LIQUOR:
MONOPOLIES: Association of brewers cannot through agreement or concerted action refuse to sell beer to any dealer or group of dealers. Such an agreement would be in violation of the anti-trust laws.

February 9, 1940

2-14 FILED 67

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Noel:

We have received your letter of February 6, which reads as follows:

> "As you probably know, Walker Pierce, my predecessor in office, has been engaged by the brewers of the state to aid the officers in the enforcement of the liquor law, and one of the methods by which they claim to be able to aid is by taking what they call a "shut-off" action in the sale of beer to law violators.
>
> Mr. Pierce has explained to me that it is the plan of the brewers to refuse to sell beer to any place found to be violating the law. He expresses some concern as to whether or not such action on the part of the brewers might be considered as violative of our restraining of trade statute.
>
> Will you please give me the benefit of your opinion concerning this action on the part of the brewers. I understand from Mr. Pierce that he has discussed this question with your assistants, Mr. Taylor and Mr. Allebach."

Under a similar state of facts, the Supreme Court of Missouri in the case of Reisenbichler vs. Marquette Cement Company et al, 108 S. W. (2nd) 343, recently passed on the propositions of law involved in your letter and also referred in the course of the opinion to the applicable statutes. In that case, the petition alleged that the plaintiff was engaged in the retail lumber business in Cape Girardeau, Missouri; that the several defendants were engaged also in the lumber business, some as wholesalers and others as retailers; that the plaintiff had, in the course of years, built up a profitable lumber business and for many years had sold cement and purchased it at wholesale from the defendants, Marquette Cement Company and Chris Stiver. The petition then alleged that all the defendants entered into an agreement, pool, and combination among themselves in restraint of trade and competition in the sale of cement; that in pursuance of such combination, pool and agreement, the defendants, Marquette Cement Company and Chris Stiver, refused to furnish, or sell, the plaintiff cement; that pursuant to said combination and agreement the defendants, Marquette Cement Company and Chris Stiver, regularly sold, and were still selling, cement to all retail dealers dealing in that commodity in Cape Girardeau except the plaintiff. The plaintiff then charged that, as a result of this combination and agreement between the defendants, he was unable to obtain cement for his retail trade as cheaply as his competitors; that plaintiff had been compelled, by reason of said unlawful combination and agreement, to purchase cement for his retail trade from a competitor at an advanced price and at a price in excess of that charged by the Marquette Cement Company; that by reason of said unlawful agreement, the plaintiff's cement business had been destroyed. The lower court sustained a demurrer to the petition, whereupon the plaintiff appealed. In reversing the case and remanding the cause for trial, the Supreme Court said, l.c. 344:

> "We are of the opinion that the first, second, fourth, and fifth points made in respondents' brief are without merit. The petition described the agreement alleged to have been entered into between the defendants. It also stated its purpose and effect. It is charged

in the petition that the defendants entered into a combination, the effect and purpose of which was: That the defendant Marquette Cement Company would sell cement to all of the retail dealers in the city of Cape Girardeau, who were named as defendants in the petition, but that no cement would be sold to the plaintiff, who was also a retail dealer in cement in said city. Section 8700 (Mo. St. Ann. Sec. 8700, p. 6486) reads as follows:

'Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article.'

We are of the opinion that the petition stated facts sufficient to constitute a cause of action under section 8700, supra. It will, therefore, not be necessary to discuss the question of whether the petition is sufficient under the other sections mentioned. It is evident, from a reading of the sections of article 1, chapter 47 (Mo. St. Ann. Sec. 8700 et seq., p. 6486 et seq.), that the Legislature intended to, and did, prohibit any and every form of combination or agreement that may be conceived, that tends to hinder or restrain competition and trade in any product or commodity. By the agreement described in the petition the defendants agree, among themselves, that plaintiff should be hindered in his business of buying and selling

cement, thereby limiting competition. In Heim Brewing Co. v. Belinder, 97 Mo. App. 64, loc. cit. 69, 71 S. W. 691, 692, the Kansas City Court of Appeals said:

'Any one may exercise a choice as to whom he will sell his goods, but he can not enter into a contract whereby he binds himself not to sell, for in such instance he barters away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement, he is no longer a free agent.'

This court in Dietrich v. Cape Brewery & Ice Co., 315 Mo. 507, 286 S. W. 38, loc. cit. 43 (14), approved the ruling of the Court of Appeals. Note what this court said:

'Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independant action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; State ex rel. v. People's Ice Co., 246 Mo. (168) 221, 151 S. W. 101; State ex inf. v. Armour Packing

Co., 265 Mo. (121) 148, 176 S. W. 382.'

The Legislature has declared all such agreements illegal. Defendants in such a case will not be heard to say that the agreement was not injurious to the public. This court has so ruled. See State ex rel. Barrett v. Boeckeler Lumber Co., 301 Mo. 445, loc. cit. 524, 525, 256 S. W. 175 (en banc); State ex inf. Major v. Arkansas Lumber Co., 260 Mo. 212, loc. cit. 315, 169 S. W. 145."

Under the federal law, the rule appears to be the same. In the recent case of U. S. vs. Ethyl Gasoline Corporation 27 Fed. Supp. 959, decided May 19, 1939, the District Court for the Southern District of New York said, l.c. 965:

"The Ethyl Gasoline Corporation has entered into license agreements with approximately 123 refiners, who together refine and sell about 88% of all the gasoline sold in the United States. These include all except one of the major refiners in this country. Each of the refiner license agreements provides that lead-treated gasoline may be sold to those jobbers only who are licensed by the defendant corporation and this provision is almost invariably complied with by the refiner licensees. Since the defendants have denied numerous applications for jobber licenses, many persons desiring to engage as jobbers in the sale of lead-treated gasoline, which comprises about 70% of all the gasoline manufactured and sold in the United States, have been excluded from the market. The unsatisfactory 'business ethics' of the jobbers has been the principal reason for such exclusion.

This provision of the refiner license agreements clearly is in restraint of trade. Each agreement calls for cooperative action between the defendant corporation and its refiner licensee in the exclusion of unlicensed jobbers from the market. While a manufacturer or trader may refuse to deal with those who do not observe the resale prices suggested by him, he may not combine or enter into agreements with intermediate distributors to cut off the supplies of such dealers. Victor Talking Machine Co. v. Kemeny, 3 Cir., 271 F. 810; Straus v. Victor Talking Machine Co., 2 Cir., 297 F. 791; cf. Federal Trade Commission v. Beech Nut Packing Co., supra."

CONCLUSION

We conclude, therefore, that the brewers cannot agree among themselves or combine in any way by agreement to refuse to sell beer to any one person or group of persons. Any one of the brewers belonging to the association can, of course, sell to whomsoever he pleases, or refuse to sell to anyone. However, any such action cannot lawfully be taken as a result of an agreement or contract or concerted action with other brewers. No brewer can enter into a contract whereby he binds himself not to sell.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RT