

CASE NOTES

Anti-Trust—Corporate Officer Prosecuted under Section 1 of the Sherman Act—Section 14 of the Clayton Act Distinguished.—*United States v. Wise*.¹—A corporation and one of its officers were prosecuted for violation of the anti-trust laws. The government charged the officer had “been acting solely in his capacity as an officer, director, or agent who authorized or ordered, or did some of the acts” constituting the violation. The officer moved for a dismissal on the ground that the government failed to charge a crime in that the Sherman Act does not apply to corporate officers acting in a representative capacity. The District Court² thereupon dismissed the prosecution as to the officer, and the government appealed. The decision was reversed and remanded by the Supreme Court. HELD: A corporate officer is subject to prosecution under Section 1 of the Sherman Act which imposes criminal sanctions upon “every person” who violates the act, whenever he knowingly participates in effecting an illegal contract, combination or conspiracy, regardless of whether he is acting in a representative capacity.

On its face, the decision easily conforms to the wording of Section 1 of the Sherman Act. However, in the interim between the lower court decision in the present case and Supreme Court’s reversal, five district courts agreed with the lower court,³ while only two courts adopted the position eventually taken by the Supreme Court.⁴

The point of controversy is in defining the respective roles of Section 1 of the Sherman Act⁵ and Section 14 of the Clayton Act.⁶ When the Clayton Act was first enacted some members of Congress felt that Section 14 was an unnecessary repetition of Section 1 of the Sherman Act,⁷ while others felt it would complement the section without disturbing it.⁸ This historical argument, however, should not be conclusive since both sides quote the Congressional debates to support their view, thus creating a futile game of rhetorical tug-of-war. It may be noted that prior to the passage of the Clayton Act in 1914 the cases tended to establish the liability of an officer even when he acted solely in a representative capacity.⁹ Even after 1914 the

¹ *United States v. Wise*, 82 Sup. Ct. 1354 (1962).

² *United States v. National Dairy Prod.*, 196 F. Supp. 155 (W.D. Mo. 1961).

³ *United States v. A. P. Woodson Co.*, 198 F. Supp. 582 (D.D.C. 1961); *United States v. American Optical Co.*, Trade Reg. Rep. (1961 Trade Cas.) ¶ 70,156 (E.D. Wis. Nov. 3, 1961); *United States v. Engelhard-Hanovia, Inc.*, 204 F. Supp. 407 (S.D.N.Y. 1962); *United States v. General Motors Corp.*, Crim. No. 30,132, S.D. Cal., 1962; *United States v. Milk Distrib. Ass’n.*, 200 F. Supp. 792 (D. Md. 1961).

⁴ *United States v. North American Van Lines, Inc.*, 202 F. Supp. 639 (D.D.C. 1962); *United States v. Packard Bell Electronics*, Crim. No. 30,158, S.D. Cal., 1962.

⁵ 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

⁶ 38 Stat. 731 (1914), 15 U.S.C. § 24 (1958).

⁷ 51 Cong. Rec. 14214 (1914) (remarks of Senator Shields).

⁸ *Id.* at 16317 (remarks of Representative Floyd).

⁹ In *Patterson v. United States*, 222 Fed. 599, 618 (6th Cir. 1915), cert. denied, 238 U.S. 635 (1915), the court stated that section 1 “includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor.” See *United States v. Winslow*, 195 Fed. 578 (1st Cir. 1912), aff’d, 227 U.S. 202 (1915).

government still continued to use section 1 regardless of the representative capacity of the accused. In spite of this fact, the question as to the exact nature of these sections did not become acute until 1955, when the penalty of section 1 became more severe than that of the unchanged Clayton Act.¹⁰

The courts not in agreement with the Supreme Court believe that it is reasonable to assume that the Clayton Act did have a specific purpose. Resting on the presumption against a construction which would render a statute ineffective or inefficient, and following the notion that specific terms prevail over general, these courts, agreeing with the district court in the present case, espoused the view that section 14 is the vehicle intended by Congress to criminally prosecute an officer acting in a *representative* capacity, while the Sherman Act is the process encompassing violations of an *individual* nature.¹¹ Assuming an alleged act is violative of the anti-trust provisions; as a corporate officer, under what situation could he act individually? It would appear that his acts would always be in a representative capacity when dealing with corporate affairs. In effect, as to corporate officers, the Clayton Act is promoted to the dominant role, a result impliedly rejected by the Supreme Court in the instant case.

One of these courts expressed a dim view of the government's continued use of section 1:¹²

The position of the government seems to be that although the individual defendants are charged with doing what was done by them in a representative capacity, it was of such a character as to impose upon them the liability they would have had, had they been acting as individuals. The government therefore contends that although the individual defendants are clearly liable under section 14 of the Clayton Act, they are also guilty of violation of section 1 of the Sherman Act; that the government may proceed under either section; that if it proceeds under section 1 and the evidence fails to suffice for a conviction, the same evidence may justify a verdict under section 14 The government admits that it is literally impossible to charge a corporate officer with violating section 1 of the Sherman Act in his official capacity without using the language of section 14 to describe his offence.

In a footnote the court commented that if the same evidence is required for prosecution under both acts as the government stated, then they are the same. But the government conceded that it is possible to have a section 14 con-

¹⁰ The fine was raised from \$5,000 to \$50,000. Congress has now before it a proposed amendment (H. R. 8136, 8138 & 8139, 87th Cong., 1st Sess. (1961)) which will have the effect of raising both acts to \$100,000 for individual offenders.

¹¹ The view of the five courts was fairly summed up in *United States v. National Dairy Prod.*, 196 F. Supp. 639 (W.D. Mo. 1961):

Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation.

¹² *United States v. Milk Distrib. Ass'n*, 200 F. Supp. 792, 796 (D. Md. 1961).

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viction when a section 1 conviction is impossible and that it is even easier to obtain a conviction under section 14. This concession, in the court's opinion, exposed the inconsistency of the government's position. As the court stated, "Whether all this is done with mirrors is not clear. Certainly, like St. Paul, this court sees through the glass darkly."¹³

Just as the views above were embraced vigorously, so the opposition states its views in no uncertain terms. It was decided in *United States v. North American Van Lines*¹⁴ that the Clayton Act was designed to make an officer responsible in the rare situations where his actions, alone, are innocent. The section would then cover a situation in which an officer did an act which, standing alone, might not be a violation of an anti-trust penal provision, but when accompanied by the acts of other officers and culminating in improper action by the corporation, would become noxious.¹⁵ Thus, section 14 is in no way a limitation to section 1 and one could be guilty of violating both acts. The confusion of this rhetoric illustrates that the respective roles of the sections cannot be effectively explained by their legislative history.

Even though we discard the congressional history, it is possible to find some answers from the era that produced the legislation. It must be remembered that the Sherman Act was passed in 1890, the same decade which saw the Pullman strike; which almost saw Jim Fiske and Jay Gould corner the gold market; and which closed with a flood of imperialism manifested in the Spanish American War. Against this background, it becomes clear that while the legislature passed the Sherman Act, the nation and the courts were not of such a "socialistic" bent. As an illustration, the Sherman Act was first used against the labor unions,¹⁶ while the courts sterilized the act against the trusts themselves.¹⁷ At any rate, the same public mood which had at first stunted the Sherman Act nursed that act into prominence, as each generation read and interpreted the act through glasses tinted by the dominant "thought" of the times. It was this process and not the Clayton Act which put teeth into the anti-trust laws. As time passed, so did old prejudice, and the Sherman Act gained such prestige and force as to conflict with the Clayton Act, thereby culminating with the controversy in the instant case.

Accepting the fact that the Clayton Act could have been passed as a statement of congressional policy, it is submitted that it is not unreasonable to give the Sherman Act the full force of its wording; and on its face, it covers these cases. It seems painfully obvious that the opposition to this, in the five district courts, has been motivated by the same thinking that has tenaciously opposed every step taken in an anti-trust direction. While these

¹³ Ibid.

¹⁴ 202 F. Supp. 639 (D.D.C. 1962).

¹⁵ Id. at 642. See *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 194 (D. N.C. 1942). A major difficulty lay in the placing of responsibility since the larger companies had so many officers. Thus, another reason was that it would facilitate getting to those who ordered the act as well as those who carried it out. 51 Cong. Rec. 9047 (1914) (remarks of Representative Floyd).

¹⁶ See, e.g., *In re Debs*, 64 Fed. 724 (N.D. Ill. 1894), aff'd on other grounds, 158 U.S. 564 (1895).

¹⁷ See, e.g., *United States v. E. C. Knight*, 156 U.S. 1 (1894).

courts are justified in assuming that there is a difference between sections 1 and 14, it appears that the difference they have selected is one strictly picked out of the air and based on, at best, a very disputable congressional history. The Supreme Court acted wisely in putting a sound and just finale on a formalistic argument and furthered the progress of anti-trust laws rather than giving them a crippling blow as they might have done.

STEPHEN J. PARIS

Anti-Trust—Sherman Act—Price Fixing—Refusal to Deal.—*Klein v. American Luggage Works, Inc.*¹—The plaintiff Klein, a retailer brought this private anti-trust action² against, American Luggage Works, a manufacturer, John Wanamaker Philadelphia, Inc. and Strawbridge & Clothier, competing retailers, for treble damages for injuries resulting from a conspiracy in violation of the Sherman Act.³ The conspiratorial violation was "alleged to be a resale price maintenance scheme implemented by the sanction of the defendant manufacturer's refusal to deal."⁴ HELD: The manufacturer, American, would be enjoined from refusing to supply the plaintiff pursuant to the price fixing conspiracy and American, Wanamaker and Strawbridge were liable in treble damages as co-conspirators.

American's policy was to show catalogues to its new and prospective customers with suggested retail prices, and preticket each individual item of luggage with a tag indicating the suggested retail price. Prospective dealers not desiring to conform to the prices were denied supply. Each dealer was informed that compliance with the catalogue and preticketed price was mandatory, and that non-compliance would result in termination, after an investigation by an American representative. Klein was discounting American Luggage for which he was repeatedly admonished by American's salesman, who was responding to complaints from both Wanamaker and Strawbridge sales clerks and inquiries by buyers from Wanamaker and Strawbridge. Klein's supply was stopped one week after a visit to his store by American's President who later refused to reinstate Klein without assurances that the suggested retail prices would be followed.

Against this factual background the court applied the principles found in the *Colgate* and *Parke Davis* decisions.⁵ Prior to *Colgate* the Supreme Court held in *Dr. Miles Medical Co. v. Park & Sons Co.*⁶ that contracts by which dealers were to sell at agreed prices were illegal under the Sherman Act. The celebrated *Colgate* case followed in which, because it came to Court on the sufficiency of the indictment, the Court stated: "And we must conclude that as interpreted the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not

¹ Civil No. 2067 (D. Del. June 15, 1962), Trade Reg. Rep. ¶ 70,355.

² Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 15, 26, 38 (1958).

³ Id. § 1: "Every contract, combination, in form of trust or otherwise or conspiracy in restraint of trade . . . , is declared to be illegal. . . ."

⁴ *Klein v. American Luggage Works Inc.*, supra note 1, p. 76,425.

⁵ *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

⁶ 220 U.S. 373 (1911).