

The former is based upon the idea that it is the right of any one to refuse to sell except to those he desires, and at such prices as he may choose. But it is an offence to "agree to unreasonably enhance the price" of any article or commodity. It is not necessary now that the agreement should be to do so "unlawfully." The combination to enhance is sufficient if the enhancement is unreasonably great.

It has heretofore seemed to be a sufficient excuse for such an agreement that to sell to the retail trade would injure the wholesaler. But if the manufacturer can sell, with profit, to a wholesaler at a price, it is difficult to argue that any addition to that price, based only upon desire to protect the wholesaler and confessedly not necessary to give a legitimate profit on a sale to him, is not an unreasonable enhancement. It is only reasonable if the rightfulness of combines for that purpose is admitted, which is begging the question.

The other agreement is a subtler form to accomplish the same end. It is clearly based on *The Mogul Steamship Co. v. McGregor* (1892) A.C. 25. In that case the giving of rebates was treated as an unobjectionable business practice. But, subject to the effect of the word "unduly" in our statute, it would seem that combination working by that means is one of the very evils aimed at by the Code.

In the *Mogul* case the combine offered rebates to those shippers who used their vessels to transport their tea. The effect of this was, of course, to secure business and take it away from their rivals. But two facts make an essential difference between what was done there and the operations of present combines. One was the arrangement that if there was no steamer of the combination at hand the shipper might ship in any vessel without losing his year's rebate, and the other feature was that, instead of limiting the transportation facilities, the combine undertook to have additional steamers on hand when their rivals were there.

A combination which agrees to give a rebate for exclusive dealing, but does not provide for outside buying in case of need, nor for extensive stocks, makes a close market and can easily, under the guise of rebates, unduly limit or lessen both the manufacture or production of an article and competition in its sale.