THE FEDERAL ANTI-TRUST
LAWS SINCE 1932

by

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CHAPTER I

INTRODUCTION

At the outset it became evident that the roots of the Act are buried deep in 'the sibylline leaves' and the agitation which brought it into being in 1890 was but an echo of the distant cry which had been raised, in the crooked little lanes of London's markets in the fifth century.[1] Colepepper protested against the monopolists in the Long Parliament: "they sit by our fires; we find them in the dye-fat, the wash bowls and the powdering tub. They share with the cutler in his box. They have marked and scaled us from head to foot."[2] This proclamation of dissatisfaction marched to the same measure of thought which prompted Thurman Arnold to cry out against the "economic toll bridges" which have been familiar features of

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[1]Anonymous Case, Moore 115, 72 Eng. Rep. 477 (1578); Blacksmith's Case, 3 Leon. 217, 74 Eng. Rep. 643 (1578); Darcy v Allen, Moore 671, 11 Co. 846, 77 Eng. Rep. 1260 (1602) culminating in the statute of Monopolies (1623-24) 21 Jac. 1, c. 3.

[2]Green, Short History of the English People, p. 75: Colepepper's lament, of course, came during the time when the policy set forth in the Statute on Monopolies went unenforced.

American life since Ida Tarbell wrote the history of the Rockefeller dynasty.[1]

By force of tradition the capitalists have occupied the unenviable position of targets for the "trust busters." The mushroom growth of corporate enterprise in the wake of the Civil War, when rugged individualism was transferred from the frontiers of the West to Wall Street, started the rumblings of protest which the Sherman Act was designed to appease. The so-called abuses of economic power which were manifest in the decade preceding the Sherman Law evolved from a natural outgrowth occasioned by the development of technology, large-scale production, and the impact of the railroads. Economies to both producer and consumer could be realized by consolidation and integration which were unattainable when business was based on an atomized structure. The real abuses at which the Law was aimed consisted of the trend toward monopolization and loose agreements to restrict output, the benefits of which accrued to the producers, rather than the public.

The legislative instrument devised to bludgeon these monopolistic menaces back into the arena of free competition was introduced by Senator Sherman at the first session of the Fifty-first Congress, on December 4, 1889, and

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[1] Temple University Law Quarterly; 15: 129 November 1940, at 129.

entitled "A bill to declare unlawful, trusts and combinations in restraint of trade and production."[1] This original bill was never passed, but formed the basis for the more comprehensive bill framed by Senator Hoar of Massachusetts, which bore Senator Sherman's name because of his initial contribution toward the ultimate statute which evolved.

On July 2, 1890, President Harrison approved the anti-trust statute, written in language that was brief, broad, and comprehensive, and, like the Constitution, said Mr. Walker, required "judicial construction and many diversified applications to different cases for its practical development into generally recognized law."[2]

The first sentence of Section 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

By analysis of the words therein and the meaning attributed to them by the framers of the law, the intent of Congress may be interpreted. "Commerce" clearly pertains to goods while they are in transit as well as to the purchase and sale of commodities. This is obvious from the omittance

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[1]Congressional Record, Fifty-first Congress, First Session, p. 96.

[2]Albert H. Walker, History of the Sherman Law (1910), p. 47.

of the Bland Amendment, which explicitly excluded transportation of goods and persons from the act. From a speech by Senator Sherman[1] and the provisional adoption of the Reagan amendment[2] it may be concluded that "restraint" applies to restraint of mutual competition as well as to restraint of extraneous competition between a combination as a whole and other parties. "Restraint" as used here applies to direct rather than indirect or ancillary restraints, as defined by common law. Walker asserted this fact in his "History of the Sherman Law":

> The proposition that such an indirect restraint was not intended to be prohibited or penalized by the Sherman Law, is indicated by the fact that those Senators and those Representatives who advocated the law in Congress aimed their arguments and censures at willful, intentional, and direct restraints of interstate and international commerce without visiting any censure upon indirect and unintentional restraints as may result from some useful and meritorious combinations of persons or corporations engaged in interstate or international commerce.[3]

Also, it is assumed that "restraint" refers to that type which is injurious, materially, to public welfare or private welfare.

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[1]Congressional Record, Fifty-first Congress, First Session, p. 2456.

[2]Congressional Record, Fifty-first Congress, First Session, p. 2611. It defined a trust in several ways, including a combination of capital, skill or acts by two or more persons, firms, corporations, or associations, to increase or reduce the price of any merchandise or commodity.

[3]Walker, History of the Sherman Law (1910), p. 55.

The second section is clearly stated:

> 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.

Senator Hoar's statement clears up any doubt as to the intended definition of the word "monopoly": ". . . . the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him."[1] All the members of the Judiciary committee were in agreement on the above definition.

In connection with this section, it may be noted that it is the act of monopolizing rather than the existence of the monopoly which is prohibited by the words of the statute.

From the definition submitted by Senator Hoar it would be logical to infer that only those monopolies which were attained by willful destruction of one's competitors would be illegal, while those which reach such a position merely by their superior efficiency and organization would be within the pale of the law.

Section 3 is identical with Section 1, except that it

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[1] Congressional Record, Fifty-first Congress, First Session, p. 3151.

applies to restraints in any territory of the United States or in the District of Columbia, or between any of them or between them and a state or a foreign nation. Sections 4 and 5 confer jurisdiction in equity upon the several Circuit Courts of the United States to prevent and restrain violation of the Sherman law in pursuance of petitions by the district attorneys of the United States, under direction of the Attorney General. Under Section 6 it becomes the duty of the several district attorneys, at the time they institute proceedings in equity, to accomplish the seizure, condemnation, and forfeiture of whatever property was the subject of that combination and has been found in the course of transportation from one state to another, or to a foreign country. Such procedings should accompany any indictment under Section 1 of the statute. Section 7 provides for triple damages in favor of those persons injured as a result of a violation of the Sherman law.

Two broad classifications of combinations are, by general interpretation, subject to the statute, loose-knit confederations and close-knit organizations. The details of the Act were later filled in by judicial interpretation, the pattern of which varies with public sentiment and political expediency.

One author commented that the law, as framed, was:

> Sketchy and ambiguous; hardly more than a legislative outline for judicial lawmaking, compelling the Courts to amplify, if not invent, economic policy, a task demanding the highest competence in the theory of an alien discipline.[1]

Every law demands that "reasonableness" be used in applying it to the practical situations which arise under its purview. Actually, this statute was explicit in its prohibitions, demanding only that the enforcement agency and the courts weigh the facts involved in a case and make their decisions accordingly. It was a codification of the common law concepts, with explicit penalties provided. The failure of Congress to designate its desire to bring within purview of the law only those restraints and monopolistic conditions which were not a result of normal expansion and large scale efficiencies is the structural deficiency which has led to an opportunity for varying interpretations by the Court, and their assumption of the role of "policy-makers" in economic situations.

At the beginning of the 20th century, agitation arose for the enactment of a law which would describe and denounce methods of competition which are unfair and which

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[1]Felix Frankfurter, "Preservation of Competition Through Federal Anti-trust Laws," Harvard Law Review, V. 51, (1938), p. 694.

William Taft described as "badges of the unlawful purpose denounced in the anti-trust law."[1] The committee on interstate commerce of the U.S. Senate in 1911 made an investigation of the necessity of an amendment. The committee expressed full confidence in the intelligence, integrity, and patriotism of the Supreme Court, but found itself "unwilling to repose in that Court, or any other Court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated."[2] The committee proceded to make three recommendations: (1) Formulate a set of conditions upon which persons and corporations might engage in interstate and foreign commerce; (2) Prohibit certain known types of combinations; and (3) Create a commission to aid in the administration and enforcement of the existing antitrust act and any subsequent legislation.

Wilson, in a speech to Congress, advised the creation of a commission without power to make terms with monopoly or to assume the control of business in any way that would make the government responsible. He also urged the lawmakers to deal with interlocking directorates and holding

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[1]William Howard Taft, Message on the Anti-trust Law, p. 11.

[2]Senate Report, No. 1326, Sixty-second Congress, Third Session.

companies and to consider the problems raised by the ownership by one person of voting power in two or more companies.

> He argued that enough was known about the processes and methods of monopoly and deleterious restraints of trade so that these practices might be explicitly forbidden by statute, item by item.[1]

Two bills were introduced into Congress, one establishing a Federal Trade Commission without regulatory powers, and the other containing the itemization of monopolistic practices. The first bill reported to the House by the Committee on Interstate and Foreign Commerce gave the Commission no powers with respect to the regulation of trade practices except the weak Section 6 providing that:

> When in the course of any investigation . . . . the Commission shall obtain information concerning any unfair competition or practice in commerce not necessarily constituting a violation of law . . . . it shall make report thereof to the President, to aid him in making recommendation to Congress . . . .[2]

In the Senate Interstate Commerce Committee debates, it was decided that it was too difficult to attempt to "define the many and variable unfair practices which prevail in commerce."[3] This decision was, of course, contrary to Wilson's request, which envisaged an enumeration of such

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[1]John Perry Miller, Unfair Competition (1941), p. 63.

[2]Ibid.

[3]Congressional Record, Ll (1914), p. 12980.

practices. The argument was also raised against the phraseology "unfair competition," that it was no more definite than "unreasonable restraint of trade" as it appeared in the Sherman law, and that the primary purpose was to clarify the existing law.

Sponsors of the bill in the Senate made the following suggestions as to the meaning of the term "unfair competition":

> The Senator (Sutherland) objects to the term 'public morals' or 'good morals' as a test. I think it is a very good test. I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair. That is a definite standard if the practice is against good morals and against public morals and tends to injury of competitors unfairly.[1]

Another flexible definition was offered by Senator Cummins:

> The trade commission becomes bound to declare what is or what is not unfair competition according to the law of the land, according to the improving and the developing sense of the country with respect to matters of commerce.[2]

These two senators felt that the bill would supplement the Sherman law in that it would not restrict merely "restraints of trade," but also those practices which would lead to restraint of trade and monopoly.

The Federal Trade Commission Act of September 26, 1914,

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[1]*Ibid.* [2]*Ibid.*, p. 11104.

established a commission with administrative and quasi-judicial functions.

Section 5 of this Act declared unfair methods of competition in commerce to be unlawful, and the commission is empowered to prevent such practices by persons, partnerships or corporations, except banks and common carriers. For this purpose the commission is authorized after due hearing to issue orders requiring the cessation of such unfair competition. To secure the observance of such an order, the commission may apply to the Federal Courts, submitting the entire record in the case, as may any party obtain a Court review of a commission order. The Court may affirm, modify, or set aside such an order. In case it is sought to introduce new evidence before the Court, the Court may allow it and may order that it shall be taken before the commission.

Section 6 confers upon this commission the following powers:

1. To investigate the organization, business, etc. of corporations engaged in commerce, excepting banks and common carriers.
2. To require such corporations to make annual and special reports.
3. To investigate and report to the Attorney General on the manner in which a decree to prevent or restrain violations of the anti-trust acts has been carried out.
4. To investigate and report on alleged violations of the anti-trust acts upon the request of the President or either House of Congress.

5. To investigate and make recommendations concerning the readjustment of the business of any corporation alleged to be violating the antitrust acts, upon the application of the Attorney General.
6. To investigate trade conditions in foreign countries where combinations or other conditions may affect the foreign trade of the United States, and to report and make recommendations to Congress.

Section 7 of this act provided that where equity suits are brought under the antitrust acts and the relief, it may refer the suit to the commission to act as a master in chancery to report an appropriate form of decree; the Court, however, may adopt or reject the commission's report.

The commission was given power to make recommendations for the investigation and readjustment of the business of "any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter operate in accordance with law."[1] This is merely upon request of the Attorney General, and then he isn't bound to abide by these recommendations. It may be presumed that the commission would be better equipped to handle such matters, and therefore, it would have been wise to have made this obligatory. The Court, also, was to use discretion in calling on the commission in matters of decrees.

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[1]Section 6, (c).

W. H. Stevens evaluated the statute at the time of its enactment:

> As originally passed by the House on June fifth, the Trade Commission bill provided for an investigatory tribunal with little or no power beyond that which is the necessary accompaniment of investigation. This fact also remains true in large measure of the bill finally adopted in conference, passed by both houses and signed by the President. If either measure be stripped of the section relating to unfair competition little remains but provision for an investigatory body.[1]

The Clayton Act, passed in 1914, represents a combination of the original "Five Brothers Bills" as first suggested by President Wilson. Uppermost in the minds of those who discussed the bill seemed to be local price-discrimination as practiced by the Standard Oil Trust and the restrictive leases of the United Shoe Machinery Company.[2]

Section 2 of the bill was intended to prevent unfair discriminations.

> It is expressly designed with the view of correcting and forbidding common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure monopoly in trade and commerce by aping the methods of the great corporations have heretofore endeavored to destroy competition and render unprofitable the business of their competitors by selling their goods, wares and merchandise at a less price in that

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[1]W. H. Stevens, American Economic Review, December 1914, Vol. 4, p. 843.

[2]Miller, Unfair Competition (1941), p. 74.

particular community where the rivals are engaged in business than at other places throughout the country.[1] The "purpose or intent" must be to "thereby destroy or injure the business of a competitor." Two provisos were attached. The first legalized price discriminations between purchasers of commodities on account of differences in grade, quality, or quantity of the commodity sold; due allowance for difference in cost of selling or transportation; and discrimination in price in the same or different communities to meet competition. The second permitted sellers to select their own customers in bona fide transactions and not in restraint of trade.

Section 3 dealt with the illegality of discrimination among purchasers of the products of mines by the owners. Mining is apt to be monopolistic or partially so, and many companies like U. S. Steel had purposely acquired these monopolies, either directly or indirectly.

Prohibitions of Section 4 were aimed at so-called "exclusive dealing arrangements" and "tying contracts." In the first situation goods are sold or leased on the condition, either express or implied, that the purchaser deal only in the goods of the seller and refrain from dealing in like goods of competitors. In the latter situation,

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[1]Report to H. R. 15657, Sixty-third Congress, Second Session, Report No. 627, p. 8.

merchandise is sold or leased under the restriction that it is to be used only in conjunction with other goods of the seller, the purchaser agreeing not to deal in such other goods of competitors. The usual tying contract involves a lease of equipment on the condition that it be used only with supplies of the lessor. Trailing this prohibition is the qualification that the effect must be "to substantially lessen competition or create a monopoly in any line of commerce."

Section 6 asserted that the "labor of a human being is not a commodity or article of commerce" and that "nothing contained herein shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations," nor would these organizations be held as conspiracies under the antitrust laws. The insertion of the words "lawfully" attain their "lawful" objectives actually lessened the freedom of labor unions, rather than emancipating them.

Section 7 dealt with the "holding company," which is a company "whose primary purpose is to hold the stocks of other companies." In the committee report it was explained that:

> Section 7 is intended to eliminate this evil so far as it is possible, making such exceptions from the law as seem to be wise, which exceptions have been found necessary by business experience and conditions,

and exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade.[1]

Section 8 was concerned with the general subject of interlocking directorates. It prohibits all corporations engaged in commerce, any one of which has capital, surplus, and undivided profits exceeding $1,000,000, except banks and common carriers subject to the Act to Regulate Commerce, from having common directors after two years from the enactment of the law, if such corporations are or have been competitors so that the elimination of competition between them would result.

Section 5 provided that a final decree in a proceeding in equity brought by the United States under the antitrust laws shall be prima facie evidence against the defendant in any suit brought by another party under those laws, with respect to all matters in which the decree would be an estoppel between the parties. This does not apply to those cases where consent decrees are entered, however.

Enforcement was assigned to the Federal Trade Commission, backed by a circuit court of appeals, and also through the district courts at the instance of the district attorneys, under the direction of the Attorney General. Individual officers who have directed the action are held

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[1]*Ibid.*, p. 17.

responsible for violations of the criminal provisions of the anti-trust acts by a corporation.

During the debates on the bill, numerous dissenting views were expressed, some favoring a more stringent law and others disapproving of the general theory of such legislation. One objection was that only discriminations in price were referred to, while such discriminations having to do with terms of sale, credit, delivery, and so forth, were not mentioned in the statute. In conjunction with this criticism is the one that these price-discriminations must be shown to have been made with the intent to injure the business of a competitor. Also, Section 2 provides that sellers can choose their own customers, and, if so, they may discriminate between proposing purchasers. It was pointed out in the committee report that:

> They may refuse to deal with more than one person in a community, or for that matter, throughout the United States . . . . This proviso, it is probable, will sanction the practice of manufacturers to refuse to sell to any middleman who will not agree to sell their commodities at a certain fixed price, although the Supreme Court has decided that such efforts are illegal.[1]

Mr. Nelson and Mr. Volstead were concerned about the bill because:

> During the hearings no big trusts appeared to oppose the tentative bills, nor has the introduction of this final draft created any uneasiness on Wall Street.

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[1]Report 627, part 3, p. 3.

> On the other hand, the smaller business men of the country have been very much concerned because of the far-reaching interference with business affairs that may follow the enactment of this measure.[1]

Mr. Morgan feared the consequences of the law and stated his reasons:

> The National Government is entering upon dangerous ground when it enters upon the policy of enforcing uniformity in prices to all persons and all sections. The policy of the Government is to maintain competition. That was the object of the Sherman antitrust law. That is the object of the proposed legislation. Monopoly means the absence of competition. Competition is to insure purchasers reasonable prices for articles purchased. Reduction of price has been universally regarded as a legitimate method of securing business. . . . . Is the National Government ready to enact a law that will tend to compel uniformity of prices . . . . that will not permit a merchant or manufacturer to lower his prices to secure customers, to obtain business?[2]

Actually, the law involved duplication in its provisions referring to price discrimination, tying agreements, and acquisition of stocks of other firms. In the General Electric Company decree[3] the Court enjoined the company from making price discriminations or more favorable terms of sale for incandescent lamps to customers of a rival manufacturer than to its established trade;

> provided that no defendant is enjoined or restrained from making any prices for incandescent

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[1]Ibid., p. 1.

[2]Ibid., part 4, p. 3.

[3]U. S. v General Electric Company, final decree, U. S. C. C., for N. Dist. of Ohio, E. Div.

> electric lamps to meet, or to compete with prices previously made by any other defendant, or by any rival manufacturer.[1]

In the same decree the defendants were enjoined from making tying arrangements.

In the Northern Securities case[2] the Court set down a precedent to deal with the acquisition of stocks in another firm engaged in the same line of endeavor, although in that case, it was not shown that competition had been lessened. The committee mentioned that:

> In the Northern Securities case the criteria when the holding by one corporation of the stock of another is unlawful under the Sherman anti-trust law was laid down as being, not that the holding of the stock of such other corporation must be shown to have had the effect of lessening competition, but that it confers a potential power to lessen competition, whether that power has been exercised or not. Had Section 7 of this bill been law, the Northern Securitigs case would have been decided against the government.[3]

Under Section 11 of the act the commission may appeal to the Circuit Court of Appeals for the enforcement of its order. In the case of any appeal, from either party, the jurisdiction of the circuit court to enforce, set aside, or modify orders of the commission shall be exclusive. Then,

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[1] _Ibid._, p. 9.

[2] Northern Securities Company v U. S., 24 S. Ct. 436, (1904)

[3] Report No. 627, part 3, pp. 7-8.

under Section 15,

> it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.[1]

> Why, after providing through the Trade Commission a complete and on the whole commendable mechanism for enforcing compliance with these sections, was it regarded necessary or advantageous to provide another means of enforcement?[2]

A rather general, but most thoughtful, criticism was expressed by William Howard Taft:

> My objection to the Clayton Act and the Trade Commission Act are that their enactment with such a blare of trumpets and avowals of hostility to capital, in general, with little discrimination, had a strong tendency to frighten those whose judgment determines the amount of new investments of capital, and thus to restrict the normal expansion in our business due to the reinvestment of earnings . . . . There was in their enactment a political motive that prompted the claim on the part of those who voted for them that they were much more radical than they are.[3]

The old law covered "unfair methods" under restraint of trade and monopoly, but the new law gives the commission quasi-judicial power to determine "unfair" methods. Appeals can be made to the courts against an order of the

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[1]38 Stat. 736; 15 U.S.C.A. § 25.

[2]W. H. Stevens, American Economic Review, (March 1915), p. 47, Vol. 4.

[3]William Howard Taft, "Justice and Freedom for Industry," an address delivered at the Convention Banquet of the National Association of Manufacturers, New York City, May 26, 1915.

commission or by the commission if orders are disobeyed. The scope of the law was left to the interpretation of the Court, and the reliance it would place on the commission's views.

A new law was proposed a few years later when the Federal Trade Commission submitted a report advising legislation to permit combinations solely for export trade, in order to remove existing doubts as to the legality of such organizations under the Sherman Law. Agitation had begun by means of a campaign to legalize export associations, launched at the National Foreign Trade Council in 1914. This was before the war, so the Webb-Pomerene bill was not a direct outcome of the war. President Wilson was very anxious for the passage of such a bill, in order that the United States could obtain foreign trade before our opportunity escaped.

It was well recognized that American exporters worked under a decided disadvantage when competing with foreign merchants for world markets. Many powerful foreign combinations were subsidized by their governments, but the Sherman Law prevented such organization among Americans, and our exporters had to compete among themselves. Development of our export trade was said to be hampered by inadequate credit facilities abroad; by discrimination against American goods by foreign steamship lines; by the

small amount of American investments in the securities of foreign companies; and by our comparative inexperience.

Said E. S. Jones:

> The purpose of the Webb bill was to enable a number of smaller companies not having a large enough volume of business to justify the carrying on of an export trade by themselves to cooperate for this purpose and, by distributing the overhead charges over their combined foreign sales, to bring the costs down to a reasonable figure.[1]

The bill as it became law is identical with the amendment of the Senate Committee except in three particulars: (1) The Senate inserted the words "or depresses" after "enhances" in order to prevent export associations from beating down the prices of goods purchased by them, (2) the Senate struck out the words "and unduly enhances" prices, from an uncertainty as to the meaning of "undue" enhancement, and (3) the conference committee added the words at the close of Section 2 reading "or which substantially lessens competition within the U. S. or otherwise restrains trade." The Act declared that a combination for the sole purpose of engaging in export trade was not illegal under the Sherman Act, provided that domestic trade and competition were not restrained or that prices were

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[1]E. S. Jones, Journal of Political Economy, Vol. 28, (1920), p. 758.

not intentionally or artificially affected.[1]

The economic and commercial working plan according to which the whole machinery of the export association was to function was generally fixed in the form of a special agreement between the members and the association. Two types of associations were formed, differing in their degree of solidarity. The first type represents complete merger of the export businesses of the members. An example of this class is the Construction Steel Corporation which represents a high intensive organization of the export business of important steel concerns. All export business of the members is done through the association which establishes base prices at which members must furnish their allotted quotas. The second class comprises associations of a less concentrated form of organization, where members retain a certain degree of independence. For example, every producer member agrees to market his full export through the association, but he may maintain his own foreign agencies and sell directly to foreign customers subject to the association agreement in respect to apportioning orders and averaging prices.

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[1]Act of April 10, 1918, c 50, 40 Stat. 516, Sixty-fifth Congress, Second Session, H. R. 2316, Public 126.

William Notz pointed out the implications of the law: "It is looked upon by many as an indication of a change in our traditional policy concerning trade combinations and their economic utility."[1] Attention was also called to the fact that the Webb Act represents the first effort involving compulsory registration of trade combinations and a certain degree of control of the activities of such combinations by a government agency under a special law.

Objections were raised and fears aroused regarding the bill. Jones warned that domestic competition might be restricted.[2] Others believed that it might tend to promote international combinations or cartel arrangements, now that the United States would be freer to become a party to such agreements. Also, in discussing foreign prices at association meetings, it might not be difficult to arrive at understandings concerning domestic prices. The Act, however, exempts only those associations which are entered into for the sole purpose of engaging in export trade.

Another amendment to the anti-trust laws resulted after the Federal Trade Commission, on December 14, 1934, turned in a voluminous report regarding their investigation of

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[1]William Notz, Journal of Political Economy, Vol. 27, (July 1919), p. 527.

[2]E. S. Jones, Journal of Political Economy, Vol. 28, 1920, p. 765.

chain stores. The House Committee on the judiciary, after studying the report, found that:

> On the basis of the Commission's report as a whole, the conclusion seems warranted that the chains got their start and grew to wealth and power in the cities, on the greater natural advantages there afforded in the nature of a mass demand for cash-and-carry service at lower prices and greater opportunities for concentrated purchasing and warehouse deliveries; and that they then used the buying power so acquired to exact purchase-price preferment, giving them a position of added advantage over independent competitors with which to expand into less populous districts and into realms of the trade to which their natural economies would not admit them.[1]

The Commission pointed out that under the original Clayton Act there were various provisos which in the light of judicial interpretation made it difficult to deal with discriminatory practices even when it appeared necessary. Section 5 of the Federal Trade Commission Act did not enhance the powers of the commission in this respect, because the more recent, specific legislation took precedence over the earlier, general statute.

The House appointed a special Committee of Investigation of the American Retail Federation. Their findings concerned rebates given for advertising by manufacturers to chain-store dealers. These advertising allowances not only defrayed for them the cost of advertising their own

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[1]House Committee on the Judiciary, To amend the Clayton Act, 1935, Seventy-fourth Congress, First Session, p. 263.

sales of the goods purchased from the manufacturer granting the allowance, but also the advertising of the rest of their goods as well, both of which costs their independent competitor had to bear for himself. These discriminatory allowances, the committee found, were the function of size and the influence it wields, rather than of cost savings or differences in the different methods of merchandising, selling, or delivery employed.

Mr. Patman, when introducing this bill, stated:

> We recognize . . . . the rights of chain-stores and mail-order houses to do business. They have just as much right to do business in this country as anyone else. This bill is not intended to destroy any right or benefit they have--that they should have; this bill proposes to give all of the independent merchants of this country the same rights, privileges, benefits, and opportunities as the larger chains or concerns receive, and no more.[1]

Unless aid would be given to the "independents," Mr. Patman saw the complete growth of monopoly in some lines such as food and meat, and the eventual inevitability of government ownership. Actually, rigorous competition existed between these large, chain-firms, but he did not seem to take this into consideration.

Answering a question as to how this bill differed from the Clayton Act, Mr. Teegarden answered:

> This bill differs from that in that it restricts

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[1] *Ibid.*, p. 4.

> the price differential on the basis of the difference in quantity to some cost saving, or differences in cost resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.[1]

Mr. Michener repeatedly asked Mr. Patman if the manufacturers actually sold to these chain-stores at a loss. After some evasion, Mr. Patman answered:

> I do not make the charge that they do it as a general rule. I say this, that having interlocking arrangements where the same people who are selling are also buying, there is a great inducement for them to do that, and they should not be allowed to have a system that would give them the inducement. In other words, the owners of the manufacturing plant are also owners of the chains.[2]

He seemingly ignored the obvious public advantage of purchasing these goods at lower prices. Later, Mr. Teegarden frankly stated that nothing contained in this bill prevented the chain store operator from doing his own manufacturing, and lower prices could not be prevented in the quantity purchase by such manufacturers of raw materials.[3]

The bill as finally passed changed the defenses and provisos of Section 2 with reference to price discrimination, by limiting the payment of brokerage and the granting of advertising allowances or other special services which are indirect sources of discrimination, and made the

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[1] _Ibid._, p. 17.

[2] _Ibid._, p. 12.

[3] _Ibid._, p. 21.

one who receives the unlawful discrimination equally guilty with the one who grants it. It differs from the former wording in that it is no longer necessary to show the "purpose or intent to . . . . destroy or wrongfully injure the business of a competitor, of either the purchaser or the seller." One author expressed that "it is the very heart of the new law and was intended by its sponsors to have much more drastic meaning than the old.[1] Differentials which make only "due allowance for differences in methods or quantities in which such commodities are to such persons sold or delivered" are lawful; however the Federal Trade Commission may fix and establish quantity limits when the number of quantity purchasers is so few as to make differentials discriminatory.

The "due allowance" clause is interpreted as follows:

> If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?[2]

Section 3 represents a considerable change in antitrust law in that it prohibits certain discriminatory transactions regardless of their effects on competition

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[1]Thurlow M. Gordon, "Robinson-Patman Anti-Discrimination Act," American Bar Association Journal, 22: 593, (1932), p. 594.

[2]Senate Report No. 1502, Seventy-fourth Congress, Second Session, at p. 9.

generally, or of the parties involved. This section, under sanction of criminal penalties, unqualifiedly forbids "any person engaged in commerce to be a party to, or assist in, any sale. . . .which. . . .to his knowledge grants any discount, rebate," and so forth, not "available" to competitors of the purchaser in contemporaneous sales "of goods of like grade, quality, and quantity" or to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (c) of Section 2 prevents the use of nominal brokers and the payment of a commission, brokerage, or other compensation except for services rendered in connection with the sale or purchase of goods to either party of the transaction.

Thurlow Gordon commented: "It wipes out individual higgling and substitutes the 'mass bargaining' to which the government so strongly objected in the Sugar Institute case."[1] The Robinson-Patman law is reminiscent, in its effect, of the N. R. A. codes. It now becomes difficult, if not impossible, to vary the scale of prices except by classes, and where lower competitive prices exist in a particular market, and then it can't go below them.

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[1]Thurlow M. Gordon, "The Robinson-Patman Anti-Discrimination Act," American Bar Association Journal, Vol.XXII, (1932), p. 594.

Another opinion expressed that:

> . . . The doctrine that only differing costs justify differing prices takes no account, on the sellers' side, of the imponderables which in practice often lead a seller to prefer the patronage of one buyer to that of another; and on the buyers' side, it eliminates the bargaining advantages that would accrue to the astute or powerful buyer in the "haggling" process.[1]

Also, where few buyers or sellers exist, it is more advantageous to have this "haggling" because of the resulting lowered prices.

Actually, the advantage to the consumer in lower prices may be questioned, when considering the effects of this statute. It is the interests of the competitors of chain-stores who are the principle beneficiaries of the law, as was their powerful lobby in Congress largely responsible for its passage.

In 1938 an amendment was added to Section 5 of the Federal Trade Commission Act by passage of the Wheeler-Lea Act. Previously, this particular section was hampered within a triangular wall, necessitating the presence of one of three conditions before the Commission could enjoin any firm in their actions. These were:

1. That the method must be unfair, and what was to be considered unfair was to be decided by the Courts.

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[1]Felix Frankfurter, "Preservation of Competition Through Federal Anti-trust Laws," Harvard Law Review, Vol. LI, at 700.

2. Like producers or competitors must be injured by the practices involved.
3. The public interest must be evident in enjoining any act.

The proposed amendment, so the House Committee on Interstate Commerce stated, would make the "consumer, who may be injured by an unfair trade practice, of equal concern before the law, with the merchant or manufacturer."[1]

The Act now reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."[2] Advertising was brought under the scrutiny of the Federal Trade Commission, and includes failure on the part of the seller to reveal facts which are pertinent to the safe and effective use of the commodity. In appropriate circumstances the Commission may appeal to the courts for a temporary injunction against the dissemination of such advertisements pending the disposal of complaints. This is a power not granted the Commission in usual proceedings under Section 5.

The changes brought about by the passage of this amendment greatly enabled the work of the Commission to be expedited. The general purpose was to give extended

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[1] Seventy-fifth Congress, First Session, House Rep. No. 1613, p. 3.

[2] Public No. 447, Seventy-fifth Congress, First Session, House Rep. No. 1613, p. 3.

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protection to the consumer and "let the seller beware." Before, a substantial proportion of the public had to be involved.

Senator Sherman had proposed an amendment to his own act, providing that agricultural associations be exempt from its restrictions, but the bill passed without his amendment. This was thereafter interpreted as meaning that Congress' purpose in passing the law was to include such organizations. The Clayton Act exempted organizations of labor, agricultural or horticultural groups for mutual help, "and not having capital stock or conducted for profit." Thereby, they were enabled to pursue "lawfully" the objects thereof, which must be legitimate. These agricultural organizations were legal, but they could be enjoined under the Sherman Law for various activities. There continued to be much agitation for their complete exemption.

> Although the attempts of Senator Capper and Representative Hersman in 1919 to secure the total exemption of such organizations died in committee, the agitation continued until the bloc secured a law which it considered satisfactory.[1]

The final bill provided that:

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[1]Seager and Gulick, Trust and Corporation Problems, (1929), p. 442.

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate or foreign commerce.[1]

They were allowed to have common marketing agencies and enter into the necessary contracts. Two provisos were attached: that no member could have more than one vote, and dividends of the organization weren't to be in excess of 8% per annum, for stock or membership capital. Also, the association was restricted in dealing in the products of non-members to an amount greater in value than such as are handled by it for members. If the Secretary of Agriculture felt that such an organization was restraining commerce or monopolizing to such an extent as to raise prices of agricultural products unduly, he should issue an order for a hearing, followed by an order to cease and desist. If the order were disobeyed, the Secretary of Agriculture was to place his order in the District Court, and notify the Attorney General, encharged with enforcing the order. Findings of the Secretary of Agriculture were to be used as prima facie evidence, but both parties could produce new evidence.

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[1]Section 1, 7 USCA.

The powers of agricultural associations were further extended by passage of the Cooperative Marketing Act of 1926 which provided for the "open-pricing" which had been condemned on several occasions under the Sherman Act. Under this law, agricultural associations could disseminate past, present, and prospective crop, market, and other similar information by direct exchange between such persons, associations, or by and through their common agent.[1]

Later, in 1937, the Agricultural Marketing Agreement Act, as amended, gave the Secretary of Agriculture power to enter into marketing agreements with those engaged in production and distribution of agricultural products if interstate commerce is involved. It also gave the Secretary of Agriculture the power, upon written application of any dairy cooperative association, to mediate, or, with their consent, to arbitrate disputes between such associations and other dairy producers and distributors.

A pressure group of wholesale druggists was largely responsible for another amendment passed in the same year. The Miller-Tydings Act exempted from the prohibitions of Section 1 resale price maintenance contracts made in interstate commerce on identified products which are in free and

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[1]U. S. Statutes at Large, Vol. XLIV, Part 2, p. 803.

open competition with other goods of the same general class, provided such contracts are legal under the law of the state in which resale is to be made.[1] Horizontal agreements were specifically excluded from the amendment, however.

In 1939, after extensive administration pressure, a bill was initiated in the Senate, and went into a committee hearing in July of that year. It was introduced by Senator O'Mahoney, and its purpose was to make more stringent the civil provisions of the Sherman Act by applying them to the officers of any corporation or association found guilty of an illegal activity under the Act. Senator O'Mahoney stated his objective:

> The purpose of the bill . . . . is to prescribe such clear, personal penalties upon the officers and directors who are responsible for commercial policy that they will not be willing to undertake the chance of personal loss in civil damages if they advise and carry through a trade policy which they know to be inherently wrong and plainly condemned by the law.[2]

The measure provided, among other things, that officers responsible for the wrong-doings of corporations would be guilty of any violations of their corporation, subject to

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[1]Public No. 314, Seventy-fifth Congress, First Session, (August 17, 1937).

[2]Hearing before a Subcommittee of the Committee on the Judiciary, U. S. Senate, Seventy-sixth Congress, First Session, on S. 2719, p. 13.

fines of a sum equal to twice their compensation during the period of the violation, and would be prohibited from employment in that corporation or any competitor firm for a stated period. The corporation would be liable for a sum equal to twice its net total income during the period in which the violation occurred.

Senator O'Mahoney said of the bill:

> If enacted into law (this bill) will be beneficial to the great majority of businessmen in America, first, because it will protect them against illegal attacks by other businessmen, and second, because by preventing monopolistic practices before they take place, it will make unnecessary the continued building up of government bureaucracies.[1]

Contrary to the Senator's expectations, however, the bill did not find its way into the statute books.

Some of the amendments and subsequent legislation have made more rigid and explicit the original anti-trust act, while others have exempted certain favored groups from the law almost entirely, because of economic expediencies and political pressures. The courts, in some instances, have been slow to accept the implied intent of Congress, and again, the lawmakers may have been astounded at the effective scope of their drafts. This can best be seen by an analysis of Supreme Court decisions, showing the changes in trend brought about by this legislation.

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[1]*Ibid.*, p. 7.

CHAPTER II

INTERPRETATION BY THE COURTS UNTIL 1932

In the early days of the Sherman Act, the power derived from any combination was deemed to constitute a menace, per se, which Congress intended to proscribe without any consideration of the benefits which might accrue to the public. The first case to be brought before the Supreme Court resulted in a decision which did not exemplify the "anti-bigness" phobia soon to plague the tribunal.

The American Sugar Refining Company had purchased the stock of the E. C. Knight Company and of three other Pennsylvania corporations, payment for which was made by issuing new shares of stock in the American Refining Company and turning it over to the former owners of the other companies. By this acquisition the purchasing firm attained nearly complete control of the manufacture of refined sugar within the United States. The Government contended that this constituted a restraint in trade and was thereby illegal under the Sherman Law. Chief Justice Fuller expressed the majority opinion of the Court:

> Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition; but this is a secondary

> and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. . . .[1]

The justices, in this decision, were not inclined to make inferences from the facts. The Attorney General had erred in presenting the case, by basing the suit on that portion of the American Sugar Refinery's business which did not violate the Sherman law. No proof was presented that the sugar involved crossed state lines, and the control of the business of such sales and of prices were the chief object of the combination. Distribution, rather than manufacture, should have been emphasized by the Government.

The dissenting opinion of Mr. Justice Harlan was emphatic and typifies more directly the later attitude of the Court: He reasoned that these actions constituted a restraint upon commerce because it deprived citizens of other states of the right to purchase sugar under competitive conditions, to be afterward transported by them to their own states and sold there. He referred to the general principle of the common law which holds direct restraint of trade to be illegal, but cited cases[2] which

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[1]U. S. v E. C. Knight Company, 156 U. S. 1, at 17 (1895).

[2]Oregon Steam Navigation Company v Minor, 20 Wall 64; Homer v Graces, 7 Bingh. 735.

lead him to remark that: "There is a partial restraint of trade which in certain circumstances is tolerated by the law." He took into consideration the theory later to be developed and discussed, namely, the "rule of reason."

The second decision of the United States Supreme Court, applying to an industrial combination was that handed down in the Addyston Pipe and Steel case in 1896.[1] The bill of complaint was based upon Sections 1 and 2 of the Sherman Law, and upon the statement that the purpose of the Associated Pipe Works was to destroy all competition in the cast-iron pipe business throughout the thirty-six states and territories, and to force the public to pay unreasonable prices for the cast-iron pipe made and sold by the corporations which constituted that combination. The unanimous decision of the Court dispelled the doubts which had arisen in regard to the statute after the Knight case.[2] The reasoning was that the members to this agreement, although engaged in manufacturing, were primarily concerned, through their association, with distribution of

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[1]Addyston Pipe and Steel Company et al v U. S., 175 U. S. 211 (1889).

[2]U. S. v E. C. Knight Company, 156 U. S. 1, (1895).

their product in interstate commerce, and their activities constituted a restraint thereof. It was opinioned: ". . . . it marks the beginning of the effort on the part of the Supreme Court to apply the Antitrust Act positively and constructively to the regulation of business methods and conditions."[1] In answer to the defense, the Court also pointed out that Congress has the power to regulate private contracts involved with interstate commerce, which, when carried into effect, would obstruct the free flow of commerce between the several states as well as the power to regulate commerce in respect to conflicting state laws.

The possibility of reasonableness, in connection with a restraint of trade, was completely obliterated by the Court in U. S. v Trans-Missouri Freight Association.[2] The agreement which was being assailed was for the purpose of mutual protection of the railroad companies which were parties thereto, by establishing and maintaining reasonable rates, rules and regulations on all freight traffic which was to be conducted by those railroad companies throughout a specifically delineated and designated territory, which included nearly one-half of the United States.

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[1]Seager and Gulick, Trust and Corporation Problems (1929), p. 95.

[2]U. S. v Trans-Missouri Freight Association, 166 U. S. 290, (1897).

Absolutely no weight was given to the fact that such an agreement was for the public benefit and did not result in unreasonable rates. Nor was the particular character of the railroads considered, and the necessary regulation, either public or private, which they require. In evaluating "reasonableness" as found at common law, in the light of the Sherman Law, Mr. Justice Peckham answered:

> The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact or may restrain trade. Some of such contracts have been held void and unenforceable in the Courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.[1]

Mr. Justice White and three others dissented. He pointed out that when reasonable restraints of trade were held

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[1]U. S. v Trans-Missouri Freight Association, 166 U. S. 290, at 327, (1897).

valid in both English common law and in American cases, they were not, then, restraints of trade within the legal meaning of the term. Mr. Justice White declared:

> This Court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable.[1]

Again, in the Joint Traffic Association case[2] the Court refused to consider the reasonableness of the contract. The Association was engaged in fixing and regulating rates to be charged by the members for the transporting of freight and passengers. The majority opinion merely restated the rule laid down in the preceding case and said that railroads came under purview of the act. Justice Peckham, however, very definitely and conclusively expressed the "rule of reason" as the guide to interpretation of the statute. He pointed out that if the words of the first section were taken without any recourse to reason, every contract or agreement, however necessary and legitimate, if it touched upon interstate commerce in any way, would be illegal. Furthermore, he saw some contracts and combinations as "indispensable."

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[1] Ibid., at 349-350.

[2] U. S. v Joint Traffic Association, 171 U. S. 505, (1898)

William Howard Taft commented:

> It follows, therefore, that the position of the Supreme Court as shown by Mr. Justice Peckham's opinion in these two cases in fact admitted that the statute might properly be construed not to include in its denunciation contracts in restraint of trade that were held reasonable and valid at common law.[1]

Reason as the test of legality of a restraint of trade was first applied in the classic case of Mitchel v Reynolds.[2] In its beginnings the concept was confined to the field of ancillary restraints by which is meant an agreement which, though restrictive of competition, is an integral part of a larger, lawful transaction. The historic examples of such ancillary restrictions are the agreement of a seller of a business as part of the contract of sale not to compete with his purchaser, the agreement of an employee not to compete with the partnership, an agreement by a purchaser not to use the article purchased in competition with the seller and restrictions in leases in respect of the use of the leased premises or of other premises owned by the landlord.[3] Up to 1890 opinions

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[1]William Howard Taft, The Anti-trust Act and the Supreme Court (1914), p. 66.

[2]1P. Wms. 181 24 Eng. Rep. 347 (1711), see Investigation of Concentration of Economic Power, Temporary National Economic Committee, p. 3.

[3]Investigation of Concentration of Economic Power, TNEC, p. 3, f. 2.

varied as to what types of combinations and agreements would be protected under the classification of "ancillary." The majority concluded that any agreements among persons engaged in the same line of trade, industry or commerce for the purpose of hindering competition, whether the price were reasonable or the regulation necessary to combat ruinous competition, were illegal. Other viewpoints were less rigid and allowed for more exceptions to be included under "ancillary." It can readily be seen, however, that such divergencies would invariably lead to court confusion.

The "rule of reason" as applied in common law was for the first time set forth in interpreting the Sherman Act in the Supreme Court by Chief Justice White in the majority opinion in Standard Oil Company v U. S.[1] This case applied the interstate commerce law to the most flagrant monopoly then in existence. This ruthless gorgon was a predominate cause for the original agitation for the Sherman Act in the latter part of the 19th century. It had acquired nine different Standard Oil companies and sixty-two other corporations and partnerships operating oil wells, refineries, pipe line and tank line companies.

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[1]Standard Oil Company v U. S., 221 U. S. 1, (1911).

Allegations were price-fixing, limitation of production, and control of transportation. From 1882 to 1889, individual oil companies turned over their management to nine trustees, the majority of whom were defendants. Finally, in 1906, Standard was labelled as a "holding company." On May 15, 1911, a unanimous decision was finally handed down affirming the decree of the lower court which had ruled that the combination must be dissolved. Chief Justice White stated:

> We think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot *an intent and purpose* to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view.[1]

The opinion referred to the Trans-Missouri and Joint Freight Rate[2] cases and pointed to the mention, therein, of the consideration of whether the restraint was "direct" or "indirect." They then construed this to mean the same as "reasonable" or "unreasonable".

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[1]221 U. S., at 75 and at 76 (italics mine).

[2]166 U. S. 290; 171 U. S. 505.

> . . . . the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-trust Law aside from the contention as to the Freight Association and Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the Court was within the statute.[1]

The same rule was expressed by the Chief Justice in the Tobacco case.[2] This "trust" consisted of over sixty corporations, which, since January, 1890, had been united into a large combination which controlled a preponderating proportion of the tobacco business in the United States. All branches of the industry were included and companies had been coerced into joining the combination, rather than be ruined. In granting the plea that the combination be dissolved, Mr. White stated:

> Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance . . . . the term 'restraint of trade' required that the words. . . . should be given a meaning which would not destroy the individual right to contract and render difficult if

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[1]221 U. S. 1; at 68.

[2]221 U. S. 106, U. S. v American Tobacco Company, (1911).

> not impossible any movement of trade in the channels of interstate commerce . . . . the free movement of which it was the purpose of the statute to protect.[1]

He thus took a different interpretation from the common law than had Justice Taft in his opinion in the Addyston case.[2] Chief Justice White didn't combine reasonable and "restraint of trade," because they were not compatible, he thought. If the restriction of competition were reasonable it was not a restriction. He merely avoided "every" as it appears in the statute. This reasoning is rather faulty, and does not actually express the common law meaning, where some restrictions are regarded as lawful, per se, and a necessary accompaniment to the operation of business.

Justice Harlan labelled this use of the common law to interpret the intent of Congress as "judicial legislation." This logic appears to be misguided when the Justice's own dissenting opinion in 1894 chartered the course more recently followed by the Court.

Great alarm was reflected in public opinion, fearful

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[1] Ibid., pp. 179-180.

[2] Judge Taft referred to common law, and pointed out that had Congress intended to codify it, the agreement in the Addyston case would have been illegal because in no way could it be classified as an ancillary agreement. He implied that some combinations and agreements, therefore, were reasonable, even though they resulted in a restraint of trade. 85 Fed. 271, 281.

that this new annunciation would destroy the effectiveness of the Sherman statute. The arguments reverberated on Capitol Hill, in the press, and in political statements of contenders for public office, an argument which is not alien to the present decade.

Mr. Taft commented on the storm thus aroused:

> A calm and considered examination of the opinions of Chief Justice White in the Standard Oil and Tobacco cases, and the use of the rule of reason which he laid down in applying the act to subsequent cases, will show that those who charged that the Court had narrowed the act, or had not comprehended the settled public opinion that found expression in it, spoke without knowledge.[1]

A tendency has been noted, since 1912, to regard the rule of reason as opening the door to the validation of any scheme or device for the curtailment of competition which may be justified on the grounds of economic expediency. A sketchy review of the cases adjudicated since that date stands as evidence that such has been neither the intention or the understanding of the Court. Regardless of reasonableness of prices fixed, output restrictions or business necessity, any agreements or combinations which unduly restrain the flow of commerce are held to be illegal, with the exception of a few isolated utterances from the Supreme Court bench. One author evaluated the

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[1]William Howard Taft, The Anti-Trust Act and the Supreme Court, (1914), pp. 89-90.

application of the rule of reason:

> In the main and subject to minor exceptions, conduct which prior to 1911 was condemned as an illegal restraint was held unreasonable <u>per se</u> thereafter and hence unlawful.[1]

One may safely class price-fixing as a per se violation of the law. This was clarified in the Trenton Potteries case.[2] The agreement to fix prices had been made by persons manufacturing and distributing 82% of the vitreous pottery bathroom fixtures produced in this country. The company contended that the prices fixed were reasonable, to which the Court answered:

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.[3]

The ruling of the Court relates to the reasonableness of the restraint imposed on interstate commerce, and only unreasonable restraints are prohibited. Price-fixing, because of the injurious effect it has on the public, is decisively removed from the realm of reasonableness. . . .:

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[1]"The Rule of Reason in Loose Knit Combinations," <u>Columbia Law Review</u>, Vol. XXXII, (February 1932), p. 303.

[2]U. S. v Trenton Potteries Company, 273 U. S. 392, (1927).

[3]<u>Ibid</u>., at 397, 398.

> . . . . it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.[1]

Several cases have arisen in connection with open-pricing systems and the collection and dissemination of trade statistics. The distinction to be drawn between what is legal and what is not seems to be dependent upon whether the information relates to past statistics or those dealing with the future.

The first decision given was that in the American Column Company case[2] in which 365 out of 9000 hardwood lumber mills from Minnesota to Texas participated in an open competition plan, involving interchange of reports, of sales, prices, production, and practices. The combined production of the group amounted to one-third of the total national production. Each member reported daily sales, daily shipping, monthly production, monthly stock, outstanding price lists on the first of the month and all price changes were reported promptly. Proof was given that prices had increased during the period of the association.

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[1]U. S. v Trenton Potteries Company, (1927), 273 U. S. 392, at 396.

[2]U. S. v American Column Company, (1921), 42 S. Ct. 114.

The Court reproved the producers, unhesitatingly:

> To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a 'new form of competition' and not an old form of combination in restraint of trade, as it so plainly is, would be for this Court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn as an old evil in a new dress and with a new name.[1]

Mr. Justice Holmes dissented and referred to freedom of speech, which right he thought this association had been practicing, and accused the government of lack of proof that competition had actually been substantially affected.

> The effect of the decision was in one respect most unfortunate, since it was rather widely interpreted as holding illegal all exchange of trade information by associations. Subsequent developments have demonstrated the error of this interpretation, but its adherents were strengthened in their opinion by the Linseed decision in 1923.[2]

This case obviously involved a price-fixing association, and members were compelled to conform to the law after an unanimous decision by the Court.

Not until the Maple Flooring case[3] was the legality of such an association and its conduct recognized. The

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[1]U. S. v American Column Company, 42 S. Ct. 114, at 410, (1921).

[2]Seager and Gulick, <u>Trust and Corporation Problems</u>, (1929), p. 456.

[3]Maple Flooring Association v U. S., 268 U. S. 563, (1925).

only noticeable difference in the material disseminated was that no mention was made of probable future prices. The statistics of average cost, freight rates, quantity and kind of flooring sold, and waste in production were compiled and made available to members. The reasoning of the Court is as follows:

> It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity in the markets of the world. . . . but the acquisition of wider and more scientific knowledge of business conditions, ... and its consequent effect on stabilizing production and price, can hardly be deemed a restraint of commerce or if so, it cannot . . . . be said to be an unreasonable restraint. . . .[1]

It becomes rather laborious to attempt to find the line of demarcation as clearly as did the Justices. After admitting that the result would probably be price stability, it seems only a step farther into the realm of probability to envisage production planned in relation to the statistics, limited supply and a weighty effect upon price. The Court made it clear that such approved movements contained the possibility of being used as a cloak for illegal activities.

In Cement Manufacturers' Protective Association v U. S.[2] the same reasoning was used in the decision handed

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[1] Ibid., p. 582.

[2] Cement Manufacturers' Protective Association v U. S., (1925), 268 U. S. 588.

down. The allegations were different from those in the preceding case and were considered in the light of the particular circumstances of that industry which enabled the dealers, through investigation of contractors, to protect themselves against fraudulant contracts. There was no coercion to act upon such information but there existed a high degree of certainty that they would, for their own benefit. Allegations also involved the exchange of information concerning credits, statistics and meetings. However, it was not shown that discussions included market conditions, current prices or production. The Court said that although the result of such cooperation might be price uniformity, the alleged actions could not be considered an unreasonable restraint of commerce.

One may conclude from this reasoning that only price-fixing, and not price uniformity would be held unlawful, per se, under the act, in 1925.

Price-leadership has never been considered by the Court as a violation, in itself, of the Sherman Law. This attitude is expressed in the U. S. Steel case[1] which was brought before the Court in 1920. The government tried to use price-leadership as evidence of a monopoly. The competitors gave testimony that they were in no way coerced

[1]U. S. v United States Steel Corporation, (1920), 251 U. S. 417.

to conform to those prices set by the larger corporation. Without "confederated action" the Court failed to recognize any illegality and found the government's assertions contradictory, because at the same instance as U. S. Steel was accused of oppressing its competitors, they were also stated to be rising to "opulence" by imitating the price policy of the power firm. Mere size, by itself, is not conclusive because:

> It requires. . . .overt acts and trusts to its prohibition of them. It does not compel competition nor require all that is possible.[1]

Very similar conditions and decision are to be found in the International Harvester case[2] seven years later. Reasonableness allows the concentration of power if such acquisition has been made because of superior efficiency, and the resultant price conformity is considered a natural economic consequence and no proof of illegality.

Several cases brought by private parties demonstrate the original ruling of the Court with regard to restrictive licensing in the selling of patented articles, and the subsequent reversal of the earlier decision. In the

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[1] Ibid., at 451.

[2] U. S. v International Harvester Company, (1927), 247 U. S. 693.

Dick case[1] the Court upheld the company in requiring purchasers of its patented mimeograph machines also to buy stencil paper, ink and other supplies from them. The sale of a patented article by patentee might be either with or without reservations.

In Motion Picture Company v Universal Film Company,[2] however, the newer ruling was stated:

> 1st. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification....
> 2nd. It has long been settled that the patentee receives nothing from the law which he did not have before, ...
> 3rd. Since Pennock v Dialogue, 2 Pet. 1, 7 L. Ed. 327, was decided this Court has consistently held that the primary purpose of the patent law is not the creation of private fortunes for the owners of patents but is 'to promote the progress of science and useful arts. . . .[3]

The Court was taking cognizance of the wish of Congress which was manifested in the Clayton Act, and thus limiting the rights conferred upon patentees.

A few months after the decision in the Steel case was delivered, the Court rather inconsistently rendered an opinion concerning a holding company controlling two great competing railroads and two competing coal companies,

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[1]Henry v Dick Company, (1911), 224 U. S. 1.

[2]Motion Picture Company v Universal Film Company, (1917), 37 S. Ct. 416.

[3]Ibid., at 418.

engaged extensively in mining and selling anthracite coal, which had to be transported to interstate markets over the controlled interstate lines of the railways. This coal amounted to approximately thirty-three and a third of the total national production.

In the Anthracite Coal case[1] the Court said:

> (As) this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control,

the combination is unlawful

> . . . . such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce. . . .[2]

This decision would, if used as a precedent, imply that any two companies, controlling a substantial percentage of the total industry, would commit an illegal act under the Sherman Law, by merging their ownership. How the Court distinguished between the acquisition of power in this instance from that obtained by the U. S. Steel Company is difficult to determine. Could not the same efficiencies have been brought about under singular control of the two railway and coal companies as the Court had recognized in the concentration of fifty per cent of the steel production

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[1]U. S. v Reading Company, (1920), 253 U. S. 26.

[2]253 U. S. 26 at 57, (1920).

of the United States? Nor was it the Hepburn Act which influenced the decision, because this statute was not even mentioned. No abusive practices were established by the holding company. Its power, alone, seems to have been the decisive element, rather than the abuse of such power.[1] It is problematical to say the least, to attempt to reconcile these words with the former utterances of the same Court which declared that size, alone, was not conclusive, keeping in mind that size, in that instance, amounted to a larger percentage of the industry than "power" condemned in this case.

Another ruling concerning mergers was that expressed in the Shoe Machinery case[2] which combination united four companies, three of which were asserted to have controlled from sixty to eighty per cent of their lines, respectively. The companies were non-competing and the machines produced by the company were patented, making them a monopoly in any case. The Court found that:

> It is hard to see why the collective business should be any worse than its component parts. . . .

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[1]The Court referred to the Northern Securities and the Union Pacific cases (193 U. S. 197; 226 U. S. 61) in which this idea was propounded. See Investigation of Concentration of Economic Power, TNEC, p. 68.

[2]U. S. v Winslow, (1913), 227 U. S. 202.

> Until the. . . .intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt.[1]

If monopoly power, then, has not been obtained, the Court reasons that acquisition of monopoly power has been abandoned. (U. S. Steel case) In borderline cases, where the element of monopoly is hard to determine, intent may be decisive. However, in the railroad cases this latter conclusion did not apply, for no attempt to monopolize was proved, while in the Shoe Machinery case, where a combination of different patent monopolies resulted, no illegality was found. Thus, the attitude of the Court in respect to Section 2 of the statute has gyrated from one extreme to the other, making a conclusive statement impossible, without the addition of confusing qualifications.

Labor was not exempted from the scope of the Sherman Law and several cases may be cited to demonstrate the statute's application to such cases.

The Supreme Court in Lawler v Loewe, commonly known as the Danbury Hatters' case,[2] unanimously affirmed the judgment of the lower court when it had declared that the manufacturers of hats in Danbury, Connecticut should

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[1]U. S. v Winslow, 227 U. S. 202, at 217, (1913).

[2]Lawler v Loewe, 235 U. S. 522.

receive triple damages under Section 7 of the act as a consequence of the injury incurred by a boycott instigated by the U. S. Hatters of North America, a labor union, when said manufacturers refused to employ union labor, exclusively.

The lower court had found this to be an unreasonable obstruction of trade, and, furthermore that:

> If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.[1]

A similar view, to be presented in a later labor case (Apex v Leader) is adopted by the Court, but to a strikingly different conclusion.

Dispelling any doubt as to the legality of a secondary boycott, the Supreme Court in the Duplex Printing Company case[2] said emphatically:

> Congress had in mind particular industrial controversies, not a general class war. 'Terms or conditions of employment' are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute.[3]

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[1]*Ibid.*, at 301.

[2]Duplex Printing Company v Deering, 254 U. S. 443, (1921).

[3]*Ibid.*, at 472.

Labor learned, distastefully, that the Clayton Act, in which they had placed their confidence, to extend to them new privileges and exemptions, was not to be interpreted by the Court as the Magna Charta which they had been seeking. "Lawful objectives" was construed to place their activities within narrow bounds.

The full impact of the burden of proof of "intent" may be seen in the Coronado Coal cases.[1] The Supreme Court took the view that the lower court had been correct in dismissing the suit against the union because evidence failed to establish that it was in any way responsible for the actions of some of the defendants and the actions which occurred were strictly of a local nature.

The union members had driven and frightened away the plaintiffs' employees, including those directly engaged in shipping coal to other states, prevented plaintiffs from employing other men, and destroyed the structures and facilities for mining, loading and shipping coal and the cars of interstate commerce, waiting to be loaded with coal in and for interstate shipment. The lower court had

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[1]United Mine Workers v Coronado Company, 42 S. Ct. 570, (1922).
Coronado Coal Company v United Mine Workers, 45 S. Ct. 551, (1925).

said: ". . . .it was a local strike, local in origin and motive, local in its waging and local in its felonious and murderous ending."[1] In the second trial, new witnesses were produced who offered proof that the intent and purpose of the union was to prevent the product of non-union mines from entering into interstate commerce. The Court still ruled that the international union was not involved, but the recent evidence constituted sufficient proof that the actions of the strikers had been an unreasonable obstacle to the flow of interstate commerce.

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act.[2]

Regardless, then, of the results of such violence upon commerce, the restraint is not direct unless the parties perpetrating the actions have divulged that their intent is to obstruct interstate commerce.

After the adoption of the "rule of reason" by the Court, one detects a broadened outlook on the part of the courts

Summary ✓

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[1]Coronado Coal Company v United Mine Workers, 45 S. Ct. 551, at 556, (2nd case), (1925)

[2]*Ibid*.

in interpreting the Sherman Act. It might be mentioned that accompanying this was a noticeable relaxation in public sentiment against corporate power for a time. However, dissatisfaction arose, occasionally, and the question of whether this statute were stringent enough was asked. Agitation against the laxity of the law, the Department of Justice and the Courts resulted in the passage of several amendments[1] to implement the Sherman Law and other additional legislation, in some cases giving special privileges to particular groups.

Up to 1930 several criticisms of the enforcement of the original bill may be mentioned. In numerous instances the presentation of cases by the Attorney General's office was faulty, and such a great length of time elapsed before cases were finally brought to Court that dissolution became a most difficult, if not super-human task. This has been emphasized in the many accounts written on the dissolution orders and their effectiveness in the Standard Oil and Tobacco cases.

> Standard Oil provides the best example of the carrying power that will sustain an established combination in spite of formal dissolution. The habit of cooperation had developed over a long history and could not be suddenly dispelled by mere judicial abracadabra. Although the decree was scrupulously observed, specialization and division of territories

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[1]See Chapter I.

persisted until economic factors attendant upon the war and the increase in crude oil production gradually drove the segment apart.[1]

Another criticism generally put forth is that the Courts did not impose severe enough penalties on offenders, so that the fear or threat of the outcome was not a deterrant.

It is our present problem to analyze the decisions of the Court during the 1930's and attempt to discover whether the general attitude of our tribunals of justice have changed, and if so, in what directions.

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[1]"Fifty Years of Sherman Act Enforcement," Yale Law Journal, Vol. XXXXIX, at 292, 293 (1939).

CHAPTER III

INTERPRETATION BY THE COURT SINCE 1932

It was generally believed that the act of price-fixing might be considered a violation, per se, of the law. Two cases have been brought before the Court since 1932, in which the allegations involved, primarily, this intent.

In 1933 the Appalachian Coals Case[1] was handed down by the Supreme Court, in favor of the appellants. The allegations involved an exclusive selling agency, the Appalachian Coal Company, with operating companies holding all its capital stock, in proportion to their production. In the majority of instances the company sold all of the producers' product. The company had agreed to establish standard classifications, and sell all of defendants' coal at the best price obtainable. If the full amount of members' coal couldn't be sold, orders were to be apportioned on a stated basis.

The government's contention, which the District Court sustained, was that the plan violated the Sherman Anti-Trust Act in that it eliminated competition among the

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[1]Appalachian Coals, Inc., et al v U. S., 53 Supreme Court 471, 1933.

defendants themselves and also gave the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. On the latter point the District Court made the general finding that this elimination of competition and concerted action would affect market conditions and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition. Complete monopoly control, however, was absent.

The lower Court found that one of the more serious problems of the industry was the fact that several sizes of coal had to be produced in one process, although the orders on hand might be for just one size, resulting in an oversupply of the sizes not on order. It was also expedient that the coal be sold quickly to avoid storage or demurrage charges. "Pyramiding" was another destructive practice which was prevelant in the industry. When a producer authorizes several persons to sell the same coal, and they in turn offer to sell to several dealers, the supply is increased and price drops accordingly. It was claimed that by means of credit purchases and organized buying agencies, purchasing substantial tonnages, another unfavorable element arose, namely, a "buyers' market." The District Court also found that among the defendants' purposes was the elimination of the destructive practice

of shipping coal on consignment without prior orders for the sale thereof, which resulted in the dumping of coal on the market, irrespective of the demand.

It cannot be disputed that many of the conditions pertaining to the industry were ruinous and needful of remedy. By elimination of such abuses, witnesses admitted that the producers would receive more, in the aggregate, for the product. "Other witnesses for the defendants," said the Court, "indicated that there would be some tendency to raise the price but that the degree of increase would be affected by other competitors in the coal industry and by producers of substitutes."[1]

In this respect, Chief Justice Hughes stated, for the Court:

> A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities . . . . The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor . . . . constitutes an unreasonable restraint of trade.[2]

The Court found that the object of the agreement was in the public interest:

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[1] Ibid., at 477.

[2] Ibid., at 479.

> The interests of producers and consumers are interlinked. When industry is grievously hurt, when producers' concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.[1]

Furthermore, it stated that cooperative action is not illegal any more than actual integration of many firms. The decisive factor is the effect of such control on the market. This infers that restriction of competition by means of loose agreements would be lawful if the degree of control did not actually fix prices or monopolize the market. If this were the actual meaning of the Court's words, the annunciation would be setting a new precedent in the antitrust field.

Before making further comment it would be well to discuss the Socony-Vacuum case[2] because in many respects, the two cases are similar, and the company, in this case, relied strongly on the decision rendered in the Appalachian Coals suit.

Unfavorable economic conditions had existed in the oil industry and both state and federal governments actively engaged in attempting to remedy and solve the problems in various ways, such as price fixing of crude oil, curtailment of production, and buying programs. An executive

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[1] *Ibid.*, at 478.

[2] U. S. v Socony Vacuum Oil Co., 105 F (2d) 809; 60 S. Ct. 811, (1939).

proclamation had been issued, forbidding shipments of oil or gasoline in violation of state proration laws. A code was fixed defining the natural parity relationship between the price of a barrel of crude oil and a gallon of refined gasoline as 18.5 to 1, and the fixing of minimum prices for crude oil and its products was authorized. The government sponsored various buying programs wherein major companies contracted to relieve the independent refiners of their surplus gas at prices above the going market.

"Hot oil" was the chief stumbling block in these programs. Refiners in the field could procure such oil for thirty-five cents or less a barrel, and manufacture gasoline therefrom for two cents or two and one-half cents a gallon, while the parity price based on one dollar oil was from five cents to six cents. Another condition in the industry was that of "distress gas," described as legal gasoline manufactured by independent refiners who had to dump it on the market for whatever price it would bring. The purchase contract of the independent refiner with the producer required him to take all the crude oil which the seller was permitted by law to produce. Thus, he was compelled to manufacture gas regardless of the demand.

The Secretary of the Interior set up a Petroleum

Administrative Board to advise with and make recommendations to him. Arnott, the vice-president of Socony was a member of the Planning and Coordination Committee, (1934). A plan was devised to purchase gasoline from independents at stipulated prices. The idea was that the parties to the agreement would be bound to buy certain amounts of gasoline at designated prices on condition that the seller would abide by the code, so as to stop "hot gas" and oil from depressing the market. The President finally set up a Tender Board and no shipment of oil in interstate commerce could be made without a certificate. This was declared illegal in Panama Refining Company v Ryan,[1] after which the price again dropped. The Connolly Act was then passed, which prohibited shipment of "hot oil" and "hot gas" in interstate commerce.

At the General Stabilization Committee meeting in January, 1935, the price of gas had still failed to meet a parity with crude oil and the Mid-Continent buying program was formulated. The purpose of this was to keep the "spot" prices up, that is, the price of gasoline sold by

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[1]Panama Refining Company v Ryan, 55 S. Ct. 241, (1935).

the independent refiners on the "spot market,"[1] which price determined the contract prices of the larger refiners.

On May 27, 1935, the Supreme Court held in the Schecter case[2] that the NIRA was unconstitutional, but by this time Arnott's program operated almost automatically as the contracts between buyer and seller became well established, and an East Texas buying program was begun.

The government contended that the members to the agreement, who were responsible for the production of a major portion of the oil in that area, conspired to fix the spot market price of gasoline by purchasing gas under the two buying programs at high, artificial and agreed upon prices, thereby causing such prices to be published in the trade journals, falsely representing them as spot market prices paid by jobbers in purchasing gasoline from independent refiners. In fact, no purchases were made above the market price and prices actually paid to the independent refiners varied considerably. This was especially true during March of 1935, when three of four different

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[1]Consists of composite sales made at the refinery and recorded in trade journals. Total sales therein constitute 5 - 7 per cent of total sales in the Mid-Continent area. It is regarded as an index for that area.

[2]Schechter v U. S., 55 S. Ct. 837, (1935).

prices were paid by the purchasing companies on the same day. More than one price was paid on 72 per cent of the days.

An actual price rise had taken place but other factors were alleged to have caused or contributed to this, namely:[1]

1. Control of production of crude oil (State compacts).
2. Connolly Act.
3. $1.00 crude oil.
4. Increase in consumptive demand.
5. Control of inventory withdrawal and of manufacture of gasoline.
6. Improved business conditions.

The companies relied heavily on Appalachian Coals, while the government relied on Trenton Potteries. The Court found the present case to be different from either of the two mentioned.

> Unlike the plan in the instant case, the plan in the Appalachian Coals case was not designated to operate vis a vis the general consuming market, and to fix the prices on the market.[2]

In this case, the Court thought that sufficient evidence had been presented to prove that purpose and effect of this combination had been to fix or contribute to the fixing of prices and the buying program contributed to the stabilization and raising of prices. It restated the

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[1]U. S. v Socony Vacuum Oil Company, 60 S. Ct. 811, at 838 (1939).

[2]*Ibid.*, at 841.

attitude of the Court toward price-fixing arrangements:

> . . . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se . . . .[1]

In the Appalachian Coals case, the Court took cognizance of the fact that though the effect might be to stabilize prices, the agency couldn't fix them. Applying the quotation from the decision in Socony Vacuum, directly above, to the admission by the Court that the effect would be to stabilize prices in the coal industry, the combination would become illegal, if the same ruling applied to both cases.

John Perry Miller offered the following opinion in his book, Unfair Competition:

> In the first place, in the coal case there was a bonafide selling agency for the conduct of market relations, while in the oil case the market functions were conducted by the individual firms by a prearranged scheme. Moreover, the Court in the coal case was very much impressed by the purpose of eliminating unethical practices and increasing efficiency, with the price effects only incidental phenomena, while in the oil decision it was inclined to pierce the veil of professed morality only to find an all too obvious intention to raise prices. Finally, although both industries have suffered from the intensity of competition, the circumstances of the industries are sufficiently dissimilar to explain differences in judicial attitude.[2]

The "circumstances" of which Mr. Miller speaks might

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[1] Ibid., at 843.

[2] Miller, Unfair Competition, (1941), pp. 47-48.

very possibly be contained in the fact that the benefits of the coal agreement were more widespread, applying to a greater number of workers, owing to the nature of the industry, while the refiners were the recipients of the benefits in the oil combination. Several remarks of the Court in the Appalachian decision pointed to the widespread unemployment which resulted from the distressed conditions of the industry. In that case the court recognized the legitimate reasons presented for stabilizing price and improving conditions, while in the Socony opinion, it remarked:

> Ruinous competition, financial disaster, evils of price cutting and like appear throughout our history as ostensible justifications for price fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case.[1]

The Court, then, ostensibly differentiated between the two schemes in the degree of control each had over the market price. The question arises as to the proof that Socony could set the market price. If the members conspired to buy at the same price and to raise it artificially, the allegation would be open to no objection. However, such were not the facts presented, but rather this was inferred, either correctly or incorrectly.

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[1]U. S. v Socony Vacuum Oil Company, 60 S. Ct. 811, at 843 (1939).

The coal producers who were members to their agreement accounted for 73 per cent of the total production. Certainly, a combination composed of this percentage of the total would be able to "influence" price.

If the "rule of reasonableness" were applied it would seem consistent for the Court in a situation in which price-fixing is alleged to allow the case to go to the jury in regard to the reasonableness of the agreement involved.

Closely connected with these cases, is the Sugar Institute suit.[1] The purpose of this combination was to abolish a system of secret rebates and concessions under which part of the buyers had been given unfair and discriminatory advantages over their competitors. Abolition of these discriminations were accomplished by making all prices and terms open and public, including the buyers as well as the sellers. Price advances were announced by three o'clock of the day before the advance, but this was customary on the sugar market; furthermore, there was no consultation among the appellants. Sugar, being an unstandardized product, was sold at generally uniform prices, but the government argued that this assurance to each refiner that no competitor would vary his prices

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[1]Sugar Institute Inc. et al v U. S., 56 S. Ct. 629, (1936).

without advance notice was sufficient to deter declines and increases in prices without justification. Prior to the Institute, the list price which many of the "unethical" refiners announced, "were merely nominal quotations and bore no relation to the actual 'selling basis' at which their sugar sold."[1] According to the agreement, the producers were required to adhere, without deviation, to the prices and terms publicly announced.

The opinion of the Court read:

> The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the subsequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful.[2]

The feature of the Institute which the Court found to be unreasonable was "in the steps taken to secure adherance, without deviation, to prices and terms thus announced."[3] It was on this point that the decision was rendered in favor of the government.

The advance announcements, in themselves, then, could not be condemned, particularly in consideration of the particular practices of the industry. The buyers were also able to receive the information, by means of the

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[1]*Ibid.*, at 582. [2]*Ibid.*, at 598.

[3]*Ibid.*, at 601.

Institute and this was not only lawful but advantageous.

One writer pointed out that in the sugar industry, where production was carried on by a very limited number of organizations, such an agreement would be a device to increase profits and prices.[1] However, proof was established that no information in respect to production was given, so the recognized method of minimizing profits by means of limited production was not available through the Institute.

The producers were attempting to deter the "unethical" practices which prevailed, however, and this could not be accomplished without the assurance that the prices announced were the actual prices at which sugar would be sold. Again, the Court refused to recognize the unfair practices which the producers were trying to regulate. In an earlier case, Cement Manufacturers Protective Assoc. v U. S., the Court applied "reasonableness" to the alleged restraint, considering the particular nature of that market, and declared it lawful for producers to protect themselves against fraudulant contracts, which is similar to the protection which these producers were asking . . . . against fraudulant price quotations, which were

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[1]James Lawrence Fly, "The Sugar Institute Decision and the Anti-Trust Laws," Yale Law Journal, Vol. XXXXVI, (1936), p. 254.

detrimental to both buyers and sellers.

In more recent cases involving patents the Court has amplified the ruling expressed in the Motion Picture suit,[1] and clarified the rights which patent owners may expect to exercise within the legality of the Sherman Law.

U. S. v Univis Lens Company, Inc. et al was brought before the Supreme Court in 1942.[2] The Corporation had been formed with Lens Company transferring to it all the latter's patents and trademarks, following which the Corporation then set up the licensing system which the government assailed. Three types of licenses were granted: to wholesalers, to finishing retailers, and to prescription retailers. In finishing the lenses so as to make them an effective aid to the vision of the buyer, it is necessary for the wholesaler to conform their curvatures to the prescription supplied by the retailer with his order. All licensees were required to keep full accounts of all purchasers, sales and prices. The only profit made by the patent holder, the Corporation, was the fifty cent charge which the Univis Company paid for each of the blanks sold. A rigid price structure was set up and

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[1]Motion Picture Company v Universal Film Company, 243 U. S. 502, (1917).

[2]U. S. v Univis Lens Company, Inc. et al, 316 U. S. 241, (1942).

licesees had to adhere to it or have their licenses rejected. Eight of the patents cover the shape, size, composition, and disposition of the pieces of glass of different refractive power in the blanks into which they are fused. The District Court had found the license system legal as it applied to the wholesalers and finishing retailers because they practiced in part the patent. The Supreme Court, however, was of the opinion that:

> The first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which that patent confers.[1]

It makes no difference whether the article is completed or not. In regard to defendant's contention that they were within the language of the Miller-Tydings Amendment to the Anti-Trust Act, the Court said:

> We find nothing in the language of the Miller-Tydings Act, or in its legislative history to indicate that its provisions were to be so applied to products manufactured in successive stages by different processors that the first would be free to control the price of its successors.[2]

The Masonite Company was involved in another violation of patent rights and the question of price-fixing again arose, although this was not the sole allegation. Masonite had signed agreements with other prospective producers of a particular type of hardboard (under different processes) to suspend such production and

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[1]*Ibid.*, at 1093. [2]*Ibid.*

recognize Masonite's patent, on the condition that Masonite would give these other parties selling rights, at designated minimum selling prices and maximum terms and conditions of sale.

Again, the Court reiterated the boundaries of patent grants:

> The owner of a patent cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant.[1]

The opinion continued to emphasize that even if the "agents" had not been competitors, price-fixing would be illegal, because once an article is sold it is out of the patentee's jurisdiction.

The allegations presented by the government in the Ethyl Gasoline case[2] included patent violations through restrictive licensing and price maintenance. The corporation had a patent covering a compound which, when added to gasoline, raised the octane rating and improved its anti-knock qualities as an explosive engine fuel. The company doesn't manufacture, refine, or sell any gasoline, but merely sells the compound to its licensed refiners who agreed to maintain a minimum differential in price between

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[1]U. S. v Masonite Corporation et al, 316 U. S. 265, at 277, (1942).

[2]Ethyl Gasoline Corporation v U. S., 60 S. Ct. 618, (1939).

Ethyl gasoline and the best non-premium grade of gasoline. Jobbers, who buy from refiners, had to obtain licenses from these companies, and the refiners agreed to sell gasoline only to jobbers who were licensed. Usually each jobber had to deal through one refiner, after being licensed. Adherance to price lists was not the only stipulation to the maintenance of a license but compliance with marketing policies was also required.

The defendant corporation sought to justify the foregoing set-up on the ground that the conditions imposed were necessary to preserve the trade marks, good will and reputation of the Ethyl Gasoline Corporation as well as to protect the public from gasoline adulteration. The Court found that the maintenance of such "business ethics" are not conditions "normally and reasonably" adopted to secure pecuniary reward for the patentee's monopoly. Furthermore, the Court was of the opinion that the patentees had used their power illegally for the purpose of controlling jobbers' prices and suppressing competition between them.

The Court clarified those actions which are within the rights conferred by a patent:

> He may grant licenses to make, use or vend, restricted in point of time or space, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some

> other which the statute and the patent together did not give.[1]

In this instance, the patent rights were extinguished when the lead-treated fuel was sold to the refiners who manufactured the gasoline. Some ambiguity arises because of the following sentence:

> Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition.[2]

Price controls, quotas, territorial limitations, and so forth, seem to be clearly within the permitted license restrictions which the Court announced in the same opinion.

> The test seems to be whether or not such conditions are reasonably adapted to secure to the patent owner full enjoyment of his exclusive rights in the field within which he has a monopoly by virtue of his patent.[3]

The Sherman Law in relation to patent rights seems fairly well clarified; perhaps more so than in many other situations. The patentee may stimulate the commercial development of his product and financial returns in any way which will not enlarge the scope of the rights granted

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[1] *Ibid.*, at 625. [2] *Ibid.*

[3] Jo Bailey Brown, "Relation of the Ethyl Gasoline Anti-Trust Case to Restrictions in Patent Licences," *University of Pittsburgh Law Review*, Vol. VII (November 1940), p. 32.

him by the patent law. In the case of the Ethyl patent, their restrictions upon the sale of the product to jobbers did not enhance the value of their patent by increasing their returns from it, but merely went beyond the commercial power granted to them.

Although patents authorize monopolies over the subjects of their grants, they confer no right upon the owners of several distinct patents to combine for the purpose of retarding competition and trade.

The question has often arisen, theoretically, as to the status of professional groups under the Sherman Law. A trial Court had an opportunity to give its answer in the American Medical Association case[1] which was appealed by the government in 1939. The Group Health Association, Inc., a nonprofit cooperative association, had been formed for the purpose of providing medical care and hospitalization for its members and their dependents and had a medical staff consisting of salaried physicians under the sole direction of a medical director.

The indictment alleged that the defendants conspired to restrain the association in its arrangements for such medical care, the doctors serving on the medical staff of

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[1]U. S. v American Medical Association, D. C., 28 F. Supp. 752, (1939).

the organization, and lastly, the Washington hospitals involved in the association.

The Court set out to express the legal definition of the word "trade" as embodied in the Sherman Act, referring to the case of the Schooner Nymph[1] in which Justice Story had had occasion to make such a distinction between those occupations and businesses which are carried on for profit or livelihood and the liberal arts and learned professions, which he set apart. The present Court reasoned that the Sherman Act was not meant to include "every combination," nor was it to include "every" trade.

> The thesis of Government's counsel that 'trade' embraces all who habitually 'supply money's worth for full money payment', and their contention that the statute should be so broadly construed represents an extreme position which does violence to the common understanding of 'trade', rejects authoritative decisions of our courts and ignores cardinal rules of statutory construction.[2]

The decision of the lower Court was overruled by the Court of appeals, however. They found that "trade" embraced the medical profession under the common law meaning, and the present Court felt it was required by the decisions of the Supreme Court to look to the common law

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[1]The Nymph, 1 Summ. 516, 18 Fed. 506, at 507, (1834).

[2]U. S. v American Medical Association, 28 F. Supp. 752, at 756, (1939).

in making an opinion.

> Congress did not provide that one class, any more than another, might impose restraints or that one class . . . . might be subjected to restraints.[1]

The Court found that the indictment stated a case under Section 3 of the Act, and no definite charges were made against the individual defendents, but rather against the Association.

Professional organizations, presumably, then are under the purview of the Anti-Trust Act, and it is not necessary that the word "trade" be given a confined meaning.

Federal legislation has been extremely favorable to cooperatives. Inasmuch as the Sherman Anti-Trust Act made no specific mention of labor or agricultural organizations, and there were cases which held cooperatives to be in violation of the Act,[2] the Clayton Act specifically exempted them from anti-trust persecution. The Capper-Volstead Act extended this exemption to cooperatives with captial stock and provided further that the Secretary of Agriculture might issue a cease and desist order should he believe that the association restrained trade to such

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[1]U. S. v American Medical Association, 110 F. (2d) 703, (1940).

[2]Ford v Chicago Milk Shippers' Association, 155 Ill. 166, (1895). Decision arising under a state statute similar to the Sherman Act.

an extent that the price of a commodity was unduly enhanced. More recently, the Agricultural Marketing Agreement Act of 1937 gave the Secretary power to make marketing agreements with those handling agricultural commodities in interstate commerce, and to issue orders designed to regulate the handling of such commodities.

This does not exempt them, any more than Section VII of the Clayton Act exempted labor organizations if their objects or means to attain lawful objects are unlawful.

The Borden Company case[1] arose under the Agricultural Marketing Agreement Act of 1937, the company being indicted on charges of fixing prices. The section of the act dealing with the handling of milk gave the Secretary of Agriculture power to classify milk according to the purposes for which it is used, to fix prices, to producers and associations of producers. It was provided, however, that nothing in the act should be construed to prevent a cooperative from distributing its proceeds in accordance with its membership contracts, except that it should not sell to distributors at prices less than those fixed pursuant to the Act.

In this instance, the conspiracy charged was not merely the forming of a collective agency of producers,

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[1]U. S. v Borden Company, 60 S. Ct. 182, (1939).

but rather

> a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus, in effect, ... 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago'."[1]

Furthermore, the Supreme Court said that the Agricultural Marketing Act only removed from purview under the Sherman Act those agreements which were entered into by the Secretary of Agriculture, and those only during such time as the contract would last. In this case the conspiracies were operative after the license came to an end.

As to the Capper-Volstead Act, the Court stated that it legalizes price-fixing for those within its purview as long as such monopoly or price-fixing does not unduly enhance the price of an agricultural product. The lower Court had been of the opinion that proceedings could not be lawfully begun against those mentioned in the Capper-Volstead Act until the Secretary of Agriculture acts to order them to "cease and desist." The Supreme Court did not think that Section 11 of the Capper-Volstead Act contained any provisions of immunity in the absence of

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[1] Ibid., at 191.

action on the part of the Secretary of Agriculture.

It was pointed out that:

> The Court did not pass squarely upon the question whether the activities charged against the cooperative actually violated the anti-trust laws, but in a consent judgement recently entered, the defendents were enjoined from combining or conspiring to fix prices in the Chicago area, either among themselves or with producers and distributors, and otherwise interfering with the free distribution of milk in the area. By the terms of the judgment, defendants were expressly permitted to bargain collectively with each other; to make lawful contracts concerning prices, terms, and conditions for milk distribution; to provide by contract that one purchaser should receive as favorable terms as any other and that disputes should be settled by arbitration.[1]

Actually, it would seem that what is legal and what is illegal rests largely upon the "need for regulation and the effect of such regulation upon the industry and the supply of a particular commodity."[2] Cooperatives are comparable to one type of "trade association," that to regulate a "sick" industry, exemplified by Appalachian coals. Mr. Chief Justice Hughes said:

> Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition on a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes . . . .[3]

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[1]E., J. H. "Cooperative Marketing Association and Restraint of Trade," <u>Virginia Law Review</u>, Vol. XXVII, (March 1941), pp 681-682. For decree, see U. S. Law Week 2201.

[2]<u>Ibid</u>., p. 685.

[3]Appalachian Coals Inc. v U. S., 288 U. S. 344, (1933).

The only guide one can distinguish is that no cooperative can conspire to fix prices, unless all of the producers, processors and others engaged in the marketing of the commodity have entered into an agreement with the Secretary of Agriculture. However, even though the cooperative association does not conspire to fix prices, if it constitutes a local monopoly, in milk, for instance, there would be but one market price, and until there is proof that such a price has been unduly enhanced, no action, in all probability, would be taken against them. The Dairymen's Cooperative Association in Portland, Salem, and other Oregon cities exemplifies this situation.

In 1890 unorganized labor, except for sporadic outbursts, seldom caused repurcussions in the national scene to the extent that they were considered logical marks for anti-trust legislation. By 1940 labor had assumed gigantic proportions. Commented one writer:

> No longer is it a voice crying in the economic wilderness. It is a force that has made itself felt, especially after the paper empire of capitalism collapsed in 1929, and through the dismal years of depression that followed.[1]

There has always been debate as to the intent of Congress in passing the Sherman Act as to its applicability

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1G., J. R., "The Apex Case," Temple University Law Quarterly, Vol. XV, (November 1940), p. 130.

to labor unions, but the Court, since the Danbury Hatters case[1] has held consistently that labor cases did come under purview of the statute if interstate commerce were restrained.

To coerce recalcitrant industries, some labor unions have resorted to sit-down strikes, during which machinery was damaged, manufactured goods were withheld from trade and industry was generally crippled. The corporations, searching for a weapon to combat this aggressive faction, turned to the Sherman Law, in which they hoped to find a double-edged blade.

In the Coronado coal cases2 we discovered that the greatest importance was placed on the concept of "intent" on the part of the strikers. This was a formidable burden of proof, but did not deter employers from taking their complaints to the Courts, equipped with the anti-trust act.

One of the most decisive and important cases to reach the Supreme Court was Apex Hosiery Company v Leader et al, in 1940.[3] The strike was called in an effort to

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[1]Lawlor v Loewe, 235 U. S. 522, (1915).

[2]United Mine Workers v Coronado Coal Co., 42 S. Ct. 570; Coronado Coal Co. v United Mine Workers, 45 S. Ct. 551.

[3]Apex Hosiery Co. v Leader et al, 60 S. Ct. 982, (1940).

obtain union recognition and a closed shop contract. Prior to 1921 Apex operated as a union plant, but that year, following a general strike, the plant was reopened as a non-union shop and continued to operate as such until the strike. Apex belonged to an association of open shop manufacturers and, together with other members of the association, had made an unsuccessful attempt to reach an open-shop agreement, satisfactory to the union. No complaint under the N.L.R. Act had been made against the Apex Company at the time of the strike, and no request had been filed with the state or national labor board for a representative election. There was evidence that at the time of the strike only eight of the Apex employees were members of the defendant union. (Testimony at pp. 154, 157, 310 U. S. 481). The President of the Apex Company testified that he had no controversy with the union other than that caused by his refusal to grant a closed shop and that he was willing to accede to all other demands. The strike began on May 6, 1937 and an injunction was issued June 23, but was reversed and dismissed (Leader v Apex).[1] As a result of damages inflicted, the plant couldn't be reopened to start manufacturing until

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[1]Leader v Apex, 302 U. S. 656 (1937).

August 19, 1937. The strikers destroyed $800,000 worth of hosiery, ready for shipment, 80 per cent of which would have entered into interstate commerce. The Court mentioned that it had sustained Congressional exercise of the commerce power in a case in which the immediacy of the effect on commerce was no greater than in the present case, and where the interstate commerce affected was no greater in volume. It is the "nature of the restraint" and its effect upon commerce, not the amount of the commerce which determines the guilt. Past decisions, said the Court, "show that (the act) was never aimed at policing interstate transportation or movement of goods or property."[1] Secondly, the opinion stated that the Sherman Act didn't apply unless the effects operated to restrain commercial competition in some substantial way. The third stipulation placed by the court was that the purpose or effect must be to raise or fix the market price. This is qualified, however:

> An elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.[2]

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[1]Apex Hosiery Co. v Leader et al, 60 S. Ct. 982, at 990, (1940).

[2]*Ibid.*, at 997-998.

The Court went on to say that in all past labor cases in which the Sherman Act had been applied, the purpose had been to affect the market and suppress competition. They referred to the decision of the Coronado Coal cases, and endeavored to apply the same reasoning here. If any other course were taken, the Court reasoned that any strike in which an appreciable amount of interstate commerce was involved would be outside the pale of the law.

> The Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as to monopolize the supply, control its price or discriminate between its would be purchasers.[1]

Considering the evidence in the present case, the Court found no such elements of restraint and therefore no violation of the Sherman Law. To clarify its position, the Court declared:

> If the above tests weren't made in a labor case, every strike in modern industry would be brought within the jurisdiction of the federal Courts, under the Sherman Act, to remedy local law violations.[2]

Justice Hughes rendered a thoughtful dissenting opinion in which he cited the Socony-Vacuum case[3] wherein reasonableness had not been applied to the purpose of the agreement or combination, but merely to the effects

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[1] _Ibid_., at 1001. [2] _Ibid_., at 1002.

[3] U. S. v Socony-Vacuum Oil Co., 60 S. Ct. 811 (1939).

of such combination. He felt that there was plainly a conspiracy in the present case.

> To restrain is to hold back, repress, obstruct --to hinder from liberty of action. Manifestly there was restraint in this case . . . . 'Commerce' is intercourse and in its most limited meaning it embraces traffic. 'Commerce' manifestly covers the shipment and transportation of commodities across state lines to execute contracts of sale.[1]

Finally, he said it would be anomalous if, while employers are bound by the Labor Act because their unfair labor practices may lead to conduct which would prevent the shipment of their goods in interstate commerce, at the same time the direct and intentional obstruction or prevention of such shipment by their employees were not under the Sherman Act.

The majority opinion said that the Sherman Law is aimed at only those restraints which are comparable to restraints deemed illegal at common law. Under common law, labor activities such as these were to the "prejudice" of trade. At the same time, in Mogul Steamship Company case the Court stated that an association to gain control of the tea trade was honest and peacable and legal at common law. Joseph Kelly remarked:

> In light of this pronouncement, made in 1889,

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[1]*Ibid.*, at 1004.

> just a year prior to the passage of the Sherman Act, the statement of the U. S. Supreme Court in the Apex case that the restraints at which the Sherman Law is aimed . . . . are only those which are comparable to restraints deemed illegal at common law . . . . sounds strangely hollow.[1]

What restrains interstate commerce in one sense apparently does not restrain it in another. "Intent" is the vital point of difference recognized by the Court between associations of producers and union organizations. Another author declared: "The slightest care taken by a union in formulating its objectives would take it out of the doctrine of the 2d Coronado Coal case, as limited by the Court's present dictum."[2] Even if a price increase occurs as a result of the elimination of price competition based on differences in labor standards, it is not held to be unlawful, according to this opinion.

Though the Courts's concern for freedom of competition is primary, it is no more obvious than its lack of concern for obstruction or interferences to interstate transportation. Obstructions imposed at any of the three stages of interstate commerce curtail the quantity of

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[1]Joseph J. Kelly, "The Sherman Act and Labor Law," Temple University Law Quarterly, Vol. XV, (1940), p. 133.

[2]Philip W. Buchen, "Labor Law: The Apex Decision and Its Effect on the Application of the Sherman Act to Activities of Labor Unions," Michigan Law Revue, Vol. XXXIX, (January 1941), pp. 469, 470, f. 41.

goods moving in commerce and so reduce competitive action in the marketing of those goods; and an obstruction at one stage can curtail the quantity of commerce as effectively as at another stage. Before the expansion of the interstate commerce clause, the Court could have taken this view, in order to keep the Act strictly within constitutional limits. Now, however, with the elasticity of the commerce clause ever being expanded, there was no rationale in this approach.

Terms like "restraint," "freedom of competition," and others are evidently elastic terms, capable of varying interpretations, according to the particular situation. One author declared:

> Whatever it (the Court) means by 'freedom of competition' in 'national markets,' it is perfectly clear that in the Apex case the Court for the first time has taken the position that the wholesale restriction of competition in national markets involved in activities of a federated labor union has the unqualified approval of the government. This means that from now on the unions, by establishing the universal closed shop in national industries, may use their collective bargaining power to impose a fixed wage system throughout each industry thereby eliminating one of the most important competitive factors in modern industrial and commercial life.[1]

In previous boycott cases the market affected was the market of the one against whom the restraint operated.

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[1]Charles O. Gregory, "The Sherman Act and Labor," University of Chicago Law Review, Vol. VIII, (February 1941), pp. 241-242.

A substantial effect upon the interstate market of the recalcitrant employer was sufficient without regard to the effect upon the consumer market. The only effect upon consumers was that which would naturally follow the restraints or competition. Somewhat different is the recent utterance of the Court that restraints must have the purpose or effect of depriving consumers, directly, of the advantages of a competitive market. Actually, it must be the "purpose" because the effect, in each instance, is the greater tendency toward price rigidity, caused by inflexible wage structures and the permissible restraints applied in acquiring them.

One opinion stated: "It is significant that all of the earlier boycott cases, so far as the proof in those cases went, could be disposed of in favor of the Union under the same rule which was announced in the Apex case."[1]

Another case involving labor[2] which arose during the same year did not help to clarify the Court's reasoning in the Apex case, because the decision was reached on a different basis. This suit was brought by the government against four officers of the United Brotherhood of

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[1]Benno C. Schmidt, "The Application of the Anti-Trust Laws to Labor," Texas Law Review, Vol. XIX, (April 1941), p. 283.

[2]U. S. v Hutcheson, 61 S. Ct. 463, (1940)

Carpenters and Joiners of America, charging them with a conspiracy to restrain interstate commerce in beer and other products and also in the construction of buildings and installation of fixtures used in the manufacturing of beer, by resorting to strikes, boycotts, and picketing. These actions were the outcome of a jurisdictional dispute at Anheuser Busch, Inc., between the defendants' union, which is affiliated with the A. F. of L. and the International Association of Machinists, also affiliated with the A. F. of L. The defendants contended that their members should be exclusively entitled to perform the work of erecting, repairing, and dismantling machinery, which work was being done by the Machinists.

Allegations included the printing and circulation of literature designed to prevent the shipment of beer in interstate commerce; several boycotts which hampered the construction of buildings at the adjoining container manufacturing corporation; and the picketing of the Anheuser-Busch plant and the premises of the Gaylord Container Corp. which was intended to cut off the manufacture and consequent shipping of beer and other products in interstate commerce. The government's contention was that the strike was unlawful because it was concerned with jurisdictional matters, but defendants claimed that this was a matter for the state courts.

The majority of the Court based its decision on Section 20 of the Clayton Act, rather than on the precedent laid down in the Apex case. Here, instead of deciding if there were unreasonable suppression of competition, they relied on the language of Section 20 which makes legal "ceasing to patronize . . . . or . . . . recommending, advising, or persuading others by peaceful and lawful means so to do."

The Court gave a broader scope to the Norris La Guardia Act in the following statement:

> To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was argued before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the Court is allowable conduct may in a criminal proceeding become the road to prison. . . . . That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems . . . ."[1]

This, in Justice Frankfurter's opinion, was the application of the rule of "reasonableness" to the precise words of a statute.

Mr. Justice Roberts sharply challenged this application of the Norris-La Guardia Act:

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[1] Ibid., at 467.

> By a process or construction never, as I think, heretofore indulged in by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change in policy in an Act as respects one specific item in the general field of law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken to legislate so radically where Congress has refused so to do.[1]

Congress, in passing the Norris-La Guardia Act rendered a legislative disapproval of the judicial interpretation of Section 20, as exemplified in the Duplex case, and placed its own meaning on that section.

John Stockham declared that:

> Early interpretation of the Norris-La Guardia Act regarded it as a procedural withdrawal of the power of the federal courts to issue injunctions and not as an alteration of the substantive law. The Court adopted the position that the Norris-LaGuardia Act restored the broad purpose of the Clayton Act, and that it removed from the specified activities enumerated in Sect. 20 the taint of being a violation of any law of the United States.[2]

Such a combination of labor unions, acting in concert to achieve their purpose, which in this instance was not to better working conditions, is comparable to two or more

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[1]<u>Ibid</u>., at 472.

[2]John B. Stockham, "The Hutcheson Case," <u>Washington University Law Quarterly</u>, Vol. XXVI, (April 1941), pp. 383, 385.

patent holders combining to monopolize the market or in some other way to go beyond their recognized rights. Either group, when acting singly, has certain rights and privileges, but when combined, constitutes an illegal association, or should, if the same reasoning were to apply to unions as applies to patent-holders. However, unions are removed from the confines of the Sherman Law by this recent interpretation of the Norris-La Guardia Act.

It seems that the Court is anxious to relieve itself of the burden of ruling on labor cases, by making "intent" the burden of proof, and by asserting in the Hutcheson case that local jurisdictional strikes, regardless of their effect upon interstate commerce, are not within the scope of the Sherman Law.

A year later another labor case reached the District Court for the Northern District of Illinois, in U. S. v Corrozzo et al.[1] The indictment charged that defendants knowingly entered into a combination, unreasonably to prevent persons, partnerships, and corporations engaged in the manufacture of truck mixers in states other than Illinois, from selling and delivering truck mixers in and shipping them to the Chicago area. The purpose was to keep members of the union from being displaced by the use of

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[1] U. S. v Corrozzo et al, 37 F. Supp. 191, (1941).

machinery, which was considered more economical. In addition to strikes, the union members forced the pavement contractors to enter into agreements with the Hod Carriers' Council, requiring paving contractors to use the same number of men which would be required if truck mixers weren't used; refused to approve employment of union men where machines were used; and warned truck mixer manufacturers and prospective purchasers that truck mixers weren't permitted in the Chicago area.

The defendants asserted that the indictment did not show any intent or purpose on their part to restrain interstate commerce; that their objective was legal under the Clayton and Norris-La Guardia Acts, and finally that labor unions weren't subject to the Sherman Act. At this point, this latter assumption is understandable, when considering the Court's recent decisions.

The decision was in favor of the union because the Court found that: "The test of a violation of the Sherman Act is not that a demand or strike is unreasonable, but that the restraint upon interstate commerce is unreasonable."[1]

The restraint, the Court thought, wasn't on commercial competition or the marketing of goods and services, and those elements must be involved before the Sherman Act

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[1] Ibid., at 399

could be invoked. The Court relied upon the opinion delivered in the Apex case in which it was stated that the effects of a strike must be so widespread as to affect prices and competition, and the restraint upon goods and services was not a sufficient effect. Here is the crux of the decision. It seems obvious that a very definite restraint upon the marketing of cement mixers had been effected, but this is not enough. There must be price increases as a direct result of the strike.

However, was not competition unreasonably obstructed by the forcing of one service, labor, upon the employer, to the detriment of another service, that of the cement mixers? If this is not considered a direct restraint upon competition and the effect injurious upon the buyer, what greater evidence is required? The public bore the brunt of this restriction, very directly, because the price of the commodity was "stabilized" at a higher price than competitive forces would have fixed it, assuming that the use of the machines would have lowered the cost of production. Furthermore, this effect couldn't be classified as incidental, but rather as the prime purpose of the strikers. The Court declared that it was not their objective to determine the reasonableness of purpose; however, when that purpose is a direct restraint of competition, these words do not appear very logical.

Preceding the above cases in point of time was Local 167 v U. S.[1], which was brought before the Supreme Court in 1934. However, different factors were involved which merit special consideration. The charge involved a conspiracy by a union composed of poultry slaughterers and wholesalers, wherein the defendants (marketmen) "organized the Chamber of Commerce and allocated retailers among themselves." The purpose and effect was to increase prices. The "Chamber" (association of marketmen) levied a cent a pound upon poultry sold by them and raised over a million dollars the first year. To accomplish their purpose they hired men to obstruct the business of dealers who resisted. They spied upon wholesalers and retailers, and by violence and other means of intimidation prevented them from freely purchasing live poultry. Members of Local 167 refused to handle poultry for recalcitrant marketmen, and members of the "schochtim" union refused to slaughter for non-members. Here, then, is an example of a combination of producers and laborers organized to acquire certain gains for themselves.

The Court decided:

> . . . . . . we need not decide when interstate commerce ends and that which is interstate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey

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[1]Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America et al, v U. S., 54 S. Ct. 396, (1934).

> begins or in the state of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce.[1]

Furthermore, intrastate acts may also be enjoined under the Sherman Law:

> Intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act.[2]

As soon as labor combines with another organization, then, which is on the production or retail end, the "intent" evidently changes, although the effects may be the same, in this case an obstruction to interstate commerce, and a consequent rise of prices. This demonstrates that labor retains its immunity from the law only as long as it acts alone.

A group of entrepreneurs who claimed to be in a position similar to labor[3] combined in a union, affiliated with C. I. O. to bargain collectively with purchasers in the sale of members' fish. The defendants were owners or lessees of fishing boats ranging in value from $100 to $15,000, some of them "entrepreneurs" having several employees. The operated as independents, uncontrolled by the processors, and controlled an extensive supply of fish

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[1] *Ibid.*, at 398.

[2] *Ibid.*, at 399.

[3] Columbia River Packers' Association V Hinton, 62 S. Ct. 520, (1942).

in Oregon, Washington and Alaska.

Union members were forbidden to sell their catch to anyone not holding a union contract, which contracts required buyers not to purchase fish from non-members. Hinton's Cannery refused these terms and was consequently boycotted.

The Court reasoned that defendants' sale of their labor took place after performance rather than before, and herein lay the distinction which limited the inclusiveness of the anti-injunction legislation.

> The economic position of defendants in the instant case was in many respects similar to that of employees. Their bargaining power was weak compared to the canneries; they purchased no raw materials; their actual produce was their own labor.[1]

The fact that they owned their own equipment didn't differentiate them, either, because in the building trades employees own their own equipment. However, basic reasoning would minimize the importance of the similarities, and show that if this association had been found legal, the precedent would have been a dangerous one, allowing any number of small producers to band together, in direct violation of the meaning of the law.

It is interesting to note that as soon as the group

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[1]"Application of the Sherman Act to Entrepreneurs In a Position Similar To Labor," Columbia Law Review, Vol. XXXXII, (April 1942), p. 703.

was taken from under the protective wing of the Norris-La Guardia Act, they were not immune to the Sherman Law, but found guilty of fixing prices. This demonstrates as poignantly as possible the honorary position given to labor by Congress and the courts. Actually, price-fixing by the unions is condoned, while the same charge against employers immediately brings the weight of the law upon them. At the same time, it is difficult to distinguish between the purposes of the two, which are individual gains, in both instances.

The last example, herein given, of the types of cases adjudicated by the Court is that of U. S. v General Motors Corporation et al.[1] This was one of three indictments against General Motors, Chrysler and Ford Corporations, respectively, the other two resulting in consent decrees being entered. The charge was made that General Motors attempted to restrain unreasonably the interstate trade and commerce in its automobiles; that their purpose was to control the financing essential to the wholesale purchase and retail sale of General Motors cars; and that in furtherance of this purpose the conspirators devoted themselves to concerted action by which GMAC financing was imposed on dealers who were engaged in the purchase and sale

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[1]U. S. v General Motors Corporation et al, 121 F. (2d) 376, (1941).

of G. M. cars.

G. M. A. C.[1] and independent finance companies compete for the transactions of financing wholesale purchases, retail sales, and the resale of used cars. This financing is indispensible to the "free movement of automobiles from the factory to the dealer as well as from the dealer to the ultimate purchaser."[2] General Motors was accused of having used coercive methods to gain this finance market. The counsel for defendants said that the company's purpose, always, was to manufacture cars, and because many finance companies charged exorbitant interest rates, General Motors established a finance organization, to promote greater sales, and "because General Motors' good-will faced the risk of being wiped out by abuses in connection with financing in the case of time sales."[3] The obstruction to commerce, then, was only in intrastate commerce, defendants reasoned.

The Court said in answer to this:

> Nor does it matter that the financing is considered to be local activity per se, for it is well settled that the federal government may under the

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[1]General Motors Acceptance Corporation of Indiana.

[2]U. S. v General Motors Corporation et al, 121 F. (2d) 376, at 383, (1941).

[3]*Ibid.*, at 384.

> Sherman Act regulate local commerce which is intimately related to interstate commerce or local activity which obstructs or burdens interstate commerce.[1]

General Motors relied on the Court's statement in the Apex case which implied that there must be some sort of market control involved. The Court was not doubtful as to "control," asserting that there was a restraint of trade in General Motors cars, interference with the competitive forces that otherwise would control the marketing of General Motors cars and creation of a forced and artificial market for G. M. A. C.[2]

One author opinioned:

> It has generally been thought that an individual entrepreneur not acting under any agreement or conspiracy, has an absolute right to deal with, or refuse to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without in any way being held responsible for his actions.[3]

There was in this case no combination of competing units,[3] but rather the grouping together of two distinct operations, as in the Shoe Machinery case.[4] The essence of the conspiracy was not material, however. The Court

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[1]Ibid., at 402.

[2]Ibid., at 403.

[3]G., N. K., "Restraint of Trade: 'Market Control'," Columbia Law Review, Vol. XXX, (1932), p. 204.

[4]U. S. v Winslow, 227 U. S. 202, (1913).

said, in this respect:

> The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce, but even if the single trader doctrine were applied it would not help the applicants.[1]

The alleged violations in this case covered some nineteen years and were open and well known. Other automobile manufacturers were engaged in the same activity. A point not raised, but one which seems pertinent, is that popular construction of a statute over a long period of time is significant as to its true meaning. That such a prosecution is unprecedented shows very strongly that the public did not consider such activity illegal.[2]

Referring back to one of the cases in which the "rule of reason" was applied, the Tobacco case,[3] the Court then defined 'restraint of trade':

> . . . . the term 'restraint of trade' required that the words. . . .should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce. . . . the free movement of which it was the purpose of the statute to protect.[4]

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[1]U. S. v General Motors Corporation et al, 121 F. (2d) 404, (1941).

[2]"General Motors Acceptance Corporation and the Sherman Law," Indiana Law Journal, Vol. XVII, (1942), p. 255.

[3]American Tobacco Company, 221 U. S. 106, (1912).

[4]Ibid., at 180.

How, in the present case, was the "free movement" interfered with? It was General Motors' avowed purpose that it was the "free movement" which they were striving to maintain, by establishing their finance organization.

In the Apex case[1] the Court placed three stipulations on actions before they might be regarded as "restraints" to suppress competition: (1) to monopolize the supply; (2) to control its price; or (3) to discriminate between its would-be purchasers. G. M. cannot be accused of monopolizing supply, nor can it be established that it controlled price or even influenced it, nor, finally, did the corporation discriminate between its would-be purchasers in any way heretofor held illegal by the Court.

In consideration of these previous opinions, the question may be asked if the Court ever questioned the "reasonableness" of the restraint imposed by General Motors Corporation.

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[1]Apex Hosiery Company v Leader, 60 S. Ct. 982, (1940).

CHAPTER IV

ENFORCEMENT ACTIVITIES OF THE FEDERAL TRADE COMMISSION SINCE 1932

Congress had decided to allow the Commission to designate the "unfair methods " mentioned in the Act, rather than to attempt to enumerate them. The jurisdiction conferred upon the Commission, the prevention of unfair competition, is by language broad enough to permit flexibility of administration, while containing adequate legal standards for the guidance of both the Commission and the courts. The activities of the Federal Trade Commission were contemplated to supplement those exercised under the Sherman Anti-Trust Law. Their function was to be a preventative agency, to intervene in those instances where the Sherman Act could not properly be invoked. The Commission is charged with the administration, in whole or in part, of the Federal Trade Commission Act, the Clayton Act and the Webb Export Act.

Just what the actual scope of the Act would prove to [illegible] left to the interpretation of the courts. In the [illegible]tely following this legislation, a spirit of

general confusion concerning the powers and duties of the Commission seemed to permeate that body. In 1920, Mr. N. B. Gaskill was appointed Commissioner. He expressed the opinion that: "Everybody, the examiners, the Board of Review, the legal staff, and the several Commissioners had theories of their own and worked on them."[1] However, with the first Supreme Court decision interpreting Section 5 in the Gratz case,[2] the scope of the Commission's activity was roughly delineated. Thereafter, the Commission for over a decade avoided further speculation, being content to reiterate the words of the Court.[3] In this case, the Court was of the opinion that:

> The words 'unfair competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[4]

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[1]N. B. Gaskill, The Regulation of Competition, (1936), p. 6.

[2]F. T. C. v Gratz et al, 253 U. S. 421, (1920), at 253.

[3]Federal Trade Commission Annual Report, (1923), p. 1.

[4]F. T. C. v Gratz et al, 253 U. S. 421, (1936), at 427.

Miller offered the following comment concerning this opinion of the Court:

> It is especially worthy of note that this leading decision took an unequivocal stand on the question as to whether or not Congress intended the concept of unfair competition to be restricted to practices in restraint of trade or tending to lead to a monopoly. The Court upheld the Commission in the view that the scope of Section 5 was not so restricted but included as well that range of practices which had long been recognized as unfair at common law.[1]

However, the Court obviously had no intent of allowing the Commission the practice of any undue discretion in determining "unfair practices." This original attitude may be explained in several ways. In the first place, the Supreme Court has often been somewhat wary of putting too much power into the hands of new governmental agencies. Under the terms of Section 5, proceedings are started by a complaint issued by the Commission, which also holds a hearing on the complaint. One author explained:

> The Commission thus acts as both prosecutor and judge, and the courts, naturally enough, have scrutinized the resulting decisions with perhaps more care than would otherwise have been the case.[2]

Again, in 1921, the Supreme Court reversed another ruling of the Commission, involving the Curtis Publishing

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[1]J. P. Miller, Unfair Competition, p. 82.

[2]R., N., "Recent Trends in Interpretation of F. T. C. Act," Michigan Law Review, Vol. XXXII, (June 1934), p. 1143.

Company,[1] which was accused by the Commission of maintaining exclusive selling agreements. The Company was charged with compelling a large number of distributors of magazines to sign contracts which prevented their handling the merchandise of the Curtis Company's competitors. The Court reversed the ruling of the Commission on the grounds that this was a contract of agency and not of sale; that the elaborate organization had been built up at the expense of the Curtis Publishing Company; and that their two competitors had used "unfair means" to compete, by attempting to use this selling agency.

The courts held the Commission strictly to the meaning of the law. Tying and exclusive dealing contracts are illegal only if a substantial lessening of competition or a tendency to monopoly can be proved. In the absence of this criteria, such methods are condoned.

Various selling methods have been disapproved by the Commission. The Keppel and Bros. candy concern, in connection with the sale and distribution of its products, employed certain lotteries and gaming devices. The company argued that the practice was beyond the reach of the Commission because it did not fall in any class which the court had previously held subject to the Commission's

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[1]Curtis Publishing Company v F. T. C., 270 Fed. 881, (1921).

prohibitions. The Court held that Congress had not intended any such categorical interpretation of the law. The aforementioned policies were found to be not only harmful to competitors, either unfairly hurting their business or forcing them to undertake the same type of methods, but it was directly injurious to the consumers--children, for the most part--and therefore, contrary to public policy.[1]

In Hofeller v F. T. C.[2] which came up in 1936, the Court followed the same reasoning as in the Keppel case, regardless of the fact that most of the customers involved in this instance were not children. The decision stated:

> It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy.[3]

Another very similar case, involving gambling in connection with the sale of silk hose, was brought before the Court, and the Commission's order upheld. From the preceding cases, it may be seen that although the Court relied heavily upon the effect of such methods upon competitors, the public interest was also given consideration,

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[1]F. T. C. v Keppel & Bros., Inc., 291 U. S. 304, (1934).

[2]Hofeller v F. T. C., 299 U. S. 557, (1936).

[3]*Ibid.*, at 694.

even though it may be questioned if a "substantial" portion of the public were affected. Gradually, the Court was vesting greater power of discrimination in the hands of the Commission in its interpretation of "unfair methods."

Several suits in regard to resale price maintenance were brought before the courts. The Commission had issued an order to cease and desist to the Armand Company, Inc. of Des Moines, Iowa, enjoining them from (1) entering into or procuring from wholesalers or retailers, contracts or agreements that respondents' products are to be resold by such dealers at prices fixed by the Armand Company, and (2) entering into or procuring from wholesale dealers, contracts or agreements that Armand products are not to be resold by them to price-cutting retail dealers.[1] The Court upheld the Commission's order, on the basis that the practices referred to were against the public interest and to be regarded as "unfair competition."[2] The same opinion was expressed by the Court in F. T. C. v Beech-Nut Packing Company[3] because such actions restrained the "free

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[1]Federal Trade Commission Annual Report, (1935), p 72.

[2]Armand Company v F. T. C., 84 F (2d) 973, (1936).

[3]F. T. C. v Beech-Nut Packing Company, 257 U. S. 441, (1922).

flow of commerce." Since the Miller-Tydings Act of 1937, resale price maintenance, as far as minimum prices are concerned, is condoned by law if it does not tend to lead to monopoly. Consequently, these cases are no longer to be held as a precedent.

The Act was rather inadequate where prosecutions against price discrimination were concerned. This fact was demonstrated in the National Biscuit Company case.[1] This company refused to give the same discounts to cooperative buying associations as it did to chain stores, and the discounts to chain stores were out of proportion to the difference in cost of marketing products to them. The Court denied the significance of the price differences, saying that the evidence

> . . . . does not sustain the charges of price discrimination, for there is no provision in the Clayton Act, or elsewhere, that the price to two different purchasers must be the same if it cost the seller as much to sell one as it does to the other.[2]

The predominating attitude, before 1936, was that Section 2 of the Clayton Act was to be applied only in those cases where discrimination lessened competition between sellers, but not between buyers.

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[1]National Biscuit Company v F. T. C., 299 Fed. 733, (1924).

[2]*Ibid.*, at 739.

A certain amount of overlapping between the Federal Trade Commission and the Attorney General's Department is noticeable in several cases brought by the Commission, involving price-fixing agreements. An association of rice growers in California was ordered to cease and desist from fixing and maintaining uniform prices, or having meetings, publishing price lists or fixing quotas that millers could mill, which thereby gave them a monopolistic position. The Federal Court affirmed the order, except for paragraph (f) which stated that no quotas or percentages of the rice crop that a miller could mill was to be fixed on the ground that the practice referred to was not interstate commerce, and authority extended under the Federal Trade Commission Act does not include practices which merely "affect" interstate commerce.[1]

Considering the fact that this association embraced a substantial portion of the total rice-producing firms, the exception made by the Court to percentages and quotas on the basis that they did not come within the jurisdiction of the Commission seems rather inconsistent with the judicial reasoning current at this time. The product definitely entered into interstate commerce, and such restrictions would obviously have a decided effect upon final

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[1]California Rice Industry et al v F. T. C., 102 F. (2d) 716, (1939).

price. This is particularly interesting in the light of the decision handed down the same year in the Socony case, in which any effect upon price condemned an association, per se.

Before 1938 and the passage of the Wheeler-Lea Amendment, the Commission had attempted on numerous occasions to compel firms to discontinue misrepresentative advertising and labelling of their products. The decisive case in this field was that of F. T. C. v Raladam Company[1] in which the Commission had found that the firm was selling an obesity cure as safe, effective, and dependable in use, when the present knowledge of thyroid as a remedial agent didn't justify such representations. The Commission foolishly based its entire argument on the fact that an injury was being inflicted upon the purchaser, despite the knowledge that there was nothing in the law at that time to bring the action under purview on this ground. The order of the Commission was reversed on the grounds that no proof was presented that any competitor had been injured or that any "restraint of trade" effected by the advertising used, had been shown. The Court criticized the Commission for its failure to observe the limitation of

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[1]Raladam Company v F. T. C., 42 F. (2d) 430, (1930).

its administrative power, "and sent the Commission to the books for a further study of what is meant by 'due process of law' within its act."[1]

This attitude was comprehensively set forth in Algoma Lumber Company v F. T. C.,[2] several years later. The Commission had complained of the use of the term "California White Pine" as an "unfair method" of competition because it was actually ponderosa pine, which is an inferior type of wood and commands a lower price. Such price differentials were still apparent after fifteen years of this practice, however. The Court said:

> To sustain the orders of the Commission, three requisites must exist: (1) That the methods used are unfair; (2) that they are methods of competition used in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public.[3]

This theory of "the buyer beware" was decried by Justice Black in F. T. C. v Educational Society[4] in 1937. The order of the Commission had been based on "unfair" methods

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[1]Henry Ward Beer, "F. T. C. and Its Due Process of Law," <u>Notre Dame Lawyer</u>, Vol. XVII, (November 1931), p. 176.

[2]Algoma Lumber Company v F. T. C., 64 F. (2d) 618, (1933).

[3]<u>Ibid</u>., at 624.

[4]F. T. C. v Educational Society, 302 U. S. 112, (1937).

used in methods of sale, including the use of ficticious testimonials and exaggerating authorized ones. In reversing the opinion of the lower court, Justice Black stated:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, not take away its power to deceive others less experienced. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.[1]

In this case the Court seems to have recognized the consumers' interest to the degree that the Wheeler-Lea Act would have directed. Herein is an example of a decidedly new trend taken by the Court in interpretation of an unchanged section of the law. When the Court discards older precedents, laid down in similar cases, and reads into the law something which was not previously recognized, this may be within the term, "judicial legislation."

The Commission came more and more to concentrate on the enforcement of the unfair competition section of the law which created it. In general it may be said that it has resulted from a less rigid differentiation by the Commission between Sections 2 and 4 of the Clayton Act, on the one hand, and Section 5 of the Commission Act on

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[1]Ibid., at 116.

the other; the refusal of the courts to uphold the Commission in its interpretation of parts of the Clayton Act, and the more general avoidance of the use by businessmen of the devices declared illegal in that act.

After 1938, however, the Commission's powers were greatly expanded in the field of policing advertising and labels of foods, drugs, curative devices and cosmetics, when disseminated in interstate commerce. The Commission's orders against misrepresentation of varying kinds increased noticeably after the passage of the Wheeler-Lea Act. For example, the Fioret Sales Company had been importing the concentrates used in the manufacture of perfume, but the actual blending with alcohol was done in the United States. The product was represented as having been imported from France, although they inscribed "Bottled in U. S. A." after the French inscription. The validity of the order of the Commission against these actions was carried to the Court, which was of the opinion that:

> By their conduct, petitioners are infringing upon the interest of the consuming public which purchases under the mistake that it is buying an imported perfume, a product rendered marketable and fit for use.[1]

The scope of the Wheeler-Lea Amendment in regard to control of the advertising and marketing of medicinal

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[1]Fioret Sales Company v F. T. C., 100 F. (2d) 359, (1938).

products was demonstrated in the Belmont Laboratories case[1] in which the Raladam decision was reversed. This company was engaged in the manufacture, distribution and sale of "Mozon," a proprietary preparation which it advertised and sold as a treatment or remedy for various skin ailments and conditions. The Commission found the claims made by the Company to be false, and not justified by the evidence recorded.[2] The Court, March 29, 1939, affirmed the Commission order after modification in certain particulars. In its decision, after quoting extensively from one of the company's leaflets, the Court said:

> Such a claim is medically untrue. It fails to recognize the scientific necessity for the application of internal remedies to diseases, which, by their etiology (the science of causes) preceed from internal disorders . . . . Such application can do no more than alleviate by modifying the exterior symptoms. Accordingly, petitioners' advertisements, in their assertion of elimination, are bad in medicine, and fortunately for the public, bad also in law.[3]

The older adage of "the buyer beware" has been legally displaced by "the seller beware." The effects of the Wheeler-Lea amendment are striking when one notes the vast

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[1] Belmont Laboratories v F. T. C., 103 F. (2d) 538, (1939).

[2] Federal Trade Commission Annual Report, (1938).

[3] Belmont Laboratories v F. T. C., 103 F. (2d) 538, at 540, 541, (1938).

numbers of orders issued against fraudulant and misleading advertising and labelling. The consumer is now on an equal basis with the competitor as far as being subject to injury is concerned.

The Robinson-Patman Act has also expanded the Commission's powers in the sphere of discrimination between buyers and sellers. The courts have placed some limitation on Section 2 of the Clayton Act, as amended, however. This can be viewed in light of the final decision in Goodyear Tire and Rubber Company v F. T. C.[1]

The Company had been making quantity sales to the Sears Company but the Commission had found that this did not form the basis for the discrimination. The 6th Circuit Court held the controversy moot because the Goodyear Company had ceased the manufacture of tires for Sears, after passage of the Robinson-Patman Act, and all contracts had been cancelled. The order was set aside and the case remanded, but without direction to dismiss the complaint and without prejudice to the filing of a supplementary complaint under the amended law.[2] The Supreme Court reversed

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[1]Goodyear Tire and Rubber Company v F. T. C., 101 F. (2d) 620, (1939).

[2]Goodyear Tire and Rubber Company v F. T. C., 92 F. (2d) 677, (1938).

this decision[1] and upon remand the case was returned to the 6th Circuit Court for reargument. The Court, this time, was of the opinion that:

> The Commission had no power to command discontinuance of price differentials reasonably based on quantity, and there is no finding which properly construed determines that those here involved are not so based since no standard for the making of such finding is recognized.[2]

The order of the Commission was therefore set aside, and a further petition for rehearing was denied the Commission.

By this decision, then, the burden of proof was made more difficult for the Commission, and the amendment to Section 2 of the Clayton Act was not as sharp an instrument as many had anticipated.

Also involved with this type of complaint was the Great Atlantic and Pacific Tea Company case.[3] The Company employed purchasing agents who were stationed in various large cities in which the Company had business interests. These buyers accepted commissions for brokerage services though this brokerage firm was likewise the purchasing

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[1]Goodyear Tire and Rubber Company v F. T. C., 58 S. Ct. 863, (1938).

[2]Goodyear Tire and Rubber Company v F. T. C., 101 F. (2d) 620, at 625, (1939).

[3]Great Atlantic and Pacific Tea Company v F. T. C., 106 F. (2d) 667, (1939).

agent. Subsequently to the passage of the Robinson-Patman Act it instructed its agents to accept no more brokerage but to make all purchases on one of three bases: (1) to purchase at a net price reflecting a reduction from the current price charged other customers of an amount equivalent to former brokerage fees, (2) to execute "quantity discount" agreements, providing for monthly payments equivalent to former brokerage fees; or (3) to enter agreements with manufacturers to keep a record of all brokerage which would be paid when, as, and if its legality should be determined. The Commission found that the sellers didn't receive the benefits of a broker's service but that the seller nevertheless paid such fees to the company.

The Court declared that paragraph (a) of the Robinson-Patman Act which contains certain provisos in regard to discrimination, that is, allowance made for actual differences in cost of production, sales, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered, should not be applied to paragraphs (c), (d), and (e) which forbid the granting of commissions of brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services

to the buyer.

This decidedly limits the activities of brokers, making any affiliation between them with the buyer or seller, illegal. Application of the Act has not been unreasonably narrowed by judicial interpretation, but the Court has not left to the Commission the full power which the sponsors of the bill anticipated.

No cases involving the Webb-Pomerene Act are herein cited, but a valuable part of the Commission's export trade work consists in its services in the investigation and adjustment of foreign complaints arising out of transactions of American exporters and importers with their foreign customers and in the avoidance and elimination of the distrust, suspicion and ill will which undoubtedly would arise if the misunderstanding were not cleared up.

From the orders of the Commission, and their approval by the courts, a definition of "unfair competition" may be broadly stated as including every form of misrepresentation of your own or your competitor's product, when such misrepresentation is likely to mislead and deceive the purchasing public, to their damage and to the injury of competitors; and also to combinations, conspiracies and concert of action to maintain prices, apportion output, or otherwise curtail competition. More specifically, unfair practices may be classified into three groups: those

involving misrepresentation, fraud and deceit; those founded on oppression and coercion; and those held unlawful by their effect upon competition.

President Wilson visualized in the Federal Trade Commission:

> a means of inquiry and of accommodation in the field of commerce which ought to both coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law.

The Commission possessed:

> powers of guidance and accommodation which have relieved businessmen of unfounded fears and set them upon the road of helpful and confident enterprise.[1]

The Trade Practice Conferences partially fulfill President Wilson's idea. By this method, the spirit of regulation, rather than "busting" is applied. Certain prohibitions are formulated by the businessmen who are most familiar with the industry and its operation. In this way, the highest and most commendable form of competition may be obtained. More orderly marketing conditions may be realized, and operators can be fully informed as to what is required of them. This is a worthy example of cooperation between business and government, for the benefit of both producer and consumer. Any industry or important group

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[1] R. E. Freer, "Practice Before the F. T. C.," Washington Law Review, Vol. VII, (Jan. 1939), p. 295.

within an industry may have a trade practice conference if the Commission is of the opinion that it is desired by a majority of businessmen within that industry and that it would be in the public interest. Notice is given so that anyone in the industry who is interested may appear and participate.

Several classes of rules have been compiled by means of these conferences. Group 1 rules codify and clarify Section 5 of the Act, while Group 2 rules are composed of more ethical practices and methods of conduct which the conference decides upon, as applicable to their own particular industry. These latter rules are not necessarily enforceable. A typical trade practice conference rule under Group 2 is that adopted by the rayon industry, which states that "it is considered a desirable practice for sellers to give consumers information in advertising and labels on the best method of cleansing, caring for and using the particular fabric."[1]

These agreements benefit businessmen by giving them an opportunity to declare and prohibit those methods of competition which are destructive of the competitive process. It is obviously quite impossible for any statute to embrace all those practices in the various industries,

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[1] Ibid., p. 297.

under changing conditions, which are detrimental; however, allowing those who are most familiar with the subject to discuss freely among themselves and set up their own codes of ethics is not only a feasible but a most practical plan. More orderly conditions can be achieved in this manner than by a system of specific adjudication to declare illegal certain actions, and the latter would be the only alternative under the law, the language of which is so broad and general.

The Commission procedure in this respect reached its peak about 1925, when new personnel was installed and a general attitude of cooperation with business prevailed. "Helping business to help itself wherever and whenever it can be done consistently without prejudice to the best interests of the public as a whole is the principle of this new policy."[1] Self-regulation was considered an important aspect of control.

This trend was abruptly changed, however, as Miller explained:

> In 1930 the movement to develop rules of fair trade received a sudden shock. The Commission announced that it proposed to reconsider and to revise where necessary the rules already adopted. It appears that some doubts were entertained concerning the legality of some of the rules adopted.[2]

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[1]Federal Trade Commission Annual Report, (1927), p. 1.

[2]J. P. Miller, Unfair Competition, (1941), p. 271.

The Department of Justice, for one, was of the opinion that these "conferences" were being used as a device by businessmen to evade the Sherman Law, and that actually their motive in many instances was to fix prices. As a result of the purge, many Group 2 rules were completely discarded by the Commission, and there followed a tendency toward standardization of Group 1 rules. Since this purge the trend has been to place such devices as bogus independents; selling goods as close outs when such is not the case, for the purpose of inducing purchasers to think they are buying at a bargain; failure to brand and identify goods; and so forth in all Group 1 rules, while Group 2 rules have dealt almost exclusively with methods of misrepresentation in particular industries.

A very powerful weapon is possessed by the Commission in utilizing the conference method and the only alternative to what Ely described as:

> an otherwise necessarily increasingly burdensome and restricting governmental regulation--due, of course, to the growing complexity of our industrial life, with its far reaching ramifications and reactions.[1]

In addition to the trade practice conference procedure, the Commission also utilized the formal proceeding and

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[1]R. S. Ely, "Work of the F. T. C.," Wisconsin Law Review, Vol. VII, (June 1932), p. 207.

stipulation. The former involves the formal complaint upon the respondent, opportunity for such respondent to file an answer, the taking of testimony and filing of briefs, the arguments of the case before the commissioners, and the issuance of an order of dismissal or of an order to cease and desist from which the respondent is free to appeal to the courts and for the enforcement of which the Commission is also at liberty to appeal. The Court, then, has the power to set aside orders. In a recent amendment, if appeal by the respondent isn't made within ninety days, the order becomes final, automatically.

The last method used by the Commission, that of stipulation, has been the subject of great controversy. On March 17, 1925, amended April 30, 1927, and September 17, 1928, the Commission adopted a rule of procedure and policy stating:

> In the interest of economy and dispatch of business, as well as the desirability of accomplishing the ends of the Commission with as little harm to respondents (wrongdoers in commerce) as possible (therefore) all cases should be settled where they can by stipulation unless the public interest demands otherwise.[1]

The procedure adopted by the Commission may be summarized as follows:

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[1] Henry Ward Beer, "F. T. C. and Its Due Process of Law," Notre Dame Lawyer, Vol. VII, (1932), p. 177.

The Commission, after being convinced that a party is guilty and without giving to that party a chance to be heard or without taking a single line of testimony or without issuing the complaint or making a finding of fact after a hearing, as the law requires, sends a letter including a stipulation of facts which it has found by investigation, stating that if the accused will sign the enclosed stipulation admitting his guilt, the government will keep his name secret as well as the facts of his guilt. Quoting from the language in the form used: The commission is of the opinion that the law is being violated. If the party doesn't sign the stipulation, the Commission will proceed against him, using the same facts as set forth in the stipulation as a basis for a cease and desist order. Of course, in some instances, these stipulations are sent out after a certain precedent has been established by judicial interpretation. The purpose is to expedite, but it is readily seen that dangers of coercion and the arbitrary use of power may easily arise from this procedure.

The Commission's policy is against allowing any respondent to stipulate when the practice involved is tinged with fraud or where there is a restraint of trade prejudicial to the public. Stipulations are also denied parties who cannot give satisfactory assurance to the

Commission that the stipulation will be adhered to.[1]

The agency's power has certain limitations beyond which it cannot go. The Commission may lawfully concern itself only with interstate business of a private character, or with that which is so closely related to interstate commerce as practically to be a part of it, or where those businesses in their unlawful practices may unreasonably obstruct the free flow of commerce in interstate channels. Furthermore, the Commission cannot lawfully engage in investigations solely for the purpose of discovering whether or not the business subject to the Commission's orders in other respects is violating the law of unfair interstate trade. (i.e. The Commission may not engage in so-called "fishing expeditions" to search for illegal practices.) Lastly, there must be a showing that the Commission's proceedings are in the "public interest." Often, complaints are entered to the Commission by private parties before investigation is made, but the Commission more often acts on its own initiative.

One writer expressed the opinion that:

> Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control . . . . In making investigations and

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[1]*Ibid.*

> reports thereon for the information of Congress under Section 6, in aid of the legislative power, it acts as a legislative agency. Under Sec. 7, which authorizes (it) to act as a master in chancery under rules prescribed by the court, it acts as an agent of the judiciary. To the extent that it exercised any executive function--as distinguished from executive power in the constitutional sense--it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.[1]

It is doubtful whether such an assertion that the F. T.C. is not a limb of the executive tree can be substantiated. Their activities are too closely integrated with those of the Department of Justice, for one thing. There is little reason to doubt that the Anti-Trust Division has often instigated the Commission's investigations and used these findings in their own prosecutions. Administration aid was certainly not lacking in the enactment of statutes to increase the powers of the Commission. Though not as directly under the control of the executive, this agency cannot be considered as completely independent of its influence.

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[1]R. E. Freer, "Practice Before the F.T.C.," George Washington Law Review, Vol. VII, (January 1939), p. 291.

CHAPTER V

ENFORCEMENT ACTIVITIES OF THE DEPARTMENT OF JUSTICE SINCE 1932

During the years of the depression enforcement of the anti-trust laws was trying, because of organized pressure and general public sentiment favoring laxity or a statutory amendment. Complying with this sentiment, legislation was enacted allowing combinations and agreements to limit production and stabilize prices. The implications of such a policy were government control of both production and prices.

A statement by the Department of Justice in 1933 discloses the dilemma in which that office found itself:

> We have tried to exercise the greatest caution in these directions and to proceed only in clear cases, and I am frank to admit that we have sometimes procrastinated or postponed action for limited periods, so that no unnecessary injury be done to business enterprises.[1]

It is supposedly the aim of this department to effectuate the policies and goals of the administration, yet the same executive who frequently endorsed the aim of free competition nowhere explicitely repudiated the contradictory

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[1] New York Times (January 28, 1933), p. 7.3.

course embodied in the N. R. A. codes, the crop restriction plan, and the Guffey-Vinson Coal Act. He denounced inflexibility of prices, but seemed to favor, simultaneously, an inflexibility of wages which makes price rigidity often inevitable. On this point, the President was quite explicit:

> The purpose of the anti-trust laws. . . . must be continued, but these laws were never intended to encourage the kind of unfair competition that results in long hours and starvation wages and overproduction.[1]

Obviously, the Anti-Trust Division was placed in a straight-jacket by the current trends relating to the loose-knit type of organisations, for that was the era of government encouragement and paternalism toward what had previously been considered antagonistic to the law.

It was rather at the "concentration of wealth" that Mr. Roosevelt aimed his disapproval. He declared a "no compromise fight" against "autocratic controls over the industry and finances of the nation," and proposed to make the Democratic party, if necessary to attain his objectives, "the good of all kinds and conditions of men."[2] Both the President and Attorney-General Jackson avowed their purpose to "eliminate all holding companies." The former was particularly vehement in his attack on such

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[1] Ibid., (May 8, 1933), p. 1:8.

[2] Ibid., (January 9, 1938), p. 1:8.

enterprises in the banking field. He was questioned as to whether the power of Mr. Eccles, of the Federal Reserve Board, might not be used as an example of this type of control, as demonstrated by his influence in the state of Utah. Jackson, it should be added, differentiated between "bigness" which effected greater efficiency and that which was aimed exclusively at financial control. The President felt that "big-business" was using the N.R.A. to the disregard of small business, and proposed a board to probe such complaints.

Sizable corporations were definite targets during the early days of the Roosevelt administration, for example, the major oil companies, the Aluminum Company, and automobile financing companies, because it was felt that from a practical and economic point of view, as well as from a legal standpoint, these were the more serious offenders. The Assistant Attorney-General in charge of the Anti-Trust Division announced:

> While this new policy of concentrating all the resources of the division against what appears to be the three or four major offenders may bring the law directly to bear on a few while others are not now molested, nevertheless it is the only practical policy to be pursued under present conditions.[1]

At the same time that Mr. Roosevelt was attempting

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[1]Report of the Attorney-General, (1937), p. 42.

to enlist the aid of businessmen and industrial majorities, and opening the doors of the White House to all who came offering to help eradicate "the evils that flow from undue concentration of economic power or unfair business practices," Mr. Jackson was declaring that government must oversee business to the point where periodic depressions would be ended. Only the government could take a long-range policy, while businessmen are interested in merely immediate gain, he emphasized. The administration objective seems to have been not only to eliminate destructive practices in business, but decidedly to take the lead in forming business policies. The prevailing attitude which had invaded the White House was not one of confidence in the responsibility of entrepreneurs, but rather one of careful and detailed direction of their actions. The antitrust laws opened the way for the disintegration of concentrated wealth, while other instruments were being employed to enlist the adherance of businessmen to the economic controls which were to replace those of big-business.

The administration exerted pressure on Congress to sharpen the legal tools at their disposal in more effectively eliminating potential monopolies. Attorney-General Cummings stated:

> In my opinion, the time has come for the Federal government to undertake a restatement of the law

> designed to prevent monopoly and unfair competition. This proceeds from the conviction that the present laws have not operated to give adequate protection to the public against monopolistic practices.[1]

Despite the investigation of the Federal Trade Commission into practices among numerous industries of collusive bidding, the burden of proof required by the government was so great, thought the Attorney General, that any civil or criminal action was impossible. It involved the whole question of the adequacy of the present laws to solve the monopoly problem. The laws were so antiquated that they were of little or no value in reaching the trusts, and so shattered by Supreme Court rulings that they were virtually of no use in halting monopolies.

Attorney General Jackson decried the fact that the Court had attached the word "reasonable" to "restraint of trade," and thus qualified the law. He stated that it is the result, and not the intent, which should be condemned. He thought that current judicial interpretation "does not permit consideration of the real factors involved,"[2] so the disparity between the moral purpose of the law and the practical application of it are not surprising. The Court upholds current business practices which have led to restraint, concentration, and monopoly. "Decorum and

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[1]New York Times, (April 28, 1937), p. 16.1.

[2]Report of the Attorney-General, (1937), p. 39.

respectability" are the standards they have to maintain. Therefore, Jackson believed that enforcement to eliminate rigid price structures was impossible. The Department was faced with an impossible burden of proof, by having to convince the Court of "intent."

Furthermore, adequate standards were not provided by the law, he complained. This inadequacy was demonstrated in the selection of cases for prosecution, in the determination in advance of the validity of the numerous combinations which do not involve the violation of some specific precedent, and in differentiating between industrial efficiency and industrial empire building for monopoly control. It might be mentioned, here, that the original law was passed with the anticipation that such standards should be built up over a period of years of enforcement, but at the same time, it was thought advantageous to refrain from enumeration of prohibitions, so that flexibility might be ensured. Actually, the problem seemed to be more one of consistent and comprehensive enforcement than one of further codification by Congress. To offer proof of his accusations, he cited the increasing degree of economic control and predominate failure of small businesses in contrast to larger ones. In many fields, competition had completely disappeared, and where it did exist, it merely gave large organizations

greater advantages in their control of prices because they may obtain their raw material in a competitive market.

In March of 1938 nothing had been heard from President Roosevelt on the subject since the first of the year. He had approved of the vitriolic speeches of Mr. Ickes and Mr. Jackson, but also had informed the Business Advisory Council that he had given his consent "for reasons of strategy." Later the White House had found ways of letting it be known that Mr. Roosevelt was determined not to agitate the already troubled waters of recession.[1] As against such developments, the appointment of Thurman Arnold gave jubilance to the anti-monopolistic faction. Some of those who were then connected with the Federal "trust busting" activities were previously associated with the former Wyoming legislator when he was outlining his book, "Folklore of Capitalism." They testified that his dislike for monopoly, if anything, was greater than Mr. Jackson's.

The new Assistant Attorney-General energetically set out to bludgeon any and all monopolies, price-fixing agreements and other combinations. Distressed conditions in industry did not deter him in his mission, but rather, he completely ignored previous administration policy of

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[1]New York Times (March 13, 1938), Part IV, p. 6:7.

leniency where economic expediency warranted it. In the first place, he outlined the conditions which have created the current emphasis on the anti-monopoly problem. They arose out of the recent depression, he stated, "which threw into bold relief our inability to utilize unproductive capacity because goods could not be distributed at going prices."[1] He reviewed the huge piling up of inventories, idle machinery, labor, waste in production, and so forth which have made people of the United States doubt whether our economic system is adequate to distribute the goods. The first step in the examination "naturally begins with our anti-monopoly policy. He felt that the reason for the ineffectiveness of our anti-trust policy in the past has been that we were not willing to take the necessary steps to insure the continuous operation of a competitive economy. "Lip service to the ideal, and verbal recognition of a need to do something about the condition, has not affected the grim fact of the loss of $8,000 per family in a decade. The time has come for a program of administration in which we will have the courage to meet the vital needs of the nation and to follow the facts where they take us."[3] He reiterated Jackson's strong

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[1]Report of the Attorney General, (1938), p. 54.

[2]*Ibid.*, p. 55. [3]*Ibid.*, p. 56.

sentiment that results in restraint of trade are more important than the intent which lies behind them. The large organizations required today for efficient production have necessarily changed our conception of "reasonable" restraint of trade, Arnold asserted, and our mistake in the past had been to personify great organizations and treat them as men.

He saw several basic reasons for the non-observance of the anti-trust laws in the past. Ignorance, due to the small range of prosecution over the past years and failure to clarify the law have resulted in a general feeling that the anti-trust laws have become obsolete. Two things are necessary in enforcing these laws in the future, he stated:

> (1) The public must be able to see the concrete results. The slogan of trust-busting for the sake of trust-busting as a moral issue will not work any longer; and (2) we must have an adequate force for the work. But trust-busting should never be considered an end in itself.[1]

He was firmly convinced that private litigation was not helpful in solving the problem. In these cases the interest of the consumer is not represented, because the persons bringing the suit are under obligation to their stockholder and directors to get the maximum price spread

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[1]New York Times, (July 11, 1939), p. 17:1.

between costs and prices. "Private enforcement of any public law will make it an instrument detached from its real purpose. Private litigation is a tool which is always more effective in the most powerful hands. . . ." He added that the only justification for private enforcement is when it is necessary to fill the gap left by inefficient public enforcement.[1]

In cooperation with Mr. Arnold's program, President Roosevelt called for "a thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition." He advised Congress to make an extensive investigation, directed toward remedial legislation. He attested that the growing economic power, when it exceeded government, would be "fascism." He suggested among other things, that the burden of proof be placed on the accused, and that such practices as identical bids, uniform price increases and price leadership be prima facie evidence of violation.

Several innovations were made by Thurman Arnold at the outset. To solve the problem of non-clarification, he announced that publicity would henceforth be given to

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[1]Thurman Arnold, The Bottlenecks of Business, (1940), p. 165.

all prosecutions. In the past, no reasons were given for the prosecution of certain actions. He saw a need for building up a body of information regarding the anti-trust laws. This publicity would include a summary of the conditions the department believed to exist, reasons for procedure, either criminal or civil, and the results which the department hoped to obtain. In this way, businessmen could weigh their own methods and doubt would be lessened.

> The lack of definition of the boundaries of the law has created a vicious circle which runs as follows. It is not fair to enforce the antitrust laws against businessmen in cases where their application is not clear. At the same time, the application never becomes clear because the cases are not brought before the court.[1]

The first example of this procedure was in the auto prosecutions. The announcement and statement of policy concerning the auto finance investigation said in part:

> At the time of the original presentation the department was of the opinion that its investigation has disclosed evidence of certain violations of the criminal provisions of the anti-trust law by these automobile manufacturers and their associated finance companies which warranted submission to a grand jury . . . . In this case the only policy which needs statement and clarification is the concurrent use of civil and criminal remedies granted by the anti-trust laws.[2]

The Attorney General then went on to explain that the sole

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[1]Report of the Attorney General, (1938), p. 59.

[2]New York Times, (May 19, 1938), p. 12:8.

purpose of the criminal proceeding is to present to an impartial tribunal evidence which leads the department to believe that the anti-trust laws have been violated. At the same time, he said, it had never been the policy of the department to bar its doors at any stage of the proceedings against businessmen who may desire to propose a practical solution which is of major and immediate benefit to the industry, to competitors and to the public and which goes beyond any results which may be expected in a criminal proceeding.

This brings up the department's strong belief in the use of the consent decree, which subject will be dealt with later.

A second innovation in anti-trust enforcement, introduced by Mr. Arnold was that of an "industry-by-industry" approach. On this point, he said: "The key to effective enforcement of the anti-trust laws is to attack simultaneously all of the restraints which interfere with the distribution of the final product to the consumer.[1] Heretofore, anti-trust actions have been largely sporadic and localized, and usually confined to one or more large corporation in the same field.

The Temporary National Economic Committee favored

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[1]*Ibid.*, (July 8, 1939), p. 1:7.

this individualizing of industries. Senator O'Mahoney asserted:

> What we want to do is to reach an agreement, not arbitrarily, but in conference with the leaders of those various industries, as to what is best for them, and at the same time, what is best for the most socially desirable functioning of the economy.[1]

The Committee was impressed by differences in problems and organizations of various industries, and this led them to the belief that the traditional single standard antitrust doctrine no longer may be suited to conditions as they exist in many modern industries. Some industries, they argued, may need a greater or lesser degree of competition than others, and it cannot be said, necessarily, that what is good for one is good for all.

This specialized approach, coupled with the consent decrees, caused some officials to proclaim that the effect would be to make rules for the competitive situation in each industry according to its requirements.

An illustration of this method was given in the trust-busting campaign held in the building industries. All were investigated simultaneously, from the producers of raw materials used in construction to labor which is involved in the finished product. Arnold proclaimed it would be unique in that it would attack some State laws

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[1]*Ibid*., (March 12, 1939), p. 22:34.

and municipal ordinances as being as much responsible for the high cost of buildings as the

> price-fixing policies of labor, manufacturers, and distributors. The competitive system should give freedom to the man with a new idea to try it out even if he goes broke in the process. The housing industry is full of new ideas. At present the execution of such ideas must be a compromise with existing gangs.[1]

His primary purpose was the destruction of price rigidities which existed. He compared industries wherein "monopolistic controls" were responsible for continued high prices during the depression to highly individualistic activities, like agriculture. This comparison, it may be noted, did not take cognizance of certain inherent differences between industry and agriculture. The one is organized on a large-scale basis, while the latter is composed of a myriad, individualistic units. When prices begin to decline, each farmer finds it to his own benefit to increase his production, so that he can meet his fixed costs, those which he must pay whether he produces or not. On the other hand, the manufacturing concern reacts to a fall in prices by curtailing production and satisfying a smaller proportion of the total demand, in order that this concern, too, can minimize its losses. This, of course, leads to increased unemployment and contributes to

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[1] *Ibid.*, (July 8, 1939), p. 1:7.

depressed business activity. However, it is a situation which cannot be blamed upon the individual producers in industry, but rather, is a result of a certain type of economic organization, and one which does not necessarily spell monopoly.

Though this integrated attack on all stages of an industry may be more effective in benefiting the ultimate consumer and doing away with the "bottlenecks of business," it might also have the effect of creating more confusion than clarity and make it impossible for the public to gauge the merits of different cases. Arnold proclaimed that:

> So far as industry-wide indictments were concerned, we could have a hundred or so separate trials instead of one in some cases, but would mean the end of anti-trust enforcement.[1]

An underlying motive of this industry-by-industry approach to the problem is aimed at supplementing the law with a series of specific prohibitions. Arnold said:

> Such enforcement to be effective must be tempered by the rule of reason, involving recognition in its application of the economic necessities of a machine age, and a willingness to facilitate compliance with the law by helping conscientious businessmen to understand it.[2]

Mr. Arnold said that the Anti-Trust Division has no

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[1]*Ibid.*, (September 20, 1941), p. 8:2.

[2]*Ibid.*, (May 2, 1939), p. 34:1.

right to direct business as to what practices it must adopt, but declared there was pressing need of precedents to inform particular industries as to what practices they may engage in. He prepared legislation whereby business could submit its plans to the Department of Commerce for its advice on how the anti-trust laws affect their problems. This is best classified as a type of "administrative declaratory ruling." In his book, "Bottlenecks of Business," Mr. Arnold said that there is one thing the Anti-Trust Division can do:

> It can tell businessmen whether it intends to prosecute or not. It can say to them, "We believe that your plan is so unreasonable that it is illegal on its face," or it can say, "We see no reason for prosecuting at present." This might appear at first blush to be an authority so limited that it will not help the X, Y, and Z corporations because some future Attorney General may take a different view regarding the reasonableness of the plan. Yet, if we go a little further in the procedure we will find that the machinery of enforcement actually offers the businessman in such circumstances every reasonable protection.[1]

Before his book was published, however, Mr. Arnold arrived at another conclusion. He stated at the close of 1938 that the Department of Justice does not want to render advisory opinions any longer.

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[1] Thurman Arnold, The Bottlenecks of Business, (1940), p. 144.

"Much may be accomplished," he added, "through the careful and resourceful use of the consent decree."[1] He urged that wise businessmen should be willing to accept an independent judiciary as a referee to preserve competition rather than to drift into combinations which in the long run can only end in positive government control of a regimented economy.

Again, at the beginning of the building trades investigation, when asked by Joseph J. O'Connell, committee attorney, whether the department might devise some plan whereby it could tell businessmen in advance what they could do under the anti-trust laws, Mr. Arnold reported: "A dog talks by barking, but we talk by litigation."[2] He added that after prosecution starts, "the door is open for proposals."[3] The course which the Department has pursued extensively has been that of utilization of the consent decree. By such decrees, Arnold has attempted to adapt the present laws to the conception of dissimilar competitive needs, or what has been referred to as the "industry-by-industry" approach, which constitutes a radical departure from the former single standard theory of enforcement.

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[1]Report of the Attorney General, (1938), p. 65.

[2]New York Times, (July 8, 1939), p. 1:7.

[3]*Ibid.*

Said Arnold:

> In this way the Department of Justice would submit to the courts any plan voluntarily offered by defendants in an anti-trust proceeding "which further efficiency or orderly marketing conditions or which may be necessary to avoid extreme economic dislocation," and thereby obtain a decision on the legality of the plan.[1]

Orderly marketing practices designed to lower prices could be submitted by use of the consent decree, but they must meet four requirements: (1) they must be addressed to problems of a particular industry; (2) they must be for a limited time, and under constant scrutiny, to see if their purposes are being achieved; (3) machinery to punish any abuses of the situation thereby created; and (4) the approval must be in a form which will permit ready reference to Congress, in order that policies may be amended where they are not adequate to meet the particular situation.

The consent decree procedure consists of bringing an anti-trust suit and at some stage of the proceeding, obtaining a judgement against the defendants by consent. As a condition to such a decree the Department of Justice requires that the defendants agree not to violate the law again. The important element of the consent decree is the

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[1] *Ibid.*, (February 3, 1939), p. 4:4.

scope of its terms. This is insurance against violations of the future, a definition of what the defendant corporation or its officers may or may not do without falling afoul of the law, subject to action for contempt of court.

Arnold pointed out that the term "consent decree" in anti-trust cases got a special meaning because it came to represent a device which was nothing more or less than a process by which a criminal offense was condoned. However, he announced that no prosecution today would be dismissed

> because the defendants have ceased the practice for which they are being prosecuted. A plan to be the basis of a nolle-prosse of an indictment must give substantial advantages to the public, to consumers, and to competitors in maintaining reasonable business practices in the future which cannot be obtained by continuing the criminal prosecution. In addition to that the Court must be persuaded of this in an open hearing.[1]

The decree submittal must be voluntary on the part of defendant. Finally, the Department issues a public statement giving reasons for its action.

The Assistant Attorney General worked out an arrangement with Harry Hopkins of the Commerce Department whereby the latter would advise defendants as to what should go into any decree. A formalized law, such as proposed by

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[1]Thurman Arnold, The Bottlenecks of Business, (1940), p. 159.

Arnold, would permit, among other things, the Commerce Department directly to advise the Court in passing upon cases of this kind. In 1939, the Attorney General's Department reported a greatly increased use of the consent decree. In practically all pending cases, businessmen were conferring with the Department to reach an agreement of this kind.

Difficulties have arisen in the past, in the utilization of legal processes to enforce anti-trust laws.

> Especially before a court but also before a commission, litigation is at best ill-adapted to economic regulation. The difficulties of proof, the canalized procedure, and the necessity of framing issues in legalistic form all impede clarification of the underlying economic problems; and unfortunately, this sacrifice to orderliness of litigation would seem inescapable unless more effective instruments of control are developed.[1]

Consent decrees started in 1906, and from then until the present, more than twenty-five per cent of suits instituted by the government were settled in this manner. Actually, it was used when the outcome of further litigation was certain, and this procedure constituted an economy. The report of the Attorney General for 1938, and departmental releases make it clear that now, however, the

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[1] Maxwell Isenbergh and Seymour Rubin, "Anti-Trust Enforcement Through Consent Decrees," Harvard Law Review, Vol. LIII, (1940), p. 386.

government regards the consent decree as something more than a mere procedural convenience.

It has been noted that:

> Whereas the Anti-Trust Division in 1926 announced a willingness to accept consent decrees where the result of litigation would be "to obtain no more for the public than is obtained by the entry of a consent decree in the beginning," the Division apparently now requires the party consenting to the decree "to offer constructive proposals which are in the public interest and which go beyond what the law requires."[1]

Another author commented:

> In the current invigoration of anti-trust enforcement, the consent decree has been treated as a deliberate instrument of administration, not as a by-product of suits in equity.[2]

Now that the Anti-Trust Division aims at achieving "orderly marketing conditions" and competition which is the ideal, a question arises. How different is this from the N. R. A. code-making authority? Actually, the same result follows from the recognition by the Department that it is proper to impose like restraints upon all major competitors in the industry, regardless of whether they are proceeded against in the same proceeding. The Department explained that an equity decree under the anti-trust laws

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[1] Ibid.

[2] Milton Katz, "The Consent Decree in Anti-Trust Administration, Harvard Law Review, Vol. LIII, (1940), p. 415.

may and often does enjoin not only the precise conspiracy complained of, but conspiracies of like character and the use of devices similar to abuses specified in the complaint. Activities which aren't directly involved in an unlawful conspiracy may be enjoined as intimately related to the conspiracy or may be omitted from the injunction as of remote or uncertain relationship.[1] This replaces the specialized, legislative rules of the N. R. A., applicable to individual industries to govern special situations. Besides raising grave problems of legal propriety and power, the fact remains that the idea of such regulation is repugnant to many citizens, particularly when it may be questioned as to whether the Department of Justice is the best qualified agency to direct this regulation. It evolves upon the Department of Justice quasi-legislative and quasi-judicial powers. Criticism came from labor as well as other sources. An A. F. of L. attorney asserted that the Department of Justice would gain control over the general industry of the country, similar to the Department of Agriculture over farming.

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[1]New York Times, (December 16, 1940), p. 8:3.

> Through the concurrent use of civil and criminal remedies, the Division seems to contemplate a kind of enforcement through barter, in which the defendants will submit voluntarily to greater restrictions than could be imposed through ordinary litigation, in return for the Division's recommendation to the proper court that criminal proceedings be nolle-prossed.[1]

Although the Court has the power to examine the submittal and make changes, it has been very lax in exercising this prerogative. The consent decree is considered as an adjudication of the Court to which it is presented, and not merely as a contract. As yet, no limits have been set forth by the Court in reference to what may be included in a decree. Furthermore, the Court seems to regard consent decrees as immune from attack equal to that of litigated decrees. Mr. Justice Brandeis gave the following answer to an objection to the decree entered in the Swift Company case:

> Here, the defendants ignore the fact that by consenting to the entry of the decree, "without any finding of fact," they left the court the power to construe the pleadings and in so doing, to find in them the existence of circumstances of danger, which justified compelling the defendants to abandon all participation in these businesses.[2]

In this case, the company had alleged that the decree was void because it extended to matters outside the

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[1]Maxwell Isenbergh and Seymour Rubin, "Anti-Trust Enforcement Through Consent Decrees," Harvard Law Review, Vol. LIII, (1940), p. 340.

[2]Swift and Company v U. S., 276 U. S. 311, at 329, (1928).

jurisdiction of the Court, either not within the Sherman Act, or intra-state in nature. Justice Brandeis stated:

> . . . . if the court enjoined some (acts) that were . . . . in no way related to the conspiracy to obstruct interstate commerce, it erred, and had not the defendant waived such error by their consent, they might have had it corrected on appeal. But the error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much.[1]

From this, one can plainly see the scope of these decrees, which has been mentioned previously. Actually, there seems to be no recourse from the terms entered, if, in the future, they are found to be unfair, an impossible burden on the company involved, in meeting other competition, or inadequate from the standpoint of efficient law enforcement. This latter difficulty will be discussed in relation to the Alcoa decree of 1912.

Within the wide bounds of the consent decree exists the possibility of its use in declaratory judgements, or in achieving similar results.

> Search has uncovered only one case in which the Federal Declaratory Judgement Act was invoked in connection with the anti-trust laws. On April 2, 1938, the Chrysler Company filed, in the U. S. District Court for the District of Columbia, a petition for a declaratory judgement on the legality of contracts between it and its dealers concerning the financing of automobiles. (106 CCH Fed. Trade Reg. Serv. 15,022).

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[1]Ibid., at 330, 331.

The case was dropped, however, presumably as an incident of the successful negotiations for the consent decree of November 15, 1938.[1]

In several instances, both permissive as well as prohibitory regulations have been set forth in the decree. In Columbia Gas and Electric Corporation case, the company was allowed to acquire certain stock holdings, the legality of which had been doubtful. Sometimes, it is through clarification; for instance, if the decree reads that X corporation is enjoined, but Y is not, it will be shown that the actions of Y are legal. This, it might be noted, is not necessarily within the court's jurisdiction. Also, certain limitations should be recognized. In spite of the Supreme Court's endowment of consent decrees with the force of a decision in a fully litigated case, the provisions do not constitute a judicial guarantee that the described acts are legal. What they announce is that these acts are not prohibitable, by this decree, and this is not necessarily a barrier to the Department's obtaining another injunction against just those acts if it could prove that they violated the anti-trust laws. The second limitation is that only those parties who have already engaged in questionable activities have the advantage of obtaining

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[1]Maxwell Isenbergh and Seymour Rubin, "Anti-Trust Enforcement Through Consent Decrees," Harvard Law Review, Vol. LIII, (1940), p. 393, f. 27.

such declaratory provisions.

Consent decrees were entered in connection with the automobile financing cases, and an analysis of the procedure and terms may help to clarify the application of this device. Three companies, Ford, General Motors, and Chrysler, were all indicted and the indictments returned. On November 8, 1938, Arnold announced the filing in the Federal District Court at South Bend of two consent decrees growing out of negotiations between Ford, Chrysler and the government. After formal entrance of the decrees, the criminal suits against these defendants were nolle-prossed. In the first criminal proceedings in the cases, the district judge dismissed the grand jury because of a belief that the criminal suit was being used to coerce a civil settlement. Judge Geiger explained his action:

> I do not think it was proper for these parties to get together during the session of this grand jury and negotiate a deal here in a matter that would be comprehended within the terms of a probable indictment. There is nothing to do here but to discharge the grand jury.[1]

He continued to opinion that the Department did not have the power to negotiate with the companies for a consent

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[1]U. S. Congress, H. R., Hearings before Committee of the Judiciary with regard to the official conduct of Judge Ferdinand A. Geiger, U. S. District Judge for the E. Dist. of Wisconsin, Seventy-fifth Congress, Third Session, (1938).

decree. Other opinion was hostile to the Department's methods:

> It is reported from Washington that the Senate Judiciary Committee will probably undertake an investigation of the methods of the department. The recent use of information in the Federal Grand jury room in Milwaukee in an attempt to bludgeon certain companies into accepting "consent decrees" has stirred misgivings among lawyers in the House. They are not willing to accept good intentions as an excuse for violations of established securities and practices . . . . Can the Department of Justice employ information confidentially obtained to coerce persons or corporations it is prosecuting? Reform is beautiful but it should keep within the law and the spirit of the law.[1]

The General Motors Corporation continued litigation, and the decrees stipulated that if General Motors won the case, any provisions in the decrees would become inoperative. Further protection was given against any competitive disadvantage, namely, that anything in the decrees would be suspended after 1940, if General Motors were not similarly restricted, or if any future competitor were not similarly restricted.

Any discrimination by the manufacturers in favor of their affiliated finance companies was eliminated. However, a preferential position was given to "registered finance companies," that is, any company which would file

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[1]New York Times, (February 1, 1938), p. 20:2 (Editorial).

with the court and serve on the manufacturer a sworn statement, containing certain matters set out in the decree. Mr. Katz commented:

> By the statement, the registrant undertakes "in acquiring retail time sales paper, arising from sales of automobiles, from dealers of the manufacturer," to conform to certain rules, which are set forth in eleven numbered paragraphs. (See sub-paragraph (j) (4) of paragraph 6.)[1]

The advantages to be received by "registered" companies included office space and information provided by manufacturers, and a position similar to that afforded only the affiliated companies. At a glance it may be seen that this was an ingenious device by the Department to exert extended regulatory control over the finance companies. Furthermore, the list of rules to which registered companies bind themselves may be enlarged, so that the standards of fair practice embodied in the registration statement may ultimately assume the comprehensiveness of an N. R. A. code.

Another provision relates to advertising, which allows the motor companies to endorse those finance companies which are registered.

Several advantages have been cited in regard to the

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[1]Milton Katz, "The Consent Decree in Anti-Trust Administration," Harvard Law Review, Vol. LIII, (1940), p. 437.

use of the consent decree. In the first place, difficulties of proof, which are particularly noticeable in cases involving economic situations, are settled by stipulation. Secondly, there is freedom from formality in negotiations and complex issues which could not be resolved in a court room may be settled. Lastly, the defendant gains some advantage in being able to participate in the formulation of the decree.

However, there exist some inherent dangers in the extensive use of this procedure. A degree of coercion is inevitable, irrespective of any direct action by the Department. The defendant faces the possibility of the grand jury returning the indictment and the resultant expense of litigation and possible triple damages. Because of the uncertainties and vagueness of the law he may file a consent decree, as the lesser of two wrongs. The motive for such a submittal is not likely to be an overwhelming sympathy and affection for administration policy. The Court has no one before it to contest the terms of the decree, because, by hypothesis, the defendant has consented. The defects of the decree, injustices, and badly conceived provisions pass without comment or discussion. The Court does not even have access to the extensive facts, usually, but rather the brief report, consisting of the petition and answer. Furthermore, parties who are not

even a member to the suit may be involved, as in the case of the automobile finance companies. They have no opportunity to be heard, but come within the provisions without their consent. This is especially apt to occur in industry wide prosecutions. The Court, as was pointed out before, is not apt to reject the decree, and if it did, the defendant would again be criminally prosecuted.

Perhaps one of the most glaring inadequacies of the consent decree is its rigidity in the face of changing economic conditions in which the terms of the decree have become obsolete and ineffective. The Department of Justice had this poignantly illustrated in their abortive attempts to prosecute the Aluminum Company of America, in the face of a consent decree entered in 1912. It had to be proved that neither the issues, the subject matter, the parties nor the relief sought in the New York proceeding was substantially identical with those in the original proceeding. It is more difficult to change the provisions in a decree of this kind than one arrived at by litigation because the records contain neither the findings nor the conclusion.

The distinguishing aspect of the consent decree, that of its "code-making" authority, appears as a disadvantage or an advantage, depending upon the individual's opinion. The coercive factor is not any more noticeable than that

appearing in any piece of regulatory legislation, but the main consideration is that no such law-making authority was ever put into the hands of the Justice Department. They have usurped this right by indirect and doubtful processes.

In his building-trades investigation, Mr. Arnold announced that labor would be prosecuted along with industries, because they were equally responsible for price rigidities. Little reflection is necessary to recall the prevailing attitude of the Roosevelt administration, with regard to labor unions. The policy was to strengthen them in every possible manner, which might be compared to presenting a machine gun to an infant, as far as observable effects are concerned in many instances. The crusader in this administration's Justice Department, however, declared himself to be consistent in his anti-monopoly policy to the point of including these labor factions in his line of fire. At the same time, one can discern in many of his statements and actions a tendency to conform with the executive policies, if not directly, by means of circumventing the issue and evasion.

In 1939, when he was asked when the anti-trust laws would be directed against labor, Mr. Arnold replied,

> . . . . That in some instances labor has been prosecuted by the anti-trust division, but that he

believed in prosecuting industrial situations rather than individual offenders.[1]

Mr. Arnold suggested that labor submit its plans to the Justice Department before any action be taken, to decide upon the "reasonableness" of the restraint. This idea, however, is coincident in point of time with a similar suggestion to industry, which he later retracted. He continued to reassure labor that if it be later determined that an approved course is actually illegal, the union would be subject only to civil action.[2] He said that his division did not believe the anti-trust laws applied to strikes for the purpose of further collective bargaining or for higher wages and hours.[3] It may be recalled that such was the purpose of the strikers in the Apex Hosiery case, which had been brought about by private litigation. In connection with the Annheuser Busch case[4] Mr. Arnold took the position that the effect of the practices complained of was to permit building trades unions to erect protective tariffs around cities, depress the annual income of labor and prevent the expansion of prefabricated

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[1]New York Times, (February 3, 1939), p. 4:4.

[2]Thurman Arhold, The Bottlenecks of Business, (1940), p. 151.

[3]U. S. v Hutcheson, 61 S. Ct. 463, (1940).

[4]New York Times, (December 11, 1940), p. 32:3.

homes.[1] It was his belief that a jurisdictional strike, in which a larger, more powerful union was destroying a smaller union, was actually a suppression of competition. He emphasized that "labor should be given every opportunity to organize but should not be permitted to destroy itself by factional wars."[2]

On November 20, 1939, Mr. Arnold wrote a letter to the Central Labor Union of Indianapolis in which he declared that union practices which have no reasonable connection with such legitimate objectives as wages, hours, safety, health, undue speeding up or the right of collective bargaining are punishable under the anti-trust laws. He pointed out that in such cases where unions actually conspire to prevent and boycott the use of more economical materials and machinery, which action prevents persons in need from having lower-cost goods, the Department has no choice.

> Such practices go beyond even the dissenting opinions of the Supreme Court of the United States, which recognizes a broader scope for the legitimate activities of labor uniions than the majority opinions. <u>In our anxiety to be fair to labor</u>, we are not subjecting to criminal prosecution practices

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[1] *Ibid.*, (February 3, 1939), p. 4:4.

[2] *Ibid.*, (December 11, 1940), p. 32:3.

which can be justified even under the dissenting opinions of the U. S. Supreme Court.[1]

William Green, President of the A. F. of L. was not convinced of Arnold's anxiety to be "fair to labor," and addressed a demanding note directly to Mr. Murphy, going over the Assistant Attorney General's head, asking if such were the Division's policy. In part, it said:

> It seems inconceivable to me that an administration, notable for its friendliness to labor should adopt a retrogressive policy advocated hitherto only by the most extreme reactionary enemies of labor.[2]

He continued by quoting the Clayton Act, and reasserted his belief that it exempted labor unions from the Anti-Trust Law. Congress' intent, he said, was to free labor from the Law, and found that Mr. Arnold's position was unjustifiable in the light of this.

Mr. Murphy in replying to the above letter said that the views of his Assistant had been so held in several Supreme Court decisions.

> In the enforcement of criminal statutes it is the practice of the department to follow the construction placed on them by the Supreme Court. In doing so in this instance the Anti-Trust Division has followed the usual practice, and I would not be justified in interfering with that course. As I said . . . . *the policy of enforcement should not vary according to the individual views of the officials charged with enforcement.*[3]

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[1] *Ibid.*, Nov. 20, 1939, P. 1:4 (Italics mine).

[2] *Ibid.*, Nov. 23, 1939, p. 30:5.

[3] Ibid., Dec. 2, 1939, p. 1:1 (Italics mine).

Admittedly, the Justice Department was "put on the spot," and it might be expected that any statements of Mr. Murphy's would necessarily contain qualifications of some kind, in appeasement.

Arnold stated:

> The types of labor restraints which the Department considered not exempt from the Sherman Act, despite the Hutcheson decision:
> (1) The strike of one union against another union certified by the N. L. R. B. to be the only legitimate collective bargaining agency with whom the employer can deal;
> (2) a strike to erect a tariff wall around a locality;
> (3) the exclusion of efficient methods or prefabricated materials from building construction;
> (4) the refusal of unions to allow small, independent firms to stay in business;
> (5) the activities of unions in imposing and maintaining artifially fixed prices to consumers;
> (6) the make work system.[1]

Subsequent decisions proved the error of these assumptions. In the Corrozzo case, the upholding of unions' activities removes the second type of labor restraint thought exempt from the provisions of the Hutcheson case; namely, "a strike to erect a tarriff wall around a locality;" the third type, namely, "the exclusion of efficient methods or prefabricated materials from building construction;" and the sixth type, namely, "the make work system." The first

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[1]Statement of Thurman Arnold before the Temporary National Economic Committee, (February 13, 1941). See George Washington Law Review, Vol. IX, (June 1941), p. 958.

type which Arnold thought exempt was shown to be not in violation of the Sherman Act by the decision in the Chicago carpenter union case, otherwise known as the plywood case. The same principle was demonstrated in another case, the Building and Construction Trades Council of New Orleans.

Realizing the futility of his efforts to include the unions within the purview of the Sherman Law, Arnold then asked for further legislation to define the lawful objectives of labor unions. He warned that the Department would continue to prosecute industries, but "the division's hands are tied so far as restraints of production by labor were concerned because of the Supreme Court case of the U. S. v Hutcheson, which seemed," he stated, "to exempt unions from prosecution under the anti-trust law. So, when Dave Beck starts a protective tariff around Seattle and Won't let defense materials in without a local label," it was illegitimate procedure in the division's eyes, but nothing could be done about it now.[1]

In 1941, Arnold testified in the hearings on bills to prevent strikes and walkouts during wartime.

> My job is to protect independent businessmen and consumers against the abuse of such privileges as

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[1]New York Times, (September 20, 1941), p. 8:2.

> Congress gives to agriculture, labor and other groups.[1]

He declined, however, to recommend any legislation, holding that other federal agencies had prior position in the consideration of labor activities. He asserted that some labor practices were hampering defense efforts by "imposing unconscionable costs" upon consumers. When asked for definite suggestions for keeping defense products going full blast, Mr. Arnold said he had none, but quickly added:

> If you let me operate and destroy restraints of trade, you're not going to have to do much regulating.[2]

Mr. Biddle, Attorney General, hastened to make a public statement to reprove his Assistant for his verbal tactlessness in the Senate hearing.

> Thurman Arnold, the Assistant Attorney General in charge of anti-trust prosecution, was not speaking for the Department of Justice when he recently criticised labor unions at a Congressional hearing. I think the timing was rather unfortunate . . . .[3]

He added that he would take no disciplinary action, but that would have to come directly from the White House. This time, it seemed, the Assistant Attorney General had become too enthusiastic, letting administration policy "go to the wind." Mr. Arnold was to be the target for

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[1] _Ibid._, (February 18, 1939), p. 10:1.

[2] _Ibid._, (February 18, 1941), p. 10:1.

[3] _Ibid._, (March 26, 1942), p. 42:3.

more recriminations, again eminating from the A. F. of L. At their 1942 convention, they adopted a resolution recommending that Attorney General Biddle be "requested to ascertain by investigation whether Mr. Arnold had exploited the prestige of his public office for his own material and financial gain." The Committee report on the Assistant said:

> It is all too apparent that the gyrations of Mr. Thurman Arnold constitute one of the most unique and most disquieting phenomena in the history of the American government.[1]

The latter accusation perhaps had more foundation than the first. One can easily surmise labor's consternation at Mr. Arnold's statements and activities. It might be that his initial attempts to deal rather gently with the administration's "fair-haired lad" finally became too onerous, as it became increasingly evident that labor was equally at fault with industry as a cause of restrictions on production and price rigidities. He faced insurmountable obstacles, between the Administration and the courts, where the attitude was to overlook the missteps of labor unions whenever possible. His difficulty lay in trying to reconcile his own enthusiastic endeavors against all restraints with these executive policies, and perhaps explains, partially, his gyrations, of which the A. F. L. complained.

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[1] *Ibid.*, (October 13, 1942), p. 17:1.

During these years when anti-monopoly sentiment was at its peak and the Justice Department was working more than energetically to eliminate these "Frankenstiens" of the market place, the administration was simultaneously searching for new and sharper weapons with which to attack. From the White House often was heard dissatisfaction with the statutes as they exist, and the demand for amendments. Some of the results have already been mentioned, such as the Robinson-Patman Act, and the Wheeler-Lea Amendment.

In 1939, President Roosevelt reported that almost fifty years after the passage of the Sherman Act, protection furnished by the anti-trust laws are so negligable that it renders the system of free private enterprise still virtually untried. At the time he asked for the investigation of the concentration of economic power, he further suggested that:

> Where a corporation is enjoined from violating the law the court might be empowered to enjoin the corporation for a specified period of time from giving any remunerative employment or any official position to any person who has been found to bear a responsibility for the wrongful corporate action.[1]

Individual penalties should be imposed, he thought. Herein, is the heart of the O'Mahoney bill presented later in the Senate. Thurman Arnold wished to go even

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[1]*Ibid.*, (April 30, 1938), p. 1:8.

further, by tightening the criminal penalties of the anti-trust laws, but was opposed on that point by Senator O'Mahoney. He was also confronted with opposition when he attempted to formalize by statute the "consent decree" procedure which he had worked out informally since his taking of office. Arnold favored the early introduction of the Civil Penalties Bill. He declared:

> (It) will permit the greater use of the civil proceeding. At present the only preventative effect is found in criminal proceedings.[1]

Also very unsatisfactory to Mr. Arnold was the Miller-Tydings Law. In an official dispatch from the Anti-Trust Department, Mr. Edwards stated:

> The Amendment has encouraged flagrant violations of the Sherman Act which it does not actually sanction. This situation is a consequence of the misrepresentations already described. When Congress passed the Miller-Tydings Act, the great body of retailers in the drug industry supposed that they had been given congressional authority to get together to fix resale prices and to force the reluctants into line. Actually, they had been given no such authority . . . . The gap between what is lawful and what is being done under the color of law has been visible ever since.[2]

Actually, it is nearly impossible for one manufacturer to establish a system of vertical but not horizontal price fixing unless he can be sure that his competitors will

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[1]*Ibid.*, (July 11, 1938), p. 17:1.

[2]Hodges, *Supreme Court and the Anti-Trust Law*, (1941), p. 52.

likewise conform, expressed the Department. In both of these attempts at statutory reform, the administration met defeat, however. As has been pointed out before, Mr. Arnold did not wait for legislative formality in utilizing his consent decrees to the fullest extent.

Mr. Roosevelt agreed with his "official aides" that trust suits which would interfere with the war effort be dropped till the end of the conflict. At the same time, he asked for legislation to make violators punishable after the war. "Arnold, Biddle, Stimson, and Knox insisted, however, that violators of this law should not escape ultimate prosecution, that prosecution should not be avoided unless war production would be affected, and finally, that no entity which has sought to defraud the government should in any event obtain postponement of investigation, and subsequent action."[1] The executive, then, was willing that his social and economic programs be superseded by any expediency which would further the war effort.

Mr. Arnold felt that war contracts had been awarded too frequently to the larger concerns, and the situation was thereby aggravated. "If we are to scatter these contracts there must be a vigorous curb on all the concealed

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[1]New York Times, (March 29, 1942), p. 1:4.

coercions and combinations which have created this problem."[1] To assist the farmer and the small business firms, there was established in the Department a Farm Section and Small Business Advisory Section, to this end. He was not to be deterred by the "holiday" declared in respect to prosecutions which would retard war production.

The Assistant Attorney General issued warnings that cartels were preparing to pick up their old arrangements when victory was assured. He stressed the necessity of breaking up these combines so that the higher living standards of a new industrial age might be realized. In March of 1943, when he was retiring from office, Mr. Arnold said that the struggle for domination of industry came from "fear of the tremendous productive energy of the new world."[2] He emphasized that economic forces on the home front were struggling for domination of industry after the war, and not for profits.

His last utterances before resigning his office were directed against government control of industry and bureaucratic direction of production and distribution. Such ideas are alien to the American mind, he said, and "these traditions are represented by the anti-trust laws which have been forgotten from time to time, but never abandoned."[3]

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[1]New York Times, (March 10, 1943), p. 9:1.

[2]*Ibid.* [3]*Ibid.*, (November 25,1943), p. 43:8.

CHAPTER VI

CONCLUSION

The anti-trust laws have come to have a new and potent meaning during the last few years. In contrast to the pre-depression era, business has found them to be a sharp edged blade, often falling on firms and groups of businessmen who enjoyed practical immunity until the Roosevelt administration. This enforcement policy did not commence immediately in 1932, however. Rather, it followed in the wake of the governmental encouragement given to combinations in the early days of the depression.

The era of the thirties was one in which the world was attempting, rather feebly, to elevate itself from the depths of an economic pitfall by various methods. In the United States the government intervened in innumerable ways to lift the nation back to the level of prosperity. A new element had appeared which could not be compatible with the anti-trust laws unless certain concessions were made. After the youthful mortality of the N. R. A., and the A. A. A., the same associations fostered by our paternalistic government were suddenly exposed to the full vent

of the Sherman Act and the legislation which amplified it.

The spirit of regulation permeated every line of industry and it was not to be given up, in many instances, without a herculean struggle. Also, the old precedents had been weakened and business, often, did not know what would or would not be found illegal. While one industry was victorious, and enabled to continue its former policies or modify them, another was convicted for attempting very similar activities. How were these differentiations made by the Court?

Such criteria as motive, potentialities to fix or influence prices were restated frequently in the Supreme Court opinions. The legal missteps of business, however, were not designated consistently on that basis, but rather on the foundation of pressures from public opinion, administration policy and political expediency. It is less of a task to discover the differences in the composition of two industries, for instance, than their respective motives and abilities to influence price. If the "distressed conditions" involved resulted in impoverishing formidable groups of laborers, such conditions were much more apt to be recognized by the Court. If the disturbing influences merely were detrimental to the producers, the same Court might not tend to be as benevolent. Perhaps this is justifiable on social principles, but it does not constitute a

coherent set of legal principles by which businessmen may be guided.

Such accusations do not apply universally to the decisions herein discussed. The boundaries of some fields, such as those involving patent rights, have been fairly well drawn by legal chalk, and the opinions rendered seem to be consistent.

When labor was involved, the hand of the law had not the strength to deal even a weak blow. This trend became fully developed in the latter years, culminating with the decisions in the Apex and Hutcheson cases.[1] Admittedly, statutory enactments during this period were notable for the favorable positions these conferred upon certain economic groups. It is the duty of the judiciary to interpret the wishes of Congress, within constitutional limits. The latter constitutes a boundary which must not be ignored, either. The question may be raised as to whether the Court went too far in giving a broad meaning to the Norris-LaGuardia Act and consequent immunity to labor union activities. Older precedents seemingly were ignored so that the Justices could join in the administration's current movement toward liberation of the labor groups from

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[1]Apex v Leader; 60 S. Ct. 982, (1939).
U. S. v Hutcheson; 61 S. Ct. 463, (1940).

governmental as well as corporate impediments.

One must take into consideration that a mimeographed pamphlet on the "do's and don'ts" under the anti-trust laws would be a most arduous task to compile, if reflection is made only on the extreme and numerous variances between industries, due to economic factors and constant changes which they undergo. The accusation which is being made, however, is that these considerations did not explain the obvious ambiguities of the Court.

The decisions are rather a reflection of administration policy. A general distrust and suspicion of "big business" dominated the executive scene. This may have resulted, partially, from the belief that it was corporate power which had substantially contributed to prolonging the depression. Also, the Justice Department was endowed with appropriations larger than it had ever before received, by which they increased their personnel and efficiency in the presentation of cases. This fact undoubtedly contributed to the number of decisions rendered against business organizations. The Department of Justice was not as successful, however, in its prosecutions against the protected groups of the administration.

And what of the much discussed "rule of reason?" In those cases like Socony Vacuum, Apex Hosiery and General

Motors[1] it would seem that something new has been substituted for the doctrine first declared in the Standard Oil case by Justice White.[2] It appears to be a diversion to the strict construction of the statute as exemplified in the earlier cases, before the common law meaning was adopted. Now, presumably, "every combination" or "agreement" between businessmen is within the meaning of the law, unless special reasons, not governed by the former standards, are advanced by the Court in response to possible Congressional intent or current economic conditions. "Intent," no longer, is the guiding factor, nor is injurious effect, if these decisions are to be taken as criteria. The unestablished meaning of such words as "restraint" allows much elasticity in the reasoning of the Court, to the point of varying interpretations in individual cases.

Once, long ago, the Court declared that the fullest degree of market competition was not contemplated by the framers of the law.[3] Now, the other extreme seemingly is in vogue, and the purpose of the law has been construed to

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[1]60 S. Ct. 811, (1939).
60 S. Ct. 982, (1939).
121 Fed. (2d), (1941).

[2]221 U. S. 1, (1911).

[3]U. S. v. U. S. Steel Corporation, 251 U. S. 417, at 451, (1920).

mean "cut-throat" competition in some cases, and destroying advantages to the public which may be realized by integration, as demonstrated in the General Motors case. On the other hand, labor has assumed the position of an "untouchable" as far as the law is concerned, regardless, evidently, of whatever restraints it imposes, reasonable or unreasonable. The Court has shown a tendency to swing the pendant from one extremity, that of giving business the benefit of the doubt, in many instances, to the other, that of giving labor an unrestricted field of action, eliminating any and all doubts.

During this period the Department of Justice has become notable for its increased activity. This tendency is to be expected because the agency is a direct part of the executive branch of government. Its activities reached such proportions that Theodore Roosevelt's "trustbusting" campaign becomes insignificant by comparison. Certain disadvantages as well as advantages accrued from this intensified enforcement.

An appraisal of the Department's activities during this period inevitably involves an appraisal of the Assistant, Thurman Arnold. His appointment marked the beginning of a new era in the enforcement of the anti-trust laws. The division's work before this time might be described as comparatively passive, in view of the "energetic" nature of the agency after Mr. Arnold assumed

office. In 1940 he reported that

> whereas the Anti-Trust Division of the Department of Justice spent $1,800,000 and collected only $73,000 in fines between 1929 and 1936, the same division, in the January-June period of 1940, spent $600,000 and collected $1,300,000, with the prospect of $3,000,000 more in potential fines.[1]

A year before, in his report, the Assistant proclaimed that complaints had increased "in geometric proportions." There had been an increase of 452 complaints over 923 complaints received the previous year. A material increase in the number of investigations, grand jury proceedings and cases in the trial and appellate courts was also noticeable.

Mr. Arnold was not "trust busting for trust-busting as an end," he often reiterated. His purpose was constructive. He saw in the anti-trust laws an avenue of relief from the depressed business conditions and lowered standards of living. He set out to use them as more than a deterrent to "restraints of competition," but as a device to transform the market-place into the theoretical ideal which has seldom, if ever, actually existed. It was the selfishness of many entrepreneurs and corporate directors which had caused the deplorable conditions in our economic life. He saw these men as working against government, rather than with it, in attempting to relieve the strain.

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[1]N. Y. Times, July 28, 1940, 24:8.

When prices remained high or stable he saw only one explanation--monopoly control. Although he spoke of our changed economic organization, he did not seem to recognize the natural degree of control over production which large-scale firms acquire. He saw businessmen grasping to add the doles given to the needy to their profits, through these high prices. He followed the administration trend toward placing every emphasis upon price, and these he was sworn to lower, while the other arm of the government was devising schemes to inflate. Actually, Mr. Arnold had the spirit of a reformer, but as too often happens, he oversimplified the complex problem at hand, and attempted a solution with one weapon--the anti-trust laws. Admittedly, he did utilize them as they had never before been utilized, namely, to effect industry-wide regulation. No longer were they a negative instrument, but assumed very positive controls. The Department used the law not only as a deterrent, but as a series of strings which it attached to its puppets, the businessmen of the nation, with the Assistant Attorney General manipulating their actions. I believe he visualized such power over business as a "middle of the road" technique, being the only alternative to a complete domination by a few corporations and inevitable government control. As pointed out before, he had no legislative grant to assume such authority, but

regarded it as a necessary expedient to accomplish his purpose.

His technique of frightening businessmen by the mere presence of Department investigators is not entirely laudable. When he announced his policy of clarification and the building up of precedents to be used as guides in the future, it did not seem to occur to him the dilemma into which the entrepreneur was placed. No definite set of rules were there to guide him, enforcement was more vigorous and it was impossible to decide what would be legal or illegal, without placing the problem before the courts. As Mr. Arnold said, this potential enforcement is as effective as actual investigation.[1] What other alternative did the businessmen have, but to comply with the Department, when the bounds of legal action were so vaguely drawn? To avoid prosecution, expensive litigation, and the more restrictive control of a consent decree, if litigation were not carried through, he acquiesced without actually discovering, in many cases, whether his actions were within the pale of the law. Businessmen did not consider such "gestapo" tactics as the most logical way of clarifying a law and presenting industry with guides by which it may know what it can or cannot do.

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[1]Reports of the Attorney General, (1941).

Mr. Arnold's attempt at consistency by defying the administration's attitude toward labor provides some proof that he was sincere in his objectives and willing to sacrifice the good-will of one sector as well as another in carrying out his own policies.

Obviously, a stricter surveillance of industrial groups was necessary. The law had been ineffective in many instances, and action was imperative. The campaigns of Thurman Arnold cannot be disregarded as inconsequential in freeing business from many "restraints." His practical application of the law was a new and vital approach, and one which resulted in eliminating many unfair practices and unnecessarily high prices to the consumer. The advisability of the methods he utilized has already been questioned.

The primary criticism would be that he attempted too much under the statutes which it was his duty to enforce, and in doing so, overstepped his bounds. He attempted to do what the Supreme Court had already told Congress was not within its authority under our constitution, and such administrative law-making, therefore, cannot be condoned.

The other governmental agency charged with enforcement of the anti-trust laws also has to be fitted into the general picture.

The Federal Trade Commission has been active in the

public interest, in eliminating those practices which are detrimental to the consumer. Particularly in the field of advertising has the Commission been instrumental in safeguarding the interest of the public. Regulation in this sphere entails much vigilance and research, but the rewards of these efforts have been domonstrated. The agency has been fair and objective in its enforcement and the buyer may now feel comparatively sure that the products which he purchases are not being misrepresented, possibly to his actual detriment.

Not only the buyers but also the producers have been benefited by the activities of the Commission. Practices which are unfair have been designated, and clarification has resulted in a more orderly conduct of business and better understanding by producers of those methods which are illegal. The most commendable practice has been that of encouraging initiative and participation on the part of businessmen in regulating their activities by means of the Fair Trade Practice conferences. A greater interest on their part has thus been aroused, and members of the industry are often the best qualified to voice the actual problems of that industry, as well as to make constructive proposals for their elimination. This method has been of vast influence in the clarification and codification of the law. Rather than being an instrument to

bludgeon the corporations this agency has been successful in eliminating abuses and effectively regulating business where such regulation is necessary.

Congress envisaged that the Commission should be instrumental in effecting legislation, when necessary, as a result of their investigations. The agency's report in regard to the situation in the chain-store organizations was a major factor in the passage of the Robinson-Patman Act in 1936. Before this time, the Commission had also wielded its influence on the enactment of the Webb-Pomerene Law by submitting a report on the disadvantageous postion of our American exporters. Although these activities may not be purely objective, the service rendered by the Commission is helpful to Congress in disclosing pertinent facts.

It must be emphasized that the Commission's powers have been greatly enhanced by recent legislation. The Robinson-Patman Act conferred upon the agency broader controls over all types of discrimination which buyers or sellers might practice. The Wheeler-Lea Amendment to the Federal Trade Commission Act broke down the confining walls which surrounded the agency before its passage. The burden of proof for the Commission was made less of a task and the interests of the consumer were given an equal position with those of the buyer for a free, competitive

market. Such legislation, obviously, would lead to increased prosecutions and greater protection afforded to the public.

Judicial decisions have been increasingly favorable to the Commission, leaving less and less doubt as to the scope of these latter statutes. More discretion has constantly been awarded to the agency.

When considering the wide field which the Commission has to police, its work has been most commendable, and not noted by spasmodic enforcement and inconsistencies. The recent trend toward more vigorous prosecution can best be explained by its utilization of the new powers which Congress has conferred. Administration policy was directed toward strengthening this agency because it has been regarded as one of the most effective, with a commendable enforcement and court record.

It is reasonable to comment that the Roosevelt administration has been more successful in proving the full scope of the anti-trust laws than any previous administration. Both enforcement and interpretation by the Court have been a corollary to the prevailing executive policies. Corporate control was regarded as one of the most potential deterrents to an economic recovery. The President did not place his fullest confidence in businessmen, particularly the leaders of large-scale enterprises. A

marked phobia to "bigness" has been discernable in the statements of the administrative officials. Typifying this attitude is a statement by Thurman Arnold that during the depression years America was unable to develop new processes in light metals, plastics, and so forth because we were afraid of full production, afraid of its effect on invested capital and monopoly powers.[1] It was believed that corporate enterprise was responsible for a direct limitation on investment opportunities and increased employment of labor. Their logical answer to this was the substitution of governmental control for corporate power. The economic mechanism no longer could operate automatically, but the recent economic collapse and the prevailing type of business organization necessitated engineers to keep it running smoothly. The anti-trust laws were a partial answer in fulfilling this objective.

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[1]N. Y. Times, May 28, 1943, 36:4.

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