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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

COLGATE & COMPANY, DEFENDANT IN ERROR.

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

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is a writ of error under the Criminal Appeals Act of March 2, 1907 (c. 2564, 34 Stat. 1246), to review a judgment of the United States District Court for the Eastern District of Virginia sustaining a demurrer to an indictment against Colgate & Company based on the Antitrust Act of July 2, 1890 (c. 647, 26 Stat. 209).

The indictment sets forth that Colgate & Company, a corporation of New Jersey, manufactures in that State laundry soaps, toilet soaps, and other toilet articles which it sells and ships to wholesale dealers throughout the United States, and

in some instances to retail dealers; that the wholesale dealers resell and deliver the articles to retail dealers both within and without the respective States in which they, the wholesale dealers, are located; that the retail dealers resell and deliver the articles to consumers both within and without the respective States in which they, the retail dealers, are located. (R. 19, 20.)

The indictment then charges that Colgate & Company created and engaged in a *combination* with these wholesale and retail dealers to maintain resale prices for its products fixed by it and to prevent such dealers from reselling the articles at lower prices, thereby suppressing competition amongst such wholesale dealers and amongst such retail dealers, and in consequence restraining trade and commerce among the several States in violation of the Act of July 2, 1890. (R. 20.)

The indictment then sets forth the means employed in carrying out the combination substantially as follows:

> (*a*) Colgate & Company sent to the dealers, wholesale and retail, letters, telegrams, circulars, and lists showing uniform wholesale prices and uniform retail prices to be charged for its products. (R. 20.)
>
> (*b*) By letters, circulars, and orally it informed the dealers, wholesale and retail, that it would refuse to continue selling its products to any dealer who did not adhere to the resale prices thus indicated. (R. 20.)

(*c*) As a condition of opening accounts with dealers, wholesale and retail, to whom it had not previously sold its products, it exacted assurances and promises that they would resell such products at the prices thus indicated. (R. 21.)

(*d*) By letters and orally it requested the dealers, wholesale and retail, to inform it of sales by dealers at wholesale or retail at prices other than those thus indicated; and many of them did so. (R. 20.)

(*e*) It also made investigations through its own agents and employees for the purpose of discovering any such departures from the resale prices indicated by it. (R. 20.)

(*f*) It placed the names of the dealers so offending upon what it called "suspended lists." (R. 20.)

(*g*) It requested the offending dealers to give assurances and promises that they would in future resell its products at the prices indicated and refused to sell them its products until they did so; in consequence of which many dealers, wholesale and retail, who had sold such products at prices other than those indicated as aforesaid gave assurances and promises that they would thereafter observe the indicated prices. (R. 20, 21.)

The indictment then alleges that by reason of the combination so entered into and carried out by Colgate & Company and dealers in its products "competition in the sale of such products, by wholesale dealers to retail dealers, and by retail dealers to the consuming public, was suppressed, and the prices of such prod-

ucts to the retail dealers and to the consuming public in the eastern district of Virginia and throughout the United States were maintained and enhanced." (R. 21.)

In most cases of conspiracy the means employed to carry out the conspiracy also constitute part of the proof of the conspiracy. So here. But, of course, it is no part of an indictment to recite evidence as such, and therefore it is not to be assumed that the things enumerated in the present indictment as means of carrying out the alleged combination between Colgate & Company and dealers in its products to maintain fixed resale prices constitute the only evidence that would be offered to the jury to prove the existence of such a combination.

The District Court held the indictment bad, being of opinion that a manufacturer of a given article may without incurring *criminal* liability sell the article to a customer "with the understanding that such customer will resell only at an agreed price between them." (R. 28.) The demurrer was accordingly sustained and the indictment quashed. Thereupon this writ of error was sued out. The assignments of error are printed in the margin below.[1]

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[1] The learned court erred—

1. In its decision that the demurrer should be sustained.

2. In entering its order sustaining the demurrer and dismissing the indictment.

3. In its construction of the Act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209) in holding that no violation of that act was shown by the averments of the indictment as construed by the court.

4. In its construction of the said Act of Congress in holding that a manufacturer whose products are the subject of interstate commerce may sell

CONSTRUCTION OF THE INDICTMENT.

In the District Court the argument for Colgate & Company proceeded on the theory that what the indictment charges as a violation of law was the refusal of Colgate & Company to sell its products to dealers who resold them at prices it did not approve of. The indictment makes no such charge. What the indictment does charge is a *combination* between Colgate & Company and dealers in its products to

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such products to dealers therein upon agreements, between the manufacturer and the dealers, that the latter shall observe fixed and uniform resale prices in reselling such products.

5. In its construction of the said Act of Congress in holding that there is a distinction between the meaning of the provisions of the act as enforceable in civil proceedings and the meaning of such provisions as enforceable in criminal proceedings.

6. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination depends upon whether the restraint of trade is effected by means of contracts between the manufacturer and the dealers as distinguished from informal agreements and understandings between the same parties.

7. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination depends upon whether the articles affected by the combination are or are not the subject of monopoly.

8. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination between a manufacturer and dealers in its products depends upon whether or not the manufacturer acts in concert with other manufacturers.

9. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination between a manufacturer and dealers in its products is affected by the question whether the manufacturer is under any obligation to manufacture and sell its products.

10. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination between a manufacturer and dealers in its products to whom it sells depends upon whether the combination controls the resale prices of other dealers to whom the manufacturer does not sell direct.

11. In its construction of the said Act of Congress in holding that the illegality of a resale price-fixing combination between a manufacturer and dealers in its products depends upon the magnitude of the prices fixed. (R. 35, 36.)

maintain fixed resale prices. The language of the charge is as plain as it could be made:

> Defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the eastern district of Virginia and throughout the United States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them as aforesaid) to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, etc. (R. 20.)

After stating first the defendant's construction of the charge of the indictment (R. 26) and then the Government's (R. 26), the District Court adopted the latter, saying (R. 27, 28):

> In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade is subject to criminal prosecution under the Sherman Act for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices. (R. 27, 28.)

The essential difference in law between the proposition that it is unlawful for a manufacturer to *combine* or *agree* with dealers in his products for the purpose of maintaining resale prices fixed by him and the proposition that it is unlawful *in and of*

itself for him to refuse to sell to dealers who fail to observe such prices is at once apparent. Thus a manufacturer might be indicted on the charge of having combined or agreed with dealers in his products for the purpose of maintaining resale prices fixed by him, and on the trial, although it were shown that the manufacturer indicated resale prices and refused to sell to dealers who did not observe those prices, the jury might nevertheless upon a consideration of *all* the evidence in the case, reach the conclusion that the manufacturer had not entered into any combination or agreement with the dealers to maintain resale prices and accordingly acquit him of the charge.

Of course, in all resale-price combinations and agreements the refusal of the manufacturer to sell to dealers who fail to observe the fixed price is one of the means—usually the principal means—of making the combination or agreement effective. So here, the refusal of Colgate & Company to sell to dealers who fail to observe the fixed price was alleged in the indictment as one of the means of carrying out the combination. But that is a very different thing from charging that such refusal to sell was in and of itself a violation of law. "It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (*United States* v. *Patten*, 226 U. S., 525, 544.)

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After construing the indictment as above set forth, the District Court in one part of its opinion (R. 28–30) cited some cases and used some language which might indicate that it thought the Government was contending that such refusal to sell was in and of itself unlawful, apart from any combination between Colgate & Company and dealers to maintain fixed resale prices. As already shown, no such charge is made in the indictment; and no such contention was intended to be made in argument. In no event, however, would a misapprehension of the Government's position on this point affect the District Court's explicit construction of the indictment as a whole, as above set forth.

ARGUMENT.

I.

ILLEGALITY OF RESALE PRICE-FIXING COMBINATIONS AND AGREEMENTS ESTABLISHED BY PRIOR DECISIONS.

The sole question is whether the combination described in the indictment is prohibited by the Antitrust Act of July 2, 1890.

The illegality of combinations or other arrangements between manufacturers and dealers to whom they have sold their products, for the purpose of maintaining resale prices fixed by the manufacturers, has been so often and so recently declared by this Court that the time for argument of the question seems to us to have passed. (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Bauer* v. *O'Donnell*, 229 U. S. 1; *Straus* v. *American Publishers Ass'n*, 231 U. S. 222; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.*, 243 U. S. 502; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.)

The leading case is *Dr. Miles Medical Co.* v. *Park & Sons Co.* (220 U. S. 373). There the combination was effected by agreements in writing between the manufacturer and each dealer binding the dealer to adhere to prices fixed by the manufacturer. It was held to be unlawful "both at common law and under the Act of Congress of July 2, 1890" (p. 409).

The vice of the combination and the ground of the decision was thus tersely stated (p. 407):

> 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.

And again (p. 409):

> The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

Insistent efforts have been made to have the principle of this decision narrowed in later cases, without success. Rather, the principle has been given full scope. It has been held applicable to copyrighted articles (*Straus* v. *American Publishers Ass'n*, 231 U. S. 222) and to patented articles (*Bauer* v. *O'Donnell*, 229 U. S. 1; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8), no less than to others. Disguises intended to frustrate the application of the principle have been impatiently brushed aside. (*Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 498–501.)

In the latest case (*Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, decided less than a year ago) this Court, after stating that the question—

> arose from a disregard by the Boston Store of the rule as to maintenance of price fixed in its contract, that is, from selling the articles at a less price than that which the contract stipulated should be maintained (p. 20),

observed (pp. 20–21):

> We at once say, despite insistence in the argument to the contrary, that we are of opinion that there is no room for controversy concerning the subjects to which the questions relate, as every doctrine which is required to be decided in answering the questions is now no longer open to dispute, as the result of prior decisions of this court, some of which were announced subsequent to the making of the certificate in this case.

After this pointed statement the Court entered upon a comprehensive review of its prior decisions, as if to put the question definitely at rest. Of the *Dr. Miles case* it said (p. 22):

> It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Antitrust Law.

As further discouragement to the renewal of the contention where the form of the arrangement might be different but the substance remains the same, the Court added (p. 25)—

> that the attempt in argument to distinguish the cases by the assumption that they rested upon a mere question of the form of notice on the patented article, or the right to contract solely by reference to such notice, is devoid of merit, since the argument disregards the *fundamental ground* upon which, as we have seen, the decided cases must rest. [Italics ours.]

For more than five years there has been a sustained and intelligently directed effort to have the law as declared in these decisions changed so as to permit manufacturers to prescribe the prices at which their products shall be resold by dealers who have bought them; but Congress has refused to make any change. (See H. R. 13305, 63d Cong., 2d sess.; H. R. 13568, 64th Cong., 1st sess.; also printed hearings on H. R. 13568, 64th Cong., 1st and 2d sess.)

II.

IMMATERIAL WHETHER THE COMBINATION OR AGREEMENT IS EFFECTED THROUGH FORMAL WRITTEN CONTRACTS OR THROUGH A MERE MEETING OF THE MINDS OF THE PARTIES.

Notwithstanding the statement of this Court in the *Boston Store case* that the decisions in the *Dr. Miles case* and the cases which followed it rested upon a fundamental ground and that the mere form of the arrangement is unimportant in determining whether a manufacturer is attempting to assert unlawful control over his product after selling it to dealers, it is now suggested and reiterated in various forms that the "outstanding and significant" feature of the present indictment is that it "does not charge defendant with effecting any *contract* to maintain resale prices," and that therefore it states no offense under the Antitrust Act. (Defendant's brief below, pp. 8-9, 20-21.)

But, of course, the act prohibits *combinations* as well as *contracts* in restraint of trade; and it is ele-

mentary that a combination may be brought about through an informal meeting of minds as well as through formal contract, and consequently more often than not is a matter of inference. (*Thomsen* v. *Cayser*, 243 U. S. 66, 84; *Eastern States Lumber Dealers' Ass'n.* v. *United States*, 234 U. S. 600, 612; *United States* v. *U. S. Steel Corp.*, 223 Fed. 55, 160.)

In *United States* v. *Kellogg Toasted Corn Flake Co.* (222 Fed. 725), where the defendant was charged with having entered into a combination with dealers to maintain uniform resale prices for its product, this same defense was made and rejected by the three judges who decided the case. They said (pp. 730-731):

> But defendants urge that no contract in restraint of trade is consummated, because the notice on the carton does not constitute a valid contract. * * *
>
> A legally enforceable contract or system of contracts is not required in order to render obnoxious to the Antitrust Act a selling plan which unreasonably restrains or monopolizes trade or commerce. The Sherman Act is not aimed alone at contracts, but embraces combination schemes of any and every kind which amount to an undue or unreasonable restraint of trade in interstate commerce, "without regard to the garb in which the acts were clothed." Indirection will not afford escape.

Again, in *Frey & Son* v. *Welsh Grape Juice Co.*, in the district of Maryland (April 27, 1916), where

the complaint was that the defendant had entered into a combination with dealers to maintain uniform resale prices for its products, although no formal contract to that effect was alleged, Judge Rose charged the jury as follows:

> If I understand correctly the decision of the Supreme Court, any agreement having for its sole purpose the destruction of competition and the fixing of prices is injurious to the public interests and void * * * It is admitted by the plaintiff that there was no written and signed agreement on the subject and none couched in any formal or express terms * * * A combination in violation of the Sherman Act may be formed between or among any two or more persons. It is not necessary that it should be formulated in words * * * It is for you to say upon the whole case whether you are satisfied from the fair preponderance of the evidence that there was such a combination.

In a similar case in the southern district of New York, *Lowe Motor Supplies Co.* v. *Weed Chain Tire Grip Co.* (May 5, 1917), Judge Mack charged the jury as follows:

> The manufacturer can not legally control—I mean legally control throughout the country by any general scheme to control and to prevent such competition in the article as to the prices at which they should be marketed, whether by jobbers or by dealers—the resale

> prices * * *. If there is an agreement or understanding between them and if the designation is based on the understanding or agreement between them, whether it is in writing, whether it is by word of mouth, whether it is by looking into each other's eyes, or in any other way in which men come to an understanding or agreement, if it is under an agreement that the manufacturer shall control the policy as to the resale price * * * the agreement is illegal because it is in restraint and it is undue restraint of interstate commerce.

Moreover, in *Bauer* v. *O'Donnell* (229 U. S. 1), the maintenance of resale prices was attempted, not through *contracts* between the manufacturer and dealers, but by means of a *notice* attached to the article. In the *Boston Store case* (246 U. S. 8) this Court said (p. 23) that that plan of price mainteance—

> was indisputably void and unenforceable under the general law as the result of the ruling in the *Miles Medical case,*

thus plainly indicating that the principle of the *Miles case* is applicable regardless of the form of the arrangement. Again, in the *Victor case* (243 U. S. 490) the plan of maintaining resale prices by so-called "License Notices" was held to be—

> in substance the one dealt with by this Court in *Dr. Miles Medical Co.* v. *Park & Sons' Co.*, 220 U. S. 373, and in *Bauer* v. *O'Donnell*, 229 U. S. 1, adroitly modified, etc. (p. 498).

And in the *Boston Store case* (246 U. S. 8) it was said of the decision in the *Victor case* that—

> Basing its action upon the substance of things and disregarding mere forms of expression as to license, etc., the Court held that the contract was obviously in substance like the one considered in the *Miles Medical Case* and not different from the one which had come under review in *Bauer* v. *O'Donnell* (p. 24)—

thus again indicating that the substance of such arrangements is the material thing.

Finally, the words of this court in the *Tobacco case* are ever to be borne in mind:

> In view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, * * * (221 U. S. 106, 181.)

III.

CONSIDERATION OF THE ATTEMPT TO DISTINGUISH THE PRIOR CASES ON THE GROUND THAT THEY MERELY HELD RESALE PRICE-FIXING COMBINATIONS AND AGREEMENTS UNENFORCEABLE AND NOT POSITIVELY UNLAWFUL.

An attempt is made to distinguish the previous decisions, particularly the *Dr. Miles case*, on the ground that they merely held that arrangements between a manufacturer and dealers to maintain resale prices fixed by the manufacturer are *unenforceable*, not that they are positively unlawful.

Clearly that is not so as regards the *Kellogg Corn Flakes case,* the *Welch Grape Juice case* and the *Weed Chain Tire case, supra,* for in each of these the whole question was whether the restrictions as to prices were unlawful under the Act of July 2, 1890.

Nor is it any more true of the cases in this Court. For whilst the issue was presented in these cases in a way which required the decision to be in the negative form that the restrictions are unenforceable, the *reason* why they were held unenforceable was that they violated the law against restraints of trade.

Thus, in the *Dr. Miles case, supra,* to repeat a previous quotation, the Court held that—

> The restrictions sought to be enforced by the bill were invalid both at common law and under the Act of Congress of July 2, 1890 (220 U. S. 409).

And in holding unenforceable the plan for maintaining resale prices in *Bauer* v. *O'Donnell, supra,* the same ground of invalidity was in the mind of the Court, for it made express reference to the *Dr. Miles case,* saying that —

> an attempt to thus fix the price of an article of general use would be against public policy and void. (229 U. S. 12.)

Again, in *Straus* v. *American Publishers Association, supra,* this Court reversed the holding of the lower court that the plan for maintaining resale prices there in question "was not within the denunciation of the Sherman Act" (231 U. S. 236).

In the *Victor Talking Machine case, supra,* the plan for maintaining resale prices was held unenforceable on the same ground as in the *Dr. Miles case* and *Bauer* v. *O'Donnell* (243 U. S. 498).

Finally, in the *Boston Store case* the plan was held "contrary to the general law and void" (246 U. S. 25), chiefly upon the authority of the *Dr. Miles case*, which was explained as holding that—

> The power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Antitrust Law. (246 U. S. 22.)

It is thus apparent that in all of these cases the underlying reason for the decision was that arrangements between a manufacturer and dealers in his product to maintain fixed resale prices violate the law against restraints of trade.

IV.

CONSIDERATION OF THE REASONING OF THE DISTRICT COURT.

The District Court based its decision apparently on three grounds: First, that a manufacturer of an article may without violating any law sell the article to a customer "with the understanding that such customer will resell only at an agreed price between them" (R. 28); second, that it is not unlawful for a manufacturer to refuse to sell his product to dealers who will not adhere to resale prices fixed by him (R. 28 et seq.); third, that it has

been shown that price competition between
ers, in the sale of a manufacturer's products,
d be in the public interest.[1] (R. 30.)
ie first of these grounds, we submit, is not a
ect statement of the law, being directly contrary
ie decision of this Court in the *Dr. Miles case*
the cases which followed and affirmed it (*supra*,

ie second ground is irrelevant because, as shown
e, what the indictment charges as a violation
w is not the refusal of Colgate & Company to
its products to dealers who refuse to adhere to
le prices fixed by Colgate & Company, but *a
bination* or *agreement* between Colgate & Com-
y and the dealers to maintain such resale prices.
he case of *Great Atlantic & Pacific Tea Co.* v.
m of Wheat Co. (224 Fed. 566; s. c. 227 Fed. 46),
which the District Court referred, is therefore
in point, since the complaint there proceeded
n the theory that the manufacturer was legally
nd to sell to the plaintiff, who had been cutting
gested resale prices, and that under the Clayton
the plaintiff had a legal right to compel the
ufacturer to sell to him. The District Court
l to the contrary. Its decision was affirmed

The District Court also remarked that no authority was cited in sup-
of an indictment against only one party to an unlawful combination.
while, of course, it requires more than one person to make a combi-
n or conspiracy, it is clearly within the power of a prosecuting officer
ngle out for prosecution the prime mover in a combination or con-
cy if in his judgment the ends of justice would be best met in that
(*United States* v. *Miller*, 3 Hughes, 553; 26 Fed. Cas., No. 15774;
orpus Juris, p. 616, sec. 191.)

by the Circuit Court of Appeals upon the ground that a manufacturer is not compelled to sell to a person to whom he does not wish to sell (227 Fed. 48, 49). That has no bearing on such a case as the present one where the alleged offense consists in participation in a price-fixing combination.

The third ground—that it is in the public interest that a manufacturer should have power to prevent price cutting in his products by fixing a uniform price at which they shall be resold by dealers—has been put forward in every case of this kind which has come to this Court (e. g., the *Dr. Miles case,* 220 U. S. 407–408), and has always been rejected as obviously a consideration of policy which should be addressed to Congress and not to the courts. And, as we have already noted, it has been addressed to Congress very persistently, but without effect.

It may not be amiss, nevertheless, to point out that particular dealers may sell a manfacturer's product at less than the price which the manufacturer considers should be charged by all dealers, because, through increased efficiency in the conduct of their business, such dealers are able to realize a satisfactory profit at a lower selling price than less enterprising dealers and feel not only that their customers should have the benefit of such lower price, but that they themselves should be permitted to reap the reward of their greater efficiency by attracting customers in larger numbers through the lower price, thereby putting their business on a basis of large sales and small profits.

There is thus no justification for indiscriminately characterizing sales at less than the price indicated by a manufacturer as injurious price cutting or as acts of *unfair* competition in the sense of foregoing a reasonable profit or of incurring actual loss on sales of a particular article in order to entice customers who will make up the deficiency by paying high prices for other products.

CONCLUSION.

The judgment of the District Court should be reversed.

G. CARROLL TODD,
The Assistant to the Attorney General.
HENRY S. MITCHELL,
Special Assistant to the Attorney General.

FEBRUARY, 1919.

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