

While the relationships are terminable at will, they have continued for many years, and there is no reason to anticipate their early voluntary termination. In the opinion of the examiner these relationships constitute agreements, understandings or arrangements which fall within the cognizance of the antitrust laws, for the reasons hereafter indicated.

6. It is asserted by respondent Luria (whose position is echoed by a number of respondent mills) that "[i]n every case in which relations between buyers and sellers have been held to violate Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act, there have been agreements between the sellers and the buyers which *bound* the buyers not to buy from competitors of the sellers" (p. 533 Luria Proposed Findings). While it is true that in a number of the cases cited there were binding legal agreements involved, this feature was not present in all of these cases nor in others which have been decided. Thus, in *Harley-Davidson*, 50 F.T.C. 1047, and *Outboard Marine Mfg. Co.*, 52 F.T.C. 1553, cited by respondents, there was no legal agreement binding the dealers to purchase exclusively from the respondent, although the latter did in practice seek to pressure dealers into following such a policy. In the *Outboard Marine* case the respondent contended that its "single dealing" policy was "a unilateral policy of customer selection, without agreement, understanding or condition of sale" and was permissible under the *Colgate* case. To this argument the examiner, whose decision was affirmed by the Commission, stated (at 1564) that: "The words [in Section 3] 'condition, agreement or understanding' were designedly employed by Congress to prevent evasions on technical arguments as to whether *informal understandings rose to the dignity of formalized written commitments*" (emphasis supplied). More recently, the Commission in *The Timken Roller Bearing Co.*, Docket 6504, [58 F.T.C. 98, 103] January 24, 1961, stated that "express written agreements are not needed to prove exclusive dealing".

7. A number of the respondents seek support for their position, regarding the necessity for proving the existence of a binding legal agreement, in the observation made by Justice Frankfurter in the *Standard Stations* case (337 U.S. at 313-14), to the effect that if it was in fact as economically desirable as the defendant contended for gasoline service stations to confine their purchases to a single supplier, they would continue to do so "though not bound by contract". The examiner does not interpret this dicta in the *Standard Stations* case as tantamount to a holding that, absent a binding legal obligation to deal exclusively, there can be no violation of Section 3 of the Clayton Act.

Holdings in other antitrust cases make it abundantly clear that this is not the law.

8. Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act are in pari materia, insofar as they involve the concept of agreement, contract, understanding, combination or conspiracy. Section 3 of the Clayton Act involves sales or contracts to sell "on the condition, agreement, or understanding" that the purchaser will not deal in competing goods. Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy in restraint of trade", while Section 2 thereof prohibits, among other things, combinations or conspiracies to monopolize trade. Section 3 of the Clayton Act involves the specific prohibition of a type of practice which has also been held to be actionable under the more generally phrased prohibitions of the Sherman Act on contracts, combinations or conspiracies in restraint of trade or to monopolize trade. Thus in *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594; and *Northern Pac. R. Co. v. U.S.*, 356 U.S. 1, tying arrangements were challenged as contracts, combinations or conspiracies in restraint of trade in violation of Section 1 of the Sherman Act, while in *International Salt Co. v. U.S.*, 332 U.S. 392, and in the *Standard Stations* case (*Standard Oil Co. of California v. U.S.*, 337 U.S. 293) tying and exclusive dealing arrangements were challenged as violations of both Section 3 of the Clayton Act and Section 1 of the Sherman Act. While the Sherman Act has been held to be "the more stringent law", insofar as the degree of proof of competitive impact is concerned (*Times-Picayune Pub. Co. v. U.S.* at 610), there is no significant difference between it and Section 3 of the Clayton Act with respect to the nature of the agreement or combination which must be established.

9. As noted in paragraph 6 above, respondents appear to recognize that the terms "condition, agreement or understanding" as used in the Clayton Act, and "contract, combination * * *, or conspiracy" as used in the Sherman Act, are substantially synonymous. However, their position is that in both instances the terms connote binding legal agreements. This position is contrary to the weight of authority. As recently stated by one with long experience in the field of antitrust law:¹¹⁵

An agreement, in antitrust parlance is not the same as an agreement in the law of private contracts. A conspiracy or combination—an agreement, if you will—is present where there is joint action. [Emphasis supplied.]

10. The above-quoted comment was occasioned by an analysis of the Supreme Court's recent decision in *U.S. v. Parke, Davis and Co.*,

¹¹⁵ Handler, *Annual Review of Antitrust Developments*, THE RECORD of the Association of the Bar of the city of New York, Vol. 15, No. 7 Oct. 1960, p. 370.

362 U.S. 29. The holding in the *Parke, Davis* case is not only contrary to respondents' position concerning the necessity for proving the existence of a binding legal agreement in restraint of trade, but also sets at rest its complementary argument that absent such an agreement a businessman has the untrammelled right to trade or not to trade with whom he chooses. In that case the defendant was charged with combining with retail and wholesale druggists to maintain the prices of its products. The District Court held that a violation of the Sherman Act had not been established because "the actions of [Parke, Davis] were properly unilateral and sanctioned by law under the doctrine laid down in *U.S. v. Colgate & Co.*, 250 U.S. 300", 164 F. Supp., at 829. The District Court, in holding that Parke, Davis' actions were "unilateral", had apparently misinterpreted the Supreme Court's ruling in the *Colgate* case that there could be no Sherman Act violation without a charge of "unlawful agreement", as meaning that there had to be an actual, express agreement, written or oral. The Supreme Court in *Parke, Davis* held, in substance, that agreements or combinations which violate the Sherman Act are not limited to "contractual arrangements, express or implied" (at 41).

11. The language just quoted is based upon the Court's earlier decision in *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, [1 S. & D. 170] which the Court cited in *Parke, Davis* as indicating that its decision in *Colgate* had been misconstrued. The *Beech-Nut* case likewise involved a charge of illegal resale price maintenance, except that the practice was challenged as an unfair method of competition under the Federal Trade Commission Act, rather than as a combination in restraint of trade under Section 1 of the Sherman Act. The parties had stipulated that there was no contract between the company and its distributors whereby prices were maintained. The dissenting opinion by Mr. Justice McReynolds, relying on the *Colgate* case, held that there could be no finding of an illegal agreement "when the existence of the essential contracts is definitely excluded" by stipulation. The majority opinion in *Beech-Nut*, as interpreted in the *Parke, Davis* case (at 41),

* * * did not read *Colgate* as requiring such contracts; rather, the Court dispelled the confusion over whether a combination effected by contractual arrangements, express or implied, was necessary to a finding of Sherman Act violation * * *.

Also cited in *Parke, Davis*, was the Court's decision in *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707, which involved a charge of resale price maintenance in violation of the Sherman Act. The Court in *Bausch & Lomb*, citing its earlier holding in *Beech-Nut* that there

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could be a combination in restraint of trade "without agreements", held that the company's combination with distributors and wholesalers was illegal, stating (at 72³):

Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial. * * * In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied * * *. [Emphasis supplied.]

12. Based on its analysis of its earlier holdings in *Beech-Nut* and *Bausch & Lomb* the Court, in *Parke, Davis*, concluded (at 44):

The *Bausch & Lomb* and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. * * * [W]hether an unlawful combination of conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. [Emphasis supplied.]

13. It is true that *Parke, Davis* and the other cases discussed therein involved resale price maintenance arrangements. However, there is no reason why the logic of these decisions should not apply to exclusive dealing or tying arrangements, which are also cognizable under Section 1 of the Sherman as well as under Section 3 of the Clayton Act. Any doubt on this score was recently set at rest in *Osborn v. Sinclair Refining Co.*, CA 4, July 11, 1960, involving a charge that the defendant had required its dealers to purchase all of their requirements of tied-in tires, batteries and accessories from a source designated by it, in violation of Section 1 of the Sherman Act. The court, by Chief Judge Sobeloff, addressing itself to the question of whether there is a distinction between price fixing and tie-ins, insofar as the necessity for establishing that they are based on express agreement, observed that "it is no distinction to say that *Parke, Davis* was concerned with price fixing whereas here we have a tie-in."

Reversing the district court's dismissal of the complaint, based on the fact that the dealers were not required by express contractual provision to purchase their accessory requirements from defendant's designee, the circuit court, citing the Supreme Court's holding in *Parke, Davis* that "an unlawful combination is not just such as arises from a price maintenance agreement, express or implied", stated:

Although, standing alone, the above general findings do not, perhaps, disclose a tie-in accomplished by express agreement with dealers, such an express contract is not necessary. [Emphasis supplied.]

14. It seems clear, therefore, that in order to establish that Luria's sale of scrap to the mills was made "on the condition, agreement, or understanding" that the mills would purchase scrap from it exclu-

sively, within the meaning of the Clayton Act, or that the arrangements between Luria and the mills each constitute a "contract, combination * * * or conspiracy" within the meaning of the Sherman Act, it is not necessary to establish the existence of any binding contractual arrangement, express or implied, between them. It is also clear that the "essential agreement, combination or conspiracy may be implied from a course of dealings or other circumstances", as stated in *Frey & Son, Inc. v. Cudahy*, 256 U.S. 208, 210 (reversing the court of appeals' dismissal, which was based on the ground that "there was no formal written or oral agreement") or, as the Court expressed it in *Parke, Davis*, the agreement or combination may be proved "by what the parties actually did rather than by the words they used". See also *Osborn v. Sinclair*, *supra*, holding that a tying arrangement "may be inferred from a course of conduct".

Viewing the course of conduct and course of dealings between Luria and each of the mills, which have been heretofore discussed in detail, there is no question as to the existence of an agreement, understanding, or combination between each of the respondent mills and Luria pursuant to which each of the mills uses Luria as its substantially exclusive broker, and whereby a number of the mills buy from Luria substantially all of their scrap and the others buy from it substantially all of the scrap which they purchase on a brokerage basis.

15. In the foregoing discussion the question of the legality of the activities of Luria and the mills has been considered in the frame of reference of an agreement or combination, and as to the necessity for such agreement or combination to be of an express, binding nature. However, it may be noted that the conduct of the parties may also be subject to attack on grounds separate and apart from any agreement or other purposeful joint action. In the *Colgate* case itself the Court's pronouncement of the right of a trader "freely to exercise his own independent discretion as to the parties with whom he will deal" was subject to the qualification that this right existed: "In the absence of any purpose to create or maintain a monopoly" (at 307). This limitation on the right of a trader to choose the persons with whom he will deal was applied by the Court in *Lorain Journal Co. v. U.S.*, 342 U.S. 143, in which a newspaper publisher claimed the right to select its customers and to refuse to accept advertisements from whomever it pleased. The Court held that this "general right" was not "an unqualified one", and that (at 155):

The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.

16. It is thus clear that the practices of Luria and the mills, insofar as they involve exclusive dealing, may also be subject to attack as attempts to monopolize within the purview of Section 2 of the Sherman Act, separate and apart from any agreement between them to deal exclusively. It may be noted, in this connection, that while the qualification on the right of a trader to deal freely appears to involve a subjective element, viz, an "intent" or "purpose" to create a monopoly, it has been generally accepted that: "The requisite intent * * * is not a 'specific' intent to monopolize, but rather a conclusion based on how the monopoly power was acquired, maintained or used". *Report of Attorney General's Committee to Study Antitrust Laws*, March 31, 1955, at 55. The courts have often inferred that a monopoly position has been "deliberately" maintained as a matter of "objective" rather than "subjective" intent, "relying on business practice to support the conclusion that men intend the natural consequences of their acts". *Id* at 56.

Line of Commerce

17. Before considering the legal questions raised concerning the nature of the competitive impact or restraint of trade which must be shown, it is well to discuss the preliminary question as to the line of commerce involved. As has been heretofore noted, respondents (particularly respondent Luria) contend that the line of commerce against which to weigh or consider the competitive impact or restraint of the arrangements between Luria and the mills should include pig iron as well as scrap, and that minimally it should include all scrap purchased by the mills, rather than merely that purchased from broker-dealer sources.

18. Respondents' position that pig iron as well as scrap should be included in the line of commerce is, of course, based on the "reasonable interchangeability" test established by the *Cellophane* case (*U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377). However, it is now generally accepted that this test is limited to cases arising under the monopolization clause of Section 2 of the Sherman Act and does not apply to cases involving a charge of incipient, rather than actual, restraint or monopoly, such as those arising under Sections 3 and 7 of the Clayton Act, where the test applied is whether the product has "sufficient peculiar characteristics and uses to constitute [it] sufficiently distinct from all other [products] to make [it] a 'line of commerce' * * *". *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593; *U.S. v. Brown Shoe Co.*, 179 F. Supp. 721; *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576; *Brillo Mfg. Co.*, 54 F.T.C. 1905; *Mytinger & Casselberry, Inc.*, Doc. 6962 [57 F.T.C. 717], September 28, 1960. It is open to question whether the rule in the *Cellophane* case applies even

