobacco Company, American Snuff Company and others enumerated should be restrained from carrying on interstate or foreign commerce, until conditions existing before illegal contracts or combinations were entered into are restored. Such relief is certainly drastic enough and should be efficient. In the petition it is prayed that receivers be appointed for the various companies, who, apparently are to conduct a tobacco business and create some sort of artificial competition to take the place of the natural competition which, it is alleged, was destroyed by the combinations. Such a scheme seems impracticable and is wholly unnecessary. I concur with Judge Cox in his reasoning and conclusions touching the United Cigar Stores Company and the R. P. Richardson Company. And also concur in the suspension of injunction pending appeal.

OPINION OF JUDGE WARD, DISSENTING.

I feel constrained to dissent from the judgment of the court in this case. The United States charges in its bill that the defendants have been and are engaged in an illegal combination to restrain and monopolize trade, in violation of an act of Congress passed July 2, 1890, known as the "Sherman act," and prays for relief, by injunction and otherwise.

An outline of the act complained of as evidencing a combination in restraint of trade and a monopoly is as follows:

In January, 1890, the American Tobacco Company was incorporated to take over the business of five independent concerns almost wholly in the manufacture of cigarettes. This company substantially covered the entire output of cigarettes in the United States. It is no defense that it was incorporated some six months before the passage of the Sherman act, if an illegal combination within the meaning of that act, United States vs. Trans-Missouri Freight Association, 166 U. S., 290. There is no evidence that the combination was the result of cutting of prices or of a commercial war of any kind. The company, from time to time bought other plants engaged in manufacturing smoking tobacco and others engaged in manufacturing plug tobacco.

In 1898 the Continental Tobacco Company was incorporated to take over the plug tobacco business of the American Tobacco Company and the business of five other independent concerns manufacturing principally plug tobacco. There had been a war in the way of cutting of prices in certain brands of plug tobacco which probably had something to do with the formation of it.

Subsequently the American Tobacco Company bought or obtained control of many plants engaged in the manufacture of smoking tobacco, and the Continental many plants engaged in the manufacture of plug tobacco. Some of them were absorbed, and others like the defendants, continued their corporate existence.

In 1900 the American Snuff Company was incorporated to take over the snuff business of the American Tobacco Company, of the Continental Tobacco Company, and of two other independent manufacturers.

In 1901 the American Cigar Company was incorporated to take over the business of the American Tobacco Cmpany and Powell Smith & Company in manufacturing and selling cigars, cheroots and stogies.

In the same year the Consolidated Tobacco Company was incorporated to take over as a holding company, in exchange for its bonds, substantially all of the stock of the American Tobacco Company and the Continental Tobacco Company.

In 1902 the American Stogie Company was incorporated to take over the stogie business of the American Cigar Company, the American Tobacco Company and the Continental Tobacco Company.

In 1904 the American Tobacco Company, the Continental Tobacco Company and the Consolidated Tobacco Company were merged into the present American Tobacco Company.

The companies above named, being the principal defendants, acquired control of the plants of many other concerns engaged in manufacturing or distributing tobacco, and also of concerns supplying things necessary in the tobacco business, such as tinfoil, licorice root and its products, bags, boxes, signs, and briar pipes. Most of the vendors of the tobacco plants entered into contracts not to engage in the business sold in certain territory for a certain time, which I regard as proper for the protection of the vendees.

Referring to the combination of 1904, which created the present American Tobacco Company, it is to be remembered that the Consolidated Company was a mere holding company, and the American Tobacco Company an dthe Continental Tobacco Company were in no sense competitors, the former being engaged in manufacturing plug and twist tobacco. Their merger was not in restraint of trade unless it could be regarded as an illegal monopoly because it produced from sixty to ninety per cent. of the total output of the United States of the various articles it manufactured.

The profits of the present American Tobacco Company and its controlled companies have been and are very large, and their business, excluding cigars, covers not less than seventy-five per cent. of the whole output of manufactured tobacco in the United States.

The government has offered in evidence a stipulation (government's Ex. No. 8) of all the defendants except the Imperial Tobacco Company, the United Cigar Stores Company, R. L. Richardson Company, Inc., and W. C. Reed, which must be taken correctly to describe the way the business is done, there being nothing in the record to the contrary, as follows:

"We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products except Imperial Tobacco Company, Limited, purchased or now purchases some or all of the requisite raw material in States or countries other than those in which the factories were or are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in States or countries other than in which the factory was or is located orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and if approved they are filled by the delivery of the goods to a common carrier, where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carier."

It can hardly be doubted that a manufacturer who makes his products of materials found within the State of manufacture and sells his entire product there is not engaged in interstate commerce. It will make no difference that the purchasers send and sell the manufacturer's product throughout the United States. Except that they buy their raw material in other States, this is the way the manufacturing defendants in this case do their business. Their business is manufacturing and the fact that they get raw material in other States and send agents to other States to solicit orders does not make their business interstaate commerce. This certainly appears to be the view of the Supreme Court in the case of the United States vs. E. C. Knight Co., 156 U. S., 1.

In it the American Sugar Refining Company and four refineries in Philadelphia were all engaged in competition with each other in the importing of raw sugar into the United States, refining it and selling it throughout the country. Their business was exactly like that of the principal defendants, except that it was in a necessary of life instead of a luxury. A combination was made between the American Sugar Refining Company and the Pennsylvania refineries by the exchange of all their capital stock for shares of its capital stock. The monopoly was greater than in the case now under consideration because the combination manufactured ninety-eight per cent. of the entire sugar output of the United States. The bill averred that the American Sugar Refining Company monopolized the manufacture and sale of refined sugar in the United States and controlled its price, had combined with the other defendants to restrain the commerce in refined sugar in the several States and foreign nations and to increase its price. The Trial Court (60 F. R., 306) found that:

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

When the case reached the United States Supreme Court, Chief Justice Fuller, who delivered the opinion of the Court, assumed that the transaction did constitute a monopoly, but held that it was a monopoly of the manufacture of a necessary of life. He said at page 17:

"The object was manifestly private gain in the manufacture of a commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manuafcture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for re-sale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject matter of the sale was shares of manufacturing stock and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

It is clear that the court recognized that the business of the defendants, though manufacturing, did incidentally and not directly, embrace interstate commerce. If this fact sufficed to bring them within the Sherman act then almost every occupation may be regulated by Congress.

The dissenting opinion of Harlan, J., proceeded principally upon the theory that the combination was necessarily one relating to the sale of goods, and raised every objection now relied upon by the government, to the conclusion of the court.

The majority of the court think that subsequent decisions, especially Loewe vs. Lawler, 208 U. S., 274, have impliedly overruled the Knight case. In no subsequent decision has it been expressly qualified, and in the Loewe case, Chief Justice Fuller, delivering the unanimous opinion of the court, said at page 293:

"We do not propose to comment on

such cases as United States vs. Knight, 156 U. S., 1; Hopkins vs. United States, 171 U. S., 578, and Anderson vs. United States, 171 U. S. 604, in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intent of the combination determined its legality."

It has been suggested that the plaintiffs in the Loewe case must have been held by the court to have been directly engaged in interstate commerce or otherwise the demurrer would not have been overruled; and if they were directly engaged in interstate commerce the defendants in the Knight case must have been so also, the only difference being that one manufactured sugar and the other manufactured hats. But one need not be engaged in interstate commerce at all to get the benefit of the Sherman act. Section 7 authorizes "any person who shall be injured in his business or property" by a violation of the act to bring just such a suit as Loewe brought. Although the plaintiffs, as manufacturers, might not have been engaged in business which would bring them within the operation of the Sherman act, still a combination of their parties to restrain a part of their business incidentally embraced in interstate commerce might well bring that combination within the operation of the act. The decision in the Loewe case was unanimous and expressly approving the Knight case, proceeded upon the ground that the defendant's combination necessarily and directly restrained the purchases and sales of hats, between the plaintiffs and citizens of others States. Three of the justices who were of the majority in the Knight case concurred in the Loewe case and it can hardly be supposed that they were overruling the Knight case by implication.

I think it conclusive in this case. If it be said this conclusion would leave great evils without correction, the answer is they may be corrected by the States or in the territories by the United States, because they can prevent monopolies and combinations in restraint of trade within their own borders, whether carried on by their own citizens or by others.

Assuming, however, that the Knight case does not apply, are the defendants within the prohibition of the first section of the Sherman act? Undoubtedly the original American Tobacco Company and the Continental Tobacco Company (both of which have ceased to exist), and the American Snuff Company and the American Cigar Company were combinations of independent concerns, but every combination is obviously not within the act. The prohibition is against combinations whose purpose is to restrain trade. Such a combination is within the act even if it fail to do so, while one whose purpose is not to restrain trade is not within the act even if it incidentally does so. Intention is of prime importance because the acts prohibited are made crimes. So far as the volume of trade in tobacco is concerned, the proofs show that it has enormously increased from the raw material to the manufactured product since the combinations, and, so far as the price of the product is concerned, that it has not been increased to the consumer and has varied only as the price of the raw material of leaf tobacco has varied.

The purpose of the combinations was not to restrain trade or prevent competition, although competition was incidentally prevented, but, by intelligent economies, to increase the volume and the profits of the business in which the parties were engaged. No agreements were entered into, as in many of the decided cases, that operated directly on interstate commerce through common carriers by maintaing rates or preventing competition, like United States vs. Trans-Missouri Freight Association, 166 U. S., 290; United States vs. Joint Traffic Association, 171 U. S., 505, and Northern Securities Co. vs. United States, 193 U. S., 197, or which limited output of manufacturers or regulated the prices at or the territory within which their output should be sold throughout the United States, as in Addyston Pipe and Steel Co. vs. United States, 175 U. S., 211; Montague & Co. vs. Lowrey, 193 U. S., 38; Swift & Co. vs. United States, 196 U. S., 375, or which sought to prevent any interstate commerce at all in the goods in question, as in Loewe vs. Lawler, 208 U. S., 274.

The case of the Shawnee Compress Company vs. Anderson, 209 U. S., 423, on which the government relies, throws little light on the one under consideration. It was an appeal from the Supreme Court of the Territory of Oklahoma, which court found as a fact that the lease in question was made in aid of a conspiracy to suppress competition and secure a monopoly. There is nothing to show whether the court was relying upon the common law, the trust act of the Territory or the Sherman act. The Supreme Court felt itself confined to determining whether there was evidence to support the conclusion of the Territorial court, and, finding that there was, affirmed the decree. Mr. Justice McKenna said, referring to the trial court:

"The court further said that it found 'ample authority in the record for that action' and following the rule 'often reiterated' the court further said 'it must hold that where a record contains some evidence to support the finding of the trial court' the judgment will not be disturbed.

"The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it on account of the view we entertain of the second proposition.

"In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial cour. The court therefore must either have conceded that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusions of fact. As our view in the nature of things is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court belbw to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. Southern Lumber Co. vs. Ward, 208 U. S., 126."

It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce between the States under the second section of the Sherman act. As this section prohibits a monopoly of or an attempt to monopolize any part of such commerce, it cannot be literally construed. So applied, the act would prohibit commerce altogether. The first and second sections must be read together, and I think mean the same thing, the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. It must be understood to prohibit monopolies or attempts to monopolize brought about by the unlawful means contemplated in the first section, viz., the purpose to restrain trade by preventing competition and preventing others from participating in it.

Tame third section of the act bears out this construction because it does not mention monopolies or attempts to monopolize in the errritories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them whic hit pronounces crimes if committed in the States.

The purposes o fhte defendants should not be made to depend upon occasional illegal or oppressive acts or letters, but must be collected from their conduct as a whole. A perusal of the record satisfies me that their purposes and conduct were not illegal or oppressive, but that they strove a severy business man strives, to increase their business, and that their great success is a natural growth resulting from industry, intelligence and economy, doubtless largely helped by the volume of business done and the great capital at command. For these reasons, without considering others discussed by counsel, I think the bill should be dismissed.

DECISION ATTRACTS ATTENTION.

Scope and Effect Upon All Classes of Industrial Combinations Engaged in Inter-State Trade is Regarded as Important—Appeal to the Supreme Court Under Way.

New York, Nov. 14.—The sweeping character of the recent decision of the United States Circuit Court in declaring the American Tobacco Company to be a combination in restraint of trade, is attracting widespread attention, particularly for its scope and effect upon all classes of industrial combinations engaged in inter-State traffic. An appeal to the United States Supreme Court is being prepared.

The full text of the decision discloses, in the language of the judges, the gradual development of judicial interpretation of the law up to the present time, Judge Coxe, one of the concurring judges, stating that "since the Knight case (against the Sugar Refineries), the tendency has been constantly towards a wider scope of the statutes."

An examination of the numerous decisions since the Knight case leads to the conclusion, Judge Coxe says, that there has been a general tendency towards a broader and more liberal construction of the statutes.

Judge Lacombe, in his majority opinion, defines the statutes of the law to-day in part as follows:

"By insensible degrees, under the operation of many causes, business, manufacturing and trading alike, has more and more developed a tendency towards larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured and industrial progress assured. But 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 construed, prohibits every contract or combination in restraint of competition. What benefits have come from this combination, or from others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects, on production or prices."

Judge Noyes, who concurred with Judge Lacombe, says:

"It is of much importance to many people at the present time whether the defendants have entered into an unlawful combination. It is of the most momentous importance to all the people for all the time whether the national government has power to reach industrial combinations dealing across State lines. All must agree that conditions may arise in the future requiring legislative action which shall be both uniform and effective."

An early decision in the Supreme Court is anticipated because of the provision of the Federal law advancing appeals in such cases.