IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 828.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

v.

COLGATE & COMPANY, a Corporation,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR COLGATE & COMPANY, DEFENDANT-IN-ERROR.

CHARLES E. HUGHES,
CHARLES WESLEY DUNN,
MASON TROWBRIDGE,
of Counsel for Defendant-in-Error.

Synopsis.

CASES CITED.

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STATEMENT.

This is a writ of error sued out by the United States under the Criminal Appeals Act of March 2, 1907, 34 Stat., 1246, c. 2564, to review the judgment of the United States District Court for the Eastern District of Virginia sustaining a demurrer to an indictment against Colgate & Company for an al-

leged violation of the Act of July 2, 1890, 26 Stat., 209, c. 647, commonly known as the Sherman Anti-Trust Act.

The single question involved is whether the judgment of the District Court that this indictment, as construed by that court, does not charge an offense under the Sherman Act, is based upon an erroneous construction of that statute.

The indictment, consisting of one count, was filed on December 2, 1918 (Rec., pp. 3-5). Colgate & Company, a corporation, is a producer of laundry soaps, toilet soaps, and other toilet articles, selling and shipping its products to wholesale and retail dealers throughout the United States. The indictment made no attempt to charge that there was a monopoly or an attempt to monopolize the trade in laundry soaps, toilet soaps, or the other articles described. Nor was it alleged that Colgate & Company was acting in concert with any other manufacturer of similar articles.

The indictment was limited to the transactions between Colgate & Company and its own customers and, as the District Court found, the conduct of Colgate & Company was confined to the exercise of its lawful right as a manufacturer to sell or not to sell as it saw fit (Rec., p. 13).

Colgate & Company maintained no system of restrictive contracts as in the *Miles* case (220 U. S., 373), or of "license contracts," as in the *Victor Talking Machine* case (243 U. S., 490) and *Boston Store* case (246 U. S., 8), or of restrictive notices, as in the *Bobbs-Merrill* case (210 U. S., 339) or the *Bauer* case (229 U. S., 1), by which it was sought to qualify the title of its customers or to keep the property sold under restrictions hostile

to the title and the right of alienation incident to it. This, as will be pointed out, was made clear by the District Court.

The acts from which the government sought to spell out the charge of an illegal combination were thus described in the indictment (Rec., p. 4):

> Colgate & Company (1) Distributed amongst the wholesale and retail dealers in its products lists, etc., showing uniform wholesale and retail prices, respectively, to be charged for its products; (2) Urged said dealers to adhere to such indicated prices in reselling its products; (3) Informed said dealers that it would refuse to sell its products to any dealer who did not resell at the indicated prices; (4) Requested said dealers to inform it of sales by dealers at prices other than those indicated (many such dealers informed defendant of many such sales); (5) Investigated and discovered, through its representatives, agents and employees, other sales by dealers at prices other than those indicated; (6) Placed the names of dealers ascertained to have made such sales at prices other than those indicated on so-called "Suspended Lists"; (7) Requested dealers ascertained to have made such sales to give it assurances and promises that they would in the future resell its products at the indicated prices; (8) Uniformly refused to sell to such dealers until they gave such assurances and promises (many such dealers gave to the defendant the requested assurances and promises and upon their receipt defendant sold to such dealers); (9) Requested similar asurances and promises from new customers (many such dealers gave the requested assurances and promises and defendant thereupon sold to them); (10) Freely sold its products to dealers with whom it had established accounts and who had not

resold such products at prices other then those indicated. Dealers, with few exceptions, resold at the suggested prices.

The District Court sustained, on December 12, 1918, the Company's demurrer to this indictment upon the grounds stated in the opinion of the Court as follows (Rec., pp. 7, 8):

> "For reasons stated in the opinion filed on the 29th day of October, 1918, in the case of United States v. Colgate & Company, a corportion, No. 1294, the demurrer to this indictment is sustained in so far as it avers that the indictment fails to charge any offense under the Sherman Act or any other law of the United States. *So far as the substance of this indictment is concerned and the conduct or acts charged, the Court construes this indictment as it construed the former indictment in the above mentioned opinion.* The demurrer is overruled in so far as it raises questions as to the form of the indictment. Let judgment be entered in accordance with this opinion." (Italics ours.)

The explanation of the statement in the Court's opinion is that there had been an earlier indictment against Colgate & Company returned to the same Court in December, 1917 (Rec., p. 31). This former indictment had presented the same question; in fact, the allegations were identical, save as to a formal matter. The only new matter in the second indictment (now under consideration) is found in the paragraph next to the last, giving the names of three dealers (Rec., p. 5).

Demurrer to the first indictment was sustained by the District Court both as to substance and

form. (*United States* v. *Colgate & Company*, 253 Fed., 522). The Government then obtained the present indictment and Colgate & Company again demurred.

As the allegations in the second indictment, so far as the substance of the charge was concerned, were identical with those of the first indictment, the District Court referred to its former opinion as giving its construction of the second indictment and directed that certified copies of the first indictment and of the Court's opinion thereon should be made a part of this record (Rec., p. 34).

The opinion of the District Court which thus contained the definitive construction of the indictment under consideration is presented in the course of the discussion.

We may note at this point also the significant fact that none of the dealers, who it is contended are parties to an unlawful combination in restraint of trade and commerce, and who are likewise liable to the fines and penalties of the Sherman Act, if the asserted offense is established, are under indictment. It would be necessary to indict the greater part of the American wholesale and retail grocery and drug trade. For, if this indictment lies against Colgate & Company, it necessarily follows that a similar indictment would lie against the dealers, albeit they have done no more than to sell the products they had purchased and owned at a fair and reasonable price, in every way satisfactory to them, thus exercising their constitutional right of property. While such dealers are not before this Court, in person, their conduct is in issue equally with that of Colgate & Company.

SUMMARY OF POINTS.

We present the following points:

(1) On this writ of error, this Court does not construe the indictment. In deciding the question as to the construction of the statute, this Court takes the construction placed upon the indictment by the District Court.

(2) The District Court did not adopt the Government's construction of the indictment. The District Court did not construe the indictment as charging that the defendant had entered into any restrictive agreement whatever qualifying its customers' title to the goods or restricting their right to dispose of them as they chose. Colgate & Company merely reserved their undoubted right to refuse to make future sales.

(3) The Sherman Act does not deprive the manufacturer of his liberty to manufacture or not as he pleases, or to sell or not as he pleases.

(4) The conduct here involved does not constitute a combination in restraint of trade in violation of the Act.

ARGUMENT.

FIRST.—On this writ of error, this Court does not construe the indictment. In deciding the question as to the construction of the statute, this Court takes the construction placed upon the indictment by the District Court.

United States v. *Carter*, 231 U. S., 492, 493-495;

United States v. *Miller*, 223 U. S., 599, 602;
United States v. *Patten*, 226 U. S., 525, 535;
United States v. *Winslow*, 227 U. S., 202 217.*

As this Court said in *United States* v. *Miller*, *supra*:

> "* * * upon these direct writs of error we must accept that Court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision."

We emphasize this familiar rule, because we think it determines this controversy. The whole argument of the Government, as we view it, rests upon an entirely different construction of the indictment than that placed upon it by the District Court.

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*See, also: *United States* v. *Keitel*, 211 U. S., 370, 386, 398; *United States* v. *Biggs*, 211 U. S., 507, 518; *United States* v. *Mescall*, 215 U. S., 26, 31; *United States* v. *Stevenson*, 215 U. S., 190, 195-196; *United States* v. *Kissel*, 218 U. S., 601, 606; *United States* v. *Pacific & Arctic Co.*, 228 U. S., 87, 108.

SECOND.—The District Court did not adopt the Government's construction of the indictment. The District Court did not construe the indictment as charging that the defendant had entered into any restrictive agreement whatever qualifying its customers' title to the goods or restricting their right to dispose of them as they chose. Colgate & Company merely reserved their undoubted right to refuse to make future sales.

The Government selects one sentence from the opinion of the District Court and presents that sentence as its construction of the indictment (Govt's Brief, p. 6). This sentence the Government misconceives—as we view it—and the full and careful statement by the District Court of its construction of the indictment, the Government ignores or belittles (Govt's Brief, p. 8). It is inaccurate to say that the District Court adopted the construction placed upon the indictment by the Government.

The situation manifestly was this: Here was a manufacturer exercising its clear right to sell or not as it pleased. It had made no restrictive contracts whatever. It could not be charged with maintaining any system of restrictive contracts or notices attempting to restrict title such as had received the condemnation of this Court. But, unable to charge any such violation of law, the Government sought, by vague generalities and use of the words "agree" and "understanding" and "assurances and promises," to make a case, when in fact

there was no restrictive agreement whatever. And when the Government came to state the actual conduct of the defendant upon which it was sought to predicate an offense, the true situation became apparent. The District Court analyzed the indictment and its conclusion as to its meaning was very different from that which the Government seeks to ascribe to it.

The District Court was immediately impressed with the omissions from the indictment, highly significant of the exact import and effect, in fact and law, of the conduct in question. The absence of monopoly and of monopolizing intent, and of any concert with other manufacturers was commented upon (Rec., p. 10). The Court pointed out that the Company dealt with its own customers separately and that there was no attempt to secure any assurances from sub-purchasers (Rec., p. 10). After adverting to these and other considerations, and pointing out that the case was not within the decisions of this Court upon which the Government relied, the Court used the language, which the Government quotes as follows (Govt's Brief, p. 6):

> "In the view taken by the Court, the indictment here fairly presents the question of whether a manufacturer of products and shipped in inter-state trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at whch the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices" (Rec., p. 11. The opinion is set forth twice in the record and the Government's citation is of the same paragraph as it appears at Rec., pp. 27-28).

But this is only a part of the statement of the District Court. The statement in the sentence quoted that the manufacturer "agrees" with his wholesale and retail customers must be read in the light of the context, for it is perfectly plain what the Court means in this use of the word "agrees." What the Court had in mind was not that there was any qualification of the customer's title or right to alienate, but simply a recognition of the manufacturer's right to decline to make future sales. The Court immediately goes on to say (Rec., p. 11):

> "This, at the threshold, presents for the determination of the Court, how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and *bona fide* manner. That he may not do so fraudulently, collusively and in unlawful combination with others, may be conceded. (*Eastern States Lumber Association* v. *United States*, 234 U. S., 600, 614). But it by no means follows that being a manufacturer of a given article he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and should the customer not observe the understanding as to retail prices, exercise his undoubted right *to decline further to deal with such person.*" (Italics ours.)

The District Court's construction of the indictment, with respect to all the matters material in this discussion, is put beyond any possible controversy by the following definitive statement (Rec., p. 13):

> "The pregnant fact should never be lost sight of, that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually.

This decisive construction of the indictment involves three controlling facts:

1. Colgate & Company did not reserve or retain, or attempted to reserve or retain, any interest in its products once they were sold and did not restrain the buyer in his right to barter and sell, without restriction, the products he had purchased and owned.

2. The buyer could sell the products he had purchased from the Company or not, as he pleased, to whom he pleased, at any price he pleased, or could decline to sell them at all, or could give them away, if he so pleased, his

course in these respects being affected only by the fact that he might by his action incur the displeasure of the Company which could refuse to make further sales to him.

(3) Colgate & Company acted only with its own customers individually, and there was no combination between the retailers themselves.

This was the construction of the first indictment, and the District Court has stated explicitly that it construes the present indictment precisely in the same way. The Government can gain nothing from the use of the word "agreed" in the single new sentence inserted in the second indictment (Rec., p. 5, next to last paragraph). This expression, in connection with the naming of three dealers in order to escape a formal objection, the District Court properly held did not affect in any way the substance of the charge, which it had already construed. And the only agreement suggested in this new sentence was made "as aforesaid," that is, in the manner and to the effect already set forth,—being the same in both indictments.

What was "agreed" must be read in the light of the District Court's construction of the charge. There was no agreement whatever which, if valid, would have constituted any restraint on alienation. There was no agreement whatever which, if valid, would in the slightest degree have affected or qualified the title of the purchaser or his freedom to sell. There was no "understanding" which amounted to any such agreement. There was no "agreement" which left the buyer in any different position from that definitely stated by the District Court.

For the position in which he was left, according to the tenor of the charge, is, for the purpose of this hearing, determined by the final construction placed by the Court below upon the charge.

So far as "prices" are concerned, there is no charge—as the District Court held—that any prices suggested were not fair and reasonable. And there was no "agreement" as to prices which qualified the right of the purchaser to sell at any price he saw fit.

The "agreement" or "understanding"—as the court below construed the indictment—was nothing but the recognition of the manufacturer's undoubted right not to make further sales to the customer if the latter had not theretofore sold at the fair and reasonable prices suggested by the manufacturer.

The customer could sell or not as he chose, or at any price he chose,—he had an unqualified title to what he bought—but if he did not sell at the fair and reasonable prices suggested by the manufacturer he would get no more goods. That was all there was of it. The "assurances" and "promises" described were only declarations of intention, not a qualification of title. The "condition" referred to only related to future sales, which the manufacturer could make or not as he saw fit.

It is this policy of refusing to sell which the Government seeks to attack and no circumlocution or reference to "combination" can obscure this real object. The decisive language of the District Court construing the indictment definitely fixes the charge under consideration. We repeat (Rec., p. 13):

> "No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer after buying could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action, incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do."

It was upon this definition of the limits of the charge that the District Court based its decision.

The District Court concluded that the essential question concerned the defendant's fundamental "right to deal lawfully with its own property, the handling, trading in and disposing of which is made the subject of this indictment" (Rec., p. 14). And the exercise of that fundamental right here involved, the validity of which exercise is challenged by this indictment, as the District Court said, was the refusal by the Company to sell to dealers failing to charge prices deemed to be fair and reasonable. The District Court concluded that such conduct on the part of the manufacturer does not constitute an offense under the Sherman Act or any other law of the United States and quoted extensively from the adjudicated cases in support of that precise conclusion.

On this definite construction of the indictment, we are thus brought to the proposition involved in the Government's appeal which, when reduced to its essential elements, is this:

> *That the manufacturer who simply declines to sell to dealers who fail to charge fair and reasonable resale prices, indicated by the man-*

ufacturer, which are of vital importance to the industry and trade, is subject to criminal prosecution as a violator of the Sherman Act, in case it appears that dealers generally resell at such fair and reasonable prices.

It is submitted that this proposition involves a most serious perversion of the statute. So far from being a proper construction of the Act, such a construction, to say the least, would throw its constitutional validity into grave doubt. This is not a case of a public calling or of a business affected with a public interest, and the ordinary principle of liberty, conserving the right of every man freely to deal or refuse to deal with his fellow men, that is, the free and untrammelled right to contract or not to contract, applies. We believe that the proposition now advanced by the Government is unwarranted by judicial decisions and opposed to sound reasoning;—that its adoption would be a serious menace to the business interests of the country and that, instead of safe-guarding the public, it would convert the Sherman Act by a process of construction into a vehicle of grave injury.

The Government cannot be permitted to beg the question by asserting "combination" or by assuming that there is a prohibited combination and that the defendant is attempting to justify itself against the prohibition.

We are not attempting to justify combination. There is no combination. We contend that the indictment, as construed by the District Court, fails to charge combination within the statute.

THIRD.—The Sherman Act does not deprive the manufacturer of his liberty to manufacture or not as he pleases, or to sell or not as he pleases.

It is of course true that the acts which the statute prohibits are not to be removed from its prohibition by a finding that they were reasonable (*American Tobacco case*, 221 U. S., 106, 179, 180), and that a combination or conspiracy condemned by the act is not saved by good motives or good results (*Thomsen* v. *Cayser*, 243 U. S. 66, 85, 86). But the questions remain whether the acts alleged *are* prohibited by the statute, and whether there *is* a "combination" or a "conspiracy" condemned by the act. There is always the duty to interpret the statute,—the duty defined in the Standard Oil case as arising from the general character of the terms employed—so that the words "restraint of trade should be given a meaning which would not destroy the individual right to contract" (see *American Tobacco case*, 221 U. S., 106, 180).

We do not find that any such proposition as the Government seeks to establish through this indictment has ever been upheld by this Court. We give a few of the many citations showing the continued recognition of the general principle to which we refer.

Thus, Mr. Justice Peckham, in delivering the opinion of this Court in the *Trans-Missouri* case (166 U. S., 290, 320), distinguished the case of a public calling from an industry or trade of the sort here involved:

> "The trader or manufacturer, on the other hand, carries on an entirely private business,

> and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

This, of course, was said long before the enactment of the special provisions of the Clayton Act (inapplicable here) with respect to discrimination in prices, but the statement serves to illustrate the general conception of the individual liberty which survived the Sherman Act in the view of the Court, at the time of its most drastic application.

Other expressions are these:

> "Further, the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."
>
> Brewer, J., in *Northern Securities Co.* v. *United States,* 193 U. S., 197, 361.

> "From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law."

Standard Oil Co. v. *United States*, 221 U. S., 1, 56.

"Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annhilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

United States v. *American Tobacco Co.*, 221 U. S., 106, 180.

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

Eastern States Retail Lumber Dealers' Assocation v. *United States*, 234 U. S., 600, 614.

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to anyone with whom he thinks it will promote his business interests to refuse to trade."

Dueber Watch-Case Manufacturing Co. v. *E. Howard Watch & Clock Co.*, C. C. A., Second Circuit, 66 Fed., 637, 645.

"There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on different set of terms. There is nothing in the Act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and venders of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a deduction in his retail price of it was not the violation of the Sherman anti-trust act charged in the indictment."

Union Pacific Coal Co. v. *United States*, C. C. A., Eighth Circuit, 173 Fed., 737, 739.

"Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

Great Atlantic & Pacific Tea Company v. *Cream of Wheat Company*, C. C. A., Second Circuit, 227 Fed., 46, 49.

It would be subversive of the fundamental purpose of the Sherman Act to interpret it as curtailing the freedom of the manufacturer to make and sell or not, as he pleases. In construing the Act so as to remedy the evils at which it is aimed, it is not to be caused "to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the Act, it was enacted to preserve" (American Tobacco Company case, supra).

The necessary implications of the principle are equally clear.

The right of the manufacturer to make and sell, or not, as he pleases, embraces the right to decline to sell to a dealer who does not charge fair and reasonable resale prices.

We might say that he could refuse to sell if dissatisfied with the dealer's prices, whatever they were, but there can be no doubt of the proposition as we have put it.

This would be so, even if fair and reasonable resale prices were not important to the industry, and certainly, as this Court said in the *Eastern States Retail Lumber Dealers* case, *supra*, he is not bound to sell to one who he thinks is acting unfairly and is trying to undermine his trade.

Moreover, it does not detract from the manufacturer's rights, and the security of his position as an entirely lawful one in refusing to sell, that he indicates—as the Government puts it—to the deal-

er what he considers to be fair and reasonable resale prices.

If he may sell or decline to sell as he pleases; and if he regards resales at other than fair and reasonable prices as injurious to the industry, certainly he may decline to sell to one who resorts to such injurious methods in his trading, and just as clearly he may tell such a dealer why he thinks his methods are injurious and what he considers to be proper methods. He may do this quite as legally with respect to prices as with regard to anything else that he thinks unfair and unreasonable. He loses no right either by complaining of objectionable conduct or by stating what he considers to be fair and reasonable resale prices. In saying that he will not continue to sell, if the dealer does not charge fair and reasonable resale prices, he is merely announcing his intention to do what he has complete right to do.

The greater includes the less, and the manufacturer is not deprived of his right to refuse to sell, because he wishes to exercise the right in the case of a dealer whose practice is contrary to fair dealing or because he gives his reason.

Nor is this right of the manufacturer one which can be exercised only in a single case or sporadically.

In the nature of things, he can exercise it with respects to all dealers whose methods he deems to be injurious to his trade. He may not like the style of the dealer's advertising; he may not like his selling methods; he may not like his unfair prices. The individual liberty of the manufacturer is not curtailed by the mere number of instances in which it is exercised. If he may exercise his right as to

A, it is certainly no objection if he exercises the same right without discrimination as to B and C.

There is nothing, then, in the charge that the manufacturer "uniformly" refused to sell to dealers who failed to charge fair and reasonable resale prices. This characterization does not alter his right, and the question remains precisely the same: Under what law is he compelled to sell, if he does not so choose?

There is no statute which compels the manufacturer to sell; there is no principle of the common law which compels him to sell. There is no statute which denies him the right to decline to sell for the particular reason that he does not like the dealer's failure to ask fair and reasonable resale prices. There is no principle of the common law which makes his ground for refusal to sell a destruction of his right to sell or not as he pleases.

FOURTH.—The conduct here involved does not constitute a combination in restraint of trade in violation of the Act.

It is manifest that the cases cited and relied upon by the Government do not support its contention. This is so for the reason that the fundamental question presented under the general law in the decided cases was whether an actual restraint imposed upon the right of alienation of movables sold was valid and could be enforced. The precise question was whether the owner of movables could sell them and lawfully impose and enforce a restraint on the price of future sales by the purchaser. The owner of such property claimed the

right so to qualify the title of purchasers. The Court decided, in effect, that such a restraint upon the right of the buyer of movables to sell, without restriction, what he has purchased and owns is invalid at common law and under the Sherman Act because inconsistent with the prohibition against restraint of trade and monopoly contained in that Act and obnoxious to the public interest.

In the present case, however, the indictment itself, and the authoritative construction of it by the District Court, conclusively establish that Colgate & Company did not impose any restraint whatsoever upon the right of alienation of its purchasers. Each buyer received a full and unqualified title and possessed complete and unrestricted liberty of alienation with respect to the products he had purchased and owned. The company did not sell its products and reserve or retain, or attempt to reserve or retain, any interest in them and did not restrain the buyer in his right to sell, without restriction, what he had purchased and owned. The buyer was entirely free to sell or not as he pleased, to whom he pleased, upon any terms and at any price he pleased, and to decline to sell at all, if he so pleased. (Opinion, Rec., p. 13.)

It is not the imposition and enforcement of a restraint upon the right of alienation of movables sold—*which is the unlawful restraint of trade, whether effected by contract, combination or conspiracy*—that is involved here, but the exercise of the fundamental right of the owner of movables to sell or not, as he pleases, to whom he pleases, who, when he *does* sell, gives to each buyer a full and unqualified title and complete liberty of alienation. Hence, we assert with confidence that the

cases upon which the Government relies do not apply.

The doctrine is now indisputable that under the general law the owner of movables cannot grant the title thereto by sale for a full price satisfactory to him and lawfully retain the incidents of it. (*Boston Store* v. *American Graphophone Co.*, 246 U. S., 8, 20-21; *United States* v. *United Shoe Machinery Co.*, 247 U. S., 32, 58). Such restraints upon future alienation "have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest." (*Straus* v. *Victor Talking Machine Co.*, 243 U. S., 490, 501.) And all of the cases cited involved the right of a seller of movables to impose and enforce such a restraint on the price of future sales, which right was asserted under the general law by virtue of contract, on the one hand, and under the patent and copyright laws by virtue of the monopoly thereby conferred, on the other hand.

The question arose in *Bobbs-Merrill Co.* v. *Straus* (210 U. S., 339), with respect to a copyrighted book. The owner of the copyright had attempted by notice to impose a restriction on resales, and brought suit to enforce the restriction.

The Court pointed out that what the complainant contended for *"embraces not only the right to sell the copies, but to qualify the title of a future purchaser"* (*id.*, p. 351). It was held that the copyright did not go so far.

What the owner of the copyright attempted to do by notice in the *Bobbs-Merrill* case, the manufacturer sought to accomplish by a system of restrictive contracts in the *Miles* case (220 U. S., 373).

That case dealt simply with the validity of contracts by which dealers were restrained in selling

what they owned. The Miles Medical Company had adopted a system of restrictive contracts with wholesalers and retailers, by which trade in the articles manufactured was limited to those who became parties to one or the other form of contract. Under the contract with the wholesalers, which was called a consignment contract, the consignee agreed "to sell only to the designated retail agents of said proprietor, as specified in lists of such retail agents furnished by said proprietor, and alterable at the will of said proprietor." The retailers were required to sign a contract wherein the purchaser, called a retail agent, agreed not to sell the products in question to any one at less than the full retail price as fixed by the manufacturer, and further, not to sell at any price to wholesale or retail dealers who were not accredited agents of the manufacturer (*id.*, pp. 396, 399).

Suit was brought by the Miles Medical Company against a wholesaler who had refused to enter into the required contract, and who was charged with inducing those who had made the contract to violate the restriction (*id.*, p. 394). The question, as the Court said, was as to "the validity of the restrictive agreements" (*id.*, see p. 395). This Court fully recognized the right of the manufacturer to sell or not, as he pleased. The decision was that while he had this complete liberty, he could not thereby, in case he *did* sell, impose upon his purchasers the described restraint upon the right to sell the property which they had bought. It was the restraint upon the right of alienation of property sold, not the right of the manufacturer to refuse to sell, that was involved. As the Court said:

"But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction" (*id.*, p. 404).

As Judge Lurton said in Park & Sons Co. v. Hartman (153 Fed., 24, 39), which was approved in the Miles case:

"The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. * * * *A prime objection to the enforcibility of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.*

"The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, has been generally held void." (Italics ours.)

It was accordingly concluded in the *Miles* case that "whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement" (p. 405). The question then was with reference to the validity of the system of restrictive contracts before the Court. As the Court said:

> "Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them" (p. 407).

And again it is said:

> "If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell" (*id*).

The final conclusion was that "where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." The restrictive provisions of the contracts sought to be enforced by the bill "were invalid both at common law and under the Act of Congress of July 2, 1890" (*id.*, p. 409).

The *Sanatogen* case (*Bauer* v. *O'Donnell*, 229 U. S., 1) did not arise under the Sherman Act, but involved this question, as stated by the Court:

> "May a patentee by notice limit the price at which future retail sales of the patented ar-

> ticle may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?" (*id.*, p. 11.)

The Court pointed out that the purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly and that this had been settled in the *Miles* case. It was also pointed out that a right had not been conferred by the copyright statute upon the owner of a copyright to limit the resale price of a copyrighted book by a notice to the purchaser. (*Bobbs-Merrill Co.* v. *Straus, supra.*) The remaining question was whether the patent law conferred upon the patentee the right to impose this restriction upon future retail sales by notice. And the Court held that it did not.

This case in no way involves the right of a patentee to refuse to sell, and gives no color whatever to the suggestion that if he had refused to sell to those who in his judgment were guilty of conduct injurious to the trade, he would be guilty of a crime, or that in case the dealer appreciated the importance of maintaining fair and reasonable prices and voluntarily sold at such prices he would be regarded as a party with the manufacturer to a combination or conspiracy, condemned by the Sherman Act.

The *Sanatogen* case merely held, that neither by contract nor by notice, could the owner, who had parted with the title to the product, restrain alienation of the product by those who had acquired the title.

The case of *Straus* v. *Victor Talking Machine Company* (243 U. S., 490), dealt with contracts

called "license contracts," which were attached to patented machines. In other words, it was simply a case of an effort by the manufacturer who had disposed of his product for a full price to place restraint upon its further alienation by a restrictive contract, and this agreement was not within the monopoly granted by the patent law.

Immediately following the *Straus* case the Court decided that of *Motion Picture Patents Company* v. *Universal Film Manufacturing Company* (243 U. S., 502), which involved the power of the patentee to sell and by notice to impose restrictions upon the title of the vendee, and such power was again denied.

In the recent case of *Boston Store of Chicago* v. *American Graphophone Company* (246 U. S., 8), these decisions were authoritatively reviewed. The American Graphophone Company, manufacturing under certain letters patent, maintained a system of restrictive contracts relating to resale prices, and the suit was brought to enjoin the Boston Store from violating the provisions of one of these contracts. The case came to this court on certified questions. In the course of his review of the cases, it was said by the Chief Justice (pp. 21-25):

> "In *Dr. Miles Medical Company* v. *Park & Sons Co.*, 220 U. S., 373, it was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables *and lawfully by contract fix a price at which the product should afterwards be sold*, because to do so would be at one and and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable

parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law. * * *

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"In *Straus* v. *Victor Talking Machine Company,* 243 U. S., 490, the right to fix a permanent marketing price at which phonographs should be re-sold after they had been sold by the patentee was considered. Basing its action upon the substance of things, and disregarding mere forms of expression as to license, etc., the court held *that the contract was obviously in substance like the one considered in the Miles Medical case* and not different from the one which had come under review in *Bauer* v. *O'Donnell.* Thus brushing away disguises resulting *from forms of expression in the contract* and considering it in the light of the patent law, it was held that the attempt to regulate the future price or the future marketing of the patented article was not within the monopoly granted by the patent law in accordance with the rule laid down in *Bauer* v. *O'Donnell.*

"The general doctrines, although presented in a different aspect, were considered in *Motion Pictures Patent Company* v. *Universal Film Manufacturing Company,* 243 U. S., 502. The scope of the case will be at once made manifest by the two questions which were certified for solution. 'First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are

no part of the patented machine, and which are not patented? Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?' The case therefore directly involved the general question of the power of the patentee to sell and yet under the guise of license or otherwise to put restrictions which in substance were repugnant to the rights which necessarily arose from the sale which was made. In other words, it required once again a consideration of the doctrine which had been previously announced in *Henry* vs. *Dick* and of the significance of the monopoly of the right to use conferred by the patent law which had been reserved in *Bauer* v. *O'Donnell.* Comprehensively reviewing the subject, it was decided that the rulings in *Bauer* v. *O'Donnell* and *Straus* v. *Victor Talking Machine Company* conflicted with the doctrine announced and the rights sustained in *Henry* v. *Dick,* and that case was consequently overruled. Reiterating the ruling in the two last cases it was again decided that as by virtue of the patent law one who had sold a patented machine and received the price and had thus placed the machine so sold beyond the confines of the patent law, could not by qualifying restrictions as to use keep under the patent monopoly a subject to which the monopoly no longer applied.

"Applying the cases thus reviewed there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be equally no doubt that the power to make it in derogation of the general law was not within

> the monopoly conferred by the patent law, and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred."

None of these decisions, we submit, gives countenance to the Government's contention in the present case.

The Government also cites the case of *United States* v. *Kellogg Toasted Corn Flake Co.* (222 Fed., 725). But, in that case, there was a restriction attempted to be imposed upon the right of alienation as an express condition of the sale, and notice was given that re-sale at a lower price than that fixed by the manufacturer would be regarded as "an infringement on our patent rights" and would render "the vendor liable to prosecution as an infringer." The pith of the decision lay in the invalidity of the restrictions sought to be imposed upon the title by the notices used, and the case was deemed to be within the ruling of *Bauer* v. *O'Donnell, supra.* The Court made it clear that its decision was not intended to conflict with the rule that the defendants were "not required to sell to anyone they do not wish" (*id.*, 729).

Reference is also made by the Government to the charge of the District Court to the jury in *Frey & Son* v. *The Welch Grape Juice Co.* (in the District of Maryland) and *Lowe Motor Supplies Co.* v. *Weed Chain Tire Grip Co.* (in the Southern District of New York), respectively, not reported. The case of *Frey & Son* v. *The Welch Grape Juice Co.* is now before the Circuit Court of Appeals in the Fourth Circuit (on re-argument), and whatever

may be said with respect to the charge of the Judge in the case in the Southern District of New York, there is little reason for doubt as to the position of the Circuit Court of Appeals of the Second Circuit (see *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, C. C. A., Second Circuit 227 Fed., 46; a note of which, with quotation from the opinion, is found in the appendix to this brief.)

We do not, of course, dispute the proposition that an unlawful restraint of trade may be effected by contract, combination or conspiracy. But the question always remains, in each case, whether the conduct involved constitutes an unlawful combination in restraint of trade. And we ask wherein *does* the conduct of Colgate & Company and of its dealers, charged in this indictment as construed by the District Court, constitute an unlawful combination?

It has been established that there is present no unlawful restraint of trade by reason of the imposition and enforcement of a restraint upon the right of alienation of movables sold, because each buyer received a full and unqualified title and possessed complete freedom of alienation.

It cannot be successfully maintained that an unlawful restraint of trade was effected through the refusal of the Company to sell to dealers charging unfair and unreasonable prices, since such refusal was merely the exercise of a fundamental right.

It seems to us to be an utter confusion of thought to treat a refusal to sell as being in the same category with a contract between dealers and manufacturers to maintain resale prices. In the latter case

there is a sale, the title passes, and the contract seeks to restrict the dealer in the sale of what he owns, that is to say, to deprive him of the *right* to name his own price on the sale of his own goods. That is the vice of the restrictive contract.

On the other hand, a refusal to sell cannot qualify the title of an article sold, since no title passes. The dealer is not deprived of the right to name terms of his own sales. It is merely the exercise of the manufacturer's undoubted right not to sell, if he does not choose to sell. He may do this because he does not like the dealer's methods in reselling, or because he does not wish to trade with the dealer at all.

As Judge Hough said in the *Cream of Wheat* case (224 Fed., 566, 572):

> "But mere abstention from dealing can not *per se* be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforcible. To call defendant's acts price fixing is inaccurate, and evades obvious legal questions, viz., whether defendant has the right to decline business, and whether it is anybody's business why the business is declined."

It is alleged that the dealers, for the most part, resell at the indicated prices, and the Government insists that this is sufficient to make out the statutory offense.

The indicated prices must be taken, as we have seen, to be fair and reasonable prices. In what, then, resides the alleged illegality, the violation of law? It is not, as we have seen, in the manufacturer's refusal to sell. But is it not competent for a dealer to recognize the reasonable require-

ments of his own trade? Does he become a criminal because he voluntarily adheres to a fair and reasonable resale price? Does the mere recognition or adoption by a dealer of what he believes to be a reasonable course of conduct on his part, which he takes unfettered by any restrictive contract, subject him to the pains and penalties of the Sherman Law?

We, of course, do not contest the proposition that a combination need not be shown by direct evidence (*Eastern States Retail Lumber Dealers Association* v. *United States, supra,* 612; *Thomson* v. *Cayser, supra*). The combination condemned by the Act is a fact, and like other facts may be established by any competent proof sufficient for the purpose. But the "combination" must be properly charged. The mere fact that there is a stable or uniform resale price is insufficient to establish a "combination" or "conspiracy" under the Sherman Act.

In every community, among both manufacturers and dealers, there are illustrations of standard and uniform prices for similar products which afford no basis for the charge of criminal "combination" or "conspiracy." The daily newspapers in our cities offer a familiar example, and there are many others. Many circumstances, principally economic, may tend to uniformity of methods or prices without the prohibited and criminal combination.

The present case does not permit such inferences as may be drawn in the case of the concerted action of competing manufacturers or of dealers in the products of different manufacturers. We are considering the case of a single manufacturer merely

exercising an unquestionable legal right and of dealings in his products alone. The case pivots on the manufacturer's refusal to sell, an entirely lawful proceeding. He cannot, as we have seen, be deemed to have lost that right because he thinks that fair and reasonable prices are essential to the industry and refuses to sell to those who fail to charge such prices. And, if the manufacturer has this right, the fact that dealers actually sell at such fair and reasonable prices affords no basis for a finding of combination or conspiracy. The dealers have no relation to each other. Each one deals with the manufacturer. Each one, unrestrained in his liberty of action by any contract or qualification of his title, resells at prices which are fair and reasonable. He may sell or not as he chooses; and how can he be said to be guilty of entering into an alleged conspiracy because he decides to sell at such prices? The case has no analogy to one where the manufacturer establishes a series of interlocking restrictions through a system of contracts with his dealers, restraining their liberty of resale; in such case it is the system of contracts that effects the combination. But certainly, in the absence of such contracts, there is no basis for such inferences of combination as may be drawn from the concerted action of several manufacturers or of dealers selling commodities produced by several manufacturers.

Take the typical case. A dealer buys from the manufacturer. He knows what is a fair and reasonable resale price. He knows that a fair and reasonable resale price is necessary for the prosperity of the trade and the proper service of the

public. He, like the manufacturer, can sell to whom he pleases, and at what price he pleases. He knows that the manufacturer will not continue to sell to those who resort to unfair methods and unfair prices and he thinks that the manufacturer is entirely right. He resells at the fair price. Before the dealer resold at the fair resale price, the manufacturer was clearly within his rights. Does the resale make both the manufacturer and the dealer transgressors of the law?

Again, the dealer has nothing to do with other dealers. Yet, if nine dealers resell at a price known by all to be fair and reasonable, and treated by them as such, and one dealer sells at a different price, are the nine to be regarded as conspirators under the Sherman Act, and is the one who sells at more or less than a fair and reasonable price the only one who is obedient to the law? And if he sees the error of his ways, and concludes that it would be better for the industry to make his sales at what is recognized in the trade as a fair and reasonable price does he then become a criminal? As the manufacturer is entitled to sell or not, as he pleases, and to refuse to sell to dealers who resort to methods injurious to the industry and trade, so also a dealer has a right to sell or not, as he pleases, and the mere fact that the dealer, unrestrained by contract, sees fit to recognize the justice of the situation and to make his sales only at fair and reasonable prices furnishes no ground for regarding either the manufacturer or the dealer as a violator of the statute. And what one dealer may do in such a case, any other dealer, or all other dealers, may do in like manner.

There is no combination of manufacturers, and there is no combination of dealers. There is the entirely legal relation of manufacturer and customer, and the act of each, incidental to this relation, is entirely within his rights.

We see, therefore, that the Government's proposition is wholly untenable, if the adherence by the dealer to the fair and reasonable prices indicated by the manufacturer is an act based on his own judgment as to the fairness and reasonableness of the prices, and as to the advisability of his action in the light of a sound merchandising policy and the true interests of the public.

It may be urged, however, that in fact the adherence of the dealer to such prices was compelled by the threatened action of the manufacturer to refuse further supplies. To this argument, it may be answered:

FIRST.—That the Government's proposition does not exclude the voluntary and entirely legal action of the dealer in the manner and upon the grounds above stated;

SECOND.—That the transaction is between the single manufacturer and each dealer separately, and there can be no combination between them within the meaning of the statute unless the dealer himself is a guilty party to it, and he cannot be charged with being gulity of illegal conduct under the act, unless his action is both of a voluntary and illegal character;

THIRD.—That it in no way derogates from the entire legality of the manufacturer's attitude and policy to describe it as a threat; and,

FOURTH.—That the question still remains—exactly the one already discussed, whether the manufacturer may refuse to sell to a dealer who resorts to injurious practices by failing to maintain fair and reasonable prices. If he may so refuse, he may of course state the grounds of his refusal (entirely legal grounds), and he may announce that he will refuse (that is, he will do what he has a right to do).

If, in fact, the dealer enjoys a full title in what he buys, and is under no restrictive contract qualifying that title, his freedom to alienate is complete. The so-called "threat" is simply the assertion of the manufacturer's constitutional liberty thereafter to withhold his goods from sale, and there is no restraint whatever.

Suppose, for example, that the manufacturer declined to sell but gave no reason for it, would he be in any better case? And if so, why? Does the reason, or the statement of it, invalidate his action or impair his liberty? The truth is that all dealers must satisfy their manufacturer or they must go without goods. The freedom to which they are entitled attaches to the goods they buy and own. Whether they will have further supplies must necessarily depend upon the manufacturer's judgment.

Similarly, the assertion of "suppression of competition between dealers" is without legal significance, if the alleged "suppression" consists in the action of the manufacturer in refusing to sell to customers whose conduct is prejudicial to the industry. There is no evil in maintaining this necessary liberty; in fact, sound public policy supports it.

"Combination" is a term which fits the concerted action of rival producers. It fits the concerted action of competing dealers. It may fit a system of restrictive contracts tying the dealers together through interlocking restraints imposed by their mutual stipulations qualifying their title. But the term "combination" does not fit—and no zeal of prosecuting officers can make it fit—the case where a manufacturer simply exercises his legal right to refuse to sell upon stated grounds; where he simply exercises this right because he objects to unreasonable and injurious practices of his would-be customers; where there is no concert whatever among the dealers themselves; where the manufacturer thus deals with each dealer separately and simply as a customer; and where he is acting as a single manufacturer, pursuing his own individual policy in his own business, without any concert with other manufacturers of similar articles.

There is, in truth, upon the facts stated in the indictment, no combination whatever, and, as we view it, there is here simply a resort to the unheard of process of attempting to create a combination by a legal fiction in order to apply a criminal statute.

The judgment of the District Court should be affirmed.

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APPENDIX.

Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co., C. C. A., Second Circuit,* 227 *Fed.,* 46, *decided on November* 10, 1915 (*affirming* 224 *Fed.,* 566).

Defendant was engaged in the business of selling selected purified wheat middlings put up in packages under the name of "Cream of Wheat," using less than one per cent. of the total purified middlings bought and sold in this country. It confined its sales exclusively to wholesalers, with the exception hereinafter noted, charging two prices, viz., $3.95 per case in car load lots and $4.10 per case in less than car load lots. To each wholesale purchaser it sent a circular requesting such purchaser to sell to the retail trade only at a price of $4.50 per case, adding to this request the statement that it did not intend to waive the right to refuse at any time to supply any dealer failing to comply with any request made by it, the infringement of which defendant might deem prejudicial to the interests of the consumer, to defendant's own business, or to the trade at large. Plaintiff was a large retailer of grocery products. Notwithstanding the policy of confining its sales exclusively to wholesalers, defendant sold its product direct to plaintiff, for a time, at wholesale rates and in large quantities with the request that, in making sales over the counter, no smaller price should be charged than the small retailer had to ask in order to get a fair profit, viz., not less than 14 cents the package. On or about a certain date plaintiff began to sell "Cream of Wheat," at retail, for 12 cents per package, whereupon defendant refused

to sell its product to plaintiff at any price or in any quantity whatever. Plaintiff then sought an injunction under the Clayton Act compelling defendant to continue to sell "Cream of Wheat" to plaintiff, as defendant sells to the wholesalers who trade with it. Plaintiff contended that defendant's course of conduct was a violation of the Sherman Act and that under the Clayton Act this suit may be instituted and maintained by it. The motion for the injunction was denied by District Judge Hough (224 Fed., 566) and an order entered accordingly. Upon appeal, the Circuit Court of Appeals, Second Circuit, affirmed this order. The appellate court, speaking through Circuit Judge Lacombe, after stating that it was unnecessary to go into the question whether this suit may be instituted and maintained by plaintiff under the Clayton Act, held that the plaintiff was not entitled to the relief ask for, since it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to wholesalers. To quote the expressive language of Judge Lacombe:

> "Much has been said about the reason why defendant ceased to treat complainant as an exception to its rule; failure of the latter to live up to some arrangement, etc. All that seems to be wholly immaterial. The business of defendant is not a monopoly, or even a quasi-monopoly. Really it is selling purified wheat middlings, and its whole business covers only about one per cent. of that product. It makes its own selection of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones, and

Robinson to make their selections out of the other ninety-nine per cent. of purified middlings and put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may persuade the public that they are. It is difficult to see how into such a business as that any novel and exceptional rule of law is to be imported. We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice.' Cooley on Torts, page 278. See also, our opinion in Greater New York Film Co. v. Biograph Co., 203 Fed., 39, 121 C. C. A., 375.

"Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him political, racial, or social. That was purely his own affair; with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government" (pages 48-49).