

UNITED STATES *v.* NELSON *et al.*

(District Court, D. Minnesota. October 10, 1892.)

1. MONOPOLIES.—SUFFICIENCY OF INDICTMENT.—WORDS OF STATUTE.

An indictment under the act of congress, "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) must contain a certain description of the offense, and a statement of facts constituting same, and it is not sufficient simply to follow the language of the statute.

2. SAME.—WHAT CONSTITUTES.—AGREEMENT TO RAISE PRICE.

An agreement between a number of lumber dealers to raise the price of lumber 50 cents per thousand feet, in advance of the market price, cannot operate as a restraint upon trade, within the meaning of the act of congress "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) unless such agreement involves an absorption of the entire traffic, and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion.

At Law. Indictment under the act of July 2, 1890, (26 St. at Large, p. 209,) "to protect trade and commerce against unlawful restraints and monopolies." Demurrer to all the counts sustained.

The United States District Attorney.

W. E. Hale, for defendants.

NELSON, District Judge. In the case of *United States v. Benjamin F. Nelson, Sumner T. McKnight, William H. H. Day, et al.*, a demurrer is interposed to the indictment. Pressure of business in court has prevented an earlier decision, and I can now only give my reasons briefly for sustaining the demurrer. The indictment intends to charge offenses under the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies." This statute declares contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce among the several states and foreign nations, illegal, and makes them offenses, and affixes the punishment. The indictment purports to charge the defendants with violating the law by entering into a contract, and unlawfully engaging in a combination in the form of a trust, and confederating together in a conspiracy in restraint of trade among the several states. There are 12 counts in the indictment. The first 6 counts charge the offense in the language of the statute, and the others set forth facts which are claimed to constitute the offense. The federal courts by this act are given jurisdiction to apply remedies in cases where interstate commerce is injuriously affected by combinations and contracts which the state courts had formerly applied to protect local interests. In order to administer the law, the court must determine what is an unreasonable and unlawful restraint of trade or commerce by contracts, trusts, and conspiracies, and whether a contract is injurious to the public. In all cases at common law, it must be made to appear that the acts complained of threatened the interests of the public, and this is true whether the remedy sought to be applied is by civil or criminal proceedings. It is urged by the district attorney that, the offense being statutory, the general rule in such cases, to wit,

that it is sufficient to allege the offense in the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. See *U. S. v. Cruikshank*, 92 U. S. 558. The charge must contain a statement of facts constituting the offense, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained.

Do the facts set forth in the last six counts describe an offense which the statute forbids? The first of these counts charges, in substance, that the defendants were each dealers in lumber in the United States, and each transacted business at numerous towns and cities in different states, and on September 7th, at the city of Minneapolis, they agreed together that they would raise the price of lumber 50 cents per thousand feet in advance of the market price of pine lumber in the states of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber 50 cents per thousand feet in each of said states in which they transacted business. How this advance in price by these parties in the several states mentioned could regulate thereby the price for all dealers is not set forth. It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of the lumber owned or manufactured by themselves 50 cents per thousand feet above the market price necessarily advanced the price of all the pine lumber for sale in those states to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.

An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least. What has been said in regard to this count applies to the remaining five, in which

wrongful combinations and conspiracies in restraint of trade are alleged, and a monopoly of the whole or a part of the trade and commerce in lumber in the several states mentioned. The allegations are too indefinite and uncertain, and the demurrer to all the counts is sustained.

STAHL v. WILLIAMS.

(Circuit Court, D. Connecticut. September 23, 1902.)

No. 708.

1. PATENTS FOR INVENTIONS—ACQUIESCENCE—EVIDENCE.

On a motion for preliminary injunction the patentee made affidavit that he put the invention into practical use about the time of the application, and it had been in practical use ever since; that the rights of the owner of the patent had been acquiesced in by the public; that the invention had been applied to many hundred machines; that he had never given any licenses, or sold any manufacturing rights; and that the validity of the patent had never been questioned. The assignee of the patent made affidavit that he had applied the patent since January, 1892. *Held*, that this was insufficient to show public acquiescence.

2. SAME—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

On a motion for a preliminary injunction, complainant introduced the record of another circuit court, showing that in a suit by him against a third person the court found infringement, and granted a restraining order; that subsequently this injunction was made perpetual, but there was nothing to show that any question as to patentable novelty, the prior state of the art, or public acquiescence, were raised therein. *Held*, that such an adjudication was not of controlling weight.

3. SAME.

On a motion for preliminary injunction, a prior adjudication in another circuit, finding infringement, and awarding a perpetual injunction, is not conclusive, when the alleged infringing devices are materially different in the two cases.

4. SAME—PRELIMINARY INJUNCTION—INFRINGEMENT.

Letters patent No. 258,205, issued to Halstead, May 23, 1882, cover an egg-holding tray for incubators, having wires or cross bars, in combination with a muslin web below the same, on which the eggs rest, and which is movable by means of rollers so as to turn the eggs. In his application the patentee claimed as his improvement an arrangement whereby the eggs rested between cross bars not supporting the eggs, and disclaimed cross rollers on which the eggs rest. In defendant's incubator the eggs rest upon a cloth supported by cross bars, and the cloth revolves on rollers, but the rollers serve both to support the eggs and to hold them in place while the cloth is moved to turn them. Defendant's device had greater likeness to a prior patent than to that of complainant. There was no evidence that serious injury would be caused by withholding a preliminary injunction. *Held*, that the same should be denied.

5. SAME—DISCLAIMER.

Letters patent No. 368,249, issued in 1887 to George H. Stahl, covers in claim 3 an incubator in which uniform heating is secured by a flat tank overlying the chamber, and divided by two partitions extending from one end nearly to the other, the hot water being discharged by pipes into the outer divisions, and carried off by a single return pipe, leading from a point between the partitions. Defendant substitutes pipes for the partitions, and it appeared that the patentee originally claimed substantially similar pipes, but, the same being rejected, he disclaimed the use of pipes for maintaining an even temperature. *Held*, that the claim should be strictly construed against him, and that a preliminary injunction should be denied, especially as it appeared that both pipes and partitions had been used prior to the patent.

In Equity. Bill by George H. Stahl against Albert F. Williams for infringement of patents. On motion for preliminary injunction. Denied.

J. J. Jennings, for complainant.