The

HAWAII ANTITRUST ACT

Report No. 8, 1961

LEGISLATIVE REFERENCE BUREAU

UNIVERSITY OF HAWAII
HONOLULU 14, HAWAII

PRICE $2.00

H. R. NO. 229

RESOLUTION

WHEREAS, H. B. No. 27, H. D. 2, S. D. 2, C. D. 1, "AN ACT RELATING TO THE REGULATION OF THE CONDUCT OF TRADE AND COMMERCE" has been passed by both Houses of the First State Legislature, General Session 1961; and

WHEREAS, the purpose of the bill as amended in C. D. 1 is "to promote the well being of the economy of the State of Hawaii by preserving, maintaining, and creating competition and prohibiting business practices which are destructive of competition"; and

WHEREAS, said Act will have an impact on trade and commerce conducted in the State of Hawaii which the economic and business community may not be fully cognizant of; and

WHEREAS, it is desired by the House to have some publication prepared under the direction of the Legislative Reference Bureau to give a more detailed explanation of this Act to assist the businessmen and others who will be affected by this Act; and

WHEREAS, your House desires that this publication be prepared and distributed at cost to those who desire to obtain copies of it; and

WHEREAS, the Governor of the State of Hawaii has not to date approved H. B. No. 27, H. D. 2, S. D. 2, C. D. 1; however, if the Governor does approve said bill, it is desirable that the machinery be set to prepare the publication; now therefore,

BE IT RESOLVED, by the House of Representatives, First State Legislature, General Session of 1961, that the Legislative Reference Bureau after enactment of H. B. No. 27, H. D. 2, S. D. 2, C. D. 1 into law, prepare and publish said publication on or before August 21, 1961, to be sold at cost to cover such expenses as is determined necessary by the Legislative Reference Bureau.

Date: May 31, 1961
Honolulu, Hawaii

FOREWORD

A major item of legislation enacted into law by the First Legislature of the State of Hawaii in the General Session of 1961 was Act 190 (H. B. No. 27, H. D. 2, S. D. 2, C. D. 1) entitled "An Act Relating to the Regulation of the Conduct of Trade and Commerce". This Act was approved by the Governor of Hawaii on July 12, 1961 and became effective on August 21, 1961, except that section 6 relating to "Interlocking Directorates and Relationships" is to take effect February 21, 1962. For convenience, Act 190 will be referred to in this report as the "Hawaii Antitrust Act".

After the adoption of the conference draft of the bill by both houses of the Legislature, House Resolution No. 229 was adopted which requested the Legislative Reference Bureau to prepare and publish a detailed explanation of the Hawaii Antitrust Act.

The subject matter of the report was so complex that a preliminary working draft was first prepared. The comments of persons who worked closely with the legislation and of others who assisted the Legislature and are knowledgeable in this field were then requested. Particularly helpful were the suggestions received from several members of the legislative conference committee, which was composed of Senators Randolph C. Crossley, Calvin C. McGregor, Francis M. F. Ching, Thomas S. Ogata and Nelson K. Doi, and Representatives Robert W. B. Chang, Thomas P. Gill, Donald D. H. Ching, Percy K. Mirikitani and Katsugo Miho. Among others who were kind enough to review the preliminary working draft were: Lee Loevinger, head of the Antitrust Division, United States Department of Justice; Marquis L. Smith, Assistant Chief, San Francisco Office, Antitrust Division, United States Department of Justice; Dr. Vernon A. Mund, Professor of Economics, University of Washington and Dr. Frank H. Jackson, Associate Economist, University of Hawaii. Substantial revisions were made to the working draft to accommodate many of the suggestions. The interest and help of all who participated are gratefully acknowledged; however, the fact of their having reviewed the working draft is not to be interpreted as endorsement of the contents of this report.

Of special staff assistance to the Legislative Reference Bureau in the preparation of this report were former staff members of both houses of the First State Legislature who assisted the conference committee during its lengthy deliberations on the bill; these included Hiroshi Sakai, Henry Shigekane, and Mitsuo Uyehara. V. Carl Bloede, Associate Researcher on the Legislative Reference Bureau staff, also participated in the work on this report. To these staff personnel, without

whose interest, patience and unstinting labor a report such as this could not have been produced, a particular acknowledgment of gratitude is expressed.

Finally, it is emphasized that this report can only attempt an explanation of some of the major concepts developed in the field of antitrust law and call attention to some of the problem areas. It does not pretend to be, nor should it be considered as an interpretation of the law, particularly as applied to any given situation. In this regard, the thought behind the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations may be appropriate:

> "This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal or other expert assistance is required, the services of a competent professional person should be sought."

Kenneth K. Lau, Director
Legislative Reference Bureau

August, 1961

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CHAPTER 1
SUMMARY OF PROVISIONS OF THE HAWAII ANTITRUST ACT

This Chapter sets forth in an introductory outline form the provisions of the Hawaii Antitrust Act, identifying each of the Act's twenty-four sections and summarizing their content. For purposes of succinctness and simplicity, the summary attempts clarity of expression rather than literary style. Except for section 16, the numbering of the paragraphs and subparagraphs within each section corresponds to the numbering of the provisions of Act 190.

Section 1. Definitions

Contains definitions used in the Act.

Section 2. Restraint of Trade

(1) Declares contracts, combinations, or conspiracies in restraint of trade or commerce in any section of the State illegal.

(2) Without limiting the generality of the foregoing and excluding members of a single business entity the following acts are prohibited:

(a) Fix, control, or maintain price of any commodity;

(b) Limit, control, or discontinue the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(c) Fix, control, or maintain any standard of quality for the same purpose in (b);

(d) Refuse to deal with any other person or persons for the purpose of effecting any of the acts described in (a) to (c);

(3) Declares the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this Act, unless the effect may be substantially to lessen competition or to tend to create a monopoly:

(a) A covenant or agreement by transferor of a business not to compete within a reasonable area and period of time;

(b) Similar covenant or agreement between partners upon withdrawal of a partner from the partnership;

(c) A covenant or agreement of a lessee to be restricted in the use of leased premises to certain business or agricultural uses, or lessee restricted to certain business uses of leased premises and lessor restricted to use of premises reasonably proximate to such leased premises to certain business uses;

(d) A covenant or agreement by an employee or agent not to use trade secrets of employer in competition with employer during term of agency, or thereafter within such time as may be reasonably necessary for protection of employer.

(4) Excludes from prohibition of this section any price fixing arrangements authorized under sections 205-20 through 205-26, Revised Laws of Hawaii 1955, as amended.

Section 3. Tying Agreements

No person shall sell or buy any commodity, or fix, discount or rebate upon a price on condition (tying agreements) that the other person shall not deal with competitor of the seller or purchaser, as the case may be, when the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4. Refusal to Deal

No person shall refuse to sell or buy any commodity from any other person when such refusal is for the purpose of compelling the other to agree to or engage in acts which if acceded to are prohibited by other sections of this Act.

Section 5. Mergers, Acquisitions, Holdings and Divestitures

(1) After the effective date of this Act, corporations are prohibited from acquiring and holding the whole or part of stock or other share capital, or assets of any other corporation, the effect of which may be substantially to lessen competition or to tend to create a monopoly; this section does not apply to such acquisitions made purely for investment without the attempt to bring about the aforesaid results. Also, subsidiary corporations and the holding of all or part of the stock therein are permitted for the carrying on of lawful corporate business when the effect is not substantially to lessen competition.

(2) Corporations are prohibited from holding, in whole or part, the stock or other share capital, or assets of any other corporation, acquired prior to the effective date of this Act, where the effect is substantially to lessen competition or to tend to create a monopoly; and contingent upon such finding the court shall order the divestiture or other disposition of such holdings within a reasonable time. Such disposition shall not be ordered unless (a) necessary to eliminate the lessening of competition or the tendency to create a monopoly, (b)

assets are reasonably identifiable and separable, and (c) it can be done without undue hardship on the economic entity.

Section 6. Interlocking Directorates and Relationships

(1) Six months after the effective date of this Act no person shall serve at the same time as a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations or corporations engaged in whole or in part in commerce, if such firms are or shall have been theretofore competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act.

(2) Six months after the effective date of this Act no person shall serve as above in any two or more non-competing firms, trusts, partnerships or corporations any one of which has a total net worth aggregating more than $100,000, or a total net worth of all the business entities aggregating more than $300,000, where the effect of a merger, whether legally possible or not, may be substantially to lessen competition or tend to create a monopoly. This subsection is made inapplicable to an interlocking directorship between a bank doing a banking business and any other business firm or entity.

(3) Prohibits any person by use of a representative from effectuating the result prohibited in the foregoing subsections where their acts indicate an attempt to manipulate the conduct of the business entities to the detriment of any such entity and to the benefit of any other entity in which such person has an interest.

(4) The validity or invalidity of any act of any director, officer, or trustee while occupying such position in violation of this section shall be determined by the statutory and common law of Hawaii relating to corporations, trusts, or associations; and it shall not be affected by the provisions of section 1-9, Revised Laws of Hawaii 1955. The non-applicability of section 1-9 shall be limited to this section only.

Sets forth the responsibilities of the State Attorney General and persons affected by violation of this section in bringing actions or proceedings to terminate the same.

Section 7. Monopolization

No person shall monopolize, attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.

Section 8. Exemption of Labor Organizations

Provides that the labor of a human being is not a commodity or article of commerce, and nothing in the Act is to be construed to forbid the existence and operation of labor organizations.

Section 9. Exemption, Certain Cooperative Organizations, Insurance Transactions, Approved Mergers of Federally Regulated Companies

(1) Provides that the Act shall not be construed to forbid the operation of fishery or agricultural cooperative organizations instituted for the purpose of mutual help under Chapters 175A or 176, Revised Laws of Hawaii 1955, as amended, or which conform to the requirements of the Capper-Volstead Act (7 USC 291, 292). However, if such organization monopolizes or restrains trade or commerce to the extent that the price of any fishery or agricultural product is unduly enhanced then this Act shall apply.

(2) Transactions in the business of insurance though in violation of this Act are exempt if such are otherwise expressly permitted by the state insurance laws.

(3) The Act is inapplicable to mergers of companies where such are approved by the federal regulatory agency having jurisdiction thereof.

Section 10. Contracts Void

Provides that contracts or agreements in violation of this Act are void and unenforceable in law and equity.

Section 11. Suits By Persons Injured; Amount of Recovery; Injunctions

(1) Persons injured in business or property by anything forbidden or declared unlawful by this Act may:

(a) Sue for damages, and in the event of judgment receive threefold damages, costs, and attorneys' fees.

(b) Institute injunction proceedings to enjoin the unlawful practices, and in the event of decree receive costs and attorneys' fees.

(2) The remedies hereunder are cumulative and may be sought in one action.

Section 12. Suits By The State; Amount of Recovery

The State, County, or City and County, if injured by reason of anything forbidden in this Act, may sue to recover actual damages. The Attorney General is authorized to institute such action to recover damages provided by this section or by any comparable provision of federal law.

Section 13. Injunction By Attorney General

The Attorney General may institute injunction proceedings to enjoin any violation of this Act.

Section 14. Violation A Misdemeanor

(1) Person violating any of the provisions of sections 2, 4, 7, or 15 of this Act, including any principal, manager, director, officer, agent, servant or employee who has participated in an activity in violation of the provisions of any of these sections, is punishable by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or both. If such person is not a natural person the fine shall not exceed $20,000.

(2) Actions authorized as above and by section 16 shall be brought in the circuit court of the circuit where the offense occurred.

Section 15. Individual Liability for Corporate Acts

Whenever corporations violate any penal provisions of this Act, such violation shall be deemed also that of the individual directors, officers, or agents who have authorized or done any of the acts constituting the violation.

Section 16. Investigations

(1) Attorney General is charged with the duty of gathering facts surrounding any alleged violation and to make appropriate investigations.

(2) Attorney General is charged with the duty of obtaining information or documentary evidence pertinent to any investigation of a possible violation of this Act, and prior to filing of a complaint in court may serve upon the person believed to possess such information or evidence an investigative demand requiring its production for examination.

(3) The contents, manner of service and disposition of the investigative demand are set forth.

(4) Penalties are provided for removing, concealing or destroying documentary evidence, or for failing to comply with a subpoena. Penalties are also provided for officers and witnesses in an inquiry who wilfully disclose to others than the Attorney General the information obtained upon such inquiry.

(5) The procedures under the Hawaii Rules of Civil Procedure are supplementary to processes under the Act.

Section 17. Additional Parties Defendant

Additional parties defendant may be brought before the court whenever it appears to the court that the ends of justice will be served thereby.

Section 18. Duty of Attorney General and of County Attorneys

(1) Attorney General shall enforce the criminal and civil provisions of this Act. The County Attorneys, Prosecuting Attorney, and Corporation Counsel of the City and County shall investigate and report suspected violations to the Attorney General.

(2) In actions under the provisions of this Act required of the Attorney General, he may require the appropriate County Attorney, Prosecuting Attorney, or Corporation Counsel to maintain the action under direction of the Attorney General.

Section 19. Court and Venue

Any action, civil or criminal, under this Act, shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided herein.

Section 20. Judgment in Favor of State

(1) Final judgment or decree in favor of state shall be prima facie evidence against such defendant in any action brought by any other party under provisions of this Act, or by the state, county, or city and county, under section 12, against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. This section does not apply to consent judgments or decrees entered before any complaint has been filed, provided, however, exceptions may be taken during a 60-day period before the consent judgment becomes final.

(2) A nolo contendere plea in any criminal action shall have the effect of admitting each material allegation in the complaint, and a final judgment or decree pursuant to such plea shall be prima facie evidence in any action brought by any other party under the provisions of this Act.

(3) When civil or criminal actions are instituted by the state to prevent, restrain, or punish violations of this Act, but not including an action under section 12, the running of the statute of limitations shall be suspended during the pendency of the proceedings and for one year thereafter.

Section 21. Immunity from Prosecution

(1) No individual is exempt from attending, testifying or producing documentary materials on the ground that the same will incriminate him.

(2) No individual shall be prosecuted criminally or subjected to any criminal penalty for or on account of any transaction concerning which testimony or evidence is produced in any investigation by the Attorney General pursuant to section 16 of this Act; however, perjury, committed in so testifying is not exempt.

Section 22. Limitations on Actions

Actions under this Act are barred unless commenced within four years after the cause of action accrues, except as otherwise provided in section 20.

Section 23. Severability

If any portion of this Act is held invalid for any reason, each and every other provision shall not be affected.

Section 24. Effective Date

The effective date of this Act is August 21, 1961.

CHAPTER II
SCOPE OF COVERAGE OF THE HAWAII ANTITRUST ACT

1. Subjects of Restraint of Trade and Commerce, Monopolization, Mergers, and Interlocking Relationships

a. *Commodity*

In section 1(1) of the Hawaii Antitrust Act "commodity" is defined as follows:

> " 'Commodity' shall include, but not be restricted to goods, merchandise, produce, choses in action and any other article of commerce. It also includes trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business."

In determining the meaning of the word "commodity" it is interesting to note that in English common law the articles and commodities within the common law prohibition against monopolies and combinations in restraint of trade were the "necessaries of life" or "articles of prime necessity".[1] Among the articles that have been held to be necessaries within the meaning of this rule are such commodities as grain, meat, salt, milk, coal and coke, ice, and plumbers' supplies.[2] By the weight of authority, any article or commodity in general use, or staple commodity, may be the subject of prohibited monopolies or combinations in restraint of trade at common law.[3] Some of the early common law decisions hold that this is the limit to which the doctrine may be extended and that an article which is neither a prime necessity nor a staple commodity ordinarily bought and sold in the market may not be the subject of monopolization. Subsequent decisions have held that any article of commerce may be the subject of monopoly.[4]

The statutory definition of "commodity" under the Hawaii Antitrust Act goes beyond the common law concept by specifically including and not restricting itself to goods, merchandise, produce and choses in action and by enumerating service trades, transportation, insurance, banking, lending, advertising and bonding with the addition of the omnibus clause "any other business." Furthermore the qualifications under the common law concept of "commodity" requiring the article to be of "prime necessity" or "in general use" are not made a part of the statutory definition.

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[1] 36 Am. Jur. Monopolies, Combinations, Etc., Sec. 101.
[2] *Ibid.*
[3] 58 C. J. S. Monopolies, Sec. 38.
[4] *Ibid.*

b. *Commerce, Trade or Commerce, and Trade or Business*

In addition to the use of the word "commerce" in section 1 (1) there are other sections of the Hawaii Antitrust Act, where the word "commerce" is used either by itself or in conjunction with "trade". The words "commerce" or "trade or commerce" have not been specifically defined. Therefore judicial interpretation of the words "commerce" or "trade or commerce" may be necessary.

In *15 C. J. S. Commerce, Sec. 1* the word "commerce" has been described as follows:

> " 'Commerce' is a generic word of extensive import; and no all embracing definition thereof has ever been formulated. The question of what is commerce is to be approached both affirmatively and negatively, that is, from the points of view as to what it includes and what it excludes. While commerce includes trade, traffic, the purchase, sale, or exchange of commodities, and the transportation of persons or property, whether on land or water or through the air, according to various definitions of the term, and also, . . . according to judicial exposition apart from formal definitions, nevertheless commerce is broader than, and is not limited to, trade, traffic, transportation, or the purchase, sale, or exchange of goods or commodities. Commerce is more than any one of these things in that it is intercourse. The terms 'commerce,' 'interstate commerce,' and 'commerce among the states' or 'commerce among the several states' embrace business or commercial intercourse in any and all of its forms and branches and in all its component parts between citizens of different states, and may embrace purely social intercourse between citizens of different states, as over the telephone, telegraph, or radio, or the mere passage of persons from one state to another for social intercourse or pleasure. Indeed, commerce is said to include not only the fact of intercourse and traffic, but also the subject matter thereof, which may be either things, goods, chattels, merchandise, or persons."

In a court decision it was stated that "commerce" is broader than trade and it comprehends intercourse for the purpose of trade in any and all its forms.[5] The word "trade" includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.[6] The word "business" has been defined to mean an occupation for living or profit, or a commercial establishment or enterprise.[7]

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[5] *U. S. v. Southeastern Underwriters Ass'n.*, 322 U. S. 533, 539, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

[6] *U. S. v. San Francisco Electrical Contractors Ass'n.*, 57 F. Supp. 57, 62 (N. D. Calif. 1944).

[7] *Westor Theatres v. Warner Bros. Pictures*, 41 F. Supp. 757, 761, (D. N. J. 1941).

2. Persons and Transactions Covered under the Hawaii Antitrust Act.

a. *Person*

In section 1(2) of the Hawaii Antitrust Act "person" or "persons" are defined as follows:

> " 'Person' or 'persons' includes individuals, corporations, firms, trusts, partnerships and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country."

Of some significance in considering the definition of "person" is the fact that under section 7, "monopolization" as stated in the Hawaii Antitrust Act, it is possible for a single person who "monopolizes, or attempts to monopolize" to violate the "monopolization" section. In addition the "monopolization" section makes it a separate violation to "combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State." Because of the definition of "person" the following situations may be prohibited under the "monopolization" section of the Hawaii Antitrust Act:

> (1) Conspiracy solely between a parent corporation and its subsidiaries or between two or more such subsidiaries;[8]
>
> (2) Conspiracy solely between two or more corporations, the stock in each of which is owned by the same natural person or persons.[9]

b. *Purchase, purchaser, sell and seller.*

The definition of the words "purchase", "buy", and "purchaser" in sections 1(3) and 1(4) of the Hawaii Antitrust Act includes the terms "contract to buy", "lease", "contract to lease", "acquire a license" and "contract to acquire a license". Likewise the definition of the words "sale", "sell", or "seller" in sections 1(5) and 1(6) of the Act includes the terms "contract to sell", "lease", and "contract to license".

3. Exemptions from the Operation of the Hawaii Antitrust Act.

a. *Labor organizations.*

In section 8 of the Hawaii Antitrust Act the "Exemption of Labor Organizations" is stated as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in this Act shall be construed to forbid the existence and operation of labor organizations,

[8] Att'y Gen. Nat'l Comm. Antitrust Rep., p. 30 (1955).
[9] *Ibid.*

instituted for the purpose of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, lawfully carrying out the legitimate objects thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under this Act.

"The provisions of this Act shall not apply to the conduct or activities of labor organizations or their members which conduct or activities are regulated by federal or state legislation or over which the National Labor Relations Board or the Hawaii Employment Relations Board have jurisdiction."

About twenty years after passage of the Sherman Act, the Supreme Court of the United States held in the Danbury Hatter's case[10] that a nation wide consumers' boycott of plaintiff's non-union-made hats was a violation of the Sherman Act because the union sought to and did restrain interstate commerce in plaintiff's hats.

In apparent response, sections 6 and 20 of the Clayton Act[11] sought to exclude certain activities in the course of a "labor dispute" from the federal antitrust laws. The Clayton Act provisions were circumscribed by the federal courts. As a result Congress supplemented the Clayton Act with the Norris LaGuardia Act.[12] The labor provisions of section 6 of the Clayton Act was incorporated as the first paragraph of section 8 of the Hawaii Antitrust Act. The second paragraph of section 8 of the Hawaii Antitrust Act provides that union activities regulated by federal or state laws or over which the National Labor Relations Board or Hawaii Employment Relations Board have jurisdiction are exempt from the provisions of the Hawaii Antitrust Act. The First State Legislature also expressed its intent not to exclude labor organizations from the prohibitions of the interlocking directorates and relationships in the Conference Committee Report adopted upon the final passage of the Hawaii Antitrust Act as follows:

"It is not the intent of Section 8 to exclude labor organizations from the prohibitions contained in Section 6 of this Act."

b. *Fishery cooperative organizations or associations.*

In section 9 (1) of the Hawaii Antitrust Act the exemption of the fishery cooperative organizations or associations is stated as follows:

"Nothing contained in this Act shall be construed to forbid the existence and operation of fishery . . . cooperative organizations or associations instituted for the purpose of mutual help, and which are organized and operating under Chapters 175A

[10] *Loewe v. Lawlor* 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488 (1908).
[11] 38 Stat. 730, 15 U. S. C. 12.
[12] 47 Stat. 70, 29 U. S. C. 101.

. . . Revised Laws of Hawaii 1955, as amended, . . . provided that if any such organization or association monopolizes or restrains trade or commerce in any section of this State to such an extent that the price of any fishery . . . product is unduly enhanced by reason thereof the provisions of this Act shall apply to such acts."

The Hawaii Antitrust Act does not forbid the existence and operation of fishery cooperatives instituted for mutual help under Chapter 175A of the Revised Laws of Hawaii 1955, as amended, provided they do not monopolize or restrain trade or commerce to such an extent that the price of any fishery product is unduly enhanced by reason thereof.

c. *Agricultural cooperative organizations or associations.*

In section 9(1) of the Hawaii Antitrust Act the exemption of the agricultural cooperative organizations or associations is stated as follows:

"Nothing contained in this Act shall be construed to forbid the existence and operation of . . . agricultural cooperative organizations or associations instituted for the purpose of mutual help, and which are organized and operating under Chapters . . . 176, Revised Laws of Hawaii 1955, as amended, or which conform and continue to conform to the requirements of the Capper-Volstead Act (7 U. S. C. 291 and 292), provided that if any such organization or association monopolizes or restrains trade or commerce in any section of this State to such an extent that the price of any . . . agricultural product is unduly enhanced by reason thereof the provisions of this Act shall apply to such acts."

The Hawaii Antitrust Act does not forbid the existence and operation of agricultural cooperatives instituted for mutual help under chapter 176 of the Revised Laws of Hawaii 1955, as amended, or which conform and continue to conform to the requirements of the Capper-Volstead Act, provided that they do not monopolize or restrain trade or commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof.

d. *Insurance transactions.*

In section 9(2) of the Hawaii Antitrust Act the exemption of insurance transactions is stated as follows:

"This Act shall not apply to any transaction in the business of insurance which is in violation of any section of this Act if such transaction is expressly permitted by the insurance laws of this State; and provided further that nothing contained in this

section shall render this Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation."[13]

The exemption covers only such transactions in the business of insurance which are expressly permitted by the insurance laws of this State, but does not cover the business of insurance in its entirety. This exemption would not apply if any of the conditions set forth in the proviso quoted above should exist.

e. *Mergers approved by federal regulatory agencies.*

In section 9 (3) of the Hawaii Antitrust Act mergers approved by federal regulatory agencies are exempted as follows:

> "This Act shall not apply to mergers of companies where such mergers are approved by the federal regulatory agency which has jurisdiction and control over such mergers."

This exemption applies only to mergers of companies where such mergers are approved by the federal regulatory agency which has jurisdiction and control over such mergers and not to such mergers which are merely subject to approval by a federal regulatory agency.

f. *Price-fixing arrangement authorized under the "fair trade act".*

Section 2 of the Hawaii Antitrust Act provides that "Combinations in Restraint of Trade, Price-fixing and Limitation of Productions" are prohibited. Section 2 (4) exempts price-fixing arrangements authorized under the "fair trade act" (sections 205-20 through 205-26 of the Revised Laws of Hawaii 1955) from section 2 of the Hawaii Antitrust Act as follows:

> "(4) Any price-fixing arrangement authorized under sections 205-20 through 205-26, Revised Laws of Hawaii 1955, as amended, shall be excluded from the prohibition of this section."

4. Relationship Between the Hawaii Antitrust Act and the Federal Antitrust Laws.

Prior to statehood, section 3 of the Sherman Act had specific applicability within the Territory of Hawaii. Section 3 in part states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States . . . is hereby declared illegal." However with statehood, section 3 which applied to a restraint of trade within a Territory no longer applies to the State of Hawaii. On the other hand all of the federal antitrust laws applicable to transactions affecting interstate commerce continue to be applicable to Hawaii as they are to other states.

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[13] See the McCarran Act, 59 Stat. 33, 15 U. S. C. 1011 ff. for federal exemption relating to the business of insurance.

Although the area of trade and commerce covered by the federal antitrust laws is very great, there are important areas where, because of the purely intrastate nature of the practice or the failure of Congress to extend a particular facet of federal antitrust laws to the constitutional limit[14] or the lack of staff and facilities of the agencies of the federal government in enforcing the federal antitrust laws, the enforcement of the Hawaii Antitrust Act may be the only remedy. In other areas where the jurisdiction is concurrent, it may be that the state is better equipped to treat restraints which, though affecting or in interstate commerce, are primarily of local impact and that adequate relief may in such cases be secured only by the enforcement of the Hawaii Antitrust Act.

It has generally been recognized that the antitrust laws of the various states and the federal government do have a common law heritage.[15]

In enacting the Sherman Act of 1890 the Congress of the United States meant "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements"[16] and in "preventing restraints on commercial competition . . . exercised 'all the power it possesses'."[17] And this commerce power does not depend on "any particular volume of commerce affected."[18] The only question is one in which "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze," the Sherman Act applies.[19] While the enforcement of the Hawaii Antitrust Act might be precluded where it would frustrate the federal scheme,[20] or otherwise discriminate against or directly burden interstate commerce,[21] yet it may apply even though the same practice is or might be subject to federal antitrust laws.[22] Unlike the situation sometimes

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[14] *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 61 Sup. Ct. 580, 85 L. Ed. 881 (1941)

[15] *Addyston Pipe & Steel Co. v. U. S.*, 85 Fed. 271 (CA-6, 1898), aff'd 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136 (1889); *Standard Oil Co. v. U. S.*, 221 U. S. 1, 59-62, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911); *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. Ed. 1311 (1940).

[16] *U. S. v. Southeastern Underwriters Ass'n.*, 322 U. S. 533, 558, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

[17] *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495, 60 Sup. Ct. 982, 84 L. Ed. 1311 (1940).

[18] *N.L.R.B. v. Fainblatt*, 306 U. S. 601, 607, 59 Sup. Ct. 668, 83 L. Ed. 1014 (1939).

[19] *U. S. v. Women's Sportswear Mfg. Ass'n.*, 336 U. S. 460, 464, 69 Sup. Ct. 714, 93 L. Ed. 805 (1949).

[20] *Northern Securities v. U. S.*, 193 U. S. 197, 344-345, 24 Sup. Ct. 436, 48 L. Ed. 679 (1904).

[21] *Southern Pacific v. Arizona*, 325 U. S. 761, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945).

[22] *Leader Theatre Corp. v. Randforce*, 186 Misc. 280, 58 N.Y.S. 2d 304 (1945), aff'd, 273 App. Div. 844, 76 N.Y.S. 2d 846 (1948).

presented by coextensive state and federal law, where the former must give way even in the absence of actual conflict,[23] the federal antitrust laws make no demand for preemption, primary jurisdiction or the exclusion of a state in the exercise of its sovereignty.[24] The objective of the antitrust laws of Hawaii is to eliminate burdens on commerce. As Mr. Justice Holmes put it, in upholding the Tennessee antitrust law against the challenge that it impinged upon a preempted field, "The mere fact that it may happen to remove an interference with commerce among the States . . . does not invalidate it. . . . (C)ertainly there is nothing in the present state of the law at least that excludes the states from a familiar exercise of their power."[25] Supporting this conclusion is the legislative history of the Sherman Act.[26]

It is pertinent to note at this juncture that the Conference Committee report adopted by both houses of the First State Legislature concluded as follows:

> "In conclusion it is the intent of your Committee on Conference that wherever there are comparable provisions of the federal anti-trust laws and tests similar in language to those provided in this bill, it is intended that those decided federal cases applicable and relating to those provisions and tests will guide the interpretation and application of such terms and provisions of this bill in the light of the economic and business conditions of this State."[27]

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[23] *Guss v. Utah Labor Relations Board*, 353 U. S. 1, 77 Sup. Ct. 598, 1 L. Ed. 2d 601 (1957); *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546 (1955).

[24] *Schwegmann Brothers v. Calvert Distillers Corp.* 341 U. S. 384, 71 Sup. Ct. 745, 95 L. Ed. 1035 (1951).

[25] *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 422, 30 Sup. Ct. 543, 54 L. Ed. 817 (1910).

[26] *21 Cong. Rec. 2457* (1890).

[27] House Conf. Comm. Rep. No. 16 on H. B. No. 27, C. D. 1, Identical Senate Conf. Comm. Rep. No. 19 on H. B. No. 27, C. D. 1. See also House Journal for the General Session of 1961, First State Legislature for a statement of House Majority Floor Leader and Conference Committee Member on May 27, 1961 to the following effect:

"Some question has been raised by certain people as to a paragraph on the last page of the Committee report which might, if you read it hastily, seem to tie this Act very tightly or exclusively to the federal interpretations. I don't believe that that was meant by the conferees.

"This paragraph does not mean that the courts, in interpreting this Act, are meant to be tied to the Federal Case law, either existing at this time or as decided in the future; nor does it mean that pertinent state case law is to be in any way disregarded. It merely means that in drafting this Act, the Committee considered many of the provisions of this bill in the light of existing federal cases, as the Committee understood them. We also considered, in regard to some sections, the provisions of the antitrust laws of other states."

CHAPTER III
HISTORY OF PROHIBITIONS UNDER THE ANTITRUST LAWS.

1. Introduction

The prohibitions against restraints of trade have their origin in ancient common law. The law relating to restraints of trade has evolved through judicial decisions and statutory enactments to meet the changing requirements and conditions of trade and commerce.

The first and basic federal legislation in the area of antitrust is the Sherman Act[1] enacted in 1890. The principal provisions of this Act are found in section 1 relating to restraint of trade and section 2 relating to monopolization which read as follows:

> "Section 1. 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 declared to be illegal . . ."
>
> "Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

The experience in the enforcement of the Sherman Act in the early days showed that these provisions were inadequate to control and to prevent the growth of practices that were destructive of competition. To meet these inadequacies supplementary laws prohibiting specific acts and practices were enacted, one of which was the Clayton Act.

The Hawaii Antitrust Act has incorporated the essential provisions of the Sherman and Clayton Acts and in addition included other provisions to meet the specific requirements of Hawaii. Section 2(1) of the Hawaii Antitrust Act corresponds to section 1 of the Sherman Act. The Conference Committee report adopted by both houses of the First State Legislature upon the final passage of the Hawaii Antitrust Act states the following with respect to the interrelationship between sections 2(1), 2(2) and 2(3):

> "It is the intent of subsection (1) to retain the language and interpretation of section 1 of the Sherman Act and it is not intended to be restricted or limited by any other subsection of this section.

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[1] 26 Stat. 209, 15 U. S. C. 1.

"It is the intent of subsection (2) to codify certain acts which have been held by the courts to be 'per se' violations of the Sherman Act, and therefore not subject to the 'rule of reason' as considered by the courts in Sherman Act cases. A further subsection (3) has been added the purpose of which is to exclude from the prohibitions of subsection (2) those ancillary restrictive covenants and agreements which the federal courts have found not to be restraints of trade within the meaning of Sherman Act language and to make them subject to the Clayton Act test where the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the state. It is understood that the listing of 'per se' violations contained in subsection (2) of section 2 may not necessarily include all of the 'per se' violations. Likewise, it is understood that the listing of ancillary restrictive covenants and agreements[2] which are similar in type and nature and related to the lawful purposes of another agreement or transaction may be excluded by the courts from the application of the 'per se' violations listed in subsection (2) and from the application of subsection (1) of this section if such is the interpretation given by the federal courts in construing section 1 of the Sherman Act."

2. Standards of Prohibitions under the Antitrust Laws.

The standards of prohibitions under the antitrust laws have changed over the years. During the early period in the development and evolution of the common law governing restraints of trade, all acts in restraints of trade for "necessaries of life" or "articles of prime necessity" were illegal and thus prohibited. With the passage of the centuries the categorical prohibitions of acts in restraint of trade of the early common law were modified through judicial decisions and statutory enactments. Today the Hawaii Antitrust Act, which reflects this evolution, prohibits some acts as being illegal per se while another group of acts though not illegal per se may nonetheless be prohibited.

The distinction between acts which are illegal per se and acts which are *not* illegal per se lies in the fact that the former acts are by their very nature considered detrimental to the general vigor of competition. Thus, in price-fixing, the price which is fixed may not have any effect on the general market structure but the very act of price-fixing is considered detrimental to the general vigor of competition and is illegal per se. In the case of boycotts, the inducement of fear in the person boycotted to make such person conform to a prearranged plan or course of action stifles independent action by competitors.

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[2] Letter of chairman of Senate conferees on H.B. 27, C.D. 1 dated June 2, 1961 to chairman of House conferees stated that the following language was omitted from the conference committee report after the word "agreements":

"contained in subsection (3) of section 2 is not exclusive and that ancillary restrictive covenants and agreements"

The distinguishing characteristic of these violations is that no investigation of effects, either actual or probable is involved. The violation of the law is established once the act is shown to exist.

Acts which are *not* illegal per se are prohibited only after considering the actual or probable effect of such acts. Thus an act may be prohibited as being illegal if such an act has been found to be a restraint on trade or commerce or if such an act may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. The method of determining whether an act comes within this prohibitory standard and thus be prohibited as being illegal may be illustrated by the case of *United States v. Bethlehem Steel Corporation.*[3]

In the *Bethlehem* case the court held that the defendant was in violation of section 7 of the Clayton Act.[4] The decision of the court was based on a detailed examination and evaluation of all relevant facts presented before the court for consideration. ". . . (A) good deal of the evidence was of a technical nature requiring some understanding of the process of producing steel and steel products and the operations of steel plants, (therefore) the Court with the consent of counsel and in their company, observed in operation two of the plants of one of the defendants."[5] The court after considering the nature of the iron and steel industry, the process of making steel and steel products, the nature of the consumers of steel, the size, nature and location of companies in the iron and steel industry, the position of the two steel corporations which are planning to merge, the history of the mergers and acquisitions of the above two steel corporations, competition in the iron and steel industry, the relevant market of the two steel corporations, including the line of commerce and section of the country concerned in the case, and the impact of the proposed merger on competition, noted that "The proposed merger would eliminate the present substantial competition between Bethlehem and Youngstown in substantial relevant markets. It would eliminate substantial potential competition between them. It would eliminate a substantial independent alternative source of supply for all steel consumers. It would eliminate Youngstown as a vital source of supply for independent fabricators who are in competition with Bethlehem in the sale of certain fabricated steel products. It would eliminate Youngstown as a substantial buyer of certain fabricated steel products."[6] The proposed merger was therefore prohibited because it ". . . runs afoul of the prohibition of the statute in so many directions that to permit it, is to render . . ." the section which prohibits such mergers ". . . sterile."[7]

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[3] 168 F. Supp. 576, (S. D. N. Y., 1958).
[4] 38 Stat. 731, 15 U. S. C. 18. See section 5 of the Hawaii Antitrust Act.
[5] *U. S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 580-581 (S. D. N. Y., 1958).
[6] *Ibid.*, p. 615.
[7] *Ibid.*, p. 618.

Under section 7 of the Clayton Act[8] it is not necessary that the merger occur, or ". . . that restraint or monopoly was intended."[9] "The issue under section 7 is whether there is a reasonable probability of substantial lessening of competition."[10]

[8] 38 Stat. 731, 15 U. S. C. 18.
[9] *U. S. v. duPont*, 353 U. S. 586, 607, 77 Sup. Ct. 872, 1 L. Ed. 2d 1057, (1957).
[10] *Crown Zellerbach v. F.T.C.*, 29 U. S. Law Week 2593 (CA-9, June 5, 1961).

CHAPTER IV
PROHIBITED ACTS WHICH ARE ILLEGAL PER SE

1. Introduction

Acts in trade or commerce which are prohibited under the Hawaii Antitrust Act may be classified as acts which are illegal per se which are described in this chapter, and acts which are *not* illegal per se which are described in Chapter V.

Acts which are illegal per se are illegal in themselves, standing alone. Acts which are not illegal per se are condemned when the effects are, or may be substantially to lessen competition or to tend to create a monopoly.

2. Price-Fixing

a. *Introduction*

". . . (P)rice-fixing as an unlawful act includes any tampering with or manipulation of prices."[1] "They are fixed because they are agreed upon."[2] ". . . (T)he machinery employed by a combination for price-fixing is immaterial."[3] These acts are prohibited as being illegal per se under the restraint of trade prohibitions under section 2(1) and the enumerated prohibited acts under section 2(2) of the Hawaii Antitrust Act.

b. *Price-fixing prohibitions under section 2(1)*

Under section 1 of the Sherman Act:[4]

> ". . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity . . ., the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or . . . purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market condi-

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[1] *Allied Paper Mills v. Federal Trade Com'n.*, 168 F 2nd 600, 607 (CA 7, 1948), cert. denied 336 U. S. 918, 69 Sup. Ct. 640, 93 L. Ed. 1081 (1949).
[2] *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 222, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).
[3] *Ibid.*, p. 223.
[4] The comparable provision is section 2(1) of the Hawaii Antitrust Act.

tions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control . . . . Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under section 1 of the Act."[5]

If there is price-fixing ". . . the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard, without increase of price to the consumer, or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing than were the 'competitive evils' in the *Socony-Vacuum* case."[6]

In the case of *C-O-Two Fire Equipment Co. v. United States*,[7] defendants were manufacturers and sellers of portable fire extinguishers in the Southern California area. These defendants generally adhered to consumer prices published by all of the defendants. These prices were identical to each other and each knew and each understood the price at which he was required to sell. The price-fixing arrangement was coupled with illegal licensing agreements, containing minimum price maintenance provisions, standardization of product, raising price during period of surplus, policing of dealers to effectuate minimum price provision, and uniform price system. These latter factors do not appear to be material in holding the defendants as having violated the antitrust laws but merely compounded the seriousness of their violations because the use of a list price itself can be unlawful under the antitrust laws as illustrated by the *Plymouth Dealers' Association of Northern California v. United States*.[8]

In the *Plymouth Dealers'* case, the Plymouth Dealers' of Northern California published and circulated to said association members a list price. There was testimony that the fixed list price was created and intended to be used to eliminate public distrust, occasioned by the previous wide variance in quoted retail prices which were

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[5] *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 223-224, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).

[6] *U. S. v. Masonite Corp.* 316 U. S. 265, 276, 62 Sup. Ct. 1070, 86 L. Ed. 1461 (1942).

[7] 197 F 2d 489 (CA 9, 1952), cert. denied, 344 U. S. 892, 73 Sup. Ct. 211, 97 L. Ed. 690 (1952).

[8] 279 F 2d 128 (CA 9, 1960).

determined as a matter of individual dealer's judgment, varying to meet competitor's prices. The "fixed, uniform list price" was not precisely followed in many, and in fact, most instances. It was not intended to be so used. It was fixed "high" so a greater trade-in could be allowed; so that the ultimate percentage of gross profit over the factory price could be higher. It was used by some dealers in seventy-five per cent of their sales. This list price was shown to customers, at times, as "the regular price" of the automobile. By the agreed uniform price, Plymouth's list price became $2,340 in San Francisco, rather than $2,130. The court held the defendants as having violated the antitrust laws because by the use of the list price, the Association members who had to pay the factory price for their Plymouths, had agreed to put the starting price for their bargaining at $2,340 instead of $2,130 (the manufacturer's suggested retail price), and thus followed a minimum price, not within their control, as modified by a hypothetical gross price controlled by them. This established as a matter of actual practice one boundary of the range within which sales would be made. This was a factor which prevented the determination of market prices by free competition alone, and thus was held to be a restraint of trade by the United States Court of Appeals for the Ninth Circuit.

c. *Price-fixing prohibitions under section 2(2).*

Under section 2(2) of the Hawaii Antitrust Act the following acts which affect prices whether done directly or indirectly are prohibited:

1. Fix, control, or maintain, the price of any commodity;
2. Limit, control, or discontinue, the production, manufacture, or sale of any commodity for the purpose of fixing, controlling or maintaining its price;
3. Limit, control, or discontinue, the production, manufacture, or sale of any commodity with the result of fixing, controlling or maintaining its price;
4. Fix, control, or maintain, any standard of[9] quality of any commodity for the purpose of fixing, controlling or maintaining its price;
5. Fix, control, or maintain, any standard of[10] quality of any commodity with the result of fixing, controlling or maintaining its price.

These acts are prohibited when done by a person in agreement, combination, or conspiracy with any other person or persons. In addi-

[9] The word "of" which appears in the Hawaii Antitrust Act may be a typographical error for the word "or". The word "or" appears in House Bill No. 27, House Draft 2 as it passed on third reading in the House of Reperesentatives. The word "of" appears in all Senate drafts of said bill including the Conference Committee draft (1st. State Leg., Gen. Sess. 1961).

[10] See note 9.

tion the prohibition applies when such person becomes a member of, or participates in, any understanding, arrangement, pool or trust. The Act thus condemns "conspiracy" and "mutuality of behavior" which is tantamount to conspiracy. These prohibitions are inapplicable to price-fixing by members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation.

3. Tying Arrangement

a. *Introduction*

". . . (A) tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier".[11] ". . . (W)here the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price".[12] ". . . (T)ying agreements fare harshly under the laws forbidding restraints of trade . . ."[13] because "(t)ying agreements serve hardly any purpose beyond the suppression of competition".[14] "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of . . . commerce is affected".[15] Such arrangements or agreements deny competitors free access to the market for the tied product because of his power or leverage in another market. "At the same time buyers are forced to forego their free choice between competing products."[16]

> "The justification most often advanced in their defense — the protection of the good will of the manufacturer of the tying device — fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied. In the usual case only the prospect of reducing

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[11] *Northern Pacific R. Co. v. U. S.*, 356 U. S. 1, 5-6, 78 Sup. Ct. 514, 2 L. Ed. 2d 545 (1958).

[12] *Ibid.*, n. 4, p. 6.

[13] *Times-Picayune v. U. S.*, 345 U. S. 594, 606, 73 Sup. Ct. 872, 97 L. Ed. 1277 (1953).

[14] *Standard Oil Co. v. U. S.*, 337 U. S. 293, 305-306, 69 Sup. Ct. 1051, 93 L. Ed. 1371 (1949).

[15] *Northern Pacific R. Co. v. U. S.*, 356 U. S. 1, 6, 78 Sup. Ct. 514, 2 L. Ed. 2d 545 (1958).

[16] *Ibid.*

competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one . . . . The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also".[17]

Although a tying arrangement is, in general, illegal per se under section 2(1) of Hawaii Antitrust Act, such arrangements may also be illegal "when the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State" under section 3 of the Hawaii Antitrust Act. Depending upon the facts of the case a person may be violating both sections 2(1) and 3 of the Hawaii Antitrust Act. The Department of Justice in its enforcement of the prohibition against tying arrangements under the federal antitrust laws have proceeded against alleged violators under both section 1 of the Sherman Act which corresponds to section 2(1) of the Hawaii Antitrust Act and under section 3 of the Clayton Act which corresponds to section 3 of the Hawaii Antitrust Act. The Supreme Court of the United States said "Since the decree below is sustained by our interpretation of section 3 of the Clayton Act, we need not go on to consider whether it might also be sustained by section 1 of the Sherman Act."[18]

The courts have drawn a distinction in the tying arrangement violations under section 1 of the Sherman Act and section 3 of the Clayton Act. ". . . (S)ection 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act."[19] ". . . (T)he broad terms and constructions of the Sherman Act cannot be transplanted automatically into section 3 of the Clayton Act . . . . Section 3 of the Clayton Act is a 'narrower Act' than the Sherman Act. Each Act must be interpreted in light of its own provisions. Although the Clayton Act may be supplementary to the Sherman Act, it is not co-extensive with it."[20] The two sections differ from each other in that section 3 of the Clayton Act consists of specifically enumerated acts which are *not* illegal per se, whereas section 1 of the Sherman Act encompasses a greater variety of acts under its general restraint of trade provisions and these acts are essentially illegal per se. Because of the substantive differences between these sections, the corresponding sections of the Hawaii Antitrust Act, i.e. sections 2(1) and 3, are considered separately, the former in this chapter and the latter in Chapter V.

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[17] *Standard Oil Co. v. U. S.*, 337 U. S. 293, 306, 69 Sup. Ct. 1051, 93 L. Ed. 1371, (1949).

[18] *Ibid.*, p. 314.

[19] *Ibid.*, p. 297.

[20] *U. S. v. Investors Diversified Services*, 102 F. Supp. 645, 649 (D. Minn., 1951).

b. *Tying agreement prohibitions under section 2(1).*

Tying agreements prohibited under section 2(1) of the Hawaii Antitrust Act cover a greater variety of situations than do tying agreements under section 3 of the Act as illustrated by the following cases. These cases illustrate the use of economic or market power to restrain trade by the use of a tying arrangement with another commodity or service which the customer must accept.

In the case of *International Salt Co. v. United States*[21] the court held that a tying agreement wherein the defendant corporation, which is the country's largest producer of salt for industrial uses, requires that lessees of machines on which it owns patents shall use only the corporation's unpatented products in them is in violation of section 1 of the Sherman Act[22] and section 3 of the Clayton Act. The fact that the tying item was patented was not material in the decision of the case. The court stated that "By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws."[23]

A similar line of reasoning has been followed in the case of *Jerrold Electronics Corp. v. United States.*[24] The defendant was a dominant community television antenna manufacturer who pioneered in the developing, equipping, and servicing of community television antenna systems. Due to the fact that the system developed by the defendant was new and required specialized knowledge and equipment, it was at first feasible to have the sale of its early equipment tied in with service contracts. When the defendant persisted in this practice to a time when it no longer needed the security of a tied contract for economic support which was required at first, the defendant was held to have transgressed into the area of prohibited acts because the defendant was now using its market power over its equipment to induce operators of the equipment to buy its services and thus curtail their freedom of choice.

Another example of tying agreement is found in the case of *Northern Pacific Railway Co. v. United States.*[25] Here the defendant had been granted approximately forty million acres of land in several northwestern states and territories to facilitate its construction of a railroad line from Lake Superior to Puget Sound. In subsequent years to 1949, it had sold about 37,000,000 acres of its holdings and re-

[21] 332 U. S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947).
[22] The comparable provision is section 2(1) of the Hawaii Antitrust Act.
[23] 332 U. S. 392, 396. 68 Sup. Ct. 12, 92 L. Ed. 20 (1947).
[24] 187 F. Supp. 545, (E. D. Pa. 1960) aff'd 365 U. S. 567, 81 Sup. Ct. 755, 5 L. Ed. 2nd 806 (1961), reh. denied 365 U. S. 890, 81 Sup. Ct. 1026, 6 L. Ed. 2d 200 (1961).
[25] 356 U. S. 1, 78 Sup. Ct. 514, 2 L. Ed. 2d 545 (1958).

served mineral rights in 6,500,000 of these acres. Most of the unsold land was leased for one purpose or another. In a large number of its sales contracts and most of its lease agreements, the defendant had inserted "preferential routing" clauses which compelled the vendee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its services) were equal to those of competing carriers. The contention of the defendant was that these "preferential routing" clauses are subject to so many exceptions and that they have been administered so leniently that they do not significantly restrain competition and also that the vendee or lessee is permitted under the clauses to ship by a competing carrier if its rates were lower or if its services were better than the defendant's. The court noted that ". . . the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant" and thus restrain trade.[26]

Tying agreements which are not illegal per se but which are prohibited by the Hawaii Antitrust Act when the effect may be to substantially lessen competition or to tend to create a monopoly in any line of commerce in any section of the State are described in Chapter V.

4. Boycotts

a. *Introduction*

Boycott may be defined as an action or a group action taken against a person for the purpose of achieving certain objectives. The word was first used in an American case in *State v. Glidden.*[27] The court in that case, to obtain the real meaning of the word, referred to the circumstances in which the word originated. In essence boycott originated from the name of Captain Boycott, who was on agent of Lord Earne and a farmer in the district of Connemara, Ireland. When Captain Boycott, as agent, served notices on Lord Earne's tenants, the population of the region retaliated by resolving not to have anything to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. When the time came to harvest his crops, Captain Boycott had to have the services of armed laborers from Ulster to the north and a little army to protect the laborers. The court concluded, "If this is a correct picture, the thing we call a boycott originally signified violence, if not murder."[28]

Under the Hawaii Antitrust Act the provisions governing boycotts which are illegal per se are provided in sections 2(1),[29]

[26] *Ibid.*, p. 12.
[27] 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23 (1887).
[28] *Ibid.*, p. 77.
[29] Section 2(1) reads as follows:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is declared illegal."

2(2)(d),[30] and 4.[31] Section 2(1) governs all types of boycotts. Section 2(2)(d) is limited to boycotts only as such enumerated prohibited acts affect prices. Section 4 is limited to buying and selling of commodities.

b. *Restraint of trade boycott prohibitions under section 2(1).*

Boycott is one of the practices which is illegal per se under section 2(1) of the Hawaii Antitrust Act.[32] The full scope of this type of prohibition is set forth in the following cases.

In the case of *Eastern States Retail Lumber Dealers' Ass'n v. United States,*[33] defendants were various lumber associations composed of retail lumber dealers in New York and neighboring states and the officers and directors of the association. This association systematically circulated among its members reports containing confidential information including the names of wholesalers who had been reported by the association's investigators to be soliciting or selling directly to consumers. Although the members were not instructed as to the course of action to be taken, the court said ". . . he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own . . . . In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed".[34] The court further noted that "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade . . . (but) (w)hen the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of . . . trade and commerce and unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation . . ."[35] of the antitrust laws.

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[30] See discussion of section 2(2)(d) for the full text of this section.

[31] Section 4 reads as follows:

"No person shall refuse to sell any commodity to, or to buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by other sections of this Act."

[32] See *Klor's v. Broadway-Hale Stores,* 359 U. S. 207, 212, 79 Sup. Ct. 705, 3 L. Ed. 2d 741 (1959).

[33] 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490 (1914).

[34] *Ibid.,* pp. 608-609.

[35] *Ibid.,* p. 614.

In group boycotts such as those in the foregoing case, the size of the person boycotted makes no difference. It may be just a small merchant whose business is so small that his destruction makes little difference to the economy such as in the case of *Klor's v. Broadway-Hale Stores.*[36] Klor's, Inc., operated a retail store on Mission Street, San Francisco, California equipped to handle all brands of appliances. Within a few blocks of Klor's were found other household appliance retailers who sold many competing brands of appliances. Next door to Klor's, Broadway-Hale Store, Inc., a chain of department stores, operated one of its stores. These two stores competed in the sale of radios, television sets, refrigerators and other household appliances. Broadway-Hale through its "monopolistic" buying power conspired and brought about a situation wherein manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others would not sell to Klor's or would sell to it only at discriminatory prices and highly unfavorable terms. The court held that "This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever . . . (I)t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."[37]

Another variation of group boycott is illustrated by the case of *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*[38] Here a manufacturer and seller of a ceramic gas burner could not sell his burners because the buyers could not obtain any gas from the supplier. This situation emerged as a result of an unlawful combination and conspiracy wherein the manufacturer was not able to have affixed on his burner a seal of approval from the American Gas Association which purported to determine the safety, utility, and durability of gas burners. The burner was submitted to the Association two times and was not approved in both instances although it was safer and more efficient than, and just as durable as, gas burners the Association had approved. The court held that the alleged conspiratorial refusal to provide gas by Peoples Gas through its influence as a member of American Gas Association to withhold approval of the burner ". . . for use in plaintiff's Radiant Burners 'interferes with the natural flow of . . . commerce (and) clearly has, by its 'nature' and 'character', a 'monopolistic tendency'."[39]

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[36] 359 U. S. 207, 79 Sup. Ct. 705, 3 L. Ed. 2d 741 (1959).
[37] *Ibid.*, p. 213.
[38] 364 U. S. 656, 81 Sup. Ct. 365, 5 L. Ed. 2d 358 (1961).
[39] *Ibid.*, 81 Sup. Ct. 365, 367.

c. *Price-fixing boycott prohibitions under section 2 (2) (d).*

Price-fixing by use of boycott is prohibited under section 2 (2) (d) which reads as follows:

". . . (N) o person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State:

"(a) fix, control, or maintain, the price of any commodity;

"(b) limit, control or discontinue, the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

"(c) fix, control, or maintain, any standard of[40] quality of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;"

"(d) refuse to deal with any other person or persons for the purpose of effecting any of the acts described in (a) to (c) of this subsection."

Specifically no person shall, together with another person (group boycott), refuse to deal with any other person or persons for the purpose of effecting any of the following acts:

1. Fix, control, or maintain the price of any commodity;

2. Limit, control, or discontinue, the production, manufacture or sale of any commodity for the purpose of fixing, controlling or maintaining its price;

3. Limit, control, or discontinue, the production, manufacture or sale of any commodity with the result of fixing, controlling or maintaining its price;

4. Fix, control, or maintain the standard of quality of any commodity for the purpose of fixing, controlling or maintaining its price;

5. Fix, control, or maintain the standard of quality of any commodity with the result of fixing, controlling or maintaining its price;

The prohibition against the above enumerated acts attaches when a person does any of the above acts as a part of the following acts:

1. Agree, combine or conspire with any other person or persons, or

2. Enter into, become a member of, or participate in any understanding, arrangement, pool, or trust.

[40] See footnote 9 of this chapter.

d. *Refusal to deal under section 4.*

Section 4 of the Hawaii Antitrust Act prohibits any person from refusing to sell or to buy any commodity to or from any other person or persons when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts, which if acceded to, are prohibited by other sections of the Act.

5. Allocation of Markets

a. *Introduction*

Allocation of markets is the practice wherein conspirators split up the market and let each conspirator do as he pleases in his sector.[41] The market division may be geographical or specific classes or categories within a geographical area. The prohibition relative to these practices are described hereafter.

b. *Allocation of market prohibitions under section 2(1).*

Allocation of markets is prohibited under section 2(1) of the Hawaii Antitrust Act. This practice is illegal per se whether the allocation is by an agreement or mutual arrangement to divide the existing customers among the conspirators[42] or to divide the territory in which each conspirator shall confine its respective activity.[43] An example of allocation of market is described in the leading case of *Addyston Pipe and Steel Company v. United States.*[44]

In the *Addyston* case, six corporations engaged in the manufacture of cast-iron pipe in several states formed an association through which a section of the United States was divided into separate territories where a member of the association would adhere to certain agreed and enumerated restrictions designed to benefit the members. There were other territories where no restrictions were to be followed. Within the controlled territories one of the practices consisted of rigged bidding. The effect of such rigged bidding within the controlled territories was to make the prices higher than in the uncontrolled territories although the foundries were closer to or located within the controlled territories. The court observed that:

> "the defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by compe-

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[41] National Conference on Consumer and Investor Protection, "State Antitrust Law, Reference Handbook," p. 15 (1960).

[42] See *United States v. American Linen Supply Co.*, 141 F. Supp. 105 (N.D. Ill., 1956), 29 U. S. Law Week 2571 (1961).

[43] See *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136 (1899).

[44] *Ibid.*

tition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret 'auction pool' to become the lowest bidder of them at the public letting . . . There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies."[45]

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded".[46]

6. Limitation of Production.

a. *Introduction.*

Limitation of production is a method of price-fixing. Under this method the price of a commodity is fixed or controlled by regulating the amount of such commodity in the market. Generally, where there is a greater amount of commodity in the market, the price of such commodity is lower than when there is a smaller amount of the same commodity in the market. This prohibition against limitation of production attaches only when such act is engaged in concert by two or more independent legal entities. This prohibition *does not* preclude the limitation or regulation of production practices of a single business entity in the normal course of business activity to attain its legitimate objectives. Where an association of business entities disseminates market information, including production figures, for the purpose of regulating or attempting to regulate production of a commodity, such activities are prohibited. Limitation of production is prohibited under both sections 2(1) and 2(2) (a) of the Hawaii Antitrust Act which are described hereafter.

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[45] *Ibid.*, p. 237.

[46] *Ibid.*, pp. 244-245.

b. *Limitation of production prohibition under section 2 (1).*

Limitation of production by joint action is prohibited under section 2 (1) as a type of restraint of trade which is unreasonable. This type of case is illustrated by the case of *United States v. Socony-Vacuum Oil Co.*[47] In this case defendant oil companies and several individuals devised and carried out an organized program of regularly ascertaining the amounts of surplus spot market gasoline[48], and of purchasing part of the spot market supply to eliminate "distress" gasoline[49] on the spot market and to eliminate it as a market factor and thus stabilize the spot market and cause an increase in prices. The effect of the plan was to cause jobbers and consumers in the midwestern area to pay more for their gasoline than they would have paid but for the conspiracy. The court noted that "Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces."[50] "For as we have seen price-fixing combinations which lack Congressional sanction are illegal *per se*; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils."[51]

c. *Limitation of production prohibition under section 2 (2) (b).*

Limitation of production by joint action is specifically prohibited under section 2 (2) (b) as follows:

> ". . . (N) o person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do directly or indirectly . . . ." the following acts:
>
> 1. Limit, control, or discontinue the production or manufacture of any commodity for the purpose of fixing, controlling or maintaining its price;
> 2. Limit, control, or discontinue the sale of any commodity for the purpose of fixing, controlling or maintaining its price;
> 3. Limit, control, or discontinue the production or manufacture of any commodity with the result of fixing, controlling or maintaining its price;
> 4. Limit, control, or discontinue the sale of any commodity with the result of fixing, controlling or maintaining its price.

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[47] 310 U. S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).

[48] Spot market gasoline is that gasoline market where a sale is based on individual bargaining between a refiner and his customers in which shipment is to be made in the immediate future i.e., 10 to 15 days.

[49] "Distress" gasoline is surplus gasoline a refiner cannot store and has to sell immediately for the best price it would bring.

[50] *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).

[51] *Ibid.*, p. 228.

7. Interlocking Directorates and Relationships Between Competitors

a. *Introduction*

Interlocking directorates and relationships under the Hawaii Antitrust Act refer to a situation in which a person who is a director, officer, partner, or trustee in a firm, partnership, trust, association, or corporation is also at the same time occupying any of the above offices in another of the named business entities. For instance a person who is a director of XYZ corporation and an officer of ABC Corporation is within the definition of an interlocking directorate. The number of offices or business entities is not material so long as two or more business entities are involved. Under the Hawaii Antitrust Act interlocking directorates and relationships involving competing and non-competing business entities may be prohibited under certain conditions. The specific prohibition relative to competitors is described in this chapter, while the prohibition relative to non-competitors is described in Chapter V.

b. *Interlocking directorates and relationships between competitors under section 6.*

Whenever any person is a director, officer, partner, or trustee or any combination of these offices in any two or more *competing* firms, partnerships, trusts, associations or corporations or any combinations of such business entities, such person is in violation of the provisions of section 6(1) which reads as follows:

> ". . . No person shall be at the same time a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations or corporations or any combination thereof, engaged in whole or in part in commerce, if such firms, partnerships, trusts, associations or corporations or any combination thereof, are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act."

Section 6(1) of the Act is comparable to the provision relating to interlocking directors between competitors of section 6 of the Clayton Act[52] except for the Clayton Act requirement of $1,000,000 aggregate of capital, surplus, and undivided profits for any one of the corporations concerned. Here no monetary limit is involved. The effect and reason for such deletion is to make any interlock between competing business entities illegal without regard to the size of such business entities. The court in the case of *United States v. Sears, Roebuck and Company*[53] noted that the inclusion of the $1,000,000 size requirement under section 8 of the Clayton Act and the exclusion of

[52] 38 Stat. 732, 15 U. S. C. 19.
[53] 111 F. Supp. 614, (S. D. N. Y., 1953).

the test "may be substantially to lessen competition, or to tend to create a monopoly" was not inadvertent but a deliberate act on part of Congress.[54] The First State Legislature deleted the monetary size requirement when dealing with directorates and relationships of and between *competitors*. On the other hand, interlocking directorates and relationships between *non-competitors* are subject to a monetary size requirement as more fully described in Chapter V. The application of this prohibitory section and specifically the reason why interlocking directorates between competitors are illegal per se is illustrated in the case of *United States v. Sears Roebuck and Company*,[55]

In the *Sears, Roebuck* case, S. J. W. was a director on the boards of both Sears, Roebuck and Company and the B. F. Goodrich Company. These two companies were competitors in almost a hundred communities located in more than thirty states in the sale of refrigerators, washers, stoves, and other household appliances; hardware; automotive supplies; sporting goods; tires, tubes and recaps; radios and television sets; and toys. The court found that Sears, Roebuck and Goodrich were competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The court noted that:

> "While the government does not charge that any such agreement (to eliminate or lessen competition through prohibited acts which are illegal per se such as by a price-fixing agreement or the withdrawal of either Sears or Goodrich from the competing territory or an agreement not to sell the refrigerators in the same area)[56] has been made or is contemplated, a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation. The fact that this has not happened up to the present does not mean that it may not happen hereafter."[57] "Since Sears and Goodrich are competitors, since a price-fixing or division of territory agreement would eliminate competition between them and since such an agreement would per se violate at least one of the provisions of . . . the antitrust laws, it follows that defendant S. J. W. is forbidden to be a director of both corporations at the same time.[58] This section is designed to ". . . nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[59]

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[54] *Ibid.*, p. 619.
[55] *Ibid.*, p. 618.
[56] Inserted for purpose of clarification.
[57] *Ibid.*, p. 620.
[58] *Ibid.*, p. 621.
[59] *Ibid.*, p. 616.

The prohibition against interlocking directorates between competitors under section 8 of the Clayton Act attaches not only as to directors but also to trustees although the language of the Clayton Act does not specify trustees but directors only. Thus five years later (in 1958) in a later *Sears, Roebuck* case, the same court held that S. J. W. may not sit as a trustee of a savings and profit sharing pension fund of Sears, Roebuck while remaining as a director of B. F. Goodrich Company in view of the fact that as such trustee, S. J. W. would have, along with two other trustees, voting power over a controlling block of stock.[60] By this action the court prohibited S. J. W. from doing indirectly what he was prohibited from doing directly under section 8 of the Clayton Act. The substance of the prohibition against interlocking directorates between competitors which underlies section 8 of the Clayton Act is to prevent a person from occupying positions of trust and responsibility within competing entities so that such a person shall not be in a position to serve one entity to the detriment of the other but shall be able to carry out such trust and responsibility without reservation commensurate with such trust and responsibility.

The Hawaii Antitrust Act more directly and specifically prohibits the evils inherent in interlocking relationships. Not only is an interlock involving directors prohibited but also trustee-director interlocking relationships and in addition interlocks involving partners or officers such as presidents, vice-presidents, treasurers or secretaries or any combination of these offices in firms, partnerships, trusts, associations, or corporations which are competitors.

In addition to the direct interlocking directorates and relationships which are forbidden, section 6(3) of the Hawaii Antitrust Act also forbids the use of representatives or "dummy directors" to effectuate the prohibitions against interlocks in cases involving not only competitors but also as between non-competitors:

> ". . . No person shall by the use of a representative or representatives effectuate the result prohibited in the preceding subsections where the act or acts of such representative or representatives acting in their capacities as directors, officers, partners or trustees of such business entities indicate an attempt directly or indirectly to manipulate the conduct of the business entities to the detriment of any of such entities and to the benefit of any other entity in which such person has an interest."

Section 6(4) of the Act also provides that in cases of interlocking directorates or relationships, whether it be between competitors or non-competitors, "the validity or invalidity of any act of any director, officer or trustee done by such director, officer or trustee while occupying such position in violation of the provisions of this

[60] *U. S. v. Sears, Roebuck and Co.*, 165 F. Supp. 356 (S. D. N. Y., 1958).

section shall be determined by the statutory and common law of the State of Hawaii relating to corporations, trust or associations as the case may be except that it shall not be affected by the provisions of section 1-9, Revised Laws of Hawaii 1955. The non-applicability of section 1-9, Revised Laws of Hawaii 1955 shall be limited to this section only."[61]

Unlike interlocking directorates and relationships between competitors, such interlocks between non-competitors are *not* illegal per se but become illegal only if such interlocks may be substantially to lessen competition or to tend to create a monopoly. Such interlocks are discussed in greater detail in Chapter V.

[61] Section 1-9, Revised Laws of Hawaii provides as follows:

"*Prohibitory law, effect.* Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed."

CHAPTER V
PROHIBITED ACTS WHICH ARE NOT ILLEGAL PER SE

1. Introduction

The second and final broad class of acts which are prohibited in trade or commerce and are described in this chapter are acts which are *not* illegal per se. To determine the legality of a group of acts which are *not* illegal per se, the courts weigh the actual or probable economic or business effects of the questioned acts in order to determine their legality. These types of acts which are not illegal per se are described in this chapter.

2. Restraints of Trade or Commerce which may NOT be Illegal Per Se under Section 2(1).

The restraint of trade or commerce provision of section 2(1) of the Hawaii Antitrust Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State . . ." The language of this section has been previously discussed to cover those prohibited acts which are illegal per se in Chapter IV. In the case of *Standard Oil Co. v. United States*[1] decided in 1911 prior to the enactment of the Clayton Act in 1914 and the Anti-Merger Act[2] in 1950, a merger, while not being found to be illegal per se, was nonetheless found to be in violation of sections 1 and 2 of the Sherman Act.[3] The following statement was made by Chief Justice White of the Supreme Court of the United States in the *Standard Oil Co.* case at pages 63-64:

> "To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts

[1] 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911). The Supreme Court of the United States announced the "rule of reason" in this case.
[2] 64 Stat. 1125, 15 U. S. C. 18.
[3] Sections 2(1) and 7 of the Hawaii Antitrust Act are comparable to sections 1 and 2 of the Sherman Act.

to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute."

3. Ancillary Restrictive Covenants or Agreements under Section 2(3).

Restrictive covenants or agreements ancillary to a legitimate purpose not violative of the Hawaii Antitrust Act are exempted from the prohibitions of section 2(2) of the Hawaii Antitrust Act by section 2(3) as follows:

"Notwithstanding the foregoing subsection (2) and without limiting the application of the foregoing subsection (1), it shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this Act, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:

(a) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of said business;

(b) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;

(c) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;

(d) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with his employer or principal, during the term of the

agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent."

The concern over restrictive covenants or ancillary agreements is of ancient origin. One of the earliest and possibly the first reported antitrust case, the *Dyer's* case[4] decided in 1414, concerned itself with the very problem of ancillary agreements and restrictive covenants. Furthermore the first and only decided antitrust case in Hawaii up to the publication of this study, the *Hawaiian Carriage Manufacturing Company v. Schuman Carriage Company*[5] decided in 1906, also involved ancillary agreements and restrictive covenants.

4. Monopolization Prohibition Under Section 7.

Monopoly is the ultimate in restraint of trade.[6] In exists when competition is actually eliminated or the restraint of trade is consummated.[7]

The United States Supreme Court has defined monopoly as that power ". . . to raise prices or to exclude competition when it is desired to do so . . . ."[8] It is the power to make the going price or to exclude competitors.

Monopoly by itself is not necessarily illegal. It may be obtained by statutory grant such as by companies in the fields of telephone, bus, electricity, gas or other public utilities. It may also be the effect of a situation that may be ". . . so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."[9]

Section 7 of the Hawaii Antitrust Act prohibits monopoly as follows:

"No person shall monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State."

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[4] Y. B. 2 Hen. 5, fo. 5, pl. 26; 27 Laws of England, 550, 551.

[5] 17 Haw. 495 (1906).

[6] *U. S. v. Aluminum Co. of America*, 148 F. 2d 416, 428 (CA 2, 1945).

[7] National Conference on Consumer and Investor Protection, "State Antitrust Law Reference Handbook," 1960, p. 25.

[8] *American Tobacco Co. v. United States*, 328 U. S. 781, 811, 66 Sup. Ct. 1125, 90 L. Ed. 1575 (1946).

[9] *United States v. Aluminum Co. of America*, 148 F 2d 416, 430, (CA 2, 1945).

Whenever a monopoly exists, it becomes unlawful if an element of deliberateness exists such as a history of predatory behavior,[10] the absorption of competitors by mergers,[11] or the taking of steps by a monopolist to preserve his power and prevent the entry of competitors such as by the use of exclusive agreements within the geographical area controlled.[12] Monopolization is prohibited whether the attempt to monopolize is successful or not because the attempt to monopolize itself is undesirable. Furthermore the prohibition extends to prevent any person to combine or conspire with any other person to monopolize.

The prohibition against monopolization extends under section 7 to "any part of the trade or commerce in any commodity in any section of the State." Thus it includes any part of the trade or commerce in goods, merchandise, produce, choses in action and any other article of commerce, and in addition trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business. The geographical area involved may be an island or a section of an island depending upon the nature of the commodity and of the market of such commodity involved in the monopolization.

5. Tying Arrangement Prohibitions Under Section 3.

The tying arrangement prohibitions under section 3 of the Hawaii Antitrust Act prohibit such arrangements when the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State." The prohibitions against tying arrangements under section 3 differs from those under section 2(1) in that the latter prohibits such arrangements as being illegal per se whereas in the former such arrangements are *not* illegal per se.

In connection with the tying arrangements under section 3 it is pertinent to note that a tying arrangement may manifest itself in the following manner in trade or commerce:

1. Exclusive supply contracts in which the supplier supplies all of the requirements of a buyer;[13]

2. Exclusive output contracts in which the producer or manufacturer delivers to the buyer all of the commodity produced;[14]

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[10] See *American Tobacco Co. v. United States*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, (1911); *Standard Oil Co. v. United States*, 221 U. S. 1, 32 Sup. Ct. 502, 55 L. Ed. 619 (1911).

[11] Ibid.

[12] *United States v. Griffith*, 334 U. S. 100, 68 Sup. Ct. 941, 92 L. Ed. 1236 (1948).

[13] *International Salt Co. v. U. S.*, 332 U. S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947).

[14] See *Standard Oil Co. v. U. S.*, 337 U. S. 293, 69 Sup. Ct. 1051, 93 L. Ed. 1371 (1949).

3. Exclusive dealership in which a manufacturer gives to a dealer the exclusive right to deal in the commodity of the manufacturer;[15]

4. Exclusive service contract in which the buyer agrees to have the commodity bought to be serviced only by the seller;[16] and

5. Preferential routing system in which the buyer agrees to ship his commodities through the facilities of the seller.[17]

Under section 3 tying arrangements are prohibited under the following situations:

1. Selling any commodity on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller when the effect of the sale or the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

2. Buying any commodity on the condition, agreement, or understanding that the other person or persons shall not deal with the competitor of the purchaser, when the effect of the purchase, or the agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

3. Fixing a price, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller, when the effect of the sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

4. Fixing a price, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller, when the effect of the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

5. Fixing a price, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person shall not deal with the competitor of the purchaser when the effect of the purchase may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

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[15] See *Nelson Radio and Supply Co. v. Motorola, Inc.* 200 F. 2d 911 (CA 5, 1952), cert. denied 345 U. S. 925, 73 Sup. Ct. 783, 97 L. Ed. 1356 (1953).

[16] *Jerrold Electronics Corp. v. U. S.*, 187 F. Supp. 545 (E. D. Pa. 1960), aff'd 365 U. S. 567, 81 Sup. Ct. 755, 5 L. Ed. 2d 806 (1961), reh. denied, 365 U. S. 890, 81 Sup. Ct. 1026, 6 L. Ed. 2d 200, (1961).

[17] *Northern Pacific R. Co. v. U. S.*, 356 U. S. 1, 78 Sup. Ct. 514, 2 L. Ed. 2d 545 (1958).

6. Fixing a price, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person shall not deal with the competitor of the purchaser when the effect of the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State.

It is not necessary that there be specific clauses not to deal in the commodity of a competitor, so long as the ". . . practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act[18] which cover all conditions, agreements or understandings of this nature . . . . This system of 'tying' restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur. It is true that the record discloses that in many instances these provisions were not enforced. In some cases they were. In frequent instances it was sufficient to call the attention of the lessee to the fact they were contained in the lease to ensure compliance with their provisions. The power to enforce them is omnipresent and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor in many instances forebore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act."[19]

The applicability of the prohibitions under section 3 may be illustrated in the case of *Tampa Electric Company v. Nashville Coal Company*.[20] In this case the Tampa Electric Company, a public utility, produced and sold electricity in the Tampa, Florida area. In 1955 the Tampa Electric Company contracted with the Nashville Coal Company to have Nashville supply the expected coal requirements of two new electric generating plants for the next twenty years. After several million dollars were expended by Tampa to be ready to perform its part of the contract, Nashville informed Tampa that it could not perform the contract because the contract was illegal under the antitrust laws. The Supreme Court of the United States noted that the controlling factor in this case was the relevant market area. ". . . (T)he relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided."[21] The court said that "In weighing the various factors we have decided that in the competitive bituminous coal marketing area involved here the contract sued upon does not tend to foreclose a substantial volume of

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[18] 38 Stat. 731, 15 U. S. C. 14.
[19] *United Shoe Mach. Co. v. U. S.*, 258 U. S. 451, 457-458, 42 Sup. Ct. 363, 66 L. Ed. 708 (1922).
[20] *Tampa Electric Company v. Nashville Coal Company*, 365 U. S. 320, 81 Sup. Ct. 623, 5 L. Ed. 2d 580 (1961).
[21] *Ibid.*, 81 Sup. Ct. 623, p. 629.

competition ."[22] ". . . (I)n the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal *per se*."[23]

Although in the *Tampa Electric* case the Court decided and disposed of the case only on the basis of section 3 of the Clayton Act, the respondents contended that sections 1 and 2 of the Sherman Act were also violated. The Court said "we need not discuss the respondents' further contention that the contract also violates section 1 and section 2 of the Sherman Act for it does not fall within the broader proscription of section 3 of the Clayton Act it follows that it is not forbidden by those of the former."[24]

In the case of *United States v. Richfield Oil Corporation*,[25] the Supreme Court of the United States affirmed the finding of the District Court that Richfield had violated section 3 of the Clayton Act as well as section 1 of the Sherman Act. This case involved a system of tying arrangements wherein service stations controlled by Richfield were allowed to advertise and sell only Richfield products. Refusal to comply with such policy resulted in replacement of such dealer within twenty four hours by another who would comply. There was no one contract which set forth the rigid requirement contracts but ". . . a series of instruments, the sole object of which is to tie these stations to contracts which, in effect, are requirement contracts, although not so denominated."[26] The Court, therefore enjoined these activities of Richfield.

6. Mergers, Acquisitions, and Holdings of Shares and Assets Prohibitions Under Section 5.

a. *Prohibitions against mergers, acquisitions, and holdings of shares and assets under section 5.*

The prohibitions against mergers, acquisitions and holdings of shares and assets under section 5 of the Hawaii Antitrust Act apply to corporations only and are restricted to situations where the effect may be substantially to lessen competition or to tend to create a monopoly or is substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the State. The specific prohibitions within the purview of section 5 are that no corporation shall:

1. Acquire and hold, directly or indirectly, the whole or any part of the stock or other share capital of any other corporation

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[22] *Ibid.*, 81 Sup. Ct. 623, p. 632.
[23] *Ibid.*, 81 Sup. Ct. 623, p. 631.
[24] *Ibid.*, 81 Sup. Ct. 623, p. 632.
[25] 99 F. Supp. 280 (S. D. Cal. 1951), aff'd. 343 U. S. 922, 72 Sup. Ct. 665, 96 L. Ed. 1334 (1952); reh. denied, 343 U. S. 958, 72 Sup. Ct. 1049, 96 L. Ed. 1358 (1952).
[26] *Ibid.*, p. 296.

where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State;

2. Acquire and hold, directly or indirectly, the whole or any part of the assets of any other corporation where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State;

3. Hold directly or indirectly, the whole or any part of the stock or other share capital of any other corporation acquired prior to the effective date of the Act, where the effect of such holding *is* substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the State;

4. Hold directly or indirectly, the whole or any part of the assets of any other corporation, acquired prior to the effective date of the Act, where the effect of such holding *is* substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the State.

b. *Legislative background of section 5.*

Section 5 (1) is concerned with the acquisition and holding from and after the effective date of this Act the whole or any part of the stock or other share capital and assets of any other corporation where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. The Conference Committee Report on section 5 (1) states as follows:

"Subsection (1) deals with the acquisition and holding of share capital and assets from and after the effective date of the Act. In subsection (1) it is intended that where the words "acquire and hold" and the words "acquisition and holding" are used they mean not only acquisition and holding of such stock, share capital or assets, but also the use of such stock or share capital by the voting or granting of proxies or otherwise."

Section 5 (2) is concerned with the holding of the whole or any part of the stock or other share capital or assets of any other corporation which were acquired prior to the effective date of this Act, where the effect of such holding is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. A procedure for divestiture is set forth under section 5 (2) of the Act for the stock, share capital or assets of a corporation where the court finds that there is a substantial lessening of competition or tendency to create a monopoly. The Conference Committee Report on section 5 (2) states as follows:

"Subsection (2) deals with the problem of divestiture of stocks, share capital or assets of a corporation which continues to hold stock, share capital or assets of any other corporation

acquired prior to the effective date of this Act where the effect of such continued holding is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. When the court determines that the holding of such stock, share capital, or assets violates the aforesaid test then the Court shall order the divestiture or other disposition within a reasonable time, manner and degree of divestiture or other disposition.

"If the assets acquired prior to the effective date of this Act is the subject of a court determination, that the holding thereof is 'substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State', but if such assets have been intermingled to such an extent that separation would cause a disruption of the economic entity (undue hardship) then it is the intent of this section that the order to divest shall not apply."

c. *Divestiture or other disposition of stocks, share capital, or assets.*

Where the acquisition or holding of stocks, share capital, or assets of a corporation is in violation of any of the provisions of section 5 of the Hawaii Antitrust Act, the divestiture of such stock, share capital, or assets is provided for under section 5(2) as follows:

"Where the Court shall find that the holding of such stock, share capital, or assets is substantially to lessen competition or tend to create a monopoly, and is therefore not in the public interest, then the Court shall order the divestiture or other disposition of such stocks, share capital, or assets of such corporation, and shall prescribe a reasonable time, manner and degree of such divestiture or other disposition thereof, provided that the court shall not order the divestiture or other disposition of the assets of such corporation unless it is necessary to eliminate the lessening of competition or the tendency to create a monopoly, and the assets are reasonably identifiable and separable, and it can be done without causing undue hardship on the economic entity."

The divestiture of stocks, share capital or assets is not limited to the provisions of section 5(2) but may also be instituted under the equity powers of the court for violation of the provisions of section 2(1) and 7 involving a ". . . contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of the State . . .," or acts by a person to ". . . monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State" respectively.

The utilization of such divestiture powers may be illustrated in the case of *Schine Theatres v. United States* involving a theatre chain which violated the provisions of sections 1 and 2 of the Sherman Act

which are comparable to sections 2 (1) and 7 of the Hawaii Antitrust Act respectively. The Supreme Court of the United States required the Schine Theatres to divest itself of the prohibited acquisitions and stated that "To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."[27]

7. Prohibitions Relating to Interlocking Directorates and Relationships Between Non-Competitors Under Section 6.

Under section 6 of the Hawaii Antitrust Act no person shall be at the same time a director, officer, partner, or trustee in any two or more non-competing firms, trusts, partnerships or corporations or any combination of such positions or business entities[28] if the following cumulative tests are met:

1. When any one of the business entities has a total net worth aggregating more than $100,000, or the total net worth of all of the business entities engaged in whole or in part in trade or commerce in this State, aggregate more than $300,000; and

2. Where the effect of a merger between such business entities whether legally possible or not may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State.

Unlike interlocking directorates and relationship between competitors which are illegal by virtue of the existence of the interlocks between competitors, interlocks between non-competitors are declared illegal only where the effect of a merger between such business entities whether legally possible or not may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. This test of the effect on competition may be considered within the context of the dollar size requirement. The dollar size requirement is a standard of substantiality involved in the test set forth, i. e. which may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State.[29] Thus if any one of the business entities involved in the interlocks have a total net worth aggregating more than $100,000 or the total net worth of all of the business entities aggregate more than $300,000 (such as five firms with net worths of $60,000 each), such interlocks may be within the area of prohibited interlocks.

The use of the words "whether legally possible or not" is intended to make clear that a hypothetical or conceptual merger shall be

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[27] 334 U. S. 110, 128, 68 Sup. Ct. 947, 92 L. Ed. 1245 (1948).
[28] Popularly referred to as "vertical interlocks."
[29] *U. S. v. Sears Roebuck and Co.*, 111 F. Supp. 614, 619 (S. D. N. Y. 1953).

used in the determination of the legality of the interlock such as in the case of *United States v. Bethlehem Steel Corporation*[30] which involved a hypothetical or conceptual merger and is not to be rejected as in the case of *United States v. Sears Roebuck and Company*.[31] The so-called horizontal interlocks between competitors are illegal per se but the so-called vertical interlocks between non-competitors are prohibited only if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State.

Interlocking arrangements between directorates may be subtle. "The web that is woven may tie many industries, . . . together into a vast and friendly alliance that takes the edge off competition."[32] Those ". . . entwined relations are the stuff out of which concentration of financial power over American industry was built and is maintained."[33]

Section 6 of the Hawaii Antitrust Act may be explained as follows:

1. Section 6(1) provides that six months after the effective date of this Act interlocking directorates and relationships among directors, officers, partners, or trustees of two or more firms, partnerships, trusts, associations or corporations or any combinations thereof are prohibited where the elimination of competition by agreement between competitors would constitute a violation of any of the provisions of the Hawaii Antitrust Act as discussed in Chapter IV.
2. Section 6(2) provides for the non-competing interlocking directorates and relationships that would be prohibited six months after the effective date of this Act. This section does not apply to an interlocking directorship between a bank and any other business firm or entity.
3. Section 6(3) provides that a person cannot use a representative or representatives to effectuate the result prohibited in the preceding sections where a person attempts directly or indirectly to manipulate the conduct of the business entities to the detriment of any one entity to the benefit of any other entity.
4. Section 6(4) provides that the validity or invalidity of the acts of any person occupying a position in violation of sections 6(1) and 6(2) is to be determined by the statutory and common law and not to be affected by section 1-9, Revised Laws of Hawaii 1955.

In addition, this section provides for the collateral attack upon interlocking directorships and relationships and the procedure to be followed which remedy is in addition and cumulative to any other remedy available under any other section of this Act or any other law.

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[30] 168 F. Supp. 576 (S. D. N. Y., 1958).
[31] 111 F. Supp. 614 (S. D. N. Y., 1953).
[32] Dissent in *United States v. W. T. Grant Co.*, 345 U. S. 629, 637, 73 Sup. Ct. 894, 97 L. Ed. 1303 (1953).
[33] Ibid., p. 636.

CHAPTER VI
ANTITRUST PROCEDURES, ENFORCEMENT AND REMEDIES AVAILABLE UNDER THE ACT

1. Civil Proceedings

a. *Jurisdiction*

When a person, state or county brings a civil proceeding or action authorized by the provisions of the Hawaii Antitrust Act, they shall bring it in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided in the Act. The specific language in the Act is section 19 which provides as follows:

> "Any action or proceeding, whether civil or criminal, authorized by the provisions of this Act shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided herein."

With respect to the proceedings for an investigative demand to secure written documentary material and answers to written interrogatories, it is provided in section 16(15) that the district court of any county in which "such person resides, is found, or transacts business, . . . except that if such person transacts business in more than one such county such petition shall be filed in the county in which such person maintains his principal place of business, or in such other county in which such person transacts business as may be agreed upon by the parties . . ." is where the petition for investigative demand and opposition thereto will be heard.

With respect to the proceedings to take oral testimony of a person, it is provided in section 16(18) that the district court in the county "where such person resides, is found or transacts business, . . ." and ". . . before a district magistrate licensed to practice law in the Supreme Court of this State . . ." is where the oral testimony under oath will be taken.

Where there is use of the processes under the Hawaii Rules of Civil Procedure for deposition, discovery and production of documents the circuit court where the action or proceeding is brought is where the foregoing processes will be utilized.[1]

[1] Order adopting and promulgating the Hawaii Rules of Civil Procedure making it applicable to actions and proceedings of a civil nature in the circuit courts of the territory and state from and after June 14, 1954.

b. *Duty, Authority and Power of the State.*

(1) Damage actions.

Whenever the State of Hawaii is injured in ". . . its business or property by reason of anything forbidden or declared unlawful by this Act, it may sue to recover actual damages sustained by it . . ." pursuant to section 12 of the Hawaii Antitrust Act.

In addition to the remedies under the Hawaii Antitrust Act the state or its political subdivisions may seek treble damages for federal violations under section 4 of the Clayton Act.[2] The Supreme Court of the United States has held that states and cities are "persons" within the meaning of the statute.[3] Therefore in certain type of cases the possibility exists that the state has alternative or cumulative remedies available in seeking damages in the federal or state courts. Occasion for such suits arises most commonly when the state or its political subdivisions have been victimized by a collusive or rigged bidding conspiracy. As an example the indictments in two of the United States Department of Justices suits against the electric equipment manufacturers charged collusive bidding and price-fixing conspiracy injuring municipalities, utility districts, power authorities, and cooperatives in at least 34 states.[4] The successful state or federal criminal or civil actions could be a useful source of evidence on which to base a damage action.[5] In addition, to facilitate the consolidation of damage suits by the State of Hawaii and its political subdivisions section 12 of the Hawaii Antitrust Act provides that "The Attorney General may bring an action on behalf of the State or any of its political subdivisions or governmental agencies to recover the damages provided for by this section, or by any comparable provisions of federal law."[6]

The chief evidentiary problems in damage cases is establishing the measure of damages sustained and that the damages were proximately caused by the conspiracy. Where there is an open market price for comparison purposes that can be used. But in the absence of such a market, such as where the goods are specially tailored to the specifications of the damaged customer, resort to cost data and estimate of

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[2] 38 Stat. 731, 15 U. S. C. 15.

[3] See *Georgia v. Evans*, 316 U. S. 159, 62 Sup. Ct. 972, 86 L. Ed. 1346 (1942) where a state was held to be a person and *Chattanooga Foundry Works v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241 (1906) where a city was held to be a person.

[4] National Conference on Consumer and Investor Protection, "State Antitrust Law Reference Handbook," *1960*, p. 38.

[5] See 38 Stat. 731, 15 U. S. C. 16, making the judgment in a civil or criminal case prima facie evidence for a subsequent damage action. Similarly section 20 of the Hawaii Antitrust Act provides that the effect of a judgment obtained by the state is to be prima facie evidence in a subsequent private action.

[6] This sentence was added to section 12 by the Conference Committee in Conference Draft 1 and adopted by both houses of the First Hawaii State Legislature.

fair mark up or even to opinion evidence[7] may prove necessary to estimate the damages.[8] The courts have allowed juries considerable latitude in basing verdicts on such evidence with respect to both the proximate cause of the damages and the measure of such damages. As the Supreme Court of the United States stated in the case of *Story Parchment Co. v. Paterson Co.*[9] in reply to one wrongdoer who asserted the defense that the damages involved were speculative:

> "The wrongdoer is not entitled to complain that they (the damages) cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise . . . . (T) he risk of the uncertainty should be thrown upon the wrongdoer instead of the injured party."

It is pertinent to note here that in the matter of establishing conspiracies, it is seldom capable of direct proof but must be discovered largely by inference from acts and circumstances. As was stated in *Heald v. United States*[10] on the establishment of a conspiracy:

> "True, there was no direct evidence of an agreement among the appellants. But as has been said times without number, conspiracies rarely, if ever, are established from direct evidence. Conspiracies, by their very nature must generally be established in large part from conversations, admissions, conduct and the natural inferences to be drawn therefrom, and it is sufficient if the circumstances, acts, and conduct of the parties are of such character that the minds of reasonable men can conclude therefrom that an unlawful agreement or understanding exists."

(2) Powers and duties of the State Attorney General.

The state attorney general has broad powers under the Hawaii Antitrust Act to enforce any violations of said Act. The state attorney general under section 18 "shall enforce the criminal and civil provi-

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[7] See *United States v. Hess*, 41 F. Supp. 197, 219-220, (W. D. Pa. 1941), aff'd, 317 U. S. 537, 63 Sup. Ct. 379, 87 L. Ed. 443 (1943); See also *Bordonaro Bros. Theaters Inc. v. Paramount Pictures, Inc.*, 176 F. 2d 594, 597 (CA 2, 1949).

[8] See *Bigelow v. RKO Radio Pictures, Inc.* 327 U. S. 251, 260-264, 66 Sup. Ct. 574, 90 L. Ed. 652 (1946); cf. *Bordonaro Bros. Theaters, Inc. v. Paramount Pictures, Inc.*, 176 F. 2d 594, 597 (CA 2, 1949).

[9] 282 U. S. 555, 563, 51 Sup. Ct. 248, 75 L. Ed. 544 (1931); see also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264-265, 66 Sup. Ct. 574, 90 L. Ed. 652 (1946).

[10] 175 F. 2d 878, 881 (CA 10, 1949), cert. denied 338 U. S. 859, 70 Sup. Ct. 101, 94 L. Ed. 526 (1949); accord *Wagley v. Colonial Baking Co.*, 208 Miss. 815, 45 So. 2d 717 (1950); *State v. Retail Gasoline Dealers Ass'n.*, 256 Wis. 537, 41 N. W. 2d 637 (1950); See also *Hashimoto v. Halm*, 40 Haw. 354 (1953) wherein the court stated on page 361: "Great latitude should be accorded the admission of circumstantial evidence of this nature if in any reasonable manner it tends to establish a conspiracy or connects those aiding, advising, abetting or encouraging the conspiracy sought to be proved."

sions of this Act." He also has the power to bring a proceeding under section 13 to "enjoin any violation of the provisions of this Act." In addition he has broad investigative powers under section 16 of the Act.

The state attorney general under section 16(1) has the power to conduct an investigation "whenever it appears to the attorney general, either upon complaint or otherwise, that any person or persons, has engaged in or engages in or is about to engage in any act or practice by this Act prohibited or declared to be illegal, or that any person or persons, has assisted or participated in any plan, scheme, agreement or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, . . ." Under section 16 whenever the state attorney general has reason to believe that any person has any documentary evidence or information pertinent to a possible violation of this Act, he may prior to filing a complaint in court do the following:

1. Issue in writing an investigative demand for documentary materials, objects, tangible things;
2. Issue in writing an investigative demand for information (written interrogatory);
3. Subpoena a person to appear before a district magistrate licensed to practice law in the Supreme Court of the State of Hawaii to give oral testimony under oath; and
4. Request a subpoena duces tecum to be issued to a person under like conditions as stated in the case of a subpoena.

In addition to the foregoing the state attorney general may employ the processes under the Hawaii Rules of Civil Procedure of deposition, discovery and production of documents.[11]

To further aid the state attorney general in his investigation section 21(1) provides that where an investigation is brought by the attorney general pursuant to section 16 "no individual shall be excused from attending, testifying, or producing documentary materials, objects or tangible things in obedience to an investigative demand, subpoena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty." Aside from compelling the person in section 21(1) to give information there is an immunity granted to a person under section 21(2) which states that "No individual shall be criminally prosecuted or subjected to any criminal penalty under this Act for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any investigation brought . . . pursuant to section 16 of this Act, . . ."

[11] Section 16(25) of the Hawaii Antitrust Act provides that the use of processes under the Hawaii Rules of Civil Procedure is not precluded or limited by section 16.

The enactment of the foregoing procedure relating to investigation under section 16 took into consideration the federal antitrust investigative procedures in which the United States Department of Justice may:

1. Depend upon the voluntary cooperation of those under investigation;

2. File a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

3. Make use of the grand jury.

These procedures do not satisfy civil enforcement needs.[12]

The state attorney general under section 6 "may bring an action at any time to cause a director, officer or trustee who may be occupying such position in violation of this section, to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship" or make a motion to remove a director, officer or trustee in violation of this section in any action or proceeding pending in which any "director, officer or trustee, or the legal entities in which such director, officer or trustee holds office are parties to the action or proceeding, without the necessity of bringing a separate action to try title to office." The state attorney general upon order of the court may be required to institute proceedings for the removal of a trustee where the court finds that there is an interlocking relationship between a trustee and a director or officer of a firm, partnership, trust or corporation.

Also where there is a holding of the whole or any part of the stock or other share capital of any other corporation and the whole or part of the assets of any other corporation the state attorney general may proceed under section 5(2) to cause the divestiture or other disposition of the stock or other share capital or the assets where the holding of such "stock, share capital, or assets is substantially to lessen competition or tend to create a monopoly, and is therefore not in the public interest, . . ."

(3) Effect of a judgment, decree or plea.

Under section 20 of the Hawaii Antitrust Act "A final judgment or decree rendered in any civil or criminal proceeding brought by the State under the provisions of this Act shall be prima facie evidence against such defendant in any action or proceeding brought by any other party . . . or by the State, county or city and county, under section 12, against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

Under section 20 the effect of the plea of nolo contendere in a criminal action is similar to that of a final judgment or decree, i.e.

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[12] Att'y Gen. Nat'l Comm. Antitrust Rep., p. 344 (1955).

to have the effect of admitting each and every material allegation in the complaint and the final judgment or decree rendered pursuant to such plea to be prima facie evidence against such defendant. The consent judgment or decree procedure was the product of the Conference Committee[13] of both houses and provided as follows:

> "This section shall not apply to consent judgments or decrees entered before any complaint has been filed; provided, however, that when a consent judgment or decree is filed, the state attorney general shall set forth at the same time the alleged violations and reasons for entering into the consent judgment or decree. No such consent judgment or decree shall become final until sixty days from the filing of such consent judgment or decree or until the final determination of any exceptions filed, as hereinafter provided, whichever is later. During such sixty day period any interested party covered under section 11 of this Act may file verified exceptions to the form and substance of said consent judgment or decree, and the court, upon a full hearing thereon may approve, refuse to enter, or may modify such consent judgment or decree."

In proceedings instituted under the federal antitrust laws, an antitrust consent judgment or decree is an order of the court agreed upon by representatives of the United States Attorney General and of the defendant, without trial of the conduct challenged by the attorney general. The first consent decree in a Sherman Act case was entered in 1906.[14] Enactment of the Clayton Act in 1914 stimulated the frequency of consent decrees in government litigation since section 5 of the Act provided that in no case would a consent decree, entered before testimony is taken, in a case brought by the Government, be available as prima facie evidence to assist private parties to recover treble damages for injuries caused by the defendant's activities.[15] This provision made the consent decree a procedure sought by defendants. Over the years the use of the consent decree has increased and today it is an outstanding feature of the administration of the antitrust laws by the Department of Justice.[16] For many years three out of every four of the antitrust cases in equity that the United States Attorney General has started have ended by consent, with no issue litigated and adjudicated.[17]

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[13] House Conf. Comm. Rep. No. 16 on H. B. No. 27, C. D. 1, Identical Senate Conf. Comm. Rep. No. 19 on H. B. No. 27, C. D. 1.

[14] Rpt. of Antitrust Subcomm. of the Comm. on the Jud., House of Rep., 86th Cong., 1st Sess. (1959) pursuant to H. Res. 27 on the Consent Decree Program of the Department of Justice, p. ix (1959).

[15] Ibid.

[16] Ibid.

[17] Ibid.

The consent decree program has resulted in savings, in both time and money, the ability to secure relief by consent decrees that the Antitrust Division would not have obtained by litigation, and in some cases the difficulties surrounding the trial of economic issues would have prevented the Antitrust Division from proving the antitrust violations and its business effects.[18]

On the other hand there has been considerable criticism of the prefiling negotiation procedures. The majority recommendation for prefiling negotiation whenever the Antitrust Division deems it feasible for efficient enforcement appearing in the 1955 Report of the Attorney General's National Committee to study the Antitrust Laws was dissented to by Louis B. Schwartz, which dissent is reported as follows:[19]

> "This proposal, he feels, will 'whittle away the last remnants of judicial control and public scrutiny in this area . . . . the proposal opens the possibility that the Government's complaint shall be modified so as to be consistent with the relief that defendant is prepared to consent to. But the settlement of the antitrust case ought not to be a simple matter of bargaining between the Department and defendant.' Instead of 'urging the Department to broaden its use of the consent decree, the Committee ought to have considered,' he feels, 'certain proposals . . . for greater safeguards on the present consent decree procedure. One of these,' he suggests, 'would have required the Department to publish an opinion accompanying each consent decree stating the Department's case, the defendant's proposition, and the reason for the Department's acceptance of the particular compromise.' "

It has been shown that although on occasion outsiders may be consulted by the Antitrust Division the circumstances that surround agreement on the final terms of the decree are highly secret.[20] The public is excluded from the negotiating process, and the information that is exchanged between the parties is held confidential.[21] No notice is given to the public of the terms of the settlement or that the litigation is about to be terminated.[22] In addition to the compromise of adequate relief, consent settlements of antitrust cases result in a substantial lessening, if not the virtual elimination, of the deterrent effect the antitrust laws have on business opperations.[23] Treble damage actions by private parties were intended by Congress not only to

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[18] Ibid., pp. 18-19.
[19] Att'y Gen. Nat'l Comm. Antitrust Rep., p. 360 (1955).
[20] Rpt. of Antitrust Subcomm. of Comm. on Jud., House of Rep. 86th Cong., 1st Sess. p. 12 (1959).
[21] Ibid., pp. 12-13.
[22] Ibid., p. 13.
[23] Ibid., p. 22.

penalize law violators, but, also to constitute an important auxiliary enforcement measure in antitrust administration to deter future violators, as well as a vital means of redress for private litigants to recoup losses that result from the activities of antitrust violators.[24] If corporate officers realize that violations of the antitrust laws, if discovered, will occasion no greater penalty than a written promise in the form of a consent decree not to err again[25] than the deterrent effect is gone. For the most part, the present consent decree procedures utilized in the Department of Justice would tend to eliminate any independent judicial determination of legal or factual issues that are involved in the particular antitrust proceeding.[26] The protracted nature of antitrust litigation with the expense and complexity of proof makes it difficult at best for a private litigant to prosecute to conclusion an action under the antitrust laws.[27] When the private litigant is deprived of the use of the Government's decree as prima facie evidence, an inevitable consequence of the acceptance of a consent decree by the Department of Justice is to reduce the effectiveness of the action by private litigants.[28]

Taking into consideration the problems that have been experienced at the federal level the Hawaii Antitrust Act has these features relating to consent judgment procedure:

1. The state attorney general shall set forth the alleged violations and reasons for entering into the consent judgment or decree.

2. The judgment or decree shall become final sixty days after the filing of such judgment or decree or until the final determination of the exceptions as hereinafter provided, whichever is later.

3. During the sixty day period any interested party who is injured in his business or property by reason of anything forbidden or declared unlawful by this Act may file verified exceptions to the form and substance of the consent judgment or decree.

4. The court upon a full hearing may approve, refuse to enter, or may modify such consent judgment or decree.

c. *Duty, Authority and Power of the County.*

As in the case of the State of Hawaii, any of its political subdivisions, the counties of Hawaii, Maui and Kauai and the City and County of Honolulu may pursuant to section 12 of the Hawaii Anti-

[24] Ibid., p. 23-24.

[25] Ibid., p. 25.

[26] Ibid., p. 302.

[27] Ibid., p. 303.

[28] Ibid.

trust Act bring a damage action to recover actual damages sustained by it. Likewise it may seek treble damages under section 4 of the Clayton Act or join with the State to recover damages provided for by section 12 of the Hawaii Antitrust Act.

The county attorneys for the counties of Hawaii, Maui and Kauai, the prosecuting attorney and the corporation counsel of the City and County of Honolulu shall investigate and report suspected violations of the provisions of the Hawaii Antitrust Act to the state attorney general as required under section 18 of the Act. Also whenever the Act authorizes or requires the attorney general to commence any action or proceeding, he may require the county attorney, prosecuting attorney, or corporation counsel of a county or city and county where an action or proceeding is to be commenced or maintained to maintain the action or proceeding under the direction of the attorney general under section 18.

d. *Private parties.*

(1) Damage actions and injunctive relief.

Whenever any person is injured in his business or property by reason of anything forbidden or declared unlawful by the Hawaii Antitrust Act he may pursuant to section 11 sue to recover treble damages sustained by him, reasonable attorneys' fee, costs of suit and may seek injunctive relief to enjoin unlawful practices, and if he prevails, he shall be awarded reasonable attorneys' fees together with costs of suit. Section 11 further provides that the remedies for treble damages and injunctive relief are cumulative and may be sought in one action. Whenever the ends of justice require the presence of additional parties the Court may pursuant to section 17 cause additional parties to be brought before the Court.

The proof of damages and establishing a conspiracy would be similar to that previously discussed when a state is bringing an action. A private person may also bring both a treble damage action and an injunction as in the case of *Radiant Burners v. Peoples Gas Light and Coke Co.*[29] under specific provisions of the federal antitrust laws, such as provided in section 11 of the Hawaii Antitrust Act. The federal treble damage provision is provided in section 4[30] of the Clayton Act while the injunctive relief is provided in section 16[31] of said Act.

Under section 20 a person may utilize a final judgment or decree rendered in any civil or criminal proceeding brought by the State under the provisions of the Hawaii Antitrust Act as a basis for his own suit and use the judgment or decree as prima facie evidence against such defendant against which the state obtained final judgment or decree. Similarly under section 20 a person may use the plea

[29] 364 U. S. 656, 81 Sup. Ct. 365, 5 L. Ed. 2d 358 (1961).
[30] 38 Stat. 731, 15 U. S. C. 15.
[31] 38 Stat. 737, 15 U. S. C. 26.

of nolo contendere by a defendant as prima facie evidence against such defendant. Under section 20 there is also the opportunity for any person who is injured in his business or property by reason of violations of the Act to file verified exceptions and have a full hearing as to the form and substance of the consent judgment or decree where it may affect him adversely.

(2) Other relief and procedures available.

Where there is a contract or agreement which is in violation of the Hawaii Antitrust Act it is void and unenforceable at law or in equity under the provisions of section 10 of the Act.

Whenever a person is affected by any act or acts of a director, officer or trustee, he may move to cause such director, officer or trustee who may be occupying such position in violation of section 6 relating to interlocking directorships and relationships to vacate the office or offices to terminate the prohibited interlocking relationship, in any action or proceeding in which the person affected, and any such director, officer or trustee, or the legal entities are parties to the action or proceeding, without the necessity of bringing a separate action to try title to office under section 6(4) of the Hawaii Antitrust Act. This will permit a person to make a collateral attack on an interlocking directorship or relationship in conjunction with a pending suit where the director, officer or trustee violating section 6 or their business entities may be a party litigant.

2. Criminal Proceedings

a. *Venue*

Under section 19 of the Hawaii Antitrust Act a criminal action or proceeding authorized by the provisions of this Act, unless otherwise specifically provided in this Act, shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent. Section 14 provides that the misdemeanor violations provided in sections 14 and 16 of this Act shall be brought in the circuit court of the circuit where the offense occurred.

b. *Criminal penalties.*

Under section 14 of the Hawaii Antitrust Act any person who violates any of the provisions of sections 2 (Combinations in Restraint of Trade, Price-fixing and Limitation of Production Prohibited), 4 (Refusal to deal), 7 (Monopolization) or 15 (Individual liability for corporate act), including any principal, manager, director, officer, agent, servant or employee who had engaged in or has participated in the determination to engage in an activity that has been engaged in by any of the business entities heretofore enumerated which activity is in violation of any provision of sections 2, 4, 7 or 15 is punishable if a natural person by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment

or if such person is not a natural person (e.g. a corporation) then by a fine not exceeding $20,000.

Under section 16 (Investigation) any person who wilfully refuses to comply with an investigative demand shall be fined not more than $5,000 or imprisoned not more than one year, or both. Also under section 16 if a person wilfully fails to comply with a subpoena issued pursuant to said section, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Under section 15 (Individual liability for corporate act) whenever a corporation violates any of the penal (criminal) provisions of this Act, the individual directors, officers or agents of such corporation who have authorized, ordered or done any of the acts constituting in whole or in part of such violation shall be deemed to have violated the penal provisions of this Act.

3. *Statute of Limitations*

Under section 22 of the Hawaii Antitrust Act any action to enforce a cause of action arising under the provisions of the Act shall be barred unless commenced within four years after the cause of action accrues. A cause of action for a continuing violation is deemed to accrue at any time during the period of such violation.

Under section 20 (Judgment in favor of the State as evidence in private action; suspension of limitation) whenever any civil or criminal proceeding is instituted by the State to prevent, restrain, or punish violations of this Act, but not including an action under section 12 (Suits by the State; amount of recovery), the running of the statute of limitations shall be suspended during the pendency thereof and for one year thereafter.

APPENDIX

AN ACT RELATING TO THE REGULATION OF THE CONDUCT OF TRADE AND COMMERCE.

(ACT 190, SESSION LAWS OF HAWAII 1961)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

Section 1. Definitions. As used in this Act.

(1) "Commodity" shall include, but not be restricted to, goods, merchandise, produce, choses in action and any other article of commerce. It also includes trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business.

(2) "Person" or "persons" includes individuals, corporations, firms, trusts, partnerships and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country.

(3) "Purchase" or "buy" includes, "contract to buy", "lease", "contract to lease", "acquire a license" and "contract to acquire a license".

(4) "Purchaser" includes the equivalent terms of "purchase" and "buy".

(5) "Sale" or "sell" includes "contract to sell", "lease", "contract to lease", "license" and "contract to license".

(6) "Seller" includes the equivalent terms of "sale" and "sell".

Section 2. Combinations in Restraint of Trade, Price-Fixing and Limitation of Production Prohibited.

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is declared illegal.

(2) Without limiting the generality of the foregoing no person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State:

(a) fix, control, or maintain, the price of any commodity;

(b) limit, control, or discontinue, the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(c) fix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(d) refuse to deal with any other person or persons for the purpose of effecting any of the acts described in (a) to (c) of this subsection.

(3) Notwithstanding the foregoing subsection (2) and without limiting the application of the foregoing subsection (1), it shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this Act, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:

(a) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of said business;

(b) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;

(c) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;

(d) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with his employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

(4) Any price-fixing arrangement authorized under sections 205-20 through 205-26, Revised Laws of Hawaii 1955, as amended, shall be excluded from the prohibition of this section.

Section 3. Requirements and output contracts; tying agreements.

No person shall sell or buy any commodity, or fix a price or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller, or shall not deal with the competitor of the purchaser, as the case may be, when the effect of the sale or purchase or the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State.

Section 4. Refusal to deal.

No person shall refuse to sell any commodity to, or to buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by other sections of this Act.

Section 5. Mergers, Acquisitions, Holdings and Divestitures.

(1) No corporation shall acquire and hold, directly or indirectly, from and after the effective date of this Act, the whole or any part of the stock or other share capital of any other corporation, or the whole or any part of the assets of any other corporation where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Provided that this subsection shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this subsection prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporation, when the effect of such formation is not substantially to lessen competition.

(2) No corporation shall hold directly or indirectly, the whole or any part of the stock or other share capital of any other corporation, or the whole or any part of the assets of any other corporation, acquired prior to the effective date of this Act, where the effect of such holding is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Where the Court shall find that the holding of such stock, share capital, or assets is substantially to lessen competition or tend to create a monopoly, and is therefore not in the public interest, then the Court shall order the divestiture or other disposition of such stocks, share capital, or assets of such corporation, and shall prescribe a reasonable time, manner and degree of such divestiture or other disposition thereof, provided that the

court shall not order the divestiture or other disposition of the assets of such corporation unless it is necessary to eliminate the lessening of competition or the tendency to create a monopoly, and the assets are reasonably identifiable and separable, and it can be done without causing undue hardship on the economic entity.

Section 6. Interlocking Directorates and Relationships.

(1) That from and after six months from the effective date of this Act no person shall be at the same time a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations or corporations or any combination thereof, engaged in whole or in part in commerce, if such firms, partnerships, trusts, associations or corporations or any combination thereof, are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act.

(2) From and after six months from the effective date of this Act, no person shall be at the same time a director, officer, partner, or trustee in any two or more non-competing firms, trusts, partnerships or corporations or any combination thereof, any one of which has a total net worth aggregating more than $100,000, or a total net worth of all of the business entities aggregating more than $300,000, engaged in whole or in part in trade or commerce in this State where the effect of a merger between such business entities whether legally possible or not may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. The total net worth herein mentioned with reference to a corporation shall consist of the capital, surplus and undivided profits; the total net worth with reference to a firm or partnership shall consist of the capital account; and the total net worth with reference to a trust shall consist of the principal of the trust.

This subsection shall not apply to an interlocking directorship between a bank doing a banking business and any other business firm or entity.

(3) No person shall by the use of a representative or representatives effectuate the result prohibited in the preceding subsections where the act or acts of such representative or representatives acting in their capacities as directors, officers, partners or trustees of such business entities indicate an attempt directly or indirectly to manipulate the conduct of the business entities to the detriment of any of such entities and to the benefit of any other entity in which such person has an interest.

(4) The validity or invalidity of any act of any director, officer or trustee done by such director, officer or trustee while occupying such position in violation of the provisions of this section shall be determined by the statutory and common law of the State of Hawaii relating to corporations, trust or associations as the case may be except that it shall not be affected by the provisions of Section 1-9, Revised Laws of Hawaii 1955. The non-applicability of Section 1-9, Revised Laws of Hawaii 1955 shall be limited to this section only.

The state attorney general may bring an action at any time to cause a director, officer or trustee who may be occupying such position in violation of this section, to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship. The state attorney general or any person affected by any act or acts of such director, officer or trustee may move to cause such director, officer or trustee who may be occupying such position in violation of this section to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship, in any action or proceeding in which the person affected, and any such director, officer or trustee, or the legal entities in which such director, officer or trustee holds office are parties to the action or proceeding, without the necessity of bringing a separate action to try title to office. The court upon finding that a director, officer or trustee is holding office in contravention of this section shall order such person to terminate the interlocking relationship, and in the case of a trustee, the court may, when it deems appropriate, order the state attorney general to institute proceedings for the removal of such trustee from his office, and the findings of the court of such

violation of this section by such trustee shall be a sufficient cause of action to maintain such proceeding. Any remedy provided in this section shall not limit and is in addition and cumulative to any other remedy available under any other section of this Act or any other law.

Section 7. Monopolization.

No person shall monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.

Section 8. Exemption of Labor Organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in this Act shall be construed to forbid the existence and operation of labor organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, lawfully carrying out the legitimate objects thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under this Act.

The provisions of this Act shall not apply to the conduct or activities of labor organizations or their members which conduct or activities are regulated by federal or state legislation or over which the National Labor Relations Board or the Hawaii Employment Relations Board have jurisdiction.

Section 9. Exemption of certain cooperative organizations; insurance transactions; approved mergers of federally regulated companies.

(1) Nothing contained in this Act shall be construed to forbid the existence and operation of fishery or agricultural cooperative organizations or associations instituted for the purpose of mutual help, and which are organized and operating under Chapters 175A or 176, Revised Laws of Hawaii 1955, as amended, or which conform and continue to conform to the requirements of the Capper-Volstead Act (7 U.S.C. 291 and 292), provided that if any such organization or association monopolizes or restrains trade or commerce in any section of this State to such an extent that the price of any fishery or agricultural product is unduly enhanced by reason thereof the provisions of this Act shall apply to such acts.

(2) This Act shall not apply to any transaction in the business of insurance which is in violation of any section of this Act if such transaction is expressly permitted by the insurance laws of this State; and provided further that nothing contained in this section shall render this Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation.

(3) This Act shall not apply to mergers of companies where such mergers are approved by the federal regulatory agency which has jurisdiction and control over such mergers.

Section 10. Contracts void.

Any contract or agreement in violation of this Act is void and is not enforceable at law or in equity.

Section 11. Suits by persons injured; amount of recovery, injunctions.

(1) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this Act:

(a) may sue for damages sustained by him, and, if the judgment is for the plaintiff, he shall be awarded threefold damages by him sustained and reasonable attorneys' fees together with the costs of suit; and

(b) may bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, he shall be awarded reasonable attorneys' fees together with the costs of suit.

(2) The remedies provided in this section are cumulative and may be sought in one action.

Section 12. Suits by the State; amount of recovery.

Whenever the State of Hawaii, any county, or city and county is injured in its business or property by reason of anything forbidden or declared unlawful by this Act, it may sue to recover actual damages sustained by it. The Attorney General may bring an action on behalf of the State or any of its political subdivisions or governmental agencies to recover the damages provided for by this section, or by any comparable provisions of federal law.

Section 13. Injunction by attorney general.

The attorney general may bring proceeding to enjoin any violation of the provisions of this Act.

Section 14. Violation a misdemeanor.

(1) Any person who violates any of the provisions of Sections 2, 4, 7 or 15 of this Act, including any principal, manager, director, officer, agent, servant or employee, who had engaged in or has participated in the determination to engage in an activity that has been engaged in by any association, firm, partnership, trust, or corporation, which activity is a violation of any provision of Sections 2, 4, 7 or 15 of this Act, is punishable if a natural person by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court; if such person is not a natural person then by a fine not exceeding $20,000.

(2) The actions authorized by this section and Section 16 shall be brought in the circuit court of the circuit where the offense occurred.

Section 15. Individual Liability for corporate act.

Whenever a corporation violates any of the penal provisions of this Act, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who have authorized, ordered or done any of the acts constituting in whole or in part such violation.

Section 16. Investigation.

(1) Whenever it appears to the attorney general, either upon complaint or otherwise, that any person or persons, has engaged in or engages in or is about to engage in any act or practice by this Act prohibited or declared to be illegal, or that any person or persons, has assisted or participated in any plan, scheme, agreement or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such complainant to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes to be in the public interest to investigate. The attorney general may also require such other data and information from such complainant as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

(2) Whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material, objects, tangible things or information (hereinafter referred to as "documentary evidence") pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may issue in writing, and cause to be served upon such person, an investigative demand requiring such person to produce such documentary evidence for examination.

(3) Each such demand shall:

(a) state that an alleged violation of the section or sections of this Act which are under investigation;

(b) describe and fairly indentify the documentary evidence to be produced, or to be answered;

(c) prescribe a return date within a reasonable period of time during which the documentary evidence demanded may be assembled and produced;

(d) identify the custodian to whom such documentary evidence are to be delivered; and

(e) specify a place at which such delivery is to be made.

(4) No such demand shall:

(a) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation; or

(b) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation.

(5) Any such demand may be served by any attorney employed by or other authorized employee of this State at any place within the territorial jurisdiction of any court of this State.

(6) Service of any such demand or of any petition filed under subsection 15 of this section, may be made upon a partnership, trust, corporation, association, or other legal entity by:

(a) delivering a duly executed copy thereof to any partner, trustee, executive officer, managing agent, or general agent thereof, or to any agent, thereof authorized by appointment or by law to receive service or process on behalf of such partnership, trust, corporation, association, or entity; or

(b) delivering a duly executed copy thereof to the principal office or place of business in this State of the partnership, trust, corporation, association, or entity to be served; or

(c) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, trust, corporation, association or entity at its principal office or place of business in this State.

(7) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or petition.

(8) The attorney general shall designate a representative to serve as custodian of any documentary evidence, and such additional representatives as he shall determine from time to time to be necessary to serve as deputies to such officer.

(9) Any person upon whom any demand issued under subsection (2) has been duly served shall deliver such documentary evidence to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary evidence to be made:

(a) at any place outside the territorial jurisdiction of this State without the consent of the person upon whom such demand was served; or

(b) at any place other than the place at which such documentary evidence is situated at the time of service of such demand until the custodian has tendered to such person a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or the transportation thereof to such place at government expense.

(10) The custodian to whom any documentary evidence is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this section. The custodian shall issue a receipt for such evidence received. The custodian may cause the preparation of such copies of

such documentary evidence as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the attorney general, to have access to such evidence for examination. While in the possession of the custodian, no such evidence so produced shall be available for examination, without the consent of the person who produced such evidence, by any individual other than a duly authorized representative of the office of the attorney general. Under such reasonable terms and conditions as the attorney general shall prescribe, documentary evidence while in the possession of the custodian shall be available for examination by the person who produced such evidence or any duly authorized representative of such person.

(11) Whenever any attorney has been designated to appear on behalf of this State before any court or grand jury in any case or proceeding involving any alleged violation of this Act, the custodian may deliver to such attorney such documentary evidence in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of this State. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary evidence so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(12) Upon the completion of the investigation for which any documentary evidence was produced under this section, and any case or proceeding arising from such investigation, the custodian shall return to the person who produced such evidence all such evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(13) When any documentary evidence has been produced by any person under this section for use in any investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the court of such investigation, such person shall be entitled, upon written demand made upon the attorney general to the return of all documentary evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) so produced by such person.

(14) In the event of the death, disability, or separation from service in the office of the attorney general of the custodian of any documentary evidence produced under any demand issued under this section, or the official relief of such custodian from responsibility for the custody and control of such evidence, the attorney general shall promptly designate another representative to serve as custodian thereof, and transmit notice in writing to the person who produced such evidence as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such evidence all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(15) Whenever any person fails to comply with any investigative demand duly served upon him under subsection (6) of this section, the attorney general, through such officers or attorneys as he may designate, may file, in the district court of any county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such county such petition shall be filed in the county in which such person maintains his principal place of business, or in such other county in which such person transacts business as may be agreed upon by the parties to such petition. Such person shall be entitled to be heard in opposition to the granting of any such petition.

(16) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the county within which the

office of the custodian designated therein is situated, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section, or upon any constitutional right or privilege of such person.

If the court does not set aside such demand, such person shall be assessed court cost and reasonable attorneys' fees and such other penalties not greater than those specified under Section 14 of this Act. If the Court sets aside such demand, such person shall be given the total cost of such petition.

(17) At any time during which any custodian is in custody or control of any documentary evidence delivered by any person in compliance with any such demand, such person may file, in the district court of the county within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(18) Whenever the attorney general has reason to believe that any person has information pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may seek a subpoena from the clerk of the district court in the county where such person resides, is found or transacts business, requiring his presence to appear before a district magistrate licensed to practice law in the Supreme Court of this State to give oral testimony under oath on a specified date, time and place. The clerk of the district court may also issue a subpoena duces tecum under like conditions at the request of the attorney general. Any witness subpoenaed shall be entitled to be represented by counsel and any subpoena shall state the alleged violation of the section or sections of this Act. The scope and manner of examination shall be in accordance with the rules governing depositions as provided in the Hawaii Rules of Civil Procedure. The person subpoenaed may at any time before the date specified for the taking of the oral testimony, move to quash any subpoena before said district magistrate from whose court any subpoena was issued for such grounds as may be provided for quashing a subpoena in accordance with the rules governing depositions as set forth in the Hawaii Rules of Civil Procedure.

(19) No person shall be excused from attending an inquiry pursuant to the mandates of a subpoena, or from producing any documentary evidence, or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefor is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof be not thereupon made. The provisions for payment of witness fee and mileage do not apply to any officer, director or person in the employ of any person or persons whose conduct or practices are being investigated. No person who is subpoenaed to attend such inquiry, while in attendance upon such inquiry, shall, without reasonable cause, refuse to be sworn or to answer any question or to produce any book, paper, document, or other record when ordered to do so by the officer conducting such inquiry, or fail to perform any act hereunder required to be performed.

(20) Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any investigative demand made under this section, wilfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary evidence in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than $5,000.00 or imprisoned not more than one year, or both. Any person wilfully failing to comply with a subpoena issued pursuant to subsection (18) of this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(21) Nothing contained in this section shall impair the authority of the attorney general or his representatives to lay before any grand jury impaneled before any circuit court of this State any evidence concerning any alleged violation of this Act,

invoke the power of any such court to compel the production of any evidence before any such grand jury, or institute any proceeding for the enforcement of any order or process issued in execution of such power, or to punish disobedience of any such order or process by any person.

(22) As used in this section the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(23) It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates and employees to render and furnish to the attorney general, his deputy or other designated representatives when so requested, all information and assistance in their possession or within their power.

(24) Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall wilfully disclose to any person other than the attorney general the name of any witness examined or any other information obtained upon such inquiry, except as so directed by the attorney general shall be punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

(25) The enumeration and specification of various processes do not preclude or limit the use of processes under the Hawaii Rules of Civil Procedure but are deemed to be supplementary to said rules or the use of any other lawful investigative methods which are available.

Section 17. Additional parties defendant.

Whenever it appears to the court before which any civil proceeding under this Act is pending that the ends of justice require that other parties be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside, engage in business, or have an agent, in the circuit where such action is pending.

Section 18. Duty of the attorney general; duty of county attorney, etc.

(1) The attorney general shall enforce the criminal and civil provisions of this Act. The county attorney of any county, the prosecuting attorney and the corporation counsel of the city and county shall investigate and report suspected violations of the provisions of this Act to the attorney general.

(2) Whenever the provisions of this Act authorize or require the attorney general to commence any action or proceeding, including proceedings under Section 16 of this Act, the attorney general may require the county attorney, prosecuting attorney, or corporation counsel, of any county or city and county, holding office in the circuit where the action or proceeding is to be commenced or maintained, to maintain the action or proceeding under the direction of the attorney general.

Section 19. Court and venue.

Any action or proceeding, whether civil or criminal, authorized by the provisions of this Act shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided herein.

Section 20. Judgment in favor of the State as evidence in private action; suspension of limitation.

(1) A final judgment or decree rendered in any civil or criminal proceeding brought by the State under the provisions of this Act shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12, against such defendant as to all matter respecting which said judgment or decree would be an estoppel as between the parties thereto. This section shall not apply to consent judgments or decrees entered before any complaint has been filed; provided,

however, that when a consent judgment or decree is filed, the state attorney general shall set forth at the same time the alleged violations and reasons for entering into the consent judgment or decree. No such consent judgment or decree shall become final until sixty days from the filing of such consent judgment or decree or until the final determination of any exceptions filed, as hereinafter provided, whichever is later. During such sixty day period any interested party covered under Section 11 of this Act may file verified exceptions to the form and substance of said consent judgment or decree, and the court, upon a full hearing thereon may approve, refuse to enter, or may modify such consent judgment or decree.

(2) A plea of nolo contendere in any criminal action under this Act shall have the effect of admitting each and every material allegation in the complaint, and a final judgment or decree rendered pursuant to such plea shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12 against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

(3) Whenever any civil or criminal proceeding is instituted by the State to prevent, restrain, or punish violations of any provisions of this Act, but not including an action under Section 12, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

Section 21. Immunity from prosecution.

(1) In any investigation brought by the attorney general pursuant to Section 16 of this Act, no individual shall be excused from attending, testifying, or producing documentary materials, objects or tangible things in obedience to an investigative demand, subpoena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

(2) No individual shall be criminally prosecuted or subjected to any criminal penalty under this Act for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any investigation brought by the attorney general pursuant to Section 16 of this Act, or any county attorney, prosecuting attorney, or corporation counsel of any county or city and county, provided no individual so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

Section 22. Limitation of actions.

Any action to enforce a cause of action arising under the provisions of this Act shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in Section 20 of this Act. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of such violation.

Section 23. Severability.

If any portion of this Act or its application to any person or circumstances is held to be invalid for any reason, then the remainder of this Act and each and every other provision thereof shall not be affected thereby.

Section 24. Effective Date.

This Act shall take effect on August 21, 1961.

APPROVED this 12th day of July, 1961.

WILLIAM F. QUINN
GOVERNOR OF THE STATE OF HAWAII