REPORT

of

Committee on Thesis

The undersigned, acting as a Committee of the Graduate School, have read the accompanying thesis submitted by Harry L. Altman for the degree of Master of Arts. They approve it as a thesis meeting the requirements of the Graduate School of the University of Minnesota, and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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Price Maintenance

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CHAPTER I.

INTRODUCTION.

Among the questions of particular import to business that the Federal Congress is now asked to legislate upon is that of Price Maintenance.(1) This is the subject-matter of the Stephens-Ashurst Bill (H. R. 9671, S._____) which, at the present writing- May, 1916, is before the respective interstate commerce committees of both Houses, and upon which hearings are soon to be had by these committees-the House Committee on Interstate and Foreign Commerce, and the Senate Committee on Interstate Commerce.

Price Maintenaince is a term used to designate the business policy by which a manufacturer stipulates the minimum price at which goods of his own manufacture shall be resold thru the various stages of distribution. In other words, the manufacturer fixes once for all a uniform price, at which the ultimate consumer may obtain the article manufactured by him.

In public opinion this policy is principally connected with the distribution of goods identified by patent, copyright, trademark or special brand; and,as the scope of this paper, I take Price Maintenaince as applied to goods so identified.

II.

Price Maintenaince is but a recent phenomenon having developed coincidently with the evolution of modern advertising; and modern advertising, that is, advertising as a prominent factor in the marketing of goods, dates back only a generation.

(1) Sixty-Fourth Congress, First Session.

With the industrial expansion following the Civil War, coincident with the development of transportation and other means of communication, a widening of the manufacturer's market became possible; indeed under sharp competition, often necessary. First by means of traveling salesmen and then thru the additional medium of advertising the manufacturer stretched his markets in all directions. With the growth of advertising came standardization in the marketing of goods. It became customary for the manufacturer to introduce certain brands of goods for sale in standard bags or boxes holding specified quantities; and in addition to affix the time honored trade mark (2) to further identify the goods and in large measure thus to guarantee their value. The manufacturer seemed to develope a veritable mania for individual brands. Hundreds of new brands appeared on the market; and the public manifestly looked with increasing favor upon the standardized packages bearing such brands or trade marks. One need but go thru any city grocery, or other store for that matter, to notice that such identified goods are still highly regarded by the public. Indeed, special brands are still increasing in numbers. (3)

(2) Altho the prolific application of trade marks is but a recent matter, "the use of trade marks dates from the very earliest times of which we have knowledge": E. S. Rogers, Good Will, Trade Marks and Unfair Trading, 34.

(3) The recent report upon the retail grocery trade made by Harvard University Graduate School of Business Administration states that the average grocery store carries from 750 to 1000 brands of merchandise.

Coincident with the advent of the highly advertised identified goods in the 80's, came price maintenance of such goods as a business policy; likewise, however, there ensued the selling of such goods at less then the price set by the manufacturer. This latter practice came to be termed "price-cutting".

In the latter 90's, thru a misconception of the import of the Button-Fastner Case,(4) it was assumed that under the Patent Act, a patentee could fix the resale price of a patented article by a so-called license agreement attached to the article. A typical form of an agreement of this kind, is that of the Victor Talking Machine Company,

"This machine, which is registered on our book no.___ is licensed by us for sale and use only when sold to the public at a price not less then $ ----. No license is granted to use this machine when sold at a less price. Any sale or use of this machine when sold in violation of this condition will be considered as an infringement of our United States patent under which this machine and records used in connection therewith are constructed and all parties so selling or using this machine contrary to the terms of this license will be themselves liable to suit and damages... A purchase is an acceptance of the terms of this license."(5)

(4) Heaton Peninsular Button Fastner Co. v. Eureka Speciality Co. (1896), 77 Fed. 288.

(5) Victor Talking Machine Co. v. The Fair (1903, C. C. A. 7th. Cir.) 123 Fed. 424.

By virtue of their analogy to patent rights, similar license agreements were employed in the sale of copyrighted works and of goods manufactured under secret process.(6)

From 1901 to 1908 a number of cases in the lower Federal Courts involving Price Maintenance as to patented articles and goods made under a secret process were decided favorably to such price maintenance.(7)

In 1908, the United States Supreme Court, in the case of Bobbs-Merrill Co. v. Straus (210 U. S. 334), denied the right of a copyright owner, by notice given in the book, to maintain, by virtue of the copyright law, the resale price on a copyrighted book.

In 1910, the same Court held to be illegal an attempt to control after sale, thru a system of contracts, the resale price of an article, either on the ground that the contracts related to an article manufactured under a secret process, or simply by virtue of the fact that they related to a product of the vendor's own manufacture.(8)

In the so-called Sanatogen Case, in 1913, the United States Supreme Court denied the right of a patentee, upon sale of a patented article, to fix the resale price of the article by notice affixed to it or by contract.(9)

(6) See Chapters VII and VIII.

(7) See Chapter VII.

(8) Dr. Miles Medical Co. v. John D. Park & Sons (220 U. S. 373)

(9) Bauer & Cie etal v. Js. O'Donnell (229 U. S.1).

The advocates of Price Maintenance now turned to Congress to obtain legislative sanction of their policy. Two bills in behalf of price maintenance were introduced in the House in the second session of the Sixty-Third Congress and were both referred to the House Committee on Interstate and Foreign Commerce.

The "Stevens Bill" (H. R. 13,305) introduced by Congressman Stevens of New Hampshire provided that contracts for the sale of goods under trade mark or special brand, for the purpose of prescribing uniform resale prices shall be legal under certain conditions subject to certain restrictions, namely: (10)

(1) That the vendor does not have a monopoly in the same general class of merchandise as the articles covered by the contract and is not a party to a combination or understanding for the purpose of forming a monopoly in such general class of merchandise.

(2) That he affixes notice to each article stating the price of sale of such article to the public;

(3) And files a statement with the Bureau of Corporations (now Federal Trade Commission) setting forth the brand and the uniform price to wholesalers, the uniform price to retail dealers, and the uniform price to the ultimate consumers.

(4) That there is no discrimination (in the statement) in favor of any vendee by way of allowance, discount, concession, or commission for any cause.

(10) See Appendix. IV - 1.

The bill further provided that articles might be sold for less than the stated uniform price under two contingencies: (1) If a dealer ceased to do business or became bankrupt the articles were first to be re-offered to the manufacturer or vendor at the price paid for the same. If after inspection, he declined to receive them, the articles might then be sold at any price. (2) If the articles had been damaged or soiled and were re-offered to the vendor at the selling price and he refused or neglected to accept the offer, the damaged goods might be sold at cut prices with a notice affixed thereon stating that they were damaged.

The other bill, the Metz Bill (H. R. 13,860) introduced by Congressman Metz of New York provided only for price maintenaince as to patented articles or copyrighted works. It stipulated that allowances in the stated uniform price might be made for cash or in the case of good credit purchases; but the allowances were to be made by way of discount on the uniform price, and not by quoting a different price to large purchasers nor by the vendor paying freight on large purchases.

Apparently the advocates of Price Maintenance intended that a bill be passed embodying both the Stevens and Metz provisions- that is, covering all identified goods. The Stevens Bill was the subject for hearings before the House Committee on Interstate and Foreign Commerce from February 27, 1914 to January 9, 1915, (11) obtaining for Price Maintenance more than ordinary

(11) Proceedings published "not for distribution"as Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Sixty Third Congress, Second and Third Sessions on H. R. 13,305 (Feb. 27, 1914 to Jan. 9, 1915).

attention. Indeed the bone of price maintenance contention of the past two years has been principally the provisions of the Stevens Bill. Neither this bill, however, nor the Metz Bill were reported back to the House.

At least three bills in behalf of Price Maintenance have thus far been introduced in the present session of Congress.(12) Congressman Ayres of Nebraska reintroduced the Stevens Bill somewhat amended in the so-called Stevens-Ayres Bills, H. R. 3672, on December 13, 1915 and H. R. 4715 two days later, in amendment to H. R. 3672. Both bills were referred to the House Committee on Interstate and Foreign Commerce.(13) This committee, it appears, pigeon-holed the bills.

The Stephens-Ashurst Bill (H. R. 9671 and S.———)(14) referred to above, has been introduced in the present session of Congress as an answer to objections urged against the Stevens Bill, and the amended form of the Stevens Bill, the Stevens-Ayres Bill (H. R. 4715). The old bill did not provide for discounts, that, it is alleged are customary and necessary in trade. The Stephens-Ashurst Bill stipulates that in the schedule which the vendor of an article, under trade mark or special brand, must file with the Federal Trade Commission in order to have the right

(12) May, 1916.

(13) Sixty Fourth Congress, First Session.

(14) This bill was introduced in the House on January 21st, by Mr. Stephens of Nebraska, and was introduced in the Senate on February 13th without alteration by Mr. Ashurst of Arizona.

to fix the price at which his article may be resold, he may, if he wishes , set forth differences in price as to grade, quality or quantity of such article, the point of delivery and the manner of payment.

The bill states, further, that price maintenance contracts may provide for two "seasonal disposal sales". At these sales the retail merchant may offer the price maintained goods at less than the schedule prices, providing he has offered the goods back to the manufacturer, at the price he bought them for, at least thirty days before the sale and the manufacturer has refused or neglected to accept within a reasonable time.

The bill excepts from price maintenance provisions sales made to the Federal government, state and public libraries, and societies and institutions organized for religious, philosophical, educational, medical, scientific or literary purposes.

The Stephens-Ashurst Bill, like its predecessors, the Stevens Bill, and the bills introduced by Congressman Ayres, applies only to contracts for price maintenance upon trademarked or branded articles. And with the exceptions noted above it is like these bills in its other provisions. Like all other legislation enacted or sought to be enacted under the commercial power of Congress, this bill applies only to "Interstate and foreign commerce".

No hearings on the bill have been had up to the present writing, May 1916. It appears, that the Congressional Committees considering this bill---the House Committee on Interstate and Foreign Commerce, and the Senate Committee on Interstate Commerce- are waiting for the Federal Trade Commission to report on the in-

vestigation of Price Maintenance being carried on by it, at the direction of Congress.

Efforts to obtain State legislation on Price Maintenance have been so overshadowed by the National legislation on the same subject that they have occasioned but little public comment. Statutes enacted, both State and Federal, bearing on Price Maintenance will be dealt with more expediently in the following chapters.

III.

Price Maintenance finds many able and influential men among its advocates as well as among its opponents. Manufacturers, merchants, and consumers; economists, lawyers, and men in public life take issue among themselves as to the merits of the policy.

The American Fair Trade League, with headquarters in New York City, organized in 1913, has as one of its avowed purposes obtaining the enactment of legislation favorable to Price Maintenance. Since its organization, it has carried on an intensely active campaign for such legislation, both national and state. At Washington, it has been doing powerful lobbying in behalf of, formerly,the Stevens Bill, now the Stephens Bill.

The National Trade Association organized more recently, with headquarters also at New York, is on the other hand conducting an active campaign in opposition to the Price Maintenance bill. This organization, like that of the American Fair Trade League, is composed of prominent manufacturer's, merchants and consumers.

The attitude of business men on this proposition is gen-

erally dictated by the inclination of their respective personal interests. Manufacturers with powerful selling organizations of their own are indifferent to Price Maintenance; other manufacturers are among its advocates. Among wholesalers, opinion is divided and not sufficient data is at hand to denote which attitude preponderates. Department stores are generally opposed to price maintenance. The textile trades, especially the National Retail Dry Goods Association are, in the main, in active opposition to the policy; the hardware and the drug trades are just as actively for it.

The Chamber of Commerce of the United States of America is conducting at the present writing May, 1916, a referendum of its membership on Price Maintenance. A committee appointed by it to investigate the question of price maintenance issued, under date of February 8, 1916, two reports---a majority report favorable to the price maintenance policy and a minority report diametrically opposed to the majority view. These reports simply amount to two briefs upon opposite sides of the question written to persuade,--one for the policy, the other against it--- rather than to present the facts in the case.

The arguments presented by the advocates and by the opponents of the price-maintenance policy impinge upon the questions:

(1) Is Price Maintenance Legal?

(2) Is Price Maintenance Economically justifiable?

(3) Is Price Maintenance Socially justifiable?

These questions my paper shall attempt to answer.

Chapter II.

METHODS OF PRICE MAINTENANCE.

Various methods of price maintenance, both direct and indirect, have been adopted by manufacturers in the past two decades and the majority of these methods are in operation at the present time.

The direct methods take the form of systems of contracts that may be termed, Absolute Price-Maintenance Contracts and Optional or Rebate-Plan Contracts.

I.

Absolute price-maintenance contracts, in most forms have been held to be illegal by the Federal courts and are probably illegal in the majority of American state jurisdictions. Since, however, such contracts have been upheld in some American jurisdictions, and obtain in others where the legality is in doubt and even in some apparently in contravention of law; and since, moreover, it is price maintenance employing such contracts, that is now contemplated in legislation and general public discussion absolute price-maintenance contracts ~~absolute price-maintenance contracts~~ merit extensive discussion in this paper.(1)

An absolute price-maintenance contract may be specifically signed or directly agreed to verbally. Or, it may consist of a notice affixed to the article in trade, to which notice, it is implied, one agrees on purchasing the article.

The systems employing absolute price-maintenance con-

(1) For the Legal Aspects, see Chapters III to IX inclusive.

tracts consist of several kinds:[2]

(1) Contracts between the manufacturer and merchants, by which the merchants agree to resell at the price fixed by the manufacturer. These are employed where the goods do not go thru the hands of the wholesaler.

(2) Contracts between the manufacturer and wholesalers whereby the latter agree to sell only to such retailer as shall agree with them to resell at the retail price fixed by the manufacturer.

(3) Contracts between the manufacturer and wholesalers, by which the wholesalers agree to <u>supply the trade at a stated price</u> and to sell only to such dealers as shall agree with them to maintain the fixed price. In many cases, such contracts purport to make the wholesaler a distributing agent for, or consignee of, the manufacturer, thus making the retail dealer the first purchaser. The courts have generally seen thru such subterfuges, however.[3]

(4) Systems of contracts, like the above between the manufacturer and various distributors of the goods, where the goods go thru the hands of more than one middleman before reaching the retailer. Such systems aim to maintain prices thru all the various stages of distribution, and finally, the price to the ultimate consumer.

(5) Contracts between the manufacturer and wholesalers

(2) For examples see Chapters VII and VIII.

(3) For a discussion, and definitions of agent and consignee see Chapter IX.

requiring them to sell only to dealers on the manufacturer's approved list. This list consists of merchants with whom the manufacturer contracts directly, that, in consideration of their being supplied with his product, they will sell only at the retail price fixed by him.

II.

The detection of violations of these contracts is attempted generally:

(1) By affixing serial numbers to the packages in which the goods are to be retailed to permit their being traced;

(2) By requiring the wholesalers to make reports as to sales of goods effected by them;

(3) By sending men on the road to investigate and report to the manufacturer, and wholesalers as well;

(4) By offering inducements to members of the trade to report violations.

Violators, that is, those selling at less than the fixed price, are termed "price cutters." If the manufacturer has been dealing directly with a price cutter, he ceases to supply the price cutter with his product. In doing so, the manufacturer is undoubtedly within his right. That a private trader has the right to refuse to sell, is elemental law.(4)

(4) See Chapter III-conclusively settled in The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co. 227 Fed. Rep. 46.--For a citation of cases see same, 224 Fed. Rep. 566.

Thus any middleman dealing with the price cutter may also refuse to sell him; and the manufacturer may likewise refuse to sell to anyone supplying a price cutter. Concerted action of a number of independent manufacturers or dealers refusing to sell to, or deal otherwise with, one who cuts the price on the products of a manufacturer would, however, be illegal both at Common Law and under the Statute Law.(5)

Where the manufacturer has a selling organization thru which he sells directly to the retailer, he can force the retailer to live up to price maintenance agreements, by refusing to sell to him, if he cuts prices. In the majority of cases, however, the manufacturer distributes his goods thru wholesalers; and where he does so cutting off the supply from the price cutter is not often possible and seldom feasible. It is often impossible to locate the immediate source from where the price cutter gets his supply. The wholesaler selling the retailer many articles, other than those of the manufacturer concerned, may be unwilling to refuse to let the price cutter have the manufacturer's goods. Threats to refrain from selling to the wholesaler, especially if the wholesaler is a big purchaser or has other sources of a similar supply, are of no avail.

Therefore, the advocates of price maintenance are greatly concerned with getting legislation favorable to their policy.

(5) See Chapters IV and V especially pp.

III.

By the rebate plan contracts, the manufacturer undertakes to refund to dealers maintaining the selling price a portion of the purchase price paid by them. This, while operating as an inducement to the dealer to resell only at the price named in no way binds him to do so, and is therefore "optional."(6)

The optional price maintenance contract has proved entirely ineffective in maintaining fixed prices for any length of time. Competition is too keen to keep the retailer from cutting set prices, in the absence of legal prohibition or illegal combination.

IV.

Indirect Methods.

Various indirect methods are in operation that obtain the result aimed for in Price Maintenance without the use of price maintenance contracts. With these methods, this paper is not directly concerned. They are not Price Maintenance per se, but are rather systems in which is realized the ultimate aim of Price Maintenance, namely, in fixing once for all the price at which the ultimate consumer may obtain the article. Since, however, they occupy a prominent part in present day discussion as methods of price maintenance still "legally legitimate" and have undoubtedly bearing on the subject they are referred to here.

1. If the manufacturer establishes a selling organization of his own and sells direct to the ultimate consumer thru

(6) For examples and legal aspects - see Chapter VII pp.

mail orders, salesmen, selling agencies, branch or chain stores, he can and does, undoubtedly stipulate the price to be paid by the consumer.(7) This obviates the use of Price Maintenance Contracts. Numerous selling organizations for selling directly to the consumer, many of which are very powerful, have been built up in the last fifteen years. Among the most conspicuous of these are: the mail order houses, such as Sears Roebuck Co., and Montgomery, Ward & Co.; the chain and branch stores, as The United Drug Co., Gately Clothing House, Woolworth & Co., and the United Cigar Stores; the concerns employing direct to consumer salesmen, especially subscription book publishing companies as, for instance, P. F. Collier & Son.(8)

If the manufacturer appoints as his agents, merchants who are already handling goods of the same class as those of his own manufacture, he creates selling agencies similar to branch store systems. Since no sale takes place between the manufacturer and the merchant, the manufacturer can dictate the price to be paid by the ultimate consumer without the use of resale price maintenance contracts. The courts have found many such arrangements to be-"agreements of purported agency," and the so-called agency contracts, absolute price maintenance contracts in the

(7) Subject to the economic forces determining normal price: ---The lower price limit is normally the point at which the production of the goods does not yield a sufficient profit to justify the undertaking. The upper limit is that price at which there is not enough sale to earn a profit on the necessary outlay for the production.

(8) See Chapters VIII and IX. See

same sense as those between independent dealers in respect to the goods to be governed by the contract.(8)

(2) If the manufacturer retains a substantial royalty in the retail selling price of the article, he can again dictate the retail price. Here again resale price maintenance contracts are obviated for the manufacturer is a part owner of the article sold.(8)

(3) The list price method is employed by many manufacturers to maintain prices on goods of their manufacture. The manufacturer either stamps a retail price on the packages containing the articles of his manufacture or states so-called "list prices" in his catalogues or other written matter and then quotes discounts from the stamped or listed prices to the trade. The list prices, it is understood, are to guide the retailers in fixing the retail price; they are in fact to be the retail prices, if they can be indirectly made so.(9) Literature is sent the merchant expounding the considered value in maintaining the list prices. Salesmen are directed to impress the retailer with the merits of maintaining such prices. The press is used to present reasons for upholding list prices, and to make the term

(8) See Chapters VIII and IX. See

(9) Thus at the meeting of the National Plow Association in 1909, its secretary made a report which was circulated among retailers, in which he said, " It would benefit the majority of the retail dealers if the manufacturers' prices would be the basis for their selling prices." Department of Commerce, Bureau Corporations, Report on Farm-Machinery Trade Associations (1915) 43. See also, same, 12, 16, 17, 207-208 & 240.

"price cutter" unsavory. Finally, in cases where the retail price is stamped on the articles, the public is "educated"in so far as is legally possible, not to patronize price cutters.(10)

(4) To prevent the spreading of a cut price, the manufacturer often resorts to buying up in the market, articles of his own manufacture sold at cut prices. This is only done, of course, where the manufacturer expects the price cutter's supply of articles of his own manufacture to be exhausted.(11)

(5) Dealers' associations have been of great influence in maintaining prices. Members of a trade coming together are prone to discuss prices and are very often influenced individually to sell at prices others are getting for the same goods. Indeed,these associations, not infrequently, make so-called "Gentlemen's Agreements" to sell at uniform prices. Such are illegal but are very often hard to detect. Many of these associations have been formed at the instigation of manufacturers. Some have been and are today financed by manufacturers individually or by manufacturer's associations. The report of the Department of Commerce, Bureau of Corporations on Farm-Machinery Trade Associations cites many instances of such associations among retail dealers in farm implements--associations that have been instrumental in regulating prices.(12) In the flour milling

(10) A systemized effort against a price cutter would be an illegal boycott.

(11) I found many instances of this in Minneapolis.

(12) (1915) Chapters II and VII.

industry we find the same condition prevailing.(13)

The legal status of such associations will be discussed in Chapter IV, Section IV, Chapter V, Section III.

(13) Names of such associations will be furnished upon application.

CHAPTER III.

INDUSTRIAL LIBERTY.

"It is a part of man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reasons, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress."(1)

It is in these words that Judge Cooley expresses the conception of industrial liberty---industrial liberty that is an elemental right at common law, that is in the very spirit of our Government, that is in the essence of our economic institutions. A guarantee of industrial liberty was written into our Federal Constitution, immediately after its formal ratification in 1789, in the Fifth Amendment thereto.(2) This amendment provides that, "No person shall be...deprived (by the Federal Congress(6)) of life, liberty, or property without due process of law." An identical provision forbidding States to interfere

(1) Cooley on Torts, 3rd Ed. Vol. 11, 587 (2nd Ed. 1, 328; 1st Ed. I, 278) Quoted in Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Am. C. 764.

(2) Religious, political and personal liberty are guaranteed by the other amendments to, and in the body of, the Constitution.

(3) The first ten amendments to the Constitution apply only to Congress.

(according to court interpretation)[4] with Industrial Liberty was inserted in the United State Constitution in 1868 by the Fourteenth Amendment to it.[5] A similar guarantee of industrial liberty is to be found in all State Constitutions.

Whence came this conception of Industrial liberty,- this elemental right that is so carefully guarded by the Supreme Law of the Land---a right that has given rise to more contention in our Courts than has any other Constitutional provision? Go thru the legal cases and you will find in almost innumerable instances pleas made for rights inherent in the principle of industrial liberty. Such pleas were almost invariably made in Price-maintenance cases.

Some writers on Constitutional law would trace the provisions for industrial liberty to the Magna Carta (1215), Article 39, which states:

"Nullus liber homo capiatur, vel imprisonetur aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur nec super eum ibimus, nec super parium, suarum, vel per legem terrae."[6]

"No freeman shall be taken, or imprisoned or dispossessed, or outlawed, or banished or in anyway destroyed; neither will we pass upon him, nor send (others to pass) upon him, unless by legal judgment of his peers or by the law of the land."

(4) It seems hardly plausible that at the time of the adoption of this amendment, Congress considered the Amendment to connote more than a guarantee of civil rights to the Negro in the South.

(5) Sec. 1, "Nor shall any State deprive any person of life, liberty, or property without due process of law."

(6) Stubb's Select Charters, 301.

These writers seem to neglect the fact that, while "liberty" in the Constitutional clauses, supra, refers principally to industrial liberty,(2) such did neither exist nor come into existence at the time of the Magna Carta. The Magna Carta related only to personal liberty; for, at the time of its enactment, and for some centuries thereafter, extreme regulation of industry prevailed. During the Middle Ages and the early Modern period, the enactment of statutes regulating prices of commodities and wages was of frequent occurrence.(7) Thus in the middle of the fourteenth century, after the Black Death had produced a scarcity in labor and wages were going up, the attempt was made by law to restrict wages to the "customary rate",(8) and to fix prices of necessaries accordingly. By an act of Edward the Third in 1363 it was provided among other things that the price of a young capon should not be over three pence, or of an old hen or goose, over four pence. Under an act of 1533 the price of butter, cheese and fowl and other "necessary victuals" was to be fixed from time to time by certain justices and other officers. As late as 1758 Parliament re-enacted the Assize of Bread, regulating the price

(2) Religious, political and personal liberty are guaranteed by the other amendments to, and in the body of, the Const.

(7) 23 Edw. III c; 25 Edw. III st. 2; 31 Edw. III st. 1 c. 6; 34 Edw. III c. 9-11; 36 Edw. III. cc 8, 14; 42 Edw. III. c. 6; 2 Richard II. c. 8; 7 Richard II. c 5; 12 Richard II. cc. 3-5, 7, 9; 13 Richard 11. c. 8; 4 Hen. IV. c. 14; 7 Hen. IV. c. 17; 2 Hen. V. st. 2 c. 2; 2 Hen. VI. c. 18; 6 Hen. VI. c. 13; 8 Hen. VI. c. 8.

(8) Statute of Laborers (1351); Holdsworth, A Hist. of the Eng. Law, Vol. II, 319, 383-384; - Vol. III.171, 386; Green's Short History of the Eng. People(Editor's and Artist's Edition. 1899) Vol. I. 307.

and the make-up of loaves of bread.[9] And in this country during the Revolutionary War, the legislatures of several of the states, acting at the suggestion of the Second Continental Congress passed laws fixing maximum prices for many commodities and in some instances authorizing "boards of selectmen" to fix prices for other articles.[10]

By this time, however, partly coincident with the Industrial Revolution, there culminated a reaction to the governmental regulation of industry under the Mercantilistic regime.[11] Mercantilism, the extreme of regulation by national government,[12] itself but a development of the local regulation during the Middle Ages, was replaced in scarcely more than a generation of reactionary doctrinism by its contrary--governmental non-interference. More correctly and positively expressed, this reaction under the tutorship of the so-called Classical school of Economists[13] produced an approximate

(9) For the earlier assize, See Holdsworth, A History of the English Law II, 319.

(10) W. B. Weeden, Economic and Social History of New England II, Ch. XXI; Similar provisions were enacted by New York in 1778.

(11) For a century preceding this, an undercurrent of reaction to Mercantilism was developing, but the tide did not turn against Mercantilism until the appearance of the Physiocrats (1756-78).

(12) "Regulation as to trade in the precious metals were but one group of a vast body of ordinances, which undertook, with varying degrees of minuteness and severity, to arrange for each individual what he should produce and how he should produce it, what he should earn and how he should spend his earnings:"Alfred Marshall, Principles of Economics (6th Ed.) 755.

(13) Adam Smith, Malthus, Ricardo and John Stuart Mill. French writers on economic history generally include the Physiocrats and Say among the Classical school.

to a possible minimum of governmental regulation of economic life,--for some regulation there always was.

The forerunners of the Classical school, the Physiocrats in France expounded the doctrines of the "natural order" an order ordained by God for the happiness of mankind[14]---an order which could be attained only by free individual action.[15] Each man can best find out, what is for him most beneficial; and what is most beneficial for the individual is to the best interests of society at large. "Propriété, sûreté, liberté, voila donc l'ordre social tout entier, "said one of the leading Physiocrats; and, as evidenced by all their writings, "liberté, denoted economic freedom, not political liberty.[16] Neammoins ce serait une capitale erreur de voir dans les Physiocrates les precurseurs des anarchistes....Leur ideal du gouvernement, ce n'est point la democratie se gouvernant elle-même. ....Ils veulent le moins possible de legislation, mais ils veulent le plus possible d'autorité"[16]. The Physiocrats are best characterized by their favorite phrase, "Laissez-faire, laissez-aller" signifying that each one should be free to make, buy, and sell what he likes, as he chooses; and that

(14) C'est l'ordre voulu par Dieu pour le bonheur des hommes:" Gide et Rist, Histoire des Doctrines Economique, 10.

(15) Mercier de la Rivière , L'ordre Naturel et essentiel des societés.

(16) Gide et Rist, supra note 14, 39-40: "It would be a great mistake to consider the Physiocrats as forerunners of the Anarchists...nor (to assume) that their ideal was democratic self-government. ...What they wanted was a minimum of legislation with a maximum of authority."

commerce of persons and goods should be unrestricted.(17)

Developing this Laissez-faire doctrine, Adam Smith, at once the exponent of the movement in reaction to Mercantilis, and its embodiment, published in 1776, "An Inquiry into the Nature and Causes of the Wealth of Nations." This work presented primarily a plea for the economic freedom of the individual. It proclaimed that in economic life the greatest good of all resulted upon the whole from the unimpeded and enlightened egotism of each, and it proposed the restriction of state activity to the narrowest limits.(18)

In behalf of individual activity, Smith not merely opposed state regulation and the granting of monopoly, but was antagonistic to combination resulting from private initiative-to big business, we would say today.(19)

(17) "Qu'on maintienne L"entière liberté du commerce, car la police du commerce intérieur la plus sûre, la plus exacte, la plus profitable à la nation et a l'Etat consiste dans la pleine liberté de la concurrence."
(Let entire freedom of commerce be maintained, for the surest, the most exact and most profitable regulator both of home and of foreign trade for the nation as well as for the State is perfect freedom of competition.)
Quesnay, Maximes générales du gouvernement e'conomique d'un royaume agricola, XXV.

(18) Smith, Wealth of Nations, Book II. ch. 2; Book IV.

(19) Ibid, Book V. Ch. 1.

Unequivocally he stated his Laissez-faire doctrine: "In general, if any branch of trade or any division of labor, be advantageous to the public, the freer and more general the competition it will always be the more so."(20)

The tenets of Laissez-faire were transplanted to America, where they found fertile soil. There is ample evidence that the "Fathers" of this country were quite familiar with the doctrines of the natural rights of man"(21) and free competition.(22)

Imbued with these doctrines the "Fathers" framed the early State Constitutions and drafted the Federal Constitution;

(20) Ibid, Book II, Ch. 2.

(21) In the early years of American independence, they were undoubtedly better acquainted with the English forerunners of the Wealth of Nations, than the recent works of the Physiocrats and Adam Smith. Chief among these forerunners were:
Locke: Two Treatises of Government (1689);
Milton: Areopagitica (1644), Tenure of Kings and Magistrates (1649);
Sydney: Discourses concerning Government (1698);
Hume; Political Discourses (1752); Essays and Treatises on Several Subjects (1753).
By the dawn of the nineteenth century, however, the wprks of the Physiocrats and the Wealth of Nations were well disseminated throut the United States. See p 30.

(22) The Elliot Debates, (Lippincott's Edition of 1866), the Jefferson Papers, the Madison Papers and the Federalist contain, interspersed, much evidence of this.
"If we examine the present state of the world, we shall find that most of the business is done in the freest states and that industry decreases in proportion to the rigor of government."
Letter of James Winthrop in Massachusetts Gazette, Nov. 23, 1787; P. O. Ford,; Essays on the Constitution, 53,55.
See also Fiske, Critical Period in American History, 56, Borgeaud,: Adoption and Amendments of Constitutions, 19; Morley: Rousseau, Introduction; Parton: Life of Burr, 1st Ed., 132; Bancroft, History of the United States,Vol. VI.

likewise, under the influence of the theory of Laissez-faire the early legislators enacted laws and the courts interpreted these laws and expounded the common law of England as developed in the colonies---the law which the States retained upon their separation from England.(23)

It cannot be said, however, that these doctrinisms directly motivated the "Fathers" at the inception and in the early decades of this country as a politically independent unit. More correctly, it may be held, the early statesmen and jurists sought and found in the tenets of Laissez-faire a justification for action arising from their inner promptings. The majority of the colonists were of the same liberty-loving Anglo-Saxon stock, who in England were then also seeking greater freedom of action. They came to America largely to find toleration for their specific religious views and to obtain greater economic welfare. They came chiefly thru private initiative, not governmental action. The "Patriots" fought a Revolution against King and Parliament, that is, in opposition to the then existing government. They were thus in no mood to brook a strong government--a government with a large degree of regulatory power. The very atmosphere betokened individualism---unrestricted economic activity. The dangers and hardships of frontier life made the American self-reliant, aggressive, individualistic. There was unlimited free land to which one could always turn; and the more desirable marketable land

(23) Louisiana, which became a State in 1813, retained the Roman Civil Law.

was also obtainable at a low price. Every one owned or hoped to own some property. The political state--that is, the enfranchised people, were undoubtedly almost entirely property holders.

No wonder thus, we find our early political institutions permeated with the doctrines of free competition, freedom of the individual contract and private property rights. Both freedom of contract and of competition, fundamentals of the then Laissez-faire "liberte", were enacted into or accepted as law.(24)

Altho the Federal Constitution was drafted in a period of reaction to the political theory of the Revolution, and was formulated by a governmental and social aristocracy---men of substance, who were alarmed over the threatened breakdown of government and were seeking to protect their economic interests, yet the economic doctrines of Laissez-faire, then current, prevailed. The reaction of this period was not a retroactive step to the Middle Age and Mercantilistic regimes, when industry was a privilege acquired by election of a guild or by license from government. The industrial liberty culled out of the century preceding had now become too well established to be even questioned.(25) "It is a singular good for-

(24) The possible incompatibility of the two was not visible to the early Statesmen and jurists, nor did it become evident until much later--until after the Civil War. See this Chapter below, . See Chapter V. Sec. III. ubi sub.

(25) Note that a decade before the ratification of the Federal Const.lingering sparks of Mercantilism were still to be found in some States--See Supra Note 10, p. 23.

tune of the Constitution, says E. Parmalee Prentice, "that it was founded during that short period when political ideas were those of the completest individual liberty."(*)

The Federal Constitution was the result of agreements between the two opposed parties--the State Rights party desiring to limit the powers of the Federal Government and the Federalist party that wished to gain more control over the states. States' Rights versus centralized Federal Government formed the bone of contention. Neither the industrial liberty provision of the Constitution, the so-called "due process clause" in the Fifth Amendment cited above, not the clause that has come to be next in importance only to the Industrial liberty guarantee, the Commerce clause,(26) were subjected to extensive discussion in the Constitutional Convention; nor were they subjected to much comment for some time after the adoption of the Constitution. As for the former, the due-process clause, industrial liberty, it has already been stated, was considered to be no longer open to question. In the case of the latter, the commerce clause,--the evils of state regulation of intersectional commerce were then manifest; in fact, these formed the immediate cause for the Constitutional Convention. The vast scope that the commerce clause would assume, was, moreover not realized then.

(26) Art. I, Sec. 8, "The Congress shall have power...to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

(*) Prentice, E. A., Federal Power over Carriers and Corporations.

By the Commerce clause, the so-called inalienable right of the individual to engage in commerce, was not impaired but was made subject to governmental regulation. A great departure from Laissez-faire concepts was made in this, nevertheless.

II.

The first half of the nineteenth century with the westward movement as its dominant note provided fertile soil for Laissez-faire. Unrestricted movement thru the heart of the continent, unlimited freeland, a constant influx of immigrants from the Teuton nations,--lovers of liberty, seeking political freedom and economic welfare lent aid to the development of the so-called American spirit--a spirit of self reliance,aggressiveness, individualism--a spirit in which competition was, and still is, the dominant note. Indeed, it seems to me, arguments to the contrary notwithstanding, competition will remain hereafter a guiding factor in economic life, if not the dominant force.

Under the American conditions fostering competition, the Americans to justify their potential actions seized upon the tenets of Adam Smith, exaggerated and distorted by his more passionate disciples. Of potent influence was Ricardo, whose chief work, Principles of Political Economy and Taxation was published in 1817.

Ricardo developed the doctrine of free competition to its height. This doctrine "rests fundamentally on the belief that when two competitors attempt to supply the same market with a given commodity the price of that commodity will finally be cut to the point at which the most effecient can still sell

at a profit, while the less efficient will find that price unremunerative. It further assumed that when that condition is reached the less efficient can and will withdraw his capital and labor and apply them to some other industry which promises at least the average reward or profit prevailing in the community."(27)

The Ricardian principle of competition, unmodified, remained the dominant note in economic philosophy for half a century after it was enunciated by Ricardo. The Dictionnaire de'E'conomie politique in 1852, just thirty five years after the publication of Ricardo's Principles of Political Economy, "expressed the opinion that competition is to industrial world what the sun is to the physical." John Stuart Mill about the same time stated that "every restriction of competition is an evil, but every extension of it is an ultimate good." Mill further developed Ricardo's doctrine that with free competition profits would tend to a minimum as a correlative of the law of diminishing returns.

Whatever the merits of the Ricardian Principle of Competition, it fitted in nicely with the American spirit - with the American conditions prevailing during the first half of the nineteenth century. Under the influence of the American spirit of competition-which, it is said, put a premium on effeciency--American industry expanded. The country was devel-

(27) Professor J. H. Gray (Minnesota), Economics and the Law, 6.

oped.

The Courts imbued with the same American spirit rendered decisions in behalf of freedom of private contract and unrestrained economic activity. The common law looked with favor upon free competition; its doctrines of competition in business might be retained (nominally at any rate). The Constitutions and statutes, both Federal and State, in so far as it was possible, were generally construed in the light of the common law principles. Thus it was, that the term "liberty" in the Fifth and Fourteenth Amendments to the Federal Constitution, and when used in similar expressions on State Constitutions, was given the denotation of the Laissez-faire, "liberté" that is, industrial liberty---freedom of the person from restraint in economic life.

So it was said by Justice Field, in his dissenting opinion in Munn v. Illinois: " By the term "liberty" as used in the Constitution something more is meant than mere freedom

(28) Competition (in Economics) is defined in Webster's New International Dictionary (1914) as "The effort of two or more parties, acting independently to secure the custom of a third party by the offer of the most favorable terms; also the relation between buyer and seller which results from this effort."

(29) A discussion of the doctrine of contracts in restraint of trade is presented in Chapters IV. and V.

(30) It may be added that, The Federal Courts took it upon themselves to declare acts of Congress inoperative for want of agreement with the Federal Constitution. The State courts following the same principle did likewise for state statutes.

(31) 94 U. S. 113.

from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner not inconsistent with the equal rights of others as his judgment may dictate for the promotion of happiness, that is to pursue such callings and avocations as would be most suitable to develope his capacities and give to them their highest enjoyment."(31)

This "liberty", however, was never taken to mean absolute freedom,= anarchistical liberty. "The liberty secured by the Constitution of the United States to every person within its jurisdiction," said the United States Supreme Court in Jacobson v. Massachusetts, "does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."(32)

And in Crowley v. Christiansen, 137 U. S. 86, the Court held that, "Liberty is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment by others. It is then "liberty regulated by law."

(31) 94 U. S. 113.

(32) 197 U. S. 11, at 26.

This conception of "liberty" made it possible to limit the freedom of the individual to contract while at the same time retaining the principle of industrial liberty. Thus we find that upon the development of business combinations after the Civil War, many statutes were enacted forbidding persons to make such contracts of combination. These statutes were almost invariably upheld on the ground that such restrictions upon the right to freedom of contract were in behalf of the public welfare.

In the enactment of these statutes--the so-called anti-trust acts, we parted company with the Laissez-faire concepts of the first half of the nineteenth century; we parted company in this respect with England, for in England, to this very day, Laissez-faire still dominates economic theory and is legally considered to prevail in industrial life. In England, emphasis is placed on freedom of contract. In the United States, freedom of competition receives the greater stress. In England, freedom of competition may be sacrificed in order that freedom of contract may be retained. In the United States freedom of contract may be made to suffer in behalf of freedom of competition.(33) All anti-trust acts undoubtedly restrict the right of contract; and this is done, it is said, in order that competition may prevail in business.

These anti-trust acts, however, apply only to monopoly by an individual, to combination of independent traders and to businesses that are legally affected with a public interest that makes them public service businesses, or public utilities

(33) See Chapter V.

in the eye of the law. The right of a private trader to make business contracts that do not involve monopoly or combination has remained impaired. It is still the privilege of a private individual to make, to use, to buy, to sell, or to refuse to do these things. Judge Cooley's remarks quoted at the beginning of this Chapter still hold good.

In behalf of the subject matter of this paper,--- Price Maintenance we are principally concerned in the rights to sell and to refuse to do so. It has been conclusively settled that any private trader has the right to refuse to sell. It was thus stated by Judge Lacombe in the recent so-called Cream of Wheat case:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice:' Cooley on Torts, page 278. Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him;--it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social. That was surely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same nor the Clayton Act has changed the law in this particular, We have not yet reached

the stage, where the selection of a trader's customers is made for him by the government."(34)

In this case, action was brot by the plaintiff, who was a chain-store dealer, against the Cream of Wheat Company which was marketing (and still ~~does~~ markets) its product, composed of a particular selection of wheat, under a trade mark and a private brand. It delivered its product to wholesalers thruout the country at a uniform price for less than carload lots and a lower uniform price for carload lots, requiring by notice, (1) that its immediate vendees should sell to the retailers at a specified uniform price, and (2) that they should not sell direct to the ultimate consumers. It made no specific contracts to that effect, but it threatened to refuse to sell to anyone cutting the price..

The chain store dealer, bought carload lots of the Cream of Wheat Company at the lower uniform price fixed for such sales. The dealer then sold the cream of wheat at cut prices. Thereupon the Cream of Wheat Company refused to sell to that dealer at any price. The dealer brot suit for an injunction to compel the defendant to sell to him, and to sell at the prices formerly fixed between the two. He based his application for the injunction on the claim that the Sherman and Clayton Anti-Trust Acts, made the refusal of the defendant to sell to him an attempt to restrain competition by means of an indirect maintanance of prices, and an attempt at monopoly.

(34) The Great Atlantic and Pacific Tea. Co. v. Cream of Wheat Co., (C.C.A. filed Nov. 10, 1915) 227 Fed. Rep. 46.

The Court held that the Cream of Wheat Company, in refusing to sell was within its right of industrial liberty guaranteed by the Constitution. Thus Congress can not limit this right to refuse to sell, even if it should wish to.

This decision is in entire accord with the preceding cases involving the right to refuse to sell.(35) It is furthermore in entire accord with the economic philosophy now dominant in the United States.

(35) In re Grice (C. C.) 79 Fed. 672; Greater New York v. Biograph Co.; 203 Fed. 39, 121 C. C. A. 375; Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cases 764. All these cases cited in this note involve the right to refuse to sell; none, however, deal directly with facts similar to the Cream of Wheat case. None involve Price-Maintenance agreements.

CHAPTER IV.

THE DEVELOPMENT IN ENGLAND OF THE COMMON LAW DOCTRINE OF CONTRACTS IN RESTRAINT OF TRADE.

I.

It has been stated in the preceding chapter that the so-called inalienable rights of economic liberty and of property, which are guaranteed by the Federal Constitution and, superflously now, [1] by all State Constitutions, are elemental rights at common law. Embodied in these rights is the right of individual freedom of contract. It has been pointed out, further, that the right of freedom of contract at common law does not, nor ever did, denote absolute freedom. This right in business contracts has always been subject to the provisions of the common law upon restraint of trade---- provisions under which contracts in restraint of trade in the eye of the law have always been held void and unenforceable.

Contracts in restraint of trade are defined as, "agreements wherein one of the parties is restrained from following a particular occupation, industry or trade". (2)

(1) The Fourteenth Amendment to the Federal Constitution, as interpreted by the Courts, has made such provision in State Constitutions unnecessary.

(2) Thornton, Treatise on the Sherman Anti-Trust Act, 46.

Agreements to suppress competition, and such as are in restraint of trade, altho perhaps "fundamentally quite distinct", as a textbook writer avers, have received definitions broad enough to cause their connotations in large measure to overlap.(3) I shall not attempt, nor is it necessary, to exclude from the term, "contracts in restraint of trade" such agreements to suppress competition as the courts have largely deemed well to include.

Contracts in restraint of trade are said by the common law to be against "public policy".(4) Public policy is defined as "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good."(5)(6) And the law presumes freedom of trade to be essential to the public welfare.(7)

The Supreme Court of the United States, in recent decisions, has held absolute price-maintenance contracts to be illegal as in restraint of trade at common law as well as under the Sherman Anti-Trust Act.(8)

(3) Ibid, 46, 47 and footnote 15, p. 47.

(4) Bouvier's Law Dictionary (8th Ed. 1914) Vol. 3, 2925.

(5) 4 H.L. Cas. 1; Greenh. Pub. Pol. 2.

(6) Public policy "is said to be determined from legislative declarations or, in their absence, from judicial decisions". Picket Pub. Co.v.Com'rs. 36 Mont 188; 92 Pac 524; 13 L. R. A. (R. S.) 1115; 12 Ann.Cas. 986; 122 Am. St. Rep. 352.

(7) Ibid, note (4).

(8) The decisions cited on pp. to.

In holding so, the proponents of the price-maintenance legislation declare, that the court has made a new departure in judicial interpretation of public policy.(9) The opponents of price maintenance, on the other hand, maintain that these decisions of the United States Supreme Court "are in entire accord with doctrines imbedded in our law for centuries."(10) With the views diametrically opposed, at least ostensibly so, it remains for us to make our own diagnosis of the legal basis for the price-maintenance decisions.

In the words of Chief Justice White, "the rudiments of the doctrine of contracts in restraint of trade in England are found in the common law at a very early date."(11) Indeed when regulation of industry, first, by local authority and later, by the national government was so extensive that the right of freedom in business contracts was almost a mere fiction, private contracts in restraint of trade were held to be bad in law.(12) In the sphere of economic activity left to the individual, by the government, the individual was not to restrain himself by agreement in any way.

(9) See statement of Louis D. Brandeis, Hearings before House Committee on Interstate and Foreign Commerce (H. of R.), (63rd. Congress 2nd and 3rd Sessions) on H. R. 13305 - Jan. 9, 1915, p. 3 ff.

(10) Chamber of Commerce of the U. S. Report of the Committee on Maintenance of Resale. Price, (Feb. 5, 1916) (Minority Report) Page 45.

(11) Dissenting opinion of Chief Justice White, in U. S. v. Trans-Missouri Freight Association, 166 U. S. 290 at 346; 17 Sup. Ch. 540; 41 L. Ed. 1007.

(12) See p.

This inhibition against restraint of trade it appears, was absolute at first. In reviewing the development of the common law doctrine upon restraint of trade, Lord Justice Bowen said, in the leading case -- Nordenfelt vs. Maxim Nordenfelt Gun and Ammunition Company, "There was an early period in English history when the courts set their face apparently against all restrictions upon trade alike whether limited or unlimited." (13) And in referring to the same subject, Williston-Wald's Pollock on Contracts states, "the original principle is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way". (14)

At the end of the thirteenth century, an illiterate court fined several chandlers of Norwich for having agreed among themselves that none should sell a pound of candles cheaper than another. (15) The first English case on the subject generally cited, however, is the Dyer's case of

(13) (1894) A. C. 535; 63 L. J. Ch. 908; 11R1; 71 L. T. 489.

(14) 467.

(15) Ibid, 471--- "pro quadam convencione inter eos facta videlicet quod nullus eorum venderet libram candele minus quam elter." Leet Jurisdiction of City of Norwich, Soc. 1892, p. 52.

1415. There the action was upon a bond in which the defendant agreed to refrain for six months from practicing his trade as a dyer in the same town with the plaintiff. The defendant pleaded performance of the condition. To this Justice Hull remarked, "In my opinion you might have demurred to him that the obligation is void inasmuch as the condition is against the common law; and per Dieu, if the plaintiff were here he should go to prison until he paid a fine to the King."(16)(17)

The doctrine expressed in this dictum by Hull J. was applied in subsequent cases, at first uncompromisingly, but from the early part of the seventeenth century, with slowly growing amelioration.(18)

Two major theories have been presented to account for the early attitude of the English courts towards restraint of trade. It has been suggested by Parsons, an eminent American legal writer(19) that the early aversion of

(16) Yearbook 2, Henry V. Pl. 26.

(17) "This was not and could not be more than a dictum and the parties proceeded to issue on the question whether the condition had in fact been performed or not." Williston, Wald's Pollock on Contracts (3rd American Ed.) 471.

(18) Coke Rep. 872; (Croz. Eliz. 872); also given in Owen 143 as late as the year 1601, the court held, apparently without previous contradiction that it was against the law to prohibit or restrain "any to use a lawful trade at anytime or any place." ---in the so-called Haberdasher case, Colgate v. Bacheler. See also, the Ipswich Tailor's Case (1602) 11 Coke's Rep. 53 A; ubi p. .

(19) Theophilus Parsons (1797-1882), professor of law, Harvard University, (1847-1872).

the law to all restraints of trade originated in the medieval apprenticeship law. "By this law, in its original severity, no person could exercise any regular trade or handicraft except after a long apprenticeship, and generally, a formal admission to the proper guild or company. If he had a trade, he must continue in that trade or have none".(20) Thus, if he agreed to refrain from exercising his own trade, he agreed not to exercise any trade and to deprive the community of the benefits of his labor. He practically covenated not to earn his living at the risk of becoming a public charge. It was to avoid this, according to Parsons, that the courts arbitrarily held all contracts in restraint of trade to be illegal.(21)

Thus in the Ipswich Tailor's Case (1602) the court held void at common law a bond wherein certain workmen bound themselves not to work at a certain trade, and said:

"No man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, and especially in young men, who ought in their youth (which is the seed time) to have lawful sciences and trades, which are profitable to the commonwealth, and whereof they might

(20) Parsons: Treatise on the Law of Contracts, 9th ed. (1904) Vol. II, 748 - 751. The first-edition of this work appeared in 1853. It has been cited by many jurists as a legal authority.

(21) This theory is referred to in Williston, Wald's Pollock on Contracts, 471, as "a plausible suggestion by a learned American writer".

reap the fruit in their old age; and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade".(22)

Professor Wyman finds in the narrowness of the medieval market the cause for the courts frowning heavily in the early times upon all restraint of trade. A contract in restraint of trade, however slight, debarred one of the contracting parties from exercising his trade over some region and for some time; and to the extent of his elimination, it put the control of the trade and the commodity produced therein, in the hands of those remaining in that trade---often, in the hands of one man. The then sources of supply to a given market were so limited that any action tending to further restrict them presented a menace to the community in which the restriction applied. Hence, according to Wyman, it was considered to be against public policy to permit any restraints of trade whatsoever.(23) (24)

Beginning with the early part of the seventeenth

(22) 11 Coke's Rep. 53a.

(23) Wyman: Control of the Market, Chapter VI.

(24) In United States vs. Addyston Pipe and Steel Co., (85 Fed. 271; 54 N. 723; 46 L. R. A. 122), Judge Taft, in rendering the opinion of the Circuit Court of Appeals, presents both theories.

century there has been a slowly growing amelioration of the doctrine on restraints of trade. In Rogers vs. Parry (1614)[25] the court for the first time it appears, recognized the possibility of certain partial restraints not being against public policy and therefore not illegal. In this case the court held that "a man may be well bound, and restrained from using his trade for a time certain and in a place certain".[26] This ruling was followed cautiously in several subsequent cases during the seventeenth century.

The leading case of Mitchell vs. Reynolds (1711)[27] is the first case definitely formulating a distinction between general restraints and partial restraints. There the action was upon a bond, wherein the defendant, in assigning his place of business to the plaintiff for a term of five years, covenanted not to exercise the same trade within the parish during that period upon a penalty of 50 pounds. Parker, C. J. (Lord Macclesfield) for the court said:

"The general question upon this record is whether this bond, being made in restraint of trade, be good. And we are all of opinion that a special consideration being set

(25) 2 Bulstr. 136.

(26) Parsons on Contracts Vol. II, 748 and Footnote 2 on 749.

(27) I P. Wms. 181.

forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is not between promises and bonds, but between contracts with and without consideration, and that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general not to exercise a trade thruout the Kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive as shall be shown by and by....

"General restraints are all void, whether by bond covenant, or promise etc., with or without consideration and whether it be of the party's own trade or not"....

"To conclude: In all restraints of trade, when nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained".(27)

Thus the rule was definitely laid down in Mitchell vs. Reynolds whereby the doctrine, originally holding all contracts in restraint of trade to be illegal, was modified to the

(27) I P. Wms. 181.

extent of declaring contracts to be valid, in which the restraint was partial and where the contract was otherwise reasonable. A restraint was partial when limited in operation as to space---less than coterminous with the boundaries of England; (or, some cases hold, as to persons) and when it extended only for a reasonable time.(28) According to the decision in this case, it rested upon the covenantee to satisfy the court that the covenant on which he brot action was reasonable and had been made for a good and adequate consideration.

The Mitchel vs. Reynolds doctrine of partial and general restraints was affirmed by the House of Lords in Cheesman vs. Nainby (1726);(29) and was followed in many subsequent cases,(30)

(28) To this Mr. Justice Bowen added (Collins vs. Locke, L. R. 4 App. Cas. 674 at 686), "There is also a third kind of limitation which the law will sanction under reasonable conditions, namely; a limitation in respect of the mode or manner in which a trade is to be carried on".

(29) 1 Bro. P. C. 234 s.c. Ld. Raym. 1456; Parsons gives this case as Cheesman vs. Ramby, Fort, 297, 2 stra. 739 (Parsons on Contracts, Vol. 2, 913).

(30) Clerke vs. Comer (1734) cas. t. Hardw. 53; Davis vs. Mason (1793) 5 T. R. 118; Binn vs. Guy (1803) 4 East 190; Gale vs. Reed (1806) 8 East 80; Hayward vs. Young (1818) 2 Chitty 407; Bryson vs. Whitehead (1822) 1 Simons & S. 74; Homer vs. Ashford (1825) 3 Bing. 322; Wickens vs. Evans (1829) 3 Young and J. 318; Young vs. Timmins (1831) 1 Cromp & J. 331; Horner vs. Graves (1831) 7 Bing 735. In the last mentioned case, Tindal, C. J. delivering the opinion of the Court, said: "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 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 can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable." See Avery vs. Langford Kay 667; English Reports, Reprints Vol. 69--Vice Chancellor's Court Book XIV (Kay; Kay & Johnson) 281,--- for a list of cases; see also ubi following pages for later cases.

not, however, without the correctness of the difference between general and partial restraints "being in some instances denied and in others questioned until the matter was finally set at rest by the House of Lords, in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company,[31] in 1894.[32]

The first definite new step in the doctrine laid down in Mitchel v. Reynolds was made in the case of Hitchcock v. Coker (1837)[33] There it was held that it was not for the court to enquire into the adequacy of the consideration and that the operation of the covenant need not be limited as to time. It still rested upon the covenantee to show that the covenant was made for a legal consideration (that is) a valuable consideration[34]

(31) (1894) A. C. 535; 63 L. J. ch. 908 affirming L. R. (1893) 1 ch. 630; 67 L. T. 469; 94 L. T. J. 177.

(32) United States v. Trans-Missouri Freight Association, 166 U. S. 290 at 347; 17 Sup. ch. 540; 41 L. Ed. 1007;---dissenting opinion of Chief Justice White.

(33) 6A and E 438--given in Parsons on Contracts, 750 note z as 1 Nev & P 796 (1836).

(34) Archer v. Marsh (1837) 6 A. and E. 959; Wallis v. Day (1837), 2 M. & W. 273; Leighton v. Wales (1838), 3 Mees. & W. 545; Ward v. Byrne, 5 Mees. & W. 548, 559; Proctor v. Sargent, (1840), 2 Scot. N. A. 289, also 2 Man & G.20; Hinder v. Gray (1840), 1 Scot. R. R. 123, also 1 Man. & G. 195; Mallan v. May (1843), 11 M. & W. 653, 7 Jur. 536, 12 L. J. Exch. 376; Rannie v. Irvine (1844), 7 Man. & G. 969; Green v. Price (1845), 13 M. & W. 695; 16 M. & W. 346; Pilkington v. Scott (1846), 15 M. & W. 657; Nichols v. Stretton (1847), 11 Jur. 411; Hartley v. Cummings (1847), 5 C. B. 247; Hastings v. Whitely (1848), 2 Exch. 211; Sainter v. Ferguson (1849), 7 C. B. 716; Tallis v. Tallis (1853), 1 E. &. B. 391; Mumford v. Gething (1859), 7 C. B. (n.s.) 305, 319; 6 Jur. (n. s.) 428; See also, cases cited in Avery v. Langford, Kay 667; English Rep. Reprints Vol. 69, 281; and Williston, Wald's Pollock on Contracts, 478-480, and the cases cited therein.

A further modification in the doctrine of restraints of trade was enunciated in the equity case, Whittaker v. Howe (1841)[35] There, action was brot for an interlocutory injunction to restrain a breach of an agreement, made for valuable consideration, not to practice as a solicitor in any part of Great Britain for 20 years. Ignoring the doctrine, requiring, that a restraint to be valid must be limited in space, the court upheld the agreement, and said: "In this case a valuable consideration being given, the question is whether the restraint intended to be imposed is reasonable."

The test of reasonableness there announced was followed in Leather Cloth Co. v. Lorsont (1869),[36] in Rousillon v. Rousillon (1879),[37] in Mogul Steamship Co. v. McGregor, Gow & Co. (1892),[38] in Badische Anilin und Soda Fabrik v. Schott, Segner & Co. (1892);[39] and it was finally firmly established in the leading modern English case on contracts in restraint of trade, Nordenfeldt v. Maxim Nordenfeldt (1894).[40] In the Nordenfeldt case, Lord Macnaghten declared:

(35) 3 Beav. 383; Eng. Rep. Reprints Vol. 3, 150; See Jones v. Lees (1856), 1 H. & N. 189, 26 L. J. Ex. 9.

(36) L. R. 9. Eq. 345; 39 L. J. ch. 86.

(37) L. R. 14, Ch. Div. 351.

(38) (1892) A. C. 25.

(39) 61 J. R, Ch. 698.

(40) Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Co., (1894) A. C. 535; 63 L. J. Ch. 908; 11 R. 1; 71 L. T. 489; affirming (1893) 1 Ch. 630; 67 L. T. 469; 94 L. T. J. 177. This doctrine of reasonableness was adopted in, Dubowski v. Goldstein (1896) 1 Q. B. 478; Underwood & Son v. Barker (1899) 1 Ch. 300; 68L. J. Ch. 201; 80 L. T. 306; 47 W. R. 347; Haynes v. Dolman (1899) 2 Ch. 13.

"The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade 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. 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 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 in no way injurious to the public."(41)

So, even the absolute rule holding all general restraints as to space to be illegal was modified to the extent of sustaining as valid, a contract in restraint of trade <u>unrestricted</u> as to space where "the protection necessary to the covenantee reasonably requires (such) a covenant."(42) A distinction came to be drawn as between reasonable and unreasonable restraints of trade in place of the former one, between general and partial restraints. The rule thus became, and is at the present time, that a restraint of trade necessary to protect the rights of the parties to the contract and apparently not harmful to the public is "reasonable"; and the contract imposing such a restraint of

(41) Nordenfeldt v. Maxim Nordenfeldt, (1894) A. C. 535 at 565.

trade is valid. Otherwise, a restraint of trade is "unreasonable" and the contract in such restraint of trade will not be upheld.(42)

In speaking of the development of the common law doctrine of restraints of trade, Sir Frederick Pollock says, "This class of cases (restraint of trade cases) presents a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce."(43)

In accordance with his theory, that the law on restraints of trade grew out of the medieval law of apprenticeship, Parsons maintains that the increasing tolerance towards contracts in restraint of trade has been coincident with the abatement in the severity of the apprenticeship rules.(44) Professor Wyman, on the other hand, following his theory that the doctrine upon restraints of trade originated in the well-grounded attempt to pre-

(42) United States v. Addyston Pipe and Steel Co., 85 Fed. 271; 29 C. A. 121; 54 U. S. App. 723; 46 L. R. A. 122. Judge Taft states in the opinion in this case that the Nordenfeldt doctrine necessarily implies that the test of reasonableness is to be applied only to contracts in restraint of trade ancillary to the carrying out of some lawful contract. See contra Collins v. Locke (1879) L. R. 4 A. C. 674; Ontario Salt Co. v. Merchants Salt Co. 18 Grant (U. C.) 540. See Davies v. Davies (1887) L. R. 36, Ch. D. 359.

(43) Williston-Wald's Pollock on Contracts, page 467.

(44) Parsons on Contracts Vol. 11, 914--See same Vol. 11, page. 56ff, for a discussion of the law of apprenticeship.

vent any interference with the exceedingly limited sources of supply to the medieval market, finds in the widening of the market---in the general expansion of trade, the cause for the relaxation in the doctrine of restraints of trade. With extensive sources of supply in a wide market, it appeared no longer necessary to make the rule against contracts in restraint of trade absolute.(45)

II.

In its very early history, the doctrine of restraints of trade applied only to contracts whereby one of the contracting parties was restricted in the exercise of his trade or calling. But, the term "restraints of trade" came to connote also, probably during the Tudor period, certain trade practices which it was deemed interfered with trade similarly as did restrictions put by one on the pursuit of his calling; and these practices, at first statutory crimes, became indictable offenses at common law.

Forestalling, regrating, engrossing and monopolizing were the terms applied to such practices against the freedom of trade. Forestalling consisted principlly in the buying of, or other interference with, goods on the way to market with the purpose of selling those goods in that market at a price higher than would have been obtained otherwise. Regrating was the buying of goods in the same market at a profit. Engrossing pertained to the buying up of large quantities of provisions with the intention of selling them again at an enhanced price. Monopolizing designated the practice by the Crown, by virtue of its

(45) Wyman, Control of the Market, Chap. VI.

Royal perogative, of granting to someone the exclusive right to the production and sale of some article.(46) These four terms, however, were not always employed according to their respective denotations. One term was often used to include practices denoted by the other terms.(47)

The earliest statute against practices such as these appears to be the Judicium pillorial of Henry the Third, in 1266 ---a provision against forestalling.(48)

Acts against forestalling, regrating and engrossing were enacted in the reign of Edward the Third(49) and again, more explicitly, in Edward the Sixth's reign.(50) By 5 and 6 Edw. VI.

(46) 4 Blackstone Commentaries = c. 12 sec. 6-9. (15th Ed.) 157-159. (1809)

(47) See, 4 Bacon's Abr. 335, Phila. ed. 1876-cited herein below, p. ; 1 Hawkin's P. C. c. 79-80 (6th Ed.) 470-485----cited herein below, p. ; 2 Wharton Criminal Law c. 40(9th Ed.)607: 1 Bishop's New Criminal Law,(8th Ed.) sec. 518, 519; W. F. Dana, 7 Harv. Law. Rev. 338 (1894); Wyman: Control of the Market, Chap-VI; Cooke: Trade and Labor Combinations, 159; Chief Justice White in the Opinion of the Court, Standard Oil Co. v. United States, 221 U. S. 1 at 51-55; 31 Sup. Ct. 502; 55 L. Ed. 619; 34 L. R. A. (N. S.) 834.

(48) 51 Henry III, "de forestallorilis que ante horam debitam et envilla statutam aliquid emant contra statutum villae et mercati" ---quoted by Freund, The Police Power (College Ed. 1904) 330 (sec. 338) on the authority of Stephen, Hist. Crim. Law. III, 200.

(49) 27 Edw.III stat 1.

(50) 2 & 3 Edw. VI c. 15. 3 & 4 Edw. VI. c. 9,19 and 21; 5 & 6 Edw. c. 14. See 5 Eliz. c. 5, sec. 13; 5 Eliz. c. 12; 13 Eliz. c. 25, sec. 20,21.

c. 14 (1552) it was declared that : "Whoever...shall make any motion by word, letter, message or otherwise, to any person or persons, for the enhancing of the price; or shall sell anything above mentioned" (any merchandise, victual or anything whatsoever on its way for sale)...shall be deemed a forestaller".

No statute was enacted against monopoly in the present day sense,---that is, monopolizing by an individual, for it was deemed that monopoly could only arise thru royal grant. Monopoly grants by royal perogative were at first recognized by the law.(51) During the reign of Queen Elizabeth, however, the monopolies granted by the Crown became so numerous and so oppressive that the Court dared to deny the right of the Crown to grant such monopolies indiscriminately. In the case of Monopolies (1602), Chief Justice Popham speaking for the Court declared that the monopoly of playing cards granted by the Queen was against the common law. He said, "all trades as well mechanical as other which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenaince of themselves and their families, and for the increase of their substance to serve the Queen when occasion shall require, are profitable to the Commonwealth, and therefore a monopoly of them is against the common law and the benefit and liberty of the subject".(52) In the reign of Queen Elizabeth's

(51) See, 4 Blackstone, Commentaries c. 12, Sec. 9. (15 Ed. 159);Chief Justice White in Opinion of the Court, Standard Oil Co. v. U. S. , 221 U. S. 1 at 52 and 55; supra,note 45.

(52) Darcy v. Allen, The Case of Monopolies, 11 Coke 84; Moore 673; Noy 173; 8 Coke 125; W. F. Dana, 7 Harv. Law. Rev. 342. See also Maucauley's Hist. of Eng. (3rd. Ed. 1855) 127-128; Hume's Hist. of Eng. (1822 Ed.) Vol. 5, 374, 377.

successor, Parliament passed an act forbidding the granting of monopolies except for new inventions and "concerning printing and the manufacture of saltpetre, gunpowder, ordnance and shot and the mining of alum." (53)

Chief Justice White describes the incorporation in the law, of provisions against the practices of forestalling, regrating, engrossing and monopolizing in these words:

"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 monopolizing 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,

(53) Statute of Monopolies, 21 Jac. 1 ch. 3 (1624) ; 4 Blackstone -c. 12 sec. 9 (15 Ed.) 159.

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 thru 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 ch. 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 vitual, 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 principle 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 engorssing 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".

"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.(54) 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'(55) 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".

(54) 3 Coke's Inst. 181 c. 85.

(55) Hawk. P. C. bk. 1 c. 29.

"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 dealings 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 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".(56)

As for contemporary presentations of the common law upon these practices against the freedom of trade---Sir Francis Bacon, writing in the early part of the seventeenth century said:

"All unlawful endeavors to enhance the price of any

(56) Opinion of the Court, Standard Oil Co. v. U. S. 221 U. S. at 52, 31 Sup. Ct. 502; 55 L. Ed. 619; 34 L. R. A. (N. S.) 834.

commodity, practices so prejudicial to trade and commerce, and injurious to the public in general come under the notion of forestalling which includes engrossing, regrating, and all other offenses of the like nature. It is punishable by fine and imprisonment, answerable to the heinousness of the offense, upon an indictment at common law."(57)

In Rex. v. Maynard (1632)(58) and information was presented against one for the engrossing of one hundred bushels of salt for resale. The court declared:

"If any engross all the salt with an intent to sell at his own price, and at unreasonable prices, he may thereof be indicted as for an offense at the common law."(58)

In the early part of the eighteenth century, Sergeant William Hawkins, stated that, 1. ..."All endeavors whatsoever to enhance the common price of any merchandise, and all kinds of practices which have an apparent tendency thereto whether by spreading false rumors, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such like devices, are highly criminal at common law, and that all such offenses anciently came under the general notion of forestalling, which included all kinds of offenses of this nature".

(57) 4 Bacon's Abridgements (7thEd. Phila Ed. 1876) 335.

(58) Cro. Car. 231; given in Eng. Rep. Reprints Vol. 79. See Anonymous, 12 Mod. 248 (1698); English Rep. Reprints (K. B.) Vol. 88.

2. "And surely there can be no attempt of this kind, but must be looked upon as a high offense against the public, inasmuch as it so apparently tends to put a check upon trade, to the general inconvenience of the people, by putting it out of their power to supply themselves with a commodity without an unreasonable expense, which often proves extremely oppressive to the poorer sort, and cannot but give just cause of complaint to the richest."(59)

All the statutes against forestalling, engrossing, and regrating were repealed in 1772 by 12th George III ch. 71. Nevertheless these remained offenses at common law until 1844, when they were abolished by statute of 7 and 8 Victoria, ch. 24.(60) Thus in 1773, Blackstone wrote:

"The offense of forestalling the market is.....an offense against public trade. This...(as well as the two following ---(regrating and engrossing)) is also an offense at common law... and...the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offense indictable and finable at the common law. And the general penalty for these three offenses by the common law (for all the statutes concerning them were repealed by 12 George III, c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment."(61)

(59) 1 Hawkins, Pleas of the Crown, c. 80(6th Ed.-479).

(60) Chief Justice White in Standard Oil Co. v. U. S., 221 U. S. at 55; 31 Sup. Ct. 502; 55 L. Ed. 619; 34 L. R, A. (N. S.) 834; Bishop's New Criminal Law (8th Ed.) Sec. 518.

(61) 4 Blackstone's Commentaries (5th Ed.,1773) 158,159.

In King v. Waddington (1800), information was presented against the defendant to the effect that he was spreading rumors with the intention of enhancing the price of hops, and that he had engrossed large quantities of hops with the intent to resell the same for an unduly enhanced price. He was convicted and heavily fined. The court said:

"That our law books do declare practices of the sort with which the defendant is charged to be offenses at common law cannot be denied."(62)

III

Of more importance to the discussion it is to note that, because of their interference with the freedom of trade, combinations by independent dealers to regulate prices came early to be referred to as in "restraint of trade" either as criminal conspiracies or as in the connotation of the practices of forestalling and engrossing.

Such combinations had been treated as criminal conspiracies from ancient times. In A. D. 483, the Emperor Zeno issued to the Praetorian Prefect of Constantinople an edict, "that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use whatever its nature may be, either of his own authority or under a rescript of an emperor already procured, or that may hereafter be procured, or under an imperial decree, or under a rescript signed by Our Majesty; nor may any persons

(62) 1 East 143; English Reports, Reprints K. B. Vol. 102, 56.

combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they have agreed upon among themselves. Workmen and contractors for buildings, and all who practice other professions, and contractors for baths, are entirely prohibited from agreeing together that no one may complete a work contracted for by another,.....And in regard to the principles of other professions, if they shall venture in the future to fix a price upon their merchandise and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay 40 pounds of gold. Your court shall be condemned to pay 50 pounds of gold if it shall happen, thru avarice, negligence or any other misconduct, the provisions of this salutory constitution for the prohibition of monopolies and agreements among the different bodies of merchants shall not be carried into effect."(63)

"A similar policy", added General Francis Walker, in the Political Science Quarterly for 1905, "was followed in the Middle Ages by the Emperors of the Holy Roman Empire and by the Kings of France, and to their influence can be traced some of the provisions of modern European codes."(64)

(63) Code IV, 59,(Translation by A. H. Marsh Q. C.,23 Am. Law. Rev. 261) This code is referred to by Blackstone's Commentaries, Vol. 4, c. 12 sec.9, (15th Ed. 159).

(64) Pol. Sci. Q. Vol. XX, p. 13,: The Laws concerning Monopolistic Combinations in Continental Europe-(upon authority of Menzel, Die Kartelle und die Rechtordnung, Leipzig 1902, 12-16.).

In England, said Blackstone, "combinations, also among victualers or artificers, to raise the price of provisions, or any commodities.., are in many cases severely punished by particular statutes; and in general by statutes 2 and 3 Edward VI, capita 15, with the forfeiture of 10 pounds, or 21 days imprisonment, with an allowance of only bread and water, for the first offense; 20 pounds or the pillory for the second, and 40 pounds for the third, or else the pillory, loss of one ear and perpetual infamy."(65)

In an anonymous case, towards the close of the 17th century, leave was granted to file an information against several plate-button markers, for covenanting not to sell for less than a specified price; and the Court (Holt.,C. J.) said:

"It is fit that all confederacies by those of a trade to raise their rates should be suppressed".(66)

Writing shortly thereafter, Sergeant William Hawkins included combinations,such as these in the definition of the term, "forestalling" which he stated, "must be looked upon as a high offense against the public, inasmuch as it so apparently tends to put a check upon trade.(67)

A case of a combination to fix prices is reported in

(65) 4 Blackstone, Commentaries, C. 12 sec. 9, (15th Ed.159)

(66) Anon, 12 Mod. 348 (Year 1698); English Rep.Reprints (K. B.) Vol. 88.

(67) I Hawkins, Pleas of the Crown, c. 80(6th Ed. published 1771- 479)-1st edition published in 1716; 2nd-1724; abridged 1738; 3rd,-1739.

the middle of the 18th century---the Droitwich salt dealers case (1758).[66] There leave was granted to file an information against certain individual proprietors of salt works in Droitwich for combining, by covenants, under a penalty of 200 pounds, not to sell salt under a certain price. Lord Mansfield for the Court declared,

"that if any agreement was made to fix the price of salt or any other necessary of life...by people dealing in that commodity, the court would be glad to lay hold of an opportunity from what quarter soever the complaint came, to show their sense of the crime; and that at what rate soever the price was fixed high or low, made no difference for all such agreements were of bad consequence and ought to be discontinued".[68]

The repeal of the statutes against forestalling, regrating and engrossing, in 1772 by 12 George III c 71, it appears, carried with it, altho not in specific words, the abrogation of statutes 2 and 3 Edward VI c 15 against combinations to fix prices. Such combinations remained offenses at common law as did forestalling, regrating and engrossing. The further abrogation of the common-law provisions against the three latter practices in 1844, by 7 and 8 Victoria ch. 24, however, did not abolish the common-law offense of combination to fix prices. Combinations of this kind continued to be "restraints

(66) Anon. 12 Mod. 248 (Year 1698); English Rep. Reprints (K. B.) Vol. 88.

(68) King v. Norris et al; 2 Kenyon 300.

of trade", and their agreements remained unenforceable in courts of law.

It was so declared in Urmston v. Whitelegg (1890)--- a case of a combination to regulate the price of mineral-water. The plaintiffs in this case were a mineral-water manufacturers' association, whose stated object of association was to maintain the price of their product. The defendant was a member of the association who had violated the agreement between them by selling mineral water at less than the price agreed upon and had thus, according to the rules of the association, incurred a stipulated penalty. Action was brot to recover the penalty. The Court (Day, J.) said:

"If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last 100 years great changes have taken place in the views of the public, of the legislature, and therefore of the judges on the matter (restraints of trade) and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable.(69) It is not neces-

(69) See, opinion of Lord Campbell, C. J. in Hilton v. Eckersley (1855), 6 El v. Bl. at 62 (English Rep. Reprints, Vol. 119 at 787; opinion of Hannen J. in Farrer v. Close (1869) L. R. 4 Q. B. 602 at 609; Hornby v. Close (1867), L. R. 2 Q. B. 153; Mogul Steamship Co. v. McGregor, Gow and Co. (1892) A. C. 25.

sary that it should be such as to form the ground of criminal proceedings"[70]. IV.

Unlike the earlier cases of combinations to regulate selling prices, cited herein, the price-fixing agreement in Urmston v. Whitelegg was held, not to present an indictable offense, but, simply to be a contract that the courts would not enforce, as being in restraint of trade. The principle holding combinations such as these unenforceable at law as in restraint of trade rather than criminal conspiracies is clearly expressed in the case of Mogul Steamship Co. v. McGregor, (1892).[71] The defendants in this case were a combination of six shipping com-

(70) Urmston v Whitelegg Brothers, 63 L. T. 455, at 455; affirmed 55 J. P. 454. This combination, it is clear, did not constitute a monopoly of the trade in mineral water. Judge Taft cited this case in opinion of the Court, United.States v. Addyston Pipe and Steel Co., 85 Fed. 271; 29 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122 to sustain his contention that the test of reasonableness never did apply to combination to fix prices. See contra, Wickens v Evans (1829) 3 Y.v. J: 318; Ontario Salt Co. v. Merchants Salt Co. (1871) 18 Grant (U. C.) 5; Collins v. Locke (1878) 4 A. C. 674; Cooke's Trade and Labor Combinations, sec. 27.

(71) Mogul Steamship Co. v. McGregor, Gow & Co. (1892) App. C. 35; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 56 J. P. 101; 7 Asp. M. 120; 8 T. L. R. 182; affirming L. R. 23 A. B. Div. 598; 59 L. T. 514; 58 L. J. Q. B. 465; 5 T. L. R. 658; affirming L. R. 21 Q. B. Div. 544; 5 T. L. R. 658; 57 L. J. Q. B. 541; which affirmed L. R. 15 Q. B. Div. 476; 54 L. J. Q. B. 540; 53 L. T. 368; 15 Cox C. C. 740; 49 J. P. 646; 5 Asp. M. 467; 4 T. L. R. 783.

panies, which had attempted to exclude the plaintiff, an oriental shipping company, from the Hankow tea trade by offering a rebate to shippers, sending their goods exclusively on the lines of the defendants. Action was commenced for damages for conspiring to injure the plaintiff. Judgment was entered for the defendant. Lord Chancellor Halsburg said:

"There are two senses in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect; and, therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, not withstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade, and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful' which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as <u>contrary to law,</u> is not applicable to such contracts".

"It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract;(72) and Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the

(72) Hull, J. in the Dyer's case, 1415, I presume is meant.

decision and therefore, manifestly obiter that the parties to a contract in restraint of trade would be indictable.[73] I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.[74]

Lord Watson in referring to the case, Hilton v. Eckersley[75] remarked: "The decision in that case which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no further than this---that an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding upon any of the parties to it if he chooses to withdraw,[76] and consequently cannot be enforced in invitum.

(73) Hilton v. Eckersley (6 E. & B. 47) at 53, it appears.

(74) Mogul Steamship Co. v. McGregor, (1892) App. C. 25 at p 39. Note, however, that forestalling, regrating and engrossing were held to be indictable offenses, at the same time that they were considered to be "restraints of trade". This is explained (if Chancellor Halsburg is correct) I presume by the fact that they were statutory crimes at the same time. "These (forestalling, regrating, and engrossing) kindred offenses, indictable both under the ancient common law and by early English statutes, yet seldom made the subject of a criminal prosecution in modern times. And in England they were abolished in 1844 by 7 and 8 Vict., c. 24, both as common law offenses and as statutory". Bishop's New Criminal Law, sec. 518.

(75) 6 E. & B. 47 (1855). In this case a body of cotton spinners had mutually agreed in effect to carry on their work in conformity with the resolutions of the majority of the body passed in general meeting. This agreement was held void.

(76) Mogul Steamship Co. V. McGregor (1892) A. C. 25 at 42.

Lords Bramwell and Hannen both distinctly declared that the contract of combination was void as in restraint of trade, but agreed with the other justices that contracts void as in restraint of trade were not unlawful in a criminal sense and gave no right of action for damages to one injured thereby. (77)

The rule prevailing in England, whereby agreements between independent dealers to regulate prices are declared void as in restraint of trade rather than criminal offenses, it appears, is due to the reluctance of the English courts to interfere with personal contractual relations. Thus in Printing and Numerical Registering Co. v. Sampson (1875) L. R. 19 Eq. 462, (78) Sir George Jessell said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider--that you are not lightly to interfere with this freedom of contract". (78)

This voices the opinion as to public policy entertained by the English courts for the past century. During this

(77) Ibid at 47 and 58.

(78) at 465.

time no statute has been enacted against price-fixing combinations. Parliament, thru its legislation, has rather declared itself opposed to state interference with business combination that is unaccompanied by violence or fraud.(79)

The attitude of the English courts towards combinations of independent traders, in the absence of statutory inhibition, has made possible the rise and present existence in England of such combinations held together by unenforceable agreements--- so-called "Gentlemens' Agreements." Many of these combinations have for their expressed primary object the regulation of sale prices. Macrosty: The Trust Movement in British Industry(78) presents a stupendous list of combinations of this kind. Price-fixing associations are to be found in coal, iron and steel industries, among the transportation companies, in the textile industries, in tobacco, liquor and many retail trades, in grain-milling and in many other industries.(80)

An example of a combination to regulate selling prices is the Federation of Master Bakers; Millers and Flour Merchant's Association of South Wales and the West of England. This "federation has now 500 baker members and includes thirteen affiliated associations, its area extending from Exeter to Swansea."(79)

(78) at 465.

(79) N. B. Williams: Laws on Trust and Monopolies (1914) p. 409.

(80) See also Hirsh: Monopoly, Trusts and Kartels.

The federation thru association committees fixes the selling prices of both flour and bread. A sales note, in the following words, is to form the basis of all contracts of sale between members:

"A. The buyer undertakes not to sell any bread or flour at a less price than that for the time being fixed by the Master Baker's Association of the district in which the buyer resides. In the event of any breach by the buyer of the above undertaking the buyer agrees that the seller shall have the right of determining this contract, or to sell out against the buyer, and of refusing to deliver the balance then undelivered of the contract quantity of flour, and that the exercise of this option shall not affect the sellers' right to recover the price of the flour delivered under this contract".

"B. Messrs._____ may require cash before delivery, or limit credit to a period of seven days, if the purchaser sells any flour supplied under this or any other contract made by him with them at a gross profit of less than 3 d. per score on Messrs. _____'s price of the day, or sells bread made from such flour at a gross profit of less than 10s. per sack, it being hereby admitted by the purchaser that each sack of flour produces ninety-two 4 lb. loaves; and any breach of the above conditions may be deemed a failure in the due performance of this contract, and shall further give Messrs._____the right, at their option, of cancelling this contract in respect of any goods

undelivered thereunder."(81)

In respect to this agreement Macrosty remarks: "In this way the underseller was deprived of his power to enter into a contract for a lengthy period and so secure his supplies. The result(of the contract) was prompt and satisfactory, for after a few months the president of the federation was able to say at the Baker's Exhibition in September, 1902, that he 'did-not believe that in Cardiff, Swansea, and Barry there were more than three men who sold below the federation minimum price. One man sold a light loaf and another gave something away with his bread;'only one firm of millers held aloof".(82)

Articles of agreement, similar to the above, were adopted by many other trade combinations that sought to regulate sale prices.(83)

(81) Macrosty: The Trust Movement in British Industry p. 268. This agreement of the combination is clearly illegal as in restraint of trade and thus unenforceable in a court of law. It is,therefore, simply a "Gentlemen's Agreement". Macrosty's work was published in 1907; and not having other information I do not know whether this agreement is still used. This is immaterial, however, since it covers at least the period of English price-maintenaince decisions. The combination still exists.

(82) Macrosty: The Trust Movement in British Industry p. 269.

(83) Ibid devotes much space to a treatment of these "price associations". See, also,---Hirsh: Monopolies, Trusts and Kartells.

V.

Summarizing this presentation of the development in England of the common law doctrine of contracts in restraint of trade, it appears:

1. From at least as early as the fifteenth century contracts in restraint of trade in England have been held to be void as against public policy.

2. The rule against contracts in restraint of trade at first had no exception. From the early part of the seventeenth century there has been a growing amelioration in the attitude of the courts towards such contracts. A distinction was drawn between general and partial restraints; and a contract in which the restraint was partial in the eye of the law and where the contract was otherwise reasonable came to be upheld by the courts. Within the past half century, this distinction between general and partial restraints has been discarded for the present day test of reasonableness of the restraints. A restraint of trade is reasonable that is necessary to protect the rights of the parties to the contract and that is not specifically injurious to the public; and a contract imposing such a restraint will be upheld. Otherwise a restraint of trade is unreasonable and the contract embodying it will not be upheld.

3. The term "contracts in restraint of trade" originally referred only to agreements whereby one of the contracting parties covenanted not to exercise his trade. Such agreements were generally ancillary to the carrying out of some lawful, principal contract. During the sixteenth century certain trade practices, that it was considered interfered similarly with

the freedom of trade, came likewise to be referred to as in restraint of trade. These practices were forestalling, regrating, engrossing and monopolizing. Monopolizing then denoted only the grant by the sovereign of the exclusive privilege to buy, manufacture and sell certain commodities. This was prohibited except for new inventions in 1624 by an act of James I which declared the acceptance of a forbidden monopoly grant to be an indictable offense. This statute was never repealed. Forestalling, regrating and engrossing, included in their connotation monopoly in the present day sense- that is, monopoly by an individual. These three practices were also statutory offenses. The statutes concerning them (statutes of Edward IV and Edward VI) were repealed by an act of George III in 1772. They remained common-law offenses, however, until abolished by a statute of Victoria in 1844.

4. Combinations of independent dealers to fix sale prices have been offenses at law from ancient times. In England an act of Edward VI made such combinations criminal; and they were treated as criminal confederacies or conspiracies in court. The statute was repealed but these combinations have continued to be offenses at common-law as in restraint of trade.

5. Contracts in restraint of trade have always been void at common law in that the courts cannot be envoked to enforce such contracts. Contracts in restraint of trade have given rise to indictable offenses only when these contracts made also statutory crimes. Such were forestalling, regrating and engrossing; and such were combinations to fix prices. Since the repeal of the statutes against these offenses, they remained

illegal only in the sense that the agreements involved were unenforceable in courts of law.

6. Now since combinations between independent dealers to regulate prices are considered to be in "restraint of trade", and thus their agreements of association are merely unenforceable, many combinations with the expressed object of controlling the selling price have appeared in England within the past few decades. They work under "Gentlemen's Agreements" as do brokers in the stock exchange. There is no positive law to put them out of existence.

CHAPTER V.

CONTRACTS IN THE RESTRAINT OF TRADE

IN THE UNITED STATES.

I.

The English law,-statutes as well as the common law and equity-as of some period during the seventeenth or eighteenth centuries, was adopted, in the main by all the American states,with the exception of Louisiana, where the Roman law is the source of its common law. Furthermore, the American law was developed up thru the first quarter of the nineteenth century in close conformity with the development of the English law. It was thus that the English doctrine of general and partial restraints, as formulated in Mitchel v. Reynolds became the doctrine of contracts in restraint of trade in the American states. And in America, as in England, the term "restraints of trade" came to be interpreted to include certain trade practices originally not within the meaning of the term. These practices, as stated hereinbefore, were designated forestalling, regrating and engrossing. Included within their connotation were price fixing combinations of independent dealers, and monopoly in the modern sense - that is, monopoly by an in-(1)

(1) Monopoly is defined by Louis D. Brandeis as a"unified control of some recognized branch of trade or some recognized service": Statement in Hearings before The Committee on Interstate and Foreign Commerce, (U. S. House of Representatives, Sixty Third Congress, Third Session) on H. R. 13305, p. 35, Jan. 9, 1915 (published not for distribution.) Monopoly in the early sense- that is, monopoly created by a grant of the sovereign power-has been precluded by the structure of our Government. Nevertheless, express prohibitions of such monopolies are to be found in several state constitutions:- Maryland, Declaration of Rights, art. 41; North Carolina, art. 1. Sec. 31; Massachusetts, Declaration of Rights; Tennessee, Art. 1. Sec. 22; Arkansas, art. 2. Sec. 19; Texas, Art 1. Sec. 26; Wyoming, Art. 1. Sec. 30.

dividual.[2] In reference to this, Chief Justice White says, in Standard Oil Co. v. United States, 221 U. S. 1:[3]

"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 dimin-

(2) Robinson's Elementary Law, sec. 5; Andrews' American Law(1900) sec. 205; I Bishop's New Criminal Law (8th Ed.) Sec.518 -529; Purdy's Beach on Private Corporations (1905) Vol.II, 1403 ff.; Cooke's Trade and Labor Combinations,(1898) Appendix II,194 -195; Wheaton v. Peters, 8 Pet. (U. S.) 659; Browning v. Browning, 3 N. Mex. 371.

(3) Standard Oil Co. V. U. S., 221 U. S. 1 at 56; 31 Sup. Ct. 502; 55 L. Ed. 619 34 L. R. A. (N. S.) 2834.

ish 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."

So, in the leading early case, Alger v. Thacher (1837), the Massachusetts Supreme Court (Morton J., delivering the opinion of the Court) reviewed the important common-law restraint of trade cases up to that time, and then said:

"Ever since the (Mitchel v. Reynolds) 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.....<u>This doctrine extends to all branches of trade and all kinds of business</u>..... That the law under consideration has been adopted and practised upon in this country and in this State, is abundantly evident from the cases cited from our own reports.(4) It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy, and <u>carries out our constitutional prohibition of monopolies and exclusive privileges.</u>"

"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,

(4) The important cases preceding Alger v. Thacher were Pierce v. Fuller, 8 Mass. 223 (1811); Perkins v. Lyman, 9. Mass. 522 (1813); Pyke v. Thomas, 4 Bibb, 486 (1817); Stearns v. Barrett, 1 Pick 443 (1823); Palmer v Stebbins, 3 Pick 188 (1825); Nobles v. Bates, 7 Cowen 307 (1827); Pierce v. Woodward, 6 Pick 306 (1828).

because they diminish their means for obtaining 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 persons 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 to 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 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." (5)

II.

Thus the doctrine of contracts in restraint of trade came to apply to two distinct kinds of contracts: (1) Contracts, whereby one of the contracting parties covenanted not to follow his trade; and (2) contracts which tended to suppress competition.

In respect to contracts of the first kind, "the decisions of the American courts substantially conform to both the

(5) 19 Pick 51;- The action was for debt on a bond conditioned that the covenantee should never engage or be concerned in the iron foundry business. The bond was held void as in general restraint of trade.

development and ultimate results of the English cases."(6) In the doctrine of general and partial restraints formulated in Mitchel v. Reynolds, the modified doctrine of Hitchcock v. Coker, and finally the test of reasonableness laid down in Roussilon v. Roussilon, in the Nordenfeldt case and in other cases of the latter half of the nineteenth century have been uniformly applied by the American courts in cases involving contracts of this kind. We find the American courts, time and again, reviewing the development of the doctrine of contracts in restraint of trade in England before presenting their decisions in the specific cases of this class.(6)

Yet, it must be noted that the American courts have laid great stress upon the ancillary nature of contracts restraining one of the contracting parties in the pursuit of his trade--stress for beyond that presented by the English decisions.

(6) Chief Justice White, in Opinion of the Court, Standard Oil Co. v. U. S. 221 U. S. 1.; 31 Sup. Court. 502; 55 L. Ed. 619: 34 L. R. A. (N. S.) 834.

Early cases given in note 4; Vickery v. Welch 19 Pick 523 (1837); Chappel v. Brockway, 21 Wend. 157 (1839); Ross v. Sadgbeer, 21 Wend. 166 (1839); Jarvis v. Peck I Hoff. Ch. 479 (1840); Bowser v. Blits, 7 Blackf. 344 (1845); Grassvielli v. Lowden, 11 Ohio St. 349;( ).

For cases thereafter see---

Note 24 L. R. A. (N. S.) 913 and cases cited therein.

Note 23 L. R. A. (N. S.) 506 and cases cited therein.

Williston, Wald's Pollocks on Contracts 468, footnote 36. State v. Duluth Board of Trade, 107 Minn. and cases therein cited. Espenson v. Wm. Koepke, 93 Minn. 378; 101 N. W. 168; Kronschnabel-Smith Co.y. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Anchor Electric Co. v. Hawkes, 171 Mass. 101, (1898)-IIWilliston's Case Book on contracts 378,- Herreshoff v. Boutineau, 17 R. I. 3 ( ); II Williston's Case Book on Contracts. See Contra. Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596. ( ).

Contracts such as these have been generally-and necessarily-ancillary to other contracts, principally, contracts of sale. Thus, in so far as such contracts in restraint of trade are concerned, the statement continually made by American jurists, that contracts in restraint of trade that were upheld were generally ancillary as well as partial, or (later) reasonable, is perfectly correct. Yet, contracts of this kind in general restraint of trade, or later, in unreasonable restraint that were not upheld were also ancillary. And contracts not of this kind-contracts not ancillary to other contracts, were upheld in a number of decisions not as yet overruled in England.(7) Certainly no emphasis was placed upon the ancillary nature of the contract in restraint of trade before the Horner v. Graves case in 1831. In that case, Chief Justice Tindal presented a test of reasonableness referred to with approval in many American cases. The Justice said, "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 offensive, and if offensive, it is in the eye of the

(7) See, Ontario Salt Co. v. Merchants Salt Co., 18 Grant 540 at 544; Wickens v. Evans, 3 Young & J. 318; Collins v. Locke, 4 A. C. 674. See also, Cooke's Trade and Labor Combinations, Sec. 27.

law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy."(8)

"The very statement of this rule," declared, Judge Taft, "implies that the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or 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."(9)

Judge Taft may be right in his deductions. As a matter of fact, however, Chief Justice Tindal's decision in this particular case, holding void a contract in restraint of trade extending over a region two hundred miles in diameter, was based not on the test of reasonableness enunciated by him, but on the Mitchel v. Reynolds doctrine of general and partial restraints. The restraint was not sufficiently particular as to space (that is, more extensive than contemplated in the Mitchel v. Reynolds doctrine) he said, and therefore unreasonable.(10)

The test of reasonableness laid down in the Norden-

(9) United States v Addyston Pipe & Steel Co., 85 Fed. 271 at 272; 29 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122.

(10) 7 Bing C. P. 735 (1831); Mellow v. May, 11 Mees & W. 653 (1843)--Parke, Baron discusses rather vaguely the ancillary nature of these contracts .

feld case, whereby a contract, it was said, would be upheld in which "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 in no way injurious to the public,"-(11) this test of reasonableness, it appears, applies only to ancillary covenants in restraint of trade, otherwise, why "guarded as to afford adequate protection to the party in whose favor it is imposed?"(11) Yet, no direct statement is to be found in this decision, averring that the contract in restraint of trade was upheld because it was ancillary or that if the contract had not been ancillary it would not have been upheld.(11)

However that may be, The American courts have held in numerous decisions that a contract in restraint of trade to be upheld, must be, among other things, ancillary to another contract.(12) Judge Taft presents in the Addyston Pipe case(13)

(11) Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Co. (1894) A. C. 535 at 565. 63. L.J. Ch.908; 11Rl; 71L.T. 469

(12) See notes, 24 L. R. A. (N. S.) 913 and 933 and cases therein cited. See Note 23 L. R. A. (N.S.) 847 and cases therein cited.
See Fox Solid Pressed Brick Co. v. Schoen 77 Fed. 29; (affirmed in 28 C. C. A 492. 55 U. S. App. 519; 84 Fed. 544. See State v. Duluth Board of Trade 107 Minn. 506 and cases therein cited; For effect or remainder of contract, of ancillary illegal covenant in restraint of trade. See note 24 L. R. A. (N.S.) 942 and cases therein cited.

(13) United States v. Addyston Pipe and Steel Co. 85 Fed. 271; 29 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122.

the conclusions of the American courts in respect to the contracts in restraint of trade that will be upheld. He says:

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property of business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements were upheld, however , the courts must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good will or interest in the partnership bought, or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business.(14)

(14) Judge Taft then cites English and American cases falling into each of these five classes.

..."It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at common law; but, it would certainly seem to follow from the tests laid down for determining of 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, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."(15)

Another difference in these American and English decisions, developed in the rather recent cases, lies in the greater emphasis put in the American decisions upon the interests of the public. The American decisions state it thus: Prima facie, contracts in restraint of trade are invalid. The first consideration in determining whether the specific contract before the Court may be deemed valid is the public welfare. If the contract would produce injury to the public it is invalid irrespective of its reasonableness to the contracting parties. If the contract is not obnoxious to the public welfare, the next consideration is whether the contract is reasonable as to the contracting parties - that is, whether it is reasonably necessary to the protection of the party in whose interest the contract is drawn. The English Courts approach a contract

(15) United States v. Addyston Pipe and Steel Co. 85 Fed. 271; 26 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122. See contra (English)--Wickens v. Evans, 3 Young & J.318; Collins v. Locke, 4 App. Cas. 674; Ontario Salt Co. v. Merchants Salt Co. 18 Grant (U. C.) 540;(American) - Kellogg v. Larkin, 3 Pin. 123 (Wis.); Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363.

in restraint of trade in this way: Prima facie, contracts in restraint of trade are invalid, as in the American states. The first consideration, however, is the reasonableness of the restraint. If the restraint is one no wider than is necessary to protect the interests of the covenantor, in respect to the property acquired or retained by him, the restraint is good unless the contract can be shown to be specifically injurious to the public.

The distinction thus drawn may appear theoretically vague. The result has been, however, that many contracts in restraint of trade have been held void by American Courts that, according to English decisions, would have been upheld by reason of their applying the test of reasonableness first. (16)

III.

In respect to contracts tending to suppress competition, the practices of forestalling, regrating and engrossing, per se, ceased to be offenses in the American states, as in England, during the first half of the nineteenth century. But, monopoly by an individual, and combination of independent dealers to regulate prices, remained offenses at law, to receive momentous consideration during the past two decades.

"Monopoly" as employed by the American Courts for the

(16) See, note 24 L. R. A. (N. S.) 913 at 915 and at 924; see, Anderson v. Shawnee Compress Co., 17 Okla. 231, 15 L. R. A. (N. S.) 846, 47 Pac. 315; (affirmed in) 209 U. S. 423. 52 L. E. 865, 28 Sup. Ct. Rep. 572; cited 24 L. R. A.(N. S.) 913 note at 915. See contra - Diamond Match v. Roeber, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419.

past half century simply denotes engrossing carried to its logical extreme. It is the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity, or dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business.(17) The fear of monopoly has hung over the American people for the past few decades, as a darkened sky ominous of a thunderstorm to one distant from shelter. Unlike the Germans who instituted a system of regulation, the American people tried to hasten to cover by enacting a vast amount of prohibitive legislation, much that is illogical. To those of us who still view competition as "the life-blood of trade" the American method appears nevertheless to be greatly preferable to the German System.

Combination of independent traders to fix prices, as already stated, has been a matter of important public concern in the United States only since the Civil War. Before the War, combinations to fix prices were infrequent and generally insignificant; and they, therefore, occasioned little attention in our courts. With their phenomenal development during the 70's and 80's, however, these combinations invoked great public interest and gave rise to many cases at law involving the validity of the combination contracts. These combination contracts were almost invariably held to be subject to the common-law doctrine of contracts in restraint of trade. Thus, at most, such of these contracts as were de-

(17) United States v. American Naval Stores Co.,172 Fed. 455.

clared to be objectionable in the eye of the law were void and were not enforced by the courts. This common-law provision, as may be surmised, proved entirely ineffective in curbing the business combinations of the 70's and 80's. In attempts to curb them, one state after another enacted legislation--- so-called anti-trust acts,--supplementing the common-law provisions principally by making restraints of trade indictable offenses. Twenty-five states including Minnesota enacted such legislation in the five year period, 1889 - 1894. Since then almost all the other states have done likewise.(18)

By virtue of the right to regulate interstate and foreign commerce, granted to it by the Constitution of the United States, Congress also passed an anti-trust act - the so-called Sherman Anti-Trust Act.of 1890, declaring "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states" and territories of the United States or between these states and territories and foreign countries, illegal and its promoters punishable by fine or imprisonment.(19)

The Sherman Anti-Trust Act was supplemented in 1894 by a provision on combinations in import trade, written into the Wilson Tariff Act.(20) This provision was revised in

(18) Coman, Industrial History of the United States, 354 -361. Jenks, The Trust Problem, Ch. IX, XI. Montague, Trusts of Today, Ch. V, VI. Lloyd, Wealth v. Commonwealth. Cooke's Trade and Labor Combinations (1898) Appendis II, 194 - 195. J. Elliott, in Opinion of the Court, State v. Duluth Board of Trade, 107 Minn. 506. Footnote ubi.

(19) Coman, Industrial History of the United States, 359-360. Durand, The Trust Problem. Thornton, Sherman Anti-Trust Act.

(20) 28 Stat. L.570, Aug. 15, 1894-Given in Appendix I, B (1).

1913 in connection with the Income Tax Law.[21]

The Sherman Anti-Trust Act was again supplemented recently in the Trade Commission Acts[22] and the Clayton Anti-Trust Act,[23] both enacted in 1914.

The state anti-trust statutes have also been frequently amended and supplemented. In but a few states do we now find the anti-trust acts in the same wording as originally enacted.[24]

The Constitutions of statutes of twenty-nine states including Minnesota specifically prohibit price-fixing agree-

(21) Public - No. 370. Feb. 12, 1913 (H. R. 25002) given in Appendix I. B (2).

(22) Chapter 203, Approved September 26, 1914; See Appendix I. C.

(23) Chapter 212, Approved October 15, 1914; See Appendix I. D.

(24) The principal anti-trust acts in Minnesota were enacted in 1894, 1897, 1907 and 1913. In some states the acts have been entirely revised or supplemented at almost every session of the legislatures in the past two decades. See, Williams, Laws on Trusts and Monopolies; Cooke's Trade and Labor Combinations, Appendix II, 194.

(25) (26) (27)
ments. Three other states - Georgia, North Carolina and Ok-
(28)
lahoma forbid price fixing in effect , tho not in words.

(25) The Laws now in force in the respective states are:
Minnesota, General Statutes 1913, Sec. 8973.
Alabama, Const. (1901) Sec. 103; Code, Sec. 7579.
Arizona, Const. Art. XIV. (1910) Sec. 15; Penal Code, Title XV., Laws of 1912 (Reg. Sess.) Ch. Sec. 1.
Arkansas, Laws of 1905, Act I. Sec. I.
Connecticut, Laws of 1911, Ch. 185.
Florida, Laws of 1915, Ch. 6933, No. 127 at 281, Sec. 1, 2,.
Idaho, Const. Art. 11, Sec. 18; Laws of 1909, Senator Bell 127, Sec. 1, 2; Laws of 1911, Ch. 215, Sec. 1 and 2.
Illinois, Criminal Code, Sec. 3550 (1), Sec. 3555, (6).
Indiana, Burn's Annotated Indiana Statutes, (1908) 3878, 3884.
Iowa, Code, Annotated (1897) Sec. 5060; Supplement Code Annotated (1913), Section 5067a.
Kansas, General Statutes of 1909, Sec. 5185 (1889 Ch. 251).
Kentucky, Statutes of 1915, (Carroll), 3915, 3918 and 3941a; Const. Sec. 198.
Louisiana, 2 La. Revised Laws, 1904 at 1804 (Laws of 1892, Act. 90 at 120); Laws of 1914, Act. 228, p. 589.
Michigan, Howell's Michigan Statutes, Sec. 2949 and 14887.
Missouri, Revised Statutes, Amended Laws 1913, pp. 550-551, Sec. 10299, 10301.
Mississippi, Code as amended by Laws of 1908, Chap. 119, Sec. 5002.
Montana, Laws of 1909, Chap. 97, Sec. 8285.
Nebraska, Revised Statutes of 1913, Sec. 4017,
New Jersey, Laws of 1913, Chap, 13, Sec. 1.
New York, Consolidated Laws, Chap 25, General Business Law, Sec. 340.
North Dakota, Laws 1907, Chap. 1, 2 and 8.
Ohio, General Code 1910, Sec. 6391.
South Carolina, Code of Laws 1902, Sec. 212.
South Dakota, Laws of 1909, Sec. 2.
Tennessee, Code 1896, Sec. 3185.
Texas, Revised Civil Statutes, 1911, Articles 7796, 7779, 7897.
Utah, Compiled Laws 1907, Sec. 1752, 1753.
Washington, Const., Art. 12, Sec. 22.

(26) Georgia, Penal Code; Civil Code, Sec. 4253, App.--II. B.

(27) North Carolina, P. L. of N. Car. 1913, Chap, 41, App.II.B.

(28) Oklahoma, Revised Laws 1910, Sec. 8220, 8227, See Appendix II. B.

In Wyoming corporations are forbidden to consolidate or combine "to control or influence productions or prices thereof."[29] Massachusetts prohibits agreements the effect of which are "unduly to enhance" the price of any article.[30] Wisconsin forbids price-maintenance agreements by corporations.[31] A Wisconsin law of 1907 provides that:

"Any 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 in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof...or fix any standard or figure by which its price to the public shall be in any manner controlled or established... shall have its charter or authority to do business in this state cancelled and annulled.[31]

Two states, California[32] and Colorado[33] by statute permit price fixing to a limited estent. New Jersey specifically legalizes price maintenance.[34] A New Jersey Act of 1913 de-

(30) Massachusetts, Laws (1911) Ch. 503, Sec. 1; Laws of 1913, Ch. 709. See Appendix II , B.

(31) Wisconsin, Statute (1911) Sec. 1791; 1770 g. See Appendix III. A.

(32) California, Statutes, 1907, p. 984 as amended, Statutes 1909, p. 593. The 1907 Act is known as the Cartwright Anti-Trust Law. In Ghirardelli v. Hunsicker, 161 Cal., 355, the Court held that these anti-trust statutes legalized price maintenance agreements

(33) Colorado, Laws of 1913, Ch. 161, almost identical in language to the California Acts - See Appendix II. C.

(34) New Jersey, Laws of 1913, Ch. 210, (April 1. 1913) App. III.B.

clares that, "it shall be unlawful for any merchant, firm, or corporation...to discriminate against....any maker in whose product said merchant, firm or corporation deals... by price inducement...,except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business.(34)

The exact language of the Federal and State laws in respect to price fixing, in so far as they concern the subject matter of this paper will be found in the Appendix. These laws, on account of their indefiniteness,(35) have been interpreted in most in the light of the common-law doctrine of contracts in restraint of trade. When so interpreted the statute laws go no further than to declare a contract that would have been void at common law, to be illegal under the statutes.

IV.

Turning to the legal decisions on price fixing agreements we find that in the majority of cases such agreements have been held to be invalid both at common law and under specific statutes. In a number of cases, however, most of which are relatively early ones---common-law cases---agreements of this kind have been upheld.

In the common-law cases that upheld agreements to fix

(34) New Jersey, Laws of 1913, Ch. 210, (April 1, 1913) See Appendix III. B.

(35) Some are considered indefinite by the courts that would scarcely be considered so by a layman. See Appendix.

prices, the decisions were based principally on the ground that the restraints in the specific contracts before the court were partial and reasonable, and were subject to the doctrine holding contracts to be valid, if the restraint be partial as to space and no more than reasonably necessary for the protection of the party in whose interest the restraint is put. This was the ground the Wisconsin Supreme Court took in Kellogg v. Larkin (1851)[36] in upholding one of a series of contracts forming a combination. It was the basis for the decision of the New York Court of Appeals in sustaining as valid a combination contract in Leslie v. Lorillard (1889).[37] It was the doctrine adopted later by California in Herriman v. Menzies (1896)[38] and by New Jersey in Meredith v. New Jersey Zinc and Iron Company.(1897),[39]

(36) 3 Pin 123; 56 Am. Dec. 164. The action in this case was on a covenant, that was one of a series of contracts, whereby the warehousemen of Milwaukee agreed with a combination of grain dealers of Milwaukee ~~agreed with a combination of grain dealers of Milwaukee~~ not to purchase or store wheat in the Milwaukee market. The court held the restraint to be good since it was limited in area to Milwaukee and was reasonably necessary to protect the grain dealers in their dealings with the warehousemen. This ruling was reversed in the case of Association v. Niezevowski, 95 Wis. 129; 70 N. W. 166.

(37) 110 N. Y. 519; 18 N. E. 363; 1L. R. A. 456. In this case there was involved an agreement between two steamship companies whereby one covenanted no longer to compete with the other over a certain route. The decision followed the ruling in Diamond Match Co. v. Roeber, 106 N. Y. 473; 13 N. E. 419; 60 Am. Rep. 464 that a "covenant being supported by a good consideration and constituting a partial and not a general restraint and being in view of the circumstances reasonable is valid and not void.

(38) 115 Cal. 15, 35 L. R. A. 318.

(39) 55 N. J. Eq. 211, 37 Atl. 539; involved a contract of sale.

These cases concerned agreements to fix prices in effect, tho not in words.[40] Some Massachusetts cases, however, involved specifically agreements to fix prices. Thus, in Central Shade Roller Co. v. Cushman (1887),[41] the Massachusetts Supreme Judicial Court sustained a combination among the principal dealers in a commodity, who substantially supplied the market. The Court said:

"The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular fixture of the parties' own manufacture."

"We cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and unform price and to prevent the injurious effect, both to producers and customers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid, as in res-

(40) See a somewhat similar Minnesota decision in National Benefit Co. V. Union Hospital Co., 45 Minn. 272.

traint of trade or against public policy."[41]

This opinion presents the attitude of Massachusetts towards price-fixing agreements. Massachusetts has undoubtedly been more tolerant than most American states towards combinations to fix prices.[42]

In a few other cases certain combinations to fix prices were sustained on the ground that they related to articles manufactured by secret process.[43]

By far the majority of the decisions, however, have gone against price-fixing agreements. I shall review just some of the more important cases.

The coal dealers of Lockport, New York, entered into an agreement forming a coal exchange with the sole authority to fix prices at which the members were to sell coal. When this agreement came before the court in People v. Sheldon, (1893),[44] it was declared to be illegal at common law and under

(41) 143 Mass. 353; 9 N. E. 629. This decision is followed in Gloucester Isinglass &Glue Co. v. Russia Cement Co. (1890) 154 Mass. 92; 27 N. E. 1005; 12 L. R. A. 563; 26 Am. St. 214. There the court declared a combination of glue manufacturers not invalid because it involved goods that were "not of prime necessity." In Gamwell Fire Alarm Telegraph Co. v. Crane, 160 Mass. 50; 35 N. E. 98 the Court held combination invalid in that it related to an article of "public necessity." See Garst v. Harris (1900) 177 Mass. 72.

(42) See.Appendix II. B; See Note to Harding v. American Glucose Co. (1899), 182 Ill. 551) in 74 Am. St. Rep 189 at 235.

(43) Morse Twist Drill & Machine Co. v. Morse (1869) 103 Mass. 73; Peabody v. Norfolk, 98 Mass. 452; Taylor v. Blanchard, 13 Allen 370;(Mass.) . See, Fowle v. Park, 131 U. S. 88 at 97.

(44) 139 N. Y. 251; 34 N. E. 785; 23 L. R. A. 221; 36 Am. St. 690.

the then recently enacted New York anti-trust statute. The court said:

"A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity was, in the contemplation of law, an act inimical to trade or commerce, without regard to what might 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 undua or excessive prices; where it appeared that the parties acted under the agreements an indictment of conspiracy was sustainable."(44)

In DeWitt Wire Cloth Co. v. New Jersey Cloth Co. (1891) the Court said: "The declared purpose of the agreement is to enable the association, as between its members, to regulate the price of the commodity in which they deal... "The people have a right to the necessaries and conveniences of life at a price determined by the relation of supply and demand, and the law forbides agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition."(45) These decisions it appears, reversed the ruling in the earlier case of Leslie v. Lorillard supra

(44) 139 N. Y. 251; 34 N. E. 785; 23 L.R.A. 221; 36 Am. St.690.

(45) (Coms. Pl.) 16 Daly 529; 14 N. Y. Supp. 277. The same view is taken in Arnot, Pittson v. Elmira Coal Co. (1877) 68 N. Y. 588, 23 Am. Rep. 190; People v. North River Sugar Refining Co. (1889), 54 Hun. 366, 7 N. Y. Supp. 466, (Affirmed 121 N. Y. 582); Leonard v Poole (1889) 114 N. Y. 371, 21 N. E. 707; Carbon Co. v. McMillin (1890), 119 N. Y. 46, 23 N. E. 790. See also Cummings v Union Blue Stone Co., 164 N. Y. 401; Cohen v Berlin & Jones Envelope Co., 166 N. Y. 292; Straus v. Am. Publishers Ass'n. 177 N. Y. 473 Ibi Chap. VIII. p. ; Walsh v. Dwight (1899) 40 N. Y. App. Div. 513 - Contra, See Chap. VIII. p. Ibi.

In Morris Run Coal Co. v Barclay Coal Co. (1871), the Pennsylvania Supreme Court held to be invalid, a contract of association whereby five coal dealers of Northern Pennsylvania formed a combination to fix prices and the proportion of sales by each. These coal dealers did not have a monopoly of the coal trade in their district. (46)

In Nester v Brewing Co. (1894) the same court held a contract void, by which a number of Philadelphia brewers agreed to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number.

In Michigan an arrangement between the wholesale dealers and plumbers of Detroit whereby the plumbers were to purchase their supplies at a fixed price was held void. (48)

The court said:

"All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any necessaries of life, are monopolies and intolerable, and ought to receive the condemnation of all courts." (48)

The Illinois Supreme Court in 1875 declared a combination

(46) 68 Pa. St. 173; 8 Am. Rep. 159.
(47) 161 Pa. St. 473; 39 Atl. 102; 24 L.R.A. 247; 41 Am.St.894.
(48) Richardson v Buhl (1889) 77 Mich. 632; 43 N.W. 1102; 6 L. R.A. 457. This was followed in Hunt v Riverside Co. operative (1905) 140 Mich. 538; 104 N.W. 40; 112 Am. St. 420.

of five grain dealers of Rochelle, Illinois, to fix the price at which they would sell grain to be invalid.[49]

The Wisconsin Supreme Court in Association v Niezerowski (1897) condemned a combination to fix prices entered into by a majority of master masons in Milwaukee.[50] This over-ruled the early case of Kellogg v Larkin supra.

In an early Louisiana case, Association v Kock (1859) a combination between eight cotton bagging firms was held to be "contrary to public order" and void.[51]

In Texas (Texas Standard Oil Co. v Andoue)[52] it was decided that a combination to fix prices by five cotton seed oil millers was invalid as in restraint of trade. In the case of San Antonio Gas Co. v State of Texas,[53] the court, in holding a combination contract void, declared, "If the combination be one to create or carry out restrictions in trade or commerce or aids of commerce, no matter what may be the result of the combination, the law has been violated. The law does not look to the results. The object of the statute (of 1889) 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

(49) Craft v McConoughy, 79 Ill. 346; 22 Am. Rep.171; followed in More v Bennett(1892) 140 Ill.69,29 N.E.888. Ford v Association(1895) 155 Ill. 166, 39 N.E.651. Distilling & Cattle Feeding Co. v People(1895) 156 Ill.448.Bishop v PreservesCo. (1895), 157 Ill. 284, 41 N.E. 765. See also Evans v Am. Straw Board Co. (1885) 114 Ill. App. 450. C.W. & V Coal Co. v People (1905) 214 Ill. 421.
(50) 97 Wis. 139, 70 N.W. 166.
(51) 14 La. Am. 168.
(52) 83 Tex. 650; 19 S.W. 374; 15 L.R.A. 598, 29 Am. St.(1892) 690.
(53) 22 Tex. Civ. App. 118 (1905).

demand, and untrammeled by combinations of men or corpo rations, (54)
which can at will control their course."

These decisions holding agreements to fix prices to be invalid have been followed in many other cases, too num- (55) (56) (57)
erous to mention here. The courts of Maryland, Ohio, (58) (59) (60) (61) (62)
Indiana, Kentucky, Georgia, Alabama, Missouri,

(54) Ibid, p. 122. This ruling is followed in Anheuser-Busch Brewing Association v Houck (1894) 27 S. W. 692 (Tex. Civ. App.); Watkins Med. Co. v Johnson (1913) 162 S. W. 394 (Tex.)
(55) For a good presentation of cases on combinations see Note in 74 Am. St. Rep. 235 - footnote to Harding v American Glucose Co. (182 Ill. 615) 74 Am. St. Rep. 189. See also 11 Am. Ry. & Corp. Rep. 388,445,474, for early cases - See, Note 6 L. R. A. (N.S.) 847 and cases cited therein. -See, State V Duluth Board of Trade, 107 Minn. 506 and cases cited therein. - See, Dewitt Wire Cloth Co. v New Jersey Wire Cloth Co., 16 Dae 529, 14 N.Y. Supp. 237 and cases cited therein. - See, Williston, Wald's Pollock on contracts, 478 note 36; also II Parsons on Contracts, 753 note (1); See, F. G. Goodnow, Trade Combinations at Common Law. Pol. Sci. Quart. XII. 212.
(56) Klingel's Pharmacy v Sharp & Dohme (1906) 104 Md. 218.
(57) Salt Co. v Guthrie (1880) 35 Ohio St. 666; Emery v Candle Co. (1890) 47 Ohio St. 320, 24 N.E. 660; State v Standard Oil Co. (1892) 49 Ohio St. 137, 30 N.E. 279; Hoffman v Brooks (1884) 11 Wkly. Law Bul. 258; 6 Ohio Dec. 1215; State v The Buckeye Pipe Line Co. (1900) 61 Ohio St. 520.
(59) Anderson v Jett. (1889) 89 Ky. 375, 12 S.W. 670; Comm. v Bavarian Brewing Co. (1902) 112 Ky. 925.
(58) See, Knight & Jellson Co. v Miller (1909), 172 Ind. 27.
(60) See, Brown v Jacobs (1902) 115 Ga. 429.
(61) See, Georgia Trust Exchange v Turnipseed, 123 Ala. App. 123
(62) State v Armour Packing Co. (1903) 173 Mo. 356; State v Standard Oil Co. (1909) 218 Mo. 1. See, City of St Louis V Gas Co. (1879) 70 Mo. 69; see also State exinf. Attorney-Gen. v Insurance Co. (1899) 152 Mo. 1; State v Arkansas Lumber Co., (1914) 169. S. W. 145 (Mo.), ; Finck v. Schneider Granite Co. (1905) 187 Mo. 244; Euston v. Edgar (1907) 207 Mo. 287.

Nebraska,[63] Iowa,[64] South Dakota[65] and Minnesota[66] have rendered decisions to the same effect. So have the Federal Courts.

In the recent case of State v. Minneapolis Milk Co.[67] (1913). Our Supreme Court held an agreement between a number of milk dealers. (six corporations and eight individuals), to regulate the price of milk in Minneapolis, to be illegal. Justice Brown said;

"In a case like that at bar where the charge is the formation of a combination between several persons and corporations to increase the price of products sold and dealt in by each, it would seem unimportant that an increase of price was justified, either in view of the cost of production or other circumstances which might justify the individual to demand more for his goods. The statute was not designed as a means for the regulation of the public market, nor as an attempt to control the price of goods offered for sale, but rather to check the tendency toward monopolization to prohibit several dealers from combining together, the effect of which is the organized stifling of competition; and the aim of the statute was to remedy

(63) See, State v. Neb. Distilling Co.,29 Neb.703, 46 N. W. 155 (1890).

(64) See Reeves v. Decorah Farmer's Co-op. Soc. (1913) 140 N. W. 844 Iowa; Chapin v. Brown,(1891) 83 Iowa 156,48N. W. 1074.

(65) State v. Lumber Co. (1909), 24 So. Dak. 136.

(66) Stewart v. Transportation Co. (1870) 17Minn. 372 - The court said, "It is against the general policy of the law to destroy or interfere with free competition, or to permit such destruction or interference".

(67) 224 Minn. 34.

or prevent that evil. And in this case the first and important issue was whether a combination was formed by the defendants as charged in the indictment, and for the purposes therein alleged. Evidence tending to show that defendants theretofore had been selling their milk and cream at a loss, or that other dealers more favorably situated occupied an advantageous position in the trade, or that defendants had valid and sufficient reasons for raising the price, would not constitute a defense or justify the wrongful combination."(68)

The Federal cases involving price-fixing agreements have been in the main concerned with the interpretation of the Sherman Anti-Trust Act. Until the decision in the Standard Oil case,(69) a literal interpretation was given to the word "every" in the Sherman Anti-Trust Act, as used in the first sentence of the first section. This sentence reads "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." Thus, it was held that a restraint to be illegal need not be "unreasonable" in fact. All combinations and contracts in restraint of interstate trade that were subjected to court decision before the Standard Oil case were held to be illegal.(70)

(68) Ibid at 42.

(69) (1910) 221 U. S. 1; 31 Sup. Ct. 502; 55 L. Ed. 619; 34 L. R. A. (N. S.) 834 modifying 173 Fed. 177.

(70) United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup Ct. 540, 41 L. Ed. 1007. United States v. Joint Traffic Association, 177 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; see also United States v. Addyston Pipe & Steel Co., 39 C. C. A. 141, 54 U. S. App. 723, 46 L. R. A. 132, 85 Fed. 271.

In the Standard Oil Case, however, the United States Supreme Court gave more sense to the Sherman Anti-Trust Act by injecting the term "unreasonable". "Every contract...or combination" means, "Every unreasonable contract or combination" the Court said in fact, tho not in express words. This is how Chief Justice White phrased it:

"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 particualr 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 of 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 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."(71)

The Standard Oil Case decision went contrary to the previous rulings of the Court,--certainly, contrary to the decisions in the Trans-Missouri Freight Association case and the Joint Traffic case, notwithstanding the apparent reconciliation to the previous cases made by the Chief Justice-(in so far as a layman can see at any rate.) The decision of the United States Supreme Court in the Standard Oil case put the American Federal Courts in accord with the English doctrine of contracts in restraint of trade applying the test of reasonableness.

It may be noted, furthermore, that no emphasis appears to be placed in this case upon the ancillary nature of contracts upheld. The doctrine that a contract in restraint of trade must be ancillary in order to be upheld--the doctrine enunciated by Judge Taft in the Addyston Pipe case and often

(71) Standard Oil Co. v. United States, 221 U. S. 1 at 63.

stated by other jurists appears not to have been followed in the United States as closely as such statements would lead one to expect. There are a number of relatively early cases in which contracts in restraint of trade ancillary to lawful principal contracts, in the eye of the layman, were not upheld. In those cases, the courts declared that the covenants in restraint of trade were not ancillary to the contracts of sale in which they were involved but rather,--the contracts of sale were ancillary to the convenants in restraint of trade.(72) The contracts declared to be valid in the Standard Oil case and in the Tobacco case(73) were not such as might appear to be ancillary to other contracts. It may thus be said that what is commonly ancillary, in the eye of the law as expounded in the cases cited above; and per contra what is considered by the courts to be ancillary may not be such as the layman would consider to be ancillary.

is not necessarily ancillary

V.

Thus it appears from these considerations of the doctrine of contracts in restraint of trade in the United States that:

(1) The American states adopted in the main the English doctrine of contracts in restraints as formulated in Mitchel v. Reynolds.

(72) Arnot v. Coal Co. 68 N. Y. 558; People v. Milk Exchange, 145 N. Y. 267; 39. N. E. 1062; People v. Refining Co. 54 Hun. 366; 7 N. Y. Supp. 406; State V. Standard Oil Co. 49 Ohio St. 137; 30 N. E. 279; Manufacturing v. Klotz, 44 Fed. 721; Distilling & Cattle Feeding Co. v. People, 156 Ill.

(73) 221 U.S.1; 31 Sup. Ct.502; 55 L.Ed. 619; 34 L.R.A. N.S. 834.

(74) U.S. v. Am. Tobacco Co. 221 U.S.106; 31 Sup. Ct. 632; 55 L. Ed. 663.

(2) Broadly speaking, the development of the common-law doctrine of contracts in the United States has been substantially in conformity with that in England. Greater emphasis, however, has been put in the American decisions, (1) on the ancillary nature of contracts, which the courts had sustained, and (2) on the interests of the public.

(3) The rule became or was thot to have become, as enunciated by Judge Taft in the Addyston Pipe Case that a contract in restraint of trade to be upheld must be ancillary to the carrying out of another lawful contract. Nevertheless, contracts have been condemned that were ancillary(in the sense that the layman uses the term) to lawful principal contracts, and contracts have been upheld that were not ancillary (in the sense that the layman employs the term ancillary). Where contracts have been condemned altho ancillary in the ordinary use of the term it may be said the court has gone on the theory that from the standpoint of the public, the contracts in restraint of trade tending to lessen competition were of greater moment than the contracts of sale with which they were connected and were therefore ancillary to the contracts of sale.

(4) In the American case the interests of the public have been given first consideration, nominally at least. The rule has become and now is that the first test of validity of a contract in restraint of trade is the "public welfare." If a contract may be injurious to the public it will not be upheld irrespective of its reasonableness.

(5) If not potentially injurious to the public, a con-

tract will be upheld if the restraint is no more than reasonably necessary for the protection of the party in whose interest the restraint is put. This test of reasonableness, however, in the majority of cases was deemed not to apply to combinations to fix prices.

(6) Combinations to fix prices had become especially obnoxious to the American people during the decades following the Civil War. The people demanded and the legislatures in most states enacted laws supplementing the common-law provisions in respect to combinations to fix prices. (These laws are termed anti-trust acts.) California and Colorado are alone among the states in sanctioning such combinations by statute; and in these states it is only done to a limited extent. Massachusetts, it may be noted is very lenient towards combinations to fix prices(7) The Anti-Trust statutes because of their indefiniteness have generally been interpreted in the light of the common-law doctrine of contracts in restraint of trade. When so interpreted the anti-trust acts have gone no further than to make contracts that would be void at common law illegal by statute law.

(8) In the majority of cases combinations to fix prices have been declared to be invalid both at common-law and under certain statutes. Such is the case in Minnesota.

CHAPTER VI.

ENGLISH PRICE MAINTENANCE CASES.

Foreword.

The legality of the maintenance of resale prices has been a subject of contention in our courts for the past two decades.(1) There are, at the present time, cases involving price maintenance still before our courts; and there remain mooted questions on the subject yet to be passed upon. In the decisions rendered, there is a great conflict in opinion and confusion in the conclusions reached. The weight of authority in this country as represented by the trinity of price-maintenance cases passed upon by the United States Supreme Court, and cited in the Introductory chapter, is to the effect that absolute price maintenance contracts are illegal both at common law and under certain statutes. The minority view, with which the English courts concur, is presented by Massachusetts, Washington, California and probably Kentucky. Optional or rebate-plan contracts, in the few specific cases passed upon, have been held to be legal.

I.

Following the plan of this work, and for a better understanding of American price-maintenance cases, I shall first review the English cases involving price-maintenance contracts.

The English Price Maintenance cases that have come to attention are:

(1) Elliman, Sons, and Co. Limited v. Carrington and

(1) A few isolated cases appeared in our State courts prior to this: Ice Co. v. Parker, 21 How. Pr. (N.Y.) 303; Clark v. Frank, 17 Mo. App. 602 (1885).

Son, Limited (1901) 2 Ch. Div. 275; 84 L. T. Rep. 858.

(2) National Phonograph Co. Ltd. v. Edison-Bell Consolidated Co. Ltd. (1908) 1 Ch. Div. 335; 98 L. T. 291; 77 L. J. Ch. 218; 24 L. T. R. 201.

(3) Taddy and Co. v. Sterious and Co. (1904) 1 Ch. Div. 354; 89 L. T. Rep. 678.

(4) McGruther v. Pitcher (1904) 2 Chancery Div. 306 91 L. T. R. 678.

(5) Kodak Ltd. v. A. W. Gamage, Ltd. and F. Wade, (1900) K. N. 1095 - High Court of Justice, Kings Bench Div. (writ issued Dec. 12, 1900; delivered Feb. 8, 1901).

(6) National Phonograph Co. of Australia v. Menck, (1911) A. C. 336; 104 L. T. R. 5.

(7) Dunlop Pneumatic Tyre Company Ltd. v. Selfridge and Co. Ltd., 30 T. L. R. 250; 136 L. T. R. 428; 110 L. T. R. 679; 83 L. J. K. R. 923.

(8) Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Co. 83 L. J. K. B. 1574; 30 T. L. R. 625.

(9) Ford Motor Co.(Eng.) Ltd. v. Armstrong 58 S. J. 456; 30 T. L. R. 400.

II.

The most cited English price-maintenance case is that of Elliman, Sons and Co. Limited v. Carrington and Son, Limited supra. There, the action was for damages for breach of contract, byt which the wholesalers bound themselves not to resell the medicine for less than certain specified prices, and if they sold th the trade, to procure a similar written agreement from every retailer they supplied. The defendants,

CHAPTER VII.

AMERICAN PRICE MAINTENANCE CASES.

The first American case involving price maintenance that has come to attention is that of New York Ice Co. v. Parker.(1) The plaintiff in that case had agreed to furnish the defendant with whatever ice the latter might need in his business during a period of one year. The agreement bore the express stipulation that the defendant, who was a retail merchant, should not sell at less than a specified price. The Ice Company made the same stipulation in agreements with all its vendees; and it established a board to investigate and penalize violations of the stipulation. In the case under consideration, the plaintiff brot action to recover the price of ice sold to the defendant and for damages. The defendant set up a defence and counterclaim that the plaintiff had refused to sell to him for three days causing a loss of trade. This was admitted, but, averred the plaintiff, it was a penalty set by its board for selling at less than the stipulated price - a penalty, the putting of which was fully within the plaintiff's right. The New York Court upheld the contention of the plaintiff and said, "By express contract he (the plaintiff) submitted not only to the conditions but to the mode of ascertaining the violations of them." He could not therefore maintain a claim for damages occasioned by the plaintiff ceasing to supply him with ice.

(1) (1861) 21 How. Pr. (N. Y.) 302.

The public policy question of permitting price maintenance contracts, it appears, was not even considered. No suggestion was made on either side relating the price maintenance stipulations to the doctrine of contracts in restraint of trade.

There next comes to our consideration a Missouri case involving optional price maintenance contracts---the case of Clark v. Frank (1885).(2) There the plaintiff had sold thread to defendant under an agreement to rebate 4% of the price paid if defendant sold a specified amount and maintained plaintiff's retail prices for six months preceding the claim for rebate. The plaintiff brot suit for the price of several hundred dozen spools of thread sold to defendant; the defendant claimed the rebate. The plaintiff proved that defendant had cut prices and so according to the agreement was not entitled to the rebate. The defendant contented that the conditions on which the rebate had been promised were unlawful as in restraint of trade. This contention the court would not accept. Judge Thompson said, "We see no force in the argument that the agreement not to sell goods at less than the trade price was void as being in restraint of trade, so far as it related to goods which might be purchased of other dealers."(3) The court held furthermore that even if the rebate plan contract were unlawful, it would not avail the defendant, as its invalidity would deprive him of the benefit he claimed.

The New York case of Walsh v. Dwight, (1899),(4) is sim-

(2) 17 Mo. App. 603.

(3) Ibid at 604.

(4) Sup. 58 N. Y. Supp. 91. 40 App. Div. 513.

ilar to that of Clark v. Harris in that this case also involves a rebate plan price-maintenance contract. Here action was brot by a manufacturer of soda sold under special brand, against another soda manufacturer for alleged damages to him thru business methods pursued by the latter. The plaintiff showed that defendant was giving rebates to all dealers who agreed to sell defendant's product at a specified price and to sell the product of other soda manufacturers at the same price. The Court said that as there was "nothing to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone willing to buy." the rebate-plain price-maintenance contracts were not in illegal restraint of trade. "The substance of the decision," says Justice Lurton,"is well cited in the syllabus as follows: 'An agreement by a manufacturer with his customers to give them a rebate if they should refuse to sell his article or other similar articles at less than a certain price, is not in restraint of trade!' "(5)

Weibolt v. Standard Fashion Co.(1898), 80 Ill. App. 67, is often cited as a price maintenance case. In that case the appellee, the Standard Fashion Company, granted to the appellant a five-years "exclusive agency for the sales of its patterns" in a section of Chicago. The Court (Sears J.) said:

"The fourth contention, viz. that the contract is in restraint of trade, because by its terms appellant agreed to sell no other patterns than those of appellee, and not to sell

(5) Parks v. Hartman, 153 Fed. Rep. 23 at 27 et. seq.

their patterns except at a price fixed, is not tenable as applied to a contract whereby an agency is created to sell specific articles made by appellee, like the patterns here. See Brown v. Rounsavell.[6]"

"The same reasoning applies equally to the application of the statute relating to trusts and combinations. By its terms, the limitations put upon an agent in the sale of his principal's (the manufacturer's) goods, are not affected."[7]

It must be noted that in that case there was involved an agreement that was clearly a contract of agency. Such a contract is undoubtedly not in restraint of trade anywhere.[8] A price-maintenance contract per se, however, is an agreement between independent dealers, - between a vendor and his vendee.

A price maintenance case, more clear cut than those cited above is that of Garst v. Harris.[9] The plaintiff in that case was a manufacturer of patent medicines; the defendant, a retail druggist was his immediate vendee. Plaintiff and defendant had entered into an agreement, whereby the defendant covenanted not to sell the articles of the plaintiff's manufacture at less than a stipulated price. In case of breach of this stipulation the defendant was to pay a specified sum as liquidated damages. Action was brot to recover the sum so

(6) 78 Ill. 589.

(7) Weibolt v. Standard Fashion Co., 80 Ill.App. 67 at 70.

(8) See Locker v. American Tobacco Co., 218 Fed. 447; 134 C. C. A. 247 Welch v. Phelps etc. Windmill Co.,89 Tex.653; 36 S. W. 71.

(9) 177 Mass. 72; 58 N. E. 174. (1900).

specified. Judgment was entered for the plaintiff. The court said:

"It is said that the contract was unlawful as in restraint of trade. .... "When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough."

In this case, it may be noted, there is involved an article manufactured by secret process. Furthermore, in so far as the facts given show, the contract under consideration involved only a single transaction and was not one of a system of contracts made by a manufacturer with all his vendees--- a system that is generally referred to when the term "price maintenance "is employed. Justice Lurton said of this case and of Elliman & Sons v. Carrington & Son, supra:

"Both cases involved contracts of sale of articles presumably made under secret formulas, thought no stress is laid upon the fact in the Elliman case. Each was a suit directly between the vendor and his immediate vendee. Each involved only a single transaction by which the article was sold upon agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law. Neither case holds that a buyer from such a vendee, even with

notice, would not get title or come under the obligation of the contract between the original parties. The most that can be made of the decisions is that, having regard to the subject matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore, not within the mischief of the rule against restraints."(10)

Shortly after the decision was rendered in Garst v. Harris, the plaintiff in that case again brot suit against a retail druggist for selling below his fixed retail price. In this case, Garst v. Hall & Lyon Co.(11) the defendant was not an immediate vendee of the plaintiff and had not entered into any specific agreement with the plaintiff not to sell below a certain price. He had obtained the articles of the plaintiff's manufacture on the market without using fraudulent means. The Court in finding for the defendant said:

"The transactions between plaintiff and his vendee set out in the bill plainly are sales which pass an absolute title to the property. It is equally, or perhaps more plain that the contract contemplates sales by retailers which shall pass an absolute title to the property. The purchaser from a purchaser has an absolute right to dispose of his property. He may consume it or sell it to another. ~~The plaintiff has~~

(10) Parks v. Hartman, 153 Fed. Rep. 23 at 27 et. seq.

(11) 179 Mass. 588.

~~an absolute right to dispose of his property. He may consume it or sell it to another.~~ The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff he has a remedy against them to recover his damages. Garst V. Harris, 177 Mass. 72. This right is founded on the personal contract alone and it can be enforced only against the contracting party. To say that this contract is attached to the property and follows it thru successive sales which severally pass title is a very different proposition. We know of no authority nor of any sound principle which will justify us in so holding."(12)

In 1905, Mr. Garst again brot suit for selling below his set retail prices.(13) In this case, (Garst v. Charles) it was shown that the defendant was formerly one of plaintiff's vendees. The defendant had notified the plaintiff that he would discontinue to sell plaintiff's medicines and then he had "conspired" with a retail druggist to have the latter procure for him the medicines from the plaintiff by fraudulent misrepresentation as to his purpose. The defendant sold these medicines below the stipulated price. The court granted the plaintiff's request for an injunction and said:

"The scheme was fraudulent. The purpose of the defendant was to induce the plaintiff to part with his property

(12) Ibid at 590.

(13) 187 Mass. 144.

at a comparatively low price to a person who was in fact a retail druggist, and who represented by his words and conduct that he wanted the medicine to sell at retail, and who agreed not to sell it at less than the regular retail price, when in fact he was obtaining it under an arrangement to turn it over to the defendant at the wholesale price, to be sold by him at retail at less than the regular price. The defendant was a party to this scheme by fraud, and presumably was the author of it. He should be held liable for the wrong."(14)

Massachusetts in these cases follows the English view in holding: (1) that a vendor may make a valid contract with his immediate vendee, whereby he stipulates the price to be charged by the vendee for the goods the vendee buys of him; but, (2) a notice affixed to an article that it shall not sell for less than the designated price cannot bind any but the manufacturer's immediate vendee and can only bind him in case the stipulation was made known to him before he purchased. The vendor's right to fix the retail price can only arise thru a personal contract between the vendee and himself and is only binding on the contracting parties.

Kentucky it is maintained upholds the price maintenance policy. This statement is based on the case of Common-

(14) Ibid at 149.

wealth v. Grimstead,(15) (1901) . There, members of the Kentucky Wholesale Grocers Association were indicted for conspiring to fix prices. It was shown that each member of the association had individually agreed by contract with the manufacturer from whom he bought, to maintain selling prices, but there was no price fixing agreement between the members of the association. The court held that there was no ground for a criminal prosecution. It declared:

"It appears, further, that certain brands of various kinds of groceries of established reputation are protected by the manufacturers or the owners of the brands by a refusal to sell the goods to any one who will not agree to refrain from selling them at a price below a minimum, from time to time fixed by the manufacturer or owner of the brand. The association receives information of changes in the prices upon such articles from the manufacturer, and sends that information immediately to its members. There does not appear, from the testimony in this case, to be any obligation on the part of any member to fix, control, or regulate the price of any of the goods, but that as to what, in the language of the trade, are called 'contract goods' or goods upon which the manufacturer puts a fixed selling price, the manufacturer alone regulates and controls the minimum price at which the jobbers may sell the goods, and this is done by requiring the customers to agree not to resell the goods at a price less than that fixed by him. We are not called upon to decide whether the legislature could prevent

(15) 11 Ky. 203.

the manufacturer from requiring such an agreement of his customers. All that is necessary to decide here is that <u>such an agreement with the manufacturer is not within the purview</u> of the statute. It is not error, therefore, for the circuit court to direct the jury to find the defendants not guilty and the judgment is affirmed."(16)

In the case of Parks v. National Wholesale Druggist Association, 175 N. Y. 1,(17) The New York Court of Appeals upheld one of the most extreme of price-maintenance systems--- a system whereby the defendants were given a 95% monopoly in the fixing of drug prices. The decision was based on the ground that a manufacturer of any article made by secret process had the same rights in respect to that article as had a patentee over his patented article; and a patentee (it was assumed) had the right to stipulate the resale price in respect to the article patented by him. Haight J. said:

"These medicines are known as 'proprietary goods' and their manufacture and sale are confessedly under the control and management of the owner or manufacturer who may fix his own price and adopt such plan for the sale thereof as he, in his judgment, may determine."....

"Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but

(16) Ibid at 427.
(17) 67 N. E. 136, 63 L. R. A. 632, 96 Am. St. Rep. 578.

upon the question of prices we must bear in mind that the goods are covered by patent rights and trade marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and following this, the right of specifying prices at which the articles shall be sold, and following this, the right also to require dealers to maintain the prices specified."(18)

The following year, the same court decided that a-combination of 95% of the publishers and 90% of the booksellers to maintain prices of books was illegal as to uncopyrighted books but was valid in respect to copyrighted works.(19) The United States Supreme Court having declared later that the copyright act did not give a copyright holder thereunder any more rights with respect to the article once sold by him, and having furthermore, held that the manufacturer of an article made by secret process could not claim the protection of the Copyright statutes, the law in New York appears to be that extensive agreements to maintain prices are illegal.

An analogy to the two preceding cases is presented by the Maryland case, Klingel's Pharmacy v. Sharp &. Dohme, (1906).(20) In that case the defendants who were drug manufacturers of drugs covenanted among themselves to maintain a maximum schedule of prices by requiring dealers to agree to sell at the prices fixed by the combination. Threats were made to

(18) 175 N. Y. 1 at 9.

(19) Straus v. American Publishers' Ass'n.,177 N. Y. 473.

(20) 104 Md. 218.

the effect that if any one of the dealers sold for less that the stipulated price he would be blacklisted; and no sale of drugs would be made to him. The defendants further agreed not to sell to anyone who would not agree to maintain such prices. The plaintiff, who was a retail druggist, refused to agree not to sell at less than the specified prices; the defendants thereupon refused to sell to the plaintiff;and thus he could obtain no drugs. Plaintiff brot action this was sustained, the court holding that such combinations were the ground for criminal procedure.

II.

The price-maintenance cases before our Federal courts have involved in the main the rights and powers of a patentee in selling a patented article or a copyright holder in selling a copyrighted work in contradistinction to those of any other vendor. In such cases the action was brot by the owner of an exclusive right-patent, copyright or trade secret---for the infringement of that right. The decision in the so-called Button Fastener Case(21) upholding the right of a patentee to restrict the use of his patented article, so that it might be employed only with supplies of the patentee's manufacture, had led manufacturers to assume, as stated hereinbefore , that the patent and copyright acts vested in them with the right to fix resale prices of patented articles and copyrighted works. On the basis of the analogy between the rights of a patentee and those of a manufacturer of an

(21) Heaton-Peninsular Button Fastener Co. v. Eureka Speciality Co., 77 Fed. Rep. 288, (1896).

article produced by a secret process it was likewise assumed that a manufacturer also had a similar right in respect to the article produced by secret process.

The right of a patentee to fix, by virtue of the patent act, the resale price of his patented article was sustained in the first price-maintenance case decided by the Federal Courts (Edison Phonograph Co. v. Kaufmann (1901) 105 Fed. Rep. 960). It was specifically held that a notice affixed to a patented article, stating that the article shall not be resold at less than a specified price, was a sufficient reservation of the right of the patentee in all future sales of the article. The breach of a resale price stipulation whether contained in a formal agreement or in a mere notice was held to be an infringement of the patent. The ruling in this case was followed in the subsequent patent price-maintenance cases appearing before the lower Federal Courts up to 1912.(22) In that year the Supreme Court of the United States, in the so-called Bath-tub case,(23)

(22) Edison Phonograph Co. v. Pike, (1901), 116 Fed. 863; Victor Talking Machine Co. v. The Fair, (1903) 61 C. C. A. 58, 123 Fed. 424, National Phonograph Co. v. Schlegel (1904) 64 C. C. A. 594, 128 Fed. 733; Ingersoll & Bro. v. Snellenberg (1906) 147 Fed. 522; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (1907) 836 C. C. A. 336, 154 Fed. 358; Fair v. Dover Mfg. Co. (1908), 92 C. C. A. 43, 166 Fed. 717; Edison v. Ira M. Smith Mercantile Co. (1911) 188 Fed. 925; Winchester Repeating Arms Co. v. Olmsted (1913) 203 Fed. 493.

(23) Standard Sanitary Manufacturing Co. v. United States (1912) 226 U. S. 20, 33 S. Ct. 9, 57 L. Ed.

held to be illegal a system of agreements to fix prices embracing eighty-five percent of the manufacturers of enameled iron ware inthe United States, altho these agreements took the form of licenses from a patentee, covering a device used in the anameling process. The Court, in other words, declared that a monopolistic combination to fix prices, is, notwithstanding that its subject matter comprises goods manufactured under patent. The year following, the same Court overruled the patent price-maintenance decisions of the lower courts to the extent of denying the right of a patentee to fix by mere notice attached to a patented article the resale price of that article (Bauer & Cie v. O'Donnell supra.(24)

In the decisions of the lower Federal Courts which upheld the right of a patentee to maintain by an agreement or by mere notice the resale price of an article manufactured under his patent, numerous dicta appeared prior to 1908 to the effect that a copyright holder has a similar right.(25) In the first copyright price-maintenance case passed upon by the Federal Courts, however, it was uniformly held that the copyright statute vested no right in the copyright owner to fix, by notice of price limitation inscribed upon a copyrighted work, the resale price of that work.(26) And in Straus

(24) (1913) 229 U. S. 1.

(25) See cases cited in footnote 22.

(26) Bobbs-Merrill v. Straus et al, 139 Fed. 155 (Cir. C. for So. Dis. N. Y.) affirmed C. C. A. , 147 Fed. 15; affirmed U. S. Sup. Ct.,(1908) 210 U. S. 339.

and Straus v. American Publisher's Association (27) (1914) the United States Supreme Court held to be illegal, notwithstanding the copyright statute, agreements between publishers and the trade embodying copyrighted book resale prices set by the American Publisher's Association, whereby this association was enabled to fix the retail price of seventy-five percent of the copyrighted books sold in the United States.

In all these patent and copyright cases, to repeat, the action was solely for infringement of an exclusive right under statute. The primary question involved in all was whether one, by virtue of the patent and copyright statutes, could fix the resale price on articles manufactured under his patent or copyright. The lower,Federal Courts had answered this in the affirmative without reservation. The United States Supreme Court reversed the decisions of the lower Courts as to patented articles, and nullified their dicta as to copyrighted works, to the extent of denying the right of one, by virtue of the patent and copyright statutes, to maintain, by notice affixed to the patented article or copyrighted work, the resale price of that article or work. The same Court, further, declared to be illegal monopolistic combinations (28) controlling the sale of a general class of patented articles or of copyrighted books in general.

(27) 231 U. S. 222.

(28) Louis D. Brandeis defines monopoly, as used here as "A unified control of some recognized branch of trade, or some recognized service". Statement before C. on Interstate and F. C., Hearings on H. R. 13305, 35, (Jan. 9, 1915).

The United States Supreme Court did not specifically pass upon the legal status of direct price-maintenace agreements between a patentee or copyright-holder and his immediate vendee. Can a patentee by virtue of the exclusive right granted him by statute, legally fix thru direct agreement with the immediate purchasers of his patented article, the price at which the article shall be resold? Let us assume that the immediate purchasers are but intermediaries between the patentee manufacturer and the vendor to the ultimate consumer. And this is the usual case. Such intermediaries may be termed, "his wholesale dealers"; the vendors to the ultimate consumer are,"retail merchants". Now can the patentee require in the agreements with his wholesale dealers, that they obtain similar agreements from the retail merchants? If a retail merchant should fail to sign the agreement required by the patentee's contract of sale, or should buy of the wholesale dealer for less than the stipulated price, can the patentee then maintain an action against the retail merchant for contributory infringement of patent in inducing a breach of the agreement between himself and his wholesale dealer? Can the patentee, as a third party having an interest in the contract---a so-called, "partial beneficiary," maintain an action against the retail merchant, if the retail merchant should sell at less than the retail price stipulated in the agreement between himself and the wholesale dealer? Has a copyrightholder similar rights in respect to copyrighted works? The United States Supreme Court has yet to pass upon these

questions.(39) According to the unreversed rulings in the patent price-maintenance decisions of the lower Federal courts, cited above, patentees have such rights. And there are numerous dicta in these cases to the effect that copyright holders have similar rights. "It is well to note here that a Federal District Court, in a very recent decision (American Graphaphone Co. et al v. Boston Store of Chicago, (District Court, N. D. Ill. E. D. Sept. 3, 1915) 225 Fed. Rep. 785) upheld the right of a patentee, by direct agreement with his vendee, to fix, upon sale of a patented article, the vendee's reselling price of that article; and the Court stated that it followed the general proposition announced in the Victor case "that the patentee and his vendee may bargain in any way respecting the scope of the former's release of his monopoly right".

With this preliminary discussion, I leave the subject of price-maintenance patent and copyright cases to revert to it later,---in a digest of the cases.

Price maintenance as to articles made by secret process comprise another class of cases that have been passed upon by the Federal Courts. For the brief space of time, in the years 1905 - 1907, lower Federal courts,in a series of patent medicine cases, sustained the right of a manufacturer to maintain the resale price of an article, by virtue

(39) See, however, E. Bement and Sons v. National Harrow Co. 186 U. S. 70, 46 L. Ed. 1058, 22 Sup. Ct. Rep. 747 - Henry v. A. B. Dick Co., 224 U. S. 1, 56 L.Ed. 645, 32 Sup. Ct. Rep. 364.

(30)
of the fact that the article is made under a secret process. These decisions were based on the analogy between the rights of a patentee and those of the owner of a trade secret with respect to the articles produced. In 1907, however, a United States Circuit Court of Appeals ruled contrary to this ((John D. Parks and Sons Co. v. Hartman, (C. C., A. 6th Circuit) 153 Fed. Rep. 24)) (31) Judge Lurton writing the opinion of the Court. This ruling was followed by the same court in a similar case (Dr. Miles Medical Co. v. John D. Parks and Sons Co., 164 Fed. Rep. 803) a year later, which in turn was affirmed by the United States Supreme Court. (15) The Supreme Court declared that a manufacturer of an article produced by secret process has no more right with respect to the control over the sales of the article, by virtue of the fact that it is so produced, than has any other manufacturer.

The jurisdiction of cases involving the exclusive rights under the Patent and Copyright Statutes lies solely in the Federal Courts; States Courts decisions, in so far

(30) Dr. Miles Medical Co. v. Goldwaite, (1905) 133 Fed. 794; Hartman v. Park, 145 Fed. 606; Dr. Miles Medical Co. v. Jaynes Drug Co., (1907), 149 Fed. 838; World's Dispensary Medical Ass'n v. Platt, Dr. Miles Medical Co. V. Platt, Hartman v. Platt, 142 Fed. 606 (1906); Wells & Richardson Co. v. Abraham, 146 Fed. 190; Loder v. Jayne, 142 Fed. 1010; affirmed Jayne v. Loder (C. C. A. 3rd Cir.) 149 Fed. 21.

(31) also 82 C. C. A. 158; 12 L. R. A. (N. S.) 135.

as they interpret these exclusive rights must of course conform to the rulings of the Federal courts.(32) The discussion above thus presents the legal status in the United States of price maintenance as to articles manufactured under the exclusive rights of patent, copyright and trade secret.

There is left for our consideration, however, the class of cases concerned with price maintenance as to articles manufactured under no exclusive rights granted by Federal Statute -- that is the so-called "unpatented" or "ordinary" articles under trademark or special brand. Cases of this type, that involve interstate commerce are subject to Federal jurisdiction; such as relate only to intrastate trade are within the jurisdiction of State Courts. This has made possible a diversity in view as to the legality of price maintenance applied to unpatented articles.

The views taken in the relatively early cases before the State courts have already been stated. The United States Supreme Court view,(33) which is followed specifically by Michigan,(34) will be presented now and then, the later deviations from this view will be given.

(32) Dr. Miles Medical Co. v. Park (1910) 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 372.

(33) Dr. Miles Medical Co. v. John D. Park and Sons Co. 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 372.

(34) W. H. Hill v. Gray & Worcester, 163 Mich. 12, 30 L. R. A. (N. S.) 327, 127 N. W. 803.

Price maintenance as to unpatented articles under trade mark or special brand first came up for the consideration of the Federal Courts in the proprietary medicine cases Parks v. Hartman and Miles Medical Co. v. Parks, supra. These cases involved two propositions: first, price maintenance as applied to articles manufactured under secret process; second, price maintenance as applied to ordinary trade-marked articles. The first has been considered above. With the second we are now concerned.

Following the lead of certain manufacturers of patented articles, chief among whom was the Victor Talking Machine Co.,(35) some manufacturers of proprietary medicines attempted to maintain the retail price of their products by an elaborate system of contracts with both wholesalers and retailers. The wholesaler signed an agreement binding him to sell at stipulated prices and to sell only to retailers designated by the manufacturer. The retailer so designated was also obliged to sign an agreement with the manufacturer, not to sell at less than specified prices. A plan was devised for tracing the articles to the ultimate consumer by stamping serial numbers on the packages. Notwithstanding these provisions, the medicines often fell into the hands of dealers, who had not signed the price-maintenance agreements, and who proceeded to sell these medicines at cut prices. The patent medicine manufacturers then commenced ac-

(35) See - Victor Talking Machine Co. v. The Fair (1903) 61 C. C. A. 58, 123 Fed. 424.

tions to restrain the dealers from so doing.

One of these patent-medicine manufacturers was Dr. Hartman the complainant in the case, Parks v. Hartman.(36) The defendant in this case was a Kentucky wholesale drug concern, that had obtained Dr. Hartman's products--the well known Peruna in some roundabout way, without signing the required price-maintenance agreement. It was selling the Peruna at cut prices. Dr. Hartman brot action to restrain the defendant from continuing this procedure.

In the court of first instance - a Federal Circuit Court,(37) the defendant demurred to the bill for want of equity. The Court overruled the demurrer. Following the earlier patent medicine price-maintenance cases, supra,(23) judgment was entered for the manufacturer on the theory that since his products were made by a secret process, the manufacturer, by analogy to patent rights, had the right to control in any manner he chose the sale of these products until they reached the ultimate consumer. Exception was taken by the defendant and an appeal on this was granted.(24) The Circuit Court of Appeals brushed aside the theory that the secret process of production gave the manufacturer the special right averred, and based the case on the question as to whether a manufacturer has the right to stipulate,thru a system of agreements, the rdsale price of

(36) 153 Fed. Rep. 23; 82 C. C. A. 158; 12 L. R. A. (N. S.) 135.

(37) The Federal Circuit Courts have since been abolished and their jurisdiction conferred on the District Courts .

the unpatented articles produced by him. This the Court then answered in the negative. After an exhaustive review of the cases upon the subject involved, the Court, in the masterful opinion delivered by Justice Lurton, reached the conclusion that the system of price-maintenance agreements were illegal both at common law and under the Sherman Anti-Trust Act. (38)

In the course of the opinion, the Justice said:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public is made impossible. If these contracts leave any room for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturers, the wholesalers and the retailers, to maintain prices and stifle competition is brot about".

The company manufacturing Dr. Hartman's medical remedies now devised a new system of agreements in the form of

(38) Followed in W. H. Hill v. Gray & Worcester, 163 Mich. 13, 30 L. R. A. (N. S.) 327, 127 N. W. 803.

agency contracts. The contract with the wholesaler was termed "consignment contract-wholesale; that with the retailer was entitled, "Retail Agency Contract".

The contract with the wholesaler stated that the wholesaler, termed "Consignee" was appointed one of the company's "Wholesale Distributing Agents" who was to sell for the account of the manufacturer, termed in the contract the "Proprietor". The wholesaler was to sell only to retailers designated by the manufacturer, who were called here "Retail Agents of said Proprietor". He was to sell only at stipulated prices with specified trade discounts. For his services and expenses the wholesaler was to deduct ten percent of the invoice value of the goods; and (note this) he was to deduct an additional five percent of the remainder for "all advances on account remitted within ten days from date of any consignment".

The contract with the retailer stated that the manufacturer appointed the "Retail Dealer as one of the retail distributing agents of its Proprietary Medicines" and gave him permission to purchase its products from the "Wholesale Distributing Agents". at specified prices to be resold only at the prices stipulated on the packages.

This new system of contracts was subjected to Federal court ruling shortly after the Parks v. Hartman decision, in an action brot by the manufacturer under the corporate name, --Dr. Miles Medical Co. against the same defendant, and for the same causes, as in the preceding case.

In the Court of first instance, - a United States

Circuit Court, the defendant again demurred to the bill for want of equity. This demurrer was sustained upon authority of the opinion in the Parks v. Hartman case. Upon appeal the case went before the same Circuit Court of Appeals that had passed upon the Parks v. Hartman case. Justice Lurton again delivered the opinion of the Court.(39) In it, the ruling in the preceding case was followed. The Court declared that, were the price-maintenance agreements in this case contracts of agency, as averred in the declaration, rather than contracts of sale, the decision would be the same.(40) These agreements were, however, said the Court, contracts of sale, not of agency.

The case was now called before the Supreme Court on a writ of certiorari. This court affirmed the judgments of the lower Courts. Justice Hughes delivered the opinion of the Court.(41)

First, he conceded that "the complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other and that, in the absence of an adequate remedy at law, equitable relief will will granted".

(39) 164 Fed. Rep. 803.

(40) Dr. Miles Medical Co. V. Park (1910), 220 U. S. 373; 55 L. Ed. 502; 31 Sup. Ct. 372.

(41) See contra Locker v. American Tobacco Co., 218 Fed. 447, 134 C. C. A. 247; Welch v. Phelps etc. Windmill Co., 89 Tex. 653, 36 S. W. 71. Virtue V. Creamery Package Co., 227 U. S. 31, 33 Sup. Ct. 202, 57 U. S. (L. Ed.) 393.

Next, he stated, the chief proposition under consideration to be, that of the validity of the price-maintenance agreements.

The first question to be settled in determining the validity was whether these agreements were contracts of agency, or of sale. The latter, he said. The wholesaler was the owner of the goods he sold to the retailer and not the agent of the patent-medicine manufacturer. Thus, the retailer was not the immediate vendee of the manufacturer. And the retailer was certainly not an agent at law of the manufacturer; he was undoubtedly an independent dealer in respect to the proprietary medicines he purchased for resale.

Then turning to the essence of the price-maintenance scheme under consideration, he characterized it as, "a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether pruchasers or sub-purchasers and thus to fix the amount which the consumer shall pay, eliminating all competition".

Since these restrictions applied to all dealers of the medicine thruout the United States, they restrained interstate as well as intrastate commerce.

Now, the Justice presented the contentions of the complainant that these restrictions were immune ffom the common law and Anti-Trust act prohibitions upon the grounds that, first, the goods were made under a secret process; and, second, "a manufacturer is entitled to control the prices on all sales of his own products".

The first of these contentions, he brushed aside on the same grounds that Justice Lurton presented in the Court below. Upon the second he spent more space. He took issue with the English view enunciated in the Elliman case[42] and acted upon without question in National Phonograph C. Edison-Bell;[43] he went contrary to the view adopted by the Massachusetts courts in Garst v. Harris;[44] and he declared "that because a manufacturer is not bound to make or sell it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction". The price-maintenance contracts before the Court, "he said, "were in restraint on alienation and were therefore invalid."

He then repeated the earlier rulings of the English cases, Taddy v. Sterious[45] and McGruther v. Pitcher[46] and the ruling of the Massachusetts case Garst v. Lyon & Hall Co.[47] to the effect that a manufacturer cannot by notice in the absence of contract or statutory right, even tho the restriction be known to purchasers fix prices for future sales.

(42) Elliman, Sons, and Co. Ltd. v. Carrington and Son, Ltd. (1901) 2 ch. Div. 275; 84 L. T. R. 858 - See supra p. 108.

(43) National Phonograph Co. Ltd. v. Edison - Bell Consolidated Co. Ltd. (1908) 1 Ch. Div. 335, 98 L. T. 291; 77 L. J. Ch. 218; 24 L. T. R. 201. See supra p. 109.

(44) 177 Mass 72; 58 N. E. 174 See. supra.

(45) (1904) 1 Ch. Div. 354; 89 L. T. R. 678. See supra.

(46) (1904) 2 C. Div. 306; 91 L. T. R. 678.

(47) 179 Mass. 588.

(1)
Thus if the complainant had any ground for controlling resale prices, it was "not upon an inherent power incident to production and original ownership but upon agreement."

The Agreements, however, concluded the Justice, in the cases at bar, were in restraint of trade,--void at common law and illegal under the Sherman Anti-Trust law.

Justice Holmes dissented to this opinion principally on the ground that the price maintenance contracts before the Court were contracts of agency and not of sale as the Court assumed. In the course of his opinion he made the often repeated remark: "I cannot believe that in the long run the public will profit by this court permitting knaves to but reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get".

~~III~~

The rulings in the Miles Medical Co. Case have been followed with but slight discussion in a number of subsequent cases before our Federal Courts.(48) A very recent one of these cases, United States v. Kellogg Toasted Corn Flake Co. 22 Fed. 275, merits special consideration for in this case unlike the previous cases, it was not the manufacturer who was bringing

(48) Waltham Watch Co. v. Keene Co. 202 Fed. 235; Ingersoll v. McColl, 204 Fed. 147; Kellogg Toasted Corn Co. v. Buck, 208 Fed. 383; United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725.

suit for selling below his set resale prices but the government that commenced action against the manufacturer for violating the Sherman Anti-Trust Act in printing a price-maintenance notice on the package containing his produce.

When the United States Supreme Court sustained the right of a patentee, upon sale of a patented article, to require as a condition of sale that it be used only with certain other unpatented articles as it did in Henry v. A. B. Dick and Co.,(49) (1912), many manufacturers thot that this would cover price-maintenance provisions. As a result they sought to patent something in connection with the articles sold by them. The Kellogg Toasted Corn Flake Co. adopted the novel scheme of patenting its corn flakes container and printed thereon the notice that,

"This package and its contents are sold conditionally by us with the distinct understanding, which understanding is a condition of the sale, that the package and contents shall not be retailed nor advertised, nor offered for sale at less than 10 cents per package. Retailing the package at less than 10 cents per package is a violation of the conditions of sale and is an infringement of our patent rights, and renders the vendor liable to prosecution as an infringer.

Notwithstanding the Bauer v. O'Donnell decision supra the Kellogg Co. retained the notice on the packages.

(49) 224 U. S. 1. (1915).

These packages were sold in cases to jobbers at the uniform price of $2.50 per case with the stipulation to resell to retailers at $2.75. The Co. refused to sell to those violating this resale price stipulation. It also continued to attempt indirectly to have retailers live up to the above quoted notices on the packages.

The Federal Government brot suit for violation of the Sherman Anti-Trust Act. The Kellogg Co. pleaded that this notice was invalid as a contract according to Bobbs Merrill Co. supra, and Bauer v. O'Donell supra. The Court (U. S. District Court, E. D. of Mich.) said:

"A legally enforceable contract or system of contracts is not required in order to render obnoxious to the Anti-Trust Act a selling plan which unreasonably restrains or monopolizes trade or commerce. The Sherman Act is not aimed alone at contracts but embraces combination schemes of any and every kind which amount to an undue or unreasonable restraint of trade in interstate commerce without regard to the garb in which the acts were clothed. Indirection will not afford escape".

III.

In the state courts but few price-maintenance cases have been decided in the past decade. In a case almost identical to that of Parks v. Hartman, supra, (W. H. Hill v. Gray & Worcester)[50], the Michigan Supreme Court commented on

(50) 163 Mich. 12, 30 L. R. A. (N. S.) 327, 127 N. W. 803.

and followed the rulings in the Hartman case without discussion. No state case other than this Michigan case, has come to attention in which the Federal Court rulings have been followed.

Two California cases support the price-maintenance policy. In Grogan v. Chaffee[51] a manufacturer of olive oil sold his product in containers each bearing a price maintenance notice giving the set retail price and stating that the oil "is sold upon the condition that the purchaser if he retails these goods will maintain my fixed retail selling price on them; and that if he wholesales them he will sell them subject to this same condition." Defendant, who was a retail grocer, sold oil that he bought of the plaintiff at less than the stipulated price. Plaintiff asked for an injunction restraining the defendant from offering the oil for sale at less than the stated price. The injunction was granted. The court said, "Under these circumstances we see no reason why the contract alleged by the plaintiff should, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell the oil, and when he did sell it had the right to ex-

(51) 103 Pac. 745 (California Supreme Court, 1909).

act, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort of a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained".

In Ghirardelli Co. v. Hunsicker et al (52) the California Supreme Court said:

"The facts in this case differ from the facts in Grogan v. Chaffey only in that the defendants in this case did not obtain the goods offered for sale from the plaintiff, but did obtain them from one of the jobbers or wholesale grocers doing business in San Francisco who purchased from the plaintiff upon the same general conditions on which Chaffey bought olive oil from Grogan in Grogan v. Chaffey, supra. There was a notice annexed to each box or case of plaintiff's goods, setting forth the fact that the goods were sold on the express condition made a part of the consideration of the sale, that the purchaser, if he retails them, will maintain fixed retail prices, and that if he wholesales them, he will do so subject to the same conditions." ...."'We see no reason for modifying the rules expressed in Grogan v. Chaffey, supra.'"

(52) 164 Cal. 355 (1912).

There is left for our consideration the much-discussed Washington case of Fisher Flouring Mills Co. v. Swenson.(53) There action was brot for an injunction to restrain the defendant from selling flour at less than the retail price fixed by the plaintiff in a price maintenance agreement with the defendant. The defendant demurred to the declaration; and the court overruled the demurrer ~~and~~ stating that plaintiff's declaration presented a good cause of action. Judge Ellis closed the opinion upholding price maintainence with the often cited statement:

"Finally, it seems to us an economic fallacy to assume that the competition which in the absence of monopoly, benefits the public, is competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles, at, or above their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on <u>all</u> brands of high grade flour is a very different thing from fixing the price on <u>one</u> brand of high grade flour. The one means the destruction of all

(53) 76 Wash. 649; 137 Pac. Rep. (Wash) 144 (1913).

competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It would not do to say that the manufacturer has no interests to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and advertisement."

IV.

Thus it appears that before the Parks v. Hartman decision price-maintenance contracts were upheld in all but one of the cases decided by our courts.

In Massachusetts, it was decided that contracts involving price maintenance as to ordinary articles (articles just under trade-mark or special brand) and as to articles manufactured by secret process are valid and are thus contractually binding on the immediate parties to the contract.(54) It was declared, however, that a mere notice affixed to an article stating that it shall not be resold for less than a specified price cannot bind any purchaser, altho, he buys aware of the notice. Such a notice is not a contract at all. In the absence of price-maintenance decisions in Massachusetts since the United States Supreme Court rulings adverse to price-maintenance it must be assumed that notwithstanding the United States Supreme Court rulings in Massachusetts the law is still as laid down in Garst v. Harris, supra and Garst v. Hall & Lyon Co., supra.

(54) Massachusetts does not recognize the right of a "partial beneficiary" to maintain an action on a contract. This is the English rule also. See Chapter VIII, "action".

In New York, an early decision (1861) upheld absolute price-maintenance contracts and a decision in the 90's sustained optional price-maintenance contracts. The former decision, it appears, has been overruled in Straus et al v. American Publishers Association, 177 N. Y. 473 and other decisions unequivocally adverse to price-fixing combinations. Optional or rebate plan contracts, it may be assumed in the absence of other decisions directly in point, are valid in New York at the present time.

The Missouri Supreme Court sustained a rebate-plan contract. Kentucky declared that covenanting for price-maintenance did not give rise to criminal prosecution. In Maryland a combination of independent dealers maintaining resale prices was declared illegal. These comprise all the early cases in State courts that have come to attention.

The United States Supreme Court has decided absolute price-maintenance contracts to be void at common law and illegal under the Sherman Anti-Trust Act whether the price-maintenance provisions applied to ordinary articles or to articles under exclusive rights of patent, copyright, or trade secret. A price maintenance notice affixed to an article was declared to be no contract at all. Such a notice nevertheless may give rise to an action for contravention of the Sherman Anti-Trust Act.

The courts of California and Washington have both sustained the price-maintenance policy and have done so after the United States Supreme Court declared price-maintenance

to be against public policy.

V.

No Minnesota case involving price maintenance has been reported. In view of the recent case of State v. Minneapolis Milk Co., supra and the general tendency of the Minnesota Supreme Court to follow the United States Supreme Court in decisions involving business relations it may be safely assumed, I take it, that in Minnesota price-maintenance contracts would be declared to be illegal.

The same may be said of the majority of the other states. The State Courts generally prefer to fall in line with the decisions of the United States Supreme Court in respect to matters of commerce. Furthermore the anti-trust acts of the states may be said to clearly indicate a public policy against price maintenance.

A P P E N D I X .

APPENDIX I.

FEDERAL STATUTES PERTAINING TO TRUSTS

THAT HAVE BEARING ON PRICE MAINTENANCE.

A.

THE SHERMAN ANTI-TRUST ACT.

(26 Stat. L., 209, approved July 2, 1890).

An act to protect trade and commerce a-
gainst unlawful restraints and monopolies.

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.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons or person, 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.

Sec. 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 of the District of

Columbia, or in restraint of trade or commerce 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 misdeameanor, 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, 4. The several (circuit courts)(1) 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.

(1) The Circuit Courts have been abolished and their jurisdiction conferred on the district courts.

B.

COMBINATIONS IN IMPORT TRADE.

I. Wilson Tariff Act.

(28 Stat. L. 570, approved August 15, 1894).

AN ACT to reduce taxation and provide revenue for the government, and for other purposes.

Sec. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary 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 in 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 $100 and not exceeding $5000, 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.

II. Amendment to Wilson Tariff Act, Sec. 73.

(Public No. 370, approved Feb. 12, 1913).

(H. R. 25002)

AN ACT to amend section seventy-three and section seventy-six of the Act of August 15, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes."

Sec. 73. "That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, 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."

C.

TRADE COMMISSION ACT.

(Chap. 203, Approved September 26, 1914).

AN ACT to create a Federal Trade Commission to define its powers and duties and for other purposes.

Sec. 1. A commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission .

The commission shall have an official seal, which shall be judicially noticed.

Sec. 5. Unfair methods of competition in commerce

are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such a method of

of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to

adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same in any wise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission under this section may be served by any one duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; ot (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering, and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 6, The commission shall also have power---

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust Acts by any corporation.

(e) Upon the application of the Attorney-General to investigate and make recommendations for the readjustment of the

business of any corporation alleged to be violating the anti-trust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said anti-trust Acts or the Acts to regulate commerce or any part or parts thereof.

D.

THE CLAYTON ANTI-TRUST ACT.

Chap. 212, approved October 15, 1914).

AN ACT to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Sec. 2. It shall be unlawful for any person in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchases of commodities on account of differences in the grade, quality, or quantity

of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons from selecting their own customers in bona fide transactions and not in restraint of trade.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession of other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in contro-

versy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

APPENDIX II.

STATE LAWS RELATING TO AGREEMENTS TO FIX PRICES.

A - LAWS SPECIFICALLY AGAINST AGREEMENTS TO FIX PRICES.

MINNESOTA.

Constitution, Art. 4, Sec. 35. Any combination of persons either, as individuals or as members or as 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.

Section 8973. "No person or association of persons shall enter into any pool, trust, agreement, contract or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade, within this state, or between the people of this or of any other state or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use bought and sold within this state, or which limits or tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do. Every person violating any provision of this section, or assisting in such violation, shall be guility of a felony." General Statutes of Minnesota. (1913).

ALABAMA.

Section 103. "The legislature shall provide by law for the regulating, prohibiting or reasonable restraint of...

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." Constitution of Alabama (1901).

Section 7579. "Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this State....must, on conviction, be fined not less than Five hundred nor more than Two thousand dollars." Code of Alabama (Criminal).

ARIZONA.

Section 15. "Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership, 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 copartnership or association of persons, or, in any manner whatever to fix the prices....of any product or commodity. The legislature shall enact laws for the enforcement of this section by adequate penalties." Constitution (1910) Article XIV.

Section 579. "A trust is a combination of capital, skill, or acts, by two or more persons, firms or corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

.....

(4) To fix any standard or figure, for any article or commodity of merchandise, or product of commerce, intended for sale, use or consumption in this State, whereby its price to the public shall be, in any manner, controlled or established.

(5) To make...any contract...by which they shall bind...themselves not to sell...any article or commodity... below a common standard figure or by which they shall agree in any manner to keep the price of such article...at a fixed or graded figure, by which they shall in any manner establish or settle the price of any article...between them or themselves and others, to preclude a full and unrestricted competition among themselves and others in transportation, sale or manufacture of any such article." .....

.....

"Any such combinations are hereby declared to be against the public policy and void." Penal Code, Title XV., Laws of 1913 (Reg. Sess.), Ch. 73, Section 1.

ARKANSAS.

Section 1. "Any corporation...transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons,

to regulate or fix within this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever...or to maintain said price when so regulated or fixed...shall be deemed and adjudged guilty of a conspiracy to defraud." Laws of 1905, Act. 1. (Repealing a similar act passed March 6, 1889).

CONNECTICUT.

"Any person who.....conspires with or enters into any combination or agreement with any other person or any firm or corporation for the purpose of fixing or maintaining a higher price, at wholesale or retail, for ice, coal, or any other necessity of life than would prevail except for such conspiracy, combination or agreement, or of limiting or restricting the production, manufacture, shipment, or sale of any such commodity for the purpose of increasing the price thereof, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both." Laws of 1911, Ch.185.

FLORIDA.

Section 1. "That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

(1) To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

(2) To increase or reduce the price of merchandise,

produce or commodity.

(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise.....

(4) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article...intended for sale, use or consumption in this State.

(5) To make...any...agreement...by which they shall bind...themselves not to sell...any article...below a common standard or figure, or by which they shall agree in any manner to keep the price of each article...at a fixed or graded figure or by which they shall in any manner establish or settle the price of any article...between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale...of any such article.....".

Section 5. Any person who violates law or "as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations" is punishable by fine of from Fifty to Five thousand dollars and (or) imprisonment of from one to ten years. Laws of 1915, Ch. 6933 (No. 127), Page 281.

IDAHO.

Section 18. "That no incorporated company or any other 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...of any article...". Constitution, Article XI.

Section I. "It shall be unlawful for any incorporated company, association of persons or stock company in this state, directly or indirectly to combine or make any contract with any 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...of any article...".

Section 2. "A violation of the provision of Section I of this Act shall constitute a misdemeanor...." Laws of 1909, Senator Bell, 127, Approved March 11, 1909.

Section 1. "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. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

Section 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 within this state shall be deemed guilty of a misdemeanor.

Every person, corporation, joint stock company, or other association engaged in business within this state who shall sell any article upon a condition, contract or understanding that it shall not be sold again by the purchaser, or

or restrain such sale of the purchaser shall be deemed guilty of a misdemeanor." Laws of 1911, Champ. 215.

ILLINOIS.

"3550. Section 1. If any corporation...or any partnership or individual or other association of persons whosoever, shall create, enter into, become 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 merchandise or commodity.... such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud....."

"3555. Section 6. Any purchase of any article or commodity from any individual, corporation or company transacting business contrary to any provision of the preceding section of this Act shall not be liable for the price or payment of such article or commodity." Illinois Criminal Code.

INDIANA.

"Section 3878. All.....agreements....between persons or corporations who control the output of any article of merchandise, made with view to lessen or which tend to lessen full and free competition in the importation or sale of articles imported into this State, and all...agreements...between persons or corporations who control the output of said article of merchandise designed, or which tend to advance, reduce or control the price or the cost to the purchaser or to the consumer of any such product or article, are hereby declared to be a-

gainst public policy, unlawful and void."

"Section 3884. That any person, firm or association of persons who shall...enter into any agreement...to induce, procure or prevent any wholesale or retail dealer in or manufacture of merchandise of supplies or of material or articles intended for trade or used by any mechanic, artisan or dealer in the prosecution of his business from selling such supplies to any dealer or to any mechanic or artisan...shall be guilty of conspiracy against trade." Burn's Annotated Indiana Statutes (1908).

IOWA.

"Section 5060. Any corporation...or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation or understanding 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. " Code of Iowa, Annotated (1897).

"Section 5067-a. That is shall be unlawful for any person, company, partnership, association or corporation owning or operating any business of buying, selling, handling, consigning or transporting any commodity or any article of commerce, to enter into any agreement, contract, or combination with any other dealer, or dealers, partnership, company, corporation or association of dealers, whether within or without the State, engaged in like business, for the fixing of the price or prices at which any commodity or any article of com-

merce should be sold by different dealers or sellers;...or to form enter into, maintain, or contribute...to any trust, pool, combination association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers or dealers in any commodity or any article of commerce; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented." Supplement Code of Iowa, Annotated (1913).

KANSAS.

"Section 5185. All...agreements...between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this State, or in the production, manufacture or sale of articles of domestic growth or product of domestic raw material...and all...agreements...between persons or corporations, designed 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...are hereby declared to be against public policy, unlawful and void." Kansas General Statutes, 1909, (Laws 1889 Ch. 257, Sec. 1).

KENTUCKY.

"Section 198. 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." Constitution of Kentucky.

"Section 3915. If any corporation...or any partnership, company, firm or individual or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind...shall be deemed guilty of the crime of conspiracy."

Section 3918 provides that all contracts in violation of Section 3915 are void, and that no recovery can be had for merchandise sold by any one violating Section 3915.

Section 3941-a. "It is hereby declared unlawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay,or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, 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." Kentucky Statutes, 1915 (Carroll).

LOUISIANA.

"Section 1. It shall be unlawful for an individual, firm, corporation or association to enter into, continue or maintain any combination, agreement or arrangement of any kind, expressed or implied, with any other individual, firm, company,

association or corporation for any of the following purposes:

First,to create or carry out restrictions in trade:

.....

Third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities;

Fourth, to fix at any standard or figure, whereby its price shall be in any manner controlled or established, any article...;

Fifth, to make or enter into...any...agreement...by which they shall bind...themselves not to sell...any article... below a common standard figure, or by which they shall agree in any manner to keep the price of such article at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article...between them or themselves and others, to preclude a free and unrestricted competition among themselves, or others in the sale...of any such article...between them or themselves, or others in the same... of any such article...,or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale...of any such article...that its price might in any manner be affected." 2 La. Revised Laws, 1904. p. 1804.(Laws of 1892, Act 90, p. 120).

Laws of 1914, Act. 228, p. 589, provide drastic methods of procedure in investigation and prosecution of violations.

MICHIGAN.

Section 2949."A trust is a combination of capital, skill or acts by two or more persons, firms,partnerships, cor-

porations or associations of persons, firms, partnerships, corporations or associations of persons or of any two or more of them to make....any....agreements...by which they shall bind ...themselves not to sell...any article...below a common standard figure, or fixed value, or by which they shall agree in any manner to keep the price of such article...at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article...between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale...of any such article.... Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Section 14887. "All...agreements...between any parties capable of making a contract...the purpose...of which shall be...to enhance, control or regulate the market "price" of "any article"...to be raised or produced by mining, manufacture, agriculture or any other branch of business or labor" or in any manner to prevent or restrict free competition in the.....sale of any such article...shall be utterly illegal and void, and every such contract...shall constitute a criminal conspiracy." Howell's Michigan Statutes.

MISSOURI.

Section 10299. "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation, or industry, with any other person or persons to regulate, control or fix the price of...any article or thing whatsoever,.....or to maintain said

price when so regulated or fixed...shall be deemed guilty of a conspiracy in restraint of trade...."

Section 10301. "All arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this state of any product, commodity or article, or thing bought and sold of any class or kind whatsoever,...and all arrangements, contracts, agreements, combinations, or understandings, made or entered into between any two or more persons which are designed or made with a view to increase, or which tend to increase the market price of any product, commodity or article or thing, of any class or kind whatsoever bought and sold,...are hereby declared to be against public policy, unlawful and void...." Revised Statutes Missouri as amended by Laws of 1913, page 550 and 551.

MISSISSIPPI.

Section 5002. "A trust and combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others-

(a) In restraint of trade;

(b) To limit, increase or reduce the price of a commodity;

(d) Intended to hinder compeition in the production, importation, manufacture, transportation, sale or purchase of

a commodity.

.....

Any corporation...or any partnership, or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into or become a member of, or a party to, any pool, trust, combine, agreement, combination , confederation, or understanding, whether the same is made in this state or elsewhere, with any other corporation, partnership, individual, or with any other person or association of persons to regulate or fix in this state the price of...any article or thing whatsoever...or to maintain said price when so regulated or fixed,...shall be deemed and adjudged guilty of a conspiracy to defraud....." Mississippi Code as amended by Laws of 1908, Ch. 119.

MONTANA.

Section 8285. "Every person, corporation, stock company, association of persons in this state who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price...of any article of commerce,.... or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce or product, intended for sale, use or consumption, will be in any way controlled,...or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such arti-

cles below a common standard figure or by which they agree to keep such articles or transportation at a fixed or graduated figure, or by which they settle the price of such articles, so as to preclude unrestricted competition, is punishable by imprisonment in the county jail for a period not less than twenty-four hours, or more than one year, or by fine not exceeding Twenty-five thousand dollars or both." Laws of Montana (1909) Chapter 97.

NEW JERSEY.

Section 1. "A trust is a combination or agreement between corporations, firms, or persons, any two or more of them, for the following purposes, and such trust is hereby declared to be illegal and indictable:

(4) To fix at any standard or figure, whereby its price to the public or consumer shall in any manner be controlled, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State or elsewhere.

(5) To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportations of any article or commodity, either by pooling, withholding from the market or selling at a fixed price, or in any other manner by which the price might be affected.

(6) To make any secret oral agreement or arrive at an understanding without express agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale

or transportation of any article or commodity, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner, by which the price might be affected." Laws of New Jersey, (1913) Ch. 13.

NEW MEXICO.

Section 1685. "Every contract or combination between individuals, associations, or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal." New Mexico Statutes. Codification 1915.

NEW YORK.

Section 340. "Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture 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 or sale of any 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." Consolidated Laws, Ch. 25. General Business Law.

NORTH DAKOTA.

Section 1. "Any corporation...or any partnership, association or individual, creating, entering into or becoming

a member of, or a party to any pool, trust, agreement, contract, combination, confederation or individual, to regulate or fix the price of any article...shall be guilty of misdemeanor.

Section 2. "A pool or a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or two or more of them for either, any or all of the following purposes:

(1) To create or carry out restraints of trade.

(2) To limit or reduce the production, or to increase or reduce the price of property, merchandise or commodities.

(3) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any...article...intended for sale, use or consumption in this state; or to establish any pretended agency whereby the sale of any such...article...shall be covered up or made to appear to be for the original vendor, for a like purpose or purposes.

(4) To make...any...agreements...by which they shall bind...themselves not to sell...any...article...below a common standard figure, or card price list, or by which they shall agree in any manner to keep the price of such article...at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any...article...between them or themselves and others to preclude a free and unrestrained competition among themselves or others in the sale...of any such article..... .....

Section 8. Any contract or agreement in violation

of the provisions of this chapter shall be absolutely void and not enforceable either in law or in equity." Laws of North Dakota (1907) Ch. 259.

OHIO.

Section 6391. "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

(1) To create or carry out restraints in trade or commerce.

(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity.

(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or a commodity.

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article...intended for sale, barter, use or consumption in this state.

(5) To make...agreements...by which they bind...themselves not to sell,...an article...below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article...at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article,...between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale...of such article.... Such trust as is defined herein is

unlawful, against public policy and void." General Code of Ohio. (1910).

SOUTH CAROLINA.

Section 212. "All arrangements, contracts, agreements, trusts, or combinations between two or more persons or individuals, firms or corporations made with a view to lessen, or which tend to lessen, full and free compeitition in the importation, or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth, or of domestic raw material, and all arangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such produce or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons, as individuals, firms, corporations, syndicates or associations that may lessen or affect in any manner the full and free competition in any tariff rates, tolls, premiums or prices, or seeks to control in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void." Code of Laws of South Carolina. (1902).

SOUTH DAKOTA.

Section 2. "That is shall be unlawful for any person or persons, corporations, copartnership or association of persons in this state, directly or otherwise, to fix prices...so as to obstruct or delay or prevent competition in such production.... or to obstruct or prevent competition in the purchase or sale of

any product or commodity. Laws of South Dakota, (1909).

TENNESSEE.

Section 3185. "All trusts, pools, contracts, arrangements, or combinations made with a view or which tend to prevent full and free competition in the production, manufacture, or sale of any article of domestic growth, production, or manufacture; or in the importation or sale of any article of domestic growth, production, or manufacture; or in the importation or sale of any article grown, produced or manufactured in any other state or country; or which are designed or tend to fix, regulate, limit, or reduce the price of any article of growth, production, or manufacture; or which are designed or tend in any way to create a monopoly, are hereby declared to be unlawful, against public policy, and void." Code of Tennessee, (1896).

TEXAS.

Article 7796. "A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either any or all of the following purposes:

(2) To fix, maintain, increase or reduce the price of merchandise, produce or commodities.....

(3) To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities.....

.....

(4) To fix or maintain any standard or figure whereby the price of any article...shall be in any manner affected, controlled or established.

(5) To make...any...agreement by which the parties thereto bind, or have bound, themselves not to sell...any article...below a common standard, or figure, or by which they shall agree in any manner to keep the price of such article...at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any...article...between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale...of any such article...".

Article 7779. "Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal."

Article 7807. "Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or equity." Revised Civil Statute of Texas (1911).

UTAH.

Section 1752. "Any combination by persons having for its object or effect the controlling of prices of any professional services, any products of the soil, any article of manufacture or commerce, or the cost of exchange or transaction, is prohibited and declared unlawful.

Section 1753. "Any person or association of persons who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any other person or persons to regulate or fix the price of any article of merchandise or commodity...shall be deemed and adjudged guilty of a conspiracy to defraud.....

Complied Laws of Utah, (1907).

WASHINGTON.

Section 199. "Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership 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 purposes of fixing the price.....of any product or commodity." Constitution of Washington. (Article XII, Sec. 23).

B.

(Georgia, North Carolina and Oklahoma forbid price fixing in effect though not in words).

GEORGIA.

"Section 707. Any person who shall commit the offense known to the common law as forestalling, regrating , or engrossing may be prosecuted and punished as for a misdemeanor." Penal Code.

"Section 4253. A Contract which is against the policy of the law can not be enforced; such...contracts in general restraint of trade....." Civil Code.

NORTH CAROLINA.

Section 1. "That every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned or both in the discretion of the court not less than One thousand dollars.

Section 2. That any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of section 1 of this act.

Section 3. That all contracts, combinations in the form of trust, and conspiracies in restraint of trade or com-

merce prohibited in sections 1 and 2 of this act are hereby declared to be unreasonable and illegal, unless the persons entering into such contracts, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of sections 1 and 2 of this act that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor, because his or its business will be fairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce." Public Laws of N. C. (1913) Ch. 41.

OKLAHOMA.

Section 8220. "Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

Section 8227. "It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodities of general use, or rendering any service to the public, to discriminate between different persons, firms, associations, or corporations or different sections, communities or cities of the State by selling such commodities, or rendering such service at a lower rate in one section, community, or city than another, or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, af-

ter making due allowance for the difference, of any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the affect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restriction of trade." Revised Laws of Oklahoma (1910).

(Massachusetts prohibits agreements the affect of which are unduly to enhance the price of any article).

MASSACHUSETTS.

"Section 1. UPon written complaint or oath of the complainant filed in the Supreme Judicial Court or in the Supreme Court alleging any person, co-partnership, or corporation...has entered into any contract, agreement, arrangement, combination or practice...whereby competition in this commonwealth in the supply or price of any such article...is or may be restricted or prevented;...whereby the price of any article....in common use is or may be unduly enhanced within this commonwealth; the court shall hear on oath the complainant and any witnesses produced by him. If it appears to the court that such contract, etc., exist," the court shall issue any order for respondent to appear, shall cause investigation to be made by a master. If the master's report is against respondent and is approved by Court, it is forwarded to Attorney General for action.

Laws of Massachusetts (1911), Ch. 503.

Laws of 1913, Ch. 709 authorize Attorney General to take cognizance of cases of combinations, agreements and unlawful practices in restraint of trade, or for the suppression of competition or for the undue enhancement of price of article

in common use, and to institute criminal or civil proceedings before State or Federal courts.

(In Wyoming corporations are forbidden to consolidate or combine "to control or influence productions or prices thereof")

WYOMING.

Article X, Section 8. 'There shall be no consolidation or combination of corporations of any kinds whatever to prevent competition, to control or influence productions of prices thereof.....' Constitution of Wyoming.

C.

Laws of California and Colorado permit Agreements to Fix prices to a limited extent.

CALIFORNIA.

"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.

2. To limit or reduce the production,or increase the price of merchandise or any commodity.

.....

4. To fix at any standard or figure, whereby its price to the public or the consumer shall be in any manner controlled or established, any article...intended for sale, barter, use or consumption in this State.

5. To make...any...agreements...by which they shall

bind...themselves not to sell...any article...below a common standard figure, or fix value, or by which they shall agree in any manner to keep the price of such article...at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article...between them or themselves and others, so as to directly preclude a free and unrestricted competition among themselves or any purchasers or consumers in the sale...of any such article...every such trust as is defined herein is declared to be unlawful, against public policy and void, provided that no agreement...shall be deemed to be unlawful...the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed, provided further, that it shall not be deemed to be unlawful...for persons, firms, or corporations, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation, having as its object or purpose the transportation marketing or delivery of such commodities." Statutes, 1907, P. 984. as amended, Statutes, 1909, p. 593.

COLORADO.

Section 1. "A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First, To create or carry out restrictions in trade or commerce, or to carry out restrictions in the full and free

pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise, produce or commodities.

Third. To prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce, ores, or commodity, or to prevent competition in aid of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article...intended for sale, use or consumption in this State shall, in any manner, be controlled or established.

Fifth. To make..any...agreement...by which they shall bind...themselves not to sell...any article...below a common standard figure; or by which they shall agree in any manner to keep the price of such article...at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article...between them or themselves and others so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article....

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful...the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further, that it shall not be deemed to be unlawful...for persons, firms, or corpora-

tions, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation, having as its object or purpose the transportation, marketing or delivering of such commodities." Laws of Colorado (1913) Ch. 161.

APPENDIX III.

STATE LAWS SPECIFICALLY ON PRICE MAINTENANCE.

A - Against Price Maintenance.

Wisconsin.

Any corporation organized under the laws of this state 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, fix the price thereof, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall upon proof thereof, in any court of competent jurisdiction have its charter or authority to do business in this state cancelled and annulled. Every ...corporation shall, upon filing its annual...report with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in this section. (S., Sec. 1791j; L. 1907, p. 432).

Upon complaint being made to the attorney-general and evidence produced to him which shall satisfy him that any such corporation has violated any of the conditions specified in sections 1791j and 179 k, he shall forthwith bring an action in the name of the state in any circuit court of this state to have the charter of such corporation forfeited, cancelled and annulled, and upon due proof being made thereof to the satisfaction of the court, judgment shall be entered therefor. (S., Sec. 179 1I; L.1905, p. 944).

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 in general use in the state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this state cancelled and annulled. (S., Sec. 1770 g; L. 1905, p. 937.)

B - In Behalf of Price Maintenance.

New Jersey.

An act to Prevent Unfair Compeition, and Unfair Trade Practices (Laws of 1913, Ch. 210.).

I. "It shall be unlawful for any merchant, firm, or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trademark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality or by price inducement or by unfair discrimation between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern

going out of business.

2. "Any person, firm or corporation violating this act shall be liable at the suit of the maker of such branded or trade-marked goods, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the Court.

"This act shall take effect immediately" (April 1, 1913).

APPENDIX IV.

A.

THE STEVENS BILL.

63d CONGRESS
2d Session. H. R. 13305.

IN THE HOUSE OF REPRESENTATIVES.

February 12, 1914.

Mr. Stevens of New Hampshire introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract for the sale of articles of commerce to any dealer, wholesale or retail, by any producer, grower, manufacturer, or owner thereof, under trade-mark or special brand, hereinafter referred to as the "vendor," it shall be lawful for such vendor, whenever the contract constitutes a transaction of commerce among the several states, or with foreign nations, or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between such territories and any States or the District of Columbia, or with a foreign nation or nations, or between the District of Columbia and any State or States or a foreign nation or nations, to prescribe the sole, uniform price at which each article covered by such contract may be resold: Provided That the following condi-

tions are complied with:

(A) Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale; nor shall such vendor be a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail or to the public.

(B) Such vendor shall affix a notice to each article of commerce or to each carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract of sale stating the price prescribed by the vendor at the time of the delivery of said article as the uniform price of sale of such article to the public, and the name and address of such vendor, and bearing the said trade-mark or special brand of such vendor. Such article or articles of commerce covered thereby shall not be resold except with such notice affixed there to or to the cartons, packages, or other receptacles inclosing the same.

(C) Such vendor shall file in the Bureau of Corporations a statement setting forth the trade-mark or special brand owned or claimed by such vendor in respect of such article or articles of commerce to be covered by such contract of sale, and also, ffom time to time, as the same may be adopted or modified, a schedule setting forth the uniform price of sale thereof to dealers at wholesale, and the uniform price of sale thereof

to dealers at retail from whatever source acquired and the uniform price of sale thereof to the public, and upon filing such statement such vendor shall pay to the Commissioner of Corporations a registration fee of $10. The price to the vendee under any such contract shall be one of such uniform prices to wholesale and to retail dealers according as such vendee shall be a dealer at wholesale or a dealer at retail, and there shall be no discrimination in favor of any vendee by the allowance of a discount for any cause, by the grant of any special concession or allowance, or by the payment of any rebate or commission, or by any other device whatsoever.

(D) Any article of commerce or any carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract and in possession of a dealer may be sold for a price other than the uniform price for resale by such dealer as set forth in the schedule provided in the next preceding paragraph (C): First, if such dealer shall cease to do business and the sale is made in the course of winding up the business of such dealer, or if such dealer shall have become bankrupt, or a receiver of the business of such a dealer by written offer at the price paid for the same by such a dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, or, second, if such article of commerce or contents of such carton, package, or other receptacle shall have become damaged, deteriorated, or soiled: Provided, That such damaged, deteriorated or soiled article shall have first been offered to the vendor by such dealer by written offer, at the price paid for the same by such dealer, and that such vendor,

after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, and that such damaged, deteriorated, or soiled article shall thereafter only be offered for sale by such dealer with prominent notice to the purchaser that such article is damaged, deteriorated, or soiled, and that the price thereof is reduced because of such damage.

APPENDIX IV.

B.

THE STEPHENS-ASHURST PRICE-MAINTENANCE BILL.

64th Congress) H. R. 9671.
1st Session) S._____

Introduced in the House by Mr. Stephens of Nebraska, January 21, 1916 and referred to the Committee on Interstate and Foreign Commerce.

(A duplicate of this bill was introduced in the Senate by Mr. Ashurst of Arizona, February 14, 1916 and referred to the Committee on Interstate Commerce.)

A BILL.

To protect the Public against dishonest advertising and false pretenses in merchandising.

Be it enacted.....

Sec. 1 - That in any contract for the sale of articles of commerce to any dealer, wholesaler or retail, by any grower, producer, manufacturer, or owner thereof, under trademark or special brand, hereinafter referred to as the "vendor," it shall be lawful for such vendor, whenever the contract constitutes a transaction of commerce among the several States, or with foreign nations, or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another Territory, or between any such Territory or Territories and any States or the District of Columbia, or with a foreign nation or nations, or between the District of Columbia and any State or States or a foreign nation or nations, to prescribe the uniform prices and manners of settlement at which

the different qualities and quantities of each article covered by such contract may be resold: Provided, That the following conditions are complied with:

(a) Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale; nor shall such vendor be a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail or to the public.

(b) Such vendor shall file at the office of the Federal Trade Commission a statement setting forth the trade-mark or special brand owned or claimed by such vendor in respect of such article or articles of commerce to be covered by such contract of sale, and also, from time to time as the same may be adopted or modified, a schedule setting forth the uniform price of sale thereof to dealers at wholesale, and the uniform price of sale therof to dealers at retail from whatever source acquired, and the uniform price of sale thereof to the public, and upon filing such statement such vendor shall pay to the Federal Trade Commission registration fee of $10. Prices set forth in such schedule and made in any contract pursuant to the provisions of this Act shall be uniform to all dealers in like circumstances, differing only as to grade, quality, or quantity of such articles sold, the point of delivery, and the manner of settlement, all of which differences shall be set forth in

such schedule; and there shall be no discrimination in favor of any vendee by the allowance of a discount, rebate, or commission for any cause, or by grant of any special concession, or by any other device whatsoever.

(c) Such contracts for the sale of such article or articles of commerce may provide for seasonal disposal sales, twice yearly at appropriate times, by dealers at retail, during which periods, duly set forth in such statement or in such schedule of prices as shall be filed by such vendor, such dealers at retail may sell such article or articles of commerce for a price other than the uniform price as set forth in the schedule provided in the preceding paragraph (b): Provided, that such article or articles of commerce shall have first been offered to the vendor, by such dealer at retail, by written offer, at the price paid for the same by such dealer, and that such vendor, not less than thirty days prior to the date set forth for the next seasonal disposal sale, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer.

(a) Any article of commerce or any carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract and in the possession of a dealer may be sold for a price other than the uniform price for resale by such dealer for such quality and quantity as set forth in the schedule provided in the preceding paragraph (b): First, if such dealer shall cease to do business and the sale is made in the course of winding up the business of such dealer, or if such dealer shall have become bankrupt, or a receiver of the

business of such dealer shall have been appointed: Provided, That such article or articles of commerce shall have first been offered to the vendor thereof by such dealer or the legal representative of such dealer by written offer at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer; or, second, if such article of commerce or contents of such carton, package, or other receptacle shall have become damaged, deteriorated, or soiled: Provided, That such damaged, deteriorated, or soiled article shall have first been offered to the vendor by such dealer by written offer at the price paid for the same by such dealer, or at the option of such vendor, in exchange for similar articles not damaged, deteriorated, or soiled, and that such vendor, after reasonable opportunity to inspect such article or articles shall have refused or neglected to accept such offer, and that such damaged, deteriorated, or soiled article shall thereafter only be offered for sale by such dealer with prominent notice to the purchaser that such article is damaged, deteriorated, or soiled and that the price thereof is reduced because of such damage.

Sec. 2. That provisions of this Act shall not apply in cases of sales of such article or articles of commerce to the United States, or in cases of sales of such articles to any State or public library, or to any society or institution incorporated or established solely for religious, philosophical, educational, medical, scientific, or literary purposes, made in good faith for use thereof by such society or institution.

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