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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE TRENTON POTTERIES COMPANY ET AL.

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

BRIEF FOR THE UNITED STATES

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PREVIOUS OPINION IN THE PRESENT CASE

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 300 Fed. 550, and appears also at R. 3699–3704.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered May 16, 1924. (R. 3704.) Petition for writ of certiorari was filed August 15, 1924, and granted October 20, 1924, pursuant to Section 240 of the Judicial Code, then in force. (Act of March 3, 1911, c. 231, 36 Stat. 1157.)

STATEMENT OF THE CASE

The respondents (hereinafter called defendants) were indicted (R. 4) in the Southern District of New York for violating the Sherman Antitrust Law (Act of July 2, 1890, c. 647, 26 Stat. 209). The jury returned a verdict of guilty as to twenty individuals and twenty-three corporations. (R. 729.)

Defendants obtained a writ of error from the Circuit Court of Appeals for the Second Circuit (R. 3614), which court in a written opinion dated May 9, 1924 (R. 3699–3704), reversed the judgment of the District Court.

The Circuit Court of Appeals charged five errors in the conduct of the cause below:

> 1. That the question whether there was an undue and unreasonable restraint of trade should have been submitted to the jury; this it characterized as "the main point."
>
> 2. That the charge to the jury that the unlawful agreement constitutes the offense under the Sherman Act empowered the jury to convict without finding venue.
>
> 3. That three errors, which the court characterized as "minor points," were committed in the admission or exclusion of evidence.

The indictment

The indictment was in two counts. The first count charged the defendants with a combination to restrain trade by a plan to fix and maintain uni-

form prices for the sale and delivery of sanitary pottery in interstate commerce. (R. 4–11.)

The second count charged a combination to restrain trade by confining sales of sanitary pottery to a special group known to defendants as "legitimate jobbers." (R. 11–15.)

The facts

Sanitary pottery consists of vitreous chinaware fixtures used in bathrooms, including wash bowls, reverse trap bowls, syphon jet closets, tanks of various sizes and many parts connected therewith. (R. 742, 880.)

The defendants were members of a trade association known as the Sanitary Potters' Association (R. 21), and manufactured 82% of the sanitary earthenware produced in the United States (R. 746).

Twenty-three corporations and 24 individuals were indicted. The indictment was severed as to one individual defendant, and a verdict of not guilty was directed as to three of the individual defendants. All the other defendants were convicted on both counts. (R. 729.)

Of the 23 defendant corporations, 12 had their factories and chief places of business in the State of New Jersey. One was located in the State of California, and the other 10 were situated in Illinois, Michigan, West Virginia, Indiana, Ohio, and Pennsylvania. (R. 5.)

Many of them sold and delivered sanitary pottery within the Southern District of New York and some of them maintained sales offices and sales agents within that territory, from which and through which they solicited, sold, and delivered their respective products to customers in that territory. (R. 24, 47, 201, 203, 204, 211, 224, 229, 230, 246, 249, 250, 272.)

The agreed price bulletins and lists which were the basis of the alleged price agreement were issued and circulated within the Southern District of New York, and defendants solicited and made sales at those bulletin prices and obtained such prices so far as possible. (R. 392, 393, 397, 439, 441, 447, 450, 464, 466, 516, 524.) Such prices were obtained in a large majority of cases. (R. 629–630.)

Meetings of the Association were held from time to time, most of them at Pittsburgh. (R. 22.) These meetings were called as needed, about once a month, and were attended by the members (R. 1120), and by the Secretary. (R. 22.)

A Price List Committee was appointed whose duty it was to compile a basic price list and to report the same to the meeting for the approval of the members. (R. 41.) One such list was adopted in March, 1917 (R. 40–41, 753–764), and another in May, 1919 (R. 42, 765–777), the latter remaining in force up to the time of trial (R. 393).

The price charged to the purchaser would be found by deducting a bulletin discount from this

basic price. It appeared from the evidence that the percentage of uniformity between the bulletins of all the members of the Association was 80.58 in 1918, 84.25 in 1919, 87.55 in 1920, 70.05 in 1921, and 84.61 in the first six months of 1922. (R. 318.)

It appeared, for example, that at the close of the war President A. M. Maddock, of the Association, called a meeting at Pittsburgh, to which he presented a list of "present prices" and "proposed prices." (R. 1617, 880, 94–95, 382.) Prices and the discount were discussed at that meeting. (R. 476, 480, 487, 179–180.) At the next succeeding meeting, on February 4, 1919, a revision committee was appointed, which adopted substantially the list prices as proposed by Maddock (R. 749, 765–778), and its recommendation was approved by the Association at the May meeting (R. 751).

Members reported to the Secretary of the Association the number of each type of article sold during a given period and the average price. (R. 24–25.) The Secretary made use of these reports to ascertain whether the members were adhering to "regulation prices" (R. 866) and maintaining the "selling price the same as agreed" (R. 914). The Secretary could make responses to complainants who would from time to time protest against a lagging member who had not kept up the price, or would answer inquiries as to the prices or terms agreed upon. Many examples of such letters are set forth in Volume II of the Record. In one case,

for example, the Secretary was able to congratulate a member that another had "seen the light" and had "now come up to very nearly reasonable figures." (R. 1164.)

Credit terms were affixed to the basic price list (R. 766) as 2 per cent ten days, net 30 days. These appear uniformly in the bulletins between 1918 and 1922. (R. Vol. III, and Vol. V, pp. 2592–2970.)

Uniform crating charges appear in the Standard Price List (R. 777) and are referred to in the correspondence (R. 894–897). Similarly, uniform extra charges for special work were fixed and maintained. (R. 867, 940–943.)

The agreement as to "class B" goods was to confine them to export, with the obvious result of simplifying the maintenance of prices and terms in the domestic market in first-class products. (R. 780, 787–794.) A uniform export price was later fixed at two-thirds of the domestic price of "class A" goods (R. 787), and defendants were further advised upon the question by the Secretary (R. 933–934). Unfortunately, one nonmember continued to solicit "class B" domestic business, and in the words of the Secretary, "inasmuch as they are not members of the Association, we could do nothing to stop this practice." (R. 793.)

The Secretary maintained a list of legitimate jobbers to whom members might properly sell (R. 59), and conducted an active correspondence with outsiders and members as to whether a pro-

spective purchaser were legitimate or not (R. 813, 818–821, 832, 1069, 1605–1610).

The defense

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.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court should have submitted to the jury the question whether an agreement among concerns representing in excess of 80 per cent of the business to make and maintain uniform sales prices, constituted a reasonable or unreasonable restraint of trade.

2. The court below erred in holding under all the facts and circumstances disclosed by this Record, where no specific objection and exception was properly noted before the District Court by the defendants, that the District Court committed error in not charging directly on the question of venue.

3. The court below erred in holding that these defendants were in any degree prejudiced by the action of the District Court in allowing the prosecuting attorney to ask the witness Bantje whether he knew that the corporation by which he was employed had plead guilty to a violation of the

Sherman Act, particularly where the witness's answer was that he had no such knowledge.[1]

4. That the court below erred in holding that the District Court committed prejudicial error in permitting the secretary of the defendants' association to be asked with reference to his knowledge of the fact that the secretary of a jobbers' association, who had offered to cooperate with these defendants, had been called before the Lockwood Committee.

5. The court below erred in holding that the District Court committed error in excluding certain questions calling for the impressions, beliefs, and recollection of witnesses as to competitive conditions existing beween these defendants in the sale of their respective product, where either no recollection or only trifling recollection was had of specific transactions (although such information was available for reference).

SUMMARY OF ARGUMENT

I. The trial court committed no error in declining to charge generally that only undue and unreasonable restraints of trade are unlawful. It was

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[1] The alleged points of error covered by 3, 4, and 5 are characterized in the opinion of the court below (R. 3702) in the following language:

"We note some minor points, as there may be a new trial."

It is apparent that the Circuit Court of Appeals would not have reversed the judgment in this case solely on these last three points.

correct to charge that a combination among those who control a substantial part of the interstate commerce in a commodity to fix the price of that commodity is an unlawful restraint of trade. Such a restraint is *per se* an undue restraint under the decisions of this court, both before and after the *Standard Oil* and *Tobacco cases*. The *Standard Oil* and *Tobacco cases* do not conflict with that proposition of law. The intent of Congress was to establish it. Whether such a price-fixing agreement is an undue and unreasonable restraint of trade is, therefore, not a jury question, and whether the prices fixed are fair and reasonable is not relevant.

II. The trial court charged that the combination and conspiracy, without proof of overt acts, constitutes the offense under the Antitrust Act. Defendants in error took no objection, exception, or assignment of error to this charge on the ground that it failed to charge the jury on the necessity of finding venue. Both sides had introduced evidence of acts in the Southern District of New York in furtherance of the conspiracy, and their existence was undisputed. It was not error to charge the jury that it did not need to find what was undisputed. *A fortiori* is this the case where the trial court's attention was not called to the oversight.

III. Defendants' witness Bantje testified to their business with the corporation of which he was a manager. He was asked on cross-examination

whether he knew that his corporation had pleaded guilty to a violation of the Antitrust Act, and answered in the negative. Assuming *arguendo* that prejudicial error might have been caused, it was cured by his negative answer. But no error was caused, for the question was properly directed to the bias of the witness.

IV. On the cross-examination of the Association Secretary, the defendants brought out that at one time 20 out of 24 members were selling "class B" goods. The question asked by the United States Attorney on redirect examination as to whether the Secretary of the Jobbers' Association was not at that time testifying before the Lockwood Committee was pertinent to an explanation of why defendants were not at that time carrying out their alleged agreement to exclude "class B" material from the domestic market.

V. Defendants objected to the exclusion of statements by various witnesses of their impressions, beliefs, and recollections of competitive conditions. Broadly, two classes of questions were excluded. Those asking whether the witness found or observed competition were too broad and called for conclusions. Those asking for recollections as to past transactions in the purchase of pottery were too vague and gave no basis for cross-examination. Wherever the witness could testify as to the details of transactions showing competitive prices, such testimony was invariably admitted, with no effort

on the part of the Government to prevent its admission. The substance of the defense of existence of competition was thereby presented to the jury.

The instances of exclusion are set forth in an Appendix, and show that there was no exclusion of this general line of testimony as to competitive conditions, but only the enforcement of a rule of evidence as to the manner of introducing it, which under circumstances here disclosed was not unjust or prejudicial to these defendants, first, because better evidence was available and denied to the jury, and second, because all the underlying facts within the knowledge of the witnesses were introduced to the jury.

ARGUMENT

I

THE DISTRICT COURT WAS RIGHT IN REFUSING TO CHARGE THE JURY THAT IF THE EVIDENCE SHOWED A PRICE AGREEMENT AMONG THOSE DEFENDANTS REPRESENTING A SUBSTANTIAL PART OF THE TRADE INVOLVED, THEY MUST THEN CONSIDER WHETHER SUCH PRICE AGREEMENT WAS AN UNDUE AND UNREASONABLE RESTRAINT OF TRADE

The Circuit Court of Appeals summarizes the situation as follows:

> 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. (R. 3701, 300 Fed. 553.)

The Government concedes the correctness of the requested charge as a proposition of law. It does not follow, however, that the District Court committed error in declining to give it. A trial court is not expected to expound to the jury the general principles of law governing a case, when courts have further defined the meaning of those general principles as applied to facts similar to those in the case on trial.

A rule of law that would require a trial court to charge the jury upon the interpretations already given to a statute by the courts, as suggested by the Circuit Court of Appeals, would in Antitrust cases lead to the absurdity of reading and expounding to a jury a course of decisions which have been gathered in more than nine full volumes of printed reports. The court here followed the proper procedure of instructing the jury as to the law applicable to the facts of the case on trial (R. 697):

> Let me advise you, so that there can not 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.

The issue presented is whether an agreement to fix prices among those controlling a substantial proportion of an industry is *per se* an unlawful restraint of trade or whether the Government must prove that the prices fixed were in themselves unreasonable. It is submitted that the latter view finds no support in the decisions of this court, not excepting the cases of *Standard Oil Company* v. *United States* (1911), 221 U. S. 1, and *United States* v. *American Tobacco Company* (1911), 221 U. S. 106.

The cases will be reviewed herein historically.

United States v. The Trans-Missouri Freight Association (1897), 166 U. S. 290

United States v. Joint Traffic Association (1898), 171 U. S. 505

These cases involve essentially similar states of fact and for our purposes may be considered together. They stand for the proposition that an agreement between carriers to fix rates is unlawful under the Sherman Act.

The rule established by these cases in so far as carriers are concerned has, of course, been modified by statute, but the principle that a price-fixing

agreement is unlawful where the particular type of enterprise concerned has not been excepted by statute remains as the rule to-day.

At page 310 of the opinion in the *Freight Association case* the issue is outlined by the court:

> The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement.

This court pointed to the impropriety of a judicial determination of the reasonableness of an agreed rate, and concluded that "there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade and commerce as described in the act." 166 U. S. at pp. 341, 342.

Standard Oil Company v. United States (1911) 221 U. S. 1

United States v. American Tobacco Company (1911) 221 U. S. 106

It is sometimes said that the *Freight Association* and *Joint Traffic cases* were overruled by the *Standard Oil* and *Tobacco cases*. In so far as they stood for the general proposition that no question of the reasonableness of a restraint can arise under the Sherman Act it is undoubtedly true that they were "limited and qualified" by the opinion in the *Standard Oil case* (221 U. S. at p. 67). However, reference to the opinion in the *Standard Oil case* shows

that the actual decisions of the *Trans-Missouri* and *Joint Traffic cases* were not affected.

Chief Justice White pointed out (221 U. S. at p. 65) that the "nature and character" of agreements upon fixed rates and terms create "a conclusive presumption" which brings them within the statute. Such a case is "plainly within the statute" (p. 67) so that there is a "want of power" to take it out of the statute by a resort to reason, and is to be distinguished from a case where the lawfulness of a contract depends upon a study of the reasonableness of its terms in the light of the surrounding circumstances. Again, at page 58:

> "The dread of enhancement of prices and of other wrongs * * * led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, *either* from the nature or character of the contract or act *or* where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade * * *. (Italics ours.)

Under the decisions of this court an agreement among a substantial proportion of those engaged in a given line of commerce upon fixed prices to be charged in that line belongs preeminently to the category of "contracts or acts which were unreason-

ably restrictive of competitive conditions * * * from the nature or character of the contract or act."

The *American Tobacco case* contained a reaffirmation of the doctrine of the *Standard Oil case,* that acts or contracts or agreements or combinations might be adjudged by their "inherent nature," as well as by their "effect," to operate to the prejudice of the public interests by unduly obstructing competition or unduly obstructing the due course of trade. 221 U. S. at p. 179.

Under the previous decisions of the court it becomes clear that an agreement or combination to fix prices is one of those which "because of their inherent nature or effect" injuriously restrain trade. In this class of cases no question arises as to the reasonableness of the price fixed, just as in cases involving an allotment of territory or a secondary boycott no question of the reasonableness of the allotment or of the secondary boycott arises. These actions are in themselves unreasonable "because of their inherent nature." This conclusion does not in any way detract from the principle that the phrase "restraint of trade" in the Sherman Act is to be read under the light of reason. The restraint of trade under consideration must be an undue and unreasonable one, but this does not mean that the price fixed must be undue and unreasonable. The unreasonableness of the price-fixing agreement arises from the nature of the agreement

itself and of the parties thereto and not from the price fixed.

Decisions between the time of the Freight Association and Joint Traffic Cases, and of the Standard Oil and Tobacco Cases

The case of *Addyston Pipe & Steel Company* v. *United States* (1899), 175 U. S. 211, directly involved a price-fixing agreement. It was determined by the Circuit Court of Appeals (opinion by Judge, now Mr. Justice Taft) that the prices fixed were not in fact fair and reasonable, and this conclusion was confirmed by the Supreme Court. It was made clear, however, in the opinions both of Judge Taft below and of Mr. Justice Peckham in this Court that an agreement to fix prices was unlawful irrespective of the fairness or reasonableness of the prices fixed. At pages 237 and 238 of the opinion of the Supreme Court the following excerpt from the opinion of Judge Taft below is quoted with approval:

> It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in "pay" territory was reasonable * * *. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract.

Swift & Company v. *United States* (1905), 196 U. S. 375, was an express decision by this Court authoritative on the case at bar. This was an

appeal by the Chicago packers from a decree entered in the Circuit Court for the Northern District of Illinois. This decree provided, among other things, that the defendants should be restrained from "by combination, conspiracy, or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold either directly or through their respective agents." *Decrees and Judgments in Federal Anti-Trust Cases* (Washington, 1918), 63, 64.

The terms of this decree, therefore, had no relation to the fairness of the prices which might be fixed, but forbade the fixing by agreement of any prices, whether higher, lower, or in any way uniform. The decree was carefully considered by the Supreme Court, and this provision was among those which were expressly approved by this Court.

It was determined that a "combination, conspiracy, or contract raising or lowering prices or fixing uniform prices" is a direct restraint of trade within the decisions of the court.

In the opinion of the Court in *National Cotton Oil Company* v. *Texas* (1905), 197 U. S. 115, construing the Texas Antitrust statute, there is found at page 129 the following reaffirmation of the American doctrine as to price fixing:

> The purpose (of monopoly) is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combina-

> tions and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well-known national enactment.

Dr. Miles Medical Company v. *J. D. Park & Sons Company* (1911), 220 U. S. 373, was argued the week before the rearguments in the *Standard Oil* and *Tobacco cases,* and the opinion of the court was handed down at the same term. The following quotation is taken from the opinion of Mr. Justice Hughes, at page 408:

> Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.

Decisions subsequent to the Standard Oil and Tobacco cases

That the *Standard Oil* and *Tobacco cases* did not overrule prior cases, such as the *Freight Association, Joint Traffic,* and *Swift cases* is strongly stated in *Thomsen* v. *Cayser* (1917), 243 U. S. 66, 84:

> * * * we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling; that is, that it was constrained to do so by the *Standard Oil* and *Tobacco cases,* 221 U. S. 1, 106 * * *.

> But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them, or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection."

Just as in the case at bar, the defendants in the case of *Standard Sanitary Manufacturing Company* v. *United States* (1912), 226 U. S. 20, manufactured 85% of the enameled iron ware in the United States, and entered into an agreement as to the prices to be charged for their product. To the argument (pages 25 and 26) that the decisions in the *Standard Oil* and *Tobacco cases* justified a consideration of the reasonableness of this agreement, the court responded that—

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S., 290; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62.

A peculiar type of price-fixing agreement came before the Court in 1918 in *Chicago Board of Trade* v. *United States*, 246 U. S. 231. This case appears to stand for the proposition that the fixing of a

price by agreement for a limited portion of the day and upon a strictly limited type of transaction may be legal if it applies only to a small portion of the commerce in question. It is true that this Court there decided that a certain type of price-fixing by agreement might be legal. But the Court was careful to point out that, first, the restriction was limited to a certain portion of the business day; second, it was restricted in operation to only a small part of the grain shipped from day to day to that market; and third, it had no appreciable effect on the general market prices. And it further appeared that the net result of the rule was to preserve the price which had been the result of open general competition on that morning on the floor of the exchange.

This case does not in any way limit the rule that where those who control a substantial proportion of any line of commerce enter into an agreement to fix prices, such agreement is illegal because of the necessary effect which it must have.

The last occasion for this Court to refer to price-fixing agreements arose in the cases of *Maple Flooring Association* v. *United States* (1925), 268 U. S. 563, and *Cement Manufacturers Protective Association* v. *United States* (1925), 268 U. S. 588. At page 578 of the *Maple Flooring* opinion appears the following:

> It is not contended that there was the compulsion of any agreement fixing prices, restraining production or competition, or

> *otherwise restraining interstate commerce.* (Italics ours.)

The inference is clear that an agreement to fix prices is an agreement to restrain interstate commerce. As such it is distinguished from the type of agreement under consideration in the *Maple Flooring* case—a type which must be considered in the light of all the surrounding circumstances in order to determine whether it constitutes a restraint of trade.

In the *Cement case* the view of the Court was expressed unequivocably. This case did not involve a price-fixing agreement. However, a minority of the court dissented from a decision upholding the agreements there drawn in question, on the ground that such agreements must lead by indirection to the establishment of prices by some other force than that of competition. The majority of the Court made it clear, in the opinion written by Mr. Justice Stone, that they were in agreement with the minority upon the illegality of any agreement to fix prices by combination:

> Agreements or understanding among competitors for the maintenance of uniform prices are, of course, unlawful and may be enjoined. (Opinion, page 604.)

Intent of Congress

There can be no doubt that the Senate which passed the Act of July 2, 1890, understood that they were rendering unlawful all price-fixing agree-

ments. During the debates on the original bill, an amendment was passed by a vote of 34 to 12 (Cong. Rec. Vol. 21, part 3, page 2611), which contained the following provisions (Cong. Rec. Vol. 21, part 2, page 1772):

> SEC. 2. That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of any two or more of them for either, any, or all of the following purposes:
>
> To limit or reduce the production or to increase or reduce the price of merchandise or commodities.
>
> To fix a standard or figure whereby the price to the public shall be in any manner controlled or established of any article, commodity, merchandise, produce, or commerce intended for sale, use, or consumption.

The bill as amended was later referred back to the Judiciary Committee and reported out in essentially its present form. It may properly be assumed, therefore, that the term "restraint of trade" was understood to embrace the particular evils which had been specified in the bill as originally passed.

Legal standard applicable to the case at bar

It is suggested in the opinion of the Circuit Court of Appeals (300 Fed. 554) that under the *Nash* case (229 U. S. 373) the reasonableness or unreasonableness of every restraint of trade must be

submitted to a jury.[2] Defendants in error argued further at the bar of the Circuit Court of Appeals that the reasonableness or unreasonableness of a fixed price must be submitted to the jury. The Government view is that each of these views represents a misconception of the law as expounded by this court.

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[2] This view has apparently been since abandoned by the same circuit court of appeals. We quote from the opinion of Learned Hand, J., in *Live Poultry Dealers' Association* v. *United States* (1924), 4 F. (2d) 840, 842:

"It is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended, on the notion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market. The suggestion is that since *Standard Oil Co.* v. *U. S.*, 221 U. S. 55, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, such a combination may be justified, if some prejudice to the public be not shown. That might be the law, but we do not so understand it."

We do not suppose that a combination of buyers is any more unlawful than a combination of sellers. Or that the substantive law is different in an equity court than in a criminal court. Indeed, on this latter point the court in the case at bar was explicit (300 Fed. at p. 553):

* * * "The statute can not mean one thing on the criminal side of the court and another on the civil side."

Attention was called below to certain remarks by the trial judge (R. 665–666) which might be construed as evidencing an analogous misconception on his part, viz., that the doctrine of the *Standard Oil* and *Tobacco* decisions could have no application to a criminal case. In so far as his remarks were applicable to the proven facts of the case at bar, however,

The suggestion that a jury is to pass upon the reasonableness of a fixed price is untenable under the cases of *International Harvester Company* v. *Kentucky* (1914), 234 U. S. 216, and *United States* v. *Cohen Grocery Co.* (1921), 255 U. S. 81. These cases stand for the proposition that a statute is unconstitutional which submits to a jury the criminal liability of a defendant upon the issue of whether prices and terms fixed by him have been fair and reasonable. The Sherman law is outside this class of statutes. *Nash* v. *United States, supra.* Reasonableness of restraint is a different concept from reasonableness of price.

The invalidity of the Kentucky statute and the Lever Act flowed from their failure to supply a standard for the guidance of the citizen. The decisions upon restraint of trade at common law and upon the Sherman Act provide, on the other hand, adequate standards of legality. So in the *Cohen case* (at p. 92), dealing with the Lever Act, this court pointed out the distinction of the *Nash* and similar cases in that they—

---

they were correct in that such facts did not present a question of reasonableness for either court or jury. They were covered by the established rule of law that a price agreement between those who control a substantial portion of the production of a commodity is an unreasonable restraint of trade.

Though a suggestion, therefore, that one rule may apply at criminal law and another in equity would be erroneous, no error can be predicated upon such a suggestion made in argument in a case like that at bar where the judge proceeded to charge the jury upon the properly applicable theory of law.

> * * * all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they deal, a standard of some sort was afforded.

The standard appears in the now familiar quotation at page 376 of the opinion in the *Nash case:*

> 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.

The request to charge which received the approval of the Circuit Court of Appeals in the case at bar was evidently founded upon this clause that—

> Only such contracts and combinations are within the act as prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade—

but in relying upon this clause defendants in error and the Circuit Court of Appeals fell into the error of overlooking the qualifying phrase—

> by reason of intent or the inherent nature of the contemplated acts.

It is this phrase which supplies the standard by which the prejudice to the public interests and the undue restraint of trade is to be measured. It is this phrase which has received definition in the cases decided by this court. They have established the doctrine of law that a price-fixing agreement

entered into by those who control a substantial proportion of a given industry is one of those contracts and combinations which are within the Act by reason of the inherent nature of the contemplated acts.

This is the clear legal standard to which citizens may refer in guiding their footsteps within the path of the law. To the jury is left the question whether such an agreement has in fact been entered into in the case on trial.

II

EVIDENCE PROBATIVE OF VENUE IN THE SOUTHERN DISTRICT OF NEW YORK HAD BEEN INTRODUCED AT THE TRIAL IN LARGE QUANTITY BY BOTH SIDES. NO PREJUDICIAL ERROR WAS CAUSED BY THE FAILURE OF THE TRIAL COURT TO CHARGE DIRECTLY ON THE QUESTION OF VENUE. NO OBJECTION WAS MADE OR EXCEPTION TAKEN AT THE TRIAL

The defendants made no point at the trial that the charge to the jury was improper in that respect. The point was presented to the Circuit Court of Appeals and only incidentally. This is shown by quotation of the point raised by them in their brief below, and by reference to that portion of the charge of the court to which they took exception, and to their exception. The quotations are taken from page 92 of the defendants' brief below:

The ground stated in defendants' brief:

> Point XII. The Court erred in charging the jury that if it found that the defendants combined and conspired to restrain trade by entering into the agreements charged in the indictment, it was immaterial whether such agreements were actually carried out or not.

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.

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

> 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.

These quotations establish beyond question that the defendants did not raise in the court below any question of venue. They argued only that the court should have charged the materiality of the carrying out of the agreements as evidence of the existence of the agreements. None of the defendants' exceptions and none of the assignments of error make any reference to a failure to prove venue in the Southern District of New York.

In fact the indictment alleged that the company was carried on in the Southern District of New York by combined action in pursuance thereof (R. 9–10, 13), and not merely the Government but the defendants produced witnesses who testified to that course of business within the jurisdiction of the court. In fact a number of the defendants themselves so testified.

Evidence that defendants circulated bulletins and made sales in pursuance of the combination in the Southern District of New York appears at the following pages of the Record:

> R. 24, 47, 48, Gov. Exh. No. 26 (Vol. 2, page 787), 199, 201, 203, 204, 206, 208, 211, 222, 223, 224, 227, 229, 230, 231, 246, 247, 249, 250, R. 262, 264, 272, 392, 398, 438, 441, 447, 463, 465, 516, 524.

By reason of their character and their relation to the agreements alleged in the indictment such acts were "overt acts" giving jurisdiction to the court, the conspiracy "carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment." *Hyde* v. *United States,* 225 U. S. 347, 363.

This was recognized by the Circuit Court of Appeals (300 Fed. at p. 552), which had itself in *Easterday* v. *McCarthy,* 256 Fed. 651, recognized the opinion of this Court as laid down in the *Hyde* case that conspiracies on a common-law footing are indictable where their operation is continued through the commission of overt acts. This Court there cited with approval (225 U. S. at p. 365) the opinion in *Robinson* v. *United States,* 172 Fed. 105, which reviewed the cases and pointed out that—

> at common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design.

Again, at page 365 of the opinion in the *Hyde case,* this court quoted with approval the following quotation taken by the *Robinson case* from *People* v. *Mather,* 4 Wend. (N. Y.) 261, opinion by Marcy, J.:

> The law considers that wherever they act there they renew, or perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as

> to all whenever any one of them does an act in furtherance of their common design.

The reasoning, equally applicable to cases under the Sherman Act, was given by this court at page 363 of the opinion:

> We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him. And this may result if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all.

The Circuit Court of Appeals confined itself therefore to the criticism that the trial judge had not charged the jury that the commission of an overt act in the Southern District of New York must be proven. It said in this connection:

> We are persuaded that both the prosecution and the learned court overlooked the peculiarities of this case.

Indeed, it is not surprising that the defendants themselves overlooked the alleged jurisdictional error, after the introduction by both sides of so much evidence in agreement upon the commission of overt acts in the Southern District of New York. There was no question or conflict on this point for the jury to resolve, but it was through the introduction of evidence as effectually admitted by the

defendants as if they had entered into a stipulation. The only issue left to the jury was whether these acts had been done in pursuance of a prior combination and conspiracy.

To reverse on such a ground the conclusion of a trial lasting over four and one-half weeks is to follow the shadow of things and to disregard their substance. Certainly there was here no error prejudicial to the rights of the defendants.

To summarize, error is predicated upon a failure to charge that the conspiracy was carried out in part within the Southern District of New York. In their exception, the defendants objected to the charge solely on the ground that proof of overt acts in pursuance of the conspiracy might be material in determining whether the conspiracy was entered into. (R. 722 and 723.) There is no connection or relation whatsoever between these two concepts.

The situation here presented is that at the time of trial the defendants objected to the charge of the trial judge upon one ground, while now they seek to object to that charge on another ground which was not called to the attention of the trial court in any form at the time of trial.

The applicable rule of law is found in the dissenting opinion of Mr. Justice Pitney in the case of *Frey & Son, Inc.*, v. *Cudahy Packing Company*, 256 U. S. 208, 214:[3]

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[3] The opinion of the majority of the court in the cited case in no way affects the applicability of Mr. Justice Pitney's opinion to the case at bar.

There is nothing here to show that the attention of the trial judge either was or ought to have been directed to that part of his charge now held to be erroneous. The exception alleged did not even faintly or approximately express the tenor and effect of that instruction or of any other that was given to the jury; much less did it fairly and distinctly raise a question of law upon this or any other point in the charge.

It is elementary that, in order to lay foundation to review by writ of error the proceedings of the courts of the United States in the trial of common-law actions, the questions of law proposed to be reviewed must be raised by specific, precise, direct, and unambiguous objections, so taken as clearly to afford to the trial judge an opportunity for revising his rulings; and that a bill of exceptions not fulfilling this test will furnish no support for an assignment of error.

III

THE DEFENDANTS WERE NOT PREJUDICED BY THE ACTION OF THE DISTRICT COURT IN ALLOWING THE UNITED STATES ATTORNEY TO CROSS-EXAMINE A WITNESS AS TO BIAS BY ASKING HIM WHETHER HE KNEW THAT HIS OWN CORPORATION HAD PLEADED GUILTY TO A VIOLATION OF THE SHERMAN ACT

Defendants' witness, Bantje, was manager of the earthenware department of the J. L. Mott Iron Works. (R. 451–453.) His testimony was cumulative of that of other defendants' witnesses, and was intended to show that he had bought from the

defendants at varying prices and prices below the arbitrary bulletin prices. On cross-examination he was asked whether he knew that his own corporation, the J. L. Mott Iron Works, had pleaded guilty to a violation of the Sherman Act, and answered "No." (R. 453–457.)

(*a*) *Any danger of prejudice was removed by the answer of the witness*

Assuming *arguendo* that the defendants might have been unfairly prejudiced by a showing that one of their witnesses knew that his employer had pleaded guilty to a violation of the Sherman Act, the danger was removed by the answer that witness did *not* know it.

Merely to ask the question surely is not such prejudicial error as to justify the reversal of a conviction reached after a month's trial.

The Government submits, moreover, that the question was competent.

(*b*) *The question was competent*

The question was directed to the bias of the witness. That he was associated in an important capacity with a corporation in the same line of business as the defendants and which had itself violated the same law would tend to show his *animus* in the case against the prosecution. In modern practice the admissibility of such questions is habitually a problem for the exercise of discre-

tion by the trial court. *Wigmore on Evidence* (2d ed.), Vol. II, sec. 949.

Suppose an analogous case. If a witness for the defense in a counterfeiting case should testify that he had handled the plates with the defendant and that they were not used for counterfeiting, the prosecution would surely be justified in showing his bias by asking him whether he had not been himself manager of a corporation whose officers had just pleaded guilty to a charge of counterfeiting.

Not only was there strong reason in the instant case to support the theory of bias, but that theory finds support in the ancient doctrines of the common law as to witnesses with an interest. This witness had run the risk of pecuniary loss, his employment had been put in jeopardy by the danger which his employer had been in through the violation of the very law under which this prosecution was being conducted.

The Circuit Court of Appeals stated:

> 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.

The learned court overlooked the fact that in the case of a loyal employee a bias very naturally arises in just such a situation. And the government did not impugn the veracity of the "whole body of em-

ployees," but only of that employee (a manager) who had been chosen by the defendants to speak on their behalf for the corporation in question.

IV

NO PREJUDICIAL ERROR WAS COMMITTED BY THE DISTRICT COURT IN PERMITTING THE SECRETARY OF THE ASSOCIATION BEING CONDUCTED BY THE DEFENDANTS TO BE ASKED WHETHER HE KNEW THAT THE SECRETARY OF ANOTHER ASSOCIATION, WHO IS SHOWN BY THE RECORD TO HAVE BEEN COOPERATING WITH THESE DEFENDANTS IN BRINGING ABOUT RESTRAINTS OF TRADE IN THE SALE OF POTTERY, HAD BEEN CALLED TO TESTIFY BEFORE THE SO-CALLED LOCKWOOD COMMITTEE

The Government was seeking to prove that the purpose of the defendants was not to sell "seconds" or class "B" pottery in the domestic markets as an aid to their price agreement. To that end it sought to prove that Dyer, secretary of the defendants' Association, their employee and co-conspirator, had had correspondence with one Hanley, secretary of an association of jobbers of pottery, who were the vendees of these defendants or some of them.

In offering evidence on that point the Government examined Dyer as to a letter passing between himself and Hanley, in which Hanley offered his and his Association's cooperation to bring about the exclusion of class B pottery. (R. 1077, 191.) Other evidence offered by the Government indi-

cated that the defendants' Association had formed a purpose to exclude class B pottery. (R. 787–794, 880–881, 907, 933–934.)

Attention had been invited on cross-examination by the defense to the fact that at one time twenty out of twenty-four companies were selling class "B" pottery. (R. 165.) It therefore became highly material for the Government to show on redirect examination why only a minority of defendant companies were refraining from selling class "B" goods at that time.

It was common knowledge that the Lockwood Committee, a duly authorized committee of the New York Legislature, was conducting a general investigation into the activities of contractors and labor leaders as to restraints and extortions in the building industry, and of this the Circuit Court of Appeals took cognizance, 300 Fed. at p. 554. As a result of the public activities of this Committee, many trade associations went out of existence and many ceased illegal activities or activities of doubtful legality. The broad investigation carried on by the Lockwood Committee had, as was well known, the effect of restraining dubious and illegal practices of many associations, particularly of those associations whose officers were called before the Committee for examination.

For the purpose of showing knowledge on the part of Dyer, the Secretary and co-conspirator of the defendants, the question was asked of him whether he did not know that Hanley, who had ten-

dered his active assistance to prevent the sale of class "B" pottery, had been called before the Lockwood Committee. The purpose was to provide the jury with knowledge of surrounding conditions, so they could judge of the connection between the cessation of practices with reference to the sale of class "B" pottery by these defendants, and the fact that it was common knowledge that Hanley, who had tendered assistance in this connection, and was the secretary of the Association to which most of the buyers belonged, was already the subject of investigation by the Lockwood Committee.

The inference would be logical that the defendants had "at that time" refrained from an illegal practice because they knew that the man with whom that business was being most actively carried on was being examined by an investigating committee.

In fairness it can not be asserted that the question was for the purpose of "besmirching" the defendants. A more rational conclusion is that the jury was entitled to know these facts for the purpose of ascertaining whether or not there were at that time in existence conditions which would deter Dyer and the defendants from fully carrying out and putting into effect their purpose to restrain the sale of class "B" pottery on domestic markets. Especially is this true since the record shows that Hanley had tendered aid and assistance in bringing about such conditions.

It is submitted that no prejudicial error, and in fact no error of any kind, was committed by the

trial court in permitting the jury to see all the surrounding conditions existing at the time when certain action was taken by this Association, which it now relies upon to show the absence of any purpose to restrain trade in class "B" pottery. If that purpose had been temporarily abandoned through fear of the Lockwood Committee, the jury was entitled to know it.

V

THE DISTRICT COURT COMMITTED NO ERROR IN EXCLUDING QUESTIONS BY DEFENDANTS' COUNSEL CALLING FOR OPINIONS AND CONCLUSIONS IN REGARD TO THE EXISTENCE OF COMPETITION BETWEEN DEFENDANTS AND IN EXCLUDING THAT TYPE OF ANSWER FROM WITNESSES WHO WERE UNABLE TO TESTIFY TO FACTS

The extracts from the record, which in substance cover the specific instances of the exclusion of certain questions and answers by the trial court, to which these defendants most seriously objected below and as to which they alleged error, are found at R. 344, 397, 436, 441, 469, 512, 375, 474, 497, and 493, and are analyzed in the Appendix to this brief.

The defendants offered the testimony of witnesses who were either manufacturers of pottery or jobbers of such pottery, who purchased their supplies from these defendants or other like manufacturers, to the effect that competition existed among manufacturers, particularly these defendants, in the sale of such pottery.

Broadly stated two classes of questions, asked by counsel of such witnesses on direct examination, were objected to and excluded.

Questions of the first class were in substance whether the witness had seen or noted competition in such sales. It is apparent that questions couched in general language as to whether competition was found or observed were too broad. The answers to such questions would not necessarily be responsive in such a case as this where the sole issue was whether there had been price competition. The witness when testifying might have had some other kind of competition in mind.

The second class of questions were addressed to witnesses in such form that the answers would have embodied the impressions, beliefs, and possibly recollections of the witnesses as to past transactions in the purchase of pottery, without any or substantial details, instead of calling for exact knowledge of competitive conditions as to which testimony was desired. In many of these instances it appears in the Record that such witnesses had available business records containing exact information and details as to what did occur with reference to competitive prices made or tendered, but that no inspection of such records had been made. (R. 344, 470, 500.) On direct examination inability on the part of some of such witnesses to testify to any specific instances in support of the general impression, belief, or recollection was conceded. (R. 469–

470, 449, 453, 524.) *Wherever the witness could testify as to the details of transactions showing competitive prices, such testimony was invariably admitted, with no effort on the part of the Government to prevent its admission.* (R. 442, 513, 521, 498, 516, 525, 491, 459.)

The question of price competition was an issue of prime importance in the case. Respondents sought to have witnesses with no or slight supporting recollection of details testify as to conclusions of fact or opinions dealing with conditions material to that issue. Moreover, allowing defendants' witnesses to give their impressions, opinions or conclusions as to the existence of competition, without reference to specific transactions, would have precluded the Government from refuting the evidence either by cross-examination or on rebuttal. Consider what would have been the situation had the evidence been admitted, and had the Government, in rebuttal, called an equal number of witnesses to testify in their opinion, based on experience and observation, that there was no competition in the pottery business. Issues of fact can not fairly be determined upon the basis of such evidence.

A study of the record also reveals that there was no effort on the part of the Government, nor was there any disposition on the part of the trial court to prevent witnesses for the defendants from testifying as to *particular acts* of competition; for example, as to selling below the bulletin prices or

cutting prices to secure business. Buyers from defendants were at liberty to give testimony that they had made purchases below the bulletin price or had received different bids or quotations in their purchases of these products, where the witnesses were able to recall any specific facts which would lay a just basis for testing the truth thereof. In fact, the trial court suggested to counsel for defendants methods by which this particular line of testimony could be introduced to the benefit of these defendants. (R. 468, 469.)

The following colloquy is instructive (R. 467):

> Mr. MARSHALL (counsel for defendants). Suppose that a man does not remember all these precise details, but has a strong impression or belief or recollection about the ordinary course of events that he has gone through.
>
> Mr. POWELL (assistant United States attorney). But he has the records.
>
> The COURT. Here he must testify as to facts.

Summarizing the facts disclosed by the record with reference to the introduction of this class of evidence, it appears that about 18 witnesses testified for the defense as to alleged competitive conditions. Seven testified without substantial objection. Eleven were prevented only from testifying as to their conclusions and impressions relative to competition between these defendants either (*a*) where no underlying facts were recalled (though in most

instances such facts were available for reference), or (*b*) where only a trifling number out of a very large number of transactions were recalled. Further, all such witnesses were permitted to testify as to all specific transactions within their recollection without substantial objection.

Furthermore, examination of this record discloses (R. 529–532) that a stipulation was entered into between counsel for the purpose of diminishing this cumulative evidence, particularly from jobbers as to competitive conditions supposed to be shown by their dealings with the defendants. This stipulation covered the authenticity of certain tabulations introduced by the defendants as to the actual sales made by them based upon the transactions disclosed by their respective books. It is evident that such tabulations would disclose the prices made by the defendants in such a fashion as to enable the jury to examine into the defence of price competition offered by them. It is expressly stated in the Record (R. 530, 532) that these tabulations were introduced in lieu of the testimony of numerous jobbers intended to be called by the defense. It will be noted that this form of introducing evidence on competitive conditions is in harmony with the contentions of the Government embodied in objections made at trial, the sustaining of which is the substantial basis of defendants' assignment of error.

There can be no doubt but that the substance of the defense as to the existence of competition between these defendants was submitted to this jury without substantial or prejudicial interference from the Government by objection, or from the court by its rulings on the manner of introducing the evidence.

On four grounds then it is submitted that no error was committed in the rejection of these broad questions:

First. The questions were, for the most part, couched in such general language that the answers would not be directly and necessarily responsive to the issues involved.

Second. This opinion testimony was offered (when the fundamental facts, neither evanescent nor complex in their nature, were confessedly available) in such a form as to make it impossible for the Government to test the trust of the generalities offered in evidence, either by cross-examination of the witness at that time or by the procurement and introduction of specific evidence *aliunde* to disprove those generalities.

Third. The conclusions or inferences sought to be testified to cover the final inference as to the existence of facts in issue, or in any event of facts highly material to the issue.

Fourth. As a result of the unimpeded testimony of witnesses to known primary facts and the introductions of tabulations of actual sales from books

of defendant companies the jury had the substance of the defense attempted to be offered as to competitive conditions.

The Circuit Court of Appeals held that it was—

> rather late in the history of Sherman law litigation to treat the word "competition" as even connoting or suggesting anything not known to all men.

It is common knowledge to those who come in contact with business men and others engaged in commerce that the word "competition" finds many definitions among them. Often, where absolutely uniform prices are maintained by groups, either with or without an agreement, the statement is made that there is actual competition in the sense that the same trade is sought by more than one at the uniform price. Again among that class where uniform prices prevail a condition described as competition is found to exist where that competition is solely one of *service,* either as to promptness or satisfaction. Again, others find a condition defined as competition where rivalry as to the *quality* of the article is the only real competition that exists. And this Court is already familiar with the vagaries of what have been called "open competition" plans. *American Column & Lumber Company* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Company et al.,* 262 U. S. 371.

There may be cases where by force of circumstances certain statements in the nature of conclusions or opinions derived from numerous inci-

dents may be rightfully submitted to a jury. But where the actual underlying facts are available to the witness (as in the instant case for the most part the admitted records as to the prices and dates of transactions were available, either for introduction in evidence or reference) there is no rule of evidence nor of right which requires the jury to formulate its judgment as to the existence of competitive conditions upon what counsel has designated "strong impressions, beliefs, or recollections," particularly where such "impressions" carry no detail of fact to give them substance. See Greenleaf on Evidence (16th Ed.), vol. I, page 549; Wigmore on Evidence (2nd Ed.), vol. IV, page 120.

There were no conditions in the testimony of witnesses offered on competition, which called for or made necessary the substitution of conclusions and impressions for the statement of facts, from which the jury could as easily draw its own conclusions and inferences as any of the witnesses whose testimony was offered. The fundamental facts which were required of these witnesses were neither evanescent in their nature nor complicated in their character. If known to the witness who desired to state his opinion, these underlying facts were equally as easy of statement as the opinion which was sought to be substituted therefor. As shown by the Record, in certain instances the underlying facts by way of records were actually

available and entirely disregarded and denied to the jury. (R. 344, 470, 500.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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NOVEMBER, 1926.

APPENDIX

Brief analysis of some of the specific instances of exclusion of testimony objected to by the defendants is herewith set out:

(*a*) Faherty, a defendant manufacturer of pottery, was asked whether he found himself in competition with other members of the Association. (R. 344.) One of the important questions before the jury in the instant case was whether there was price competition between these defendants, and the defense desired this witness to express his own conclusions as to the competition between these defendants without defining the kind of competition, or any specific facts from which such conclusion or inference could be made.

(*b*) Shannon, a salesman of one of the defendant companies (R. 397), was asked on redirect examination whether he found himself "in active competition." Immediately subsequent to the exclusion of this question on the ground of calling for a conclusion, and being vague and uncertain, there appears (on page 398 of the Record) a statement in detail by this witness containing facts as to the form and kind of price competition which he engaged in, which were the primary facts upon which his answer to the question would have been founded. So it is evident there was no substantial error or injustice to these defendants.

(*c*) Efron, a jobber (R. 436), was asked whether he found any competition for his business among

"these people." This question was excluded as calling for a conclusion. Examination of the testimony of this witness (R. 434–435) shows that he had testified in detail as to some transactions taking place between himself and defendant manufacturers, and invoices of such transactions were introduced in evidence. (R. 437.) So it is apparent that the primary facts relative to the issue before this jury as to competitive conditions, of which this witness had actual knowledge, were permitted in evidence without objection, and therefore no substantial injury could have been done these defendants.

(*d*) Drugan, a salesman of one of the defendant manufacturers, and himself a defendant (R. 441), after being permitted on direct examination to state the primary facts with reference to his sales and methods of sale, was asked the question whether or not he cut his price to meet "that competition." (Undefined.) This question was excluded on the ground that it called for a conclusion of the witness as to several transactions which are not identified—vague, indefinite, and uncertain. Immediately thereafter this witness was permitted to testify without objection as to the primary facts of specific instances recalled, where he averred that he had so cut his price. It is evident that these defendants received the benefit before this jury of all the knowledge of price cutting to meet competition which this witness possessed, and therefore no substantial injury was done them.

(*e*) Weil, a jobber and retailer (R. 469) was asked whether there were instances in which there was a cutting of prices, although in his previous statement it appeared he had no specific recol-

lection, and although subsequently it appeared that he had complete records, which were readily available. The Court suggested that counsel have this witness refresh his recollection and then testify, if he could, as to the instances about which he had been questioned. (R. 469.) It is clear at this point that if any specific instances of this kind referred to in the question excluded had taken place that they could have been testified to as suggested by the Court, but that these defendants in lieu of such definite information desired the Court to permit this witness to testify as to his impressions.

(*f*) Thorndike, president of a large jobbing house which bought from these defendants (R. 512), after having stated that he recalled buying from these companies below their bulletin prices, was asked which had been most frequent, purchases at or below the bulletin prices. This question was excluded on the ground that it called for the conclusion of the witness as to a mass of transactions covering several years and afforded no proper basis for cross-examination. He then proceeded to testify as to specific instances of purchases below the bulletin price and as to certain specific facts with reference to competition. He then said, "I can not recall any other instances of competitive bidding on prices not specifically enough for testimony." (R. 514.) It is evident that where no greater knowledge of the specific details abides in the mind of this witness, who was carrying on a very large business, involving very numerous transactions, a statement from him based on that kind of recollection, comparing the instances of purchases at the bulletin with purchases below the bulletin, could be nothing more than his impression and

could not be a conclusion based upon a reliable recollection of known facts.

(*g*) Smith, treasurer of one of these defendant companies (R. 374–375), testified that he had knowledge of the sales made by his company "involving a great many transactions" throughout three years, and he was permitted to testify without objection that the sales were not "being made at our bulletin prices." He was then asked, "How much cutting from your prices did you notice?" The same reasoning, as applied in the next above instance likewise applies to the question here, that his conclusion as to the frequency or number of these price cuttings, in view of his own statement of the number of transactions involved, must in all human probability be of a largely speculative character, and the court said that he must substantiate such testimony by information from his records.

(*h*) Kirk, a manufacturer of pottery (R. 474), was asked whether he had not heard from time to time of other members of the Association who were cutting prices besides Abingdon, as to which he had just testified specifically. This question was likewise excluded on the ground that it was too vague and uncertain and afforded no basis for cross-examination. To this objection there might also be added that such testimony would be hearsay, if it was intended thereby to prove that other companies had been cutting, and would be clearly inadmissible. Neither the source nor the time of information is identified.

(*i*) Seifert, a jobber (R. 524), testified that he received the price bulletins but rarely referred to them; that he could not recall any instances where

different companies bid different prices for the same job; that when he went into the market, it was usual for him to get two or three or four bids of prices from different manufacturers. He was then asked, "How wide a range can you remember it as having taken?" Objection was interposed. Witness stated he could give no specific instance of such conditions in the large volume of business done. Witness did testify in detail from invoices in his possession as to certain prices being made by certain defendant companies and this without objection.

It is clear that wherever this witness had real knowledge as to conditions in the trade he was allowed to testify without objection to that knowledge, and that objection was only made when he was requested to give his impression of the range of prices which he received, where no specific recollection was retained. Such evidence would be of too speculative a character to be of value.

(*j*) Winzinger, a jobber (R. 497), was asked whether he observed any uniformity of prices at the time he was making purchases. This question was excluded as calling for a conclusion.

Thereafter he testified without objection in detail as to certain prices received from certain defendant companies, the underlying invoices for which he had examined and brought with him.

Thereafter he testified that he had all the necessary papers "back for ten years which were at the disposal of anyone at all; that they had been available to trial counsel for the past three weeks or a month; that he *himself did not claim to have compared them.*" (R. 500–501.)

Here again is a condition where all of the fundamental facts were available to the witness being examined and to trial counsel, where the witness admitted he had made no comparison upon which to answer the question as to uniformity, and where no effort had been made actually to establish from the available data the true conclusion as to uniformity. Yet it is insistently asserted that this jury must found its conclusions upon testimony of this character.

(*k*) Buda, a jobber (R. 493), had been examined as to competition among these defendants as evidenced by his experience in purchasing their goods and having refreshed his recollection from available invoices, testified at length (R. 491) as to certain prices which he had received, not, however, from defendant manufacturers but from outside or independent manufacturers. He then undertook to testify that he had received different prices from an outside company and one of the Association defendant companies. Upon questioning it developed that he could not identify the transaction, and he was then advised to go ahead and mention any other instances of like character, to which question he started to respond in the following language: "Well, the only way I used to purchase my goods was," to which general statement objection was entered. He was then asked, "Now, tell me the way you purchased your goods." Objection was interposed on the ground that the witness be confined to a specific instance as to which he could give information. This question was excluded upon objection and made the basis of the exception. The record shows that immediately thereafter this witness went into a full explanation of how he made

his purchases and was permitted to indicate that a certain specific defendant company had made lower prices than the other bidding concerns.

It is apparent that no substantial injury was done these defendants by the ruling, as the witness was permitted without objection to answer direct questions which brought to light the information which was desired by defendants' counsel.

It furthermore appears that the invoices which the witness had brought with him, containing the exact prices which he had received in the purchase of this pottery, had not been compared by him with the bulletin prices. (R. 495.)

A reading of the testimony of this witness will indicate that there was no exclusion of any real information relating to the issues of this case, but only the rejection of unsupported or insufficiently supported inferences.

Further, it appears that in substantially all these instances of exclusion the witness was permitted without objection to testify to any fundamental facts or specific instances, which established or tended to establish competition in this industry as carried on by these defendants.

It will be recalled that the defendants were permitted by stipulation to introduce in evidence tabulations (prepared by them from their books) showing prices made by the various defendant companies.

Careful examination of all these instances of exclusion convinces that there was no exclusion of this general line of testimony as to competitive conditions sought to be established by these defendants, but only the enforcement of a rule of evidence as

to the form of introduction of that evidence, which under circumstances here disclosed, was not unjust or prejudicial to these defendants; first, because better evidence was available and denied to the jury; and second, because all the underlying facts within the knowledge of the witnesses were introduced to the jury.

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