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TRADE RESTRAINTS--ANTI-TRUST LAWS-TYING CONTRACTS--RIGHT OF SELECTION OF CUSTOMERS

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TRADE RESTRAINTS—ANTI-TRUST LAWS—TYING CONTRACTS—RIGHT OF SELECTION OF CUSTOMERS—Defendant, one of the country's largest producers of salt for industrial uses, held patents on two machines for utilization of salt products. It leased these machines on condition that the lessee purchase from defendant all the salt (an unpatented product) to be used with the machines unless salt should become available elsewhere at a lower price. The federal government brought suit under the Sherman [1] and Clayton [2] Acts to enjoin the continued observance of these provisions of the lessee. The district court granted the injunction and ordered that defendant, if offering any machines at all for lease, offer the same to any and all applicants on nondis-

[1] 26 Stat. L. 209 et seq. (1890), 15 U.S.C. (1940) §§ 1-7.
[2] 38 Stat. L. 731 (1914), 15 U.S.C. (1940) §§12-27.

criminatory terms. On direct appeal to the Supreme Court of the United States, *held*, affirmed. Three justices dissented as to the latter part of the decree. *International Salt Co., Inc. v. United States*, (U.S. 1947) 68 S.Ct. 12.

Section 3 of the Clayton Act forbids the use of "tying clauses" (leases or sales in which the lessee or purchaser is forbidden to use or sell products of competitors of the lessor or seller), "where the effect . . . may be to substantially lessen competition or tend to create a monopoly." [3] Some cases have indicated that if a tying clause is imposed by a "non-dominant" manufacturer and affects only a small amount of trade it does not violate that act.[4] On the other hand, it has often been said that the amount of trade restrained is not the test of violation of the Sherman and Clayton Acts, but that the direct and absolute character of the restraint governs.[5] At least, when the party imposing the tying clause does a large percentage of the business in its field, there is clearly a violation of the Clayton Act.[6] The provision requiring defendant to meet the competitive price does not save the contract from illegality, for it still leaves the defendant with a special advantage in this market. Nor does the possession of patents give the lessor any greater right to impose such conditions,[7] for the act applies to leases of machinery whether patented or unpatented.[8] The decree appears to be on weaker ground in requiring defendant to offer the machines to any applicant. It is usually said that a party in private business "may select his own customers and . . . may sell or refuse to sell to a customer for good causes or for no cause whatever." [9] It has also been thought that a patent holder could withhold his discovery from use entirely, or permit its use only within narrow limits.[10] At least one decision has gone far in the direction of requiring the holder of patents to license them to all applicants at an equal

[3] 38 Stat. L. 731 (1914), 15 U.S.C. (1940) § 14.

[4] Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450 (1923); B. S. Pearsall Butter Co. v. Federal Trade Commission, (C.C.A. 7th, 1923) 292 F. 720.

[5] Apex Hosiery Co. v. Leader, 310 U.S. 469 at 485, 60 S.Ct. 982 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940).

[6] International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701 (1936); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 42 S.Ct. 363 (1922); Judson L. Thomson Mfg. Co. v. Federal Trade Commission, (C.C.A. 1st, 1945) 150 F. (2d) 952, cert. den., 326 U.S. 776, 66 S.Ct. 267 (1945).

[7] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S.Ct. 9 (1912); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 37 S.Ct. 416 (1917). On the relation between the policies of the patent and anti-trust laws, see generally WOOD, PATENTS AND THE ANTI-TRUST LAW (1942).

[8] 38 Stat. L. 731 (1914), 15 U.S.C. (1940) § 14; Barber-Colman Co. v. National Tool Co., (C.C.A. 6th, 1943) 136 F. (2d) 339 at 343.

[9] Johnson v. J. H. Yost Lumber Co., (C.C.A. 9th, 1941) 117 F. (2d) 53 at 61; United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465 (1919); Federal Trade Commission v. Paramount Famous-Lasky Corp., (C.C.A. 2d, 1932) 57 F. (2d) 152.

[10] Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 28 S.Ct. 748 (1908); United States v. General Electric Co., 272 U.S. 476 at 490, 47 S.Ct. 192 (1926); Powell, "The Nature of a Patent Right," 17 COL. L. REV. 663 (1917).

royalty; [11] and it has been suggested that a system of compulsory licensing would be both constitutional and desirable.[12] Congress, however, has never adopted such a proposal.[13] While the decree here does not go so far as that, it does invade the normal right of a trader to select his customers.[14] Moreover, it is contrary to the usual equity rule that the injunction shall be no broader than the wrong previously done or threatened, as shown by the evidence.[15] The majority seems to consider this form of decree essential to insure complete destruction of the monopolistic practices. They refer to the desirability of making the decree specific enough so that the defendant may know exactly what he may and may not do, and point out that the district court retained jurisdiction to modify the decree. Yet it does place defendant under an extra hazard in carrying on its ordinary business, subjecting it to danger of punishment for contempt for acts not strictly forbidden by the anti-trust laws. As the dissenting justices point out, evasion of the decree by the exercise of the right to select customers could have been prevented by a less inclusive decree, for example, by enjoining the defendant from making its selection on the basis of willingness of prospective lessees to buy salt from it.

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[11] Hartford-Empire Co. v. United States, 323 U.S. 386 at 419, 65 S.Ct. 373 (1944); discussed in "Integration of the Anti-Trust and Patent Laws," 45 COL. L. REV. 601 (1945).

[12] Schechter, "Would Compulsory Licensing of Patents Be Constitutional?" 22 VA. L. REV. 287 (1936).

[13] Hartford-Empire Co. v. United States, 323 U.S. 386 at 417, 65 S.Ct. 373 (1944).

[14] This right is denied by neither the Sherman or Clayton Acts nor the Robinson-Patman price discrimination act, 49 Stat. L. 1526 (1936), 15 U.S.C. (1940) § 13. It is subject to the qualification that the selection may not be made in circumstances which give it the effect of an illegal restraint of trade, Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150 (1922); Hills Bros. v. Federal Trade Commission, (C.C.A. 9th, 1926) 9 F. (2d) 481; TOULMIN, TRADE AGREEMENTS AND THE ANTI-TRUST LAWS 240 et seq. (1937); Brown, "The Right to Refuse to Sell," 25 YALE L. J. 194 (1916). However, the mere refusal to sell raises no inference of any such restraint, Johnson v. J. H. Yost Lumber Co., (C.C.A. 8th, 1941) 117 F. (2d) 53 at 61.

[15] New York, N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U.S. 361 at 404, 26 S.Ct. 272 (1906); National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 at 435-437, 61 S.Ct. 693 (1941).