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Price-Fixing Agreements Under the Sherman Anti-Trust Law*

John C. Peppin†

Since publication of the first installment of this article, the Supreme Court has rendered its decision in the Socony-Vacuum case, in which five of the members of the Court joined in an opinion which stated in the plainest language conceivable that all agreements which fix or in any way affect prices are unlawful per se under the

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192 Peppin, Price-Fixing Agreements Under the Sherman Anti-Trust Law (1940) 28 Calif. L. Rev. 297 (hereinafter referred to as Part I).

Mr. Justice Black had not heard the four-hour argument in the case. See (1940) 8 U. S. Law Week 245, 247, 282. Participation under such circumstances is sometimes considered improper as evidenced by state constitutional provisions, statutes, and decisions. Thus in California, section 2, article VI of the constitution requires that the concurrence of four justices “present at the argument” shall be necessary to pronounce decision. See Bowles v. Wood (1907) 90 Miss. 742, 44 So. 169; Corning v. Slosson (1857) 16 N. Y. 294 (dealing with similar statutory requirement). The obvious reason for such provisions is that the absent judge may have decided differently if he had heard the argument. See Johnson v. Lewis (S. C. 1845) 1 Rich. Ek. 390, 391. This reason would apply with greater force where, as in the Socony-Vacuum case, the decision was a close one on which trial and appellate courts differed and where the case was deemed by the Court itself to be so important as to warrant four hours of oral argument instead of the customary two hours. In the Supreme Court of the United States other members of the Court seem to regard it as sufficient ground for disqualification that they did not hear the argument. Thus Mr. Justice Roberts disqualified himself for this very reason in Ford Motor Co. v. N. L. R. B. (1939) 305 U. S. 364, 376. And this seems to be the reason for the disqualification of Chief Justice Hughes in State Tax Comm. v. Van Cott (1939) 306 U. S. 511. See (1939) 6 U. S. Law Week 1007.
Sherman Act. In doing so the Court purported to distinguish the Appalachian Coals case on the grounds discussed in greater detail later, but did not expressly overrule it. After making its purported distinction, however, the Court added language which was wholly inconsistent with that case having any further vitality whatever. The Court in the Socony-Vacuum case also stated flatly that the state of the common law at the time the Act was passed or at any other time was wholly immaterial to the determination of the legality of price-fixing agreements under the Act. Standing by itself the Socony-Vacuum case removed much, if not all, of the uncertainty to which reference was made at the start of the first installment of this article. But in the subsequent decision in Apex Hosiery Co. v. Leader the Court indicated a retreat from both of these propositions and that the Socony-Vacuum case will in the future be confined to agreements whose purpose or effect is to fix or affect "market" prices, as distinguished from the prices of the parties to the agreement. In the Apex case the Court cited the Appalachian Coals case approvingly several times, and thereby indicated that it is not to be regarded as overruled. It also announced that the common law at the time the Sherman Act was adopted was the criterion of validity of agreements and combinations under the Sherman Act, even today. Thus Mr. Justice Stone, speaking for the Court in the Apex case, said:

"In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between states."

He added:

"This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are

195 Appalachian Coals, Inc. v. United States (1933) 288 U.S. 344.
197 Part I, op. cit. supra note 192, at 302-305.
198 Supra note 193.
only those which are comparable to restraints deemed illegal at common law, ..."\(^{200}\)

Unless, therefore, we are to say that labor and business are not entitled to equal treatment before the present Supreme Court, it would seem difficult to deny that the Court in the *Apex* case either showed that it did not mean, or took back much of what it said in the *Socony-Vacuum* case and has re-introduced much confusion into the subject.

Assuming that this part of the *Apex* opinion stands, the common law on restraint of trade must still be regarded as controlling in Sherman Act cases. In the first installment of this article it was assumed that the common-law authorities would and should play an important part in the decision of the question of the validity of price-fixing agreements under the Sherman Act.\(^{201}\) The Supreme Court had repeatedly said that they did in the past.\(^{202}\) For this reason an analysis of all the common-law authorities that could be found which had been decided before July 2, 1890, was made and the conclusion reached that those authorities did not support the proposition that price-fixing agreements were unlawful *per se* and that Judge Taft was pretty clearly wrong in the *Addyston Pipe* case,\(^ {203}\) at least so far as he sought to declare the law in force on July 2, 1890. (Nowhere in the *Socony-Vacuum* opinion is this disputed. On the contrary, it was impliedly recognized by the Court itself when it found it necessary to abandon the common law as the prop for the unlawful *per se* rule announced therein—a prop which had always found a place in previous opinions supporting that rule.)

To this writer this seemed, when coupled with strong evidence that the 1890 Congress intended to adopt the common law (evidence

\(^{200}\)Ibid. at 995, 84 L. ed. Adv. Ops. at 925. The conclusion that legality of combinations and agreements under the Sherman Act is to be tested by the common law was recently made the main ground of decision in the important case of United States v. American Medical Ass'n (App. D. C. March 4, 1940) 110 F. (2d) 703, 707, where the court, after a lengthy review, came to the conclusion that "It must, therefore, be considered that the scope of 'restraint of trade' in Sec. 3 is to be measured by its use at common law." *Ibid.* at 708. The Supreme Court denied review of this decision on June 3, 1940. See 60 Sup. Ct. 1096, 84 L. ed. Adv. Ops. 1099.

\(^{201}\)To this effect also is Hamilton, *Common Right, Due Process and Antitrust* (1940) 7 Law & Contemp. Prob. 24, 26, also relying on Senator Hoar as authority. Cf. Pope, *The Reason for the Continued Uncertainty of the Sherman Act* (1912) 7 Ill. L. Rev. 201, 217.

\(^{202}\)Part I, *op. cit. supra* note 192, at 305-308.

which the Supreme Court itself recognized as such in the "Apex" case) to be conclusive evidence that the intention of the Congress which passed the Sherman Act was not to condemn all price-fixing agreements but only those found to be unreasonable. It was shown that Senator Hoar (whose views the Court strongly relied on in the "Apex" case) agreed with this conclusion.

It was implied in that discussion that the common-law authorities after 1890 took a different turn, and so some of them in this country did. But it would seem wholly immaterial that they did, even if it be assumed that all of them did. Obviously authorities decided subsequent to July 2, 1890, can be of no aid in determining the intent of the Congress which placed the Sherman Act on the statute books at that time. This is so plain as to require no discussion.

If it be assumed, however, that the common-law authorities subsequent to July 2, 1890, somehow become of significance in determining what the 1890 Congress intended, it is perfectly clear that the majority of those authorities do not now condemn all price-fixing agreements.

It would seem proper to continue the discussion of the common-law authorities along the lines originally staked out in this article and then to follow with a consideration of the cases decided under the Sherman Act, so that it may appear in the clearest possible manner: (1) that the view declared by the Supreme Court in the "Socony-Vacuum" case is not in accord with the common-law view of price-fixing agreements, either in 1890 or the present time, and that accordingly it may fairly be said, in the light of the previous discussion, that it represents not the intention of the Congress which passed the Sherman Act in 1890, but the intention of five members of the Supreme Court in the year 1940; and (2) that the statement of Mr. Justice Douglas in the "Socony-Vacuum" case that for over forty years the view now declared has been adhered to "consistently and without deviation" is incorrect.

COMMON-LAW AUTHORITIES SUBSEQUENT TO ENACTMENT OF SHERMAN ACT

1. English Authorities

As shown in the first installment of this article, the common-law view prevailing both in England and in this country at the time the

204 60 Sup. Ct. at 842, 84 L. ed. Adv. Ops. at 792.
Sherman Act was enacted (July 2, 1890) was that price-fixing agreements were not unlawful per se but were unlawful only if unreasonable.

English cases decided subsequent to the enactment of the Sherman Act continued to follow and in fact reaffirmed more strongly than ever before the view thus previously expressed, and such view prevails in England today. Thus in a series of cases, agreements directly fixing prices,\(^2\) or setting up agencies with authority directly to fix prices\(^3\) were upheld because reasonable. Cases involving re-

\(^2\)In Cade v. Daly [1910] 1 Ir. R. 306, the High Court of Justice for Ireland, deciding on basis of English cases, upheld an agreement by several bottlers (described by the court as "a few local bottlers") in the City of Cork, Ireland [ibid. at 320] by which they agreed (in order to eliminate price cutting as between themselves) not to sell mineral waters, beer, stout, porter, hop bitters, or ginger stout at lesser prices than those fixed in the agreement to any customer residing or carrying on business within a radius of sixteen miles of the city of Cork, except in two towns specifically named, any party having a right to withdraw on one month's notice. The court said "The test of validity is reasonableness." Ibid. at 319. It also added: "Having regard to all the facts and circumstances of this case, I am prepared to hold not merely that this contract is not per se unlawful, but that it is a legitimate and fair arrangement to which a Court of Equity can give effect without infringing upon the principles by which the Court is fettered by authority." Ibid. at 320-321. In The King v. Gage (Ct. of App., Manitoba 1908) 13 Can. Cr. Cas. 428, 436, the court upheld an agreement fixing minimum commissions of grain dealers as not violating the Canadian antitrust law, which was assumed to set up the same standard as the common law, the court justifying the agreement on the ground the rate fixed "is the lowest price at which the business can properly be done, with a reasonable profit to those engaged in it, and that the allowing a reduction below that reasonable rate, would result in an unstable market." Ibid. at 436. In Weidman v. Shragge (Can. Sup. Ct., 1912) 2 D. L. R. 734, an agreement between two dealers in junk, fixing specific purchase prices and selling prices for junk, was held to violate the Canadian antitrust law although the agreement was conceded by the court to be valid at common law. The Manitoba Court of Appeal had upheld the agreement on the basis of such common-law authorities as Hearn v. Griffin (1815) 2 Chitty 407; Collins v. Locke (1879) 4 App. Cas. 674; and Ontario Salt Co. v. Merchants Salt Co. (1871) 18 Grant Ch. 540 [see Shragge v. Weidman (Ct. of App., 1910) 20 Man. L. R. 178 at 188, 200, 204, 205], holding the Canadian antitrust law declared the same rule as the common law. In Attorney Gen. for Ontario v. Canadian Wholesale Grocer Ass'n (Ontario Sup. Ct.) [1923] 2 D. L. R. 617, an agreement fixing wholesale prices of starch was upheld because reasonable, even under the Canadian antitrust law, which sets up a stricter standard than the common law (Weidman v. Shragge, supra).

\(^3\)Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co. [1913] A. C. 781 (upholding "vend agreement" between colliery owners which divided the business among them according to agreed proportions and set up a board with power to fix the selling prices for all, and which actually resulted in a 20 per cent rise in their prices in two years time, as against charge that it violated the Australian statute which made criminal contracts entered into with intent to restrain trade or commerce "to the detriment of the public"); North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd. [1914] A. C. 461 (upholding agreement between substantially the whole of the salt manufacturers in northwestern England who together had the practical control of the
inland market in England for certain types of salt, setting up corporate selling agency with power to fix selling prices for all); Rawlings v. Gen. Trading Co. [1921] 1 K. B. 635 (upholding agreement between prospective purchasers to the effect that one should bid for goods and if bid accepted, goods to be divided equally between them); Ware and DeFreville v. Motor Trade Ass'n [1921] 3 K. B. 40 (upholding agreement between manufacturers and dealers in automobiles whereby the dealers agreed to resell only at the manufacturers' list prices—a horizontal and vertical arrangement—as against claim that it restrained trade); Crown Milling Co., Ltd. v. The King [1927] A. C. 394, 396, rev'd [1925] N. Z. L. R. 753 (upholding agreement by nearly all of flour millers of New Zealand establishing common selling agency with power to fix prices for all as against charge that it violated New Zealand statute making criminal any conspiracy to monopolize or control the demand or supply of goods "if such monopoly or control is of such a nature as to be contrary to the public interest"); English Hop Growers v. Dering [1928] 2 K. B. 174 (upholding agreement by 90 per cent of hop growers of England setting up a common selling agency to sell hops at prices fixed by the agency); The Sydney Brick Co. v. Speare (N. S. W. Sup. Ct., 1893) 14 N. S. W. (Eq.) R. 350 (upholding combination of brick manufacturers in Sydney, Australia, setting up common selling agency to fix prices and divide market on authority of Collins v. Locke, supra note 205, degree of control of market not appearing); MacEwan v. The Toronto Gen. Trusts Corp. (1916) 54 Can. Sup. Ct. 381 (agreement setting up a common selling agency by producers of 90 per cent of salt manufactured in Canada, with power to fix prices, and exercise exclusive control of salt works of parties to agreement upheld as not violating common law or Canadian antitrust law, following North Western Salt case, supra); Associated Growers of B. C. v. B. C. Fruit Land Co. (B. C.) [1925] 1 D. L. R. 871 (upholding agreement among 80 per cent of vegetable growers of British Columbia setting up agency to fix prices even as against charge of violating Canadian antitrust law); Saskatchewan Co-op. Wheat Producers v. Zurowski (Sask. Ct. App.) [1926] 3 D. L. R. 810 (upholding as not contrary to common law or Canadian antitrust law agreement by wheat growers setting up selling agency with power to fix prices for all).

In two of the cases above cited the courts were construing special statutes and not the common law, as indicated above. Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co.; and Brown Milling Co., Ltd. v. The King, both supra. The Adelaide case expressly disclaims any intention of deciding on the basis of the common law. But later English cases have overlooked this point and regard the Adelaide case as a common-law case. North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., supra; Joseph Evans & Co. v. Heathcote [1918] 1 K. B. 418; Rawlings v. General Trading Co., supra; English Hop Growers v. Dering, supra. Accordingly, the Adelaide case seems clearly to express the present common-law view in England. See Levy, The Sherman Law and the English Doctrine (1920) 6 CORN. L. Q. 36, 49; Levy, The Sherman Law and the Australian Statute (1923) 9 Va. L. Rev. 409, where it is assumed that the Australian statute is declaratory of common-law principles; Simpson, Does the Law of England Forbid Monopoly? (1925) 41 Q. Rev. 393, 406, 407. The decision in Crown Milling Co., Ltd. v. The King, supra, is also based on a statute—the New Zealand statute above referred to. An examination of the opinion of the Privy Council and the opinions of the judges of the New Zealand Court of Appeal which it approved lead clearly to the conclusion that the test laid down by this statute was the same as that laid down by the English common law. Thus English common-law cases were cited as determinative. See [1927] A. C. 403, 404, and The King v. Crown Milling Co., Ltd. [1925] N. Z. L. R. 753, 805, 834, 835.

In Thorne v. Motor Trade Ass'n [1937] A. C. 797, the House of Lords gave approval to the arrangement approved in Ware and DeFreville v. Motor Trade Ass'n, supra, when it upheld a provision designed to enforce the agreement. The provision was
sale price-maintenance agreements appeared for the first time, and such agreements were uniformly and apparently unqualifiedly upheld in England.\textsuperscript{207}

Examination of the reasoning used in these cases reveals that the test of the validity of price-fixing agreements in England was virtually the same after as before July 2, 1890, and remains the same today. Thus the English courts continued to stress that the agreement was designed to end a ruinous competition;\textsuperscript{208} that the party violating the agreement would have his name put on a "stop list" (involving boycotting) unless he paid a fine. The threat to put a dealer's name on such a stop list was held not to constitute a crime under a statute prohibiting persons from demanding any property or valuable thing "with menaces, and without reasonable and probable cause". [1937] A. C. at 800. The court held that since here the demand was in furtherance of legitimate trade interests it was with reasonable cause. See Campbell, \textit{The Anomalies of Blackmail} (1939) 55 L. Q. Rev. 382, discussing the Thorne case.\textsuperscript{207}

\textsuperscript{207}Ellimans, Sons & Co. v. Carrington & Son, Ltd. [1901] 2 Ch. 275; Dunlop Pneumatic Tyre Co. v. Selfridge & Co. (1913) 29 T. L. R. 270; Palmolive Co. (of England) v. Freedman [1927] 2 Ch. 333. See also Ware & De Freville, Ltd. v. Motor Trade Ass'n, \textit{supra} note 206. In Ellimans, Sons & Co. v. Carrington & Son, Ltd., \textit{supra}, at 279, Kelkewich, J., said that such an agreement was "just about as much \ldots in restraint of trade as for Ellimans to say that they will not sell at all." In Dunlop Pneumatic Tyre Co. v. Selfridge & Co., \textit{supra}, at 271, Mr. Justice Phillimore said that "Price maintenance agreements were modern things and were strange to those who had been brought up on older lines, but they were in almost universal commercial use, and it would be a scandal if they could not be enforced." See good discussion of English authorities in Palmolive Co. v. McCaskie (N. S. W. Sup. Ct., 1925) 26 N. S. W. St. R. 212, 214. The above cases seem to indicate unqualified approval of resale price-maintenance agreements by the English courts.

Resale price-maintenance agreements did not meet with such complete success in the Dominions. In Australia, the English view of resale price-maintenance agreements was followed in Palmolive Co. v. McCaskie, \textit{supra}, but the court stressed that the prices fixed were reasonable, indicating that limitation on the rule. In Canada such agreements were held to violate the Canadian antitrust law where the prices fixed were unreasonable. Wample & Co. v. F. E. Karn Co. (H. Ct. of J., 1906) 11 Ont. L. R. 619, 627; Stearns v. Avery (Ont. Sup. Ct. 1915) 24 Can Cr. Cas. 339. They were upheld, however, where it was not shown that the prices fixed were unreasonable. Attorney Gen. for Ontario v. Canadian Wholesale Grocer Ass'n, \textit{supra} note 205, at 653.\textsuperscript{208}

\textsuperscript{208}Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co., \textit{supra} note 206, at 803-804 (failure of collieries to pay dividends, their falling into hands of bank who had financed them and payment of low wages without prospect of rise, all in a period of advancing prices relied on to show competition ruinous). In North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., \textit{supra} note 206, at 469, Viscount Haldane said: "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view." Lord Parker expressed much the same views,
parties did not control the market\(^\text{209}\) (although in four cases control of the market seemed clearly to exist and yet agreements were upheld\(^\text{210}\)), and that the prices fixed were reasonable\(^\text{211}\) as indicating

adding, "it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition." \textit{Ibid.} at 480. In \textit{Ware & De Freville v. Motor Trade Ass'n}, \textit{supra} note 206, at 71, Scrutton, L. J., said: "While low prices may be good for the public for the time, they are not a benefit if all the suppliers are thereby ruined. A steady level price may have considerable advantage over violent fluctuations from very high prices in times of scarcity, and fierce competition and unremunerative prices in times of plenty or financial pressure." In \textit{Kerridge v. Rotorua Theatres (Sup. Ct.)} [1937] N. Z. L. R. 156, 180, the court in upholding a contract eliminating price and all other competition said: "...if the threatened competition really would have been ruinous, that circumstance would afford a strong reason why his company should be held to the contract into which it had entered in order to escape from ruinous competition."


\(^\text{209}\) Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co., \textit{supra} note 206, at 810 (effective present competition existed); \textit{North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.}, \textit{supra} note 206, at 469, 470, 471 (here there was seemingly no present existing outside competition, but the court thought that the mere possibility of outside domestic or foreign competition later developing was sufficient to indicate reasonableness); \textit{McEwan v. The Toronto Gen. Trusts Corp.}, \textit{supra} note 206, at 393 (although parties controlled 90 per cent of salt produced in Canada, quantity of imported salt exceeded that produced in Canada, and therefore agreement held reasonable because of lack of control of market); \textit{Cade v. Daly}, \textit{supra} note 205, at 320 ("To my mind, when the sphere of operations is 'cabinied, cribbed, confined' within such limits of time and space, when there is no prohibition, and can be no prohibition, against outsiders coming in and competing against any one or all of the persons named as parties to the covenant, the public at all events, cannot suffer wrong").

\(^\text{210}\) In \textit{North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.}, \textit{supra} note 206, there seemingly was no existing effective outside competition but only a "possibility" of it. In \textit{Kerridge v. Rotorua Theatres}, \textit{supra} note 208, at 184, the combination in the North Western Salt case was described as one "which had practical control of the inland salt market." In \textit{Ware and De Freville v. Motor Trade Ass'n}, \textit{supra} note 206, there was seemingly no effective outside competition. In \textit{Crown Milling Co., Ltd. v. The King}, \textit{supra} note 206, the combination consisted of practically all the flour millers of New Zealand who seem clearly to have had power to fix prices at their discretion. See \textit{ibid.} at 403; \textit{English Hop Growers v. Dering}, \textit{supra} note 206 (where growers of 90 per cent of hops produced in England were parties to agreement).

\(^\text{211}\) In \textit{Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co.}, \textit{supra} note 206, at 796, the court laid down as a test of validity at common law whether the agreement is calculated to produce a "pernicious monopoly" which was defined as one "calculated to enhance prices to an unreasonable extent." The court further said: "To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent." \textit{Ibid.} at 810. In \textit{North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.}, \textit{supra} note 206, at 469, the existence of "unremunerative prices" was said to justify a price-fixing agreement. It was stated that a combination to secure reasonable prices would be valid. \textit{Ibid.} at 480. In \textit{Rawlings v. Gen. Trading Co.}, \textit{supra} note 206, at 647, it was conceded that if the purchase price fixed were not below the fair value of the article, the agreement fixing such price would
that such agreements were reasonable and therefore legal. The fact that no protective tariff against foreign competition existed was relied on in one instance as indicating reasonableness because of greater probability of effective foreign competition. In others the power of the legislature to fix rates or lower a protective tariff was said to be a safeguard against possible abuse of power by a price-fixing combination. In one instance the desire of the combining parties to avert "state socialism" was held to indicate reasonableness. It was very definitely announced that a price-fixing agreement is presumed to be reasonable and that the burden is on the party attacking the validity of such agreement to establish its unreasonableness.

be lawful. In Ware and De Freville v. Motor Trade Ass'n, supra note 205, at 71, it was held that a combination to avoid "low" prices and to secure a "steady level price" was lawful. Crown Milling Co., Ltd. v. The King, supra note 206, at 402, 404 (the reasonableness of the prices fixed was assumed a defense); English Hop Growers v. Dering, supra note 206, at 181, 187 (combination reasonable where purpose to secure "a steady and profitable price"); Palmolive Co. v. McCaskie, supra note 207, at 214 (resale price-fixing agreement valid where prices reasonable); The King v. Gage, supra note 205, at 436 (agreement upheld fixing commissions for grain brokers at "the lowest price at which the business can properly be done, with a reasonable profit to those engaged in it"); Attorney Gen. for Ontario v. Canadian Wholesale Grocer Ass'n, supra note 205, at 654 (agreement fixing price of starch held valid where prices not unreasonably enhanced or trade not unduly restricted or injured); cf. Rex v. Canadian Import Co. (Queb. K. B.) [1935] 3 D. L. R. 330, 336, 362-365 (price-fixing combination held illegal because prices unreasonable).


213 In Crown Milling Co., Ltd. v. The King, supra note 206, the Privy Council, after reviewing opinions below ([1925] N. Z. L. R. 753), simply stated that the prosecution had failed to sustain the burden resting on it of showing public injury and so reversed, without giving independent reasons of its own, seemingly approving the reasoning of the trial court in New Zealand and of the dissenting judges in the highest court of New Zealand. One of those judges stressed the power of the legislature to fix maximum rates as preventing public injury. [1925] N. Z. L. R. at 806. Another stressed the power of the legislature to lower the protective tariff and let in foreign competition. Ibid. at 832. The failure of the Privy Council to make its own independent reasoning here came "as a slight shock" to the writer of the article in (1927) 43 L. Q. Rev. 314, 315.

214 The dissenting judges in the highest court of New Zealand stressed this. See The King v. Crown Milling Co., Ltd., supra note 206. The reasoning of these judges seems impliedly to have been approved by the Privy Council. See supra note 213.

215 In Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co., supra note 206, at 796-797, Lord Parker said, in referring to the common law: "It is, however, in their Lordships' opinion, clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it. ..." Cf., however, ibid. at 809. In North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., supra note 206, at 472, Viscount Haldane approved the views thus expressed by Lord Parker and held them applicable to a common-law case. Cf. ibid. at 470. The other judges also took the view that the agreement was not
was also made very clear that a contract restraining competition, including a price-fixing agreement, may be reasonable and valid even though not ancillary to any other lawful contract. As a matter of fact the English courts continued to affirm and reaffirm in case after case that the validity of non-ancillary agreements involving price fixing turned on whether the restraint (1) was reasonable in the interests of the parties, and (2) reasonable in the interests of the public—in short, the test laid down in *Mitchel v. Reynolds*, and which Judge Taft in the *Addyston Pipe* case expressly held not to be applicable to a non-ancillary agreement restraining competition. While some hostility to mere covenants not to compete, without more, was expressed, it is clear that the English courts did not unlawful *per se* but only if shown to be unreasonable. Lord Sumner said: "In a case such as this the burden is on the respondents of proving the illegality on which they rely. Since the decision of *Attorney General of the Commonwealth of Australia v. Adelaide Steamship Co.* this must be taken as established." *Ibid.* at 480. (Italics added). To like effect, see *Rawlings v. Gen. Trading Co.*, *supra* note 206, at 644, 650-651; *Crown Milling Co., Ltd. v. The King, supra* note 206, at 402, 405.

*216* *Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co., supra* note 206, at 795, stated that the rule of *Nordenfelt v. Maxim Nordenfelt Co.* [1894] A. C. 535 [extending rule of *Mitchel v. Reynolds* (1711) 1 P. Wms. 181] was applicable to non-ancillary price-fixing agreement. To like effect are *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., supra* note 206, at 473; *McEllistrim v. Ballymacelligott Coop. Agr. & Dairy Soc.* [1919] A. C. 548, 562, 563, indicating rule still remains that contract restraining competition to be valid must be (a) reasonable as to the parties as affording no more protection to their interests than necessary, and (b) reasonable in the interest of the public; *English Hop Growers v. Dering, supra* note 206, at 180, 185.


*218* *Supra* note 216.

*219* *Supra* note 203.

*220* In the *McEllistrim case, supra* note 216, at 563, Lord Birkenhead stated that "The respondents were not entitled to be protected against mere competition." In *Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries, Ltd., supra* note 217, a covenant in connection with sale of a non-transferable license to brew beer, that in consideration of $15,000 defendant would not engage in business of manufacturing and selling beer for fifteen years, was held to be unlawful as in restraint of trade, because unlimited
mean to qualify in any way the rule with respect to price-fixing agreements.

On the other hand, English courts, in several instances, held agreements involving the direct fixing of prices unlawful because unreasonable. The feature most strongly stressed by courts in hold-

in space. But the court added language (seemingly dicta) supporting the proposition that contracts seeking to protect parties "against mere competition" were unreasonable and void. Notwithstanding the citation by counsel to Wickens v. Evans (1829) 3 Y. & J. 318; Shrewsbury & Birmingham Ry. v. London & Northwestern Ry. (1851) 17 Q. B. 652; Collins v. Locke, supra note 205; Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co., North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., both supra note 206; and Palmolive Co. (of England) v. Freedman, supra note 207, the court said "so far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract, or arrangement effective." [1934] A. C. at 190. (Italics added.) This clearly indicates that the court did not mean to qualify or impeach the authority of the cases thus cited by counsel, but intended to limit its condemnation to contracts which simply bind a party not to compete without more. In fact Lord Mac-Millan expressly said that here the case was not one "of an arrangement among traders to submit themselves to mutual restrictions on their activities in the common interest of all the parties." Ibid. This is obviously a far cry from the position of Judge Taft in the Addyston Pipe case, who condemned such arrangements as bad per se. The Vancouver case was later held not to invalidate a covenant between competing exhibitors of motion pictures whereby some of the parties thereto agreed not to compete with defendant in a certain town in order to eliminate ruinous competition and secure reasonable profits. In Kerridge v. Rotorua Theatres, supra note 208, at 185, Callan, J., said: "In my view, what is meant by 'bare' competition or 'mere' competition is competition which the covenantee cannot show he ought not to have submitted to"; that in the Vancouver case "the covenantee had simply taken advantage of the financial difficulties of the covenantor"; and that there "There was nothing whatever to suggest that such a bargain was necessary to protect the legitimate interest of the covenantee—namely, its retention of steady and adequate profits." But where a covenant not to compete was not made to eliminate ruinous competition or to preserve stability of trade and adequate profits, it was held in unreasonable restraint of trade. Ibid. In Invercargill Sports Depot, Ltd. v. Patrick (Sup. Ct.) [1939] N. Z. L. R. 161, 164, a provision of articles of incorporation of a corporation forbidding any stockholder as such from competing with the corporation was held in unreasonable restraint of trade as "merely preventing competition by members." From these cases it would seem that the Vancouver case simply creates a presumption of invalidity with respect to bare covenants not to compete—a presumption which can be rebutted by showing justification. In The King v. Clark (Alberta 1903) 14 Can. Cr. Cas. 57, 69, it was held that an agreement by a competitor not to compete while holding himself out to the public as an active competitor was unreasonable and illegal both at common law and under the Canadian antitrust law. See also language in Townsend v. Jarman [1900] 2 Ch. 698, 702. But cf. language in E. Underwood & Son, Ltd. v. Barker [1899] 1 Ch. 300, 305.

221 Urmston v. Whitelegg Bros. (1890) 63 L. T. (N. S.) 455 (agreement between association of manufacturers of mineral water in Bolton—the extent to which they con-
ing such agreements unreasonable was that the agreement was to run for a long period of time and gave a party no privilege of withdrawal unless the other parties thereto consented.\footnote{222} Control of the
trolled market not appearing—not to sell at less than certain minimum prices specified in agreement, or as modified by committee from time to time, for a ten-year period, with no right of withdrawal held illegal); Mogul Steamship Co. v. McGregor [1892] A. C. 25 agreement between shipowners to cut prices in order to drive competitor out of business assumed to be illegal restraint of trade, affirming court of appeal on reasoning similar to that employed by court of appeal. See Part I, op. cit. supra note 192, at 332-333; Joseph Evans & Co., Ltd. v. Heathcote, supra note 206, (agreement between manufacturers of cased tubes, who seemingly controlled the market, forming association which limited production, divided markets, and provided for minimum prices specified except as changed by the association in general meeting, with no time limit or right of withdrawal); McEllistrim v. Ballymacelligott Co-op. Agr. & Dairy Soc., supra note 216, (holding unlawful as in restraint of trade the by-laws of a society composed of producers of milk in certain specific townships in Ireland formed to manufacture butter and cheese from such milk, and to pay members a stipulated price for milk, which by-law required members not to sell any milk except to the society, except with the consent of the society. The fixing of prices seems not to have been attacked as illegal, however. No time limit or right of withdrawal existed, except with the consent of the society); Heron v. The Port Huon Fruitgrowers Co-op. Ass'n, supra note 217, (holding unlawful as in restraint of trade the articles of association of fruit-growers in Tasmania set up to sell fruit at prices to be fixed, members having no privilege of withdrawal without consent of society. Court followed McEllistrim case); The Pakenham Upper Fruit Co. v. Crosby (H. Ct. Aust.) [1925] V. L. R. 27 (same); Otaraia Co-op. Dairy Co., Ltd. v. Flynn, supra note 217, (holding unlawful as in restraint of trade by-law of co-operative dairy association of milk producers formed to buy milk of producers at fixed prices, producers having right to withdraw only in certain limited circumstances on satisfying onerous conditions, relying on McEllistrim case).\footnote{222} \footnote{Urmston v. Whitelegg Bros., supra note 221, at 456. The Urmston case contained other language which lends some support to the unlawful per se view of direct price-fixing agreements. Thus it was said, “During the last hundred years great changes have taken place in the views of the public, or the Legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtained that combination, for the mere purpose of raising prices is not enforceable in a court of law. \textit{Ibid.} at 455. This statement (strongly relied on by Judge Taft in the Addyston Pipe case) is obviously inaccurate in view of what has been said above. The attempt of the court to distinguish Wickens v. Evans, supra note 220, on the ground that the case did not involve direct price-fixing was clearly without foundation for, as we have seen, (1) that case did involve an agreement directly fixing purchase prices; and (2) even as to the portion of the agreement providing for the division of territory, that case necessarily went farther than an agreement which merely fixed prices without more, for it eliminated not only price competition, but all other competition as well. See Part I, op. cit. supra note 192, at 328. As stated by the High Court of Justice for Ireland in Cade v. Daly, supra note 205, the Urmston case is in reality explainable on the basis of the unreasonableness of the contract. Thus the court there said: “... I cannot imagine a more unreasonable contract or agreement than that in \textit{Urmston v. Whitelegg} ... There was no limit as to what we are in the habit of calling space and the limit as to time, instead of being six months as here, was the very considerable period of ten years. There was no clause enabling a party to retire from the agreement.” \textit{Ibid.} at 319. In Shragge v. Weidman, supra note 205, at 184, the Urmston case was thus dis-}
market, or unreasonableness of prices fixed were not stressed, or even mentioned. Most of these cases involved elements restraining trade other than or in addition to mere direct price fixing.223

Because of the fact that American common-law authorities since 1890 have been very strongly influenced by the vicissitudes of the Supreme Court construction of the Sherman Act and that the English common-law authorities have never been subjected to any comparable influence, it would seem that the latter are entitled to much greater weight as an indication of the common law.

2. American Authorities

After 1890 a substantial number of cases—many more than is generally supposed—continued to adhere to the views previously expressed, that price-fixing agreements are lawful if reasonable and unlawful only if unreasonable, with the elements indicating reasonableness or unreasonableness being substantially the same as before. Thus horizontal agreements directly fixing prices were upheld in many cases.224 In many more cases (especially in more recent times

223 Joseph Evans & Co., Ltd. v. Heathcote, supra note 206, involved limitation of production and division of markets also. McEllistrim v. Ballymacelligott Coop. Agr. & Dairy Soc., supra note 216; Heron v. Port Huon Fruitgrowers Coop. Ass'n, supra note 217; and Otaraia Coop. Dairy Co., Ltd. v. Flynn, supra note 217, all involved commitments by producers to sell all or a substantial part of their output to a common selling agency for a long period of time in addition to provisions fixing prices to be paid to producers, and this feature was the one on which main reliance was placed in each case.

224 Agreements directly fixing prices were upheld because reasonable in the following cases: Herriman v. Menzies (1896) 115 Cal. 16, 44 Pac. 660, 46 Pac. 730 [upholding agreement between a number of stevedores in San Francisco fixing prices to be charged for their services. Agreement found reasonable on grounds (1) that the parties did not control the market, and (2) that the prices fixed were reasonable, approving Central Shade Roller Co. v. Cushman (1887) 143 Mass. 353, 9 N. E. 629]; Burns v. Wray Farmers' Grain Co. (1918) 65 Colo. 425, 176 Pac. 487 (co-operative marketing association agreement illegal solely because of provision farmers could not sell except to association); Gloucester Isinglass & Glue Co. v. Russia Cement Co. (1891) 154 Mass. 92, 27 N. E. 1005 (upholding agreement between two manufacturers of glue from fish skins, who controlled the market, fixing price to be paid for fish skins and the selling price of the glue manufactured, stressing reasonableness of prices fixed, but indicating rule might be limited to goods which were not necessaries or staples ordinarily bought and sold on the market); Harelson v. Tyler (1920) 281 Mo. 383, 219 S. W. 908 (recog-
in co-operative marketing cases), agreements setting up common selling agencies with authority to fix prices were upheld.\textsuperscript{225} Resale

izing that by-law of hay dealers association controlling market fixing rates of such dealers for services was valid at common law); Raritan River R. R. v. Middlesex & S. Traction Co. (1904) 70 N. J. L. 732, 58 Atl. 332 per Mr. Justice Pitney, upholding agreement between competing railroad companies not to reduce rates during the life of a specified stipulation respecting litigation between them; Reed v. Salsaff (1900) 78 N. J. L. 158, 73 Atl. 1044 [agreement between proprietors of rolling chairs at Atlantic City to maintain a fixed schedule of rates upheld as reasonable on grounds that (1) parties did not control market, (2) rates fixed were in fact reasonable, and (3) rates were same as those fixed by city ordinance]; Brooklyn El. R. R. v. Brooklyn, B., & W. E. R. R. (1897) 23 App. Div. 29, 48 N. Y. Supp. 665 (agreement between connecting carriers on rates upheld); Kohart v. Skou (1914) 163 App. Div. 899, 147 N. Y. Supp. 509 [upholding agreement between two retail dealers fixing selling prices. Held reasonable on grounds that (1) parties did not control supply; (2) price fixed not “excessive”; and (3) would eliminate “a long and disastrous competition”]; New York Clothing Mfrs. Exch., Inc. v. Textile Finishers Ass’n, Inc. (1933) 238 App. Div. 444, 265 N. Y. Supp. 105 (agreement by textile finishers on prices to be charged clothing manufacturers for processing upheld on authority of Appalachian Coals case); Sailer v. Affiliated Dress Mfrs. (1938) 168 Misc. 319, 5 N. Y. Supp. (2d) 855 (agreement to raise depressed wages upheld, citing Appalachian Coals case); H. Lipman & Sons v. Brotherhood of Painters (Ohio App. 1939) 25 N. E. (2d) 853 (combination of laborers to raise wages did not violate Ohio antitrust law which condemns only combinations unlawful at common law); Queen Ins. Co. v. State (1898) 86 Tex. 250, 24 S. W. 397 [combination of insurance companies to fix rates held not illegal at common law, expressly disapproving the unlawful \textit{per se} rule and More v. Bennett (1892) 140 Ill. 69, 29 N. E. 888]; Lytle v. Galveston H. & S. A. Ry. (1907) 100 Tex. 292, 99 S. W. 396 (agreement between carriers and city whereby former to give reduced rates on excursion and to maintain usual rates to those not taking excursion upheld); Harris v. Commonwealth (1912) 113 Va. 746, 73 S. E. 561 (agreement between insurance companies fixing rates held not an indictable common-law conspiracy and not unlawful).

Several cases indicate approval of the rule of the foregoing cases but by way of dictum only: Georgia Fruit Exchange v. Turnipseed (1913) 9 Ala. App. 123, 62 So. 542 [co-operative marketing agreement void because unreasonably enhancing prices, but expressly approving Judge Sanborn’s review of the common law in United States v. Trans-Missouri Freight Ass’n (1897) 166 U. S. 290]; Over v. Bryam Foundry Co. (1906) 37 Ind. App. 452, 458, 77 N. E. 302, 304 (contract to purchase output of sash weights upheld, court quoting language from Herriman v. Menzies, \textit{supra}, to effect that combination between individuals or firms for the regulation of prices and of competition in business “are not unlawful as in restraint of trade, so long as they are reasonable”); Rohlf v. Kasemeier (1908) 140 Iowa 182, 118 N. W. 276 (holding agreement among physicians fixing fees was not indictable under Iowa antitrust law and indicating it was valid at common law); State v. Adams Lbr. Co. (1908) 81 Neb. 392, 412, 116 N. W. 302, 309 (agreement fixing prices and dividing territory held to be void under Nebraska antitrust law but said it was illegal at common law only if unreasonable); Anheuser-Busch Brewing Ass’n v. Houck (Tex. Civ. App. 1894) 27 S. W. 692, \textit{aff’d}, (1895) 88 Tex. 184, 30 S. W. 869 (holding price-fixing agreement by beer dealers of city invalid under Texas antitrust law, but stating it was not unlawful at common law).

\textsuperscript{225} Agreements setting up common selling agencies with authority to fix prices were upheld as against the charge that they restrained trade as a matter of common law in the following cases: Anaheim Citrus Fruit Ass’n v. Yeoman (1921) 51 Cal. App. 759,
price-maintenance agreements were upheld almost universally.\textsuperscript{226}

197 Pac. 959 (relying on Herriman v. Menzies, \textit{supra} note 224); Lee v. Clearwater Growers' Ass'n (1927) 93 Fla. 214, 111 So. 722 (reasonable because no attempt to limit production or control prices in any market); Brock v. Hardie (1934) 114 Fla. 670, 154 So. 690 (agreement fixing insurance rates not contrary to Florida antitrust law which seemingly set up same test as common law, where not alleged to be unreasonable); Burley Tobacco Soc. v. Gillaspy (1912) 51 Ind. App. 583, 595, 100 N. E. 89, 92 (held reasonable because purpose only to secure a fair and adequate price for products—was not in conflict with "the morals of the time"; also was a combination for the purpose of resisting a monopoly of tobacco buyers); Dark Tobacco Growers Coop. Ass'n v. Robertson (1926) 84 Ind. App. 51, 150 N. E. 105 (reasonable because competition not suppressed or coerced, prices not arbitrarily fixed or maintained, no unfair or fraudulent rivalry, production not limited and artificial scarcity not created, quality not impaired, wages or the price of materials not decreased); Kansan Wheat Growers Ass'n v. Schulte (1923) 113 Kan. 672, 216 Pac. 311; Potter v. Dark Tobacco Growers Coop. Ass'n (1923) 201 Ky. 441, 257 S. W. 33 (reasonable because of stabilizing farm prices); Nebraska Wheat Growers Ass'n v. Norquest (1925) 113 Neb. 731, 204 N. W. 798 (cooperative marketing association reasonable where prices not controlled); Barnes v. Dairymen's League Coop. Ass'n, Inc. (1927) 220 App. Div. 624, 222 N. Y. Supp. 294 (reasonable because (1) no control of market; (2) no unfair or vindictive practices; (3) desire to build up an orderly marketing system for dairy industry); Bullville Milk Producers Ass'n, Inc. v. Armstrong (1919) 108 Misc. 582, 178 N. Y. Supp. 612; Castorland Milk & Cheese Co. v. Shantz (N. Y. Sup. Ct., 1919) 179 N. Y. Supp. 131 (relying on Kohart v. Skou, \textit{supra} note 224); List v. Burley Tobacco Growers' Coop. Ass'n (1926) 114 Ohio St. 361, 377, 378, 151 N. E. 471, 476 (co-operative marketing association reasonable where price was conceded to reach only "those transactions which were unlawful at common law" and held agreement reasonable because (1) designed to promote "sound and sane relations between supply and demand"; (2) designed to prevent ruinous competition; (3) prices were not fixed in any market because of lack of control; and (4) combination was designed to defend against buying pools); Stark County Milk Producers' Ass'n v. Tabeling (1934) 129 Ohio St. 159, 194 N. E. 16 (following List case, \textit{supra}); Oregon Growers' Coop. Ass'n v. Lentz (1923) 107 Ore. 561, 582, 212 Pac. 811, 818 (not \textit{per se} illegal); State v. Burley Tobacco Growers' Ass'n (1926) 2 Tenn. App. 674; Washington Cranberry Growers Ass'n v. Moore (1921) 117 Wash. 430, 201 Pac. 773 (held reasonable on ground that arrangement did not result in limiting production or controlling or fixing the price in any particular market); Olympia Milk Producers Ass'n v. Herman (1934) 176 Wash. 338, 342, 29 P. (2d) 676, 678 (co-operative marketing association upheld because designed to secure "orderly marketing," "a uniform price" and to maintain prices at a "fair and reasonable level," and parties did not control the market).

It should be noted that in some of the foregoing cases co-operative marketing associations were involved and there existed in the states involved statutes expressly legalizing their activities. But the courts in such cases did not rest their conclusions on these statutes but on the ground, partially at least, that wholly irrespective of such statutes the activities were not in unlawful restraint of trade.

\textsuperscript{226}Dr. Miles Medical Co. v. Goldthwaite (C. C. D. Mass. 1904) 133 Fed. 794 (no reasoning); Ford Motor Co. v. Benjamin E. Boone, Inc. (C. C. A. 9th, 1917) 244 Fed. 335 (stressless lack of control of market and distinguishing Dr. Miles case, \textit{supra}, on this ground); Grogan v. Chaffee (1909) 156 Cal. 611, 613, 105 Pac. 743, 747 (stressless lack of any showing that olive oil subjected to agreement 'comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff,' and
On the other hand, while many other cases held agreements of the foregoing types unlawful as a matter of common law, these cases did not do so on the ground that all price-fixing agreements were expressly approved reasoning of Herriman v. Menzies, supra note 224; D. Ghirardelli Co. v. Hunsicker (1912) 164 Cal. 355, 128 Pac. 1041 (distinguished Dr. Miles case, supra, on ground there control of market existed); W. T. Rawleigh Medical Co. v. Osborne (1907) 177 Iowa 308, 158 N. W. 566 (upheld without reasons); Garst v. Harris (1900) 177 Mass. 72, 58 N. E. 174 (upheld, Holmes, C. J., approving Central Shade Roller Co. v. Cushman, and Gloucester Isinglass & Glue Co. v. Russia Cement Co., both supra note 224); Garst v. Charles (1905) 187 Mass. 144, 72 N. E. 839; Quinlivan v. Brown Oil Co. (1934) 96 Mont. 147, 29 P. (2d) 374 (stressed lack of power to control price of gasoline at Billings); Ingersoll & Bro. v. Hahne & Co. (1917) 88 N. J. Eq. 222, 103 Atl. 1030, (1918) 89 N. J. Eq. 332, 105 Atl. 128 (dictum only—agrees with Fisher Flouring case, infra); John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n (1903) 175 N. Y. 1, 67 N. E. 136 (stressed that aim was to eliminate ruinous and unhealthy competition among retailers and jobbers); Walsh v. Dwight (1899) 40 App. Div. 513, 58 N. Y. Supp. 91 (stressing that manufacturer still subject to outside competition); Fisher Flouring Mills Co. v. Swanson (1913) 76 Wash. 649, 137 Pac. 144 (upheld on ground monopoly power lacking; also approving Herriman v. Menzies, supra note 224, and distinguishing Dr. Miles Medical case solely on basis that monopoly power present in that case).

The leading case for the contrary view that all resale price-maintenance agreements are unlawful per se at common law is Dr. Miles Medical Co. v. J. D. Park & Sons Co. [(1911) 220 U. S. 373], which so held under both the Sherman Act and the common law. It is to be noted, however, that this case arose in a federal district court for Kentucky so that it would seem that under the ruling of Erie R. Co. v. Tompkins [(1938) 304 U. S. 64], the Court took an unauthorized and unconstitutional course in adopting its own independent view of the common law rather than feeling itself bound to adopt the Kentucky version [cf. Commonwealth v. Grinstead (1901) 111 Ky. 203, 63 S. W. 427] or the version almost uniformly adopted by state courts up to this time which was to the contrary. Accordingly, the common-law basis of the case seems badly shaken. Several cases followed the Dr. Miles version of the common law: John D. Park & Sons Co. v. Hartman (C. C. A. 6th, 1907) 153 Fed. 24 (chiefly relied on in Dr. Miles case); W. T. Raleigh Medical Co. v. Walker (1917) 16 Ala. App. 232, 77 So. 70; W. H. Hill Co. v. Gray & Worcester (1910) 163 Mich. 12, 127 N. W. 803; Stewart v. W. T. Raleigh Medical Co. (1916) 58 Okla. 344, 159 Pac. 1187; Hunt v. W. T. Rawleigh Medical Co. (1918) 71 Okla. 193, 176 Pac. 410.

Resale price-maintenance agreements were held not to violate state antitrust laws in the following cases: Ghirardelli Co. v. Hunsicker, supra; Munter v. Eastman Kodak Co. (1915) 28 Cal. App. 660, 153 Pac. 737 (stressed lack of monopoly power); Commonwealth v. Grinstead, supra.

unlawful *per se.* Nowhere in these opinions can any support, ex-

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227 Chicago, I. & L. Ry. v. Southern Indiana R. R. (1904) 38 Ind. App. 234, 70 N. E. 843 (agreement between railroads not to compete in certain area held void but conceded it would be upheld if its purpose was to prevent destructive competition); Chapin v. Brown Bros. (1891) 83 Iowa 156, 48 N. W. 1074 (agreement between all grocers of town to discontinue buying butter for two years—non-ancillary—held void, court stressing agreement gave control of butter business of town to single person); Reeves v. Decorah Farmer’s Coop. Soc. (1913) 160 Iowa 194, 140 N. W. 844 (common selling agency held void because of undertaking of parties not to sell except through agency); Huston v. Reutlinger (1891) 91 Ky. 333, 343, 15 S. W. 867, 869 [agreement of insurance companies to fix salaries of solicitors held unlawful, court broadly condemning any agreements depressing or elevating the price of wages “to the injury of the public,” overruled in Louisville Board of Fire Underwriters v. Johnson (1909) 133 Ky. 797, 119 S. W. 153]; Finck v. Schneider Granite Co. (1905) 187 Mo. 244, 86 S. W. 213 [agreement between all granite suppliers of a large area, fixing minimum prices held void but court stressed control of market which existed and distinguished Skrainka v. Scharrinhausen (1880) 8 Mo. App. 522 (see Part I, *op. cit. supra* note 192, at 336, n. 141) on basis of the lack of control there, and also relied on ground that combination did in fact unduly raise prices]; Burns v. Wray Farmer’s Grain Co., *supra* note 224 (common selling agency held void because of undertaking of parties not to sell except through agency); Bailey v. Master Plumbers (1899) 103 Tenn. 99, 105, 52 S. W. 853 (agreement between majority of plumbers of Memphis through association not to compete with one another on payment of penalty to association held illegal but court stressed “the arbitrary and unreasonable enhancement in prices” caused by the arrangement); Texas Standard Cotton Oil Co. v. Adoue (1892) 83 Tex. 650, 657, 19 S. W. 274, 276 (agreement between cotton seed mill owners authorizing fixing of prices by common selling agency held unlawful, irrespective of the extent to which parties controlled market although indicating control probably existed in fact. Reservation by court that the agreements to avoid “unhealthy fluctuations in the market” might be legal indicates court had no intention of declaring all price-fixing agreements unlawful); Milwaukee Masons & Bldrs. Ass’n v. Niezerowski (1897) 95 Wis. 129, 70 N. W. 166 (agreement by 60 out of 75 master masons in Milwaukee to add 6 per cent to all bids before submitted to owner or architect held void but conceded that some price-fixing agreements might be lawful and stressed control of group); Gatzow v. Buening (1900) 106 Wis. 1, 81 N. W. 1003 (agreement between liverymen of Milwaukee, through association to fix rates held illegal, but court expressly stated not all such agreements illegal; that it could be shown by way of defense that such an agreement was not unreasonable). And see Lee Line Steamers v. Memphis, Helena & Rosedale Packet Co. (C. C. A. 6th, 1922) 277 Fed. 5, 9 (pooling agreement between competing steamboat lines held illegal at common law and under Sherman Act because of control of market but conceding such an agreement might be valid if shown to be “a reasonable protection against destructive rate wars”); Queens Ins. Co. v. State, *supra* note 224.

In the following cases price-fixing agreements were held contrary to state antitrust laws without indicating that all such agreements were illegal either under such laws or at common law: Johnson v. People (1922) 72 Colo. 218, 210 Pac. 843 (fixing price of installation of electric fixtures in such way as to control price of fixtures); Ford v. Chicago Milk Shippers’ Ass’n (1895) 155 Ill. 166, 39 N. E. 651 (common selling agency controlling Chicago milk prices); State v. Phipps (1893) 50 Kan. 609, 31 Pac. 1097 (insurance rates); State v. Dreany (1902) 65 Kan. 292, 69 Pac. 182 (conspiracy to pool profits and fix prices of grain at town of Bison, Kansas—control not alleged or found); Greer v. Payne (1896) 4 Kan. App. 153, 46 Pac. 190 (fixing minimum commissions for
pressly or by inference, for the unlawful *per se* doctrine be found. Instead the courts in most of these cases pointed out features of the particular agreements before them which made them unreasonable and, for all that appears in these opinions, condemned such agreements solely because of the existence of such features. In others it simply condemned such agreements without assigning any reasons therefor.  

It would seem perfectly clear that these cases cannot be regarded as supporting the unlawful *per se* doctrine, although writers frequently so regard them. In still others, agreements for the division of territory or markets, for the pooling of profits, and for the termination of competition not ancillary to some other lawful contract were upheld.  

live stock dealers); Brewster v. Miller's Sons Co. (1897) 101 Ky. 368, 41 S. W. 301 (price fixing by funeral directors); Commonwealth v. Bavarian Brewing Co. (1902) 112 Ky. 925, 66 S. W. 1016 (agreement between brewers of Cincinnati, Covington, and Newport raising price of beer $1.00 to cover war tax imposed on beer held illegal); Barataria Canning Co. v. Joulian (1902) 80 Miss. 555, 31 So. 961 (agreement fixing price of oysters—stressing power to fix arbitrary price); State v. Omaha Elevator Co. (1906) 75 Neb. 637, 106 N. W. 979 (price-fixing and pooling agreement among grain dealers); People v. Amanna (1922) 203 App. Div. 548, 196 N. Y. Supp. 606 (fixing price of foundations of buildings); Arnsman v. State (1908) 30 Ohio Cir. Ct. R. 445 (agreement between lumber dealers fixing prices and pooling profits).  

Agreements for the division of territory or markets, even by parties apparently controlling the market, were upheld in the following cases: Roush v. Gesman Bros. & Grant (1905) 126 Iowa 493, 102 N. W. 495 (agreement dividing insurance and real estate business of town upheld); National Benefit Co. v. Union Hospital Co. (1891) 45 Minn. 272, 275, 47 N. W. 506, 807 (upholding agreement between insurance companies for division of territory for three years, and where Mr. Justice Mitchell said: "The general consensus of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade"); Age Pub. Co. v. Times Pub. Co. (1914) 4 Ohio App. 13, 15 (agreement between newspapers that one not to publish morning paper upheld).  

Agreements for the pooling of profits, even by parties who apparently controlled
But while the view that price-fixing agreements were lawful if reasonable and unlawful only if unreasonable thus had the support of many of the cases decided after the passage of the Sherman Act, such view was by no means unanimous. Shortly after the enactment of the Sherman Act two other views appeared which soon won the support of many cases, namely (1) that all price-fixing agreements are unlawful \textit{per se}, and (2) that all such agreements are unlawful \textit{per se} if the parties thereto control the market.

\textit{(1) View That All Price-Fixing Agreements are Unlawful Per Se}

The view that all price-fixing agreements are unlawful \textit{per se} first made its appearance in this country in a group of state court cases decided just after the enactment of the Sherman Act. It is probable that the great public outcry of this period against trusts and combinations in restraint of trade resulting in the wide-spread enactment of antitrust legislation at this time had a strong effect on the courts and moved many of them to a stricter view on price-fixing agreements. Whatever the reason may have been, it is clear that cases broadly condemning all price-fixing agreements began to appear in 1892. By the time Judge Taft delivered his opinion in the \textit{Addyston Pipe} case in 1897, several such cases had been decided.\textsuperscript{230} In one of the market, were upheld in the following cases: Fechteler v. Palm Bros. & Co. (C. C. A. 6th, 1904) 133 Fed. 462 (stressed lack of showing of control of market, also valid under the Ohio antitrust law); White Star Line v. Star Line of Steamers (1905) 141 Mich. 604, 105 N. W. 135 (conceding pooling agreement between steamship lines would be valid as confined to points within state of Michigan); Ceballos v. Munson Steamship Line (1904) 93 App. Div. 593, 87 N. Y. Supp. 811 [although only charge was that contract violated Sherman Act, it was upheld on basis of common-law cases, one of which was Leslie v. Lorillard Co. (1888) 110 N. Y. 519, 18 N. E. 363].

Agreements not to compete, not ancillary to an employment contract or the sale of business or good will were upheld in Heinz v. National Bank of Commerce (C. C. A. 8th, 1916) 237 Fed. 942 (agreement by retiring bank president not to compete with bank for one year in consideration of pension, upheld as reasonable); Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. (1901) 114 Iowa 574, 87 N. W. 496 (agreement not to sell paving materials in city for a certain period upheld, court stressing that there was no showing of control of market); Louisville Board of Fire Underwriters v. Johnson, supra note 227 (by-law of association of fire underwriters, that no member to take agency of company which already has existing agency in town, upheld); Vandiver v. Robertson (1907) 125 Mo. App. 307, 102 S. W. 659 (contract to discontinue publication of rival newspaper in a town upheld because restraint limited to single town); Robey v. Plain City Theatres Co. (1933) 126 Ohio St. 473, 186 N. E. 1 (contract not to operate moving picture theatre in particular building); Horany v. Treese (1923) 91 Okla. 264, 217 Pac. 396 (same).

\textsuperscript{230} More v. Bennett, supra note 224 [stenographers' agreement fixing minimum rates held illegal, court holding it immaterial (1) that rates fixed were reasonable; (2) that purpose was to eliminate ruinous and dishonorable competition; (3) that
these cases, More v. Bennett, decided by the Illinois Supreme Court parties did not control the market); People v. Sheldon (1893) 139 N. Y. 251, 264-265, 34 N. E. 785, 789 (agreement between four out of the five retail coal dealers of a town setting up coal exchange with power to fix minimum prices for coal and which resulted in an advance in prices but not in unreasonable prices was held to violate the New York conspiracy statute, discussed in Part I, op. cit. supra note 192, at 339, note 153. It is arguable, as shown there, whether this statute establishes the same criterion as the common law. The court held it immaterial whether or not the prices were reasonable or whether any injury to the public had in fact resulted and added: "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character") (Italics added); Judd v. Harrington (1893) 139 N. Y. 105, 34 N. E. 790, a companion case to People v. Sheldon, refused to enforce an agreement between sheep brokers pooling commissions, relying on People v. Sheldon, and so seems based on the conspiracy statute rather than the common law, the court saying it was immaterial whether the agreement in fact produced any injury to the public; Nester v. Continental Brewing Co. (1894) 161 Pa. 473, 29 Atl. 102 (holding illegal agreement by 45 Philadelphia brewers not to sell beer at less than $8 per barrel, holding lack of control of market not material and expressly approving More v. Bennett, supra).

Other cases before 1897 supported the unlawful per se rule less clearly. Bishop v. American Preservers' Co. (1895) 157 Ill. 284, 41 N. E. 765 (approving More v. Bennett and condemning all agreements limiting competition but involving drastic type of trust agreement turning complete control of competing industries over to trustees and eliminating price and all other competition); People v. Chicago Live Stock Exchange (1897) 170 Ill. 556, 48 N. E. 1062 (approving More v. Bennett and unlawful per se language involving by-law of live stock dealers exchange limiting number of solicitors which each member could employ and providing solicitors to be paid on fixed salary rather than commission basis, which was held illegal); Chapin v. Brown Bros., supra note 227 (agreement by all grocers of a town not to deal in butter for two years in order to give complete control of that business to new butter store held void, court using language giving some support to view that contracts restraining competition which are not ancillary to some other lawful contract are unlawful per se); People v. Milk Exchange (1895) 145 N. Y. 267, 39 N. E. 1062 (holding illegal a selling agency formed by milk dealers with authority to fix prices. While fully approving language of People v. Sheldon condemning all agreements eliminating price competition, the case is arguably based on New York conspiracy statute rather than common law. Furthermore, control of market was stressed, for in response to the claim that the purpose was to reduce the price of milk, the court replied: "But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers." Ibid. at 274, 39 N. E. at 1064. It is interesting to note that Judge (later Mr. Justice) Peckham, who later wrote the Trans-Missouri opinion, supra note 224, dissented on the ground that the agreement "did not fairly tend to enhance the price of milk to the consumer." Ibid. at 275, 39 N. E. at 1065]; De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co. (1891) 16 Daily 529, 14 N. Y. Supp. 277 (holding void agreement of wire cloth manufacturers not to sell under certain prices, containing language supporting unlawful per se view, but also stressing that the parties had the power to fix the price, that is, control of the market, and that it was a violation of the New York conspiracy statute); Cleaver v. Lenhart (1897) 182 Pa. 285, 37 Atl. 811 (where on sale of business, covenant not to compete being embodied in separate instrument, it was held void because not ancillary).
in 1892, the unlawful per se view was applied to a combination of stenographers fixing minimum wages, and in the course of the opinion the court announced the principle which, as we have seen, had never found expression in any previous case, namely, that unless agreements restraining competition are ancillary to some other lawful contract they are unlawful per se. It must be conceded that this view had some plausibility in view of expressions in cases dealing with covenants not to compete which were ancillary to the sale of a business and the good will thereof. Cases upholding such covenants stemmed from *Mitchel v. Reynolds* and were decided on the principle that if the covenant were no wider than necessary to the protection of the business sold and not against the public interest, it would be upheld. Covenants were condemned if broader than required for the protection of the business to which they were ancillary. From these cases it was not wholly illogical to conclude that if there were no sale of a business or good will to which a contract restraining competition was ancillary there was nothing with which to measure validity and the contract must be illegal. But this reasoning was clearly unsound, for it failed to take account of the many cases referred to above in which non-ancillary covenants restraining competition were upheld and where the test of reasonableness was declared applicable to them. It also failed to take account of the opinion of *Mitchel v. Reynolds* itself, which clearly recognized that some non-ancillary covenants restraining competition were permissible. But though unsound, this reasoning was soon followed in other cases and achieved great prominence when Judge Taft adopted it as the basis for his view expressed in the *Addyston Pipe* case that all price-fixing agreements are unlawful per se at common law. In thus adopting the non-ancillary rule as an epitome of what the common law was in 1897 and always had been, Taft obviously leaned heavily.

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232 See *Handler, Cases on Trade Regulation* (1937) 119-136. See also *Carpenter, Validity of Contracts Not to Compete* (1928) 76 U. of Pa. L. Rev. 244, 246-256.

233 *Supra* note 216.


235 *Supra* note 216, at 184, where the court, in discussing the law, stated that "By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases." The court then cited *Freemantle v. Company of Silk Throwsters* (1678) 1 Lev. 229, upholding a combination to limit production of silk—clearly non-ancillary.
on More v. Bennett—a labor case—and it may well have been that one of his motives in making the decision may have been to strike a blow at labor, in the light of his known views on this subject. His further reliance on Hilton v. Eckersley tends to support this hypothesis. Whatever may have been his motive, it seems plain that Taft was guilty of many errors and omissions which led him into what, it seems quite apparent, was an erroneous conclusion. Thus he made no effort to reconcile some of the cases referred to above which were clearly inconsistent with his analysis of the common law, but rejected them as unsound. In doing so he gave greater weight to lower court decisions than to a decision of the Privy Council. He failed to refer to many English and American cases which were opposed to his conclusions. He failed to observe that the opinion in Mitchel v. Reynolds had clearly indicated that its doctrine did not condemn all non-ancillary covenants restraining competition. He failed to note that many cases which he cited as supporting the unlawful per se principle contained no statement or intimation that the courts were condemning all price-fixing agreements, or any agree-

230 Supra note 224. See United States v. Addyston Pipe and Steel Co., supra note 203, at 285, 289. His strong reliance on More v. Bennett is very plain from the fact that it was the first American case to give voice to the non-ancillary rule which was the central theme of Taft’s opinion (although the rule was strongly suggested in Chapin v. Brown Bros., supra note 227, in 1891).

237 (1855) 6 E. & B. 47. See 85 Fed. at 290.

230 He conceded that Leslie v. Lorillard Co., supra note 229, Kellogg v. Larkin, supra note 234, Wickens v. Evans, supra note 220, Ontario Salt Co. v. Merchants Salt Co., Collins v. Locke, both supra note 205, were opposed to his views. See 85 Fed. at 284, 286. It is interesting to note that Leslie v. Lorillard Co. has never been overruled in New York.

230 Taft accepted and relied on the broad language of Hilton v. Eckersley (Ct. of Ex.), supra note 237, and Urmston v. Whitelegg Bros. (Ct. of App.), supra note 221, but rejected as unsound the decision of the Privy Council in Collins v. Locke, supra note 205. See 85 Fed. at 290, 284, 289.

240 Hearn v. Griffin, supra note 205; Shrewsbury & Birmingham Ry. v. London & Northwestern Ry., supra note 220; Hare v. London & Northwestern Ry., (1861) 2 John & H. 80, all English cases contrary to his view, were not referred to. Only one of the ten American cases cited in Part I, op. cit. supra note 192, at 336, notes 141, 142, which uphold price-fixing and wage-fixing agreements, viz., the Central Shade Roller case, was cited by him. 85 Fed. at 286. Dolph v. Troy Laundry Mach. Co. (C. C. N. D. N. Y. 1886) 28 Fed. 553; Herriman v. Menzies, supra note 224; Clark v. Frank (1883) 17 Mo. App. 602; Commonwealth v. Tack (Phila. Quor. Sess. 1868) 1 Brewst. 511; Queen Ins. Co. v. State, supra note 224, were not cited. The omission to cite Herriman v. Menzies, a California case decided subsequent to other California cases relied on by Taft, seems inexcusable. The fact that it was a labor case is no answer, since More v. Bennett, Hilton v. Eckersley, and Collins v. Locke are also labor cases.

235 See supra note 235.
PRICE-FIXING AGREEMENTS

Although unsound, Taft's analysis of the common law soon became the basis for many decisions holding price-fixing agreements. 246

245 Craft v. McConoughy; Morris Run Coal Co. v. Barclay Coal Co., both supra note 234, on both of which Taft placed strong reliance. See 85 Fed. at 288, 289. Other cases condemning price-fixing agreements which were relied on by Taft expressly stated in their opinions that a price-fixing or pooling agreement would be upheld if reasonable. Hoffman v. Brooks, (Cincinnati Super. Ct. 1884) 6 Ohio Dec. 1215; Texas Standard Cotton Oil Co. v. Adoue, supra note 227. See 85 Fed. at 289, 290.

244 See 85 Fed. at 288-291. His failure to appreciate this distinction is clearly evidenced by his discussion of Anderson v. Jett (1889) 89 Ky. 375, 12 S. W. 670 where he failed to note that this case suggested this very distinction. His discussion of this case gives evidence of hasty and inadequate study, for he even misstated the facts of the case when he said it involved an agreement to keep up rates and pool profits when it actually involved only pooling. See 85 Fed. at 289.


244 See 85 Fed. at 291. Cravens v. Carter-Crume Co. (C. C. A. 6th, 1899) 92 Fed. 479 (agreement by manufacturers of woodenware, controlling market in United States, fixing prices and limiting production); Arnold & Co. v. Jones Cotton Co. (1907) 152 Ala. 501, 44 So. 662 (agreement fixing purchase prices of cotton); Brown v. Jacobs' Pharmacy Co. (1902) 115 Ga. 429, 41 S. E. 553 (combination by druggists to fix prices); Chicago, W. & V. Coal Co. v. People (1905) 214 Ill. 421, 73 N. E. 770 (association fixing price of coal in northern Illinois); Sanford v. People (1905) 121 Ill. App. 619 (same); People v. Aachen & Munich Fire Ins. Co. (1905) 126 Ill. App. 636 (combination of fire insurance companies to fix rates); Klingel's Pharmacy v. Sharp & Dohme (1906) 104 Md. 218, 64 Atl. 1029 (combination of wholesale and resale druggists of Baltimore to fix prices and to refuse to sell to retailers who did not abide by such prices held void both on basis of pre-nineteenth century English common law and Addyston Pipe case); State
and all other non-ancillary contracts restraining competition unlawful per se at common law.

v. Craft (1914) 168 N. C. 208, 83 S. E. 772 (agreement fixing price of milk unlawful per se and criminal at common law—combination actually controlled 60 per cent of milk supply of city and actually had power to raise and did raise prices); Bennett v. Southern Ry. (1937) 211 N. C. 474, 191 S. E. 240 (combination by railroads to fix low rates to drive trucking company out of business void at common law and under North Carolina antitrust law); Slaughter v. Thacker Coal & Coke Co. (1904) 53 W. Va. 642, 47 S. E. 247 (common selling agency for three competing coal companies to sell coal at uniform prices); Pocahontas Coke Co. v. Powhatan Coal & Coke Co. (1906) 60 W. Va. 508, 56 S. E. 264 (common selling agency for coal producers almost identical with that upheld by United States Supreme Court in Appalachian Coals case, supra note 195, held unlawful—specifically rejecting contention that degree of control of market material).

Price-fixing agreements were said to be unlawful per se at common law in the following cases: Hunt v. Riverside Co-operative Club (1905) 140 Mich. 538, 104 N. W. 40 (involving Michigan antitrust law, even though prices lowered in this case); State ex inf. Crow v. Armour Packing Co. (1903) 173 Mo. 356, 73 S. W. 645 (involving Missouri antitrust law); State v. Standard Oil Co. of Indiana (1909) 218 Mo. 1, 116 S. W. 902 (involving Missouri antitrust law).

Cases under state antitrust laws which, in holding agreements illegal, seemingly adopt the unlawful per se view of price-fixing agreements as the test under such laws are: Dothan Oil Mill Co. v. Espy (1930) 220 Ala. 605, 127 So. 178 (agreement by all consumers of cotton seed in state fixing purchase prices thereof held illegal, even though approved by Federal Trade Commission Trade Practice Conference rule); Ricou v. Crosland (1921) 81 Fla. 574, 88 So. 380 (agreement between fish dealers fixing purchase prices, pooling profits and dividing market held illegal, indicating any elimination of competition bad); State v. Minneapolis Milk Co. (1913) 124 Minn. 34, 144 N. W. 417 (conspiracy to raise retail price of milk—ruinous competition no defense); State v. Arkansas Lbr. Co. (1914) 260 Mo. 212, 314, 169 S. W. 145, 177 (agreement to fix prices of lumber and also to limit production thereof—ruinous competition, and reasonableness of prices fixed held no defense); State v. Boeckeler Lbr. Co. (1923) 301 Mo. 445, 256 S. W. 175 (agreement fixing selling prices of lumber); Photo-Engravers Board of Trade of New York v. Addison (1932) 145 Misc. 479, 260 N. Y. Supp. 323, aff'd, (1933) 239 App. Div. 827, 264 N. Y. Supp. 939 (fixing charges of photo-engravings on a basis not less than cost of production); State v. Fullerton Lbr. Co. (1915) 35 S. D. 410, 424, 152 N. W. 708, 712 'agreement fixing price of lumber—court said since agreement "would prevent all competition between themselves" it was "sufficient to constitute the offense created by the statute"'); Potomac Fire Ins. Co. v. State (Tex. Civ. App. 1929) 18 S. W. (2d) 929 (agreement fixing commissions of insurance agents).

247Tuscaloosa Ice Mfg. Co. v. Williams (1900) 127 Ala. 110, 28 So. 669 (agreement to close down competing ice plant); Flowers & Pegler v. W. T. Smith Lbr. Co. (1908) 157 Ala. 505, 47 So. 1022 (agreement between competing lumber companies dividing territory); Pearson v. Duncan & Son (1916) 198 Ala. 25, 73 So. 406 (covenant not to compete ancillary to sale of equipment only); American Laundry Co. v. E., & W. Dry Cleaning Co. (1917) 199 Ala. 154, 74 So. 58 (agreement between laundry company and dry cleaning companies not to engage in other's business); Shapard v. Lesser (1917) 127 Ark. 590, 193 S. W. 262 (contract not to erect competing cotton gin); Stewart v. Stearns & Culver Lbr. Co. (1908) 56 Fla. 570, 48 So. 19 (contract by which company relinquished right to maintain commissary for own employees); Clemens v. Meadows (1906) 123 Ky. 178, 94 S. W. 13 (agreement by two competing hotels, the only two
It is important to remember, however, that this view of the common law emerged after the passage of the Sherman Act, and so could not have been the common-law view which the Congress which enacted that law had in mind. This is a fact which has been completely lost sight of.

(2) View That Price-Fixing Agreements Are Unlawful Per Se Only Where Parties Have Sufficient Control to Dictate Price

The Taft view of price-fixing agreements was not the only new view of the common law to find expression after the Sherman Act became law. Many decisions took the view that price-fixing agreements are unlawful *per se* only where the parties thereto have sufficient control to dictate the price—to impose their own terms on the public.248

first class hotels in town, whereby one agreed to close for three years); Brent v. Gay (1912) 149 Ky. 615, 149 S. W. 915 (agreement pooling purchases of blue-grass seed); Fields v. Holland & Son (1914) 158 Ky. 544, 165 S. W. 699 (agreement between competing transfer companies whereby one agreed to carry only passengers and the other only freight, but also stressed control of market and that prices actually were raised); Milgram v. Milgram (1938) 105 Ind. App. 57, 12 N. E. (2d) 394 (covenant not to operate shoe business in city); Clark v. Needham (1900) 125 Mich. 84, 83 N. W. 1027 (agreement by competitor to cease manufacturing for one year in consideration of payment of $1500); Gross, Kelly & Co. v. Bibo (1914) 19 N. M. 495, 145 Pac. 480 (agreement not to compete with general merchandise business in a certain town); Shute v. Shute (1918) 176 N. C. 462, 97 S. E. 392 (agreement between competing cotton ginners, who controlled market, for division of territory); Klafl v. Pratt (1915) 117 Va. 739, 86 S. E. 74 (covenant by stockholder not to compete with corporation); Charleston Gas Co. v. Kanawha Gas Co. (1905) 58 W. Va. 22, 50 S. E. 876 (agreement between two competing gas companies dividing territory and pooling profits); Durrow Comm. Co. v. Donner (1930) 201 Wis. 175, 229 N. W. 635 (agreement by employee not to engage in business of selling poultry or veal in Milwaukee County).

Agreements dividing territory were held unlawful *per se* within state antitrust laws without indicating their status at common law in the following cases: Kosciusko Oil Mill & F. Co. v. Wilson Cotton Oil Co. (1907) 90 Miss. 551, 43 So. 435; State v. Jackson Cotton Oil Co. (1909) 95 Miss. 6, 48 So. 300.

Agreements (non-ancillary) ending all competition were held unlawful *per se* under state antitrust laws in the following cases: Gard v. Holmes (1931) 132 Kan. 443, 295 Pac. 716 (agreement by three competing undertakers whereby one to cease business and be hired by another, the other two to share expense of his salary); Crandall v. Scott (Tex. Civ. App. 1913) 161 S. W. 925 (agreements by competing motion picture house to close down); Smith v. Kousalakis (Tex. Civ. App. 1914) 172 S. W. 586 (agreement not to set up competing lunch counter in building for two years).

248 Endicott v. Rosenthal (1932) 216 Cal. 721, 16 P. (2d) 673 [agreement fixing prices of all cleaners and dyers in Los Angeles County held illegal, relying on unlawful *per se* language of United States v. Trenton Potteries Co. (1927) 273 U. S. 392, but distinguishing Herriman v. Menzies, *supra* note 224, on ground that there parties did not control market]; Buckelew v. Martens (1931) 108 N. J. L. 339, 156 Atl. 436 (agreement
These cases reasoned that price-fixing agreements should be condemned only because of the arbitrary control to which the public is subjected. They argued that where market control is possessed by the parties in the aggregate they may fix the price at their own discretion and the natural temptation to make the most profits will make it improbable that a price so fixed will be a reasonable one, or if fixing laundry rates void, but indicating it would be valid if parties did not control market); Cummings v. Union Blue Stone Co. (1900) 164 N. Y. 401, 404, 58 N. E. 525, 526 (common selling agency of producers of 90 per cent of blue stone of country held illegal, the court saying: "The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great."—the court cited and therefore regarded as authoritative the case of Leslie v. Lorillard, supra note 229); Cohen v. Berlin & Jones Envelope Co. (1901) 166 N. Y. 292, 59 N. E. 906 (combination manufacturing 85 per cent of envelopes of country condemned on authority and reasoning of Cummings case, supra, even though formed to ameliorate unsatisfactory business condition and price reasonable); State v. Standard Oil Co. (1892) 49 Ohio St. 137, 186, 30 N. E. 279, 290 (trust agreement turning over complete control of competing oil companies who controlled market to trustees, eliminating price and all other competition, condemned because price could be fixed at pleasure, the court saying: "Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others"); State v. Eastern Coal Co. (1908) 29 R. I. 254, 264, 70 Atl. 1, 6 (charge of price fixing between retail coal dealers of Providence did not state an offense where the extent of their control of market was not alleged, the court saying: "Conspiracies to exercise power without possessing it must be futile, as if the courtiers of King Canute had conspired to regulate the ocean tide"); Pulp Wood Co. v. Green Bay Paper & Fiber Co. (1919) 168 Wis. 400, 170 N. W. 230, cert. den., (1919) 249 U. S. 610 (combination of pulpwood supply agencies fixing prices and dividing territory held to violate section 2 of Sherman Act and common law because of control of market). See also Lovejoy v. Michels (1891) 88 Mich. 15, 49 N. W. 901 (holding that price fixed by a combination controlling market could not be regarded as a "reasonable" price within contract because it rests in discretion of combination at any time to raise the price to an exorbitant degree).

Cases under state antitrust laws which seemingly adopt the control of the market test of price-fixing agreements are: State v. Armour Packing Co. (1915) 265 Mo. 161, 176 S. W. 382 (agreement fixing purchase and selling prices of meat products and limiting production thereof); People v. Dwyer (1914) 160 App. Div. 542, 145 N. Y. Supp. 748, aff'd, (1915) 215 N. Y. 46, 109 N. E. 103 (conspiracy to fix and control price at which poultry could be bought and sold in New York City—monopoly power stressed—indictment under New York conspiracy statute referred to in note 230, supra); People v. Baff (1917) 98 Misc. 547, 164 N. Y. Supp. 709 (conspiracy to fix purchase and selling prices of live poultry—indictment held defective because of failure to allege control of market); State v. Erickson (1909) 54 Wash. 472, 103 Pac. 796 (conspiracy to fix price of milk in Seattle held illegal, court distinguishing Herriman v. Menzies, supra note 224, and State v. Eastern Coal Co., supra, distinguished on the ground that there the purpose was to fix prices only of parties to agreements—not the market price in city); State v. Scollard (1923) 126 Wash. 335, 218 Pac. 224 (agreement not to sell milk to distributors who supplied retailers who sold for less than 11 cents per quart held not to violate state law because of want of allegation of control of market).
reasonable that it will remain so for very long. On the other hand, where such control is lacking and the parties to the agreement are faced with effective outside competition the public is not subjected to arbitrary power limited only by the self-restraint of vitally interested parties, and the agreement is not unlawful *per se*. Under this view the reasonableness of prices actually fixed is of no importance. It is not the excessive or unreasonable price fixed that vitiates but the possession of power to fix such prices.

One of the noteworthy features about the common-law decisions in this country after 1890, briefly referred to above, was the tendency of such cases to mirror the changing Supreme Court views of the proper construction of the Sherman Act on the question. Thus most of the unlawful *per se* cases were decided after and in reliance on the *Addyston Pipe* dictum, and after and in reliance on the *Trenton Potteries* case. On the other hand, following the *Standard Oil* and *Appalachian Coals* cases many cases appeared applying the rule of reason to price-fixing agreements.

It thus appears that even when the cases subsequent to the enactment of the Sherman Act are considered it is difficult to support the view of the *Socony-Vacuum* case as representing the general common-law view.

We pass now to a consideration of the cases decided under the Sherman Act so that it may be determined whether the claim of Mr. Justice Douglas that such cases are in complete harmony and consistency in holding unlawful *per se* all agreements whose purpose or effect is to fix or in any way affect prices is justified.

**CASES DECIDED UNDER THE SHERMAN ACT**

The first case dealing with price-fixing agreements under the Sherman Act to come before the Supreme Court was *United States*
v. Trans-Missouri Freight Association in which the United States brought suit to enjoin a claimed violation of the Act by defendant association, consisting of all the railroad carriers having lines west of the Missouri River and east of the Pacific Coast (who, therefore, controlled the market in that area), which had appointed a committee and given it power to establish rates for all members of the association, who agreed to be bound thereby, and were subject to heavy penalties for noncompliance. The trial court dismissed the bill on the ground that the agreement was designed only to prevent an unhealthy and ruinous competition, to establish only reasonable prices and avert failure of the carriers and further held that because it was valid at common law, it did not violate the Sherman Act. The court reviewed the common-law authorities at great length and found that they condemned only those agreements which prevent a "healthy" competition—not those which prevent "unhealthy" competition and furnish the public with adequate facilities at reasonable prices, and made to avert personal ruin. The circuit court of appeals affirmed this determination. Judge Sanborn, who wrote the opinion for the court found that the act was designed to prohibit only contracts which unreasonably restrained trade; that to determine what was an unreasonable restraint, the common-law authorities on restraint of trade should be consulted. After an elaborate review of these authorities Judge Sanborn found them to hold that agreements fixing prices were valid if reasonable. Neither at common law nor under the Act, the court ruled, were contracts regulating competition so that it may be fair, open and healthy, forbidden. The court stressed particularly, as showing the reasonableness of the agreement, that it was designed to prevent sudden and violent fluctuations of rates which upset the calculations of business men and also to prevent "rate wars" and that restraint of trade); Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. (C. C. S. D. N. Y. 1893) 55 Fed. 851, 853 (agreement by manufacturers of watch cases fixing selling prices held not unlawful under act where it was not alleged that the parties controlled the market "or that the prices fixed by them were more than the goods were worth or in any respect unfair").

253 Supra note 224.

254 The court placed some stress on control of the market by the parties. See ibid. at 323-4, 335. Hornblower, "Anti-Trust" Legislation and Litigation (1911) 11 Col. L. Rev. 701 at 711, regards the decision as resting on the circumstance that the combination "was capable of being operated so as to prescribe unjust or unreasonable rates,"


256 United States v. Trans-Missouri Freight Association (C. C. D. 8th, 1893) 58 Fed. 58.
it would "make the strife for patronage among the members of the
association open, fair, and honorable." Judge Sanborn quoted
from the reports of the Interstate Commerce Commission where the
Commission took the view that "uncontrolled struggles for patronage
by railway carriers are frequently detrimental to the public wel-
fare," and that the establishment of a common authority vested
with power "to fix rates, and to provide for their steady mainte-
nance" was absolutely essential.

The Supreme Court by a five to four vote held that the agree-
ment violated the Act and reversed the judgment of the circuit court
of appeals. In a now famous opinion by Mr. Justice Peckham the
Court announced the rule that the Sherman Act forbids all contracts,
combinations or conspiracies in restraint of trade whether reasonable
or not and that accordingly it was unnecessary to consider whether
the contract was reasonable. In analyzing the holding of the Court
it is necessary to bear in mind several facts which are frequently lost
sight of: (1) that the Court had before it two lower court opinions
which had made exhaustive and thorough reviews of the common-law
authorities and found that they condemned only unreasonable price-
fixing agreements and did not condemn this agreement and (2) that
the Court had before it evidence in the form of congressional deb-
bates that Congress intended to adopt the common-law rule when
it passed the Sherman Act. In order to avoid the inescapable con-
clusion that these facts made for validity the Court was obliged to
hold and did hold that reasonableness was immaterial; that the com-
mon law was immaterial and that extrinsic evidence of the intent
of Congress in the form of debates was not admissible. It is clear
that the Court found it could not successfully take issue with the
analysis of the common law made by Judge Sanborn and so was
driven to say that the Act condemned all agreements restraining trade
whether valid at common law or not. The Court's conclusion that

257 Ibid. at 81.
258 Ibid. at 75.
259 Ibid. at 76.
260 166 U. S. at 327-328. The Court did indicate, however, that there was some
support at common law for the view that all price-fixing agreements between public
utilities, as distinguished from other parties, were unlawful. Ibid. at 334.
261 The Court stated categorically that "debates in Congress are not appropriate
sources of information from which to discover the meaning of the language of a statute
passed by that body." Ibid. at 318. This conclusion was announced with respect to
another point made in the case, viz., that railroads were not covered by the Act, but
was equally applicable to the legality of the agreement.
The congressional debates were not admissible as evidence of the intent of Congress—a conclusion now thoroughly discredited—obviously contributed greatly to the holding that the common-law view in 1890 was not material. It should be noted that that conclusion was also repudiated by the opinion in the *Apex* case, where these very debates were used for the purpose of establishing this very point, namely, that Congress intended to adopt the common-law view as declared in 1890. Accordingly the decision, to a large extent, ignored the actual intent of Congress and did so advisedly.

The Court's decision seems to have been dictated by the fear that if it upheld reasonable price-fixing agreements, it would be compelled to examine into the reasonableness of prices fixed in every case, which would make the decision turn on what is a fair profit, which is too vague a standard. The fear that the Court, if it holds the rule of reason applicable to price-fixing agreements, might have to determine what is a reasonable price is one which has bulked large in Sherman Act cases. As will hereafter appear, it was a potent influence in the *Trenton Potteries* and *Cline* decisions. The reason for this fear is not apparent. In the first place it is difficult to see how this question is any more difficult than any other of the difficult questions of degree which the Supreme Court is constantly called upon to decide—in fact, in the public utility field the reasonableness of rates is continually passed on by the courts. And as will hereafter appear the Supreme Court has itself passed on this very question in cases involving the antitrust law (i.e., in the *Addyston Pipe*, *Thomson*, *American Column*, *Maple Flooring*, and *Sugar Institute* cases). Furthermore, recognition of the principle that reasonable price-fixing agreements are legal would not necessarily place upon the Court the burden of determining what is a reasonable price or a fair profit in every case. In this connection the experience of the English courts in the cases considered above is helpful, for it reveals that in not one case did the decision turn on what is a fair profit, and we find in

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262 Where the language of the statute is ambiguous or unclear the well-settled rule now permits resort to Congressional debates to reveal the exposition of the bill on the floor of Congress by those in charge of sponsoring the legislation or to show common agreement on purpose. See Wright v. Vinton Branch of Mountain Trust Bank (1937) 300 U. S. 440, 463-464, n. 8, and cases cited.


264 166 U. S. at 331-332.

them no discussion of that question. Reasonableness or unreasonableness of the agreements was established by reference to factors other than what is a fair profit. In most of them it was not even stated that the prices fixed were or were not reasonable.

As noted above, four justices dissented, in the *Trans-Missouri* case, the views of the minority being expressed in an opinion by Mr. Justice White which is generally accepted as the first statement of the "rule of reason." Mr. Justice White contended at length for the view that only unreasonable restraints were forbidden by the Act; that what is unreasonable is determined by reference to the common law and that the common law would not have condemned this agreement. It should be remembered that the "rule of reason" here first announced by Mr. Justice White was first used as an argument to justify a price-fixing agreement by parties controlling the market.

The question was again presented the following year in *United States v. Joint Traffic Association* where an agreement between other carriers relating to rates, which was substantially the same as that involved in the *Trans-Missouri* case was held to violate the Act and was enjoined at the suit of the United States. The decision was five to three and the same five judges who formed the majority in the *Trans-Missouri* case formed the same majority in this one (i.e., Peckham, Harlan, Brewer, Brown and Fuller). The Court simply reaffirmed the position previously taken that the Act prohibits all restraints whether reasonable or not. The result of the *Trans-

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260 Justices White, Field, Gray and Shiras.

261 The doctrine of the *Trans-Missouri* case was criticized in the following cases: Post v. Southern Ry. Co. (1899) 103 Tenn. 184, 224, 52 S.W. 301, 310-311 (deems the case "contrary to the purpose and spirit of the act"); The King v. Gage, supra note 205, at 439-443.

262 One lower federal court decision intervened, *United States v. Coal Dealers’ Ass’n of Calif.* [(C.C.N.D. Cal. 1898) 85 Fed. 252], where an association of retail coal dealers fixing prices of coal in San Francisco was held unlawful on the reasoning of the *Trans-Missouri* case, but the court also pointed out that the association could and did exercise arbitrary power to control prices and therefore that it would have condemned it in any event.

263 (1898) 171 U.S. 505. This case involved an agreement of the same character by 31 railroads engaged in transportation between Chicago and the Atlantic coast. It is clear enough that here, as in the *Trans-Missouri* case, the carriers had sufficient control to dictate rates in many areas served by them.

264 The Court made it clear, however, that ordinary business contracts were not within the condemnation of the doctrine of these cases. *Ibid.* at 568. In the *Trans-Missouri* case it was said (supra note 224, at 329) that a covenant not to compete ancillary to the sale of business or property which was valid at common law "might not be
Missouri and Joint Traffic cases was an unprecedented movement towards close-knit combinations.\textsuperscript{271}

The next case was the famous Addyston Pipe case\textsuperscript{272} to which reference has so frequently been made in this article. In this case a group of manufacturers of iron pipe entered into a price-fixing agreement, and the United States sought to enjoin it. The circuit court of appeals found it unnecessary to rely and expressly refrained from relying on the rule laid down in the Trans-Missouri case that all restraints were illegal. Instead it tentatively took the view that if it could be shown that the contract was void at common law, then it was within the inhibitions of the Act.\textsuperscript{273} Judge Taft thereupon proceeded to make his analysis of the common law and to come to the conclusion that all non-ancillary agreements restraining competition including price-fixing agreements were unlawful \textit{per se} at common law\textsuperscript{274}—an analysis which, it is submitted, has been shown to be unsound. As shown above, Taft took no account of the state of the common law as of the date of the enactment of the Sherman Act and placed chief reliance on cases decided after its enactment.\textsuperscript{275} This fact has been ignored in later years. But a fact which is even more significant and which has also been almost entirely ignored is

\begin{footnotesize}

\textsuperscript{272} Addyston Pipe & Steel Co. v. United States, \textit{supra} note 203.

\textsuperscript{273} \textit{ibid.} at 279-291.

\textsuperscript{274} \textit{ibid.} at 279-291.

\textsuperscript{275} Of the thirty-two cases which Taft cited as supporting his view, fourteen were decided before July 2, 1890, and eighteen were decided after that date. See \textit{ibid.} at 288-291. As shown above, only one of the fourteen cases, \textit{i.e.}, Central Ohio Salt Co. v. Guthrie (1880) 35 Ohio St. 666, can be said actually to support his view and even this is doubtful. See Part I, \textit{op. cit. supra} note 192, at 336 \textit{et seq.} On the other hand, of the seven cases regarded by Taft as contrary to his position six were decided prior to July 2, 1890. Taft obviously relied more heavily on People v. Sheldon, \textit{supra} note 230, and More v. Bennett, \textit{supra} note 224, than on any other cases—both of which were decided after July 2, 1890. It certainly is difficult to support Taft’s reasoning as applied to the period before 1890 when it is remembered that the latest decisions from the highest courts of New York, Massachusetts, and Wisconsin were respectively Leslie v. Lorillard Co., \textit{supra} note 229, Central Shade Roller Co. v. Cushman, \textit{supra} note 224, and Kellogg v. Larkin, \textit{supra} note 234.
\end{footnotesize}
the fact that Taft, after thus analyzing the common-law authorities expressly refrained from deciding the case on the basis of the common law as thus found by him. This clearly appears from the following passage:

"Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the ground stated [i.e., necessity of eliminating ruinous competition, lack of monopoly power, and that prices fixed were reasonable] is without foundation."276

Judge Taft then examined the facts and found that the real object was not to curb ruinous competition,277 that control of the market, within effective limits, existed,278 and that the prices fixed were in fact unreasonable.279 Thus Taft's review of the common law was dicta only. But that dicta had a profound effect in later years, for it came to be accepted as an authoritative statement of what the common law is and always had been, thus completely obscuring the plain truth that it was not the common law which Senator Hoar and the Congress which framed the Sherman Act knew—the common law which the Supreme Court in the Trans-Missouri case recognized, and to escape which it had invented the "rule of unreason."

When the Addyston Pipe case reached the Supreme Court on appeal the judgment of the circuit court of appeals was affirmed, but the Court refused to decide on the basis of the Trans-Missouri rule.280 Neither did it approve Taft's common-law view, but instead it quoted

276 85 Fed. at 291. (Italics added.)
277 Ibid. at 291-293.
278 In this case a group of pipe manufacturers whose plants were in southern states combined to fix the price in all markets nearer defendants' factories than their eastern competitors (with whom keen competition existed) at a differential just below the figure at which eastern competitors could profitably compete, thereby allowing defendants to decrease their price by a corresponding amount in markets nearer the eastern factories. It was clear, of course, that defendants, controlling as they did only about one-third of the total production of pipe in the United States were not free to exact any price they saw fit. The extent of their power was limited by the amount of the difference in freight rate between their factories and eastern factories to any buying market, which was from $2.00 to $6.00 per ton. Within those limits, control existed.
279 85 Fed. at 293.
280 175 U. S. at 235.
only his language showing that the agreement was in fact unreasonable, and that the prices fixed were unreasonable.\textsuperscript{281} Thus the Supreme Court, just as did the circuit court of appeals, actually decided the case on the assumption that only unreasonable restraints were forbidden by the Act and that a price-fixing agreement is not \textit{per se} an unreasonable restraint. Its failure to approve Taft's language on the common law while at the same time approving his language showing the agreement unreasonable must, it would seem, be considered as an implied rejection of the former language.

Little of importance occurred between 1898 and 1911. In \textit{Chesapeake \\& O. Fuel Co. v. United States}\textsuperscript{282} a common selling agency for the coal industry in Ohio and West Virginia with power to fix prices for all, but which did not control the market—in short an arrangement almost exactly parallel to that involved in the \textit{Appalachian Coals} case was held by the Sixth Circuit Court of Appeals to violate the Act, the court relying on the \textit{Trans-Missouri} rule that all restraints are forbidden, whether reasonable or not. The fact that in the \textit{Socony-Vacuum} case Mr. Justice Douglas seemingly cites this case with approval,\textsuperscript{283} is strong evidence that he intended to over-

\textsuperscript{281} "...we are of opinion that the agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them. Even if the objection thus set up would, if well founded in fact, constitute a defense, we agree with the Circuit Court of Appeals in its statement of the special facts upon this branch of the case and with its opinion thereon as set forth by Circuit Judge Taft, as follows: [then quoting only that portion of Taft's opinion showing the agreement unreasonable and the prices unreasonable]. . . ." Ibid. at 235-238. (Italics added.) While it is true that in the portion of Taft's opinion quoted the following appears: "'A great many affidavits of purchasers of pipe in "pay" territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe has been sold by the defendants have been reasonable. We do not think the issue an important one, because as already stated, we do not think at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give to the defendants the power to charge unreasonable prices, had they chosen to do so. But if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable.'" (Italics added.) It is perfectly clear from the prefatory remarks that the Court was quoting the opinion of Taft only on the proposition that the agreement and prices were unreasonable—and that the portion above italicized was not meant to be approved. In the Trenton Potteries case, supra note 248, Mr. Justice Stone regarded the italicized portion as indicating Supreme Court approval of Taft's views in the circuit court of appeals.

\textsuperscript{282} (C. C. A. 6th, 1902) 115 Fed. 610.

\textsuperscript{283} 60 Sup. Ct. at 846, n. 39, 84 L. ed. Adv. Ops. at 796, where he states: "Only a confusion between the nature of the offenses under those two sections (see United States v. Nelson, D. C. 52 F. 646; United States v. Patterson, C. C. 55 F. 605; Chesapeake \\& O. Fuel Co. v. United States, 6 Cir. 115 F. 610) would lead to the conclusion that power
rule and not to distinguish the *Appalachian Coals* case. In *Swift and Company v. United States* a bill in equity charging a conspiracy between meat packers to fix selling prices and to do many other acts as part of an alleged scheme to monopolize was upheld against demurrer. The Court considered that all the acts charged were part of a single attempt to monopolize commerce. There was no discussion of the status of price-fixing agreements under the Act. The bill which the Court had before it was not drawn upon the theory that all price-fixing agreements are *per se* illegal, for it charged not only that prices were arbitrarily raised, lowered and fixed, but many other facts showing the unreasonableness of the restraint. We find here no authority for the view that price-fixing agreements are *per se* unreasonable restraints and illegal.\(^{285}\)

\(^{284}\)(1905) 196 U. S. 375. The following lower federal court price-fixing cases intervened between the Chesapeake & Ohio and Swift cases: Gibbs v. McNeely (C. C. A. 9th, 1902) 118 Fed. 120, 123 (combination of 108 manufacturers of shingles, comprising all in state, who fixed minimum prices which were higher than previous market prices held illegal both at common law and under Sherman Act which "goes as far, if not farther, than the common law"; holding ruinous competition and fact that prices were reasonable were no defense; does not say price-fixing agreements are unlawful *per se*); Ellis v. Inman, Poulsen & Co. (C. C. A. 9th, 1904) 131 Fed. 182 (combination of dealers in lumber in Portland, Oregon, who controlled market in finished lumber, agreeing not to supply builders with finished lumber unless they either purchased rough lumber from them or paid them difference between what was paid others for rough lumber and that charged by defendants, held unlawful, because unreasonable, court noting (ibid. at 188) that rule of Trans-Missouri case probably not any longer applicable after decision in Northern Securities case); Fechteler v. Palm Bros. & Co., *supra* note 229 (in which the same court which decided the Addyston Pipe case five years previous (Judge Lurton, who gave the opinion, was one of the judges who participated in the Addyston Pipe case) held that a pooling agreement between competing mercantile houses, was valid at common law). In Ceballos v. Munson Steamship Line (1904), *supra* note 229, a pooling agreement was held not to violate the Sherman Act.

\(^{285}\)Between the Swift case and the Dr. Miles Medical case in 1911, the following cases intervened: Cincinnati Packet Co. v. Bay, *supra* note 270; Chattanooga Foundry & Pipe Works v. City of Atlanta (1906) 203 U. S. 390 (allowing treble damages to city injured by agreement held void in Addyston Pipe case); Loewe v. Lawlor (1908) 208 U. S. 274, 297 (where Court in holding labor union subject to the Act, said that the Trans-Missouri, Joint Traffic, and Northern Securities cases "hold in effect that the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at common law"); Southern R. R. Co. v. Tift (C. C. A. 5th, 1906) 148 Fed. 1021 (holding void a price-fixing agreement between railroads of southeastern United
In 1911 Dr. Miles Medical Co. v. John D. Park & Sons 280 condemned a resale price maintenance agreement as illegal both at common law and under the Sherman Act but did not say the agreement was unlawful *per se* because it fixed prices. 287 It cannot be denied, however, that its language seemed to condemn all resale price-maintenance agreements, since it stressed that the evil was the elimination of competition among retailers who signed agreements. 288 In the course of the opinion Mr. Justice Hughes advanced the proposition that since retailers could not enter into a horizontal agreement fixing prices, neither could the same result be accomplished by their separately contracting with the manufacturer or wholesaler to maintain resale prices. 289 But surely this is a *non sequitur*. It would seem just as correct to say that because retailers cannot combine to raise

States on authority of Trans-Missouri case); Jayne v. Loder (C. C. A. 3d, 1906) 149 Fed. 21 (horizontal and vertical agreement to maintain resale prices held illegal and outside competition, reasonableness of prices and ruinous competition held no defense); Darius Cole Trans. Co. v. White Star Line (C. C. A. 6th, 1911) 186 Fed. 63, *cert. den.*, (1912) 225 U. S. 704 (pooling agreement between competing ship owners disguised as ancillary covenant not to compete held void—control existed); United States v. McAndrews & Forbes Co. (C. C. S. D. N. Y. 1906) 149 Fed. 823 (agreement by two corporations controlling 85 per cent of licorice paste trade of United States whereby prices fixed and customers divided held void, with stress laid on monopoly power and actual rise in prices); Blount Mfg. Co. v. Yale & Towne Mfg. Co. (C. C. D. Mass. 1909) 166 Fed. 555 (agreement by patentees and manufacturers of door checks fixing prices and pooling profits held void without reasons); Leonard v. Abner-Drury Brewing Co., *supra* note 228 (combination fixing prices of beer and coercing others to abide thereby held void, citing Trans-Missouri case); White Star Line v. Star Line of Steamers, *supra* note 229 (pooling agreement between competing shippers held to violate Sherman Act, with stress laid on monopoly control of traffic); Lytle v. Galveston H. & S. A. Ry., *supra* note 224 (agreement between competing carriers fixing rates for special excursion held not to violate Sherman Act).

280 *Supra* note 226.

287 The agreement related to patented medicines manufactured by a secret process. The extent of outside competition from other articles does not appear, and therefore the extent to which control of the market existed cannot be determined. It was assumed that monopoly power existed in the case in Brown, *The Right to Refuse to Sell* (1916) 25 YALE L. J. 194, 199. In the Dr. Miles case (*supra* note 226, at 406) it was stated that the test of the legality of this or any other agreement under the Act was reasonableness. Failure to overrule Fowle v. Park (1889) 131 U. S. 88 might also be taken to indicate that not all resale price-maintenance agreements were intended to be banned.

288 "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." 220 U. S. at 407. Compare this statement with the language in Fowle v. Park, *supra* note 287, at 97, to the effect that the vendors were entitled "to prevent competition between purchasers."

289 220 U. S. at 408.
prices, they cannot accomplish the same result by individually raising them without agreement. In fact it is difficult to see the parallel between horizontal and vertical price-fixing cases. The former involve agreements between competitors while the latter do not, and this in itself would seem to place them in entirely separate categories. In any event, while the court thus assumed arguendo that prices could not be fixed horizontally, its opinion falls short of saying that all such agreements are unlawful. All it was willing to say on that subject was that agreements "having for their sole purpose the destruction of competition and the fixing of prices" are void. With respect to the Court's holding that the agreement was void at common law, it failed to take note of the fact that its own previous decision in *Fowle v. Parke* held to the contrary and that the common-law view of most states including Kentucky where the *Dr. Miles* case arose, was that resale price-maintenance agreements were not unlawful *per se* but were lawful if reasonable. As the case was decided before the Court had announced the rule of reason, it would seem, in any event, to have little weight on the question under discussion.

Later in 1911 came the famous "rule of reason" announced by Mr. Chief Justice White in the *Standard Oil* case. While dealing with a combination which was obviously and clearly contrary to the act under any construction, the Court went out of its way to correct the error it had fallen into the *Trans-Missouri* case and announced that thereafter only those combinations which unreasonably restrained trade would be held to violate the Act and that the question of reasonableness was to be determined by reference to the common-law authorities on restraint of trade. This was the precise position for which counsel contended in vain in the *Trans-Missouri* case and completely overthrew the only basis on which the case was decided, namely, that all restraints were illegal under the Act. With the over-

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290 See Kales, *Contracts to Keep Up the Price on Resale and to Buy or Use Other Articles in Connection with Those Sold* (1918) 3 CORN. L. Q. 89, 93, where this position is ably defended, particularly in cases where outside competition exists.

291 *Supra* note 287.


294 *Standard Oil Co. of New Jersey v. United States*, *supra* note 250.
throw of that basis it is clear that the case ceased to have other than historic interest. But the Court, while expressly repudiating the rationale of the *Trans-Missouri* case, stopped short of expressly overruling it. Instead it sought to distinguish it in a manner reminiscent of “distinctions” made by justices of the present Supreme Court. The “distinction” was that there the agreement really restrained trade unreasonably, and that the Court had condemned it because it had found it unreasonable. Thus it said of the *Trans-Missouri* and *Joint Traffic* cases that “the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute.”

Here we have a clear recognition by the Court that price-fixing agreements were no longer to be regarded as *per se* violations of the Act. It is true that Mr. Chief Justice White also made the following statement about the *Trans-Missouri* and *Joint Traffic* cases:

“This being true, the rulings in the cases relied upon, when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.”

This cumbersome and vague language was later regarded by Mr. 

295 “A mistake was made, however, in the effort, which could hardly be successful, to show that the construction adopted was not in conflict with prior decisions. The reasoning in this part of the opinion is a curious production, and suggests either intellectual jugglery or confusion of thought.” Raymond, *op. cit. supra* note 271, at 42. “I, for one, am certainly not satisfied with the grounds upon which the court seeks to distinguish the Standard Oil case from the preceding cases and I don’t believe that the bar of the country will be.” Royall, *The Trust Decisions* (1911) 73 Cent. L. J. 57.


296 *Supra* note 250, at 64.


298 Raymond, *op. cit. supra* note 271, at 43, refers to this language as follows: “To the average man this sort of hair-splitting is irritating; and the irritation is not lessened by the involved language in which the reasoning is clothed, suggesting as it
Justice Stone in the *Trenton Potteries* case and Mr. Justice Douglas in the *Socony-Vacuum* case as indicating that the Court regarded all price-fixing agreements as unlawful *per se*. Obviously the passage indicates at most that the Court regarded only the actual agreements involved therein (which were by parties controlling the market) not all price-fixing agreements, as violating the Act. A careful reading of the context in which the above passage appears in the opinion and of the other parts of the opinion reveal that the Court had no intention of declaring all price-fixing agreements unlawful *per se*, even if it be assumed that such declaration would be authoritative in a case not involving a price-fixing agreement. Indeed, the fact that the opinion was rendered by Mr. Chief Justice White, whose strong dissent in the *Trans-Missouri* case was the real antecedent of that rule—a dissent which as we have seen advocated the view that price-fixing agreements were lawful if reasonable—is itself the strongest indication that this is true. It cannot be supposed, notwithstanding the language referred to, that he did not intend to adopt his own dissenting views in that case. It should be remembered also that Mr. Chief Justice White clearly and unequivocally stated that the rule of reason was to be applied "in every given case"—not in every case except price-fixing cases. Lower federal and state court cases decided immediately thereafter put this construction on the case. So did contemporary writers.

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does some of Mr. Gladstone's speeches in the House of Commons, when he seemed positively anxious not to cast light on the subject under discussion."


301 See Walker, *The Unreasonable Obiter Dicta of Chief Justice White* (1911) 72 CENT. L. J. 413, 419, where the author shows that the "unreasonable" *obiter dicta* of Chief Justice White "has no foundation whatever, except in the dissenting opinion which he himself originated and inserted in the report of the Trans-Missouri case in 1897."

302 221 U. S. at 64.

303 The outstanding example of this was the case of United States v. Prince Line (S. D. N. Y. 1915) 220 Fed. 230, 235, where a four circuit judge district court, composed of Judges Lacombe, Coxe, Ward and Rogers, upheld agreements between competing steamship lines fixing uniform rates on the ground that such agreements were reasonable, specifically rejecting the contention that "the agreements themselves" violated the Act. Appeals to the Supreme Court resulted in reversals on the ground that the agreements had been dissolved because of the European war, and with directions to the trial court to dismiss the bill without prejudice. Others are United States v. American-Asiatic S. S. Co. (1917) 242 U. S. 537; American Sea Green Slate Co. v. O'Halloran (C. C. A. 2d, 1915) 229 Fed. 77 (after trial court had held that common selling agent for slate manufacturers with power to fix prices for all violated Sherman Act irrespective of degree of market control, circuit court of appeals reversed on other grounds,
This interpretation of the case is further borne out by the fact that in the next price-fixing case to come before the Court, Standard Sanitary Mfg. Co. v. United States,\textsuperscript{306} nothing at all is said about price-fixing agreements being unlawful per se. In that case an agreement between patent owners manufacturing 85 per cent of the enameled iron-ware products in the United States fixed prices to jobbers, and also uniformly exacted resale price maintenance agreements of jobbers, thereby exercising complete control of the trade from manufacturer to consumer. The Court, particularly stressing such control, held the arrangement illegal. That "control" was the essence of this decision is plain from the oft-quoted passage that "The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."\textsuperscript{306} This language seems to be directed against a group controlling the market—otherwise there would be no rights which could be "pushed to evil consequences." The Court added that the prohibitions of the Act could not be evaded by good motives. The case seems susceptible of the interpretation that a price-fixing agreement will be held unreasonable if control of the market exists, but it went no further than that.

The matter rested in this state until Thomsen v. Cayser\textsuperscript{307} in 1917, where the court held illegal an agreement between ocean carriers who had combined and agreed on uniform rates and also had agreed

\textsuperscript{304} Bruce, \textit{The Supreme Court and the Standard Oil Case} (1911) 73 CENT. L. J. 111, 115-119; Raymond, \textit{op. cit. supra} note 271, at 54-57 (stating that law of loose combinations changed and that where such combinations are formed to secure "the economic benefits of the fact of combination" or to "save the wastes of competition" and have no monopoly control they were valid after 1911); Royall, \textit{op. cit. supra} note 295, at 59.

\textsuperscript{305} (1912) 226 U. S. 20.

\textsuperscript{306} Ibid. at 49.

\textsuperscript{307} (1917) 243 U. S. 66.
to give rebates to shippers who shipped their goods exclusively over the lines of defendants, while charging unduly high prices on other goods. It also appeared that when any outside competition did threaten their trade by offering rates lower than those given by the combination, the latter would thereupon use "fighting ships," that is, ships competing with these lines only, and would offer further rebates to shippers so as to prevent such competition; that the combination had not dispatched steamers to African ports at stated and regular dates, but had placed steamers on berth to receive general cargo only at such times and for such African ports as they deemed best for their private gain and profit and that the rates exacted were extortionate. In the light of the foregoing facts the claim that the combination was a reasonable one and did not violate the Act must have sounded hollow indeed. And so it did to the Supreme Court which condemned it. In doing so the Court, in rejecting the claim of defendants that the rule of reason justified their actions, saw fit to express the opinion that the Trans-Missouri and Joint Traffic cases had not been overruled by the Standard Oil case. In view of the facts thus found it was wholly unnecessary to refer to these cases, so different were their facts. In any event the Court's reference to them indicates at most only that it regarded the particular agreements involved therein as unlawful—not that it regarded all price-fixing agreements as unlawful. The Court made it very clear that it was condemning only this combination. It also stressed the combination's control of the market. Obviously such combination would have been condemned also at common law. In fact it was almost identical with the combination assumed illegal in Mogul Steamship Co v. McGregor.308 Finally, it should also be noted that here again the Court actually considered the reasonableness of the rates fixed by the combination and found them unreasonable, for it said:

"The plaintiff alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury.... The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion."309

The next year the argument that all price-fixing agreements are per se unreasonable restraints was expressly made and expressly re-

308 Supra note 221.
309 Supra note 307, at 88.
jected by the Court in *Chicago Board of Trade v. United States*.

In that case the 1600 members of the Board of Trade had agreed upon and were enforcing a rule prohibiting its members from purchasing or offering to purchase grain between sessions of the Board at a price other than the closing bid at the previous session. The government sued to enjoin, and it is important to note that it relied solely and exclusively on the proposition that price-fixing agreements are unlawful *per se*. Thus the Court in stating the case, said:

> "The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to any one. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law."  

The Court, speaking through Mr. Justice Brandeis, rejected this "bald proposition" and said:

> "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

It is thus plain that the unlawful *per se* argument was the sole reliance of the government and that the court expressly rejected that argument. It is also clear that control of the market, power to affect market prices, existed and was exercised. One would have thought that this case clearly and unequivocally established, once and for all, that violation of the Sherman Act is not shown by establishing, without more, that defendants agreed to fix prices even where they control the market.

The decisions on the question for the next few years prior to the *Trenton Potteries* case were indecisive. The Court continued to
condemn resale price-maintenance agreements, but in no case did it say that such agreements were *per se* unlawful—just as it had not said that in the *Dr. Miles Medical Co.* case. In *American Column & Lumber Co. v. United States*, the Court condemned what was construed as a tacit understanding or gentlemen's agreement through a trade association, consisting of producers of 33 per cent of the hardwood lumber of the country (but whose degree of control of any markets does not appear, except that it must be assumed to have existed from the fact that their agreement actually resulted in raising prices), to maintain prices at high levels, and which resulted in actual maintenance of high prices "to an unprecedented extent" and "regardless of cost and merit." There is nothing in this opinion to support the proposition that all price-fixing agreements are *per se* unlawful. Obviously the case did not conflict with the *Chicago Board of Trade* case which simply announced that price-fixing agreements were not unlawful *per se*—not that they were lawful *per se*. In *Keogh v. Chicago & N. W. Ry. Co.* the Court indicated that an agreement by railroads fixing only reasonable and nondiscriminatory rates "may be illegal" thus assuming that a price-fixing agreement is not unlawful *per se*. In *United States v. American Linseed Oil Co.* trade association activities of producers of linseed oil and products thereof were condemned, but there was no claim of horizontal price fixing, although an agreement to adhere to prices announced to other competitors was condemned. But the Court went into great detail to show the unreasonableness of the restraint. Clearly there is no support here for the proposition that price-fixing or price-affecting agreements are unlawful *per se*.

On the other hand the next three cases to come before the Court upheld agreements and combinations whose purpose was clearly to affect prices. Thus in *National Association of Window Glass Manufacturers v. United States* the Court upheld an agreement by 65

313 Boston Store v. American Graphophone Co. (1918) 246 U. S. 8; United States v. A. Schrader's Son, Inc. (1920) 252 U. S. 85. For cases in lower federal and state courts to like effect, construing Sherman Act, see Notes (1920) 7 A. L. R. 449, 472-474; (1922) 19 A. L. R. 925, 927-928; (1924) 32 A. L. R. 1087-1088; (1936) 103 A. L. R. 1331, 1333-1335. In *Straus v. American Publishers' Ass'n* (1913) 231 U. S. 222 a combination involving both vertical and horizontal price maintenance by a group composed of the publishers of 75 per cent of the books in the United States was held to violate the Act.

315 (1922) 260 U. S. 156, at 161, per Brandeis, J.
316 (1923) 262 U. S. 371.
317 (1923) 263 U. S. 403.
factories producing all the hand-blown window glass manufactured in the country with labor unions representing all the laborers in the industry (skilled laborers) the purpose and effect of which was that each factory agreed to close its plant for half the working year so that only half the factories would be operating at any one time. The effect of this arrangement was obviously to eliminate or drastically curtail price competition between the factories producing and those not producing. It also limited production. Nevertheless, the Court upheld the arrangement solely on the ground that the industry was subject to so much outside competition from machine-blown window glass which could be produced for half the cost of hand-blown glass that the parties did not control the price and in fact the industry existed only at the sufferance of the machine-blown industry. Moreover, said the Court, the arrangement was designed to save useless expense and obtain a more equitable apportionment of the available work between the 2500 workers of the industry. Here we have a clear pronouncement that an agreement limiting production and dividing markets may be upheld where the parties do not control the market—that such arrangements are not unlawful per se.

Two years later the Court handed down two decisions upholding activities of trade associations, regardless of their control of the market, which in each case it conceded "would tend to bring about uniformity in price." These cases were Maple Flooring Manufacturers Assn. v. United States and Cement Manufacturers Protective Assn. v. United States, in which the exchange of information between competitors as to prices, production, costs, and other details of their business was upheld, the court pointing out in each case that there was no agreement to fix prices or limit production. There being no such agreement involved, of course anything said by the Court with respect to the validity of such agreements would obviously be dicta. It happened that Mr. Justice Stone, who rendered the opinions in these two cases, decided to engage in a gratuitous observation in one of them with respect to price-fixing agreements. He said:

"Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful, and may be enjoined,..." If it be assumed that Mr. Justice Stone meant to condemn all such agreements, even though he did not say "all," obviously this gratui-

\[318\] (1925) 268 U. S. 563.
\[319\] (1925) 268 U. S. 588.
\[320\] Ibid. at 604-605.
tous statement could not be regarded as authoritative, or as overturning the clear holding to the contrary in the *Chicago Board of Trade* case.\(^3\)\(^2\)\(^1\) Furthermore, in the *Maple Flooring* case Mr. Justice Stone noted that prices resulting from the arrangement were not unreasonable.

The last case\(^3\)\(^2\)\(^2\) dealing with price-fixing agreements before the *Trenton Potteries* case was *Federal Trade Commission v. Pacific States Paper Trade Assn.*\(^3\)\(^2\)\(^3\) In this case an agreement between paper manufacturers to fix prices was held to be established by the evidence and to constitute a violation of section 5 of the Federal Trade Commission Act as an "unfair method of competition." Control of the market seemed to exist, and there was no attempt to justify any agreement. The whole defense consisted of denying that any agreement existed. One will look in vain in the opinion for any statement, inference, or assumption that any price-fixing agreement other than the one directly involved in the case was unlawful.

Such then was the state of the Supreme Court authority at the time the *Trenton Potteries* case\(^3\)\(^2\)\(^4\) came before it. That case involved

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\(^3\)\(^2\)\(^1\) Probst, *The Failure of the Sherman Anti-Trust Law* (1926) 75 U. of Pa. L. Rev. 122, 133, took the view that these cases in effect sanctioned even direct price fixing.

\(^3\)\(^2\)\(^2\) Cases in lower federal and state courts between 1920 and 1927 were as follows: Lee Line Steamers v. Memphis, H. & R. Packet Co., *supra* note 227 (pooling agreement between competing steamboat lines held void, with stress on monopoly power; also indicating agreement giving reasonable protection against destructive rate wars "might" be valid); Butchart v. United States (C.C.A. 9th, 1924) 295 Fed. 577 (agreement by cement manufacturers fixing prices held to violate Act, citing Addyston Pipe case); Live Poultry Dealers Protective Ass'n v. United States (C.C.A. 2d, 1924) 4 F. (2d) 840, 842-843 [agreement fixing purchase prices in poultry industry held void, L. Hand, J., saying: "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." (Italics added)]; Tilbury v. Oregon Stevedoring Co. (D. Ore. 1925) 8 F. (2d) 398, 900 (agreement by employers fixing maximum wages upheld, with the statement "no complaint is made that the wage adopted is either too high or too low"); Rifle Potato Growers Ass'n v. Smith (1925) 78 Colo. 171, 240 Pac. 937 (common selling agency with power to fix prices held not to violate Sherman Act); Dark Tobacco Growers Coop. Ass'n v. Robertson, *supra* note 225 (same); Potter v. Dark Tobacco Growers Coop. Ass'n, *supra* note 225 (same, stress on lack of monopoly power); Minnesota Wheat Growers Coop. Market Ass'n v. Huggins (1925) 162 Minn. 471, 203 N. W. 420 (same); Tobacco Growers Cooperative Ass'n v. Jones (1923) 185 N. C. 265, 117 S. E. 174 (same); List v. Burley Tobacco Growers Coop. Ass'n, *supra* note 225 (same).

\(^3\)\(^2\)\(^3\) *Supra* note 248. Justices Stone, Taft, C. J., Sanford, McReynolds, and Holmes formed the majority. Justices Van Devanter, Sutherland, and Butler dissented. Mr. Justice Brandeis did not participate.
an indictment charging violation of the Sherman Act by manufacturers controlling 82 per cent of the business of manufacturing and distributing in the United States of sanitary pottery. It was charged that they had entered into a combination to fix and maintain uniform prices for the sale of sanitary pottery. The trial court charged, in submitting the case to the jury, that if it found that an agreement on prices existed, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised, since such an agreement was in itself an unreasonable restraint. It also refused to quote a portion of the opinion of the Chicago Board of Trade case, hereinabove referred to. The circuit court of appeals held such refusal to be error and reversed the resulting judgment of conviction. The Supreme Court, by a vote of five to three, in turn reversed the judgment of the circuit court of appeals and held that the action of the trial court was correct. Mr. Justice Stone, who wrote the opinion of the Court, conceded that "only those restraints upon interstate commerce which are unreasonable are prohibited," but said "it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable." He then proceeded to use language condemning "every price fixing agreement" and any agreement which aims or results in the elimination of any form of competition, for he said:

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. ... Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints. ..."

The above language clearly limits the principle of the case to agreements by parties controlling the market. There obviously is no power to fix arbitrary or unreasonable prices unless such control exists. As noted above, therefore, the case looks in three different directions, and language may be found supporting either of three views, namely (1) that the case condemns all price-fixing agreements; (2) that it

325 Trenton Potteries Co. v. United States (C. C. A. 2d, 1924) 300 Fed. 530.
326 273 U. S. at 396.
327 Ibid. at 397. (Italics added.)
328 Part I, op. cit. supra note 192, at 302-304.
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condemns such agreements only by parties controlling the market; and (3) that it merely holds that a price-fixing agreement may not be justified by showing that the prices fixed are reasonable.

Mr. Justice Stone found that his view (whichever of the three interpretations he meant, of course, not being clear) was sustained by past authority and referred especially to the Trans-Missouri and Joint Traffic cases. Obviously those cases do not support him. They were decided on the basis that all restraints, whether by price-fixing or otherwise, were unlawful, not that price-fixing agreements were unlawful. With the overthrow of that basis the decisions were both left without any supporting rationale and therefore should not have been considered as authoritative by the Court. The next authority relied on was the Addyston Pipe case and the quotation from the opinion of Judge Taft that at common law there was no question of reasonableness of prices open to the Court in considering price-fixing agreements, which, Mr. Justice Stone said, was approved by the Supreme Court in that case. From the discussion above it is clear that no such approval was given. Mr. Justice Stone purported to see support for his view in Swift & Co. v. United States, the Dr. Miles Medical case, the Standard Oil case, Thomsen v. Cayser, the Maple Flooring and the Cement Manufacturers cases and Federal Trade Commission v. Pacific States Paper Trade Association, but from what has been said above it is clear that such support is lacking. His further statement that "Cases in both the federal and state courts have generally proceeded on a like assumption,"\(^{329}\) has been shown above to be unsound. In this connection Mr. Justice Stone cited but a very small and carefully selected number of the many state and federal cases in existence. His claimed distinction of the Chicago Board of Trade case was palpably frivolous. He said it was a decision dealing with a regulation of a board of trade and "does not sanction a price agreement among competitors in an open market such as is presented here."\(^{330}\) Here is a strange distinction indeed. Apparently Mr. Justice Stone is making the point that a price-fixing agreement is bad if made between competitors in an open market, but if such competitors form an exchange and fix prices through such exchange, there is no objection. Obviously there is nothing to the purported distinction. Mr. Justice Stone failed to take note of the plain fact that in the Chicago Board of Trade case the Court squarely met and squarely

\(^{329}\) 273 U. S. at 400.

\(^{330}\) Ibid. at 401.
repudiated the view that all price-fixing agreements are unlawful *per se*.

Later on in the same term the Court strongly reaffirmed the rule of the *Trenton Potteries* case. This was done in a case involving not the Sherman Act but a state antitrust law. The Colorado antitrust law was designed expressly to make the rule of reason applicable to price-fixing and all other agreements and to that end expressly provided that no agreement would be deemed to violate the act "the object and purpose of which are to conduct operations at a reasonable profit. . . ." In *Cline v. Frink Dairy Co.* suit was brought to enjoin enforcement of the Act, and it was held void for uncertainty because of the proviso, in that the proviso left the whole statute without a fixed standard of guilt, reasonableness of profits being too vague a standard. To the argument that the act did nothing more than incorporate the rule of reason of the Sherman Act the court replied, through Mr. Chief Justice Taft, that under that act, which was simply declaratory of the common law (referring to his own opinion in the *Addyston Pipe* case) the Court could not inquire into the reasonableness of prices, citing the *Addyston Pipe* and *Trenton Potteries* cases. This case indicated very clearly the Court's belief that not only was the unlawful *per se* rule the proper view of the Sherman Act, but that Congress lacked constitutional power to make the rule of reason applicable to price-fixing agreements.

Notwithstanding the doubt as to what its real holding was, the *Trenton Potteries* case was assumed more often than not to condemn all price-fixing agreements as unlawful *per se*. On this construction the Supreme Court was subjected to sharp attacks on the basis of the comparison between its holdings as to close-knit and loose-knit combinations. With respect to the former type of combination the court had held in the *United States Steel* and *International Harvester* cases that mergers of corporations controlling 51 per cent of the total United States industry in one case and 64 per cent in the other were not obnoxious to the Sherman Act because, notwithstanding the business controlled, each corporation was met with

331 Colo. Laws 1913, c. 161.
332 Supra note 265.
335 United States v. United States Steel Corp. (1920) 251 U. S. 417.
effective outside competition in every market in which they sold their products—in short, a control of the market test. It was argued with considerable force that the result of the Supreme Court decisions was to promote or compel mergers and other close-knit combinations thus leading to greater combinations of capital and concentrations of economic power. It was not long before the Supreme Court took notice of this objection and began once more to veer away from the unlawful per se rule of the Trenton Potteries case.

The first such veering came in Standard Oil Co. of Indiana v. United States, decided in 1931, where the owners of the patents on “cracked gasoline” pooled their patents and agreed to charge specified royalties to manufacturers using the process, thus preventing competition among themselves and increased cost of manufacture. The Court conceded that, although where combining patent owners effectively dominate an industry the power to fix and maintain royalties “is tantamount to the power to fix prices,” here the agreement was valid because no such domination was present since “cracked” gasoline, constituting only 26 per cent of the total production, had to compete in every market with uncracked gasoline. Mr. Justice Brandeis, for the Court, said:

"In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition."

The inconsistency of the foregoing case with the unlawful per se rule is apparent. Here the licensing rates of competing patentees were directly fixed and yet the agreement was upheld.

If the Standard Oil case showed only a veering away from the unlawful per se rule, there can be little doubt that the next case, Appalachian Coals Inc. v. United States constituted an open and avowed repudiation of it. In this case a group of 137 producers

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337 This argument was first put forward by Mr. Justice Brandeis in his dissenting opinion in American Column & Lumber Co. v. United States, supra note 314, at 418-419. After the Trenton Potteries case it appeared very frequently. Handler in Handler, op. cit. supra note 333, at 174; Jaffe and Tobriner, The Legality of Price-Fixing Agreements (1932) 45 Harv. L. Rev. 1164, 1181; Washburn, op. cit. supra note 271, at 112-114.

338 (1931) 283 U. S. 163.

339 Ibid. at 179.

340 Supra note 195.

of bituminous coal in the Appalachian territory (consisting of four states) who produced 74.4 per cent of the coal produced in that territory combined to form a common selling agency which was given authority to fix selling prices of all 137 producers, a type of agency identical with that dealt with in many cases previously considered. Obviously the prices of the parties to the agreement were fixed in the same sense that they had been fixed in a multitude of other cases heretofore considered, and there can be no doubt that the purpose and intent of the parties was to fix them. Price competition between them was eliminated. If all price-fixing agreements are unlawful, then this must have been unlawful. In reliance on the decision in the Trenton Potteries case the three-judge district court held that it was and enjoined it. The Supreme Court, in an opinion by Chief Justice Hughes in which Mr. Justice Stone and six other justices concurred, upheld the agreement and reversed. In doing so it announced principles which were strongly reminiscent of common law authorities prior to 1890 which had upheld price-fixing agreements and even more reminiscent of modern English cases upholding them. The purpose of the Sherman Act, said the Chief Justice, "is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor."

He added that "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Of particular significance is his statement that:

"The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either

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342 There is a striking similarity in the facts of the Appalachian Coals case and those of the following cases considered above: People v. Sheldon; People v. Milk Exchange, both supra note 230; Pocahontas Coke Co. v. Powhatan Coal & Coke Co., supra note 246 (strikingly similar to Appalachian set up); Texas Standard Cotton Oil Co. v. Adoue, supra note 227; Attorney Gen. of the Commonwealth of Australia v. Adelaide Steamship Co.; North Western Salt Co. v. Electrolytic Alkali Co.; Crown Milling Co., Ltd. v. King, all supra note 206; Ontario Salt Co. v. Merchants Salt Co., supra note 205. And see other cases cited supra notes 206 and 225.


344 Supra note 195, at 359. (Italics added.)

345 Ibid. at 359-360.
by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis." 348

The comments that the restrictions imposed by the Act are not mechanical or artificial and that reasonable measures to protect commerce from injurious and destructive practices and to promote competition on a sound basis seem to be aimed particularly at the Trenton Potteries case, the only case which had heretofore established any "mechanical" or "artificial" rule (other than the Trans-Missouri and Joint Traffic cases, whose mechanical rule had been repudiated). The Court expressly approved both the first and second Standard Oil cases, the Chicago Board of Trade case and the National Association of Window Glass Manufacturers case. The Court then added significantly that in applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case and "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it," 347 citing the Chicago Board of Trade case. Again striking (so it seems) at the Trenton Potteries case he said "The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions." 348 It was necessary, therefore, to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the plan adopted, the reasons for its adoption, and its effect on market prices. In doing so the Court found that the condition of the industry was deplorable; that destructive practices existed; that the producers were subject to highly organized and concentrated buyers but were themselves unorganized; that most of the Appalachian coal was sold in the highly competitive region east of the Mississippi and north of the Ohio rivers at an adverse freight rate; that many producers had gone into bankruptcy or shut down and that wages were extremely low and tax collections difficult; that the selling agency was organized for the purpose of improving this situation, eliminating destructive practices and to bring about "a better and more orderly marketing of coals" from this region and "better to enable the producers . . . more equally to compete in the general markets for a fair share of the available

346 Ibid. at 360. (Italics added.)
347 Ibid. (Italics added.)
348 Ibid. at 361.
coal business.’”\textsuperscript{349} The Court concluded that “the existing situation prompted defendants to make, and the statute did not preclude them from making an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce.”\textsuperscript{350} It then expressed a much broader view of public interest than was found in previous cases (which identified public interest with consumer interest) and resembled modern English cases very closely. It said:

“The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”\textsuperscript{351}

Since they had made bona fide a fair and open endeavor to aid the distressed industry the only remaining question said the Court was whether it must, notwithstanding, be condemned. Because defendant would be unable to fix the market price of coal in the consuming markets, the Court found that the Act was not violated. In this connection the Court found that “wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers,”\textsuperscript{352} and that “The plan cannot be said either to contemplate or to involve the fixing of market prices.”\textsuperscript{353} To the argument that even so prices would be “affected” in that the tendency would be to stabilize them, the Court replied:

“The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade.”\textsuperscript{354}

Thus the Court expressly met and expressly repudiated the contention that agreements which “affect” prices are necessarily illegal.

Older cases relied on by the government were distinguished. No reference was made to the \textit{Trans-Missouri} and \textit{Joint Traffic} cases, the Court thereby indicating that they were no longer authoritative.

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\textsuperscript{349} \textit{Ibid.} at 366.
\textsuperscript{350} \textit{Ibid.} at 372.
\textsuperscript{351} \textit{Ibid.}
\textsuperscript{352} \textit{Ibid.} at 373.
\textsuperscript{353} \textit{Ibid.}
\textsuperscript{354} \textit{Ibid.} at 374.
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The Addyston Pipe case was distinguished on the ground that there the combination "was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased."\textsuperscript{355} The Trenton Potteries case was said to rest on the basis that defendants, controlling 82 per cent of the business, had the power to fix prices and had exerted it, adding that "In the instant case there is, as we have seen, no intent or power to fix prices."\textsuperscript{356} Obviously this meant market prices, for, as noted above, the prices of the parties to the agreement were to be fixed and they had both the power and the purpose to fix them.

Finally the Court took notice of the argument that it had established different criteria in close-knit and loose-knit cases by stating that henceforth the test would be the same in both. If businesses could unify without violating the Act then they could also establish a co-operative common selling agency involving price fixing.\textsuperscript{357}

The result of the Standard Oil and Appalachian Coals cases was seemingly to make control of the market—involving power to dictate market prices—the criterion. The Appalachian Coals case definitely restored the Chicago Board of Trade case, and the principle that the mere elimination of competition, even price competition, between the parties to the agreement does not establish invalidity. There can be little doubt that the Appalachian Coals case was the case that expressed more accurately than any other case, the actual intent of the Congress which enacted the Sherman Act. The control of the market test was again applied in Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.\textsuperscript{358} decided the next year, in passing on an agreement which fixed prices of advertising by competing farm newspapers.\textsuperscript{359}

\textsuperscript{355} Ibid. at 375. (Italics added.)
\textsuperscript{356} Ibid.
\textsuperscript{357} Ibid. at 376.
\textsuperscript{358} (1934) 293 U. S. 268.
\textsuperscript{359} The case involved a combination between five publishers of a total of twenty-three farm newspapers in the mid-western area, largely dependent for their subsistence on advertising revenue, whereby the parties each agreed to offer a combination rate for advertisement in the newspapers of all five publishers—a rate lower than that previously offered by all five in the aggregate. The circuit court of appeals held that because of small percentage of control of the total newspapers of the entire county (5 out of 300) no violation of the Act was made out, owing to the decisions in the Appalachian Coals and Standard Oil cases. The Supreme Court reversed this and ordered a new trial, saying that control throughout the entire county was not essential to establishment of a violation of the Sherman Act, which was held to have both a geographical and distributive significance, and to apply to restraints in any part of the United States. The case was
Sugar Institute v. United States\(^{360}\) and Interstate Circuit, Inc. v. United States\(^{361}\) both seemed to indicate that the broad theory of the Appalachian Coals case would be retained and perhaps even sent back for a new trial to determine whether restraint of trade existed in the area—to determine whether and to what extent control of the market existed. On the second trial judgment in the district court was affirmed by the circuit court of appeals on the basis of the opinion of the Supreme Court on the first appeal. Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co. (C. C. A. 7th, 1936) 82 F. (2d) 704. But the Supreme Court found that the circuit court of appeals had decided the second appeal on the hypothesis that the Supreme Court had indicated in the first appeal that the combination was illegal, which was contrary to the fact, and accordingly the Supreme Court remanded the case to the circuit court of appeals for a consideration of the case "untrammeled by any supposed expression upon that point by this Court." Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co. (1936) 299 U. S. 156, 159. On remand the circuit court of appeals then found that the combination was valid because it was met with effective and powerful outside competition in all markets in which it solicited advertisements and moreover, was designed to eliminate competitive abuses and unfair practices and was well within the scope of the Appalachian Coals decision and reversed. (C. C. A. 7th, 1937) 88 F. (2d) 979. The Supreme Court denied certiorari from this decision and a rehearing thereon. (1937) 301 U. S. 696. While denial of certiorari does not ordinarily indicate approval of the opinion of the court below it is hard to believe that the Supreme Court did not here approve the decision of the circuit court of appeals in view of its thorough acquaintance of the facts of the case because of the previous two hearings. The case constitutes a very clear application of the control of the market test of price-fixing agreements.

\(^{360}\) (1936) 297 U. S. 553. This case did not involve direct price fixing \(\text{(ibid. at 582)}\) but mainly an agreement to adhere to prices publicly announced without deviation. Nevertheless the general tenor of the Appalachian Coals case prevailed in the Court's discussion of the general principles applicable to the construction of the Act. See \textit{ibid.} at 597-602. In particular it repeated the language that the restrictions imposed by the Act are not "mechanical or artificial" and stated that "Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade." \textit{Ibid.} at 598. But it limited its approval to co-operative enterprises designed "to end abuses and to foster fair competitive opportunities" and which "carries with it no monopolistic menace." \textit{Ibid.} The fact that the Court assumed that even where control of the market exists, as it did in the Sugar Institute case, competitive abuses and ruinous competition might justify co-operative action seemed to be an indication that the Court was prepared to extend the principle of the Appalachian Coals case.

\(^{361}\) (1939) 306 U. S. 208, 232, a case which did not involve a horizontal price-fixing agreement but a monopolistic effort by exhibitors to coerce price policies of distributors. In the course of the opinion Mr. Justice Stone noted that "It does not appear that the competition at which they were aimed was unfair or abnormal. \textit{Cf.} Appalachian Coals, Inc. v. United States, 288 U. S. 344, 363, 372." This seemed to indicate that even a group having monopoly power might justify a cooperative effort on the ground that it sought to correct competitive abuses or unfair competition. In California Rice Industry v. Federal Trade Commission (C. C. A. 9th, 1939) 102 F. (2d) 716 an agreement by rice millers fixing prices for rice was held to constitute an unfair method of competition but the court did not proceed on the theory that price-fixing agreements are unlawful \textit{per se}. 
extended to allow some price-fixing agreements even where control of the market existed. There was another reason why such an extension might have been expected. At the time the *Trenton Potteries* case was decided there was much better reason for holding unlawful *per se* price-fixing agreements by parties controlling the market in view of the principle then current that the legislature had no power to fix prices by legislative act.\(^{365}\) As observed in several English cases, this power was relied on to justify price-fixing agreements even by parties with control—as a brake to prevent prices going too high.\(^{363}\) There being no brake in this country, at least in most industries, there was perhaps reason for condemning all such agreements so as to prevent any unlimited exercise of arbitrary power by interested persons. But after 1934, this situation was changed and the legislative power to fix prices in any industry recognized.\(^{364}\) Accordingly after this time it could be urged with greater force in this country that even where the parties control the market a price-fixing agreement should not necessarily be held illegal.

But the present Supreme Court, at least a majority of the members thereof, have decided that the pendulum should swing the other way. The first indication that such a swing was coming was found in *Ethyl Gasoline Corporation v. United States*,\(^{365}\) decided in March, 1940. There a combination between the owner of the patent on tetraethyl lead, a substance used in nearly all gasoline sold in the United States, entered into a combination with refiners of oil whereby they licensed such refiners to mix tetraethyl lead with ordinary gasoline and to sell the mixture only to jobbers licensed by the patentee. It was shown that 88 per cent of the gasoline sold in the country was produced under this arrangement and that the patentee had actually, although on infrequent occasions, used its licensing power to coerce the price policies of the major oil companies. This

\(^{365}\) *Tyson & Bro. v. Banton* (1927) 273 U. S. 418, 430, establishing that only in those few businesses which are "affected with a public interest" is legislative price fixing permissible—in other industries it denies due process.

\(^{363}\) See *Hare v. London & N. W. Ry.*, *supra* note 240; *Crown Milling Co. v. King*, *supra* note 206.


In *Mayo v. Lakeland Highlands Canning Co.* (Feb. 26, 1940) 309 U. S. 310, 318, the Court said "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it; and allegation of that fact does not raise substantial federal questions."

\(^{365}\) (March 25, 1940) 309 U. S. 436.
was condemned, and enjoined. That there was nothing unusual in the decision itself is apparent since the combination had a greater control of the market than perhaps any case which had ever come before the Court. Since it had used this power to coerce price policies of others this seemed to justify the injunction without in any way impairing the principles announced in the Appalachian case. But the Court, through Mr. Justice Stone, elected to go further and added the dictum that:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition. United States v. Trenton Potteries Co. . . . and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act. . . ."366

The foregoing dictum seemed to herald a return to the unlawful per se rule and even the Trans-Missouri rule for it implied that it was enough to condemn an agreement that it eliminates competition. Coming at a time when the Socony-Vacuum case was still pending, the dictum clearly foreshadowed the decision in that case, which came on May 6, 1940.367

The pertinent facts of the Socony-Vacuum case have been stated above. While it is not difficult to agree with the conclusion that the Act was violated in this case, the opinion, delivered by Mr. Justice Douglas, went far beyond a mere condemnation of the specific agreement involved in the case and is sweeping and far reaching. It went far beyond previously expressed views of even Mr. Thurman Arnold and the Department of Justice.368 Indeed, it is not clear that it did

366 Ibid. at 458. (Italics added.)
368 At the December 2, 1938, hearing before the Temporary National Economic Committee, after a witness had testified that provisions limiting production and fixing minimum prices had been allowed under N. R. A. Codes but that such agreements were contrary to the antitrust laws except as allowed by N. R. A., Mr. Arnold stated: "May I just, for the sake of the record add a word, that according to the antitrust laws as I see them, had the agreement been consistent with efficient or orderly marketing, it might conceivably had been held reasonable. In other words, I wouldn't like the record to show that these agreements would necessarily be in violation. I don't think you mean they would." 1 HEARINGS BEFORE临时 NATIONAL Economic COMMITTEE, CONGRESS OF THE UNITED STATES, 75th Cong., 3d Sess., p. 134. (Italics added.)

See also Mr. Arnold's remarks set forth infra note 382, and Arnold, Antitrust Law Enforcement, Past and Future (1940) 7 LAW & CONTEMP. PROB. 5, 14. See also government's petition for certiorari in Socony-Vacuum case, p. 18, where it is said: "The ratio decedendi of the Trenton Potteries case, as we understand it, is that an agreement by
not in effect restore the rule of the *Trans-Missouri* case. In this connection it should be noted that the *Trans-Missouri* case was cited with approval—even on its reasoning. While it is apparent that Mr. Justice Douglas intended to condemn all price-fixing or price-affecting agreements whether or not the parties thereto controlled the market, there are several inconsistencies in his reasoning. He started out by grounding the case squarely on the *Trenton Potteries* decision, which he reviewed at length. He then proceeded to consider the cases relied on by the oil companies. The first *Standard Oil* case he disposed of on the ground that, as the *Trenton Potteries* case had pointed out, that case has "no application to combinations operating directly on prices or price structures." As shown above, this is a strained, distorted and untenable construction of the case. The *Appalachian Coals* case was distinguished from the *Socony-Vacuum* case on the ground that "Unlike the plan in the instant case, the plan in the Appalachian Coals case was not designed to operate vis a vis the general consuming market and to fix the prices on that market." This was so, as we have seen, only because in that case the parties to the agreement did not control the market. It was clear there that they fixed prices and eliminated price competition among themselves and that they intended to do so. Therefore Mr. Justice Douglas is enunciating the theory that if a combination fixes or affects market prices it is illegal but that if it merely fixes the prices of or eliminates price competition among the parties thereto without affecting the general market price the agreement will be upheld. This is clearly a control of the market test, at least as applied to price-fixing agreements. The *Maple Flooring* and *Cement Manufacturers* cases were distinguished on the ground that they did not involve "price fixing" agreements and at the same time doubt as to their correctness indicated. No account was taken that those cases definitely upheld "price-affecting" agreements and that the *Socony-Vacuum* case was concerned with the latter only. The distinction of

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the *Chicago Board of Trade* case consisted of a virtual rewriting of the opinion of Mr. Justice Brandeis in that case and complete disregard of the only point presented and the only point decided therein, namely that price-fixing agreements are not unlawful *per se*. Mr. Justice Douglas said that the rule there involved "was somewhat akin to rules of an exchange limiting the period of trading" and that "No attempt was made to show that the purpose or effect of the rule was to raise or depress prices" and that "Since it was not aimed at price manipulation or the control of the market prices and since it had 'no appreciable effect on general market prices' the rule survived. . . ." Here Mr. Justice Douglas puts forth several different ideas. First he plainly states that a price-fixing agreement which has only the effect of limiting the period of trading is valid—in other words a negation of the idea that all price-fixing agreements are bad. He then skips to the notion that the test is whether the purpose or effect of an agreement is to "raise or depress" "prices," as distinguished from keeping them constant (which obviously was done in the *Chicago Board of Trade* case). He then shifts to indicate the test is whether the agreement is aimed at price manipulation or control of "market prices" (this being more in accord with his *Appalachian Coals* distinction). But he also indicates that the agreement must have an "appreciable" effect on market prices—a negation of the proposition that all market price-affecting agreements are bad. His answer to the *Sugar Institute* case was that the combination there was held illegal and the attempted justification of competitive abuse was not permitted—which, of course, ignores the reasoning of the opinion therein.

After the foregoing review of previous cases Mr. Justice Douglas proceeds to arrive at the conclusion that:

"Thus for over forty years this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

To call the record of the Supreme Court on this question over the last forty years one of adherence to the unlawful *per se* principle "consistently and without deviation" rather than what it very plain-

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ly is—one of incredible vacillation and confusion in which no consistent adherence to the unlawful *per se* or any other principle has been shown—is to fly in the face of facts which seem indisputable. The statement is an obvious attempt to conceal what the Court was really doing, namely, under the thin guise of adhering to past precedents writing into law the conception of five members of the Court as to what the law should be.

If Mr. Justice Douglas had stopped at this point, even though he had stated that "price fixing agreements are unlawful *per se*" it would have been doubtful, in view of his attempted distinctions of the *Appalachian Coals* and *Chicago Board of Trade* cases whether he did not mean by "price fixing agreement" an agreement which fixes only market prices as distinguished from the prices of the parties thereto—in short, one by parties who control the general market price. But in holding the *Trenton Potteries* and unlawful *per se* rule applicable to the agreement in the *Socony-Vacuum* case he made it clear that he meant to condemn all agreements which eliminate price competition or affect prices of parties to the agreement, whether or not they control the market. This was obviously inconsistent with his claimed distinction of the *Appalachian Coals* case. As noted above, his citation with approval of the *Chesapeake & O. Fuel* case, whose

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877 *Ibid.* "But the thrust of the rule is deeper and reaches more than monopoly power." *Ibid.* at 843, 84 L. ed. Adv. Ops. at 794. "Price fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control." *Ibid.* at 844, 84 L. ed. Adv. Ops. at 795. "But the fact that the group cannot control the market price does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Ibid.* at 845, n. 59, 84 L. ed. Adv. Ops. at 796, n. 59.

Mr. Justice Douglas then stated that the question of monopoly power or control of the market becomes important only in cases involving section 2 of the Act, not in those involving section 1. *Ibid.* But this view is unsound on authority. Lack of control of the market was a defense in *National Ass'n of Window Glass Mfrs. v. United States* (supra note 317) which involved only section 1 of the Act; and in *Standard Oil Co. of Indiana v. United States* (supra note 338) and the *Appalachian Coals* case (supra note 195), both of which involved proceedings charging violation of both sections 1 and 2 of the Act. Unless lack of control of the market were a defense under section 1, the *Appalachian* and *Standard Oil* decisions could not have been rendered. As a matter of fact the language of the *Appalachian* opinion evinces a clear purpose to make control of the market the test under both sections. *Ibid.* at 374.

877 *Supra* note 282.
facts are on all fours with the Appalachian Coals case and whose decision is the other way, shows very clearly that Mr. Justice Douglas really intended to overrule rather than to distinguish the Appalachian Coals case. Mr. Justice Douglas said it was up to Congress to change the rule—not observing that the 1890 Congress seemingly did not intend to adopt that rule.\textsuperscript{378} He said that "if the so-called

\textsuperscript{378} The opinion seems to be an open invitation to Congress to change the rule if it sees fit to do so. It is significant that nowhere in the opinion is the Cline case [\textsuperscript{supra} note 265] referred to so that perhaps the present Court is prepared to allow Congress to write the rule of reason into the Act as to price-fixing agreements. Congress has already by express legislation legalized some price-fixing agreements. Thus section 15 of the Shipping Act of 1916 (39 Stat. 728, 733, 734, 46 U. S. C. (1934) \$ 814) allows common carriers by water to enter into agreements with other such carriers "fixing or regulating transportation rates or fares; ... controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried...." Such agreements must be filed with the Shipping Board which may disapprove, cancel or modify any such agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States...." Agreements entered into after the organization of the Board were valid only after approval by the Board. And the Webb-Pomerene Export Trade Act (40 Stat. (1918) 516, \$ 2, 15 U. S. C. (1934) \$ 62) provides that nothing in the Sherman Act shall be construed as declaring illegal an association entered into for the sole purpose of engaging in the export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, if not in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, and not to enhance or depress prices in the United States of commodities of the class exported by such association. The Capper-Volstead Act (42 Stat. (1922) 388, \$ 1, 7 U. S. C. (1934) \$ 291) legalizes co-operative marketing associations by providing that persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged but section 2 gives the Secretary of Agriculture power if he "shall have reasons to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is \textit{unduly enhanced by reason thereof}" he may after hearing order such association to cease and desist. (Italics added.) This Act would seem clearly to be subject to the same vice as the Colorado law condemned in the Cline case [\textsuperscript{supra} note 265]. In United States v. Borden Co. ([1939]) 308 U. S. 188, 205 the provisions of the Capper-Volstead Act are discussed without any intimation that the Act is invalid because of the provision preventing monopolization which unduly enhances prices. The Civil Aeronautics Act of 1938 (52 Stat. 973, 1004, 49 U. S. C. Supp. IV (1938) \$ 492) allows air carriers to enter into agreements pooling or apportioning earnings or "relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition...." Agreements must, to be legal, be filed with and approved by the Civil Aeronautics Authority and the
competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case" and that "In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." But surely this is pure *ipse dixit*. The characterization of the Sherman Act as a "charter of freedom" was first made by Mr. Chief Justice Hughes in the *Appalachian Coals* case and his conception of that "charter" as there set forth can hardly be said to be in accord with that of Mr. Justice Douglas here. Furthermore, as shown above, the English cases show that adoption of a different rule does not in fact result in the reasonableness of prices necessarily or otherwise becoming an issue in every case. Moreover, the statement carries with it a proposition which, it is submitted, cannot be supported, namely, that the English do not and have not since the eighteenth century had "a system of free competition." Mr. Justice Douglas then spoke with contempt of "the age-old cry of ruinous competition and competitive evils," without noting that that old cry was often effective in previous cases; had won the day in the *Appalachian Coals* case; and had been recognized as a valid cry in the *Sugar Institute* and *Interstate Circuit* cases. As noted above, he did not base the rule so declared on the common law but instead said that whatever may have been the status of price-fixing agreements at common law "the Sherman Act has a broader application to them than the common law prohibitions or sanctions," citing the *Trans-Missouri* case.

Authority is required to disapprove any such agreement which it "finds to be adverse to the public interest."

It would seem that all of the above laws are condemned by the decision in the Cline case but it would be surprising if the Court should hold any of them illegal. In this connection, see Sunshine Anthracite Coal Co. v. Adkins, *supra* note 364, at 914, 915, 84 L. ed. Adv. Ops. at 833. See also section 3 of Robinson-Patman Act [49 Stat. (1936) 1526, 15 U. S. C. Supp. IV (1938) §13a] which condemns the selling of goods "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

In 1932 the American Bar Association drafted a proposed amendment to the Sherman Act along the same line as the Shipping Act and the Civil Aeronautics Act. It allowed parties to enter into loose-knit arrangements provided they obtained approval of the Federal Trade Commission for them after public hearing at which it finds that the agreement does not so lessen competition as to be against the public interest or tend to create a monopoly. See Montague in *HANDLEY*, *op. cit. supra* note 333 at 27, where Mr. Montague argues that such a law would be invalid under the Cline case.

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The revolutionary character of the Socony-Vacuum opinion is apparent. At a single blow it undid virtually all that was done in the Appalachian Coals case, respecting the interpretation of the Sherman Act. Coupled with the opinion in the Ethyl Gasoline case condemning all restrictions on competition, it virtually restored the rule of the Trans-Missouri case; for as noted above almost any agreement can be shown to have some effect on prices. Once more it placed the Court squarely in the dilemma of announcing a stricter rule for loose-knit than for close-knit combinations, thereby promoting and often compelling mergers and other unifications of enterprises and tending to greater concentrations of capital and economic power and tending to frustrate the aims of the present antitrust drive. In fact on this aspect it also runs directly counter to the position strongly taken by Mr. Thurman Arnold and the Department of Justice itself prior to the Socony-Vacuum case.\textsuperscript{382}

The sweeping language of the Socony-Vacuum opinion seemed to indicate that the status of price-fixing agreements was settled once and for all, at least so long as the present majority rules. A dictum in Sunshine Anthracite Coal Co. v. Adkins,\textsuperscript{383} decided two weeks later

\textsuperscript{382} At a hearing before the Temporary National Economic Committee on December 2, 1938, at which Mr. Justice Douglas was present as a member of the committee, the following colloquy occurred between Willard L. Thorp, Adviser on Economic Studies, Department of Commerce, Washington, D. C., and Mr. Arnold:

Dr. Thorp. "...I should like to advance the suggestion that the Sherman Act or antitrust law is in considerable part responsible for the development of these large enterprises. The reason for that is that through the process of interpretation, we have arrived at a state of law where five enterprises, each of which, let's say, represents 10 per cent of an industry, cannot have collective action with regard to prices of markets or allocation of production without running afoul of the antitrust laws. That becomes a combination or conspiracy in restraint of trade. If, however, those five enterprises should merge into a single enterprise, then that single enterprise has no problem of conspiracy or combination; it is only a single enterprise."

Mr. Arnold. "I don't think that is the position which the anti-trust division is taking, and I don't think it is one that they are in a position to take. We have the identical problem in the Aluminum case. ...That is a common interpretation, newspaper interpretation of the antitrust law, but without arguing the point, I wish to make the record clear that we make no such distinction, and we will get a specific decision on that, I think, in the Aluminum case."

\textsuperscript{383} Supra note 364, where the Court in upholding the Bituminous Coal Act of 1937 [50 Stat. 72, 15 U.S.C. Supp. IV (1938) §§ 828-851] indicated in a very clear manner that the evils which existed in the Appalachian Coals case (the case was cited at 60 Sup. Ct. 913, n. 12, 84 L. Ed. Adv. Ops. at 831, n. 12) however much they might be the occasion and justification for government price fixing, federal or state, afforded no justification for co-operative endeavors on the part of industry itself to meet those evils. Mr. Justice
gave additional support to this view and to the view that the Appalachian Coals case had been really overruled. But the decision rendered one week later in Apex Hosiery Co. v. Leader will make it extremely difficult for the Court to adhere to all of the Socony-Vacuum language. In the Apex case the Court had before it an action to recover treble damages against a labor union which had intentionally restrained the movement of goods in interstate commerce by means of a sit-down strike. In holding that these activities did not violate the Act the Court placed chief reliance on principles and authorities which it had just repudiated in the Socony-Vacuum case. Thus, after deciding that labor unions were not entirely exempt from the Sherman Act Mr. Justice Stone, speaking for the Court, found that the phrase "restraint of trade" which "had a well understood meaning at common law," was made the means of defining the activities prohibited by the Act. He found that "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law" and that Congress intended to take over those doctrines and prohibit only what was condemned at common law. This statement should be contrasted with the refusal of the Court in the Socony-Vacuum case to look into what the common law on price-fixing agreements was prior to 1890 on the ground that the common law was not material to the question since the Sherman Act goes beyond the common law.

Douglas, for the Court, said: "If the industry acting on its own had endeavored to stabilize the markets through price-fixing agreements, it would have run afoul of the Sherman Act," citing the Socony-Vacuum case. Supra note 364, at 914, 84 L. ed. Adv. Ops. at 832. While this is susceptible of the interpretation that such co-operative efforts are still permissible if they do not fix or affect general market prices, the whole tenor of the opinion seems to be that the matter should be left to the government to deal with as it sees fit and that all voluntary co-operative attempts by private parties to deal with the situation will be deemed officious intermeddling with the competitive system and proscribed. The Court seemed clearly to imply that the Appalachian Coals method of correcting this situation in the coal industry was improper, that the Sunshine Anthracite method was the only proper one.

Supra note 193.

Ibid. at 992-993, 84 L. ed. Adv. Ops. at 923. (Italics added.)

Ibid. at 994, 84 L. ed. Adv. Ops. at 924. (Italics added.) In note 17 on page 994, 84 L. ed. Adv. Ops. at 924, n. 17, it was observed that "In his explanation of the bill Senator Sherman referred to several common law cases on restraint of trade. 21 Cong. Rec. 2457-2460." Compare this article, Part I, op. cit. supra note 192, at 305, n. 29, where this same citation to the Congressional Record was made to establish this very point, a point which in the Socony-Vacuum case Mr. Justice Douglas said was immaterial.

Mr. Justice Stone then said that apart from labor cases "in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price."\(^{388}\) This ignores the fact that he had himself stated in the Ethyl opinion that all restraints on competition were condemned; that this statement had been approved in the Socony-Vacuum opinion, which also stated very clearly that all price-fixing agreements, whether they raise or fix market prices or not, are illegal—that it is enough that they fix the prices of the parties to the agreement. Continuing, he said "It is in this sense that it is said that the restraint, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices," and that "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition,"\(^{389}\) citing the Chicago Board of Trade, United States Steel, Cement Manufacturers, International Harvester, and Appalachian Coals cases. Here is a remarkable statement, which openly avows what Mr. Justice Douglas had just repudiated in the Socony-Vacuum opinion. As shown above, the cases now cited by Mr. Justice Stone were denuded of all their reasoning by the Socony-Vacuum opinion which, with the Ethyl Gasoline opinion, announced (1) that the mere fact that an agreement eliminates competition between the parties thereto is enough to condemn it, and (2) that the fixing of any prices by parties—market or otherwise—and whether the parties do or do not control or have power to affect the market are illegal. Obviously Mr. Justice Stone was here citing the Chicago Board of Trade and Appalachian Coals cases for both their holding and the principles declared therein and was therefore giving approval to agreements which fix prices of the parties to the agreement or which otherwise fix or affect "prices" as long as those prices are not "market prices." This seems to be a studied attempt to restore the full force of the opinion in the Appalachian Coals case and to set forth a control of the market test for price-fixing agreements.

Accordingly, it would seem that the present disposition of the Court is to limit the Socony-Vacuum case to its precise facts and

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\(^{388}\) Ibid. at 996, 84 L. ed. Adv. Ops. at 926. (Italics added.)

\(^{389}\) Ibid. (Italics added.)
to hold that only agreements which fix or affect "market prices" are unlawful *per se*. Those which merely eliminate price or other competition without fixing or affecting general market prices are not condemned. With respect to price-fixing agreements "market prices" can be fixed only where the parties control the market. But with respect to price-affecting agreements no such control is necessary for market prices can be affected whether or not the parties thereto control the market. Thus almost every purchase or sale of stock on the New York Stock Exchange affects prices on that exchange regardless of whether the purchaser or seller controls that market. Any agreement for the joint purchase of such stock or of any other commodity in or affecting interstate commerce, however large or small the purchase, is necessarily condemned by the principle of the *Socony-Vacuum* case.

It is to be hoped that the limitations on the doctrine of the *Socony-Vacuum* case which are suggested by the opinion in the *Apex* case will prevail in the future and that the Court will not condemn agreements which eliminate price competition between parties who have no monopoly power or control of the market and whose purpose is not to raise, depress or affect general market prices, *i.e.*, agreements such as the one involved in the *Appalachian Coals* case. It would seem that such agreements are desirable and necessary in many situations.\(^{300}\) They are also necessary as a check on the tendency toward

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\(^{300}\) It would seem that the need for defensive price-fixing combinations to combat monopolistic groups which have been allowed to flourish because of inadequate enforcement of antitrust laws in past years (see [Arnold, loc. cit. supra note 368]) is clear and that such combinations should be permitted. A trader confronted with such a combination would seem to have no alternative but to take co-operative action if he is to preserve his business. If he waits for the Department of Justice or Congress he may have none to preserve. Thus, if a combination of buyers of coal actually combines to depress the price of coal why should the Sherman Act forbid the sellers of coal to combine to keep it up? It should be remembered in this connection that one of the principal reasons advanced for upholding the agreement involved in the *Appalachian Coals* case was that it was entered into to combat combinations of buyers of coal. A price-fixing combination to combat monopoly power or restraint of trade would not only seem most reasonable but in fact to forward rather than to thwart the purposes of the Sherman Act. Yet under the dicta of the *Socony-Vacuum* case such combinations are "all banned." If the Court adheres to the language of the *Socony-Vacuum* opinion it certainly can be said no longer, as it was said in the *Appalachian Coals* case, that the restrictions imposed by the Sherman Act "are not mechanical or artificial." 285 U.S. at 360. See also [Jaffe and Tobriner, op. cit. supra note 337, at 1181-1195]. The absurdity of the unlawful *per se* rule is apparent when it is considered that literally applied it would condemn voluntary co-operative efforts sponsored by Presidents of the United States to keep up wages or keep down prices in times of depression or war. Many such efforts were sponsored in recent years by
greater concentration of economic power through close-knit combinations—a tendency which strict adherence to the language of Mr. Justice Douglas would seem surely to bring about. Sooner or later, it is submitted, and notwithstanding the dicta in the *Socony-Vacuum* case, the Court will have to recognize—as it was almost universally recognized at common law before 1890 and by the Congress which passed the Sherman Act, as well as in the *Appalachian Coals* case—that there are good and bad price-fixing agreements or other loose combinations—just as there are good and bad trusts, and that cases under the Sherman Act should be determined by examination of the actual nature, extent and effect of the restraint in each case, rather than by categorical assumptions or mechanical rules.

Presidents Hoover and Roosevelt, and it would seem that they must be called conspirators in restraint of trade and criminals by the criterion of Mr. Justice Douglas. Furthermore, the broad sweep of that language would condemn as unlawful *per se* an agreement by conspirators already engaged in arbitrarily fixing prices—to discontinue their price-fixing conspiracy! The unlawful *per se* principle thus becomes a *reductio ad absurdum*. 