MONOPOLIES: )
) Any contract, agreement or arrangements made with intent to create or maintain a monopoly, contrary to the provisions of Chapter 47, R. S. 1929.
CORPORATIONS: )

March 4, 1936. 3/9

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Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

This is to acknowledge your letter dated February 28, 1936, as follows:

> "This office is now faced with a proposition which I feel is of sufficient importance to warrant an opinion from your office.
>
> "In this city there are two ice plants manufacturing artificial ice. There are no concerns or individuals engaged in the natural ice business. Neither of the two manufacturing ice plants maintain or operate wagons for the purpose of distributing ice to customers throughout this city. At the present time there are at least four or five individuals or partnerships engaged in the retail sale of ice direct to the customer. Both of the ice plants retail ice at their platform and in turn sell it wholesale to the people engaged solely in the retail ice business. It is my frank opinion that the people now engaged in the retail business are furnishing first class and efficient service to the homes and business establishments in Hannibal at a fair and reasonable price and that these individuals have ample facilities to take care of the trade.

"The present ice plants seem to feel that they are being adequately and most efficiently served by the firms and individuals now engaged in the retailing and distribution of ice and the question which has arisen is that other parties have expressed a desire to engage in the retailing and distribution of ice in this city. Is it compulsory on their part to sell at wholesale to any other parties desiring to engage in the retailing and distribution of ice in this city?

"The two ice plants in this city have no connection with each other, nor are they financially interested in any of the individuals or concerns that are peddling ice. The applicable provisions of law as I see it, are contained in Article 1 of Chapter 47, R. S. Mo. 1929. (Page 2420).

"I would like particularly to know that in the event either of the local plants or both would refuse to sell ice to people not now engaged in the distribution thereof but who contemplate entering into this field, would it be a violation of the above mentioned chapter.

"I would deeply appreciate your usual prompt attention to this inquiry."

While you only request our opinion on the singular subject of whether or not your two local ice plants, in refusing to sell ice to people not now engaged in the distribution thereof but who contemplate entering into the field, would be violating Article 1, Chapter 47, R. S. Mo. 1929. Although we could dispose of said question with an affirmative or negative answer and cite authority therefor, yet, in view of the fact that it is of such far-reaching concern to the public, we do not deem it amiss to elaborate upon monopolies.

The appellate courts of Missouri have had many cases presented to them concerning the right of corporations and persons attempting to circumvent the statutes relating to monopolies, pools and trusts, and a reading of their decisions, hereinafter cited, show that the courts have very zealously guarded the interests of the public in closely scrutinizing the facts in each individual case, with the result that at the present time decisions may be found in the reports condemning all arrangments, contracts, agreements and combinations and circumstances that tend to lessen, or with a view to lessen, free and full competition. State ex rel. v. Polar Wave Ice & Fuel Co., 259 Mo. 578, l. c. 608.

Chapter 47, R. S. Mo. 1929, relates to "Pools, Trusts, Conspiracies and Discriminations" and Article 1 of said chapter defines "pool and trust agreements." Section 8701. Section 8702 makes combinations to boycott or threaten to boycott a conspiracy. Section 8703 makes certain combinations to increase prices a conspiracy. Section 8704 prescribes penalties for violations of provisions of said sections.

In State ex rel. v. Polar Wave Ice & Fuel Co., supra, the Supreme Court of Missouri, speaking through Graves, J., at page 607 quoted the following from State ex inf. v. International Harvester Co., 237 Mo., l. c. 405, concerning Section 8703, as follows:

> "'It will be noticed that our statute is exceedingly broad. It includes not only contracts, agreements and understandings, but also all arrangements and combinations. It includes not only all those things which tend to lessen full and free competition, but likewise all those things which were done with the view of lessening full and free competition. In other words, this statute punctuated and worded as it is, covers two classes of 'arrangements, contracts, agreements, combinations and understandings'; i. e., (1) those that were made 'with the view to lessen . . . full and free competition,' but which may have

> never been so operated as to reach the result had in view or in mind; and (2) those made 'which tend to lessen . . . full and free competition' and which in fact did lessen competition.
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> "'I repeat that this statute, when fairly analyzed thus resolves itself, so far as the question under discussion is concerned. The several clauses purposely placed therein by the lawmaking power do not mean one and the same thing, but were put there purposely to be far reaching in effect. It was intended to reach all conceivable methods which might be designed by shrewd 'captains of finance.' The purpose of the statute was to thwart action in the very incipiency, as well as all down the line. It was designed to reach all arrangements, etc., which were designed and made with the view of lessening competition, as well as those which in fact did that thing. Either class falls equally under the ban of the statute--one no more nor less than the other.'"

Perhaps at the present time the case that is most widely known and more frequently cited on the subject of monopolies and trust agreements, is State ex inf. v. Standard Oil Co., 218 Mo. 1. The main question in that case was, "was there an unlawful combination or agreement existing between respondents in restraint of trade and in fixing and maintaining prices." (l. c. 393) The court en banc extensively reviewed the facts and came to the conclusion that respondents were guilty and entered a decree of ouster. At page 405 the court said:

> "In the consideration of a similar question, arising under the Anti-trust Acts of Congress, Sanborn, J., in the case of Phillips v. Iola Cement Co., 61 C. C. A. 19, used the following language:

> "'It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the States. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the States, while its main purpose and chief effects are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of inter-state commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of the business, to enhance their trade, and to make their occupations gainful, so long as those combinations anddevices do not necessarily have a direct and substantial effect to restrict competition in commerce among the States. (Cases cited.)"

The court,after summarizing all the facts as to the acts of respondents in dividing the state into districts for the purpose of selling oil and giving a monopoly to each corporation, arrived at the following conclusion (page 447):

> "Can it be supposed for a moment that such phenomenal results could have been accomplished by them if they had been engaged in open competition with each other? Certainly not. They knew that, and their object and purpose in entering into the combination was to monopolize the trade and maintain prices, which they did against all other competitors."

It is thus seen that the court constantly looked to the subject matter as to whether or not said agreements tended to stifle competition. The results accomplished by said arrangements were paramount with the court and not the manner and method that produced said results. In other words, any arrangement of whatsoever kind and nature that produces the result that deprives the public of the advantages of free competition, is condemned. Note the language found at page 451:

> "The court quotes again with approval the same passage from the decision of Chief Justice Fuller in United States v. E. C. Knight Co., 156 U. S. l. c. 16, quoted in the insurance trust case, to the effect that, in order to establish a combination, 'it is not essential that its results shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'"

In Dietrich v. Cape Brewery & Ice Co. et al., 286 S. W. 38, the Supreme Court held that the selling of ice was a commodity within the purview of the statutes relating to monopolies. The evidence in the above case was to the effect that two manufacturers of ice in the City of Cape Girardeau zoned the city into three zones and agreed to sell ice to only certain persons in said zones. The court held that the facts made a case that was submissible. The court at page 43 said the following relative to a "conspiracy":

> "'A conspiracy is an agreement or understanding between two or more persons to do an unlawful act, or to use unlawful means to do an act which is lawful, but it is not necessary that it should be proven by an express agreement or by direct evidence, but may be proven like any other fact by circumstantial evidence. * * * But it must exist between at least two persons.' Ross v. Mineral Land Co., 162 Mo. 331, 62 S. W. 987."

The case of State ex rel. v. People's Ice Co., 246 Mo. 168, also involved a monopoly to buy and sell ice (l. c. 182). The court at page 213 said the following:

> "The new company took over and carried out the contracts of the old; contracts which tend, on their face, to show a purpose to restrict competition. The People's Ice & Fuel Company had been organized and employed as a mere agency by and through which the purposes of the original agreement among the several ice companies in business in Kansas City in 1898 might be carried out. It was not, nor could it have been, authorized by its charter to directly or indirectly monopolize the ice business, and in so far as it proceeded to effectuate the plans of other corporations and individuals to do so, it was acting outside its charter powers and in defiance of law. The People's Ice, Storage & Fuel Company was not, nor could it have been, chartered to purchase from the People's Ice & Fuel Company any conspiracy to restrict competition in which the latter was engaged, but its subsequent participation in any such agreement cannot be defended on the ground that the agreement or conspiracy was in existence before the corporation was. To hold otherwise is to say that individuals and corporations may conspire to restrain trade and lessen competition, in violation of the statute, and then by subsequently forming a corporation to carry out that conspiracy put themselves and the corporation thus formed beyond the reach of the statute. That the statute can be thus evaded we decline to hold."

At page 221 the court said:

> "The statute of this State leaves scant room for construction. We are not concerned in this case with any question as to a contract, otherwise lawful, which incidentally restrains

> trade. The rule applicable in such a case is not applicable in this. Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute and in that language there is no ambiguity. The statute condemns every direct restraint of trade, great or small. It closes the only door through which doubts as to its construction could enter by positively prohibiting defined combinations without regard to what the courts may think as to the extent of their effect. The Legislature saw fit to ordain 'that competition and not combination' should obtain in business in the State. As long as it moves in its constitutional orbit the judgment of the Legislature is final and the wisdom of its enactments is not open to question in the courts."

The St. Louis Court of Appeals in Walsh v. Ass'n. of Master Plumbers, 97 Mo. App. 280, held a contract unlawful which only permitted members of the Association of Master Plumbers to purchase supplies from respondent corporation (l. c. 291).

A reading of the above cases conclusively shows that any manufacturer or seller of any products, commodity or article that enters into an agreement, contract or otherwise, that results in the stifling of free and full competition, violates the statutes and is unlawful. The manner and method employed is of small consequence if the results tend in part or in full to establish a monopoly. However, the courts have recognized the right of one to sell to whomsoever he choses just so long as such person does not have the intent to stifle competition and tend to create a monopoly. Thus when a person sells to only certain individuals and refuses to sell to others, the facts should be closely scrutinized to see if the results reached do in fact tend to create a monopoly. You will understand then that it is difficult for us to give a "yes" or "no" answer to your question as to the local plants

in refusing to sell ice to people contemplating going into the ice business.

In Walsh v. Ass'n. of Master Plumbers, supra, the court very ably discussed the right of citizens to deal with whomsoever such pleases as follows (l. c. 288):

> "In Hunt v. Simonds, 19 Mo., at page 586, the court said: 'It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others.'
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> "The same doctrine is announced in Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410; Carew v. Rutherford, 106 Mass. 13; Brewster v. C. Miller's Sons, 38 L. R. A. (Ky.) 505. Cooley, in his work on Torts (2 Ed.), page 328, states the principle broadly as follows: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.'
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> "In Walker v. Cronin, 107 Mass. 555, it is said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbances or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with.'

"A capitalist has the right to employ his capital or to hide it away and refuse to use it, so long as he does not become a public charge, and a man without capital may labor or refuse to labor, so long as he keeps out of the poorhouse. So also have capitalists the right to combine their capital in productive enterprises and by lawful competition drive the individual producer and the smaller ones out of business. And laborers and artisans have the right to form unions and by their united effort fight competition by lawful means. Snow v. Wheeler, 113 Mass. 179; Master Stevedores' Association v. Walsh, 2 Daly 1; Reg. v. Rowlands, (1851) 2 Den. C. C. 364. And courts will not lay their hands upon either to restrain them, however fierce the competition, so long as their methods are lawful. But if either steps without the pale of the law and by fraud, misrepresentation, intimidation, obstruction or molestation hinders one in his business or his avocation as an artisan or laborer, courts have not hesitated to interfere and to afford remedial relief, either by awarding compensatory damages in an action at law or, where the injury is a continuing one, by granting injunctive relief. (Many cases cited.)"

Corpus Juris, Vol. 41, page 138, says the following:

"In the absence of any intent or purpose to create or maintain a monopoly, a trader or manufacturer engaged in an entirely private business has the right to exercise his own independent discretion as to parties with whom he may deal, and may sell or refuse to sell to whom he pleases, unless such refusal is part of an illegal conspiracy or combination; * * *"

In Dietrich v. Cape Brewery & Ice Co., supra, the court also said (page 43):

> "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 independent 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. Peoples Ice Co., 246 Mo. 221, 151 S. W. 101; State ex inf. v. Armour Packing Co., 265 Mo. 148, 176 S. W. 382."

The case of Cantrell v. Knight, 72 S. W. (2d) 196, is an interesting case which holds a contract was not void as in restraint of trade; the Springfield Court of Appeals (l. c. 200) having the following to say:

> "The contract is not void as in restraint of trade. It is based upon a valuable consideration, as well as the mutual promises, and while not limited as to time it is limited to the particular location where the business of defendant was being conducted. The failure of the contract to limit as to time does not make it void if otherwise valid. Gordon v. Mansfield, 84 Mo. App. 367; Vandiver v. J. K. Robertson & Son, 125 Mo. App. 307, 102 S. W. 659; Clabaugh v. Heibner (Mo. App.) 236

> S. W. 396. While the contract may be said to restrain trade to a limited extent, that was merely incidental and not unreasonable. It is not such a contract, standing alone, as is prohibited by our statute against pools, trusts and discriminations (chapter 47, Sec. 8700 et seq., R. S. Mo. 1929 (Mo. St. Ann. Sec. 8700 et seq., p. 6486 et seq.)). State ex rel. v. Standard Oil Company, 218 Mo. loc. cit. 416, 116 S. W. 902, Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452. This is simply a contract between two individuals for the exclusive right to sell on the part of one, and the right to purchase on the part of the other, all of a certain product at a particular place and did not materially affect the public interest. We are not considering a case where there might be several of such contracts, which, considered together, would render what was otherwise a legal contract, entirely void as a conspiracy in restraint of trade."

Conclusion.

From the foregoing it is our opinion that the two local plants located in Hannibal, Missouri, may "refuse to sell ice to people not now engaged in the distribution thereof but who contemplate entering into this field," and not violate the provisions of Article 1, Chapter 47, R. S. Mo. 1929, if there is an absence of an intent or purpose to create or maintain a monopoly.

The duty involves upon you to analyse the facts to see if such refusal is for the purpose and intent to create or maintain a monopoly and if you come to the conclusion such is the intent, then proceedings should be instituted under and by virtue of Section 8705, R. S. Mo. 1929, in our opinion.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General

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JLH:EG