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THE APPLICATION OF THE SHERMAN ACT TO FOREIGN COMMERCE*

VICTOR H. KRAMER**

This article divides the subject into three parts. The first sketches the principal legal problems involved in obtaining jurisdiction over the person. The second considers some of the substantive questions involved in applying the Sherman Act to foreign commerce. The third section discusses some current questions as to the relief to be granted in cases where unlawful restraints on our foreign commerce have been found.

I. JURISDICTION OVER THE PERSON

The meaning of the phrase, jurisdiction over the person, is simple where natural persons are involved. Jurisdiction obtains where the person is found or caught. However, in civil antitrust litigation, plaintiff is rarely concerned with getting ahold of anything as tangible as a living human being — usually he is concerned with serving process on corporations. Congress has provided that a foreign corporation can be sued under the antitrust laws “in any district wherein it may be found or transacts business,” but that it may be *served* only where “it may be found.”¹

Accordingly, the first part of our discussion will be concerned with the question: Where do you find a corporation? The legal principles are fairly well settled. But, like almost every question worth arguing about in antitrust law, their application depends on the facts. Facts in these cases are subject to annoying variations. Against this caveat, there are stated below some of the principal rules.

(1) The word “found” in the statute imports something more than “transacting business.”² In other words, a foreign corporation

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¹ Section 12 of the Clayton Act, 38 Stat. 736, 15 U.S.C. §22 (1914) reads as follows:

“Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”

² *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, at 373 (1927).

cannot be served in a suit under the antitrust laws in a particular district solely because it buys or sells in that district.

(2) "The question is whether there is proof of continuous local activities and whether under all circumstances of the case, the forum is not unfairly inconvenient."³

(3) A foreign parent's commercial and financial domination of its United States subsidiary does not bring the parent within the jurisdiction of the United States courts so long as the formal separation of the affairs of parent and subsidiary is scrupulously maintained.⁴

(4) When a subsidiary acts as an agent of the parent and the subsidiary is present in the jurisdiction, the parent may be served in that jurisdiction.⁵

(5) Justice Frankfurter, in his concurring opinion in the *Scophony* case, summed up the law as follows:⁶

"And a corporation can be found anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges."

Thus far the Government has never lost an antitrust case in the Supreme Court on the issue of whether a defendant foreign corporation was, or was not, found in the United States.⁷ The leading case is *United States v. Scophony Corporation of America*.⁸ The Court held that British Scophony was found in the Southern District of New York. American Scophony's capital stock was owned in part by British Scophony; precisely, it owned two-thirds of the "A" shares. The "A" shares collectively had the right to elect sixty percent of American Scophony's directors; the balance was to be elected by the "B" shares whose holders were United States corporations. The purpose of the arrangement was alleged by the Government to be to effect an international division of territories in certain electronics equipment by use of patent licensing and other arrangements dividing world markets.

The United States Marshal first served the complaint against British Scophony by serving the president of American Scophony.

³ *United States v. Watchmakers of Switzerland Information Center, Inc.*, 133 F. Supp. 40 (S.D.N.Y. 1955), *reargument denied* 134 F. Supp. 710 (S.D.N.Y. 1955).

⁴ *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925); 133 F. Supp. at 45.

⁵ *Ibid.*

⁶ *United States v. Scophony Corp. of America*, 333 U. S. 795, at 819 (1948).

⁷ But see *United States v. DeBeers Consolidated Mines, Ltd.*, 325 U. S. 212 (1945).

⁸ See note 6 *supra*.

Some three months later he served one of British Scophony's directors who visited the United States with an irrevocable power of attorney to act for and "bind" British Scophony in all matters "affecting the Company's interests in the United States."⁹

On this set of facts the Supreme Court held that British Scophony was found in the Southern District of New York despite the fact that it had no office or place of business there, owned no physical property there and had no employees, telephone, made no sales and solicited no orders there. The Court rejected these negatives as applicable only to a manufacturer and seller. British Scophony, on the other hand, was characterized as having "continuing and pervasive supervision over and intervention in" the affairs of American Scophony and this was enough.¹⁰ To hold otherwise, said Mr. Justice Rutledge for the Court, would defeat the "... policy ... of the anti-trust laws."¹¹

The learned Justice did not tell us what aspect of that policy applied in the case before him. We shall have occasion to consider the policy in the second part of our discussion.

The most important antitrust case now pending against foreign corporations involving questions of jurisdiction over the person is *United States v. The Watchmakers of Switzerland Information Center, Inc., et al*—the so-called *Swiss Watch* case—in the Southern District of New York.¹² The defendants include several United States corporations and five foreign corporations alleged to be related to the United States defendants as parents, subsidiaries or affiliates. The latter five moved to dismiss the complaint against them on the ground that the Court lacked jurisdiction over their persons. After submission of affidavits, briefs and oral argument, Judge Walsh dismissed all the motions. The case is pending, awaiting trial.

The opinion of the Court should be studied for an understanding of the factors on which it relied in holding that the Government, *prima facie*, had established jurisdiction over the Swiss defendants.

II. JURISDICTION OVER THE SUBJECT MATTER

Assuming jurisdiction is obtained over the person, what of jurisdiction over the subject matter in cases involving alleged restraints on and monopolizations of "... commerce ... with foreign nations"?

Foreign commerce cases under the Sherman Act give alert defense counsel an opportunity to utilize a category of arguments which the Supreme Court has foreclosed against defendants in cases involving restraints on interstate commerce. This is but another way of saying

⁹ 333 U.S. at 801.

¹⁰ *Id.* at 814.

¹¹ *Id.* at 817.

¹² See note 3 *supra*.

that some of the settled rules in domestic commerce cases cannot be relied upon with the same degree of assurance by the plaintiff in foreign commerce cases.

The first great international cartel prosecuted under the Sherman Act was the Tobacco Trust. Perhaps because of Chief Justice White's turgid prose, or perhaps because the then intense preoccupation with the domestic aspects of trusts, the important holding in the case respecting foreign commerce often goes unnoticed. The Imperial Tobacco Co. of Great Britain, named as a defendant, and the American Tobacco Company had entered into contracts *executed in England* allocating world markets and assigning to the British-American Tobacco Company, also named as a defendant, the foreign export business of both parties. Without discussion of any subtleties, the Court held these contracts to be unlawful, thus reversing the trial court which had dismissed the complaint against the two British companies.¹³ The relief granted is worth noting. The final decree abrogated all the foreign restrictive covenants to which these three defendants were parties except (a) those that "relate wholly to business in foreign countries" and which had previously been assigned to other parties; "or (b), are covenants exclusively between foreign corporations and relating wholly to business in or between foreign countries."¹⁴

The second case is *United States v. Pacific and Arctic Railway and Navigation Company*.¹⁵ It is usually cited for establishing the proposition that the Sherman Act has an "extra territorial operation." The case involved the validity of an indictment against the Canadian Pacific Railroad Company and a United States corporation and others which charged them with participating in a scheme to monopolize transportation between points in the United States and Alaskan and Canadian ports. Defendants contended that the indictment was invalid because it undertook to apply the Sherman Act to transportation on foreign lines in foreign nations. The Court rejected this argument because of the "control to be exercised over transportation in the United States." The Court said: "We certainly may control . . . [foreign] citizens and corporations operating in our territory. . . ."¹⁶ On this basis, the applicability of the Sherman Act was extended to certain of the operations of these defendants outside the United States.

The third case — *United States v. Sisal Sales Corp.* — is of great importance.¹⁷ The opinion came down almost twenty years after Holmes' decision in a private antitrust case against the United Fruit

¹³ U.S. v. American Tobacco Co., 221 U.S. 106, at 171-3, 184 (1911).

¹⁴ *Decrees and Judgments in Federal Antitrust Cases*, p. 167 (1918).

¹⁵ 228 U.S. 87 (1913).

¹⁶ *Id.* at 106.

¹⁷ 274 U.S. 268 (1927).

Company.¹⁸ That opinion had dismissed the private suit on the ground that the particular acts of the alleged banana monopoly complained against had been performed abroad and with the support of the government of a foreign nation and hence were immune from attack. The defendants in *Sisal* thought that that defense would work again but it failed.

The facts were these: three United States banks entered into a combination with other United States nationals and a Mexican corporation to corner the market on sisal grown in Mexico. They enlisted the support of the governments of Mexico by having them pass discriminatory legislation to the sole advantage of one Mexican sisal buyer. The result was to drive all other buyers in Mexico out of business with defendants left in control of commerce between Mexico and the United States in sisal. In the District Court, the defendants successfully moved to dismiss the bill. The Supreme Court reversed. The *Banana* case was distinguished on a ground that would suggest that plaintiff's counsel in that case could have prevailed if his pleading had been more artfully drawn. In *Sisal*, Justice McReynolds, for a unanimous court, held that the pleading alleged that the conspiracy was "made effective by acts" done in the United States with the "object" of controlling imports and sale of sisal both inside and outside this country.¹⁹ On these allegations the Court held that a violation of the Sherman Act was pleaded. No relief resulted, however, because the controversy became moot and the bill was dismissed with the consent of the government.²⁰

The chief importance of the *Sisal* case is that it distinguished the *Banana* case so as to make it clear that the Sherman Act applies to restraints created outside the United States even with the assistance of the legislature of a foreign nation where the effects of the restraints are felt in this country, and were so intended by the defendants.

The last case to be mentioned filed during the first fifty years of the Sherman Act is *Alcoa*.²¹ Aluminum Ltd., a Canadian concern, at that time said to have been a creature of Aluminum Company of America, together with five European corporations, organized a Swiss corporation which collected "royalties" from aluminum producers whose production in foreign nations and exports to the United States and other countries exceeded their assigned quotas. The royalties thus obtained were divided among the participants. This situation gave Learned Hand an opportunity to discuss the foreign commerce question. His conclusions may be summarized as follows:

¹⁸ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

¹⁹ 274 U.S. at 276.

²⁰ See CCH, *FEDERAL ANTITRUST LAWS*, Case #290, p. 139 (1952).

²¹ *U.S. v. Aluminum Co. of America*, 148 F. 2d. 416 (2d Cir. 1945).

(1) Congress did not intend the Sherman Act to prohibit "conduct which has no consequences within the United States."

(2) Congress did intend to reach some types of "conduct outside its borders" that have "consequence within" the United States.

(3) Congress did not prohibit "agreements made" outside the United States "not intended to affect imports, [but] which do affect them, or which affect exports."

(4) The Act covers agreements made in a foreign nation intended by the parties to have an effect upon United States imports or exports which actually do have an effect upon them.²²

Applying these rules to the case at hand, he found that the agreements made abroad by these foreign corporations were intended to affect imports into the United States and that the defendant had not sustained the burden of proving that they did not have that effect; hence, judgment for the United States.

We should not leave our discussion of the *Alcoa* case without sounding a note of caution. At the beginning of his discussion of this problem, Judge Hand referred to "conduct outside the United States of *persons not in allegiance to it*." But this qualification is omitted in his subsequent formulation of the rules. Nevertheless, the rules Judge Hand formulated *may* apply only to agreements made outside the United States by foreign nationals. Thus, an agreement made in a foreign country by a United States citizen unreasonably restraining imports to this country might be held to be unlawful irrespective of the facts: (a) that it was made outside the United States and (b) that there is no proof that it was intended to have any restraining effect.

There is a good reason for ruling intent relevant in cases involving acts done abroad by foreign nationals and not in cases against United States citizens. In attacking arrangements restrictive of our commerce made abroad by persons owing us no allegiance, we must observe a decent respect for the contrary or divergent policies of other nations. This suggests that our own economic system should not be enforced against foreigners operating abroad unless their acts can be shown to have been adopted with an intent to affect our commerce in a manner prescribed by our laws. On the other other hand, we may rightfully expect our own citizens to so conduct their affairs abroad that their acts will not restrain the trade unreasonably of the nation to whom they owe allegiance, irrespective of their intent.²³

²² *Id.* at 443.

²³ *Cf.* Cheatham & Reese, *Choice of the Applicable Law*, 52 COL. L. REV. 959, at 982 (1952). I recognize the difficulties in applying these views in antitrust cases involving concerted action abroad between a United States citizen and a foreign national. See *United States v. Oldham Co.*, yet unreported (N.D. Calif., June 11, 1957), especially note 3. A preliminary report by the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York, entitled "National Security and Foreign Policy in the

World War II brought into play forces which radically altered patterns in foreign trade. Dollar shortages, import and export quotas, foreign exchange restrictions and related restraints imposed by other nations upon our foreign commerce made international trade far more difficult. Allegedly in response to these difficulties, American firms organized subsidiaries or combinations with foreign nationals abroad to carry on their businesses in foreign nations. These activities presented a host of complex antitrust legal problems both for prosecutor and defense counsel. Definite answers to many of them are not at hand, though some of the general principles seem clear.

Judge Wyzanski's opinion in the *Minnesota Mining* case undertook to restate some of the fundamentals.²⁴ At issue was the legality under the Sherman Act of a combination of five American manufacturers organized in 1929—long before World War II—and controlling four-fifths of the export trade in coated abrasives. These manufacturers had established factories abroad owned by the combination and had refrained, pursuant to agreement, from exporting goods made in America to those countries in which the same goods made in their foreign plants could more profitably be sold. The defendants relied heavily upon the contention that they had been unable, as a result of political and economic barriers, to export from the United States at a profit. The court stated that if the defendants could establish that this had been the fact "... over a sufficiently long period ... then any private action taken to secure or interfere solely with business in that area [of foreign trade] ... does not [violate] ... the Sherman Act."²⁵

Note the two important conditions: (1) the burden is apparently on the defendants to establish the impossibility of profitable exports; and (2) this must be proved to have been the case for "a sufficiently long period." Judge Wyzanski concluded that the defendants had not proved their defense of inability to export and, therefore, held the restrictions on export to be an "obvious"—his word—restraint on our foreign commerce in "violation of section 1 of the Sherman Act."²⁶

We now turn to a case involving a type of international arrangement which involved restrictions not only on exports, as in *Minnesota Mining*, but also on imports to the United States: *Timken Roller Bearing Co. v. United States*.²⁷ In brief, the facts were these: American Timken had entered into agreements with a British corporation and a French corporation in neither of which did it have voting control.

Application of American Antitrust Law to Commerce with Foreign Nations" (1957), seems to take the position that it would be unsound policy in cases involving restraints on our foreign commerce to distinguish the treatment to be accorded U.S. nationals from that to be given aliens, (See pp. 10-11).

²⁴ U.S. v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1940).

²⁵ *Id.* at 958.

²⁶ *Id.* at 961.

²⁷ 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd in part*, 341 U. S. 593 (1951).

Pursuant to these agreements, the three corporations had allocated trade territories among themselves; fixed prices on products of each sold in the territory of the others; cooperated to protect each other's markets and to eliminate outside competition; and the foreign corporations participated in arrangements which restricted shipments to the United States. A bare majority of the Supreme Court upheld the District Court's conclusion that the Government had made out a case under the Sherman Act.

In his dissenting opinion, Mr. Justice Jackson said:

"The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are 'separate persons,' and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy."²⁸

The case had nothing to do with "subsidiaries organized by an American corporation." Involved were corporations, organized and jointly owned by competitors only one of which was American, coupled with findings of fact supported by substantial evidence that the purpose of the combination was anticompetitive.

Perhaps one of the most advanced applications of the Sherman Act to the foreign commerce field is found in the case of *United States v. R. Hoe & Co., Inc.*, settled by consent decree in December, 1955.²⁹ The defendant Hoe, a manufacturer of certain kinds of printing presses, had a subsidiary in England called British Hoe. In 1938, these two concerns entered into an agreement with a British concern called Crabtree, Ltd., pursuant to which Hoe sold its British subsidiary to Crabtree. The contract contained a covenant prohibiting Crabtree and British Hoe from selling printing presses under the name "Hoe" in the United States, Canada and South America. Defendant Hoe in turn agreed not to sell under the name "Hoe" in most other markets of the world. At the time the agreement was made none of the parties had either utilized or registered the name "Hoe" in many of the countries covered by the agreement.

Upon these facts alone, the legality of the agreement may be debatable. The covenants by each party not to ship into defined territories under the name "Hoe" might be successfully defended as a necessary adjunct of the sale of a business in order to protect both buyer and seller against confusion and unfair competition which would have arisen if both could have used the same mark or name in the same territory. On the other hand, the agreement suggested an unlawful division of territories. If the government could have shown that none of the parties to the agreement had ever sold in certain

²⁸ *Id.* at 606.

²⁹ See note 35 *infra*.

countries allocated to one of the parties, the ancillary defense would have been open to attack as a rank allocation of territory, and not justifiable as a reasonable restriction in connection with the sale of a business. The allocation of future business cannot be ancillary to the sale of non-existent business.

But the Government's case did not depend upon this agreement alone. In addition, in 1945 the parties made a supplemental agreement, subsequently claimed to have been abandoned before suit. This agreement prevented either party from selling printing equipment in the territory allocated in 1938 to the other party, whether or not the mark or name "Hoe" was used in connection with the sale. This agreement could not have been justified as ancillary to the sale of British Hoe to Crabtree since it was made many years after that sale. Nor could it have been justified as necessary to prevent trademark confusion since it prevented sales of goods whether or not they were trademarked or otherwise identified by name.

As already indicated, the case was settled by consent decree and thus we do not have the benefit of a judicial discussion of the interesting legal issues involved.

With this necessarily sketchy review of some of the leading cases in mind, we turn to some illustrative hypothetical situations. The facts have been chosen for the purpose of illustrating some current controversial problems.

Assume that the producers of steel in Pennsylvania were to agree upon the price at which they would sell f.o.b. their Pennsylvania mills. Assume they were indicted under the Sherman Act. Their counsel could argue interminably that they should be acquitted on the ground that they did not intend to affect commerce between Pennsylvania and the other states, but no court today would pay any attention to this defense. Now assume that all the producers of steel in Europe did the same thing and that it could be proved that the effect was to diminish imports of steel to the United States. Assume further that at least one of those European steel producers could be "found" here and indicted. His defense of no intent to affect imports to the United States would probably be treated with respect.

Next, consider the legality of an agreement entered into in the United States between two or more corporations fixing the prices at which one or more of them will sell goods manufactured in the United States for shipment and sale abroad. There is no doubt that any defense based on intent would be of no avail, and that per se rules would apply.

For a third hypothetical case, let us assume that an American manufacturer of mousetraps, not having a monopoly, desires to sell the traps in England. Assume further that because of "Buy British"

sentiment, he has had little success in selling the traps abroad. Possessing, as he thinks, a better mousetrap, and the British refusing to beat a path to his door in the United States, he decides to set up a mousetrap manufacturing subsidiary in England in which he owns half the stock. The other half he sells at public offering to British investors. So far, it seems clear that there is no violation of the Sherman Act. Perhaps it would be argued that establishment of the British subsidiary automatically stopped exports from this country and hence restrained trade. The argument is met at once with the fact that our mousetrap manufacturer had no success in selling an American-made trap to the British. But even if this argument were not available, there is the further defense that no joint action, no contract, combination or conspiracy is involved. True, there is the subsidiary—a separate legal entity—but there is nothing in our postulated facts which would support the claim that parent and subsidiary propose to take any joint action in restraint of trade. The parent simply does not sell in England; it does not agree with anyone not to sell there.

But now let us change our facts just a little. Let us suppose that the other fifty percent of the capital stock in the British mousetrap manufacturing subsidiary is owned by a British manufacturer of mouse-traps: an inferior variety but nonetheless a mousetrap that efficiently catches mice. Is this fact alone enough to supply the requisite combination? In the absence of evidence that the combination has restrained or intends to restrain American exports or imports, it is probably safe to conclude that there is no violation.

Now let us add to our postulated facts this additional circumstance: the jointly-owned foreign subsidiary agrees with its American parent that it will not export any mousetraps from Britain to the United States. This makes our problem a good deal tougher and takes us into the penumbra in antitrust law. The purpose of and motives behind the agreement restricting imports would probably be relevant. Perhaps the restrictive agreement could be justified as the necessary *quid pro quo* for the delivery of the American company's know-how to the British subsidiary. No American concern, it should be argued, should be expected to help create a child abroad to compete with the parent. Without the necessary know-how from the American parent, the British subsidiary could not have been formed and hence could not have engaged in any trade, in Britain or elsewhere. Such logic is suspect, however. Thus, it used to be argued that restrictions in domestic patent licenses were lawful because the patentee could have lawfully refused to grant a license at all. The Supreme Court has, of course, rejected that logic time and again.³⁰

³⁰ *E.g.*, *United States v. Masonite Corp.*, 316 U.S. 265, at 277 (1942).

Recall Judge Hand's opinion in the *Alcoa* case. He thought it was necessary for plaintiff to prove an intent to restrain United States imports and that proof of this intent shifted the burden to defendants to prove that the agreement had no adverse effect on imports. But suppose plaintiff has no evidence of intent outside the agreement itself. Can the plaintiff, in attacking these agreements, invoke the rule that a person will be presumed to have intended the necessary consequences of his agreements?³¹ Or does the plaintiff have to prove that the defendant specifically intended to reduce imports to the United States or otherwise affect them? The writer's guess is that the plaintiff does not have to introduce independent evidence of the intent where the adverse effects of the agreement are demonstrated by its terms, and when at least one of the parties to the agreement is within the jurisdiction of a United States District Court. If this guess is correct, it may do violence to Judge Hand's generalization in the *Alcoa* case. There he required the plaintiff to carry the burden on intent and the defendant on effects.

There are few, if any, litigated cases which deal with the problem involved in our hypothetical mousetrap case. *Hoe* is the closest but it never reached trial. The facts in *Timken* are a far cry from our hypothetical case. Not only was there price-fixing in *Timken* but also each party agreed not to ship into the territories assigned to the others. In other words, world markets were divided. In our hypothetical case, the markets of only one party were restricted. Finally, in *Timken*, the findings of the district court on the intent of the parties played a heavy role. Thus, the late Judge Freed's opinion repeatedly referred to defendant's intent to avoid all competition with British and French *Timken* and with others. The Supreme Court twice alluded to these particular findings in its six-page opinion.

In our mousetrap case we have postulated no evidence on intent other than that which can be presumed from the bare facts as stated. From these facts, it does appear clear, of course, that the American mousetrap manufacturer intended to prevent its British subsidiary from using American know-how to compete in the United States. But the fact that a concern manifests an intent to eliminate some competition is not a dispositive fact. For example, if *A* sells *B* his factory. *B* may without unlawfully restraining trade require *A* to agree to refrain from competing with *B* by establishing another factory in an area perhaps as large as the United States for a period of years. Such covenants are labeled "ancillary" to the lawful sale of a business. But we must be careful to avoid allowing the label, "ancillary," to decide our mousetrap case. The plain truth is that we term an agreement "ancillary" only after we have decided for some other reason

³¹ *United States v. Patten*, 226 U.S. 525, at 543 (1913).

that it does not violate the Sherman Act. The same is true of the label, "joint venture." Many unlawful combinations are joint ventures just as there are many joint ventures that are lawful combinations.

In concluding this phase of our discussion, only three generalizations appear to be assured: First, mere investment by United States corporations in the business of manufacturers or distributors located in foreign nations does not violate the antitrust laws. Second, agreements made here or abroad designed to effect restraints on exports from the United States or agreements which have that effect, will be tested by the same standards as would similar agreements restraining interstate commerce. Third, agreements made abroad solely by foreign nationals not intended to affect imports to the United States are probably immune from attack even though the participants can be "found" in the United States. Between these last two extremes lie types of business arrangements affecting our foreign commerce, the legality of which is still the subject of sharp debate.

III. RELIEF

We turn now to questions of relief. In the foreign commerce field the Antitrust Division has been well-nigh invincible in the Supreme Court in establishing liability. With one exception,³² there is no case adjudicated during the past thirty-five years or more in which the Supreme Court did not hold with the Government on the issues of liability in Sherman Act foreign commerce cases. The record is not as good on issues of relief. For example, in *Timken* the Supreme Court was unable to muster a majority of the Justices sitting to uphold that portion of the district court's decree which would have required Timken to divest itself of its capital stock interest in British and French Timken. The effect of this reversal on divestiture was to license American Timken to so increase its financial interests in the British and French companies to give it control. This license it promptly exercised. Thus Timken, with the blessing of a majority of the Justices sitting on the case, now controls its two erstwhile co-conspirators. Justice Jackson ended his dissenting opinion with these words: "I think this decision will restrain more trade than it will make free."³³ As it turned out, he was probably right but for the wrong reasons.

A perplexing relief problem arises in foreign commerce cases when the defendant, having been an erstwhile competitor abroad, unlawfully agrees to cease competing there. The proverbial horse cannot be made to drink but only led to the trough; defendants, however, are sometimes required to drink. Thus, in the *Timken*³⁴ and *Hoe*³⁵ cases

³² See note 7 *supra*.

³³ 341 U.S. at 608.

³⁴ Final judgment not printed.

³⁵ CCH 1955 TRADE CASES, par. 68215.

defendants were required to advertise abroad advising prospective purchasers that they were prepared to sell their products in these countries, and to accept orders from foreign purchasers. The decree in the *Holophane* case, goes further in requiring defendant to sell abroad. It is required to have available for sale sufficient quantities of glass "to meet reasonable anticipated foreign demand," and to "use reasonable efforts . . . to promote" sales in the foreign countries formerly allocated to its co-conspirators. Beyond this, if a valid trademark prevents shipment of existing stocks abroad, then the defendant is required to "have available sufficient quantities of unmarked glass or glass marked with a new trademark to be distributed under a new trade name if necessary to meet reasonable anticipated foreign demand."³⁶

This case was argued last term in the Supreme Court. The Court unanimously affirmed the district court's conclusion that defendant had violated the Sherman Act and all but one paragraph of the decree which was affirmed only by an evenly divided Court.³⁷ In the course of the argument, Government counsel was hard pressed by some of the Justices. Specifically, counsel was asked by the Chief Justice whether the Government interpreted the decree as requiring the defendant to use reasonable efforts to sell abroad, if in its best business judgment those efforts would be unwise.

The Government chose to reply to this question by letter sent a day or two after the argument. The letter contained this lengthy sentence:

"The Government believes that the reasonable efforts provision in the judgment may properly be interpreted as not requiring appellant to take any action which is clearly precluded by the exercise of sound business judgment, so long as the [district] court is satisfied that such judgment was not arrived at and not influenced by unlawful motives or purposes, *i.e.*, motives or purposes related, directly or indirectly, to continuation of the prior violations of the antitrust laws specifically condemned and prohibited by the decree."

Since the judgment was affirmed, following the Government's letter, it is probably safe to assume that the decree will not be interpreted against defendant more strictly than the Government did in that letter.

The *Holophane* decree posed another dilemma for the defendant which its counsel pressed in argument in the Supreme Court. Apparently, however, that argument did not impress at least the four members who voted for affirmance. *Holophane* argued that the decree required it to break a contract with the British company not to export

³⁶ *Id.* at par. 67679.

³⁷ 352 U.S. 903 (1956).

to England. Even if invalid under American law, argued *Holophane*, the contract was enforceable under British law and, therefore, the decision required it to risk a suit in England either for breach of contract or for specific performance.

The Government took the position in its Supreme Court brief that until *Holophane* made a showing in the district court that the contract with the British company was enforceable, would be enforced in Britain, and that this would subject it to financial liability, defendant's attack on this provision of the decree was premature. Sufficient unto the day is the evil thereof, was the Government's view. Thus far the evil day has not come; at least *Holophane* has not asked the district court to modify its decree.

Even so, however, the possibility of a conflict of laws exists. But such conflicts have been rare. Yet there are those who, being opposed to any application of the Sherman Act to acts done abroad, have greatly exaggerated the importance of these conflicts.³⁸

IV. CONCLUSION

To conclude, the reach of the antitrust laws in foreign commerce has been extended a long way since 1909 when Justice Holmes in the *Banana* case found it "rather startling" and "surprising"—his words—for a plaintiff to argue that acts done abroad can form the basis for a charge of violating the Sherman Act.³⁹ We now find ourselves in an age in which a vast number of business arrangements made outside this country affect commerce in the United States. Yet, as we noted in our review of Judge Hand's analysis in *Alcoa*, our courts have not yet gone the whole way by holding that acts done abroad concertedly which restrain our foreign commerce are in all circumstances subject to the Sherman Act. Judge Hand reminded us of "the limitations customarily observed by nations upon the exercise of their powers."⁴⁰

Equity's capacity for flexibility reached full flower in fashioning antitrust decrees. The writer's view is that it is at this point in the litigative process, rather than in deciding issues as to the Act's substantive reach, that caution is in order. A missionary zeal for antitrust must co-exist with a decent respect for the contrary opinions of friendly foreign nations. We should avoid—at least until we have the sanction of a treaty—transforming the Sherman Act from a charter of liberty for American businessmen into an international economic crusade for free competitive enterprise.

³⁸ See Whitney, *Anti-Trust Law and Foreign Commerce*, reprinted from *The Record of the Association of the Bar of the City of New York*, Vol. 11, No. 3, March 1956.

³⁹ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, at 355 (1909).

⁴⁰ 148 F. 2d at 443.