ESSAY

Folklore and Myth in Judicial Opinions — Some Reflections Inspired by *Texaco-Getty*

*Moses Lasky**

In interpreting its antitrust statute, the Cartwright Act, California case law has attributed its origin to common law, has also stated that it is "patterned" after the federal Sherman Act, and, more recently, has asserted that it is both "broader" and "deeper" than the Sherman Act. These several inconsistent assertions are also mythology. They suggest that mythical history is created to support legal conclusions reached without regard to history. Indeed, they suggest that the premises of legal opinions are often selected after the conclusion has been reached.

Lawyers read the words of judicial opinions as if graven on the tablets at Mt. Sinai; broad meaning lurks in every phrase, to be extracted by arcane processes of which the legal profession is master. That is a bold and sweeping pronouncement, and the reader must be content without demonstration, for this Essay deals with only a part of the phenomenon and then only in a limited context.

Time was when a quotation from a venerable sage — like Aristotle, Galen, or St. Thomas Aquinas — sufficed to establish truth. In our scientific age reliance on "authority" will no longer do, except for lawyers (and, no doubt, disciples of Rajneesh). Lawyers still look to the sage, the opinion of someone called a "judge" or a "court." But an historical falsehood is still a falsehood, despite the fact that it is asserted as truth in a reported opinion of an established court. A court may

* Mr. Lasky is a prominent California attorney and the founding partner of the law firm of Lasky, Haas, Cohler & Munter in San Francisco.

create law based upon a falsehood of history, and its law is the law whatever the illegitimacy of its birth. But courts cannot alter truth. Illustrations abound for the interested and diligent searcher to find, but for now an example from California antitrust law will suffice.

On November 8, 1985, the court of appeal for the Third District decided *California v. Texaco, Inc.*[1] California sued to divest Texaco of its acquisition of Getty Oil Company. The court stated, "[t]he Cartwright Act[2] is patterned after the Sherman Act and federal cases interpreting the Sherman Act are applicable to questions arising under the Cartwright Act."[3] Here is a sentence of two clauses. The first purports to state an historic fact, and it is false. The second clause states California law, and is true because no more than the court's statement is necessary to make it true.

The fiction of the first clause has become folklore, oft-repeated, and it will doubtless be repeated again and again. In *Blank v. Kirwan*,[4] the California Supreme Court quoted from *Marin County Board of Realtors, Inc. v. Palsson*:[5] "The Cartwright Act is patterned after the Sherman Act and both statutes have their roots in common law." This is another sentence with two clauses, and the first is the same false statement quoted from *California v. Texaco*. The second clause will be examined in a few moments of the reader's time.

The truth is that there are two different streams of antitrust statutes: the Sherman Act stream, beginning with its enactment in 1890,[6] and another, which can be called the "populist stream" despite the rejection of that appellation in the *Palsson* case.

The Sherman Act contains two basic sections. Section 1 makes combinations, agreements, and conspiracies in restraint of interstate trade and commerce unlawful. Apart from the language about interstate commerce, inserted to confine the statute within the constitutional limits of federal power, Section 1 contains but twenty-three operative words. Section 2 makes monopolization, attempts to monopolize, and conspiracies to monopolize unlawful. Conspiracies to monopolize are also unlawful under Section 1.

In 1890, when Senator Sherman's bill was still before Congress, sub-

---

[1] 184 Cal. App. 3d 221, 219 Cal. Rptr. 824 (1985). The California Supreme Court has granted review.

[2] CAL. BUS. & PROF. CODE § 16,720 (West 1964).

[3] *Texaco*, 184 Cal. App. 3d at 232, 219 Cal. Rptr. at 830.

[4] 39 Cal. 3d 311, 320, 703 P.2d 58, 63, 216 Cal. Rptr. 718, 723 (1985).

[5] 16 Cal. 3d 920, 925, 549 P.2d 833, 835, 130 Cal. Rptr. 1, 3 (1976).

[6] 15 U.S.C. §§ 1, 2 (1982).

stitutes and amendments were proposed, one by Senator Reagan of Texas. Senator Reagan explained:

> I may say to the Senator that much of it is copied out of a law, not a law of Congress but of one of the States, which underwent very thorough and searching discussion. So all I had to do in this case (and that is the purpose I had) was to make the provisions of the State law applicable to international and interstate commerce.[7]

Senator Reagan's model was a Texas statute of 1889, an Act to Define Trusts.[8] The Senate rejected the amendment, and the Sherman Act is not "patterned" on the Texas statute. It follows with impeccable logical precision that statutes "patterned" on the Texas statute are not "patterned" on the Sherman Act. And the Cartwright Act is patterned on the Texas Act. There was a lull in state antitrust legislation, but beginning in the late 1890's a number of western states adopted acts similar to the Texas Act: Nebraska and South Dakota, 1897; Ohio, 1898; Michigan, 1899; Mississippi, 1900; Texas again, in 1903; North Dakota, 1907.[9] In 1907, California adopted the Cartwright Act, reading much as it does today and lifted from the Texas Act.

Whereas the Sherman Act condemns every contract, combination, or conspiracy "in the form of trust or *otherwise*" that is "in restraint of trade or commerce,"[10] the populist acts like the Cartwright Act merely declare a "trust" unlawful and then define a "trust":

> *Trust.* A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
>
> (a) To create or carry out restrictions in trade or commerce.
>
> (b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
>
> (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
>
> (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
>
> (e) To make or enter into or execute or carry out any contracts,

---

[7] CONG. REC. 2564 (daily ed. Mar. 24, 1890).

[8] *See In re* Grice, 79 F. 627 (C.C.N.D. Tex. 1897).

[9] *Nebraska*: Ch. 79, [1897] Gen. Laws 347; *South Dakota*: Ch. 94, [1897] Laws 249; *Ohio*: Act of Apr. 19, 1898, 83 Laws 143, now Page's OHIO REV. CODE ANN. § 1331.01(B) (1979); *Michigan*: No. 255, [1899] Pub. Acts. 409, now MICH. STAT. ANN. § 28.31 (Callaghan 1981); *Mississippi*: Ch. 88, [1900] Laws 125, amended by ch. 119, [1908] Laws 124, now MISS. CODE ANN. § 75-21-1 (1973); *Texas*: Ch. 94, [1903] Gen. Laws 119; *North Dakota*: Ch. 259, [1907] Laws 413, now N.D. CENT. CODE § 51-08-02 (1974).

[10] 15 U.S.C. § 1 (1982).

> obligations or agreements of any kind or description, by which they do all or any combination of any of the following:
>
> (1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.
>
> (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.
>
> (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.
>
> (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.[11]

A curiosity is that the source of these statutes, the Texas statute of 1889, had been declared unconstitutional in 1897. In *In re Grice*,[12] in habeas corpus proceedings arising from the convictions of John D. Rockefeller, Henry Flagler (of Florida fame), and others, a federal court held that the Texas statute violated the fourteenth amendment. The court's reasoning rings so strange in the contemporary ear that it cries to be quoted:

> This law that deprives the citizen of many of his rights of contract, and that seeks to divide citizens, not exactly by the calling they follow, but by the source of the property they hold, and exempts 80 per cent. of them from the penalties it visits upon the remainder, is not sustained by any good reason or excuse; is not just; is utterly without support in law, and can have no just purpose; is vicious class legislation, depriving the citizen of his constitutional right of life, liberty, and property without due process of law, contrary to the law of the land; and is therefore declared to be null and void. The relator is discharged.[13]

O tempora! O mores! Had the Sherman Act been enacted in 1980 instead of 1890, after years of expansion of the first amendment, would a court hold it unconstitutional as violating freedom of speech? The decision in *In re Grice* now rests on the shelf of a cabinet of curiosa.[14]

---

[11] CAL. BUS & PROF. CODE § 16,720 (West 1964).

[12] 79 F. 627 (C.C.N.D. Tex. 1897).

[13] *Id.* at 650.

[14] Each state except Georgia and Vermont now has an antitrust statute providing for penalties, criminal or civil, and private suits for damages. Only California, Kansas, Mississippi, North Dakota and Ohio still have an act like the Cartwright or "populist"

Enacted in 1907, the Cartwright Act was amended at the very next session of the California legislature in 1909 to exempt any combination the "object and business of which are to conduct its operations at a reasonable price or to market at a reasonable profit."[15] But in 1927, in *Cline v. Frink Dairy Co.*,[16] the United States Supreme Court held a similar Colorado antitrust act unconstitutionally vague under the fourteenth amendment. The Cartwright Act was therefore universally considered a dead letter. It was so held by a prominent federal judge, Judge Yankwich, in *Blake v. Paramount Pictures*.[17] But it was resuscitated by Justice (later Chief Justice) Traynor in *Speegle v. Board of Fire Underwriters*.[18]

The *Speegle* decision outlawed the 1909 amendment under the impact of *Frink Dairy*. But, instead of outlawing the entire act, *Speegle* let the 1907 statute, unamended, stand as the law of California. It acknowledged that, if the provision had been in the original Act, the Act and its prohibitions would all fail. But, it reasoned, the provision for a reasonable price and profit was separable from the remainder of the statute because it was not in the Act in 1907. This is the reverse of reason, for the legislature in 1909, pretty much the same legislature as that of 1907, was saying that California wanted no antitrust law that did not allow for a reasonable profit. However, other judicial opinions contain inverted reasoning, and without more in *Speegle* to remark on, the subject would not be worth mentioning.

The notable fact about *Speegle* is that Justice Traynor, one of the outstanding state court judges in the history of the Republic, bolstered his conclusion by saying:

> The policy against combinations in restraint of trade underlying the Cartwright Act was not created by that act but had previously been evolved at common law. The act was not intended to change that policy but merely

---

form. The statutes of most of the states and the District of Columbia are closely patterned on the Sherman Act. In 1973, the National Conference of Commissioners on Uniform State Laws approved a Uniform State Antitrust Act, which the American Bar Association's House of Delegates approved in 1974. It is largely like the Sherman Act in approach, with some elementary and fundamental judicial gloss written in, with the notable exception that, instead of the Sherman Act's mandatory treble damage provision, the trier of fact may impose multiple damages not to exceed treble if it or they find the violation "flagrant."

[15] 1909 Cal. Stat. 594.

[16] 274 U.S. 445, 453 (1927).

[17] 22 F. Supp. 249 (S.D. Cal. 1938); *see also* Ward v. Auctioneers Ass'n, 67 Cal. App. 2d 183, 153 P.2d 765 (1944).

[18] 29 Cal. 2d 34, 172 P.2d 867 (1946).

> to make its enforcement more effective.[19]

Any craftsman in words with knowledge of the background must be suffused with admiration for that sentence, for, confronted by a challenge to its truth, it can be defended as not saying as much as it seems to say. And challenged it is. The truth about the common law was summed up by Judge (later Chief Justice) Taft in *United States v. Addyston Pipe and Steel Co.*:[20]

> Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudiciously affected thereby, but were simply void, and were not enforced by the courts.[21]

It is a far cry from refusal to enforce a contract to penalizing it by criminal sanctions or subjecting it to civil penalties trebled; the policy is so different in degree as to be different in kind. While the term "restraint of trade" did come into the Sherman Act from common law,[22] its meaning was far more limited than it has become in the nearly 100 years since enactment of the Sherman Act. Significantly, the term is not in the Cartwright Act at all. Justice Traynor's statement avoids historical untruth only by being a statement carefully crafted to bolster reasoning in need of bolstering. And it was this statement in *Speegle* that was expanded in the second clause in the *Palsson* case — that "both statutes have their roots in common law."[23]

Fairness requires acknowledging that, however dubious the reasoning, the resuscitation of the Cartwright Act in *Speegle* accords with what later California legislatures have favored. Over the years the legislatures, lobbied by district attorneys and the Attorney General, have repeatedly stiffened the Act, departing from federal decisions when those decisions lightened the burden of the law.[24] Whether the legislatures in the years after 1946 (the year of *Speegle*) would have acted to create an antitrust law from scratch had *Speegle* not given them one, is anyone's guess; they did not do so between 1927 (the year of *Frink Dairy*) and the year of *Speegle*.

As the Cartwright Act is expressed in language quite different from

---

[19] *Id.* at 47.

[20] 85 F. 271 (6th Cir. 1898).

[21] *Id.* at 279.

[22] This total reach of the common law is expressed in the single sentence of the Business and Professions Code § 16,722.

[23] Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925 (1976).

[24] *See, e.g.*, the 1978 addition to CAL. BUS. & PROF. CODE § 16,750, enacted in disagreement with Illinois Brick Co. v. Illinois, 435 U.S. 720 (1977).

the Sherman Act, one would suppose that an attorney's starting point in ascertaining California antitrust law would be the text of the statute. Indeed, attorneys inexperienced in antitrust do file complaints under the Cartwright Act in which they charge that the defendant has created "a trust." Until December 31, 1985, this was wasted effort, for the language of the Act had sunk without trace until it was salvaged in *Cianci v. Superior Court.*[25] Until then, the Cartwright Act had exhausted its function by making the leap from common law. It was like the fossilized remainder of a coral colony; it had no life of its own beyond permitting courts to say "California has an antitrust law." For the content of that antitrust law, the California courts turned to decisions under the federal Sherman Act. Thus in *Palsson*, the court said, "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act."[26] Use of Shepherd's, Lexis, or Westlaw produces numerous cases repeating that proposition.

California antitrust law is a compound of (1) Sherman Act decisional law, (2) a supposed common law about restraints of trade, and (3) a body of nonstatutory law still in the course of creation stemming from an entirely different area. For example, a group in a profession that has such power that it can prevent one from earning a living in that profession by denying or limiting membership or access to its facilities, acts tortiously in doing so. The exclusion of physicians from hospital facilities is illustrative.[27] An antitrust jurisprudence fed by such diverse streams in a jurisdiction in which courts are not reticent about their creative power is capable of breaking in unexpected directions. The *Palsson* decision itself illustrates that amalgam. For example, the issue in *Palsson* that produced its excursion into history is whether the Cartwright Act extends to services of human beings or is confined to commodities. In *United States v. National Association of Real Estate Boards*,[28] the United States Supreme Court applied the Sherman Act to services, over the dissent of Justice Jackson, a master of the pungent phrase, who observed:

> It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose

---

[25] 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985).

[26] *Palsson*, 16 Cal. 3d at 925.

[27] Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974); Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961).

[28] 339 U.S. 485 (1950).

> unions frequently do include owners of establishments that employ others, such as automobile sales agencies. . . . I suppose this immunity is not confined to those whose labor is manual, and is not lost because the labor performed is professional. . . . However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his service than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trust agent and, oftentimes, advisory as to values and procedures.[29]

Despite Justice Jackson's cogent observations, the decision that the Sherman Act applies to services easily withstands criticism, because Section 1 uses simple forthright words denouncing "*every*" contract, combination or conspiracy in restraint of trade or commerce. But, as already noted, the Cartwright Act is defined solely in terms of a "trust," and it then so defines a trust as to make the language of the Cartwright Act different and narrower than the Sherman Act. If the Cartwright Act had abbreviated its definition of a "trust" to its first phrase — a combination "to create or carry out restrictions in trade or commerce,"[30] it could well be deemed equivalent to the Sherman Act. But the definition of a "trust" does not stop there; it has numerous subdivisions that seem to emphasize that the legislature was aiming at trade or commerce in physical objects.[31] Statutes identical in substance or in language to the Cartwright Act, and part of the same non-Sherman Act stream, had, both before and contemporaneously with its enactment, been held not to apply to personal services.[32]

The argument put to the California Supreme Court in *Palsson* was an historical one. The Cartwright Act, in 1907, was aimed at the evils that troubled state legislatures of the time, and collaborative effort in human services, other than in railroading, was not one of those ends. This was the period of western and midwestern populism, outraged at railroads and purveyors of goods but insistent on the rights of human beings to collaborate with respect to their own services.

But all this history was rendered irrelevant when the California Supreme Court first chose — for what can now be said to be for the "time being" of ten years — to derive the Cartwright Act from the Sherman Act. California antitrust law had thus become a very supple instrument, free to follow the decisions under the Sherman Act and free to ignore them. California courts do not bind themselves to Sherman Act

---

[29] *Id.* at 496.

[30] CAL. BUS. & PROF. CODE § 16,720 (West 1964).

[31] *Id.*

[32] *See, e.g.*, Rohlf v. Kasemeier, 140 Iowa 182, 118 N.W. 276 (1908); Downing v. Lewis, 56 Neb. 386, 76 N.W. 900 (1898).

decisions. Despite a United States Supreme Court decision that the Sherman Act applies to the medical profession,[33] the California courts in *Willis v. Santa Ana Community Hospital Association*[34] and *Osteopathic Physicians and Surgeons v. California Medical Association*[35] held that the Cartwright Act does not apply to the "professions." It took no prophetic qualities to predict that these decisions would not survive in view of the fact that the United States Supreme Court later held bar associations' setting or recommending of minimum fee schedules to be illegal under the Sherman Act.[36] In *Cianci v. Superior Court*, the California Supreme Court did overrule *Willis*. But the interesting fact is not that it did so — development of federal antitrust law plainly supported the change. The interesting fact is the ground on which it did so. The court said:

> In the foregoing discussion, we have observed that the Cartwright Act is broader in range and deeper in reach than the Sherman Act, and have concluded on that basis that it applies to the professions. But even if the Cartwright Act were merely coterminous with the Sherman Act, our conclusion would be the same.[37]

The successful party in *Cianci* had advanced no such argument that the Cartwright Act was broader or deeper than the Sherman Act. In its Petition for Hearing by the Supreme Court after denial of a writ of mandate by the court of appeal, Cianci had argued only that *Willis* was inconsistent with federal decisions.[38] How or why the Cartwright Act is "broader in range and deeper in reach than the Sherman Act" requires more explication than the *Cianci* opinion gives. Ordinary eyes would read Cartwright as narrower and shallower, and all the more so in the view of Chief Justice Hughes' teaching in *Appalachian Coals v. United States*[39] that the Sherman Act has the generality and adaptability of a constitutional provision.

Even more so now than before *Cianci*, California antitrust law has

---

[33] *See* United States v. American Medical Ass'n, 317 U.S. 519 (1943).

[34] 58 Cal. 2d 806, 26 Cal. Rptr. 640 (1960).

[35] 224 Cal. App. 378, 36 Cal. Rptr. 641 (1964).

[36] *Cianci*, 40 Cal. 3d at 920, 710 P.2d at 384, 221 Cal. Rptr. at 584.

[37] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[38] The submission of the petition was:

> This court ruled in *Marin County Board of Realtors Inc. v. Palsson* (1976) 16 Cal.3d 920, that federal law should be applied in California to issues arising under the Cartwright Act. Accordingly, it is appropriate to reconsider *Willis* in light of definitive federal authority supporting the proposition that a profession is subject to antitrust provisions. (p. 3).

[39] 282 U.S. 256 (1932).

become a supple instrument. One would not be presumptuous to predict that the phrasing "the Cartwright Act is broader in range and deeper in reach than the Sherman Act" will be seen in quotation and out of quotation in many decisions to come, even in double harness with the incompatible statement that the Cartwright Act is "patterned" on the Sherman Act.[40] In the words of Hobbes, they will pass "like a gaping from mouth to mouth."[41]

Even before *Cianci*, the *Palsson* case and its offspring were a striking example of suppleness. There the Court had before it the question whether a board of realtors must give access to its multiple listing service to a nonmember real estate licensee. It held that access had to be given if access was essential to the economic existence of a nonmember broker.

Palsson was followed by debate over whether it went so far as to hold that access must be given to one who declined Board membership when that membership was available on reasonable and nondiscriminatory terms. Every federal court facing this question under the Sherman Act has held that access need not be given to one who declines membership available on reasonable, nondiscriminatory terms. But *Glendale Board of Realtors v. Hounsell*[42] held the reverse; it held the *Palsson* rule applies even though the person seeking access to the multiple listing service has rejected membership.

The identical issue then arose in Iowa. The Iowa Supreme Court, in *Iowa v. Cedar Rapids Board of Realtors*,[43] reviewed *Palsson* and held that it could not be interpreted as sustaining the *Hounsell* conclusion. The issue arose again in California in *People v. National Association of Realtors*,[44] which held that the Iowa Supreme Court erred in its interpretation of *Palsson*. Then the same question arose in New Jersey, and in *Pomanowski v. Monmouth County Board of Realtors*,[45] the New Jersey Supreme Court reviewed the *Palsson* decision and agreed with the Supreme Court of Iowa. Both Iowa and New Jersey noted that their antitrust laws were interpreted in accordance with federal decisions under the Sherman Act, as California purports to do, and held contrary to *Hounsell* and *People v. National Association of*

---

[40] Both statements, it may be noted, originated from the same pen.

[41] Quoted in similar context by Professor Francis Bowes Sayre in *Criminal Conspiracies*, 35 HARV. L. REV. 393 (1922). Professor Sayre was later governor general of the Philippines.

[42] 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977).

[43] 300 N.W.2d 127 (1981).

[44] 120 Cal. App. 3d 459, 174 Cal. Rptr. 728 (1981).

[45] 89 N.J. 306, 446 A.2d 83, *cert. denied*, 459 U.S. 908 (1982).

Realtors.

These facts were presented to the California Supreme Court in a petition for rehearing from a later decision, *People v. National Association of Realtors.*[46] Paraphrasing the Declaration of Independence,[47] it was submitted that a "decent respect for the opinions of the highest courts of the two sister states concerning the meaning of the *Palsson* opinion" warranted the California Supreme Court, as author of that opinion, to grant a hearing and explain exactly what it meant. The California Supreme Court rejected the suggestion about what a "decent respect" required.

Thus, on the same body of federal law and proceeding upon the same hypothesis that federal decisions concerning the Sherman Act guide the interpretation of state antitrust law, California stands alone in opposition to the rule elsewhere in the United States.

Another example of suppleness in California antitrust, stemming from myth, appears in *California v. Texaco.*[48] The trial court sustained a demurrer without leave to amend on two grounds — first, the Cartwright Act does not purport to prohibit or regulate mergers or acquisitions; second, the Federal Trade Commission had preempted the matter by a consent decree with Texaco in proceedings based upon the federal antimerger statute. The Court of Appeal affirmed on the basis of preemption, and therefore expressly refrained from reaching the question of whether the Cartwright Act applies at all. On February 27, 1986, a petition for review of *Texaco*, filed by the State Attorney General, was granted by the California Supreme Court on a four to three vote. The case was taken off the calendar for resetting when the electorate rejected Chief Justice Bird and Justices Reynoso and Grodin, but was restored and argued on April 8, 1987.

Unless and until the California Supreme Court holds otherwise, one can say with confidence that the opinion of the court of appeal on the preemption issue is sound and solid, but it is long. The court's failure to dispose of the case on what, until *Cianci v. Superior Court,*[49] was the much easier ground that the Cartwright Act does not apply at all suggests that it may have been troubled by a possibility that it does.

---

[46] 155 Cal. App. 3d 578, 202 Cal. Rptr. 243 (1984).

[47] "When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another . . . . a decent respect for the opinions of mankind requires that they should declare the causes which impel the separation. . . ."

[48] 184 Cal. App. 3d 221, 219 Cal. Rptr. 824 (1985). The California Supreme Court has granted review.

[49] 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985).

Even if so, it is dubious that it was prescient enough to have anticipated what the California Supreme Court would shortly do with the subject, by way of dictum.

The federal prohibition of acquisitions and mergers is not part of the Sherman Act. It is in the Clayton Act, adopted in 1914 and expanded by the Celler-Kefauver Act of 1950.[50] To that statute California has no counterpart; nothing in the Cartwright Act speaks to the subject. If a court were to look to precedent under the Sherman Act, it would find it both sketchy and dubious. Until 1964, it was not the law that an acquisition of one company by another could violate section 1 of the Sherman Act. The contrary had long been believed true. And it was for that very reason that prosecutors sought and obtained the 1950 Celler-Kefauver amendment to section 7 of the Clayton Act, and then used section 7 to attack mergers.

In *United States v. First National Bank of Lexington*,[51] believing that the Clayton Act did not reach bank mergers, the Department of Justice invoked section 1 of the Sherman Act to assail a bank merger. Suffering an adverse decision in the district court, the Government appealed, but before its appeal reached the Supreme Court, the Court held that section 7 of the Clayton Act applied to bank mergers.[52] Thus resort to section 1 of the Sherman Act became unnecessary. But in the short time while it flourished, it produced the Supreme Court's *Lexington Bank* decision. There the Court held that mergers can violate section 1 in a very strict and rigorous situation; the elements that could turn a merger into a violation of section 1 were (1) elimination of significant competition between the buyer and the seller, and additionally, (2) the buyer and seller must each be a major competitive factor.[53]

One would have thought that only by falling back upon the false history that the Cartwright Act is "patterned" on the Sherman Act and

---

[50] 15 U.S.C. § 18 (1982 & Supp. III 1985).

[51] 376 U.S. 665 (1964).

[52] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[53] Dissenting in *Lexington Bank*, Justices Harlan and Stewart referred to the decision as a vehicle "for turning the clock back to antitrust law of days long past." The writer has found only one other federal case in which the *Lexington* decision was applied. *See* Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975). In *Helix* the court reversed a summary judgment in favor of the defendants. After remand and trial resulting in a verdict for the plaintiff, the cause was again appealed. The decision on the first appeal was assailed by defendant Terminal Flour Mills as wrong. The plaintiff settled the case with the other defendant, General Foods. Terminal Flour Mills refused to settle, and plaintiff-appellee vacated the judgment against it. In other words, *Lexington Bank* has had no progeny in the federal area.

then pursuing an aberrant federal decision under the Sherman Act could the Attorney General of California have plausibly made his contention in *California v. Texaco*. But in *Cianci*, less than two months after *California v. Texaco*, the California Supreme Court said that the Cartwright

> Act reaches beyond the Sherman Act to threats to competition in their incipiency — much like section 7 of the Clayton Act, which prohibits mergers that "*may* . . . substantially . . . lessen competition, or . . . *tend* to create a monopoly" (15 U.S.C. § 18, italics added) — and thereby goes beyond "clearcut menaces to competition" in order to deal with merely "ephemeral possibilities" (*Brown Shoe Co. v. United States* [1962 Trade Cases ¶ 70,366](1962) 370 U.S. 294, 323 [§ 7 of Clayton Act]).[84]

No issue in the *Cianci* case called for this observation; nothing in the decision required it; it was not espoused in any of the briefs. Sherlock Holmes would observe that just two weeks before the *Cianci* decision, the California Attorney General, on December 17, 1985, filed his petition for review by the Supreme Court in *California v. Texaco* and there argued not only that the Sherman Act prohibits anticompetitive mergers under *Philadelphia National Bank*, but also that the Cartwright Act, by section 16,720(e)(4), anticipated the Clayton Act's antimerger prohibition by forbidding combinations of capital by which the parties agree to pool, combine, or unite any interests that "price might in any manner be affected." Sherlock Holmes would correlate in time the Attorney General's petition for review in *California v. Texaco* and the dictum sixteen days later in *Cianci* and reach the conclusion that the Supreme Court took the opportunity of endorsing the Attorney General's views, in advance, and then to go even farther than the Attorney General had done by the pronouncement about the depth and reach of the Cartwright Act.

By the dictum in *Cianci*, California appears now to have an antimerger law, newly discovered three-quarters of a century after the Cartwright Act was enacted. With the grant of review by the California Supreme Court in *California v. Texaco*, we appear to be in the creation of new history, *creatio ex nihilo*, heretofore attributed by theologians only to the Divinity. Exhumed from the grave in *Speegle* by assigning a derivation to common law, given meaning in *Palsson* by saying that the Cartwright Act is "patterned" on the Sherman Act, the umbilical cord has now been cut and the Cartwright Act is greater than either of its putative ancestors. Federal decisions under the Sherman

---

[84] 40 Cal. 3d 903, 918, 710 P.2d 375, 383, 221 Cal. Rptr. 575, 582-83 (1985) (source citation altered).

Act and prosecution under the Celler-Kefauver Act are in a stage of contraction, and the California Supreme Court has resorted to dictum to position itself to push beyond federal law whenever it wishes to do so. Whether the post-Bird court will pursue the course adumbrated in *Cianci* and in the grant of review in *Texaco* remains to be seen.

Texaco raises two further areas of interest. The first has to do with preemption of the subject matter. In 1960 in *Standard Radio and Television Co. v. Chronicle Publishing Co.*,[55] it was held that the business of television is a matter of interstate commerce so that California antitrust law cannot apply. Later, the United States Attorney General, seeking to engage the cooperation of state attorneys general in antitrust prosecution, encouraged suits under state laws. In the process, *Standard Radio and Television* was disapproved in *Younger v. Jensen*.[56] But in *Partee v. San Diego Chargers*[57] the California Supreme Court held that professional football is so intrinsically a matter of interstate commerce that the Cartwright Act does not apply at all! The court in *Texaco* escaped being enfiladed because it was able to dispose of the issue of preemption on the basis that the Federal Trade Commission had in fact taken over the subject matter.

The *Texaco* case is of interest by virtue of another fact that ties it to *Cianci*. A third ground under which the Attorney General asserted rights against Texaco was California's "unfair competition law." This is a law that the California courts have developed into a mighty engine, an engine both of law enforcement against wrongdoers and also of oppression in the hands of prosecutors possessing more zeal than balance. The prosecutors have insisted on calling it California's "little FTC Act." Although no reported California opinion has used that term, it is possible that it has had some impact, just as stating that the Cartwright Act is patterned on the Sherman Act. Yet historical truth tells us that California's "unfair competition law" is not a "little FTC Act," but differs from the FTC Act in precisely the respects that make all the difference in the world.

The "FTC Act" is the Federal Trade Commission Act[58] enacted by Congress in 1914. Section 5 of that Act[59] pronounces "unfair methods

---

[55] 182 Cal. App. 2d 293, 6 Cal. Rptr. 246 (1960) (hearing by Supreme Court of California denied).

[56] 26 Cal. 3d 397, 409 n.7, 605 P.2d 813, 820 n.7, 161 Cal. Rptr. 905, 912 n.7 (1980).

[57] 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1984).

[58] 15 U.S.C. §§ 41-58 (1982 & Supp. III 1985).

[59] 15 U.S.C. § 45 (1982 & Supp. III 1985).

of competition in commerce" to be "unlawful." By itself, the term "unfair methods of competition" has no meaning. As the United States Supreme Court said in the famous "sick chicken case" that held the NRA unconstitutional,[60] the term "unfair methods of competition" was a new expression in the law. It "does not admit a precise definition" or determination as to what are unfair methods,[61] and "to make this [determination] possible Congress set up a special procedure. A commission, a quasi-judicial body, was created."[62]

Section 5 of the Federal Trade Commission Act is not a basis for private suits or suits by the government for penalties;[63] it merely supports cease and desist orders looking to future conduct. Otherwise, its constitutionality would have been highly suspect. Indeed, as late as the *Schechter* case, it would have been held unconstitutional on the same grounds as the Colorado antitrust law in the *Frink Dairy* case.[64] Again, a true knowledge of history teaches that President Wilson urged the adoption of the Federal Trade Commission Act to create a commission that would *aid* business by informing it in advance what methods of competition would *thereafter* be considered unlawful and subject to punishment if thereafter continued or used.[65]

Compare all this with California's "unfair competition law." In 1872, Civil Code section 3369 was enacted to forbid courts of equity from using specific or preventive relief to enforce a penalty or forfeiture. It was amended in 1936 to permit the Attorney General to obtain an injunction against performance or threat of "unfair competition"; it is doubtless true that the term was lifted from the Federal Trade Commission Act. As amended, Civil Code section 3369 went on to define the term as including "unfair or fraudulent business practice." In 1963, section 3369 was amended to define unfair competition as meaning and including "unlawful, unfair or fraudulent business practice." In 1972, Civil Code section 3370.1 was added to authorize public authority to

---

[60] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[61] *Id.* at 532.

[62] *Id.* at 533 (*i.e.*, the Federal Trade Commission).

[63] Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) presents a detailed discussion of the subject.

[64] Cline v. Frink Dairy Co., 274 U.S. 445 (1927). Even the scope claimed for Section 5 by the Federal Trade Commission has been cause for concern, although all that emanates from the Commission is an order to cease and desist and not an imposition of penalties for past conduct. M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 420-43 (1973).

[65] See Holloway v. Bristol-Myers Corp., 485 F.2d at 986, and the reference in n.15 to the Presidential Message of January 20, 1914.

recover a civil penalty in situations in which Civil Code section 3369 authorized an injunction. Then in 1977 these sections of the Civil Code were swept into the Business & Professions Code as sections 17,202, 17,203, and 17,206. These Business & Professions Code provisions are what *Texaco* refers to as California's "unfair competition law." Section 17,202 provides that "notwithstanding section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in case of unfair competition,"[66] thus turning 180 degrees from the sense of equity of an earlier day.

The "unfair competition law" addresses three different categories of conduct. The first is "false and deceptive advertising," and in that aspect it is not subject to the crucial criticism of vagueness. The second, "unlawful conduct," has been held to apply to conduct violating the Cartwright Act, thereby importing into antitrust law an additional set of sanctions not in that Act itself.[67] Although the referent is conduct unlawful under other statutes, the objection of vagueness cannot be brushed aside in the antitrust context. As the United States Supreme Court said in *United States v. United States Gypsum Co.*,[68] the antitrust act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[69] Instead, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. . . ."[70] The FTC Act recognized this truth, and its concept was that penalties or sanctions should not be imposed except on conduct committed after the uncertain had become certain.

The third category of conduct at which the "unfair competition law" aims is that of "unfair practices," neither false nor deceptive and not otherwise unlawful. Here the vice of vagueness remains undiminished. Yet this kind of application appears to be permitted.[71]

The precautions of the FTC Act that save the statute from unconstitutional vagueness went into the trash can when the phrase "unfair

---

[66] CAL. BUS. & PROF. CODE § 17,202 (West Supp. 1978).

[67] People v. National Ass'n of Realtors, 155 Cal. App. 3d 578, 202 Cal. Rptr. 243 (1984); People v. National Ass'n of Realtors, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728 (1981).

[68] 438 U.S. 422 (1978).

[69] *Id.* at 438.

[70] *Id.* at 440-41.

[71] *See* Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 162 Cal. Rptr. 543 (1980) (opinion of Justice Kaus noting that California's "unfair competition law," with its "open ended definitions of unfairness," has been given broad meaning, an "expansive interpretation").

methods of competition" was imported into California law. Courts have not yet adopted the prosecutors' false term "little FTC Act," but they may have been influenced by it.

We may pause, before stopping, to ask whether the mythical history related in the foregoing pages has produced or contributed to present California law, or whether, on the contrary, the mythology was created to support legal propositions reached without regard to history. An answer — either cynical or coolly objective — is that the flow of cause and effect runs in the other direction, that the conclusions about California law have produced the false history rather than being produced by them. Recent issues of *Scientific American*[72] discuss a new process by which a beam of light that has been diffused can be restored to its original condition, as if reversing the flow of time. The process is analogized to running a motion picture film backward: A diver emerges from a disappearing splash, defies gravity, and rises in an arc to land upon the end of the diving board in a certain position. Citation to *Scientific American* permits one to recall that Archimedes exclaimed, "Give me a fulcrum on which to rest a lever, and I will move the world."[73] A cynic might paraphrase, "Give me the premise from which to begin, and I will reach the result I desire."

So it may be with judicial decisions: they do not start with a premise and then by a course of reasoning proceed to their conclusions. In the formal opinion the film indeed runs forward, but before the opinion was written the film was run backward. The court starts with the desired conclusion and then, by running the film backward, discovers the premises from which to begin the reasoning that will compel the conclusion. And, *Miracule Visu*, so it does!

---

[72] "Optical Phase Conjugation," SCI. AM., Dec. 1985, at 54; "Application of Optical Phase Conjugation," SCI. AM., Jan. 1986, at 74.

[73] See 1 J. NEWMAN, THE WORLD OF MATHEMATICS 179 (1956) for similar quote.