IN THE

Supreme Court of the United States.

No. 27.

OCTOBER TERM, 1926.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE TRENTON POTTERIES COMPANY, *et als.*,
Respondents.

ON CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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SUBJECT INDEX.

AUTHORITIES CITED

CONSTITUTION, STATUTES AND COURT RULES

DECISIONS

TEXT BOOKS, ETC.

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BRIEF FOR RESPONDENTS.

Statement of the Case.

The statement of the case contained in the Petitioner's brief is so inadequate as not to give any clear statement of the respondents' activities, or the particulars of the offense charged against them. The respondents therefore submit the following statement in which is contained facts which the jury would have been warranted in finding from the evidence, had they been properly instructed.

General Theory of Prosecution.

The general theory of this prosecution was that a conspiracy to maintain prices, and to deal solely with a special group of jobbers, had originated somewhere—certainly not in the State of New York or the Southern District of New York, and at some time—certainly not within the Statute of Limi-

tations. The indictment was apparently framed with a view to avoiding the bar of the Statute of Limitations, under the doctrine of the case of *U. S.* v. *Kissel*, 218 U. S. 601, and to conferring jurisdiction on the District Court for the Southern District of New York, under the doctrine of *Hyde* v. *U. S.*, 225 U. S. 347.

While the indictment is silent both as to the time and place of the origin of the alleged conspiracy, it may be inferred from the evidence that the Government's theory is that the conspiracy originated in point of time, perhaps, about December, 1918, and that the place where the conspiracy originated was, perhaps, Pittsburgh, Pa.

The indictment, for the purpose of showing jurisdiction to try this conspiracy, for which no date or place was named, alleged as to each count thereof in virtually the same language:

> "That heretofore and within the period of three years next preceding the finding of this indictment, the above described combination and conspiracy among said defendants was by said defendants extended, renewed and carried out within the Southern District of New York, in that in pursuance of said combination and conspiracy the said defendants did" * * * various alleged overt acts within the Southern District of New York. (R., pp. 9-10, fols. 27-28, for language of First Count; R., p. 13, fols. 37-38, for language of Second Count.)

The issue presented by the indictment and the defendants' plea of not guilty is simple. The charge is that the defendants *did* in fact maintain arbitrary, uniform and non-competitive prices (R., p. 9, fols. 25-27), and *did* in fact limit their sales to a "special group" selected by themselves known as legitimate jobbers (R., p. 12, fols. 34-36). These two things are stated to have occurred at times within the Statute of Limitations, and places within the jurisdiction of the court; and are brought under the condemnation of the Sherman Act by allegations that the acts were respectively the result of a combination and conspiracy entered into at some unnamed time and place, to perform the alleged acts.

The Material Facts.

It was not contended on the trial, and is not contended now, that the defendants ever charged excessive prices, or ever did anything to injure the public. On the contrary, by evidence introduced on the part of the Government, it appeared that the industry, for a number of years, had not been profitable (Gov. Ex. 122, R., Vol. II. top of p. 923). We think we are safe in saying that this is the first case under the Sherman Act where defendants have been convicted and sentenced to prison for the mere possession of an unused power to raise the price if they chose to (R., p. 699, fol. 2095; Exception, R., p. 724, fol. 2170).

The period of three years next preceding the indictment extended from August 8, 1919, to August 8, 1922, the date of the indictment. The evidence, however, goes back as far as the latter part of 1916. All of the corporate defendants but one were members of an organization known as the Sanitary Potters' Association (hereinafter referred to as the Association) during the entire period covered by the evidence; the remaining member did not join until the latter part of the period (R., p. 21, fol. 63; p. 533, fol. 1598). The individual defendants were all officers or employees of corporate defendants, and from time to time attended meetings of the association, all of which appear to have been held either at Pittsburgh or Shawnee, Pa., or Atlantic City, as did also representatives of corporate members not indicted, and guests who had no connection at all with the association (Govt.'s Exs. 226 and 227, R., pp. 1120-1). Certain of the individual defendants acted as officers of the association and served on its various committees.

The association was organized informally without any constitution or by-laws long before the period covered by the indictment (R., p. 22, fol. 65; p. 332, fol. 998). Originally its principal if not its only activities were concerned with labor matters, particularly the relations between its members and a labor union known as the National Brotherhood of

Operative Potters, in which were enrolled the great majority of the workmen employed by the defendants (R., p. 173, fol. 518; pp. 332-3, fols. 996-8; p. 340, fol. 1018). By the beginning of 1917, however, it had engaged in numerous other activities, none of which were shown or contended to have been unlawful.

At one time or another, it dealt with cost accounting systems, advertising, methods of manufacture, technical difficulties and their remedies, conducted discussions as to such subjects at its meetings (R., p. 333, fol. 998), and at times procured lecturers on scientific subjects to address its members (R., p. 174, fol. 522). It took steps to secure accurate information as to customers, considered trade practices, took up the subject of standardizing products and eliminating obsolete models (R., p. 174, fol. 522), and endeavored to work out rules and regulations to protect the health of the workmen (R., p. 176, fol. 526). It recommended the adoption of uniform terms of credit (Govt.'s Exs. 21, 22, 26; R., pp. 779-780, 787) which were adopted by some of its members, while others made different terms (Govt.'s Exs. 265, 266, 270, 105; R., pp. 1173, 1221, 1466, 898; p. 437, fols. 1309-1311). It considered other trade practices, such as discounts for orders in quantity (Govt.'s Ex. 105; R., p. 898); an extra charge for shipments elsewhere than to the buyer's place of business; and allowance for freight (Govt.'s Ex. 119, R., p. 920); and an extra charge for new moulds, or changes from standard models (Govt.'s Ex. 85; R., p. 867). A recommendation of the first of these practices aroused some opposition (Govt.'s Exs. 106, 107, 108; R., pp. 902, 904, 906), and none of them appear to have been actually followed by the members.

From 1918 to 1920 some of the members, pursuant to a resolution adopted at a meeting of the association at Pittsburgh in 1918, sent to its Secretary reports of the number of pieces of certain kinds of ware ordered from them, the zone from which the order came, and the price. The making of these reports was entirely optional with the members. From

the reports the Secretary prepared tabulations which he sent to the members reporting, first destroying their original reports in order to prevent the possibility of one member getting information as to the business of any other. The tabulations of the Secretary did not show either the names of the members reporting or of purchasers. The members did not all report except on three occasions. Less than one-third of the tabulations show over 90% as reporting, and approximately one-half show under 80%. These tabulations contained no recommendation as to curtailments of production, or the pursuance of any particular policy as to prices or otherwise (Govt.'s Exs. 12 and 137; R., pp. 743, 944). The percentages of kilns reporting were sometimes over-stated by the Secretary (R., p. 654, fol. 1962; Govt.'s Ex. 137, R., p. 1028, fols. 3082-3084), and at times sales at low prices were omitted (Defts.' Exs. D-286 and 287; R., pp. 2970, 2971). The inclusion of prices in these reports was discontinued in July, 1920, the reports and tabulations thereafter showing only quantities sold, without prices. The tabulations from 1918 to July, 1920, are all in evidence (Govt.'s Exs. 12 and 137, R., pp. 12, 137), and show wide variations in prices.

The defendants pursued the practice common to most large industries involving trade in a great number of different articles, of circulating a printed base price list among their customers (R., p. 349, fols. 1046-7; p. 470, fols. 1410-1; p. 476, fol. 1426). This practice, as is well known, is for the purpose of making more convenient the issuing of quotations of prices from time to time, by adding or subtracting figures from the base price list in which the standard articles have a so-called base price. This relieves the manufacturer of the necessity of reprinting from time to time a voluminous catalogue of his articles as prices vary. The prices appearing in the so-called base price list were admittedly not intended to be selling prices.

The statements on pages 4 and 5 of the Government's brief would tend to create an erroneous impression as to these base price lists. At this point of the brief it is stated that one list

was adopted in March, 1917, and another in May, 1919, which latter had been prepared by a revision committee, appointed at the meeting in Pittsburgh, called directly after the war and which was still "in force". The references given in the brief indicate that the base price lists here alluded to are Government's Exhibits 19 and 20. The way in which the brief is worded would tend to create the erroneous impression that these base price lists were lists of prices to be charged for output; whereas, as a matter of fact, it was undisputed at the trial that this was not the case. The use to which the base price lists were put clearly appears from the uncontradicted testimony of the witness Faherty, who testified as follows (R., p. 362, fol. 1085):

> "Every article that I manufacture has a list price. I meant something such as Government's Exhibits 19 and 20.
>
> "Q. You did not have in mind, did you, that these list prices, or these books of prices here, were intended to be prices that were to be charged for anything? A. No, sir."

And again (R., p. 349):

> "There is a difference between prices and list prices. I did not know that what you wanted to know is not merely the list price but what was being charged. * * * The list is the basis of our actual charge. We begin with the list and then we figure the discounts. We have to begin with the list and figure the discount. * * * I would say that our discount as announced in our bulletins has been different from the others."

Bulletins were issued from time to time, stating the discounts or surcharges to be subtracted from or added to the base list. The evidence did not show any explicit agreement as to the price bulletins or discount sheets by which the discounts used in determining the actual sale prices were announced, and that there was any such agreement was denied by a number of the witnesses (R., p. 325, fols. 974-975; p. 340, fol. 1020; p. 341, fol. 1022; p. 342, fol. 1024; p. 343, fol.

1027; p. 364, fol. 1092; p. 534, fol. 1602; p. 342, fol. 1044; p. 348, fol. 1150).

There were only four instances directly shown of activity by the Association with respect to prices charged by its members for their output:

1. During the war there had been an agreement between the Quartermaster's Department of the United States Army and the members of the Association as to the prices at which Government orders should be put (R., p. 487, fol. 1461). The nature of this agreement is set forth in a letter admitted by stipulation (R., p. 489; defendants' exhibit D-173). From this letter it appears that fixed prices for sales to the Government had been determined upon, and an agreement to sell to the Government at these prices was recommended to all members of the association by its President, in a circular letter sent around to all of its members (R., p. 489). As the war advanced and prices were raised, these prices were slightly increased by agreement. Inasmuch as the Government was the largest single purchaser of the commodities sold by the members of the association during the erection of its cantonments during the war, the price agreed upon with the Government had a natural tendency to produce uniformity in the prices charged to other customers who dealt with the defendants.

2. At a meeting in Pittsburgh, Pa., about December 17, 1918 (the first meeting after the Armistice), the association debated the question of bringing about a reduction of prices. The President of the association made an address and presented a memorandum and a blueprint (R., p. 179; Government's Exhibits 93 and 97; R., volume II, p. 884). In this circular the many reasons for reducing prices were pointed out. Allusion was made to public statements that there should be an immediate adjustment of prices to stimulate buying (R., Volume II, p. 885); allusion was made to the advisability of this association doing its part to help architects and builders convince prospective builders that the much talked of reduc-

tion in prices had taken place, so as to start proposed operations (R., Volume II, p. 886). The manufacturers were advised to bulletin the trade with revised prices which "should be as low as is consistent with good business, so that future reductions will not be necessary" (R., Volume II, p. 884), and it was pointed out (R., Volume II, p. 884) that "the present extraordinary conditions necessitate extraordinary measures".

It is common knowledge that this action on the part of this association was similar to action taken in many other trades at the same time and that many public men and economists were urging all trades to get prices down from the war level and stimulate the normal resumption of business.

3. In 1919 the John Douglas Company, a member of the association, began underselling its neighbors, the Abingdon Sanitary Mfg. Company and the National-Helfrich Potteries Company. It was the contention (R., p. 1148, 1151) of the two last named companies that the John Douglas Company had cut prices below its cost of production (R., pp. 1141-1170). Representatives of the two last named companies called the matter to the attention of the Secretary of the association, who, in turn, communicated with John Douglas and with the Executive Committee. Mr. Douglas promptly informed the Secretary that the matter was "none of the executive committee's damn business" (R., p. 291, fols. 872, 875; Govt.'s Ex. 251, p. 1154). Representatives of the other two companies visited Mr. Douglas and contended that he was selling below cost. After talking with them he raised his prices (Govt.'s Ex. 150, R., p. 1079), and stated that he was always willing to compare cost of production (R., Vol. II, p. 1170). The new prices were not shown to be uniform with those of the other companies and were not in excess of a reasonable figure (Govt.'s Ex. 260, R., p. 1164). The gentlemen who visited Mr. Douglas advised the association of their visit and its result (Govt.'s Exs. 257, 260, R., pp. 1161, 1164).

4. A salesman acting for the Horton Pottery Company at one time took orders at prices below its cost of production. The low price quoted caused comment, and upon inquiry by Mr. A. M. Maddock, President of the association, Mr. Horton advised him that it had been a mistake (R., pp. 535-6, fols. 1604-6).

In these two instances, the effort on the part of some of the defendants to bring about a raise of prices was manifestly dictated by a desire to prevent the starting of a trade war, and it was the contention of the defendants, advanced in their requests to charge, which were refused by the court, that it was entirely reasonable for the other people in the business to remonstrate with a competitor who was selling below his cost of production (R., pp. 681-2; Requests to charge Nos. 48, 49, 50).

A certain proportion of the output of sanitary pottery was slightly defective, the defects not interfering with its utility. Such ware was known as class "B" (R., p. 47, fol. 139). It was not produced intentionally, but was an accident of manufacture. Successful plants produced very little of it (R., pp. 463, 534, fols. 1387, 1600-1). The sale in the domestic market of the first-class product and also of the second-class product furnished opportunities for fraud by dishonest plumbers and dishonest jobbers, and it was the contention of the defendants (R., p. 154) that it was the desire to prevent these frauds that was the reason for advocating the exporting of the second-class products. While the association recommended the export of this class of ware, such policy was never to any great extent followed by the members. On one occasion a poll of twenty-four companies showed twenty selling class "B" ware in the domestic market. The association appointed a committee to confer with the jobbers' association with a view to stopping the practice (Govt.'s Ex. 148, R., p. 1077). The Committee never appears to have done anything, and no further action seems to have been taken. Class "B" ware was sold in the

domestic market by most of the corporate defendants (R., p. 380, fols. 1140-1; p. 434, fols. 1301-2; p. 447, fols. 1340-1342; p. 496, fol. 1486; p. 465, fol. 1395; p. 469, fol. 1407; p. 441, fol. 1321; pp. 524-5, fols. 1572-4; p. 465, fol. 1357; p. 365, fol. 1094; p. 438, fols. 1313-14), such sales being so frequent as to cause complaint from manufacturers who advocated the policy of exporting it (Govt.'s Exs. Nos. 27, 28, 29, 31, 64-69, pp. 788, 790, 792, 794, 834, *et seq.*), and from a jobbers' association (Govt.'s Ex. 148, R., p. 534). One company never exported any (R., p. 534, fol. 1601). The remonstrance on the part of the Jobbers' Association could certainly not have been dictated by any desire to aid the defendants in restraining trade or maintaining prices, which the jobbers themselves had to pay, and must obviously have been based on the danger to them of the frauds rendered possible by the sale of the two classes of goods at the same time, in the same market.

With the exception of the Horton Pottery Company all of the corporate defendants from time to time issued to the trade bulletins showing either the discounts they would make from the base price list or the prices at which they would sell or both. There is nothing to show when this practice commenced. It was followed in 1917 (Govt.'s Exs. 265, R., p. 1175, fol. 272; p. 1583; Defts.' Ex. D-174, p. 2901; Ex. D-175, p. 2970). Frequently a number of the defendants' bulletins bore the same dates and announced the same prices. They were not, however, always issued on the dates they bore. When the smaller plants received bulletins from the larger they issued similar bulletins antedating them to correspond to those of the larger concerns (R., p. 342, fol. 1024; p. 384, fol. 1150).

During all of the period in question sales of sanitary pottery were made at prices below those announced in the current bulletins (R., p. 344, fols. 1030-1031; p. 375, fol. 1123; p. 397, fols. 1189-1191; p. 422; fol. 1264; p. 442, fols. 1324-1325; p. 445, fol. 1335; p. 459, fol. 1375; p. 459, fol. 1376; p. 460, fol. 1378; p. 498, fol. 1493; p. 512, fol. 1535; p. 516, fol. 1547 and p. 521, fol. 1562). Some buyers never paid the

bulletin prices (R., p. 424, fol. 1271). Others bought oftener below than at the bulletin prices (R., p. 448, fol. 1342; p. 452, fol. 1356; p. 459, fol. 1375; p. 459, fol. 1376; p. 460, fol. 1378; p. 464, fol. 1391). The prices at which the various companies actually sold were usually different (R., p. 528, fol. 1582). Sometimes the bulletin prices varied (R., p. 450, fol. 1348; p. 459, fol. 1376). The prices charged by some of the companies were always lower than those of any of the others (R., p. 381, fol. 1142). Some manufacturers regularly gave certain customers a stated reduction from their published prices (R., p. 513, fol. 1539). Salesmen of defendant companies found themselves in competition as to price with those of other companies (R., p. 398, fols. 1193-1194), and manufacturers, if they wanted the business, met their competitor's prices (R., p. 471, fol. 1412). Buyers found manufacturers bidding against each other for their business (R., p. 422, fols. 1265-1266; p. 492, fol. 1475; p. 514, fol. 1541; p. 525, fols. 1573-1575) and reducing their prices to get orders (R., p. 439, fol. 1317; p. 446, fol. 1336; p. 450, fol. 1349). Some buyers obtained prices from several manufacturers at the same time and found that these prices differed (R., p. 436, fol. 1306; p. 438, fol. 1314; p. 440, fols. 1318-19; p. 446, fol. 1336; p. 465, fol. 1393; p. 528, fol. 1582). Some of the buyers thought so little of the price bulletins that they threw them away (R., p. 439, fol. 1316).

An analysis of the records of sales by twenty-one of the several corporate defendants of standard tanks and bowls from June 1, 1918, to July 31, 1922, shows 26% of the tanks sold at bulletin prices, 64% sold below, and 10% above, while 28% of the bowls were sold at the bulletin prices, 68% below, and 4% above (R., pp. 566-7, fols. 1698-1700; Defts.' Charts, Exs. D-228 and D-229). Similar analysis of particular bulletins during the same period showed the greater part of the sales at prices below those announced in the bulletins (R., pp. 558-567, fols. 1674-1701; Defts.' Charts, Exs. D-210 and D-227). This analysis was based upon the tabulations referred to on page 43 of the Government's brief as having been admitted in evidence by stipulation.

The adoption of resolutions by the Association did not affect the conduct of members who disapproved of them (R., p. 335, fol. 1004).

The majority of the members of the Association distributed their wares through jobbers and confined their sales to this class of dealers. Some of them had adopted this policy many years ago (R., p. 326, fol. 977; p. 340, fols. 1019-1020). Although it is referred to by the Secretary as the settled policy of the Association (R., p. 68, fols. 203-204, Govt.'s Ex. No. 62, p. 832), the National-Helfrich Potteries Co. and the John Douglas Co. never adopted it, but sold principally, if not entirely, to plumbers (R., p. 291, fol. 873; p. 506, fol. 1517, Govt.'s Exs. No. 246, p. 1149, fol. 3445, No. 250, p. 1153, fol. 3459). The Abingdon Sanitary Mfg. Co. sold to plumbers (fol. 1517), the Kalamazoo Sanitary Mfg. Co., the Camden Pottery Co. and the Universal Pottery Co. sold to retailers not engaged exclusively in the jobbing business (R., p. 465, fol. 1395). The Acme Sanitary Pottery Co. at times sold to retailers (R., p. 379, fol. 1137), as did the Resolute Pottery Co. (R., pp. 364-5, fols. 1092-93). The Lambertville Pottery Co. originally adopted the policy of selling to jobbers, but for a time abandoned it and sold to retail plumbers. This manner of distribution was not profitable and it returned to the policy of selling through jobbers (R., p. 340, fols. 1019-1020). It adopted the policy of selling through jobbers before joining the Association (R., p. 345, fol. 1033).

The Secretary of the Association kept a mailing list of jobbers (R., p. 59, fol. 177), containing only the names of concerns actually doing a jobbing business, and not installing plumbing (R., p. 61-2, fols. 183-186), and from time to time he answered inquiries from companies whose policy was to distribute their products through jobbers.

The method of manufacture of the product of the defendants was shown at length (R., p. 320, fol. 960 *et seq.*). The materials entering into the product of each of the manufacturers and the method of manufacturing were substantially the same (R., p. 330, fols. 989, 990), and the cost

of labor amounted to about seventy per cent. of the cost of production (R., p. 340, fol. 1020). The great majority of the workmen employed by the corporate defendants were members of a single labor union, the National Brotherhood of Operative Potters (R., p. 173, fol. 518; p. 340, fol. 1018). Consequently, it followed necessarily—as the output consisted of standardized articles, and the articles and labor going into manufacture were substantially identical,—that the cost of production was substantially uniform.

From the foregoing statement it would appear that, on the main issues presented by the indictment, the evidence may be classified as follows:

(a)

As to uniformity of prices at which sales were made.

(1) The reports of sales prices by the Secretary (*ante*, pp. 4, 5). The value of these reports was somewhat impaired by the fact that there were nine concerns which were not indicted, but which were members of the association, which might or might not have joined in making the reports from which these tabulations were prepared. Their value was further affected by proof that in at least one instance the Secretary deliberately suppressed a report of a sale at a very low price. Nevertheless, these tabulations (Government's Exhibits 12 and 137; R., pp. 743, 944) indicated a wide spread of prices; and perhaps the most significant thing about them was that, as to each article about which the reports were sent out, each report contained a statement of what the high price was, what the general average was, and what the low price was during the period reported, *e. g.* Secretary's report of February 28, 1919 (R., p. 951), where it appears (R., p. 953) that the prices of the standard articles varied as follows: Syphon jets $10.50 to $18.65; Washdown bowls $7.25 to $9.35; Reverse traps $8.25 to $9.07; small tanks $11.90 to $13.43; large tanks $14.28 to $15.58. See also pages 956, 959, 962, 966, etc. During the period when these reports were sent out, therefore, it was known, to all members making

reports of their sales, and receiving the tabulations of the Secretary, that there was no uniform price charged; and for this period of eighteen months, from December, 1918, to July, 1920, it was common knowledge among the defendants who received these reports of the Secretary that, if there was any agreement as to uniformity of price, this agreement was habitually disregarded.

(2) The testimony of purchasers. The witnesses, who bought the output of the defendants, were unanimous in their testimony, so far as they were allowed to testify, that during the whole period covered by the indictment, the defendants were in active competition as to prices at which sales were made (*ante,* pp. 10, 11).

(3) The tabulations prepared to indicate the actual sale prices of the defendants, and the charts showing these figures. These charts (Defendants' Exhibits D-176—D-285) speak for themselves, and tell about the same story as was told by the purchasers, namely: that through the whole period covered in the indictment, the defendants were in active competition as to the prices at which sales were made.

(b)

As to uniformity of prices asked, or "bulletin" prices.

The method, adopted by most of the defendants, of notifying the purchasers with whom they marketed their product of their asking prices, and of changes in these asking prices, was by issuing printed "bulletins" of prices. These bulletins would remain extant until a change took place in the asking price, either upwards or downwards, when a new bulletin would be issued. There was necessarily a considerable degree of uniformity in the bulletins of different defendants extant at any one time. Obviously, if bulletins were issued by some of the defendants reducing prices, other defendants would be forced, whether they liked it or not, to meet the reductions, or be in the position of being underbid in the market. Equally obviously, where economic conditions made it practical for

some of the defendants to raise asking prices, the others would naturally follow the lead, induced by the hope of getting the higher prices, and the fear of being caught in a rising market with a lot of orders at low prices if they did not follow the lead and raise their bulletin prices (R. pp. 341, 342). It requires no assumption of a conspiracy or combination to account for uniformity in bulletin prices, as there necessarily would have been such uniformity if no one defendant had ever seen or communicated with any other one, but if each had learned from his salesmen of changes in the bids of competitors.

(c)

As to margin of profit over costs.

As the government did not contend at the trial that either the prices asked or the prices received by the defendants were unfair or exorbitant, the case was left barren of the proof, ordinarily found in a Sherman Act prosecution, indicating the difference between the cost of production and the price realized by sale. There is, however, one incident in the record which throws some light on this important matter of fact. When the Douglas Company cut their prices to what was claimed by their neighboring competitors to be a price below the cost of production, they advertised and offered a combination article at $22.00 per article (R., pp. 1148, 1151). This figure, so their neighbors claimed, brought sales price below cost of production. When the Douglas Company, after the remonstrance of its neighbors, and after analyzing the cost of production, agreed to raise the price, they raised the price of this article to $24.50 per article (R., p. 1163). This change was apparently entirely satisfactory and obviated the complaint that sales were being made below cost. From this incident it would appear that the difference between cost price and sales price was 10% or less of the cost of production.

(d)

As to dealing with jobbers.

There is absolutely no evidence of any contract or combination restricting the liberty of action of any of the defendants as to whether they should or should not deal with jobbers and a number of the defendant Companies did not confine their sales to jobbers (*ante*, p. 12). The utmost extent to which the evidence on this subject goes is that it was the general policy of most members of the association to deal with jobbers. That is to say, there was about the same evidence along this line, as the court will, we think, take judicial notice, as could be obtained against almost any other group of manufacturers. In this case, the government retired from the position that it was necessary to find a combination or agreement to deal with a special group of jobbers, and went to the jury on a charge that it was sufficient, for a conviction, if the defendants assented to a general policy to deal with jobbers as a class.

* * * * * * *

In the Government's brief (p. 7) it is stated:

> "The defense was directed to proving that defendants did not adhere to the uniform prices and terms *agreed upon*, but that competition between them continued to exist in fact."

The words which we have italicized above do not correctly describe the position taken below by the defendants. It was never conceded that any bulletin prices or any terms or charges had been agreed upon, although it was conceded that they had a natural tendency to gravitate to uniformity. To illustrate this, we quote from the testimony of one of the defendants, who was describing the method he used in determining his prices. He said (R., pp. 341-342):

> "I was influenced by the prices fixed by other people in our line of work. I couldn't naturally expect to get more for my goods than most of my competitors.

"The people that sold the same sort of products that we had that were in our neighborhood were the Trenton Potteries Co., Thomas Maddock's Sons Co. I considered the market prices made by Trenton Potteries, Standard Sanitary, Thomas Maddock's and the larger plants as a rule.

* * * * * *

"Those are the three biggest potteries in our trade neighborhood, and I couldn't expect to get more than they did. If I learned of a price that they put out in a bulletin or anything, I would get out a bulletin just as quick as I could, to keep my plant from being flooded with cheap business. That is, if they put out a bulletin with a raise in price, I would put up my price just as quickly as I could, and I would date it back to their date, as far as possible, to protect myself on incoming orders, if I didn't want to accept them."

ARGUMENT.

I.

The trial of this case was permeated by an erroneous legal principle.

From opinion below:

> "The second of the above facts raises the main point in the case, a matter urged throughout the trial, and most frankly met by the presiding judge.
>
> "Defendants insisted in various forms that inasmuch as they were indicted under the Sherman Act they could not be convicted thereunder unless what they had done amounted to an unreasonable or undue restraint of trade in interstate commerce (Standard Oil Co. v. United States, 221 U. S., 1; 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734; United States v. Am. Tobacco Co., 221 U. S., 106, 31 Sup. Ct. 632, 55 L. Ed. 663). But the court ruled "that the ideas suggested by the Supreme Court in the Standard Oil and Tobacco cases * * * applied to actions of that character (i. e., the character of the Oil and Tobacco cases), which were bills in equity," and he held that said ideas "have (no application) here unless we are to construe this (Sherman) act in a way that would render it as obnoxious to the constitution and as incapable of enforcement" as the so-called Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 3115, ⅛ E, et seq.), considered in United States v. Cohen, &c., Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045). The matter was finally presented by the following request to charge:
>
> > 'The essence of the law is injury to the public; it is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.'

"Which request was refused in toto. In this we think the learned court erred, and in a manner that went to the foundation of the prosecution. Whether the government brings a suit in equity to obtain injunctive relief or a private person sues at law for triple damages, or a grand jury finds an indictment for conspiracy, such proceedings and all of them, if brought under the Sherman Act, must necessarily charge and prove a violation of that statute. The statute cannot mean one thing on the criminal side of the court and another on the civil side.

"In the well-known cases relied on by defendants the court was not defining a civil injury; it was defining the phrase 'in restraint of trade'. That is a very old phrase of the law; it became a term of art generations before the Sherman Act was enacted, and the cases cited are full authority for the proposition that when that phrase was used by the Congress in this statute it meant the same kind of restraint of trade that the law had known for generations, to wit, undue and unreasonable restraint. And when the highest court assigned this meaning to the phrase, that meaning applies, however and wherever the statute is invoked.

"The point is not without authority, if any were needed. In Nash v. United States (229 U. S., 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), a demurer was lodged to an indictment under the Sherman Law on the ground "that the statute was so vague as to be inoperative on its criminal side" (p. 376, 33 Sup. Ct. 781), and this objection to the 'criminal operation of the statute', was thought to be warranted by the Standard Oil and Tobacco cases (supra). But Holmes, J., for the court, speaking in a criminal case, declared that the cases last referred to 'may be taken to have established that only such contracts and combinations are within the act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade'. This is a direct holding, binding upon this court, to the effect that the construction of the statute or the accepted definition of its essential phrase, applies on the criminal side as well as on the civil.

> **"Further, in the Cohen Company case (supra) the Nash decision was cited with approval, and the Chief Justice pointed out (p. 92, 41 Sup. Ct. 301) that while the Lever Act there under consideration afforded no sufficient guide to the jury in their deliberations, because it set up no 'reasonable standard of guilt', yet in the instances of which the Nash case is one it had been found and held 'either from the text of the statutes involved or the subjects with which they dealt (that) a standard of some sort was afforded'. In other words, there is no more difficulty in asking a jury to decide whether a given set of facts constitutes an unreasonable or undue restraint of trade than there is in asking the same jury to answer the question stripped of its adjective.*"**

In Point I of the brief of the Government, it is apparently contended that the evidence in this case warrants the finding of a hard and fast price fixing agreement, such as was disclosed in many of the cases referred to under that point. This, as appears from our statement of facts, was not the case. The contention of the Government is that, from the fact that that bulletin prices were largely uniform, it may be inferred that there was an agreement to make them uniform; but if such inference is to be drawn, the further inference must be drawn that any agreement existing along this line was coupled with an agreement that any of the defendants at any time was at full liberty to depart from his bulletin or asking prices.

The Government contends (brief, p. 12) that the rejected requests of the defendants, based on the application of the rule of reason (requests 22-32, R., pp. 672, 675) are academic, and that, although they were sound in law, the court was not bound to grant them, because they were inapplicable to the case. We may answer this argument by examining the consequences of granting one of these re-

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* That the so-called "rule of reason" was foreseen is interestingly shown in the last Albert H. Walker's "History of the Sherman Law" (see page 57), a book published before final decision in the Oil and Tobacco cases.

quests, in which the defendants asked that the jury be instructed that they could consider the facts declared to be relevant in the Chicago Board of Trade case (the defendants' 25th request to charge, R., pp. 673, 674). Had this request been granted and the jury directed that they could make the inquiry declared to be proper in that case, the evidence would have warranted the following conclusions by the jury:

1. As to the facts peculiar to the business:

(*a*) So far as concerns the first count, we find that all the defendants are dealing in a standardized product, made of practically the same raw materials, and manufactured by the same methods, and almost entirely by union labor, at a uniform wage scale. All of this, in the nature of things, tended to produce uniform cost of production, which, in turn, tended to produce uniformity in the selling price.

(*b*) As to the second count—we find that the facts surrounding the defendants' dealing with jobbers, are the same as in the case of all other groups of manufacturers doing business in this country.

2. As to the condition of the business before and after the restraint was imposed:

(*a*) As to the first count, we find that no difference has been caused because of any restraint proved to have been imposed by the defendants. The prices realized have been competitive, moderate and fair; in fact, the prices have been so low as at times to have passed below the cost of production. Nothing that the defendants have done has made or can make any change in the situation. The same conditions would exist if they had never conferred together.

(*b*) As to their relations with jobbers:—there has been no change whatever caused in the dealings of the defendants by any restraint that has been proved in this case.

3. As to the nature of the restraint and its effect, actual or probable:—

(*a*) We find, as to the first count, that any uniformity in asking or bulletin prices that has been shown has not limited actual competition as to prices received. The bulletin or asking prices must be substantially uniform in either a rising or a falling market, and when some of the defendants advance their prices the others must, for self-protection, follow suit or be swamped with orders at low prices on a rising market, and, when some of the defendants reduce their bulletin prices, the others must follow suit or be underbid in a falling market. We find that no one is deceived by uniformity in asking prices, as the customers of the defendants are all well aware that the bulletin prices are mere asking prices from which the defendants habitually depart in making actual sales. We find that the restraint, so far as it has been proved, has had no effect, and, if continued, as it now is, that it is not probable that it will have any effect on any actual competition among the defendants.

(*b*) As to the second count:—we find that all that has been proved is a general policy among the defendants to deal with jobbers, which is the same as that existing in all other large manufacturing industries in this country, and that there has been no restraint caused by the adoption of this policy that would not exist among the defendants if they had never seen or communicated with each other, nor is there any probable likelihood of any restraint of trade resulting in the future from the adoption of this policy.

4. As to the history of the restraint:—

(*a*) We find that in this trade the output has become largely standardized and the cost of manufacture has become substantially uniform, so that there cannot be, in the nature of things, a wide difference in prices received. We find that this tendency to uniformity has been stimulated by a reason-

able agreement, made during the war, to which the Government was a party, for charging absolutely uniform prices on the large government orders placed with the various defendants during that period and that this tendency to uniformity received a further impetus from a reasonable effort, made by the defendants immediately after the Armistice, to have a general reduction of war prices.

(*b*) As to the policy of dealing with jobbers:—this policy is very common in this country and ante-dates the birth of any of the individual defendants and the incorporation of any of the corporate defendants. The policy was in existence before the defendants ever organized their association.

5. As to the evil believed to exist:—

(*a*) So far as concerns uniformity in asking prices:—Any defendant that did not follow the asking prices of the others, either up or down, would face financial disaster on either a rising or a falling market. So far as concerns any effort of the defendants to get together and cause the export of Class B ware, the evil believed to exist was that if the same factory sold in the same market Class A and Class B ware, the jobbers who purchased from it, and the public, would be exposed to frauds by dishonest plumbers, as there was little difference in appearance between the two classes of goods.

(*b*) As to the second count:—the policy of dealing with jobbers is not deemed to be an evil, but a reasonable policy and is one that is almost universally followed.

In the discussion in the Government's brief of the trial court's charge, and the court's refusal to grant defendants' requests to charge, there is little attention paid to the underlying principle, that the so-called "rule of reason" announced by this court in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Company,* 221 U. S. 106, had no application to criminal cases, either for the consideration of the jury or of the Court, but only existed

as a guide to the construction of the statute when a case in equity under the statute was being considered (R., pp. 665-666). There is no mention made, save in a foot note (pp. 24-5, Govt.'s brief), of this view entertained and stated by the trial court. It is only by bearing in mind this underlying view as to the Sherman Act, entertained by the court, that the charge of the court and the court's refusal to charge as defendants requested can be understood.

The question first arose (so far as the record shows) in a discussion with respect to the application of certain evidence offered by the Government. In the course of this discussion the court defined the Sherman Act as denouncing "a combination or a conspiracy which has for its object the interference with the freedom of interstate commerce, that is all." Thereupon counsel for the defendants made the following request: "Won't your Honor add to that, undue and unreasonable interference." To this the Court replied, "I think I will exclude that, Mr. Marshall. It is in accordance with the view I heretofore advanced" (not appearing in the record). To this the defendants excepted (R., p. 83, fols. 248-9).

The question arose again at the close of the testimony upon a motion made by counsel for the defendants for a direction to acquit upon the ground that there was no substantial evidence before the court to support the allegations made in the indictment (R., p. 663, fol. 1987 *et seq.*, pp. 665-6, fols. 1993-8). The sole and only reason which the Court stated for denying this motion was:

> "I wish to say in that regard, that my very careful examination of the whole subject has satisfied me that the grounds, at least the grounds advanced in support of the motion to dismiss that first count of the indictment, are based upon an erroneous, entirely erroneous, theory of the law and the construction to be given to this criminal feature of the Sherman Act.
>
> "The considerations urged by counsel in support of this contention, that the indictment must allege that the combination or conspiracy brought about an unreasonable or undue restraint of commerce, in my judgment

has absolutely no application to a criminal prosecution or to an indictment.

"The considerations urged by counsel might well appeal to the chancellor upon an application in equity for relief by way of an injunction, from injury being suffered through similar acts, under the civil features of the act asking for injunctive relief. *But they have to my mind no application to the consideration of a jury in a criminal case or the consideration of the court in a criminal case.**

"Whether a given act is a criminal offense is purely a question of law to be determined from the language of the particular statute involved and such interpretation as its language warrants; but it must be a fixed and immutable thing as to whether a given act constitutes a criminal offense, and that can never be submitted to a jury.

"The question, of course, as to whether that act has been committed in any instance is a question of fact to go to a jury and under our system they are the exclusive tribunal for the trial of that question, but not for the determination as to whether or not the facts constitute in law a criminal act. And it is for that reason I did not suggest this at the beginning—but it is for that reason, I take it, to my satisfaction at least, that there is nothing in the attitude contended for, in a criminal case.

"Those considerations spring from the ideas suggested by the Supreme Court in the Standard Oil and Tobacco cases and some others, which as I say applied to actions of that character which were bills in equity or equitable relief at the appropriate place. They have none here, unless we are to construe this act in a way that would render it as obnoxious to the constitution and as incapable of enforcement as the act involved in the case of the *United States* v. *Cohen* the so-called Lever Act.

"For these considerations, the motion will be denied."

The view thus expressed was adhered to by the court throughout the trial, particularly in the charge to the jury

*Italics ours.

and in the refusal to charge defendants' requests numbered 22-31 (R., pp. 672-5, 727-9).

The court charged the jury (R., p. 697):

> "On this head, first and most important, let me advise you, so that there cannot be any possible misunderstanding in your minds that it is illegal and a violation of the Sherman Law for a group of independent units, that is individuals or corporations, operating in combination such as a trade association of the character shown here, to agree amongst themselves to fix the prices to be charged for the commodity which the members manufacture, where they control a substantial part of the interstate trade and commerce in that commodity. That proposition you should bear clearly in mind. If you find that the defendants combined and conspired to fix the sale price of sanitary pottery as charged then you will understand that these defendants have contravened the Sherman Act and are guilty as charged in the first count of the indictment, whether, as I have suggested, they ever successfully accomplished that purpose or not. * * *"
>
> "If the minds of these defendants met and they either expressly or tacitly agreed to fix the sale price of sanitary pottery, then these defendants have violated the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged against them. Moreover, such an agreement, if you find that it was made, is illegal and a violation of this law entirely regardless of whether the price of the commodity was lowered or increased and such an agreement or understanding is illegal and in violation of the Sherman Law regardless of whether the prices fixed by the combination were reasonable or unreasonable. And such an agreement, understanding or policy, if you find it was made, is illegal regardless of whether the individual defendants whom you find were parties thereto violated the agreement by selling at less than the prices fixed.
>
> "If you find that the defendants combined and conspired to fix the sale price of sanitary pottery any good intention which they may have had in what they did will not make such an agreement or combination legal or excuse them from the consequences of their acts."

To this portion of the charge the defendants interposed appropriate exceptions (R., pp. 723-724).

As to the second count the Court charged the Jury (R., pp. 702-704):

"Under the second count of the indictment evidence has been offered on behalf of the Government to show an agreement or understanding that no sales by any member of the association should be made directly to owners of property, to builders of property, to architects, or to plumbers, and that the sales should be made only to or through so-called 'legitimate jobbers.' Secondly that not only was such an understanding reached or agreement made, or policy determined upon, but that the defendants cooperated from time to time to carry out and enforce such an understanding. Now again I should repeat to you that the mere making of such agreements, if you find they were made, or such understandings, if from all the facts and circumstances you find that such understandings were reached, would in and of themselves be illegal, even though none of them were successfully carried out, and that would be true even though the association or combination provided no machinery to carry them out. You should not concern yourself with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether that is a commendable or usual trade practice." * * *

"If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade. And if you find that the defendants did so combine and conspire to restrict their sales to jobbers only, any good intentions they may have had in such course will not make such an agreement legal or relieve defendants from the consequence of their acts. You will not consider in

this connection any suggestion that the course pursued was necessary to the protection of the jobber or promotive of the public welfare."

To this portion of the charge appropriate exception were interposed (R., pp. 724, 725).

The trial court refused the following requests to charge (R., pp. 672-675):

"22. For you to find a verdict of guilty against any defendant, it is not enough for you to find that a conspiracy in fact existed. If no combination or conspiracy in fact existed that will end your task and you must find a verdict of not guilty against all the defendants. If you find that a combination or conspiracy did in fact exist, you then approach a task in which you must exercise the greatest care, for in order to find any defendant guilty it is not enough that he should have engaged in a conspiracy. It is not enough that he should have been engaged in a conspiracy in restraint or competition. You must be satisfied beyond a reasonable doubt that he engaged in a conspiracy which unduly and unreasonably restrained trade.

"23. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

"24. In considering whether a combination unduly and unreasonably restrained trade, you must have in mind and carefully consider all the facts in evidence with relation to the nature and character of the business.

"25. Not every combination or agreement which affects prices constitutes an illegal restraint of trade. The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To

determine that question, you must consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

"26. If you are satisfied beyond a reasonable doubt from the evidence that there was a combination during some part of the three years prior to the finding of the indictment, among the defendants, or some of them, to fix uniform and non-competitive prices for the sale of sanitary pottery, then it would be your duty next to inquire whether that was a reasonable restraint of trade or on the contrary an unreasonable restraint of trade. If it was a reasonable restraint of trade in your opinion, then it would not imply guilt, though it was a price fixing agreement. On the other hand, if it was an unreasonable restraint of trade in your opinion, then guilt would follow as to those of the defendants who were parties to it.

"27. Not all price-fixing arrangements or combinations are illegal. In order to find a defendant guilty, if you find that he was a party to a price-fixing combination, such combination must be found by you to be an unreasonable or undue restraint of trade in order for the combination to be illegal; and whether it was an unreasonable restraint of trade or not is to be determined by you from all the facts and circumstances; you are the judges of whether such combination was reasonable or unreasonable.

"28. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

"29. If the jury find from the evidence that there was no unreasonable restraint of trade effected and no undue or unreasonable prices brought about by any combination and no injury caused to the public and that the price of the product was not put up to any figure that

caused the public to make unreasonable concessions as to price, terms or conditions, then the jury must find the defendants not guilty.

"30. A restraint of trade does not constitute a violation of law unless such restraint be an unreasonable restraint.

"31. No defendant can be found guilty unless the jury find beyond a reasonable doubt that he or it entered into a combination or conspiracy to restrain competition to an unreasonable or undue degree or to cause some substantial prejudice to the public interest.

"32. None of the defendants may be found guilty unless the jury find that he or it was engaged in a combination within three years of the date of the indictment which did or was intended to restrain or affect to a substantial extent prices with which purchasers were to be charged and thereby operated in a material degree to the injury to the public and beyond what can fairly be said to constitute a proper protection to the parties to the alleged combination or agreement.

* * * * * *

"48. The cutting of sales prices to a point below the cost of production with intent to engage in destructive and cut-throat competition for the purpose of eliminating competitors is obnoxious to the law. If the jury shall find from the evidence that the defendants, Weaver and Slater, when they called upon Douglas to ask him to raise his prices, believed that Mr. Douglas was selling below cost and was starting a destructive trade war in the territory where they sold their goods, and if such belief was justified by the facts, then the defendants, Weaver and Slater, had a right to remonstrate with Mr. Douglas against the continuance of such practice and to ask him to bring his prices up to a level which would not be below the cost of production, and it was not illegal for Mr. Douglas to agree with them to refrain from selling pottery below the cost of production.

"49. Any of these defendants had the right to remonstrate with any other manufacturer engaged in their line of business against the cutting of prices below cost and precipitating a destructive and cut-throat competition; and if the jury find from the evidence that a salesman of the defendant, Horton Pottery Company, had

been offering goods at prices below cost of manufacture, then it was not illegal for the defendants, Stern or Maddock, to complain of such practice and to remonstrate with the Horton Pottery Company and the defendant Horton, against the continuance of selling output below the cost of production and it was not illegal for the defendant, Horton, to accede to such arguments and discontinue the sale of pottery below the cost of production.

"50. For one or more of the defendants to remonstrate with other manufacturers or with another manufacturer engaged in their line of production against the initiation of sales below cost of production or the starting of a destructive trade war is not obnoxious to the law, provided such remonstrance is in good faith, and is not made in pursuance of a combination in restraint of trade" (R., pp. 681-2).

And especially as to the Second Count the defendants requested charges:

"55. Under the second count of the indictment, the defendants are not charged with a combination or conspiracy to deal with jobbers as a class, but are charged with having agreed and combined to limit and confine their sales to a special group selected by defendants by agreement; and the jury may not convict any of the defendants under the second count unless they find that there was a conspiracy to deal with such a special group, and that said special group had certain determining characteristics which differentiated them from all other persons with whom the defendants might have dealt.

"56. Even though the jury should find that the defendants or some of them by combination or agreement confined their sales to jobbers as a class, they may not convict under the second count of the indictment for the reason that the indictment does not charge any agreement to deal with jobbers as such, but charges an agreement to deal only with a special group selected by agreement by the defendants."

To the refusal of all of these requests the defendants excepted (R., pp. 726, 729).

The question arising here is whether the activities of the defendants shown in this case were *per se* a violation of the

Sherman Act. That they would not have been held a violation of the law had the case been tried by the court without a jury is apparent from the language of the Circuit Court of Appeals. That court said (R., p. 3700):

> "It is not necessary to review the facts at large; sufficient to note that the subject matter of prosecution is a trade agreement to maintain a central bureau of information, disseminate knowledge of prices, customers, discounts, etc., obtained thereby, and thus persuade or induce the large number of sanitary pottery manufacturers who belonged to the association to conduct their business in a *reasonably* uniform manner as to prices and discounts, and protect the jobbers who constituted their largest normal 'outlet'." (Italics ours.)

Moreover the argument of the government overlooks the second count of the indictment almost altogether. The refusal to grant any of the defendants' requests to charge as to the rule of reason means, in this case, that if a number of manufacturers adopt the policy of dealing through jobbers, the jury may not consider whether it is reasonable for them to do so.

The charging of concededly reasonable prices, and the practice of dealing through jobbers, may occur under circumstances which would warrant a finding that trade was unduly restrained. But surely there may be circumstances under which either a court or jury ought to find that any restraint of trade produced in either manner is not unreasonable. This latter proposition was denied *in toto* by the trial court.

If the view of the trial court were sound, a defendant who, in an injunction suit, had successfully supported a combination as not unduly or unreasonably restraining trade, might thereafter be indicted, convicted and imprisoned for having entered into such combination on the ground that it effected a restraint of trade, although not unduly or unreasonably. A view which would lead to such a result cannot be accepted without rendering the Act ridiculous.

The trial court was led to adopt the view that the rule

of reason laid down in the *Standard Oil* and *Tobacco* cases cannot be invoked in a criminal case because to apply it in such a case would, so it is thought, render the Sherman Act as obnoxious to the constitution and as incapable of enforcement as the act involved in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81—the so-called Lever Act. The fallacy of this reasoning is shown in the portion of the opinion of the Circuit Court of Appeals, quoted at the outset of this point (*ante*, p. 20).

While *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, were at first taken by many to hold that the prohibitions of the Sherman Act were not limited to cases where the restraint is unreasonable, the error of this view was pointed out in the *Standard Oil* case, where it was unequivocally stated that the words "restraint of trade" in the statute referred only to undue and unreasonable restraints, and this doctrine, reiterated in the *Tobacco* case, has never since been modified.

No attempt is made in the Government's brief to support the ruling of the trial court that this doctrine, although applicable in an equitable proceeding, has no application in a criminal case. Instead the petitioner argues that the Government was not required to prove that the defendants fixed unreasonable prices—an issue which is not at all involved in the case.

The petitioner's brief cites a number of decisions of this court as authority for the proposition that any price-fixing agreement is *per se* an unlawful restraint of trade. A careful examination of those decisions, however, discloses that they do not sustain the Government's view.

The authorities cited by the petitioner add little weight to its contention. Not one of them is a criminal case—not one of them remotely suggests that the construction of the statute in a criminal case differs from its construction in a civil case. And every one of them decided since the *Standard Oil* decision in 1911 expressly applied the test of reason which was rejected by the trial court in this case.

All of the decisions referred to in the first point of the petitioner's brief were proceedings by bill in equity under the Sherman Act except *National Cotton Oil Company* v. *Texas*, 197 U. S. 115, which involved the construction of a Texas statute, and *Thomsen* v. *Cayser*, 243 U. S. 66, which was a civil suit for damages. None of them gives any support to the view of the trial judge that no consideration of reason is involved in a criminal case.

Nor are they authority for the proposition that the question of reason is not a question of fact. Of course in all of the equity suits, where there was no jury, the question of reason was decided by the Court, but in such case the Court decided questions of fact as well as of law. While in the case of a written contract the interpretation of which is for the Court (as in the *Joint Traffic Association* case) or cases arising on demurrer (as in *Swift & Co.* v. *U. S.*, 196 U. S. 375; *National Cotton Oil* v. *Texas*, 197 U. S. 115, and *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373), where all questions are for the Court, the question of reason is one of *fact*. The modern rule is well stated in Wigmore on Evidence (2d Ed.), Vol. 5, Sec. 2553, as follows:

> "There are many situations in which the issue of reasonableness of conduct presents itself. In general it is recognized as an issue of fact for the jury."

Not only has the question of reasonableness uniformly been submitted to the jury in cases of homicide (*People* v. *Hubert*, Ill. 1911, 96 N. E. 294, 296), malicious prosecution (*Western Union Tel. Co.* v. *Thomasson*, 251 Fed. 833, 835—C. C. A., 4th Circuit, 1918), false imprisonment (*Fagan* v. *Knox*, 66 N. Y. 525), but also as pointed out in the *Nash* case, in many other cases, and it has been expressly held that whether a restraint of trade is reasonable is a question of fact (*United States* v. *United States Steel Corporation*, 223 Fed. 55, affirmed 251 U. S. 417), where Judge Buffington said (p. 61):

> "The basic question for us to decide *is one of fact*, namely, whether the union of the several defendant com-

panies in the United States Steel Corporation 'prejudices the public interest by *unduly* restricting competition or *unduly* obstructing the course of trade'."*

And again (p. 78):

"Monopoly and unreasonable restraint of trade *are, after all, not questions of law.*"

To the same effect are *Miller* v. *Strahl*, 239 U. S. 426; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *C. A. Weed Co.* v. *Lockwood*, 264 Fed. 453, 266 Fed. 785, and *Nash* v. *United States*, 229 U. S. 373.

That in a criminal case all questions of fact must be submitted to the jury is too well established to require the citation of authorities.

Nor do the decisions cited by the petitioner's brief support the contention that any price-fixing arrangement is *per se* illegal. All that they do is to show that in certain cases, a court which passed upon fact as well as law found a particular arrangement illegal. In the only case cited which was tried before a jury (*Thomsen* v. *Cayser*), the jury found that the rates exacted by the defendants were unreasonable (Briefs for Plaintiff in Error, 243 U. S., at p. 77; Opinion, *Id.*, p. 88), although the fact of combination was decided by the Court, there being no conflict in the evidence. In that case, therefore, while the fact of combination, not being controverted, was properly assumed by the Court, the reasonableness or unreasonableness of the *effect* of the combination was submitted to the jury.†

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* Italics ours.

† The trial judges in the southern district of New York have adopted the view that the question of reasonableness should be submitted to the jury in Sherman Act cases. Thus in 1917 the case of *United States* v. *Aileen Coal Company et al.* was brought on for trial before Judge Grubb and a jury in the District Court in which the present case was tried. The indictment charged a combination or conspiracy to restrain trade in violation of the Sherman Act by fixing and maintaining minimum prices for coal. The learned judge adopted and applied the rule of reason laid down by the Supreme Court in the foregoing cases and left it to the jury to determine whether or not the restraint of

Even if the petitioners' view that the question of reasonableness could properly be taken from the jury and passed upon by the Court in this case, the Circuit Court of Appeals was nevertheless right in reversing the judgment of the District Court. For the trial judge explicitly ruled that the question was to be considered neither by the jury as a matter of fact, or by the Court, as a matter of law, saying

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trade effected by the combination was undue or unreasonable. In instructing the jury on this subject, Judge Grubb said:

> "Now one of the tests, probably, you have a right to look to in making that determination is this: the courts have said that such agreements in restraint of trade may be made by persons provided they afforded only the necessary protection to the persons making them, and in their business, against ruinous competition or bad trade practices; and provided that they are not any such unreasonable restraint of trade as to unduly injure, by their fixing of prices, the public; that is, the consumers, who are the purchasers of the product, of those who enter into the combination. You see, the law recognizes the two purposes; one, that it could be a necessary and reasonable protection to those who enter the combination where the situation requires protection, and the other that of the public, that no such combination be considered legal which unduly restricts competition by fixing prices and thereby works unreasonable injury to the public. * * * On the contrary, if there was ruinous competition, and trade practices that were injuriously affecting the proper conduct of the trade, then that would be a situation which might call for the making of an agreement between the parties to correct that situation. However, as I have said, it could not be done at the expense of the public and to the extent of injuring and restricting trade to the injury of the public." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, pp. 2268-2269.)
>
> "If, on the other hand, you are satisfied beyond a reasonable doubt, from the evidence, that there was a combination during some part of the three years prior to the finding of the indictment, among the defendants, or some of them to fix a minimum price for the sale of contract coal, then it would be your duty next to inquire whether that was a reasonable restraint of trade, or, on the contrary, an unreasonable restraint of trade. If it was a reasonable restraint of trade, in your opinion, then it would not imply guilt, though it is a price fixing arrangement. On the other hand, if it was an unreasonable restraint of trade in your opinion then guilt would follow as to those of the defendants who were parties to it.
>
> "As I said, not all price fixing arrangements or combinations are illegal." (Stenographer's minutes, *U. S.* v. *Aileen Coal Co.*, p. 2267.)
>
> "Then you would also have a right to take into consideration the effect of such combination to fix prices upon the purchasers and consumers in the market; that is, how much injury they would suffer from an agreement to maintain and fix minimum prices, as against a situation where prices were free to be made without

with respect to the considerations of reasonableness (R., p. 665, fol. 1995):

> "* * * They have to my mind no application to the consideration of a jury in a criminal case, *or the consideration of the Court in a criminal case.*"

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obligation on the part of any operator to expect any fixed price. As I have said, if that in your opinion was so great as to be unduly and unreasonably in restraint of trade and to the injury of the public, then that would be against the reasonableness of such a price-fixing arrangement. In other words, you balance the benefit to the operators with the injury to the public and make your own deductions as to whether it was an agreement, under the circumstances that it was made and under the methods under which it was conducted, with the conditions existing at the time it was made, which was or was not a reasonable agreement in restraint of trade—of course, any price-fixing arrangement is, in its nature, a restraint of trade." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, p. 2271.)

Judge Grubb also granted a request by the defendants to charge as follows:

> "# 37. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade, that works an injury to the public, it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, p. 2296.)

In 1922 the case of *United States* v. *Atlas Portland Cement Co. et al.* was brought to trial in the same court before Judge Knox. In that case the defendants were charged with a conspiracy to fix and exact excessive prices for Portland cement. The judge charged the jury in part as follows:

> "The question of price of any given commodity is a most important one. It is the one which instantly occurs to us in every commercial transaction and it is the most outstanding feature of this case. With that in view, I am going to ask you to consider if, over the period of time you may find any combination or conspiracy to have existed, and within three years of August 8, 1921, the result of such combination or conspiracy, and through the instrumentality of the practices enumerated in the indictment to have been carried on by the Protective Association, was that the price of cement was substantially greater than it would have been but for such combination or conspiracy. Also, has the supply of cement been so regulated and controlled by reason of any such combination or the trade practices mentioned that the public in purchasing the same has been required to make unreasonable concessions as to price, terms and conditions that it would not have been required to make had no combination or conspiracy existed?" (Stenographer's minutes, *U. S.* v. *Atlas Portland Cement Co. et al.*, p. 4239.)

In view of this statement by the trial judge, it is apparent that he never gave any proper consideration to the question of reasonableness which was an essential element of the case.

The doctrine declared by the trial court, and adhered to with inexorable logic to the very end, is so repugnant to one's sense of justice that it is difficult to discuss it calmly. As this court found it necessary in the *Standard Oil* case to read the rule of reason into the Sherman Act in order to save it from public condemnation, so here the rejection of such views as those expressed by the trial court with respect to the meaning of the Act when applied to a criminal case would seem to be necessary if the Act is to retain the respect of right-thinking men.

The rule thus adopted was recognized by the Department of Justice, and followed even in criminal prosecutions until this case. An examination of all of the indictments found under the Sherman Act in which price fixing was charged between the date of the Standard Oil decision and the date of the indictment of these defendants, shows that every one of them which ever went to trial contains an allegation that excessive, extortionate, or unreasonable prices were exacted, or that the restraint was in other ways unreasonable (*post*, p. 73).

The ruling of the trial judge as to this was not only prejudicial as to the charge of price fixing set forth in the first count. It was, if possible, even more prejudicial in its application to the charge set up in the second count of confining sales to jobbers.

It is apparent throughout the record that "legitimate jobbers" meant actual jobbers—those who were conducting a bona fide jobbing business. It has never been held that for manufacturers to deal as wholesalers, and to sell exclusively to jobbers, is improper. Yet, the trial judge, as a direct consequence of his view that no consideration of reason was applicable in a criminal case, went so far as to charge that if the defendants gave assent to the proposition that

they should restrict their sales to jobbers only, they were guilty of a crime (R., p. 703, fol. 2109). The facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, actual or probable; the history of the restraint; the evil believed to exist; the reason for adopting the particular remedy; the purpose or end sought to be obtained; all of which were held in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, to be relevant facts, were all excluded from consideration in this case.

The Government, in discussing the rulings in question, ignores entirely their application to the charge made in the second count of the indictment, and confines its argument to the proposition that no price fixing arrangement between persons representing eighty per cent. of an industry can ever be legal.

This court, in the *Standard Oil* case, and in all of its subsequent decisions, has taken pains to point out that the Sherman Act is not an arbitrary statute setting up a hard and fast rule, but a reasonable act, under which each case must be decided upon its own particular facts, and judged in the light of reason—the great standard of the common law. Is the court now, in the first criminal case where the question has been presented, to make an exception—to hold that there are two fields of activity, one of which is to be governed by a rule of reason, and the other by an arbitrary rule, from which all considerations of reason are to be excluded? Is the court to hold that the field of prices is to be made an exception to the general rule that the act is to be interpreted in the light of reason, and to go further, and say that this exception is only to be recognized in criminal cases?

This Court cannot hold that no rule of reason is to be applied in an equity suit to restrain a price fixing arrangement, without repudiating the *Chicago Board of Trade* case. But if it holds that the considerations of reason there applied cannot be applied in a criminal case, then it must be pre-

pared to hold that the defendants in that case could be indicted, convicted and sent to jail for doing the very things which this court refused to enjoin because, being reasonable, they were no violation of the statute.

It is easy to conceive of cases involving an agreement as to prices that would be *per se* unlawful. But is the court to hold that *no* price fixing agreement can ever be lawful? Or that no question of reason can ever be submitted to the jury in such a case? If this is the law, then every member of a trade association, who, at the request of the Government, as these defendants did, fixed a uniform price for government orders during the war, should have been punished, together with the public officials at whose request the agreement was made. All of those who agreed, as did these defendants, to reduce prices after the war, pursuant to the urgent recommendations of all of the economists and public officials who were crying abroad the slogan "Back to Normal" should have been punished. For, as the matter affected prices, none of those considerations held in the *Chicago Board of Trade* case to be the test by which a violation of the Sherman Act must be determined, could be considered at all.

If the question of reason was involved in the case—and we can reach no other conclusion than that it was—it was one of fact, which should have been submitted to the jury. That this is a question of fact was distinctly held in *United States* v. *U. S. Steel Corporation* (*ante*, pp. 34, 35).

II.

The instruction of the trial court, discussed in Point II of the Government's brief, warranted a conviction of the defendants without a finding by the jury of one of the essential constituent parts of the crime set out in the indictment, the finding of which was requisite to give the court jurisdiction to try the case.

From opinion below:

> "The question growing out of the first fact is this: Did the trial court err in instructing the jury in substance (though in several forms and at various times) that if they found that the defendants did conspire to restrain trade, as charged in the indictment, then it was immaterial whether such agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, and whether (finally) "any effort was made to carry" the object of the conspiracy into effect.
>
> "That as a general proposition of law under the Sherman Act this instruction was correct is a commonplace (Nash v. United States, 229 U. S., 373, 33 Sup. Ct. 780, 57 L. Ed. 1232). This is because, as the case cited puts it, conspiracy under the Sherman Act is punished on a common-law footing, and no overt act is necessary for conviction, because the offense is complete with the formation of the illegal meeting of minds. But we are persuaded that both the prosecution and the learned court overlooked the peculiarities of this case. None of the parties proceeded against lived within the Southern District; the indictment does not charge that any conspiracy was formed in that district; consequently there was no jurisdiction there to bring the indictment or there to try the case unless it was shown that jurisdiction was conferred by the commission of an overt act within the Southern District (Easterday v. McCarthy, 256 Fed., 651, 168 C. C. A. 45).
>
> "The pleader understood this, for otherwise all the allegations concerning acts done in the Southern Dis-

> **trict in pursuance of the object of the conspiracy were mere surplusage. Why the United States was so anxious to institute and prosecute this case in the City of New York we do not know, but the frame of indictment, compared with the undisputed facts, show that New York was intentionally selected, and trial of these defendants in the Third Circuit, where most of them resided, was sedulously avoided. Such a choice as this carried with it the burden of proving something done in the Southern District, i. e., an overt act—justifying the finding of an indictment therein. The peculiarity of this transplanted litigation was overlooked below, and it was error, and very material error, to instruct a New York jury in so many words that it was immaterial whether any effort had ever been made to carry out the conspiracy complained of."**

In the second point of the Government's brief there is set out, on page 28, only a portion of the part of the record relevant to the point under discussion. A correct understanding of the point cannot be had without a consideration of the facts which do not appear from the portion of the record cited in the Government's brief.

The charge of the court (R. 695):

> "I must, therefore, advise you that if you find the defendants combined and conspired to restrain trade by entering into the agreements charged in the indictment, then these agreements violated the Sherman Act, and it is immaterial whether such agreements were actually carried out or have accomplished their purpose in whole or in part."

The charge of the court (R. 697):

> "If you find that the defendants combined and conspired to fix the sale price of sanitary pottery as charged then you will understand that these defendants have contravened the Sherman Act and are guilty as charged in the first count of the indictment, whether, as I have suggested, they ever successfully accomplished that purpose or not. It is, as I have said, the entering into the illegal combination or conspiracy which violates the Act. If the minds of these defendants met and they either ex-

pressly or tacitly agreed to fix the sale price of sanitary pottery, then these defendants have violated the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged against them."

Exception taken by defendants to this portion of the charge (R., pp. 722-3):

"I respectfully except to that portion of your Honor's charge wherein your Honor stated that a mere agreement constitutes an offense, whether anything is done to carry it out or not, and where your Honor went on to say that it is immaterial whether agreements are carried out or not. That latter phrase, that it is immaterial whether the agreements were carried out or not, I submit is wrong——

"The Court: Immaterial for the consideration of the jury.

"Mr. Marshall: That is precisely what I want to bring to your Honor's attention—that I submit they are material from the aspect of determining whether the agreement was made, and if the jury find they were not carried out, it may be cogent evidence in their minds that the agreement was not made. Your Honor has put it so strongly here that I think your Honor——

"The Court: The jury may consider all the facts and circumstances in determining whether a combination and conspiracy has been entered into. But, if you will note, what I charged the jury is that they have determined that such a combination and conspiracy was entered into, then it is immaterial whether any effort was made to carry it out.

"Mr. Marshall: I respectfully except to the charge as modified."

The first two portions of the charge, above quoted, are sound law, as it was not necessary for the Government to prove that the agreements accomplished their purpose. The only bases for exceptions to these two pronouncements of the court were that they tended to confuse the jury by leading them to believe that the proof which had been introduced by the defendants, to the effect that no such agree-

ment as stated had ever been carried out, was immaterial on the issue of whether or not there had been an agreement. This criticism of these first two statements of the court was accordingly presented and is quoted on page 43 *ante*. To this proposition the trial judge assented, stating that the jury could consider everything, but then went on to greatly modify and enlarge the two prior statements which he had made to the jury, and charged he jury that it was immaterial whether any effort was made to carry out the alleged conspiracy. To this an exception was taken, in which it was pointed out that the prior charge had been modified and that the defendant excepted to the charge as modified. Manifestly, the exception to the modified charge was not based on the same theory as the exception theretofore taken to the first two portions of the charge on this subject, as the court had conceded the correctness of the criticism involved in the exception to these first two portions of the charge.

The effect of this portion of the charge to the jury is very succinctly stated in the opinion of the Circuit Court of Appeals (R., pp. 3700-1).

It is obvious that what the government classes as a point involving venue is rather a point involving the jurisdiction of the court itself.

The defendants under Art. III, Section 2, of the Constitution of the United States, which provides that

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crime shall have been committed"

were guaranteed the right to be tried in the state where the alleged crime was committed. (See also amendments to Constitution, Art. VI.)

It was by a divided court, in fact by a bare majority, that this court held that a conspiracy entered into in one State can be prosecuted in a district outside of that State, provided overt acts in pursuance of the conspiracy are proved to have occurred in the district where the indictment is found. *Hyde*

v. *United States*, 225 U. S., 347. Since that memorable decision, the law on this subject has been deemed settled.

As pointed out by the Circuit Court of Appeals, the pleader who drew the present indictment, alleged in each count of the indictment that a conspiracy, not stated to have been formed in New York, was continued and carried out in New York by the commission of various overt acts. These allegations were plainly designed to bring the case within the doctrine of *Hyde* v. *United States* (*supra*), and proof of these allegations was essential to the jurisdiction of the court in New York to try the case.

At the close of the trial, after every purchaser who testified, so far as he was allowed to testify, had given evidence tending to show that no conspiracy to maintain uniform, arbitrary and non-competitive prices was in fact being carried out, the court permitted the Government to retire from the position taken in the indictment (that uniform, arbitrary and non-competitive prices had been in fact maintained and that the defendants had in fact handed their sales to a "special group") to the position that there had been a naked and unperformed conspiracy; and charged the jury that if they found the defendants had conspired to restrain trade as charged in the indictment, it was immaterial whether such agreement was ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part or whether "any effort was made" to carry the object of the conspiracy into effect.

The erroneous charge here complained of was not an accidental misuse of language. It embodies a proposition advanced by counsel for the Government in the early stages of the defendants' case. In attempting to exclude some testimony offered by the defendants, counsel for the Government advanced the argument that "what the law condemns is the making of an agreement, even if nothing is ever done to carry it out" (R., p. 375, fols. 1123-25). To the ruling made on this occasion the defendant excepted (R.,

p. 376), but it is not clear that the ruling was based on the argument, just quoted, of the prosecuting attorney.

None of these defendants lived in New York. Some of them lived as far away as California. It is a shocking proposition that jurisdiction can be obtained in a New York court to bring defendants from all parts of the country to try them in New York by making allegations that overt acts of the conspiracy have been committed in New York; and that the prosecutor may then be relieved on the trial of the necessity of proving such overt acts and the jury instructed that the defendants may be convicted although such acts were never done at all. It is submitted that this point requires no argument or discussion beyond its mere statement.

The Government's brief fails adequately to meet the issue presented, and seeks to treat the matter as a failure of the court to give an instruction as to venue which was not requested. The error is of an entirely different character. It is not the failure to give a charge that is complained of, but the giving of an incorrect charge, which warranted the jury in convicting the defendants without finding the commission of the overt acts which were essential to the jurisdiction of the trial court.

It is claimed, in the Government's brief (p. 29), that there is undeniable evidence in the record that there were overt acts, committed in the Southern District of New York, of the alleged conspiracy, and for this reason it is of no consequence that the jury were not required to find that such overt acts had been committed. This argument seems to us remarkable. The defendants denied below, and deny here, that there was evidence either of a conspiracy or of the commission of overt acts. If the Government believed that it had proved the commission of overt acts, it should not have avoided submitting that essential element of its case to a jury.

It is outside the province of an Appellate Court, in a criminal case, to pass on controverted questions of fact, and, as pointed out above, it would be an invasion of the constitutional rights of the defendants to have a jury trial, if an

Appellate Court were to make, at the instance of the prosecutor, a finding of fact essential to the conviction.

The Government does not go so far in its brief as to contend that the instruction given was correct. Instead, it argues that the matter was not raised by a proper exception.

In this connection we point out that, with or without exception, either the Circuit Court of Appeals or this court, had the unquestioned right to notice such an error. Rule 11, Circuit Court of Appeals for Second Circuit; Section 4, Rule 25, Rules of the U. S. Supreme Court.

This error, involving, as it does, a violation of the defendants' constitutional rights and the very jurisdiction of the court to try the case, belongs to that class of errors which it is the right and duty of Federal Appellate Courts to notice, whether the question is raised by counsel or not. *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Mansfield, etc., Railway Co.* v. *Swan*, 111 U. S. 379; *Schick* v. *U. S.*, 195 U. S. 65, (where this court, of its own motion, noticed a question not raised by counsel, and determined whether or not, on the trial, there had been an infringement of Article III, Section 2 of the Constitution).

Indeed, it is probable that the mandate of Article III, Section 2 of the Constitution could not be waived, and jurisdiction could not be conferred by the actual consent of the parties. *Dickinson* v. *U. S.*, 159 Fed. 801; *Low* v. *U. S.*, 169 Fed. 86, 91; *Schick* v. *U. S.*, 196 U. S. 65.

But the exception was entirely adequate, and was put in a form which the trial court itself explicitly approved, in dealing with other exceptions, a few moments after the exception was taken.*

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*"The Court: You need not argue anything. All you need to do is to put your finger on the feature of the charge you except to, and reserve your exception" (R. p. 723, fol. 2169).

* * * * * * *

"The Court: The distinction is this: When you are excepting to something that is in the charge of the court, you must state the substance of it.

"Mr. Marshall: I have tried to do that.

"The Court: Yes, you have done that. But your written requests need not be covered that way, but you simply say you except to the refusal to charge" (R. p. 726, fol. 2177).

An exception to a designated portion of a charge is good.

Lucas v. *U. S.*, 163 U. S. 612-618.
Price v. *Pankhurst*, 53 Fed. 312-313.
Columbus Construction Co. v. *Crane Co.*, 101 Fed. 55.
Hindman v. *First National Bank*, 112 Fed. 931.

In *Hicks* v. *United States* (1893), 150 U. S. 442, the portion of the charge was not designated with anything like the precision with which it was designated in this case. Yet the Court held the exception sufficient, saying (p. 453): "The learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered".

As stated in *Farnsworth* v. *Union Pacific Coal Co.*, 89 Pac. 74, 77 (Utah, 1907) it is not necessary to give any reason in stating an exception, as giving a reason is but argument, which should be made when the instruction is presented for review, all that is necessary being to point out to the judge the particular portion of the charge to which objection is made.

The reference in the petitioner's brief (p. 32) to the dissenting opinion in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, overlooks the fact that in that case the Court considered the very point which in the dissenting opinion is said not to have been raised by a proper exception, and sustained the action of the Circuit Court of Appeals, based thereon, in reversing the judgment of the trial court.

Even should we grant the correctness of the extremely technical criticism of the exception taken to this portion of the charge of the court, the Government is left in the position of asking this court to reverse the Circuit Court of Appeals for acting within its own rules and noticing a plain error not assigned. That the error was plain cannot be and is not, as we understand the Government's brief, disputed.

If the exception were not properly taken, the question

of whether or not the error should be noticed was one addressed to the discretion of the Circuit Court of Appeals, and this court will not review the exercise of discretion by the court below "unless misuse or abuse of discretionary power plainly appeared." (*Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve*, 174 U. S. 603; *Harrison* v. *Perea*, 168 U. S. 311, 325, 326.)

The case is directly within the rule announced in *Mahler* v. *Eby*, 264 U. S. 32, where this court said (p. 45):

> "It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this court. There was an averment that the warrant was void without definite reasons in the petition of habeas corpus. There was nothing of the kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned. Rules 21, secs. 4 and 35, sec. 1, 222 U. S., Appendix, pp. 27, 37; *Wiborg* v. *United States*, 163 U. S. 632, 658; *Clyatt* v. *United States*, 197 U. S. 207, 221-222; *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362. The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made earlier it might have been quickly remedied. There was no chance for objection afforded the petitioners until, after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this Court."

III.

The trial court erred in permitting questions as to whether the J. L. Mott Company and the J. L. Mott Iron Works had not pleaded guilty to a violation of the Sherman Act.

From opinion below:

> "The same theory of action was carried further in the examination of one Bantje, an employee of the J. L. Mott Company (not a defendant), who was asked, over objection, this question: 'You know that your concern pleaded guilty to a violation of this very law in this very court?' The theory, frankly stated, on which the question was allowed, was that the matter affected the credibility of the witness, and this reason was given after the witness had declared that he personally did not know anything at all about it. We are not aware of any other ruling heretofore made which in effect impugns the veracity of a whole body of employees because the corporate employer had previously pleaded guilty to an infringement of the Sherman Law."

There is no merit in the statement in the footnote on page 8 of Government's brief that the Circuit Court of Appeals would not have reversed the judgment of the District Court because of the matters discussed in this and the next two points. This contention is based solely upon the fact that the Circuit Court of Appeals referred to them as "minor points." But they were "minor" only by comparison. The Circuit Court of Appeals discussed them expressly "because there may be a new trial". Far from giving rise to any inference that these errors would not alone have constituted sufficient ground for reversal, this indicates that the Circuit Court of Appeals felt that a repetition of these errors at a second trial would invalidate any judgment against the defendants, and clearly amounts to an admonition lest a second judgment be reversed. The matters referred to by the

Circuit Court of Appeals as "minor points" are real and prejudicial errors. Their presence in the record is not of the defendants' seeking. They were allowed to enter over the defendants' vigorous objection at the insistence of the Government, and the Government should not now be allowed to argue that they are matters of no importance.

As the Court said in *Miller* v. *Territory of Oklahoma*, 149 Fed. 330 (at page 339):

> "The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of conviction by the appellate courts to what is popularly termed 'mere technicalities'. The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

The witness, Bantje, called by the defendants, was a purchasing agent for a large corporation which purchased part of the product of many of the defendants. He had testified that his purchases were made at greatly varying prices, and that in the majority of instances his purchases were made at prices from 5% to 25% or 30% below the bulletin prices. His testimony was thus most important to the defendants, and damaging to the Government's theory that uniform,

arbitrary and non-competitive prices were maintained (R., pp. 451-452).

The following extract from the record shows the manner in which the rulings discussed in this point occurred and enables an estimate to be formed of their effect upon the jury (R., p. 453):

"Cross-examination by Mr. Podell:

My company is the manufacturing part of the J. L. Mott Iron Works. I was not in charge of the tile department. I can't tell you who had charge of that.

Q. You know that your concern pleaded guilty to a violation of this very law in this very court?

Mr. Marshall: I object to that.

A. I don't know anything about that at all.

Q. The J. L. Mott Company? A. The J. L. Mott Company have no tile department.

Q. The J. L. Mott Iron Works? A. That may be.

Q. That is your concern, is it not?

Mr. Marshall: I object to the question and move to strike out the answer, and ask the court to instruct the jury to disregard it on the ground that it is improper; that it tends to create prejudice, that it does not affect in any way the witness on the stand, and that it is incompetent, irrelevant and immaterial, and I ask your Honor to instruct the jury to disregard it.

The Court: What is your theory in asking that, Mr. Podell?

Mr. Podell: Purely as affecting the credibility of this witness and the business conducted by his company, to which he has testified. I think we have an absolute right to show the previous history of the concern that this man is connected with.

The Court: I do not think there is any doubt about that, if it is a transaction that affects the concern.

* * * * * *

The Court: Was this one of the concerns that pleaded guilty before me?

Mr. Podell: Yes, your Honor——

The Court: The name is familiar, but I do not remember.

The Witness: May I interrupt your Honor——

Mr. Marshall: I want a ruling on my motion. The motion is that the jury be instructed to disregard all of this on the ground that it is improper to bring it before the jury; that it does not tend at all to affect the witness who is on the stand and on the ground it is unfair and tends to introduce prejudice and it is incompetent, irrelevant and immaterial and I ask your Honor to instruct the jury to disregard it.

* * * * * *

Mr. Marshall: Does your Honor then overrule my objection?

The Court: I have, yes.

Mr. Marshall: I ask your Honor to allow me to note an exception.

The Court: Certainly." (Italics ours.)

These erroneous rulings of the court were in the highest degree prejudicial. The questions were calculated to create in the minds of the jury the impression that Mr. Bantje was the employee of a corporation which had committed the very offense charged against the defendants and that he had been implicated in such offense; and to arouse against him all the hostility and distrust which is publicly directed against those who are involved in such transactions, and thus to lead the jury to disregard his testimony as to facts, which, had they been believed, would have tended to negative the inference of an agreement to fix prices which the prosecution asked the jury to draw from circumstantial evidence. Such was the avowed purpose of the questions.

While it has been held that the conviction of a witness of an infamous crime or one involving deceit or moral turpitude can be shown to affect his credibility this rule is strictly limited. The conviction must be that of the witness himself. Proof that the witness is a close blood relation of the persons convicted of crime is not admissible. *Lee* v. *State* (Ark. 1899), 50 S. W. 516. Nor is proof that the witness associated with evil companions. *People* v. *UnDong* (Cal. 1895), 39 Pacific, 12; *Miller* v. *Territory of Oklahoma* (C. C. A., 8th Circ., 1906), 149 Fed. 330. Proof that a witness was an

employee of a corporation that had pleaded guilty of an offense under the Sherman Act can certainly have no effect upon his credibility. The individual was testifying. It was his credibility, not that of his company, which was involved, although the Court stated a contrary view (R., p. 454, fols. 1360-1361).

The Government contends that the answer of the witness, that he did not know whether his concern pleaded guilty removed all danger of prejudice. It will be seen from the foregoing quotations from the Record that the Court invited the prosecuting attorney to state that the concern had pleaded guilty, and denied the motion of defendant's counsel to strike out the statement. It made no difference whether the witness knew the answer to the question or not.

The petitioner does not now argue that the questions were proper for the purpose of affecting the credibility of the witness, but instead contends that they were asked for the purpose of showing *bias* on the part of the witness. But at the trial no such ground was stated for allowing the question. On the contrary, when questioned by the trial court as to the purpose thereof, counsel for the Government said:

> "Purely as affecting the credibility of this witness" (R., p. 454, fol. 1360).

Having been offered for this purpose, and the jury having heard the trial court's ruling that it was proper for that purpose, together with the statement that the company in question had pleaded guilty before the trial court, they were undoubtedly led to believe that this might be considered as affecting the credibility of the witness, whose testimony, as the petitioner's brief admits, would tend to show that no price fixing agreement existed.

IV.

The trial court erred in permitting questions as to whether one Hanley had not been examined as a witness by the Lockwood Committee.

From opinion below:

"We note some minor points, as there may be a new trial. In the examination of witnesses there is great room for discretion on the part of both court and counsel. That of counsel is often and naturally clouded by a desire somehow or anyhow to advance his own case. It is the duty of the court to exercise its own discretion in keeping counsel within what ought to be the very plastic rules of evidence.

"There is no flat regulation of injurious immateriality or hearsay, and it would be a misfortune if there were one, yet both court and counsel must always run the risk of making a mistake in the degree of latitude exercised. We think mistake was made and error committed in some instances:

"The secretary of the Potters' Association was on the stand, and some mention had been made of one Hanley, who was an official of the Jobbers' Association, whereupon the prosecution asked the witness whether 'at or about that time you knew the Lockwood Committee was in session, and that this Mr. Hanley had been summoned as a witness and was being examined before that committee?' Over objection the witness answered that he did know from the newspapers that Hanley had been under fire" before said committee. Ordinarily this would be one of those incidents of trial sure to happen in the heat of examination, and of no importance at all. But the context shows that this mention of the Lockwood Committee was of design, the imputation or suggestion being that anyone who was under fire by that organization (a local investigating body that had attracted considerable attention in the building trades) was smirched by being attacked. This is a favorite and very modern

> **form of verbal assault, but it had no place in a criminal trial. We mention it because it is an illustration of how the same latitude of language or suggestion may be of no importance in one cause and of serious moment in another. In this case, in its essence an inquiry into statutory trade regulations, the suggestion that the man with whom the witness had had dealings was an unreliable person (to put it mildly) because he had been called as a witness before the Lockwood Committee was inadmissible and prejudicially erroneous."**

The errors in question occurred during the examination of the witness Dyer. Counsel for the prosecution showed the witness a letter to refresh his recollection, which was not offered in evidence, but which was dated May 19th, 1921 (R., p. 192, fol. 575), and asked if at that date he knew that the Mr. Hanley (Secretary of the Greater New York Association of Jobbers), referred to in one of the Government Exhibits had been summoned as a witness and was being examined by the Lockwood Committee. This was objected to as wholly irrelevant and tending to promote prejudice (R., p. 189, fols. 566-7). The trial court stated that the question was proper to lay before the jury to show how it came about that twenty out of twenty-four companies were selling class "B" ware in the domestic market, and counsel for the prosecution stated that this was his purpose, saying (R., p. 190, fols. 568-9): "We want to show why there was that small minority just at that time." An exception was taken by the defendants to the court's ruling. The question was then repeated and was again objected to, and the objection was again overruled on the statement of counsel for the prosecution that he intended to follow it up by showing that Mr. Hanley's examination was publicly heralded in the newspapers and was a matter of common knowledge at the time, stating that the witness could testify as to this. Whereupon the witness answered that he did know that the Lockwood investigating committee had Mr. Hanley "under fire". He was then asked how long before May 19th he knew that Mr. Hanley was "under fire". An objection to this question

having been overruled, the witness replied that he had known it for from thirty to sixty days (R., pp. 191-3, fols. 573-577). In response to a later question he stated that he derived his information from the newspapers.

None of the defendants live in New York and there is no evidence that any of them read the New York newspapers. There is no evidence that any of the defendants knew that Mr. Hanley had been examined as a witness by the Lockwood Committee or was "under fire", nor that they had ever heard of Mr. Hanley prior to the meeting of April 5th, 1921, at which a communication (Govt.'s Ex. 148, R., p. 1077) from him was produced. There is no evidence as to why Mr. Hanley was examined as a witness or what subjects his testimony referred to. The only facts shown were that Mr. Dyer learned from the newspapers that Mr. Hanley had been examined as a witness before the Lockwood Committee some time between March 20th and April 20th, 1921. Yet the trial court stated and allowed counsel to state before the jury that the fact that Mr. Hanley was so examined showed why twenty out of twenty-four companies were selling class "B" goods in the domestic market. A more improper or more prejudicial incident can hardly be imagined. The questions and answers coupled with the statement of the counsel and the court could not have failed to give the jury the impression that the defendants knew of Mr. Hanley's examination by the Lockwood Committee, although there is no evidence of this fact, and that by reason of such knowledge they had in some undisclosed fashion modified their conduct. The impression upon the minds of the jurors undoubtedly was that Mr. Hanley had been examined and was "under fire" because of some improper conduct on his part and that there was some sinister connection between him and the defendants. These inferences were wholly unwarranted by any evidence in the case. The fact that Mr. Hanley was testifying before a legislative committee in New York on some unknown subject, of which fact the defendants were not shown to be aware, is so obviously irrelevant that it is difficult to see how anyone could seriously contend that the questions were proper.

It is doubtless obscure to the members of this Court, who may not have followed the history of local events in New York City during the last few years, why the Circuit Court of Appeals regarded the interjection of this fact into the record as a "verbal assault" which "had no place in a criminal trial". There was no proof in the record as to what the Lockwood Committee was. The Circuit Court of Appeals, however, took judicial notice of what it was, and of the fact that a person "under fire" by that committee was "smirched", and that the question conveyed the suggestion that such a person was "an unreliable person", "to put it mildly".

We fail to see what action the Government can ask this Court to take as to this ground of reversal. It surely cannot be denied that it was known to every one in New York that the Lockwood Committee had developed a shocking condition in the building industries, which was widely heralded in the press. It cannot be denied that to the gouging and extortion in the building trades disclosed by that committee was attributed the high rate of rents prevailing in the City of New York, and that wide-spread public indignation had been excited. The question addressed to the secretary of the defendants' trade association tending to couple him with one of these supposed extortioners, was based on the assumption by the Prosecuting Attorney that the jury understood its full significance; for no proof was offered by him in the case, or needed to be offered, as to what the Lockwood Committee was, or what facts it had developed.

The Circuit Court of Appeals has determined, on account of facts of which that court takes judicial knowledge, that interjection of questions tending to cause the jury to bracket in their minds the secretary of the defendants' association with a person "under fire" by the Lockwood Committee, was a ground for reversing the judgment. Whether that decision of the Circuit Court of Appeals is right or wrong depends on facts of which that court took judicial notice. If the revelations of the Lockwood Committee had worked up the public, including, presumably, the jury that tried this case,

to a state of furious indignation with everyone who was "under fire" by the Lockwood Committee, then the court was right in treating the unnecessary and unwarranted interjection of this evidence as a "verbal assault" which "had no place in a criminal trial" (R., p. 3705).

Is this court asked to decide that the Circuit Court of Appeals erred as to the facts of which it took judicial notice? The Government, surely, cannot contend that any court sitting outside of the City of New York should hold that a Federal Appellate Court sitting in that city does not know the public facts of which it assumes to take judicial notice and on which it bases a decision.

V.

The trial court erred in excluding the evidence of many witnesses to the effect that there was active competition between the defendants during the period covered by the indictment.

From opinion below:

> **"The other point to be noted is the treatment of testimony offered in respect of competition averred by defendants as existing between themselves during the period covered by indictment. Under the first count it was essential for the prosecution to prove the absence of competition, i. e., the exaction (in the language of the count) of 'non-competitive prices'. As is customary in conspiracy causes, one if not the main object of the prosecution was to show the absence of effective competition, and ask the jury to infer therefrom an agreement to bring about the proven course of business. It was of course incumbent upon the defense to show, if possible, the presence of actual competition in respect of prices. It seems to us that competition, even when limited to competition in price, is a word or phrase of very plain and simple meaning. It is not one that calls for expert knowledge or labored definition, yet, for example,**

> **a purchaser of the kind of goods manufactured by defendants was asked: 'Did you find any competition for your trade among these people?' and he was not permitted to answer, on the ground that 'competition is a conclusion which results from a certain course of dealing. That is for the jury to find out'. This is but illustrative of a long line of rulings. We think it clear that when a man is asked whether he had competition, encountered competition, entered competition or observed competition, any trader, indeed any man acquainted with the English language, knows what is meant, and such questions do not in the legal sense ask for 'conclusions'. Words, like coins, are more or less current, and so men are more or less acquainted with their significance: it is rather late in the history of Sherman Law litigation to treat the word 'competition' as even connoting or suggesting anything not known of all men."**

One of the principal tasks of the jury was to determine the proper construction to be placed upon a large number of letters introduced, which the Government contended indicated a belief on the part of the writers that there existed an agreement or combination as to the fixing of prices to which all of the defendants were parties. The defendants contended that if these letters were read in the light of the surrounding circumstances, they indicated the precise contrary, and showed that there never had been any agreement or combination effected between the parties.

Such being the question of fact presented to the jury in regard to these letters, it became of the utmost consequence to find out what was actually done during these years by the defendants. That they could, had they wished, have established a uniform price and could have maintained it, is obvious. They had during the war maintained an absolutely uniform price in their sales to the Government of the United States, from which no one had been shown to have departed.

Under these circumstances it is plain that the defendants were entitled to the fullest opportunity to show by their customers that uniform and arbitrary prices were not in fact charged, and that throughout the period under investi-

gation the defendants had been in active competition as to prices with each other; and that this fact had been well known to all of their customers.

Under these circumstances, the most natural source of information as to whether the defendants were in a combination or in competition with each other was the purchasers of their output. Most of the defendants pursued the policy of selling to jobbers, and these jobbers were very numerous. It was very easy for either side to call for information from purchasers as to whether or not the defendants were in a combination or in competition.

This line of inquiry naturally presented itself to the mind of the prosecuting officers, and the record discloses that they called on at least two of the large jobbers for information on this point and were advised that there was active competition among the defendants (R., p. 423, fol. 1268; p. 426, fol. 1276; p. 428, fol. 1282; p. 495, fol. 1485; p. 529, fol. 1587; p. 532, fol. 1594).

The prosecuting officers, having learned that the defendants were actually in competition, dropped the inquiry among the purchasers of the output of the defendants, and attempted to prove a sort of theoretical agreement among the defendants to maintain prices which was actually, as they had learned, not observed by the defendants at all. The Government had learned that if any agreement had been made, it had never been carried out but was openly violated by all of the defendants and they attempted to prove a bald agreement which was in no sense effective in the trade.

It was not until the defendants' side of the case came to be presented that the court heard from their customers at all. The defendants called a long line of dealers who had dealt with the defendants and made purchases from them. The first of these, Smolka (R., p. 421, fol. 1261 *et seq.*) was permitted to testify fully, and his evidence showed convincingly that during this whole period he had found active competition and price cutting among the defendants.

This testimony was highly damaging to the Government's

case, and when the next witness, Mr. Efron, was called the Prosecuting Attorney practically shut his testimony off by obtaining a ruling from the Court, over the exception of the defendants, that the witness could not testify to the existence of competition among the defendants on the ground that the testimony embodied a conclusion (R., p. 434, fol. 1301; p. 436, fol. 1307).

Many erroneous rulings along the same line were made by the trial court, over the exception of the defendants, as follows:

1. The court refused to allow counsel for the defendants to ask Philip J. Faherty, who had been in the pottery business for twenty years, fourteen of which he had been with the Lambertville Pottery Co. (R., p. 339, fol. 1016), the following question:

> "Can you state whether or not you found yourself in competition with other members of the Association at any time?"

on the ground that the question was a vague, broad generalization calling for conclusions and not specific facts (R., p. 344, fols. 1031-2; assignment No. 119, p. 3642).

2. It refused to allow the witness, Robert T. Shannon, who sold the goods of the Acme Sanitary Pottery Co. (R., p. 394, fol. 1182) to be asked:

> "I ask you whether you found yourself in active competition in your efforts to push this product?"

upon the ground that it called for a conclusion and was vague, indefinite and uncertain (R., p. 398, fols. 1191-2).

3. It refused to allow the witness, Jacob Efron, a jobber of twenty-two years' standing, who bought pottery from nine of the defendants (R., pp. 434-6, fols. 1301-1306) to be asked:

> "Did you find any competition for your trade among these people?"

on the ground that it called for a conclusion (R., p. 436, fol. 1307).

4. It sustained an objection to the following question addressed to Walter F. Drugan, who was active as salesman of Cochran-Drugan & Company for fourteen years (R., p. 440, fol. 1320), and who testified that in selling the products of that company he met with competition (R., p. 441, fol. 1323):

> "Please state whether or not you cut your prices to meet that competition?"

and struck out the witness' answer that in some cases he did so, upon the ground that the question called for the conclusion of the witness as to several transactions which were not identified, and was vague, indefinite and uncertain.

5. It sustained an objection to the following questions addressed to Jerome L. Weil, a wholesale and retail dealer who bought from three of the defendants (R., p. 465, fol. 1395):

> "Can you state whether or not there were instances where there was a cutting of prices to get your business?"

(R., p. 469, fol. 1406), and

> 6. "Can you state whether the price that you paid for the articles that you bought were more at or more below the prices stated on those price bulletins?"

(R., p. 466, fol. 1397), upon the ground that the questions were vague, indefinite and uncertain.

7. It sustained an objection to the following question addressed to Jerome W. Thorndike, president of a large Boston jobbing house, who bought pottery from eleven of the defendants (R., pp. 511-512, fols. 1533-4):

> "As compared with the times you paid the bulletin prices which was the most frequent, the purchases at or below the bulletin prices?"

upon the ground that it called for the conclusion of the witness as to a mass of transactions covering several years and that it afforded no proper basis for cross-examination (R., p. 512, fol. 1535).

8. It sustained an objection, the ground of which was not stated, to the following question addressed to the witness John F. Smith, Treasurer of the Resolute Pottery Company, who had testified that his company made sales below its bulletin prices (R., p. 375, fol. 1123):

> "How much cutting of your prices did you notice and how frequent were the cuts?"

the judge saying that the question was excluded because the witness was asked to state something in a general way that he ought to show by his records (R., p. 376, fol. 1126).

9. It excluded the following question addressed to the witness Charles J. Kirk:

> "Did you not from time to time, Mr. Kirk, hear of other members of the Association who were cutting prices besides the Abingdon?"

on the ground that it was too vague, general and uncertain to afford any basis for cross-examination (R., p. 474, fol. 1420).

10. A similar objection was sustained to the following question addressed to Jerome L. Weil, who testified that he procured prices from several companies (R., pp. 466-7, fols. 1398-9):

> "Were those prices the same or did they differ?"

because it was vague, and general, affording no basis for cross-examination (R., p. 467, fol. 1401).

11. It also excluded the following question addressed to Robert P. Seifert, who stated that in purchasing it was usual for him to get three or four different bids or prices from different manufacturers:

> "How wide a range can you remember it as having taken?"

because the witness could not refer to specific instances (R., p. 525, fol. 1575).

12. It excluded the following question addressed to Edmund F. Winzinger, who purchased pottery from four of the defendants:

> "Will you please state whether you observed any uniformity of prices at the time you were making purchases?"

upon the ground that it called for a conclusion of the witness (R., p. 497, fol. 1491).

13. It sustained an objection to the following question addressed to Aaron Buda, a large jobber who dealt with fourteen of the defendants (R., p. 491, fols. 1471-2):

> "And now tell me the way you purchased your goods?"

upon the ground that the witness should be confined to specific instances (R., p. 493, fol. 1478).

The questions above referred to fall into five groups. Nos. 1, 2 and 3 inquire as to the existence of competition. Nos. 4, 5, 8 and 9 inquire as to the cutting of prices. Nos. 6 and 7 inquire whether more sales were made at or below the bulletin prices. Nos. 10, 11 and 12 inquire as to the uniformity of selling prices. No. 13 inquires as to the customary way of purchasing pottery.

The importance, in a case like this, of such evidence can hardly be exaggerated. The defendants were charged with fixing a uniform price, at which they actually sold, and of refraining from competition as to price, all pursuant to agreement. The jury was asked to infer such an agreement from circumstantial evidence. If the jury had found that the defendants did not sell at uniform prices, but competed with each other, cutting their prices to meet competition, and that many more sales were made below the bulletin prices (which the Government apparently contended were the "uniform, arbitrary and non-competitive prices") than were made at such prices, they might also have found that the customary way of doing business was for buyers to procure bids from a

number of defendants, and that the prices so obtained were not the same, but varied widely. Had they found that these things were true they might well have reached the conclusion that whatever the relations between the defendants may have been they effected no restriction upon competition or restraint upon trade; that the defendants never attempted or intended to fix prices and suppress competition; and that the alleged agreement, which is the foundation of the case against them, did not in fact exist. Such a finding would have changed the interpretation of the whole body of documentary evidence. If the documents are considered in connection with the continued existence of competition and a wide variation in prices they indicate no more than that some of the defendants were making recommendations which any of them might follow or disregard as they saw fit and which most of them entirely disregarded. Who can say that had the testimony, which the Court excluded, been submitted to the jury, it might not have furnished the additional weight of evidence which would have compelled their belief.

The court did not deny the relevancy of testimony of the character offered, but excluded it upon the ground that the questions called for conclusions; were vague, indefinite and uncertain, affording no basis for cross-examination, and because in its opinion price cutting and variation of prices could not be shown except by records or specific instances.

There is no force in the objection that the questions were too vague to afford a proper basis for cross-examination. Competition is not a vague, broad generalization, but a definite thing; whether prices were cut to procure orders, and whether the greater number of a given individual's purchases were made at or below bulletin prices are likewise facts. While the questions undoubtedly call upon the witnesses to give testimony which involve the exercise on their part of a certain measure of opinion or conclusion from facts personally observed by them, this does not render the testimony inadmissible either because it is a conclusion or opinion, or because it affords no basis for cross-examination. All

of the witnesses whose testimony was thus excluded had been in the business of buying or selling sanitary pottery for many years. All of them were qualified as experts with respect to the matters as to which they were examined, and even if this were not so their testimony would still have been admissible.

The so called "opinion rule" has been the subject of much misunderstanding, and the cases dealing with it are conflicting. The correct rule supported by the weight of authority does not exclude the testimony of the witnesses even though they are not of the class generally recognized as experts where they testify to conclusions from facts observed by them in cases where it is impossible to state the facts fully to the jury, or where to do so would tend to confuse the jury.

In *Greenleaf on Evidence* (16th Edition), Vol. 1, page 550, it is said:

> "Thus in practice, opinions are received * * * Secondly, From persons who have no special skill, but have personally observed the matter in issue and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place and enable them equally well to draw the inference."

In *Wigmore on Evidence* (2nd edition), section 1917, Vol. 4, page 104, it is said:

> "When an ordinary or lay witness took the stand, equipped with personal acquaintance with the affairs and, therefore, competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper."

The same authority also says, *Ibid* (section 1922) Vol. 4, pages 117-118:

> "There is no principle and no orthodox practice which requires a witness having personal observation to state in advance all his observed data before he states his inferences from them; all that needs to appear in

> advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination."

The rule laid down by Mr. Wigmore is amply supported by the authorities. *Commonwealth* v. *Sturtivant* (1875), 117 Mass. 122, 123; *Schultz* v. *Frankfort, etc., Insurance Company* (Wis. 1913), 139 N. W. 386-391; *Railroad Company* v. *Schultz* (1885), 43 Ohio St. 270, 282; *Atwater* v. *Clancy* (1871), 107 Mass. 369, 376; *Parker* v. *Boston & Hingham Steamboat Company* (1872), 109 Mass. 449-451. The rule is well stated in *Mobile J. & K. C. R. Co.* v. *Hawkins* (Ala. 1909), 51 S. 37. The witness there was asked whether one of the parties did not at a certain conversation withdraw his claim of authority. In discussing the admissibility of the evidence the court said:

> "A witness may state a conclusion of fact; he is not required to state every fact separately from every other fact; he may state facts either separately or collectively. It is conclusions of law that he may not attempt to state; nor will he be allowed to draw a conclusion, or to state a conclusion which is to be drawn from several other facts—that would be the province of the jury; but it is not only permissible for a witness to sometimes state a conclusion as to a fact, but often absolutely necessary that he do so, if he testify at all relative to the fact. The rule prohibits merely the drawing or stating of conclusions of law, which are questions for the court, and of certain conclusions of fact which, under the issues and the evidence, are exclusively questions for the jury, and to be determined from all the other facts or evidence in the case. These conclusions of fact are denominated by our court 'shorthand rendering of facts', to distinguish them from mere gratuitous opinions, motives, and conjectures of the witness. A witness may testify that certain work was done in a workmanlike manner, that he controlled land for a certain person, that a person's character is good or bad, that a person seemed to be suffering, etc. 3 Mayfield's Dig. p. 468, *et seq.*, which collects the authorities" (p. 43).

The rule has repeatedly been recognized by the Federal Courts.

Connecticut Mutual Life Insurance Company v. *Lathrop,* 111 U. S. 612, 620-621;
Hopt v. *Utah,* 120 U. S. 430, 437-8;
Gulf C. & S. F. R. Co. v. *Washington* (C. C. A., 8th Circ., 1892), 49 Fed. 347-349;
Baltimore & Ohio R. Co. v. *Rambo* (C. C. A., 6th Circ., 1893), 59 Fed. 75-77;
City of Charlotte v. *Atlantic Bitulithic Company* (C. C. A., 4th Circ., 1915), 228 Fed. 456, 459-460.

While there are cases which question or deny the rule established by the above authorities they proceed upon a misunderstanding of the "opinion rule" as originally established and result in a situation which has been found intolerable in practice. As Mr. Wigmore says (*Wigmore on Evidence,* 2nd edition, section 1929, Vol. 4, p. 124):

> "The opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it * * * We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination."

To say, that a dealer in pottery cannot testify as to whether he purchased more goods below bulletin prices than at such prices because he cannot recall each specific transaction, is as illogical, as to say that a railroad conductor cannot testify that he collects more tickets than cash fares unless he can recall each particular transaction.

The prejudicial effect of excluding the testimony in question does not admit of any doubt. Testimony of the character here offered was one of the decisive factors in the *Steel*

case, where two hundred witnesses gave testimony of this character (*U. S. v. U. S. Steel Corporation*, 251 U. S. 417-448). The Government cannot successfully contend that the exclusions of this testimony was not prejudicial, in view of the fact that the jury was asked to infer, and did infer, from circumstantial evidence the existence of a restraint of trade, although the Government called not a single witness to prove either that prices were excessive to the detriment of the purchasing public, or that prices were ever fixed at figures unreasonably low for the purpose of injuring competitors or forcing them out of the trade, or that competition as to prices had been eliminated or even diminished.

The rulings of the trial court, if adhered to, would have made it impossible for the defendants to have the actual picture presented to the jury. Had the books of each jobber been produced in court, had the men who made the entries and the agents who made the purchases, called to substantiate them, still the whole picture would not have been presented, for the records would only have shown the one offer accepted, and not the five or six competitive offers which were rejected during the negotiations.

The stipulation entered into at the trial and the evidence offered thereunder does not cure the error of rejecting the testimony in question. In the first place, no documentary evidence of that character, particularly when compiled from the defendants' records, could have the same effect as the actual testimony of witnesses—particularly of witnesses in no wise connected with the defendants or employed by them. In the second place, the stipulation was not entered into until *after* all of the testimony referred to had been excluded, and its purpose was not merely to avoid the necessity of introducing the evidence already improperly excluded, but to attempt to avoid the burden, imposed by the erroneous ruling. Under the rulings complained of, a jobber, to prove that when he wanted to buy he procured offers at different prices from different defendants, would have been required to prove each specific offer. Obviously there would be no record on his

books of the rejected offers, but only of the purchases which resulted from the acceptance of the successful offer; yet he might have a very clear recollection that at the time of a particular purchase, or that whenever he made a purchase, he procured numerous offers from different defendants at different prices, although not able to give the details as to each or any of the rejected offers.

There is no force in the petitioner's argument that the competition referred to in the questions excluded was not "competition as to price". The questions quoted as numbers 4 to 12, both inclusive, specifically refer to *competition as to price;* an examination of the context will show that the other questions must have been understood as referring to competition as to price.

The exclusion of the evidence offered was error the prejudicial effect of which can hardly be overestimated.

VI.

The denial of the motion in arrest of judgment on the first count of the indictment was error.

Among the objections to this count raised by the motion in arrest are:

(*a*) That the first count of the indictment does not state a crime (Rec., p. 732, fols. 2195-96); and

(*b*) That it was so vague and indefinite that it fails to advise the defendants of the charge against them (R., p. 732, fol. 2196).

(*a*) If the rule of reason is applicable to criminal prosecutions under the Sherman Act and the fact of unreasonableness is an element of the crime, it follows that an indictment should allege facts showing this, as well as other necessary

elements. It should allege facts which *must* constitute a crime, not merely facts which, *under certain circumstances not alleged, may do so.*

The first count is defective in this respect. It alleges merely that pursuant to agreement prices were fixed and competition as to prices restricted. There is no indication in this count that the alleged combination brought about any prices different from those which would have existed in the absence of any combination at all. There is no statement of any facts peculiar to the business in which it is alleged the restraint occurred; no account of the condition of the business before and after the alleged restraint, and no statement of the effect of the alleged restraint actual or probable; nor is there any statement in this count of the history of the restraint, the evil believed to exist, or the reason for adopting the alleged restraint.

The mere fact that prices are regulated or affected is not sufficient to render a combination unlawful (*U. S.* v. *John Reardon & Sons,* 191 Fed. 454; *United States* v. *Whiting,* 212 Fed. 466); nor is the fact that competition is restricted sufficient (*United States* v. *John Reardon & Sons, supra,* and *United States* v. *Chicago Board of Trade,* 246 U. S. 231).

If the law is as stated in the charges of Judge Grubb in the *Aileen Coal* case (footnote, *ante,* p. 35) and Judge Knox in the *Atlas Cement Company* case (footnote *ante,* p. 37) a mere allegation of price-fixing in an indictment, without more, does not charge a crime, and the first count of the indictment is insufficient.

The first count is also insufficient if tested by the rule laid down in the *Chicago Board of Trade* case, *supra,* and the recent case of *National Association of Window Glass Manufacturers* v. *United States,* 263 U. S. 403. When this count is examined, it will be observed that in spite of the decision in the *Chicago Board of Trade* case, the pleader undertakes to adopt the "simple test" which was there held insufficient, and to rest his whole case on the mere proposi-

tion that a charge of restraining trade is in and of itself a sufficient charge of violating the Sherman Law.

The first count is experimental, in that it is the first indictment ever brought to trial that does not allege any unreasonable restraint or any injury to the public.

Copies of all indictments returned under the Sherman Act are preserved in Washington and were accessible to both parties. Prior to the trial, the defendants caused an examination of these indictments to be made, and at the trial handed to the court and counsel for the prosecution a printed pamphlet containing a collection of quotations from every indictment under the Sherman Act since 1909 which had any relation to price-fixing. All but two of these indictments stated some fact from which the inference of an unreasonable or undue combination could be drawn. Prices were alleged to be "excessive", "exorbitant", etc., or sellers were charged with combining to fix "minimum" prices, or buyers with combining to fix "maximum" prices, or there were other allegations of fact indicating injury to the public or unreasonableness, not present in the first count of the present indictment. To the only two indictments that were drawn along the lines of the first count of the present indictment and in which mere price-fixing without more was charged, demurrers were sustained, though they did not rest on the ground which we are now discussing, and therefore, these two never came to trial.

Under the first count of the present indictment the most reasonable and patriotic combination to lower prices in times of public emergency would be a crime. That such is not the case has, we think, been demonstrated.

The fact that, under the first count of the indictment, the pleader does not make any of what may be called the standardized allegation in Sherman Act indictments, of enhancement of prices, or other facts showing injury to the public, is thrown into bold relief by the way in which this subject is dealt with in the second count. There the allegation is distinctly made that, by means of the alleged conspiracy

described in that count, the defendants compelled the consumers to pay "additional sums and increased prices" (R., p. 14, fol. 40). Although this allegation was not proved, its presence in the second count prevents the making against that count of the point which we are here urging against the first count.

(*b*) As to the objection of vagueness and indefiniteness. Two of the principal reasons for requiring precision and definiteness in an indictment are (1) to apprise the defendant of the exact charge against him; and (2) to enable the defendant, in case of another prosecution to plead his conviction or acquittal in bar of the second prosecution.

The maintenance of arbitrary and uniform prices by the defendants, standing alone, is no crime; but may be a constituent part of either one of two different and unrelated offenses under the Sherman Act.

(1) It may be part of a plan directed against the public with a view to forcing the public to pay higher prices.

(2) It may be part of a conspiracy against the persons controlling the remaining fifteen per cent. of the business, with a view to driving them out of business and securing a monopoly.

There is no allegation in the indictment as to the identity of the persons against whom the combination was directed—whether it was aimed on the one hand at the pubilc, or, on the other hand, at the fifteen per cent. of outside competitors.

To illustrate this thought, let us state the substance of the indictment, as it now stands, as an incomplete sentence:

> "The defendants, who controlled 85% of their industry, and were engaged in interstate commerce, combined to maintain uniform arbitrary and non-competitive prices——"

Now let us add:

> (1) "which prices were unreasonably high, excessive and exorbitant, with intent to injure and oppress the consumers"

or

(2) "which prices were unreasonably low, with intent to ruin and drive out of business the persons and corporations who controlled the remaining 15% of the industry."

The sentence, finished in either of the ways above suggested, would state a crime under the law. There is nothing in the indictment in conflict with either conclusion of the sentence. Standing unfinished as it does in the indictment it states a course of conduct which may be entirely innocent.

That is to say, under such an indictment as the present one, when the trial begins, the prosecutor would apparently be at liberty to prove that the uniform, arbitrary and noncompetitive prices were fixed at a figure unreasonably high, to the detriment of the purchaser; or at a figure below the cost of manufacture, and that the way in which it was intended to restrain trade was to drive the other fifteen per cent. out of the business, and that the gist of the offense charged by the indictment was cut-throat competition, directed against the remaining fifteen per cent. of the industry.

If he should decide to use this vague indictment for the purpose first named above, his proof would be that the uniform prices were high; if he should decide to use the indictment for the second purpose, his proof would be that the uniform prices were low.

In either event, he would be in position to claim that his general charge of a combination in restraint of trade enabled him to prove either of the two different violations of the Sherman Act suggested above.

In like manner, should a defendant be either acquitted or convicted under this indictment and should be reindicted and plead this indictment in bar, it would be open to the Government to adopt either of the constructions of the indictment above suggested.

Consequently, no defendant was apprised by the indictment as to which of these two offenses he had to meet; nor is a defendant convicted or acquitted under this indictment given complete protection from another prosecution.

VII.

The second count of the indictment was submitted to the jury on an incorrect statement of its meaning and effect. The motion to direct a verdict of not guilty as to this count should have been granted.

(*a*) The Sherman Act is a statute, the words of which do not define all the elements of the offense, and, therefore, an indictment under it must allege the specific acts and particular facts which are alleged to have been done by the defendants. *In re Greene* (C. C. S. D. Ohio, 1892), 52 Fed. 104, 111. The indictment charges that the defendants by common and concerted action "limited and confined their sales of sanitary pottery to a special group selected by said defendants by agreement and known and denominated *by them* as 'legitimate jobbers' " (R., p. 12, fol. 35).

Every word in the portion of the indictment just quoted conveys the thought that the persons to whom the defendants are charged with limiting and confining their sales were a definite set of individuals. The "group" is said to be "special". The "special group" is charged to have been "selected" by the defendants. The selection is said to have been the result of "agreement". The persons thus "selected" are said to have been given a name by which they were known to the defendants.

Each of the significant words here appearing has a well recognized meaning:

Part of the definition of the word "special" in Funk & Wagnall's New Standard Dictionary is "Pertaining to one or more individuals *as distinguished from the class to which they belong*" (italics ours).

By no possibility can this language be taken to designate jobbers as a class. The class of persons who go into the jobbing business is continually fluctuating. The persons who

go into this business are not "selected" by the defendants. The defendants made no "agreement" as to who shall or shall not belong to the class of jobbers.

The court refused to grant the defendants' request to charge as follows:

> "56. Even though the jury should find that the defendants or some of them by combination or agreement confined their sales to jobbers as a class, they may not convict under the second count of the indictment for the reason that the indictment does not charge an agreement to deal with jobbers as such, but charges an agreement to deal only with a special group selected by agreement by the defendants."

This request is typical of a group of requests that were refused (Numbers 54-59, both inclusive; R., pp. 683-4, fols. 2048-2052), due exception being taken.

Instead, the court charged the jury that an agreement to confine sales to jobbers as a class would constitute guilt under the second count.

The refusal of the court to charge as requested and the charge actually delivered by it, constitute a departure from the allegations of the indictment and informed the defendants for the first time, after all of the evidence was in, that they were on trial, not for agreeing to confine their sales to a special group selected by them, but for agreeing to confine them to a general class of which anyone could become a member at will, and without regard to any "selection" or "agreement" by defendants. There was such a material difference between the allegations of the second count and the facts laid down by the court as sufficient to constitute the crime there alleged, that the refusal of the request, in question was, we submit, reversible error. Had the indictment, instead of referring to a special group, named its members and charged an agreement to confine their sales to A, B, C and D, no one could doubt the error of the charge in question; but there is as much difference between a special group

arbitrarily selected and a general class as there is between enumerated individuals and a general class.

Upon the trial, there was no "special group" identified in any way as that referred to in the second count, but the proof amounted, when it is all summed up, to the fact that many of the defendants marketed their output through jobbers as a class. This, of necessity, required them to refuse jobbers' prices to plumbers and builders who are, so to speak, the retailers in this business. Such of them as dealt with jobbers had to exercise care that they did not sell at jobbers' prices to the retail trade; for if they did they could never have kept their jobbers. Many inquiries, therefore, appear in the evidence as to whether a proposed purchaser is or is not a legitimate jobber (which means an actual jobber) and thus entitled to jobbers' prices, and these inquiries came from such of the defendants as dealt in any given territory with jobbers only.

The language of the indictment was calculated to and did lead the defendants to suppose that they were not charged with having adopted the policy of marketing their product through jobbers, but with having by some agreement established a special group to whom they limited their sales.

It is quite evident that, when this indictment was drawn, it was the theory of the prosecution that the defendants had in fact selected by agreement some special group of jobbers to whom their sales were to be limited. Early in the case the Government proved that the Secretary of the Sanitary Potters Association kept a list of jobbers which he consulted when inquiries were made by members of the association, who dealt with jobbers, to ascertain whether a new customer was or was not a legitimate jobber (R., pp. 59-60, fols. 177, 178). The prosecution also proved by the same witness the existence of the so-called Eastern Supply Association, which was an association of jobbers and manufacturers (R., p. 60, fols. 179, 180). The prosecution endeavored to prove by the quotation clerk of the Trenton Potteries Company (R., p. 239, fol. 776) that there was, as to the jobbers he dealt with,

a "certain well defined group that you can tell the description of" (R., p. 263, fol. 787). The witness, however, merely stated that he had dealt with jobbers that had been his customers before, and when a new concern came in and requested prices, it was investigated (R., p. 263, fol. 789).

It would seem to be apparent from these questions and from the language of the indictment that at the outset it was the theory of the prosecution that the defendants had had an agreement to boycott all jobbers except the special group either on Mr. Dyer's list of jobbers or the group in the jobbers' association. It was only after the failure of the prosecution to prove the existence of any "special group selected by the defendants" that the theory of the prosecution was changed to a charge that the defendants dealt with jobbers as a class.

There is no proof in this case that the defendants attempted in any way to limit the opportunity of any trader to become a jobber. It is shown that in this business, the jobbers' contribution to the distribution of the output consists of assembling the products of manufacturers in many lines, such as brassware, enameled iron, etc., as well as pottery; assuming part of the transportation (R., p. 427, fol. 1281); investigating credit risks, and giving the retailer or plumber time to pay and sometimes making advances to the plumbers until they get money from the jobs out of which to pay for the material purchased (R., p. 432, fol. 1296); that they carry the job until some payment comes to the plumber out of which he can pay.

The jobber, in other words, does in this trade what he does in others, assembles many lines of merchandise, assumes all credit risks and certain transportation charges, and also purchases in large quantities, and thus stabilizes the distribution of the product. His contribution to distributing the output of the factories is real and it has never been denied that he is entitled to have a concession made to him in prices to compensate him for his services in the distribution of the product.

(*b*) The court charged the jury as to the second count to the effect that the Government contended that there was an understanding reached or agreement made "or *policy* determined upon" that no sales should be made directly to owners of property, builders or architects or plumbers (R., p. 702, fol. 2106). This contention is not in accordance with the indictment. The refusal to deal with certain classes is not the confining of sales to a "special group". Having thus defined the contention of the Government, it charged the jury:

> "The statute, however, condemns the adoption of any policy, agreement or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others" (R., p. 703, fol. 2108).

To these portions of the charge, the defendants excepted (R., p. 724, fol. 2171).

The court here imports into the Sherman Act a new and very far reaching addition. It is a matter of common knowledge that it is the policy or practice of most—if not all of the large manufacturers—to market their product through jobbers. Such a course of business is necessary unless the manufacturer is prepared to set up a selling department which will take care of credit risks and distribution at distant points and in communities where the manufacturer may be a stranger.

It is also a matter of common knowledge that when a manufacturer adopts this plan of distribution, he cannot do it without giving the jobber a profit for his share in the work of distribution. He cannot sell in the same territory to jobbers at a price and give the same price to the retailers who are customers of those jobbers.

The Secretary of the Sanitary Potters' Association stated (R., p. 68, fol. 203) that it was the settled policy of the manufacturers of pottery to sell to the jobbing trade. If the secretary of any other large trade association in any other line of business were asked the same question, he would probably

make the same answer. The adoption of this policy of distribution cannot by any stretch of language be deemed a violation of the Sherman Law. When the court added to the words "understanding and agreement" the further word "policy" in the disjunctive (R., p. 703, fol. 2108), and told the jury that the adoption of a policy was condemned to the same extent as the making of an agreement or the reaching of an understanding, it enlarged the penal provisions of the law far beyond any point to which they have yet gone.

If the jury had concluded, what is undoubtedly the fact, that the great majority of the defendants had adopted the policy of selling to jobbers, they must have understood from this charge of the court that such conduct on the part of the defendants was condemned by the law.

If the defendants at one of their meetings had passed a written resolution to the effect that good business policy dictated distribution through jobbers and this resolution had been unanimously carried at a meeting where all of the defendants were present, the language of the court's charge would have made their conduct a crime.

The word "policy" conveys to the mind the idea of a course of conduct adopted because deemed advantageous and reasonable and not because of any agreement to adopt it. Nevertheless, persons adopting a policy in such a frame of mind are under the condemnation of the law as interpreted by the Court.

If any manufacturer on a large scale who belongs to a trade organization in this country were called upon to answer the question: "Has your organization adopted the policy of dealing with jobbers?" his answer would be "Yes"; but, if asked "Are the members of your organization bound by any agreement or understanding that they would deal only with jobbers?" his answer would probably be that such matters are left for individual determination. However, his answer in the affirmative to the first question would render him guilty of a violation under the charge in the present case, although the truth of his negative answer to the second question was admitted.

The court in its charge twice emphasized the error of which we now complain. It specified the three alternative charges of the government, that there had been an *understanding* reached or an *agreement* made or a *policy* determined upon (R., p. 702, fol. 2106), and after doing so, told the jury that if they found that any one of these three things had occurred, the defendants came under the condemnation of the statute (R., p. 703, fol. 2108).

The rest of the charge on the subject must have driven home in the minds of the jury the error of which we now complain. After stating that the law condemned all of the three things specified, namely, a policy, agreement or an understanding, the court said (R., p. 703, fol. 2109):

> "If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade."

This language must have conveyed to the minds of the jury that a man who made a promise, express or implied, was guilty and that a man who attended a meeting where a proposition was announced that it was good policy to confine sales to jobbers and who in his own mind assented to that proposition without so advising any one else, was equally guilty.

In *Jayne* v. *Loder* (C. C. A., 3rd Cir., 1906), 149 Fed. 21, it was held that a common policy is not necessarily a combination and that if one decides upon a policy, the fact that others make the same decision does not constitute a conspiracy. The court there considered a policy which was found to have been the result of an agreement to the observance of which the members were bound and for the enforcement of which disciplinary and coercive measures were provided. This feature was lacking in the case here, there being no direct evidence of anything more than the recommenda-

tion of a common policy from which the defendants were free to depart if they saw fit, and there are some of them who did in fact depart from it (*ante*, pp. 12, 16). The arrangement found to exist in *Jayne* v. *Loder* was held to be illegal, but the court in that case expressly recognized the fact that a common plan or policy is not necessarily unlawful, saying (p. 27):

> "It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor today will likely cut his medicines tomorrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind."

U. S. v. *Southern Wholesale Grocers Association* (D. C., N. D. Ala. 1913), 207 Fed. 434.

The combination considered by Judge Grubb in the case last cited went much further than did the defendants here. While the Sanitary Potters' Association's secretary stated that its settled policy was to sell only to jobbers, this policy was not followed by all of its members; the Abingdon Sanitary Manufacturing Company selling direct to plumbers, as did the National Helfrich Pottery Company through the Peerless Selling Company. The John Douglas Company, a member of the association, also sold direct to plumbers. These members never appear to have been criticized for departing from the policy of distribution through jobbers.

No steps were ever taken to coerce them in any way, nor was any attempt ever made to drop them from the association. The jury may well have found that the inquiries made by members of the association as to whether particular concerns were jobbers and the replies thereto were merely the exchanging of information to enable the defendants making such inquiries to follow a policy, which, while common to most of the defendants, was not common to all, and which

was not the result of any agreement, but which was at most the result of following recommendations or expressions of opinion which all were free to disregard if they saw fit and which some did disregard. Had the jury found this, their verdict under the charge excepted to could not have been other than guilty in the second count. Had the portion of the charge excepted to been omitted and had the court instead charged the defendants' 34th, 35th and 36th requests (R., pp. 3669-3671, fols. 11007-11011), the verdict would probably have been otherwise.

(*c*) The Court charged the jury (R., p. 703, fol. 2107):

> "You should not concern yourselves with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether it is a commendable or usual trade practice."

To this portion of the charge the defendants excepted on the ground that the inquiry which the trial court forbade the jury to make ought to be made by the jury (R., p. 724, fols. 2171, 2172; Assignment of Error No. 236; p. 3688).

This exception illustrates sharply the length to which the trial court was driven by the inexorable rule it had laid down for itself that no excuse could be offered for any combination, agreement, conspiracy or policy among manufacturers. Every member of the jury doubtless knew that whether there had or had not been a combination, most of, if not all of these defendants would under business conditions in this country have been obliged to market their products through jobbers. They were told that they must not concern themselves with this knowledge, and that though this might be a commendable trade practice, it was a violation of law for the defendants to agree to enter into it or even to assent to the proposition that it was a good business policy. The court's logical pursuit of its determination that the "rule of reason" has no application to a criminal case apparently

required it to charge the jury that it was undue and unreasonable for people in like circumstances to approve of the same policy whether they make agreements or not.

(*d*) Inasmuch as there was absolutely no evidence to support the charge that the defendants "selected by agreement" a "special group" to whom they "limited and confined their sales", as charged in the second count of the indictment, it follows that it was error for the court to deny the defendants' motion to direct a verdict of not guilty as to the second count (R., p. 663), and the defendants' exception to the denial of such motion to direct (R., p. 665) raises a point requiring a reversal of the judgment.

In the Government's brief little effort is made to defend the conviction of the defendants under the second count. If that count was tried under entirely erroneous instructions, and if evidence relating to that count was improperly excluded, and if, as a matter of fact, the motion to direct a verdict in favor of the defendants as to that count should have been granted, the consequence is that the conviction on both counts should be reversed. *Graves* v. *U. S.*, 165 U. S. 323; *People* v. *Van Zile*, 143 N. Y. 368; *People* v. *Werblow*, 241 N. Y. 55, at p. 69; *State* v. *McCaless*, 9 Iredell (N. C.) 375.

VIII.

The trial court erred in refusing the various requests of the defendants to instruct the jury that they could not be convicted unless they had entered into an agreement in some way imposing upon themselves an obligation, and in excluding evidence along this line.

(*a*) It is said in the case of the *United States* v. *Piowaty*, 251 Fed. Rep., 375, at page 377:

> "In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided and beyond its proper meaning, and would cause the greatest confusion and uncertainty."

The defendants' requests numbered 16 to 21, both inclusive (R., pp. 670-2), and 34 to 38, both inclusive (R., pp. 676-7), and 42, 44 and 45 (R., pp. 679-680), all embody this idea. They were all refused by the Court on the ground that they were covered by its charge, and the defendants duly excepted. Typical examples of these requests are as follows:

> "36. To find any defendant guilty of being a party to a combination, the jury must be satisfied beyond a reasonable doubt that such member was not merely following advice as to price or trade practices which he was at liberty to either follow or disregard; but the jury must find that such defendant entered into some form of agreement or understanding which in some way limited or restricted his liberty of action and placed him under some form of obligation to other defendants as to

the fixing or maintenance of prices or the determination of his trade practices."

"45. If the jury find from the evidence that there was no obligation express or implied imposed by any combination or agreement upon the defendants or any of them to deal either with jobbers or with retailers, but that each defendant was entirely free to act according to his own business policy in this regard, they must find the defendants not guilty upon the second count of the indictment."

There can be no denial of the correctness of the law set out in these requests. The Court did not refuse the requests on the ground that they embodied bad law, but deemed that they were properly covered by its charge.

The Court emphasized the error of refusing these requests to charge by the following portion of its charge (R., p. 695, fols. 2084-5):

"Nor is it necessary to the existence of an unlawful combination that there be any obligation assumed by the parties thereto to keep their promises or abide by their understanding among themselves. The law would not enforce such a promise if made because it would be illegal. Nor need there by any penalty attaching to any violation of the agreement by a party to it."

It is true that in certain portions of its charge the Court made such pronouncements as the following (R., p. 703, fol. 2109):

"If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade."

The effect of the charge was to render the whole subject entirely obscure and leave the jury uncertain whether there

need be any obligation or understanding among the defendants or not.

The Court had in effect told the jury that they could convict if they found an agreement imposing some sort of obligation upon the deefndants; and told the jury that they could convict without finding such an agreement; and after thus leaving the jury with the general impression that they could convict if they did not find an agreement, he again refused the defendants' request to him to tell the jury definitely that they could not convict unless they should find some promise or agreement among the defendants. This occurred after the charge had been delivered (R., p. 724, fol. 2172):

> Defendants' Counsel: "I except to that portion of Your Honor's charge in which Your Honor charged the jury that if they find some promise on the part of the defendants or any of them, was made to conform to some class of conduct dealing with jobbers, they then had entered into a combination. I ask Your Honor to charge the converse of that. If their conduct was not dictated by some promise or agreement to conform themselves to some course of conduct but the mere following up of advice, the defendants would not be guilty of entering into a conspiracy.
>
> The Court: You asked that in your requests and I have refused them.
>
> Mr. Marshall: I except."

(*b*) Along this line may be considered certain rulings of the court which had further tended to confuse the minds of the jury as to whether they could find the defendants guilty without finding that their conduct was actuated by agreement.

Some of the defendants offered evidence that their conduct was not the result of any agreement or sense of obligation, which the court excluded (R., pp. 220-1, fols. 658-662; pp. 325-7, fols. 975-7; p. 327, fols. 980-981; p. 342, fol. 1025). This was clearly error. The accused in a criminal case is entitled to testify as to his intent, motive or belief, where these are

material issues. *Wigmore on Evidence* (2d Ed.), sec. 581; *Stockdale's case* (Eng. H. L. 1789), 22 How. St. Tr. 237; *Crawford* v. *U. S.*, 212 U. S. 182, 202-3, 205; *Sparks* v. *U. S.* (C. C. A., 6th Circ., 1917), 241 Fed. 777, 791; *Buchanan* v. *U. S.* (C. C. A., 8th Circ., 1916), 233 Fed. 257, 259; *Heap* v. *Parish* (Ind., 1885), 3 N. E. 549, 551. Here the jury were asked to infer from defendants' conduct that they acted pursuant to an agreement, combination, or conspiracy. The rule that a defendant may testify to his motives applies with especial force to such a situation, and the evidence is admitted to rebut the inference which his conduct suggests. *Macy* v. *St. Paul & D. Ry. Co.* (Minn., 1886), 28 N. W. 249; *Crawford* v. *U. S.*, 212 U. S. 182, 205; *McKown* v. *Hunter* (1864), 30 N. Y. 624, 627; *State* v. *King* (1882), 86 N. C. 603.

In the last mentioned case the court said (p. 606):

> "Where the acts themselves are equivocal and become criminal only by reason of the intent with which they are done, both must unite in order to constitute the offense, and both facts must be proved in order to" (support) "a conviction. In such case, unless the intent is proved, the offense is not proved. As the criminal intent may be, and usually is inferred from the declaration and conduct of the accused, he is permitted to disavow the imputed purpose, and repel the presumption." (Italics ours.)

Similarly, where acts are not criminal unless done by agreement, the accused should be permitted to testify as to whether or not in doing them he was actuated by any agreement to repel any inference or presumption of agreement that might otherwise arise from such acts.

The exclusion of this class of testimony is, we submit, indefensible error, in the highest degree prejudicial. The court is asked by the Government to approve and affirm a conviction obtained when the defendants—when called as witnesses—were not allowed to deny their guilt.

One example may be quoted to show the character of these rulings. The witness Campbell, President of the Trenton

Potteries Company, was the first witness called for the defense (R., p. 320), and, after he had stated how he fixed the prices for his company, the following occurred on his direct examination (R., pp. 325-326):

> "Q. Will you please state whether or not in fixing prices you are actuated or motivated in any way by any combination or agreement with anybody whatever?
>
> "Mr. Podell: I submit that is calling for the witness' conclusion as to what motivates or actuates him.
>
> "The Court: I think so, Mr. Marshall. Objection sustained.
>
> "Mr. Marshall: I except. That is exactly what the company, that he is president of, is charged with doing. I asked him.
>
> "The Court: That is your substantive defense, and you are called upon, with your witnesses, to pursue the usual and ordinary and proper method of eliciting the facts.
>
> "Mr. Marshall: I except to your Honor's ruling.
>
> "Exception to the defendants."

In other words he was allowed to state the reasoning by which he was actuated in fixing prices. But he was not allowed to deny that he was actuated by the agreement charged against him in the indictment.

Conclusion.

It is respectfully but confidently submitted that when the record is read as a whole, the court will conclude that, even if judgment is not arrested, the defendants ought at least to have another trial.

They have been convicted in what the Circuit Court of Appeals properly characterizes as a "transplanted litigation," in a jurisdiction where not one of them resides and where it is not even contended that their alleged combination or conspiracy was formed.

They have been convicted in spite of the frank conces-

sion of the Government that neither the defendants, nor any of them, were either profiteers at the expense of the public, or cut-throat competitors to the detriment of producers not members of their group.

They have been convicted under an indictment which failed to apprise them of the exact nature of the case which they were to meet.

They have been convicted following the exclusion of relevant evidence and the admission of matter which should have been excluded.

Their conviction followed a series of rulings and a charge by the learned trial judge, which ascribed to the Sherman Act a machine-like operation at variance with the reasonable interpretation which this court has declared it should receive.

Jail sentences imposed upon citizens of standing, for conduct which, if in violation of the law, is neither alleged nor proved to have been damaging to the public or to competitors, will lead this court to scrutinize with exceeding great care the record upon which they are based.

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