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BANKS—COUNTY BANKERS ASSOCIATION—MONTHLY SERVICE CHARGES COVERING CHECKING ACCOUNTS—ANTI-TRUST LAWS NOT VIOLATED.

SYLLABUS:

The rules proposed to be adopted by the members of the county bankers association, to charge their patrons a small monthly service charge, would not be in violation of either the state or federal anti-trust laws.

COLUMBUS, OHIO, May 11, 1929.

HON. ELBERT H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, as follows:

> "Many banks, realizing that the cost incidental to handling small checking accounts results in a loss to the institution, have advised their patrons that a small monthly service charge will be made thereon.
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> The question has arisen whether or not an agreement, entered into between banks which are members of county bankers associations by the terms of which it is agreed to make such a charge on small accounts, would in any way constitute a violation of either the Clayton Act U. S. Compiled Statutes, Sec. 8835, A et seq.), the Sherman Anti-Trust Act (U. S. Compiled Statutes, Sec. 8820, et seq.) or the Valentine Anti-Trust Law (General Code of Ohio, Sec. 6390, et seq.).
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> I shall appreciate your opinion upon this question."

Bouvier's Law Dictionary defines a trust to be a contract, combination, confederation or undertaking, expressed or implied, between two or more persons to control the price of a commodity or service for the benefit of the parties thereto and to the injury of the public and which tends to create a monopoly.

The agreement to be entered into by the county bankers association provides for a service charge for the handling of small checking accounts. The question to be considered is whether an agreement among the banks establishing a uniform fee to be charged on checking accounts would violate the federal or state anti-trust laws.

The Sherman Act, U. S. Compiled Statutes, paragraph 8820, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," etc.

Whether or not the charging of a service charge on checking accounts is a violation of this section of the Federal Code has never been directly before any of the courts. It has been decided, however, that where a clearing house has adopted a rule fixing a maximum rate of interest on savings accounts, such act was not a violation of the Sherman act. The question of the right of an association to enter into agreements binding among themselves for the maintenance of uniform rates of exchange and collection and uniform interest rates has never, to my knowledge, been held by any court to be in violation of the anti-trust laws and has been before successive attorneys general of the United States. Some years ago interests antagonistic to the

out-of-town collection charge rule of the New York Clearing House made contention to Attorneys General Knox, Moody and Bonaparte, that such rules were in violation of the Sherman Anti-Trust Law, with the request that proceedings be instituted for a restraining order. But such contentions were never deemed worthy of affirmative action and it would appear that the Department of Justice considered that the decision of the United States Supreme Court, in the live stock cases, *Hopkins* vs. *United States,* 171 U. S. 578, and *Anderson* vs. *United States,* 171 U. S. 604, demonstrated that the act was not violated.

It is my opinion that where there is a small monthly charge made against patrons of a bank on small checking accounts, there is no violation of the Sherman Anti-Trust Act (U. S. Compiled Statutes, Secs. 8820, et seq.) or the Clayton Act (U. S. Compiled Statutes, Secs. 8835, et seq.) for the reason that the carrying on of the business of a bank does not constitute interstate business but is in its nature intrastate. However, the Valentine act (Section 6391, General Code of Ohio) follows the Federal anti-trust acts and the discussion which follows as to the Valentine act might also be considered as applying to the Federal acts in case that particular business of the bank might conceivably be interstate.

The Valentine act, Section 6391, General Code of Ohio, provides:

> "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:
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> 1. To create or carry out restrictions in trade or commerce.
> 2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.
> 3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or a commodity.
> 4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.
> 5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void."

Section 6393, General Code, is pertinent in the consideration of this question, and provides:

> "A contract or agreement in violation of any provision of this chapter is void and not enforceable either in law or equity."

The transactions which are forbidden include agreements to restrict production

for the sole purpose of enhancing price, stifling competition or creating a "corner," fixing prices at a definite standard or combining in a manner that has a necessary tendency to oppress competitors or the public. The Supreme Court of Ohio, in a discussion of the Valentine act in the case of *List* vs. *Burley Tobacco Growers' Co-operative Assn.*, 114 O. S. 361, held, as stated in the fourth branch of the syllabus:

> "Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation, they are not illegal."

I believe that consideration should be given as to whether or not the question before me comes within the purview of the Valentine act.

It is true that the word "commodity," in its broad sense, is said to mean "convenience," "accommodation," "profit," "benefit," "advantage," "interest," but its use in that sense has become obsolete. In that sense it cannot be said to be a thing that can be produced, used or transported, and the section in question, as shown by reference to the terms used in subdivisions 2, 3, 4 and 5 of Section 6391, refer to things that can be "produced," "manufactured," "made," "transported," "sold," "used" or "consumed"; hence I think that the word 'commodity" was used in this act in its ordinary and well understood commercial sense of something that is produced or used and is subject of barter or sale, something movable and tangible.

The word "commerce" as ordinarily used has to do with the sale or transportation of commodities or tangible and movable things, but it is a term of wide import and it includes communications and intercourse for the purpose of trade in any and all its forms, and yet the Supreme Court of the United States has held that the issuing of a policy of insurance is not a transaction of commerce, but is a simple contract of indemnity against loss. *Paul* vs. *Virginia*, 75 U. S. 168. Mr. Justice Field, in deciding this case, used this language:

> "These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

So far as I know, no court has decided to the contrary of the principle laid down in the case of *Paul* vs. *Virginia*, supra, and I therefore hold that the word "commerce," as used in the act in question, does not include checking accounts in the banking business.

The word "trade" is ordinarily understood as meaning one's occupation or employment, or else the business of buying and selling. In the latter sense it is of no wider import than "commerce" or "traffic," for "trade," in the sense of "exchanging commodities by barter, the business of buying or selling for money," has to do with movable and tangible things. In its broadest sense, the word "trade" applies not only to skilled handicraft, but to any business that a man regularly engages in for a livelihood. If this broad meaning was intended, then the law applies to practically all business affairs, not only to the production, consumption, use, sale and transportation of tangible things, but to all cases where any occupation or employment is engaged in for the purpose of profit or gain, or a livelihood, except the learned professions. In this broad sense it would include the occupation of the mechanic, the

laborer, the agent, clerk or servant and all those who are employed for hire, except the lawyer, doctor, minister and those engaged in the liberal arts.

If that is the sense in which the word "trade" is used in this act, then it is made a criminal offense for two men to agree with each other not to work for less than two dollars per day. That construction would render illegal all that class of unions and combinations of workingmen and tradesmen which are unqualifiedly recognized to be lawful and which have been encouraged and protected by the state. That men can combine for the purpose of regulating their wages by proper means is now the settled law of the land, and such a combination was held not to be made criminal by a law very similar to our anti-trust law. *Hunt* vs. *Co-operative Club,* 140 Mich 538. It will be noticed that the word "trade" is used just twice in Section 6391, General Code, hereinbefore quoted—in subdivision 1, where restrictions in trade are spoken of, and in subdivision 5, where reference is made to any commodity or any article of trade, use, merchandise, commerce or consumption. It is apparent that as used in subdivision 5 the word "trade" has reference to something movable and tangible. Throughout the act terms are used which clearly indicate that the Legislature had in mind concrete things which could be produced, transported, used or consumed. The language of subdivision 4 is "any article or commodity or merchandise, produce or commerce intended for sale, barter, use or consumption in this state."

That the terms "merchandise, product or any commodity" were not intended to include intangible things, is shown by the fact that the Legislature took particular pains to mention transportation among the list of things which might be the subject of a trust, thus evidently not intending to include such an intangible thing as transportation within the definition of such tangible things as "article" or "commodity."

This is a criminal statute and must be strictly but fairly construed and any reasonable doubt there may be should be resolved in favor of the proposed service charge. Having in mind that this is a criminal statute, a careful reading and consideration of the whole act leads me to the conclusion that the words in question were used in their ordinary and commonly-understood meaning and not in their obsolete or unusual meaning, and that the Legislature intended the act to apply to tangible things, their manufacture, making, production, transportation, sale or purchase, and that it did not intend the law to apply to checking accounts in the banking business. A statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute. *State* vs. *Meyers,* 56 O. S. 340.

In reaching my conclusion I have followed closely the opinion of Judge Washburn, *State* vs. *Bovee, et al.,* 6 O. N. P. (n. s.), p. 337, in which the court held that selling fire insurance is not commerce; contracts of insurance are not commodities; and the carrying on of an insurance business is not a trade within the meaning of Section 6391, General Code, excluded under the Valentine act.

I am of the opinion, therefore, that the rules proposed to be adopted by the members of the county bankers association, to charge their patrons a small monthly service charge, would not be in violation of either the state or federal anti-trust law.

Respectfully,

GILBERT BETTMAN,

Attorney General.