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Patent Act--Sherman Anti-Trust Act (Ethyl Gasoline Corporation v. United States, 309 U.S. 436 (1940))

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that, subject to constitutional restrictions, the statute as enacted will be applied. The statute itself supplies two relevant criteria to be used. First, the dispute, in order to be a labor dispute, must be one which relates to conditions of employment or representation of persons in negotiating conditions of employment.[16] Second, the disputants must be commercially participating in the same industry.[17]

The plaintiff contended that the statute limiting an injunction to a period of six months was unconstitutional. The statute does not deprive plaintiffs of property without due process of law, but prevents the use of a stale injunction. It seeks to provide a method whereby the injunction may be re-examined at reasonable intervals.[18] Injunctions are protection for the future, not punishment for the past.[19] Injunctions should issue to restrain only unlawful and violent methods of the defendant, and should not include the peaceful and legal methods sanctioned by law. The statute itself enumerates eleven categories of activities such as peaceful picketing which may not be restrained.[20]

B. F.

PATENT ACT—SHERMAN ANTI-TRUST ACT.—Defendant corporation appeals from a decree of the District Court of the United States for the Southern District of New York restraining it from granting licenses to jobbers and oil refiners who sell and distribute such fuel on the ground that such conduct violates the Sherman Anti-Trust Act.[1] The corporation manufactures tetraethyl lead, a patented, poisonous, fluid compound which, when made a part of gasoline used in high-pressure engines, increases their efficiency. This substance is sold to oil refiners solely for use in the production of this improved type of motor fuel. Licenses are issued gratis to jobbers and refiners of

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[16] N. Y. CIV. PRAC. ACT § 876-a (10-c) ("The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, * * * terms or conditions of employment, * * *").

[17] N. Y. CIV. PRAC. ACT § 876-a (10-b) ("A person * * * shall be held to be a person participating or interested in a labor dispute if relief is sought against him * * * and if he * * * is engaged in the industry, * * * in which such dispute occurs, or is a member, * * * or agent of any association of * * * employees engaged in such industry, * * *").

[18] N. Y. CIV. PRAC. ACT § 876-a (8) ("No permanent injunction shall remain in force for more than six months, from the date on which the judgment is signed, provided, however, that the duration of the injunction may be extended for another six months, if after a further hearing initiated and conducted in the same manner as the original hearing the court shall determine that the injunction shall be continued or modified in accordance with the findings of facts on the subsequent hearing").

[19] Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931).

[20] N. Y. CIV. PRAC. ACT § 876-a (1-F).

[1] 50 STAT. 693, 15 U. S. C. A. § 1 (1937).

gasoline under patents controlled by the corporation, for the purpose of bestowing the privilege upon these fuel dealers of producing gasoline with tetraethyl lead. The corporation's only source of profit is in the sale of the patented compound. However, the licenses which it issues are conditional upon the compliance by the licensees with rules and regulations promulgated by the licensor, and as a result the latter controls the methods and practices used in the production of this improved type of gasoline as well as its resale price. One hundred and twenty-three refiners who refine eighty per cent of all gasoline sold in the United States are involved, and competition in the industry is restrained. The company seeks to justify its actions on the theory that the public health requires protection from its poisonous product. *Held,* the conditional licenses are not within the scope of the defendant's patents and the legislative provisions under which they were issued, and the judgment of the lower court to the effect that they violate the Sherman Anti-Trust Act is affirmed. *Ethyl Gasoline Corporation* v. *United States,* 309 U. S. 436, 60 Sup. Ct. 618 (1940).

The United States Constitution gives to Congress the right to create patents and copyrights.[2] Pursuant to this provision Congress has granted to every patentee, for the term of seventeen years, "the exclusive right to make, use, and vend the invention or discovery." [3] The Sherman Act [4] states:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal * * *
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of * * * trade or commerce * * * shall be deemed guilty of a misdemeanor * * * "

Only "undue" restraint of commerce is prohibited.[5] A combination or contract may be unlawful under the Sherman Act though it relates to either patented or copyrighted commodities.[6] The right of the patentee to contract with respect to the patent is conferred by the general law rather than the patent.[7] There is a point beyond which the patent laws have no force. Thus it is stated with respect to a license agreement in *Straus* v. *American Publishers' Association:* [8]

> "The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly

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[2] U. S. CONST. Art. I, § 8.
[3] 16 STAT. 201 (1870), 35 U. S. C. A. § 40 (1934).
[4] See note 1, *supra.*
[5] Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911).
[6] Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9 (1912).
[7] Pope Mfg. Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. 632 (1892).
[8] 231 U. S. 222, 34 Sup. Ct. 84 (1913).

> which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * * "

The Sherman Anti-Trust Act does not restrict the monopoly created by the patent laws.[9] Since the term "restraint" in the Sherman Act has been construed to mean "undue restraint", only such acts as are against public policy are within the scope of this law.[10] Therefore, as the patent law is an act of the legislature, it is definitely not against public policy; and, when an agreement is within the scope of the patent law, it is not subject to the provisions of the Sherman Act.[11]

Patent monopolies have their inherent limitations beyond which there is no protection from the anti-trust laws.[12] License agreements seeking to control an industry under a patent, which obviously does not cover the entire industry, are illegal.[13] Patents authorize monopolies over the subjects of their grants, but confer no right upon the owners of several distinct patents to combine for the purpose of retarding competition and trade.[14] Agreements requiring licensed manufacturers to maintain fixed prices are valid unless the licensees produce a substantial majority of the output in the restricted line.[15] A survey of the cases on this branch of the patent law reveals that the courts have applied the doctrine of "reasonable protection" [16] in determining legality. It also evidences the necessity for careful and vigorous investigation and research by skilled legal technicians to determine whether the decisions are only in apparent conflict and whether the present flexible state of the law is more advantageous than the certainty that a well-planned codification would bring.

M. S.

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[9] Rubber Tire Wheel Co. v. Milwaukee Rubber Co., 154 Fed. 358 (C. C. A. 7th, 1907).

[10] See note 5, *supra.*

[11] See notes 8, 9, *supra.*

[12] See note 8, *supra.*

[13] National Harrow Co. v. Hench, 83 Fed. 36 (C. C. A. 3d, 1897).

[14] See note 12, *supra.*

[15] Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747 (1902) (In the other *Harrow* cases, 83 Fed. 36 (C. C. A. 3d, 1897), 84 Fed. 226 (C. C. N. Y. 1898) a different result was reached because the scheme maintained a monopolistic control over a substantial part of the output. The "Bathtub" Trust, 226 U. S. 20, 33 Sup. Ct. 9 (1912), controlling 78% of the output of enameled-ware and 80% of the jobbers in that line, was held illegal. The license agreement in that case also fixed prices as in the instant decision); United States v. Standard Sanitary Mfg. Co., 191 Fed. 172 (D. C. Md. 1911), *aff'd,* 226 U. S. 20, 33 Sup. Ct. 9 (1912); Lord v. Radio Corp. of America, 24 F. (2d) 565 (D. C. Del. 1928) (Radio Corporation, controlling 70% of the supply of vacuum tubes, licensed manufacturers to make receivers under its patents, the licensees agreeing to purchase all tubes used in such sets from the licensor; the contract was held to be in violation of the Sherman Act).

[16] The doctrine that a patentor to keep within the protection of the patent act must only impose such restrictions on the use of his patent as will reasonably protect his rights in such patent.