

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

AUTOMATIC PHONOGRAPH EXHIBITION CO. *v.* NORTH AMERICAN PHONOGRAPH CO.

(Circuit Court, S. D. New York. January 21, 1891.)

1. CORPORATION—CONTRACTS—PRELIMINARY INJUNCTION.

Defendant, owning letters patent for phonographs, organized various local sub-companies, authorizing them to rent out machines to the public. Complainant, who owned letters patent for a coin-slot machine, to be used in connection with phonographs, made an agreement with defendant wherein the latter agreed to use its best endeavors to induce the various sub-companies to grant complainant the exclusive right to use the coin-slot machine within their respective territories. In pursuance of such agreement, defendant acquired from the various local sub-companies such exclusive right for the period of five years. Defendant then directed the various local sub-companies to sell machines directly to the public, instead of leasing them as theretofore, which complainant alleges will irreparably injure its business. *Held*, on motion by complainant for a preliminary injunction to restrain such contemplated sales, that it would not be presumed that the agreement between complainant and defendant, which was formally executed under seal, by mistake omitted a clause authorizing defendant to direct such sales by the local sub-companies to the general public, and that a preliminary injunction would issue.

2. SAME—ESTOPPEL.

Defendant, which received 15,000 shares of complainant's stock as a consideration for the agreement, cannot defeat the motion for preliminary injunction on the ground that complainant had never been legally organized as a corporation, and that the contract was *ultra vires*.

On Motion for Preliminary Injunction.

Bill by the Automatic Phonograph Exhibition Company to enjoin the North American Phonograph Company from compelling its various sub-companies to sell phonographs to the public. The North American Phonograph Company owns various patents for phonographs. It has conducted its business by the formation of various local companies throughout the United States, and has granted an exclusive license to each of them to use the phonograph within its territory, with a right in the local companies to sublicense the use of the machines to the general public. The North American Company in such agreement of license also reserved the right of compelling the local companies to sell the machines outright to

the public after January 1, 1890. The complainant, the Automatic Phonograph Exhibition Company, owns patents for a coin-slot machine, designed to be used in connection with phonographs, and on April 19, 1890, it entered into an agreement with defendants and others, known as the "Six-Party Agreement," under which defendant agreed to use its best endeavors to induce the local companies to enter into contracts with defendant, giving the latter exclusive right to use the phonograph in connection with the coin-slot machine. This six-party agreement contained no reservation of the right to sell phonographs directly to the public in favor of defendant. Pursuant to this six-party agreement, complainant entered into contracts with the various local phonograph companies, by which it obtained the exclusive right to use phonographs in connection with a coin-slot machine for a period of five years. Complainant then invested large sums of money in a manufacturing plant, and put on the market a large number of phonographs with coin-slot attachments, which are each earning on an average about two dollars per day. In December, 1890, defendant directed the various local companies in the United States to sell machines directly to the public, instead of licensing their use as heretofore. Against such contemplated sale defendant immediately protested, as being in violation of the six-party agreement, and of its contracts with the various local companies, and stating that such contemplated sales would utterly and entirely destroy its business. Defendant now moves for a preliminary injunction restraining such contemplated sales.

John H. Kitchen, for complainant.

J. Adriaance Bush, for defendant.

LACOMBE, Circuit Judge. This motion must be determined upon the papers as they stand. It is not disputed that the six-party agreement to which both defendant and complainant were parties was in the form set forth in the bill. Its fourth clause, therefore, contained an agreement on the part of the defendant to use its best endeavors, so far as it could legally do so, to induce its licensees to enter into agreements with the complainant similar to the one annexed to such six-party agreement, and which did not contain the reservations which had been inserted in contracts made with such licensees before the friendly offices of the defendant had been thus secured. It is insisted that the six-party agreement was signed in such form by a mistake, and defendant prays, or is about to pray, that it be reformed in that respect. It is, however, manifestly an important document, formally executed under seal, presumably with all the deliberation which attends the execution of such instruments, and upon this motion for a preliminary injunction it must be held as correctly expressing the intention of the parties, certainly unless a perfectly clear case of fraud or mutual mistake of fact were made out.

The objections that the complainant is not lawfully organized as a corporation, and that for various reasons such contracts are *ultra vires*, should not avail to defeat this motion under the principles laid down in *Arms Co. v. Barlow*, 63 N. Y. 62, and *Railway Co. v. McCarthy*, 96 U.

S. 258, as the defendant has received under the contract, and still holds, 15,000 shares of the complainant's stock.

The injunction may continue until further action of the court in the terms of the *ad interim* order, but with an express reservation of the graphophones.

SPELLMAN *et al.* v. CITY OF NEW ORLEANS.

ILLINOIS CENT. R. Co. v. SAME.

(Circuit Court, E. D. Louisiana. February 5, 1891.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

A city ordinance, prohibiting any railroad company from allowing the sale of fruit, vegetables, or perishable freight arriving in the city over its lines from cars on the tracks, from any platform, shed, or building at the depot on the grounds of the company, is, where the merchandise affected largely comes from other states, an interference with interstate commerce, and, if not based on considerations of public health, or intended to prevent the crowding and obstruction of streets and public places, but solely to hinder competition between non-resident shippers and resident licensed dealers in the same line, it is unconstitutional and void.

In Equity. Bill for injunction.

W. W. Howe, for complainant Spellman.

Girault Farrar, for complainant railroad.

F. B. Lee, for city of New Orleans.

Before PARDEE and BILLINGS, JJ.

PER CURIAM. The submission is upon applications for injunctions *pendente lite*. These suits are brought—the one by the receiver of a railroad company, and the other by the railroad company itself—to enjoin the city from enforcing, at the depots and grounds of the complainants, the following ordinance:

“No. 4891, COUNCIL SERIES.

“An ordinance amending ordinance 4090, C. S., to prohibit the peddling of fruit, vegetables, produce, or merchandise from cars, platforms, sheds, warehouses, grounds, or other property owned or controlled by any railroad company or companies in the city of New Orleans.

“Section 1. Be it ordained by the council of the city of New Orleans that ordinance No. 4090, C. S., adopted November 5th, 1889, be amended and re-enacted so as to read: ‘That it shall be unlawful for any railroad company or companies in the city of New Orleans to allow the sale of fruit, vegetables, market produce, perishable freight or merchandise, except pears, peaches, berries, and melons, arriving over their line in the city of New Orleans, from cars on the tracks, from any platform, shed, or building at the depot or depots, on the grounds or other property owned or controlled by such railroad company or companies in the city of New Orleans.’”

“Sec. 4. Be it further ordained that the provisions of this ordinance shall apply likewise to the levee and steam-boat landings of this city, except in the case of fruits just arriving from tropical countries, on vessels plying to this