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TRADE RESTRAINTS - IS THE UNITED STATES A PERSON WITHIN THE TREBLE DAMAGES PROVISION OF THE SHERMAN ANTITRUST ACT?

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TRADE RESTRAINTS — IS THE UNITED STATES A PERSON WITHIN THE TREBLE DAMAGES PROVISION OF THE SHERMAN ANTITRUST ACT? — The United States filed a complaint charging that defendants had attempted collusively to fix prices in bids submitted by them to the federal government. A judgment for three times the money damages sustained was sought under the Sherman Antitrust Act.[1] *Held*, that the United States is not a person within section 7 of the act under which relief was demanded. *United States v. Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742 (1941).

A number of arguments are put forth by the majority to sustain their decision, but the problem involved is more concretely presented by the dissenting opinion. The dissent refers to the rule that the United States is entitled to all rights given to other persons by statute unless the statute or its history expresses the contrary.[2] This position is seemingly the dictate of the federal courts, for it has been held that the general words of a statute exclude the government only if the statute would otherwise deprive the United States of a recognized sovereign prerogative, or if by a contrary interpretation an absurdity would result.[3] Again, it has been stated that the court must estimate whether or not the injuries done the government by including it within the statute are so great that the legislature would not so have intended.[4] Cases contradicting this author-

[1] "Section 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. L. 210 (1890), 15 U. S. C. (1934), § 15.

[2] Justice Black, dissenting, distinguishes Davis v. Pringle, 268 U. S. 315, 45 S. Ct. 549 (1925), cited by the majority, on the ground that in that case an intention was manifest by the general context of the statute in controversy to exclude the United States as a person. See also 35 ILL. L. REV. 223 at 224 (1940).

[3] In Nardone v. United States, 302 U. S. 379 at 383, 58 S. Ct. 275 (1937), the Court cited as examples the statute of limitations and the inapplicability of speed ordinances to firemen and policemen in pursuit of their duty.

[4] Sherwood v. United States, (C. C. A. 2d, 1940) 112 F. (2d) 587 at 594.

ity carry little weight, for they have been based upon decisions of a state court interpreting purely local statutes.[5] Resort to the legislative debates preceding enactment of the Sherman Act is not helpful in solving the problem of the principal case, for the scattered statements which seem to bear on the point in issue are not harmonious.[6] Further, it is unlikely that the speakers were considering the right of the government to sue for actual damages suffered by it as a consumer; it is more probable that they were considering its right to bring a suit for damages to the public interest.[7] Moreover, the statements, instead of casting light upon the history of the times, are merely indicative of the intentions of the speakers, and for this additional reason should be accorded little weight.[8] The most compelling argument in support of the Court's decision is based upon the peculiar problems present in the regulation of commercial practices. Not only is it difficult for the legislature to prescribe norms of conduct which will combine commercial freedom with adequate protection of the public interest, but it must create appropriate remedies for the enforcement of these necessarily indefinite standards. An ill-chosen remedy may very well nullify the effect of any soundly formulated legislative policy of trade regulation and may even augment the evils sought to be destroyed.[9] Conceding that section 7 of the Sherman Act is

[5] United States v. Fox, 94 U. S. 315 (1876). The Court was concerned with the validity of a devise of realty to the United States under the New York Constitution. This is not a federal question, and the Court was bound to accept the earlier ruling of the New York court that as devises were unknown to the common law the United States must be expressly named in order to come within the constitutional provision authorizing them. White v. Howard, 46 N. Y. 144 (1871).

[6] The words of at least one speaker, Senator Hoar, raise an inference that the United States could sue for an injury. 21 CONG. REC. 2641 (1890). On the other hand, the words of Senator Calberson, which are relied upon as expressing an intent to exclude the United States, were spoken during the debates upon the subsequent Clayton Anti-Trust Act. 51 CONG. REC. 13898 (1914).

[7] Much of the discussion on suits by the United States centered on the issue of whether the United States should be given civil or penal remedies to enforce the act. In connection therewith it was declared that a suit for damages would be an illusory weapon, because of the inability of the United States to prove damages. Obviously this was not a reference to a suit by the United States as an injured purchaser. 21 CONG. REC. 2567 (1890).

[8] Debates may be studied with a view to ascertaining the history of the times, but not as a means of interpreting the statute. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 at 50, 31 S. Ct. 502 (1911). The ease with which a prohibition on the use of the debates in interpretation can be circumvented in the guise of the historical development is pointed out in 25 CAL. L. REV. 326 at 330 (1937).

[9] "Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all

properly described as remedial legislation, and that remedial statutes are generally given a liberal construction,[10] nevertheless in this particular case the complexity of the subject matter and the very mode of regulation require a uniformly strict construction of the entire statute.[11] If this viewpoint is adopted, a strong argument can be made for precluding the United States as a person under section 7. This conclusion is furthered strengthened when it is noted that the principal case represents the first time in the act's fifty year history that the United States has sought treble damages. This reluctance on the part of the government may be explained on two grounds. First, the United States, acting through the same agents which brought this suit, could have proceeded in equity to enjoin the defendant's action,[12] or could have instituted a criminal prosecution.[13] Secondly, the provision for treble damages is intended to induce action against violators of the act who might not come within the purview of the government officers charged with its enforcement.[14] Such an incentive is unnecessary to induce action by the United States, for the cost of litigation is not of material importance to the sovereign, and, as set forth above, there are additional remedies available.[15]

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peculiarly matters of time and place. They are thus matters within legislative competence." Frankfurter, J., in Tigner v. Texas, 310 U. S. 141 at 149, 60 S. Ct. 879 (1940).

[10] Pidcock v. Harrington, (C. C. N. Y. 1894) 64 F. 821; City of Atlanta v. Chattanooga Foundry & Pipe Co., (C. C. Tenn. 1900) 101 F. 900; 35 ILL. L. REV. 223 (1940).

[11] Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 35 S. Ct. 398 (1914).

[12] 26 Stat. L. 209, c. 647, § 4 (1890), 15 U. S. C. (1934), § 4.

[13] 26 Stat. L. 209, c. 647, §§ 1, 2, 3 (1890), 15 U. S. C. (1934), §§ 1, 2, 3.

[14] An injury may be so slight that private interests might not act, but for the attraction of treble damages. City of Atlanta v. Chattanooga Foundry & Pipe Co., (C. C. Tenn. 1900) 101 F. 900.

[15] The principal case has been noted in 21 BOST. UNIV. L. REV. 535 (1941).