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CONSTITUTIONAL QUESTIONS UNDER THE FEDERAL ANTI-TRUST LAW.

The Federal Anti-Trust Law [1] is confined in its sphere of operation to interstate and foreign trade or commerce. It makes two classes of acts illegal—first, contracts, combinations or conspiracies in restraint of trade or commerce; and second, monopolies of or attempts to monopolize any part of such trade or commerce. The word "trade" adds nothing to the scope of the act, as the word "commerce" embraces everything which is within the constitutional power of Congress. Four remedies are provided for violations of the act—first, they are made crimes; second, they may be enjoined by proceedings in equity; third, property in transit which is the subject of such a contract, combination or conspiracy may be forfeited; and fourth, persons injured may recover treble damages, together with costs and a reasonable attorney's fee. Prior to the present year this law has been three times before the United States Supreme Court for consideration and two constitutional questions arising under it have been settled.

In the Sugar Trust case,[2] in 1894, the court held in effect that many or most of the so-called "trusts" at which the act was aimed were not within its scope, because Congress has no power under the Constitution to regulate agricultural or manufacturing industries, and that while combinations in such industries might have a great indirect effect upon commerce, that was not sufficient foundation for Congressional interference. In the recent case of the Cast Iron Pipe Trust,[3] the ruling was construed by

[1] Act of July 2, 1890, c. 647.

[2] U. S. *v.* E. C. Knight Co., 156 U. S. 1.

[3] U. S. *v.* Addyston Pipe and Steel Co. *et al.*, 78 Fed. Rep, 712, reversed Feb. 14, 1898, by Mr. Justice Harlan, and Taft and Lurton, JJ., 85 Fed. Rep. 271.

the court of first instance to mean in effect that a combination of manufacturers could not be attacked under this act at all; but the appellate court held that when such a combination adopts methods which directly restrain commerce, it may be and is reached by the Congressional prohibitions.

The Debs case,[4] in 1895, involved consideration of the Anti-Trust Law, but was decided by the Supreme Court wholly upon other grounds.

The Trans-Missouri case,[5] in 1897, finally established the right of a court of equity to prevent violations of this act by its injunction. On petition for rehearing a very strong protest was made against this ruling upon constitutional ground, eminent counsel[6] claiming that this was an invasion of the right of trial by jury, since the offenses thus punished were criminal in their nature. After long consideration the court denied this petition without further opinion. Substantially the same question had been fully argued and decided in the Debs case.[7]

The main question argued in the Trans-Missouri case as to the interpretation of this act was whether its first clause should be given a more literal meaning, prohibiting "every" contract, combination or conspiracy whose main object was in restraint of trade, or whether the word "unreasonable" should be interlined by the court, so that the statute should prohibit only such restraints as should seem to the court or jury unreasonable. In the latter event the clause would have raised a new constitutional question, for it is very doubtful whether merely "unreasonable" actions can be declared penal.[8] The word is not sufficiently definite. Nobody could tell whether he was a criminal or not until he obtained the opinion of some subsequent court or jury as to whether his charges had been too high, or his methods too vigorous. The Supreme Court, by giving the more literal construction to the present statute, avoided this particular objection.

The decision, however, was at once given a very extreme construction by the business world, and raised a storm of fear and indignation out of which sprang a new constitutional objection, first formulated by Mr. W. D. Guthrie in a paper after-

4 *In re* Debs, 158 U. S. 564, 600.

5 U. S. *v.* Trans-Missouri Freight Association; 166 U. S. 290.

6 Including Judge John F. Dillon.

7 See argument of Lyman Trumbull, 158 U. S. at pp. 575–7, and opinion of Mr. Justice Brewer at pp. 594–6.

8 Tozer *v.* U. S., 52 Fed. Rep. 917, 919, per Mr. Justice Brewer; but see the statute enforced without question in People *v.* Sheldon, 139 N. Y. 251, 261.

wards published in *The Harvard Law Review.*[9] His objection was not presented to the court upon the then pending petition for re-hearing in the Trans-Missouri case, but it has been most strenuously and ably urged upon the court in the three cases which were recently argued at its bar and are now in process of decision.[10]

This objection is based upon the Fifth Amendment to the Federal Constitution, which provides that no person shall "be deprived of life, liberty or property without due process of law." It is claimed that one of the rights coming under the head of liberty or property is the right to make contracts; that a general freedom of contract is, therefore, guaranteed by this amendment; that reasonable restraints of trade have been permitted since before the framing of the constitution; and that no reasonable restraints can therefore be prohibited by legislation—the court or jury to be the judge whether or not any given restraint is reasonable.

Mr. Guthrie and his followers largely rely upon the *dictum* of Mr. Justice Peckham in a recent case to the effect that the word "liberty" as used in the Fourteenth Amendment includes the right of every citizen "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[11]

This phraseology, however, is not to be taken too literally. The same supposed principle was recently invoked by a pension attorney who was being tried for the crime of charging more than $10 for services in preparing a pension claim. Mr. Justice Brewer overruled the objection and said: "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It * * * may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of

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9 11 Harv. Law Rev. 80.

10 U. S. *v.* Joint Traffic Association, Anderson *v.* U. S., and Hopkins *v.* U. S., argued Feb. 23–25, 1898. The first of these cases is reported below at 76 Fed. Rep. 895. The two latter relate to live stock exchanges at Kansas City, one of them being reported below at 82 Fed. Rep. 529.

11 Allgeyer *v.* Louisiana, 165 U. S. 578, 589.

his labor, services or property."[12] The statutes of every State are full of restraints upon liberty of contract, as may be seen by referring to the factory laws, the banking and insurance laws, and so many other familiar branches of municipal legislation.

Is there any general legislative power to prohibit reasonable restraints upon trade? Counsel in these cases seem to assume that if the power exists in the Federal legislature with respect to interstate and foreign commerce, it exists also in the State legislatures with respect to all the avocations of life. They say of the Trans-Missouri case, "The extent to which this limits the freedom and destroys the property of the individual can scarcely be exaggerated. For it needs no argument to show that contracts and combinations which are most ordinary and indispensable have the effect of restraining trade. As examples may be suggested all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; a covenant in a deed restricting the use of real estate. The effect of most business contracts or combinations is to restrain trade in some degree. The precise purpose of the present statute as now construed is to deprive the citizen of the rights which these overwhelming authorities hold that he possesses in this regard."[13]

It will be noticed that under the ruling in the Sugar Trust case some of the examples just put do not relate to interstate or foreign commerce at all, while others do not come within the common law definition of a "contract in restraint of trade"—a definition which never included the formation of a partnership

[12] Frisbie *v.* U. S., 157 U. S. 160, 165; and see Holden *v.* Hardy, 169 U. S. at pp. 391–3.

[13] Brief of Messrs. Robert W. DeForest and David Willcox in U. S. *v.* Joint Traffic Association.

or corporation. Still, it is a serious matter for the business community if legislatures are to exercise a power which would so seriously interfere with the salability of the good-will of a business, and would make so dangerous the confiding of business secrets to an employee, as this claimed power to make criminal, whether at common law valid or invalid, every covenant which the common law would have considered as "in restraint of trade."

Perhaps we may expect from the Supreme Court, in the cases now pending, some interesting discussion of the above-quoted awful examples. I do not think, however, that such a discussion will be necessary to the decision of these or any other cases which have so far been prosecuted under the Federal Anti-Trust Law; for, first, it is an open question, not now involved, whether the law applies to a restraint of trade which is not the main object of the contract in which it is found, but is merely incidental to the effectuation of some other and lawful object; and, second, the power of Congress over interstate commerce may be much greater than that of any legislative body over the ordinary avocations of life.[14] In the cases now pending the restraint upon trade is not merely ancillary to a sale, lease, employment or other ordinary business transaction, but is the main object of the combination. The Joint Traffic Association is what is called a "traffic pool," being an agreement among the great eastern trunk lines of railway for a division of the traffic among themselves, so as to avoid any competition; and its articles also provide, as in the Trans-Missouri case, for the establishment of minimum rates. The two Kansas City live stock exchanges, if the charges against them be true, are combinations of dealers for the purpose of monopolizing a certain branch of business and conducting it at rates not below a fixed standard.

Now, in the first place, it is still very doubtful whether the Anti-Trust law will be held by the Supreme Court to apply when the restraint of trade is merely ancillary, and in aid of the

[14] In the Joint Traffic Association case there is the additional reason that the defendants are *quasi* public agents, over whom the law therefore keeps especially close supervision. Whether or not the law can forbid a partnership in an ordinary business, it can certainly forbid the combination of two parallel and competing railroads (Pearsall *v.* Great Northern Ry. Co., 161 U. S. 646, 714; see also State *v.* Vanderbilt, 37 Oh. St. 590, 595; and, as to other industries in which the public has a special interest, Gibbs *v.* Baltimore Gas Co., 130 U. S. 396; Gamewell Fire Alarm Co. *v.* Crane, 160 Mass. 50; Cast Iron Pipe Trust case, 85 Fed. Rep. at p. 291).

main purpose of a sale of good will, the employment of a confidential agent, or some other contract for a legal purpose. Statutes in derogation of the common law, especially if they are penal in character, are strictly construed, and from the history of the time we know that the great combinations primarily intended to restrain competition were the objects aimed at, as is indicated by the use of the words "combination" and "conspiracy." Attorney-General Harmon pointed out the distinction in his argument of the Trans-Missouri case,[15] and the court carefully reserved its opinion as to these minor restraints.[16] The question is assumed to be still an open one in the Cast Iron Pipe Trust opinion, in which Mr. Justice Harlan of the Supreme Court (one of the majority of the court in the Trans-Missouri case) concurred. Judge Taft, in that opinion—which probably contains the most complete judicial discussion of the authorities upon contracts in restraint of trade—shows that by the great weight of authority combinations whose main object was to restrain some branch of trade, or wholly or partially monopolize it, have always been invalid at common law; that the partial and reasonable restraints which were valid at common law, and are perhaps still valid in interstate and foreign commerce under this statute, are those which are merely incidental to a sale of property or business, to the formation or dissolution of a partnership, or to the employment of an assistant, servant or agent; the restraints being such as are reasonable and necessary to carry out the purposes of the sale or partnership agreement, or to protect the employer from unjust use of the confidential knowledge acquired in his business by the employee.

In the second place, assuming that Congress has the power to prohibit all combinations in restraint of interstate or foreign commerce, however reasonable the purpose and effect of such combinations may be considered by the courts, does it necessarily follow that the State legislatures have the power to interfere similarly with all the avocations of life? I think not. Congress is acting under an express power—the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The power acknowledges "no limitations other than those prescribed in the constitution."[17] The limitation here appealed to is found in the words "due

15 His brief upon this point is to be found at 6 YALE LAW JOURNAL, 311–2, 314–6.

16 166 U. S., at p. 329.

17 Leisy *v.* Hardin, 135 U. S. 100, 108.

process of law." These words conserve those personal rights which were regarded as sacred at the time of the adoption of the Constitution.[18] Congress cannot interfere with external commerce where, if at all, interference of the same nature was regarded in 1787 as a violation of liberty or property; but its power over interstate commerce is the same as its power over foreign commerce; it inherited the powers of sovereignty over the latter, and these powers of sovereignty were very wide indeed.

It is hard to realize at the present time that Congress under the Constitution has the abstract right to prohibit interstate commerce altogether. That its powers in this respect are precisely the same as over foreign commerce has been frequently recognized by the Supreme Court.[19] The commercial relations of the States in 1787 were, in fact, those of foreign nations. In surrendering these powers to Congress, no special reservation was made in favor of the trade between the States, and that it has remained so free has been due to the wisdom of the legislature, not to its impotence. In very recent times, however, Congress has asserted its right altogether to prohibit interstate commerce in articles which previously had been allowed free transit through the country so long as they did not make use of the United States mails.[20] In the exercise of a similar power over the foreign and Indian trade Congress has altogether excluded certain articles therefrom[21] and, by an act almost contemporaneous with the Constitution, confined the latter to persons holding special licenses.[22] The latest instance of exclusion is the recent act prohibiting the importation of certain sealskins.[23] The registry and enrollment acts are full of severe restrictions upon commerce by sea. One of the earliest acts, for instance, prohibited dutiable importations in vessels of less than thirty tons burthen.[24]

18 Murray's Lessee *v.* Hoboken Land and Imp. Co., 18 How., 272, 276–7; Hurtado *v.* California, 110 U. S. 516, 535–6.

19 Gibbons *v.* Ogden, 9 Wheat. 1, 228; License Cases, 5 How. 504, 578; Brown *v.* Houston, 114 U. S. 622–630; Bowman *v.* Chicago, etc., R. R. Co., 125 U. S. 465, 482; Crutcher *v.* Kentucky, 141 U. S. 47, 58; Pittsburg Co. *v.* Bates, 156 U. S. 577, 587; 2 Story on the Constitution, § 1065.

20 Anti-Lottery Act of March 2, 1895, c. 191; Obscene Literature Act of February 8, 1897, c. 172; see, also, the severe restrictions of the Interstate Commerce Act and other legislation referred to by Mr. Justice Brewer in the Debs case, 158 U. S. at p. 580.

21 United States *v.* Holliday, 3 Wall. 407, 416–18.

22 1 Stat. 329.

23 Act of December 29, 1897, Sec. 9.

24 1 Stat. 48.

In former times Congress has gone even further in the regulation of foreign commerce, and has stopped it altogether. The embargo was a familiar measure in the legislation of the various States prior to 1787. One State at least recognized it in its constitution, another in its general customs administration law. It was used as a weapon against famine, as well as for war purposes.[25] Their example was followed by the framers of the Constitution, and without questioning their own constitutional right to do it, in the embargo of 1794.[26] Embargoes and non-intercourse acts were thereafter passed from time to time until the war of 1812.[27] They were enforced without constitutional question by many decisions of the Supreme Court,[28] and their constitutionality was referred to by Marshall and Story as an established fact.[29] If Congress can lay an embargo upon all foreign commerce, can it not regulate the manner in which such commerce is to be managed, even to the extent of prohibiting the individuals engaged therein from pooling the traffic or agreeing with each other upon the scale of charges?

Probably any contemporary statesman who was asked how Congress was liable to exercise its power of regulating external commerce, would, like John Adams, have first suggested either absolute prohibition or high duties,[30] and if asked how it was to be regulated if it should be permitted to exist at all, would probably have entered into a discussion of the question whether Congress should allow it to be prosecuted under special licenses,[31] or should make it free to all citizens. The regulation of foreign commerce at that time was so peculiarly a

25 First Constitution of Maryland, 33; 9 Hening's Va. Statutes (1778), p. 530; 11 *id.* (1783), p. 259.

26 Joint resolution of March 26, 1794, 1 Stat. 400; Act of June 4, 1794, *id.* 372. The only constitutional objection made was that the act would be an infringement on the right of the Executive, as negotiations for a treaty were pending. The answer was "that the Legislature have solely a right to regulate commerce; that this measure is strictly within the constitutional duty of the Legislature." Madison, Macon, and the strict constructionists voted for it (Annals of Congress, April 18, 1794, pp. 600–1.)

27 A list of these is to be found at 5 Stat. 826, 829, 846.

28 A digest of these is to be found at 2 Stat. 451–2.

29 Gibbons *v.* Ogden, 9 Wheat. 1, 192–3; 2 Story on the Constitution, Secs. 1264, 1289, 1290.

30 Letter to Jay, 8 Life and Works, 282–3.

31 The system of licenses for Indian trade has already been alluded to. Licenses were in early days a common feature of the British foreign trade (Leone Levi, History of British Commerce, 2d ed. p. 109). They were granted by the State authorities during the revolutionary embargoes (N. Y. Act of March 15, 1781, c. 29; 9 Hening's Va. Statutes, 1778, p. 532).

perquisite of sovereignty that it was common among European nations to grant to some single corporation the sole right to trade with a given region of the world. Thus the Dutch, English, French, Swedes and Danes all had companies exercising exclusive rights of trade with the East Indies, while England had given to various companies similar exclusive rights of trade with Turkey, Africa, the South Sea and Hudson's Bay.[32] The British East India Company continued to have a monopoly of the Chinese trade until 1833, while individual merchants had to get licenses in order to trade with Ceylon, Java or with the neighboring Archipelago.[33] The early congresses, like their successors, wisely refrained from granting similar monopolies; but they would have been astonished at the suggestion that they had no right to prohibit combinations aimed at the establishment of practical monopolies without the permission of the nation.

It is easy to see what serious conflicts are in danger of arising if the Federal courts shall undertake to exercise the *quasi*-legislative powers which are claimed to exist. Counsel often speak of Courts—especially to their faces—as if they carried in their breasts consummate wisdom, while legislators are mere *canaille*, to be held under strict control. However far this may be true, it is at least a fair statement to say that the courts are apt to be more conservative than the legislators, and to represent the educated sentiment of a generation back rather than that of the present day. The decisions now relied upon by counsel as evidencing the length to which a court should go in reviewing the legislative judgment include some which are opposed to the views seriously held by at least a considerable portion of the thinking community. I may instance the decisions which annul laws restricting the hours of labor for women, prohibiting payment of employees in store orders, prohibiting employees from waiving damages for future personal injuries suffered in the course of employment, and requiring railroads to keep flagmen at crossings which legislators regarded as dangerous, but which the court regarded as safe.[34] No branch of the law has shown more continual change in judicial opinion, keeping pace with public opinion, than that which deals with restraints upon trade by contract, and with restraints upon contracts in restraint of trade

32 Leone Levi, p. 30; Adam Smith, Wealth of Nations, Book IV., ch. I.

33 Leone Levi, pp. 235-6.

34 Ritchie *v.* People, 155 Ill. 98, 108; Godcharles *v.* Wigeman, 113 Pa. St. 431; Shaver *v.* Pennsylvania R. R. Co., 71 Fed. Rep. 931; Toledo Co. *v.* Jacksonville, 67 Ill. 37.

by legislation. Contracts which were held void by one generation are held valid by the next, perhaps to become void again with the next stage of industrial development. Nor does any branch of the law show more diversity of judicial opinion. The decision just cited upon hours of labor, though very recent and carefully considered, seems to have been in effect overruled by the United States Supreme Court.[35]

The advanced position now taken by the corporation lawyers concerning the legislative power to limit the right of the individual to make contracts regarding his own affairs, has been clearly and frankly stated as follows: "That right can be limited only so far as may be requisite for the security and welfare of society."[36] It is claimed that the courts are the final judges whether any given law is requisite for this purpose. Such a test would give the courts almost, if not quite, complete revisory power over legislation. Its logical sequence would be a constitutional amendment insuring that the courts should keep in touch with the progress of public opinion by the election of judges for short terms; or, as under the old New York Constitution, by putting the final judicial appeal into the control of a legislative body.

However wise the courts may be, and however foolish the voters and their representatives, the wisdom of continual appeals to the judiciary, based upon maxims in the Bill of Rights, has been questioned by great judges who are no believers in the modern developments of socialistic legislation. In the words of Mr. Justice Brewer:[37] "It may be true, as contended—and, not disturbed by the common hue and cry about monopoly, I am disposed to believe that it is true—that the real interests of the public are subserved by the consolidation of the various transportation systems, and that the putting into the hands and under the control of one corporation the telegraphic business of the country would secure to the public cheaper and better service. But, like the other, this is no question for the courts. This is a government of the people. They express their will through legislative action. It would disarrange our system of government, and would be freighted with peril, if the courts attempted to interpose their opinions upon matters of policy, to stay or thwart such constitutionally expressed judgment." *Edward B. Whitney.*

New York City, April 1st, 1898.

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35 Holden *v.* Hardy, 169 U. S. 366.

36 Brief of Messrs. DeForest and Willcox.

37 U. S. *v.* Western Union Tel. Co., 50 Fed. Rep. 28, 92.