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An Antitrust Case in Ancient Greek Law

I. Prologue

For a Greek scholar to speak in the United States about antitrust law is, as the ancient Greeks would say, "to bring owls to Athens." That is not my intention. I will try simply to analyze an ancient Greek law case that, in my humble opinion, could be considered as the first reported antitrust case, a precedent of the universal jurisprudence and legal culture.

Antitrust laws are the traditional instruments to preserve a competitive economy. In modern times the laws developed from the thought that competition is not by nature self-regulated in a self-correcting market, but must be imposed as a duty, as an order.¹ The antitrust idea is as old as civilization, yet as contemporary as the human spirit.² It arises from the negative inclination of human nature under which men in all ages sought to advance their own pecuniary interests by taking advantage of the necessities of their fellows, using unnumbered and unclassified methods and mechanisms for the accomplishment of their purpose. Hoffman wrote that antitrust jurisprudence is a kind of "poetry of law in which symbols frequently are exchanged for reality; . . . and where . . . the triers of facts are called upon to make judicial findings from the moving shadows of competitive facts."³ And he further noticed an "evidentiary

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1. See W. FIKENTSCHER, *WETTBEWERB UND RECHTSCHUTZ* 13 (1958).

2. See C. BEACH, *A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS* 1 (1898). Loevinger, *Antitrust Means Economic Freedom*, in 1 *ANTITRUST LAW AND TECHNIQUES* 143 (M. Hoffmann ed. 1963).

3. Hoffman, *Introduction*, in 1 *ANTITRUST LAW AND TECHNIQUES* 3 (M. Hoffmann ed. 1963).

music in the phrase 'concert of action' '' required for the violation of article 1 of the Sherman Act.⁴

Poetry and music. It is true that in talking about antitrust we find ourselves in the field of art, art not in its cultural sense, but in the Homeric sense of "techne," of skill and cunningness. From the beginning of recorded history we come across legislation and codes, concerned about the exercise of economic power, trying to establish an equitable method of suppressing combinations for the control of production and prices.⁵ One such case is a criminal public suit brought before an Athenian Heliastic court against a ring of "grain dealers" who violated laws regulating the corn trade. It is given to us by the orator Lysias⁶ in his famous speech "Against the Grain Dealers."

II. The Case Against the Grain Dealers

A. LAWS AND REGULATIONS

In Athens, freedom of trade and competition was a general rule. It was not a rule of law based on a certain economic system but a consequence of the basic principle that individuals were free to engage in commerce, unless public policy required certain restrictions. At the beginning of the sixth century the great legislator Archon Solon, willing to attack the depression, proceeded with a so-called "new deal."⁷ He cancelled all mortgages on lands and all debts and he forbade debt slavery for the future. He devalued the Athenian currency in order to facilitate trade and he prohibited the export of grain.

4. Hoffman, *id.* at 3.

5. See generally Loevinger, *supra* note 2; Jones, *Historical Development of the Law of Business Competition*, 35 YALE L. J. 905 (1926).

6. Among the orators of the Golden Age, such as Andokides, Isocrates, Isaeos, Lysias is designated as the "canon of attic grace," R. JEBB, *SELECTIONS FROM ATTICA ORATORS*, XV (1880); the "master of narration," O. BUCHLER, *DIE UNTERSCHIEDUNG DER REDENDEN PERSONEN BEI LYSIAS* 14 (1936); and the "norm of the rhetorical art," DIONYSIUS, *DE LYSIAS* ch. 18. On the Lysias stylometry, see K. DOVER, *LYSIAS AND THE CORPUS LYSIACUM* 94 (1968). He was the son of Cephalos, a Syracusan who had settled at Piraeus, the harbor of Athens, by invitation of Pericles. Tradition places the birth of Lysias in 458-457 B.C. His family was prosperous, but by the Athenian Constitution neither his father nor Lysias nor his brothers could become Athenian citizens. They probably received the rank of "privileged metics" (*isoteles*), by which they were exempted from paying a small but humiliating tax on aliens and from being enrolled under the formal protection of a patron. As a resident alien, Lysias had no share in public life. Being *isoteles* he could write speeches for others but he could not deliver them in public himself. Speech writing became his regular profession. He must have died in the year 380 B.C. From Dionysius we learn that his genuine works numbered 230, but only 30 have been handed down under his name.

7. On the reformations of Solon (*translated in* LOEB'S CLASSICAL LIBRARY, PLUTARCH'S LIVES I, at 413 (1914)) PLUTARCH, SOLON, XV-XVI, especially on the *Seisachtheia* (disburdenment or discharge from all debts), T. NORTH, PLUTARCH'S LIVES OF THE NOBLE GREEK AND ROMANS 224 (1895).

Restrictions concerning export and import issues were defined by Aristoteles⁸ as the most important cases of the state wisdom. In Attica the problem of the population's supply with grain was especially vital. The small area of the Attic Territory (about forty square miles) in proportion to its population (about half a million), and the Attic soil poor in grain production,⁹ left the city largely dependent upon foreign sources for its corn supply. The main regions from which grain was imported were Sicily, Rhodes, Cyprus, and the Hellespont and Euxine lands.¹⁰ The development of the corn trade and the expectations of large profits opened the gates to speculators who knew how to corner the market. Mostly foreign residents (*metics*) were engaged in the grain business. The importation was in the hands of wholesale dealers called *emporoi* and the retail dealers called *sitopoles* (grain sellers), or by way of contempt, *kapiloi* (hucksters).

To protect the people from speculative conspiracies and combinations of the grain importers and grain dealers, all those engaged in the grain business were required to observe complex prohibitive laws and regulations. The laws provided that:

- No land products, except olive oil, could be exported from Attica.¹¹
- The import of cereals was facilitated by law; no Athenian citizen or *metic* was allowed to carry grain from any source to any place except Attica¹² or to lend money on grain cargoes not destined to places inside Attica.¹³
- Importers were required to sell. They were forbidden by law to store up more than one-third of every cargo; two-thirds had to be disposed of in the market.¹⁴
- To prevent a monopoly of a large stock the law expressly forbade any grain dealer to buy up more than fifty *medimni*¹⁵ (about 72 bushels of grain) at a time.¹⁶

8. RHETORIC, Book I, 4, 1359b, 22 (translated in R. ROBERTS, RHETORICA (1924)).

9. THUCYDIDES, Book I, 2, (translated in H. DALE, THE HISTORY OF PELOPONNESIAN WAR BY THUCYDIDES 2 (1855)); PLUTARCH, *supra* note 7, XXII, 1 (translated in LOEB'S CLASSICAL LIBRARY, PLUTARCH'S LIVES I, at 465 (1914)); T. NORTH, *supra* note 7, at 233.

10. DEMOSTHENES, AGAINST LEPTINES XX, 31-33 ("the corn that comes from the Black Sea is equal to the whole amount from all other places of export").

11. PLUTARCH, SOLON 24.

12. DEMOSTHENES, AGAINST SACRITUS XXXV, 50 (translated in LOEB'S CLASSICAL LIBRARY, DEMOSTHENES I, at 311 (1935)); DEMOSTHENES, AGAINST PHORMIO XXXIV, 37 (translated in LOEB'S CLASSICAL LIBRARY, DEMOSTHENES I, at 261 (1935)).

13. DEMOSTHENES, XXXV, 50.

14. ARISTOTELES, ATHENIENSIS RESPUBLICA 51, 4 (translated in THE WORKS OF ARISTOTLE (W. ROSS ed., F. Kenyon trans. (1921))).

15. One *medimnus* (a basket or measure) was about a bushel and a half.

16. LYSIAS, AGAINST THE GRAIN DEALERS, XXII, 5.

- The law forbade the grain dealers to charge more than one obol¹⁷ above the cost-price for each *medimnus*.¹⁸
- The whole corn business was supervised by officers: the wholesale market by ten superintendents of the market, and the retail grain trade by a ten-member Board of Grain Commissioners called *sitophylaces*. Their mission¹⁹ was to see that the unground grain was offered in the market at a reasonable price, that the millers sold the barley meal at a price proportionate to that of barley, and that the bakers sold their loaves at a price proportionate to that of wheat and of such weight as the Commissioners prescribed.

Through that legislative network the grain was followed from its arrival at the harbor of Piraeus to the hands of the last consumer.

The penalty for violating the laws prohibiting grain monopoly was death,²⁰ so the grain dealers took a great risk by breaking the law. That risk was greater because of a class of unprincipled informers, called *sy-cophants*,²¹ who often brought them to trial hoping either to be bought off or to get a large fee if the suit was successfully prosecuted.

B. THE FACTS

The winter of the year 388–387 B.C.²² seemed to be a period of unusual disturbances in the grain trade. The Hellespont passage, although under the control of Athenians, was no longer safe, and the Spartans, having driven the Athenians from the neighboring island of Aegina, were a danger for the grain ships coming to the harbor of Piraeus. These risks in grain imports and the existing freedom of competition pressed the retail grain dealers to bid against one another, raising the purchase price of grain and consequently the price of bread. That winter a grain commissioner named Anytus advised the grain dealers not to compete with each other and to purchase the grain at a reasonable price since the importers, according to the law, were obliged to sell at least two-thirds of their cargo. He intended the advice to be beneficial to the grain dealers, but mainly to the consumers.

17. An obol (*obolus*) was an ancient Greek coin valued at one-sixth of a drachma (equivalent to U.S. \$0.003). See C. ADAMS, *LYSIAS: SELECTED SPEECHES* 357–58 app. IV, *Money and Prices at Athens* (1905) (a drachma at the time of Lysias would pay a day's wages of a carpenter or stone cutter and a day's salary of a senator).

18. *LYSIAS*, *supra* note 16, XXII, 9.

19. *ARISTOTELES*, *supra* note 14, at 51, 3.

20. *LYSIAS*, *supra* note 16, XXII, 5, 33; *LYCURGUS, AGAINST LEOCRATES* 27 (*translated in* *LYCURGUS, THE SPEECH AGAINST LEOCRATES* 11 (A. Petrie ed. (1922))).

21. *LYSIAS*, *supra* note 16, XXII, 1, 5.

22. On the most probable time that the speech was delivered (386 B.C.) and prior to its events see C. ADAMS, *supra* note 17, at 213 n. 1 and accompanying text; *LYSIAS* (translated in *LOEB'S CLASSICAL LIBRARY* (1930)).

Following his advice grain dealers formed a kind of association, a "ring," and agreed to cease competition. The bidding seemed to be identical, and the grain prices were effectively down. Instead, of using the low prices for the benefit of the people, by passing the grain to them at a fair, legal profit, however, they bought up large quantities of grain, more than the law prescribed. Further, they refused to sell to the people and preferred to store the accumulated grain in their storerooms. Consequently, they were selling, at a higher than legal profit, only when grain prices rose because of rumors of war or rumors fabricated by the grain dealers themselves, such as loss of ships, capture of vessels, blockade of trading ports, or rupture of the truce. The same practices were repeated in the following winter of 387–386 B.C.

The combination of the grain dealers was revealed, probably by some importers, through information given to the *Prytanes*, the executive committee of the senate (*voule*, parliament).²³ The case was carried under the form of impeachment (*eisangelia*), that entailed immediate summons of the accused before the senate to answer to the charges made against them. When the matter was brought before the senate such furor arose that some senators, under the influence of the popular indignation, wanted the accused handed over to the *Eleven* (constables) for execution without trial.

This demand was remarkable because the senate at that time had no legal jurisdiction to inflict the death penalty prescribed for this offense.²⁴ The case had to be tried by a law court. One senator, the speaker, found such a proposition monstrous and persuaded the senate to have the grain dealers tried in accordance with the law. His rationale was that if they had committed acts deserving of death the jury would be no less able than the senate to come to a just decision, while if they were innocent they ought not to perish without trial. The senate adopted this view.

During the preliminary hearing before the senate, the same senator pressed the case against the accused. In so doing he wanted to clear himself from any suspicion of abetting them. During this preliminary hearing the accused admitted the facts. They tried, however, using a *remotio criminis* defense, to pass the guilt on to the grain commissioners (*sito-phylaces*), the dealers arguing that they followed the commissioners' advice. The senate sustained the charges, and the case was submitted to the heliastic trial court, presided over by the *Thesmothetae*.²⁵

23. At the time of Lysias, the senate consisted of five hundred members. Cleisthenes (in 508 B.C.) moved the senate to consist of five hundred instead of four hundred as was provided by the constitution of Solon. See ARISTOTELES, *supra* note 14, at 21, 3.

24. *Id.* at 45.

25. The six juniors of the Ten Archons were called *Thesmothetae* and attended to such cases as did not properly belong to some other Archon-magistrate. See PLUTARCH, *supra* note 7, at 24, 2; T. NORTH, *supra* note 7, at 238.

C. THE SPEECH OF THE PROSECUTOR

The same senator appears now in the heliastic court where he delivers the accusation speech prepared by the great orator²⁶ Lysias. The speech is clear and logical. The language is as simple as the thought. The speaker does not want to appear as a professional prosecutor; hence the speech is free from ornament or rhetorical artifice. The defendants' acknowledgment that they had violated the law left for the prosecution the task of rebutting their contentions that they acted for the public interest under the direction of the commissioners.

The speech is divided into four parts: the preamble, the proposition, the argumentation and the epilogue. In the preamble the speaker narrates briefly how he was involved in the case and what had occurred at the senate. In the proposition the speaker calls the whole group of the accused to the stand, but addresses his question to only one of them, the supposed leader of the unlawful ring. In response to the speaker's question, had he violated the law buying up grain in excess of the fifty measures (*medimni*), the defendant acknowledges the accusation arguing that "I bought it up on an order of the commissioners."²⁷

The speaker now proceeds to the argumentation, answering the allegations of the defendants. He rejects the contention that they acted on an order with the following arguments:

1. Only advice, not an order, was given to the grain dealers and only by one commissioner named Anytus. The other grain commissioners of the city knew nothing about it. Actually, in the previous winter when corn was dear and the grain dealers were outbidding each other, this commissioner did advise them not to compete with each other for the benefit of the people but did not order them to buy up the grain and store it.²⁸ To strengthen his argument, the speaker produces Anytus himself as a witness. The advice was to combine against the importers, keep the wholesale price down, and buy the grain in common. This "advice" to buy in common is turned by the grain dealers into an "order" to buy up, to buy from various sources.
2. The allegation of the grain dealers that they had the understanding of the commissioner in the previous year, however true that may be, is irrelevant.²⁹ The defendants are accused of acts of the present year (387-86) and by the senate of the present year.
3. The statement of the defendants that they acted on an order, even if it were true, would not justify their unlawful practice, but would amount to an accusation of the commissioners.³⁰ In that case, the speaker argues the law should apply without distinction to both the violators and those who ordered its infringement.

26. See distinctions between oratory, rhetoric and consultantlogographos made by K. DOVER, *supra* note 6, at 175.

27. LYSIAS, *supra* note 16, XXII, 5.

28. *Id.* at 8, 52-56.

29. *Id.* at 9, 61-63.

30. *Id.* at 10, 65-67.

The speaker anticipates the defendants' contention based on compensation or "resistance" (*antistases*), namely that they infringed on the law in good faith in order to keep the prices down and to sell the grain to the people at the cheapest price.³¹ Such a contention cannot be sustained: because the grain dealers were charging six times the legal profit; because it is known that the grain dealers avoid contributing to common burdens when a special levy is needed, making poverty their pretext; because of the impudent rapacity of the grain dealers who trade on the misfortunes of the city.³² The speaker now emphasizes this point: in bad times the grain dealers store the grain and refuse to sell it so that the people are glad if they can purchase at any price however high, "and thus in times of peace they become our besiegers."³³

Terminating his argumentation the speaker calls for the jury not to show any sympathy or mercy to the defendants and to condemn them because:

- An acquittal of the accused who have confessed to breaking the law would be an affront to the importers against whom the accused have combined;³⁴
- Lawsuits like this one are fights of the most common interest;³⁵
- Their conviction is needed not only for what they have done but also as an example for the future, because in their business many prefer to risk their own lives every day than cease to gain illicit profits.³⁶

In a short epilogue the speaker closes his speech by saying that the conviction of the accused is in accordance with justice and the interest of the people.³⁷

The sources do not give any answer to the verdict, but there must be little doubt that it was conviction.

III. Epilogue

Much more than any common resemblance between yesterday and today, especially as regards underlying social problems in antitrust analysis, antitrust laws and trials coincide in their basic premise with the saying of Lysias: this trial is an "*agon koinotatos*," a fight of utmost common interest. Men in the earliest times have been confronted by the same fundamental problems and have tried to solve them. Viewing the past in the light of our present experience and knowledge we may see how far we have come, what has changed, and what straight line moral or legal ideas mankind follows in its way.

31. *Id.* at 11, 72-74.

32. *Id.* at 14, 88-89.

33. *Id.* at 15, 96-98.

34. *Id.* at 17, 114-16.

35. *Id.* at 19, 128-29.

36. *Id.* at 20, 135-36.

37. *Id.* at 22, 155-56.

