

5. SAME—COMMON-LAW RULE.

The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy.

6. PUBLIC POLICY—HOW DETERMINED.

The public policy of the nation must be determined from its constitution, laws, and judicial decisions.

7. SAME—INTERSTATE COMMERCE.

The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences.

8. EQUITY—HEARING ON BILL AND ANSWER—EVIDENCE.

When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted.

9. SAME.

Where the contract is admitted, but the allegations tending to show its sinister purpose, tendency, and effect contained in the bill are denied by the answer, and averments tending to show a just and honest purpose, tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed.

10. CONTRACTS—PUBLIC POLICY.

Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy.

11. SAME—RESTRAINT OF TRADE—ANTI-TRUST ACT.

A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the interstate commerce act. Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the anti-trust act when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been to diminish, rather than to enhance, rates, and there is no other evidence of its consequences or effect. Shiras, District Judge, dissenting. 53 Fed. Rep. 440, affirmed.

12. SAME.

No monopoly of trade or attempt to monopolize trade within the meaning of the anti-trust act is proved by such a contract.

18. SAME.

The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties.

Appeal from the Circuit Court of the United States for the District of Kansas. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and 18 railroad companies, under the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red river; thence via that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line'; thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to

the Gulf of Mexico, and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"Exceptions.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver and Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver and Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"Article II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and reg-

ulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said com-

pany that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Article III.

"The duties and powers of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3 of article 3 of the agreement.

"Article IV.

"Any willful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Article V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at

its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"Article VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"Article VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Article VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and changed by the association thus formed, and that they have complied

with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the act of congress of February 4, 1887, entitled, "An act to regulate commerce," and the acts amendatory thereof. They aver that under that act they were required to make all charges reasonable and just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the interstate commerce commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the interstate commerce commission under the act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the interstate commerce act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440.

J. W. Ady, for appellant.

George R. Peck and Joel F. Vaile, (A. L. Williams, N. H. Loomis, R. W. Blair, John M. Thurston, O. M. Spencer, C. A. Mosman, J. D. Strong, and W. F. Guthrie, on the briefs,) for appellees.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their