THE ANTI-TRUST ACT
AND
THE SUPREME COURT

BY

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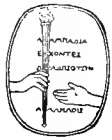

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CONTENTS

CONTENTS

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CHAPTER I

LIMITATIONS UPON RIGHTS OF CONTRACT AS TO PROPERTY, BUSINESS, AND LABOR AT COMMON LAW.

THE prospect of legislation at this session of Congress amendatory of the Sherman law has again brought before the public the whole question of anti-trust legislation. A great deal of misunderstanding concerning the effectiveness of that law has been displayed in such discussion as has already arisen.

The decisions of the Supreme Court interpreting the statute have not been clearly understood by many of those who have taken part in that discussion. The proposals for further

legislation do not take into account the progress of those decisions in making the statute effective.

In what follows I shall try to set forth in a summary way the present legal status of trusts and combinations in this country. I shall not attempt to discuss in any detail the proposals to amend and supplement the existing statute against trusts now pending in Congress. I shall confine myself to making clear the law against trusts and monopolies as it grew up under the common law, as it was changed by statute, as it has been enforced by the courts, and as it is to-day.

The federal anti-trust law is one of the most important statutes ever passed in this country. It was a step taken by Congress to meet what the public had found to be a growing and intolerable evil in combinations between many who had capital employed in a branch of trade, industry, or transportation, to obtain control of it, regulate prices, and make unlimited profit. Whether Congress intended it or not, it used language that necessarily forbade the combinations of laborers to restrain and obstruct interstate trade.

The statute, therefore, qualified three im-

portant phases of what we include in the general term "individual liberty"—the right of property, freedom to contract, and freedom of labor.

In this law Congress used general expressions, "restraint of trade," "monopoly," "combinations," and "conspiracy." It was passed in a country which recognizes as controlling the customary law handed down to us from England and known as the common law. It was drafted by great lawyers who may be presumed to have used those expressions with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our federal Constitution are to be so construed.

It is of the highest importance, therefore, to consider, as a preliminary basis for our discussion of the statute, what the common law was in respect to restraints of trade—that is, its limitation upon the right of property and the right of free contract, and upon the right of one to dispose of his labor. Just what use should be made of the common-law rules on these subjects in giving effect to the statute we can determine later.

The statute made unlawful a great number of

business methods and plans, all directed to the same purpose of suppressing competition and controlling prices, which until the passage of the act had been regarded merely as shrewd and effective, and as justified in the struggle for success. Such methods had resulted in the building of great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us with a plutocracy.

Combinations of labor also in the field of interstate commerce had grown to most formidable proportions. A few years after the passage of the anti-trust statute, Debs and the American Railway Union attempted to take the country by the throat and to stop the arterial circulation of interstate commerce in order to win a victory in the matter of better terms of employment for employees of a particular industrial company.

The statute was passed in 1890. It has, therefore, been nearly a quarter of a century on the statute-book. It has had the benefit of construction by the Supreme Court of the United States in a series of most important cases which presented issues that have in their decision

searched its meaning; and, in spite of a great deal of assertion and intimation to the contrary, the effect of those years of litigation has been to give us a valuable and workable interpretation which any one who gives it sincere attention can understand and can follow in the methods of his business, in the use of his capital, or in the organization and rules of action of his trade-union.

One difficulty in giving the public a clear understanding of the meaning and effect of the statute is that it has been made a football of party politics, that shibboleths have been fabricated out of it without any clear understanding of the distinctions which the court has made, that results have been misrepresented, and the superlatives of stump oratory have been substituted for a clear statement of the scope and operation of the law. Politicians have seized upon phrases that would attract the public eye, the meaning of which in the law they have not themselves understood, and have proposed amendments to accomplish purposes of a most indefinite character, without knowing or caring how they were to operate, if only the pressing of the amendment gave them a ground

for appeal for votes and for a claim to the gratitude of their constituents.

The statute dealt with a most difficult subject. The members of Congress who passed it knew that it was a difficult subject. They made plain the object that they had in mind, and they used general expressions to accomplish it, which they thought had had definition in the existing law. The evil to be remedied was manifest, and they pursued the legislative course, so often pursued before, of trusting to the learned, just, and equitable construction of the courts to effect their legislative intention.

As early as the second year of Henry V. a restraint which any man put upon himself by contract not to engage in any branch of trade or labor was not legally binding on him and was unenforceable. This was in 1415. There is no authority that goes so far as to indicate that the making of such a contract was indictable, but the rule that it was void was without exception for two centuries. An effort to make an exception appears in the eighteenth year of James I., where it was held that a contract not to use a certain trade in a particular place was an exception to the general rule.

It was regarded as against the general interest of freedom of labor and trade to enforce a man's agreement to disable himself to earn his own livelihood, and so to become a charge upon the community. Probably that was the sole purpose at first. Later on the kings exercised the power to grant the privilege to individuals of exclusive dealing in particular trades, and they did this by patents for monopolies. Naturally, such an exclusion of all others from any particular business or trade by arbitrary royal act stirred the indignation of the people, and the abolition of those statutory monopolies followed.

Meantime there had arisen abuses growing out of the attempt on the part of traders to exclude others from the sale of foodstuffs and other necessities of life by what was called engrossing or regrating—that is, by cornering the market and enabling them to raise and exact exorbitant prices. These were made the subject of statutes punishing them as crimes. As the results of the royal monopoly and of the cornering by engrossing and regrating were in more or less degree the same, there came to be a confusion of the terms, and the word "monopoly" came to

be applied also to the result of the cornering of the market.

The history and growth of the exceptions to the at first absolute rule avoiding all restraints of trade are interesting and important, and their development has continued down to very recent years. The absolute restriction proved in some ways to be embarrassing to trade rather than in the interest of its freedom. If a man had a business and wished to sell it, with its good will, he could get a better price if he might lawfully bind himself not to interfere with that business which he was selling by engaging in the same business within the same territory. This was in the interest of the purchaser, because he wished to secure the benefit of his bargain and make legitimate profit out of it, and it was not contrary to the public interest, because it did not affect the public. The condition of trade was not changed by the transfer from the one to the other, and the *status quo* was maintained by the agreement.

Of course, if the restraint upon the seller's going into business was larger in its scope than the business which he sold, either in the matter of territory or in the character of the

business, it was beyond the proper and legitimate purpose of such a restraining term of the contract. Therefore it was held to exceed the just limits of the exception to the old rule and to be unreasonable and unenforceable. It was not punishable as an offense; it was merely a term of the contract for the breach of which the other party could not recover damages and in respect to which a court of equity would not aid him.

The instance of sale of a business with its good will is only one of a number of analogous cases in which a contract restraining the contractor in his future trade or business was deemed to be germane and legitimately adopted to the lawful purpose of the principal contract, and, therefore, enforceable as part of it if the restraint was limited in its terms to the needs of the main transaction. Another instance was that of an agreement by a retiring partner not to compete with the firm which he had just left, which was quite analogous to the sale of a business and its good will to a stranger.

A third instance was that of one entering a partnership stipulating that while he was a member of it he would not do anything to interfere by competition or otherwise with the

business of the firm, which presents an exact analogy to the two previous cases. A fourth was where one sold property to another, and that other agreed not to use the property in competition with the business retained by the seller. In this case it was held proper for the owner of the property, who had full liberty either to sell or not to sell, to prevent injury to himself and his business by taking a contract from the buyer not to use it for such purpose.

A fifth instance was where an assistant or servant or agent entering upon a contract of service agreed as an incidental term not to compete with his master or employer after the expiration of his time of service. This was to protect the employer in his business from damage or loss caused by the unjust use on the part of the employee of the confidential knowledge he might acquire in such business.

It is conceivable that other analogous instances might arise in which exceptions would be made at common law to the general rule preventing the enforcement of contractual restraints upon the contractor's trade, though after a thorough search of the authorities I do not find any other instance suggested.

These exceptions were made because it was said that they were reasonable restraints of trade. Now, they were reasonable not because in a general way the judges thought they would not hurt anybody under the particular circumstances, but they were held to be reasonable as measured by the lawful purpose of the principal contract to which they were subsidiary and ancillary.

This gave a definition for judicial guidance. It laid down the purposes to which such a contract must be confined, and it was not open to the criticism that it enlarged judicial discretion into legislative action. I do not think that any well-reasoned and well-supported case can be found in which an agreement has been enforced by the courts of England or of this country where the main object was either to get or to keep another man out of business or to restrict his business in quantity, prices, or territory. When no other purpose than one of these has been manifested in the contract it has always been unenforceable at common law.

It used to be said that partial restraints of trade would be enforced if they were reasonable. The expression "partial" was not a happy

one, and it was rejected later on because there came before the courts instances in which ancillary contracts of this character had to be, not partial, but general, had to include the whole realm, or it might be the whole world. For instance, where a man was engaged in the manufacture of large ammunition, great guns, or war material, which to be profitable must be sold chiefly to sovereign governments and in which he had established a good-will that was world-wide, and he wished to sell his business to another. If the seller was to secure a good price, and the purchaser was to receive and enjoy the good-will and world-wide business which he was paying for, it was reasonable for the seller to stipulate in the contract of sale, as a term of it or as ancillary to it, that he would not go into the same business at all or anywhere.

What I wish to insist upon and emphasize as much as I can is that when it is said that a contract in restraint of trade was reasonable at common law, it was not a contract in which the restraint was the sole or chief object of the contract. The restraint was a mere instrument to carry out a different and lawful purpose of the main contract.

Fear of monopoly was one of the reasons why such restraints were not enforceable at common law. We see this clearly set forth by Chief-Justice Parker in 1711, in the leading case of Mitchel *vs.* Reynolds, I. P. Williams, 181, 190, where he stated the objections to a contract in the restraint of trade of one of the contracting parties as follows:

First. The mischief which may arise from them: (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public, by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible.

The reasons were stated at length in Alger *vs.* Thacher, 19 Pick, 51, 54, by the Supreme Judicial Court of Massachusetts when Chief-Justice Shaw was at its head, and when Putnam, Wild, Morton, and Dewey were associates. Referring to the rule as stated by Chief-Justice Parker in 1711, the Court through Justice Morton said:

That the law under consideration has been adopted and practised upon in this country, and in this

State, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy and carries out our constitutional prohibition of monopolies and exclusive privileges.

The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void.

The changed conditions under which men have ceased to be so entirely dependent for a

livelihood on pursuing one trade have rendered the first and second considerations stated by Chief-Justice Parker, for this rule against the restraints of trade, less important to the community than they were in the seventeenth and eighteenth centuries; but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the considerations last stated by the learned judge have lost nothing in weight as time has passed.

It will be observed, however, that the restraints in contracts in which the question of reasonableness or unreasonableness played any part at the common law were contracts in which one of the contracting parties disabled himself, and that constituted the restraint. Contracts or combinations between persons to restrain the trade of a third person were at common law voided by the statute against engrossing, and certainly never at the common law did the question arise whether such contracts were reasonable or unreasonable. They were always void and were never enforced. Early in the nineteenth century a contract restraining the trade of others came before

Lord Chancellor Eldon in a case of this kind.

A combination of wholesale grocers formed what was called a fruit club and appointed a select committee to act for them. Their purpose was to purchase all imported fruits that came into the market in order that they might control the trade and compel all the other wholesale dealers to apply to them for a supply. They sold to their own members at a small price and to the outsiders at advanced prices and in such quantities as they thought proper. If any importer sold to any other wholesale dealer without making an offer to the club its committee refused to have any further dealings with the importer, and thus the club obtained complete control over the price of fruit.

The plaintiff had been a member of this club and then withdrew from it, but subsequently entered into an agreement with it to buy two cargoes of fruit, the club agreeing to let him have a quarter of the purchase at the price the club paid. The club purchased the two cargoes and furnished one-quarter of the whole lot to the plaintiff. He paid part of the price the club charged, but then declined to pay the rest on

the ground that the price charged him exceeded what the club paid. In order to make his complete defense and to elicit the facts he applied to Lord Eldon in a bill of discovery to compel the club to show what its dealings were with respect to these two cargoes of fruit, and Lord Eldon declined to give him any relief on the ground that the association to which he originally belonged, and with which he was then seeking to enforce a partnership agreement, was contrary to public policy.

In the early part of the nineteenth century the regrating and engrossing statutes were repealed with a recital by Parliament that they interfered with the freedom of business instead of promoting it. There was thereafter no penalty for those acts which would have constituted engrossing or regrating, even though they resulted in monopolies. As Lord Justice Fry says in Mogul Steamship Company *vs.* McGregor, L. R. 23, Q. B. D. 598, 629, referring to the recital of the act: "This statement is very noteworthy. It contains a confession of failure in the past, the indication of a new policy in the future." But in spite of this change in the statutory law of England it is

perfectly clear that such engrossing or regrating combinations or contracts to interfere with and restrain the trade of third persons, though no longer criminal, continued to be unenforceable as between those who combined.

In Hilton *vs.* Eckersly, tried in the Court of Queen's Bench about 1863, a number of employers entered into a bond that they would carry on their works for a year in the matter of wages, employing workmen, and maintaining the rate of wages and the terms of the employment in accordance with the vote of the majority. One member violated the agreement, and this was a suit against him on the bond for his breach of the agreement.

One of the judges in the Queen's Bench, Mr. Justice Crompton, expressed the opinion that the contract was not only unenforceable, but that it gave a right of civil action to any one who was injured thereby, and that it was indictable as a common-law misdemeanor. The two other judges, Lord Campbell being one, agreed that the bond was unenforceable, but did not think that it was criminal. The Court of Exchequer Chamber on error held that the bond was unenforceable, but declined to pass

on the question whether such a combination gave an action for damages or was indictable.

The Mogul Steamship Company case, decided by the highest courts in England in 1892, has figured very largely in the question of trusts and monopolies in this country, and has frequently been misunderstood. The facts were that a number of ship-owners who were regular carriers of tea entered into a combination to drive out of business an outsider who was in the habit of coming into the harbor of Hankow and lowering prices. The combiners agreed to conduct a year's steady and persistent campaign of underbidding against his ships and thus end his competition. Then the outsider brought suit for damages against the combiners for the injury they had done him.

This case turned on the question whether the combination was affirmatively illegal in such a sense that it was indictable at common law. Lord Coleridge held that it was not. In the Court of Appeals, two justices, Lord Justice Bowen and Lord Justice Fry, held that it was not, while the Master of the Rolls, Lord Esher, held that it was, following the authority of Justice Crompton in Hilton *vs.* Eckersly.

In the House of Lords there was a unanimous judgment that the combination was not illegal in the sense of being actionable or indictable.

This case has been quoted frequently as indicating that such a combination as that was a reasonable contract of restraint at common law. It has no such effect. It will be found in nearly every one of the judgments that a clear distinction is made by the judges between an illegal contract and one which is unenforceable, and that the combination in that case was conceded to be unenforceable as a contract between the parties to it and to be void at common law.

Therefore we find that the state of the common law when Congress passed the anti-trust statute was that contracts in restraint of trade, in so far as they restrained a party to the contract, were void, unless they were reasonable in the sense that they were merely ancillary to a main contract which was lawful in its purpose, and were reasonably adapted and limited to that purpose, and that all contracts or combinations in which the contracting parties agreed to combine to restrain the trade of a third party or

affect it injuriously were void at common law, without exception, and there were no reasonable contracts or combinations in restraint of trade of that kind. When one party to such a contract sought to enforce it against another the court left both where it found them and gave no aid to either.

Our anti-trust statute, however, now makes such restraints, which were thus only void and unenforceable at common law, positively and affirmatively illegal, actionable, and indictable.

It has been frequently said that at common law a combination among laborers to raise their wages was illegal. I think this untrue. There were statutes punishing laborers for combining in this way, but it was not illegal at common law. Lord Bramwell in Mogul Steamship Company *vs.* McGregor, said:

> I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law.

And, while cases can be found in this country in which the illegality of combinations of laborers for this purpose has been asserted, they cannot be sustained.

But it is one thing to say that a combination of laborers to cease work in order to secure a raising of wages or more favorable terms of employment is not actionable, and it is quite another thing to say that such combination for other purposes and to accomplish other results may not have been actionable at common law. The great weight of authority is that in certain cases they were.

It may reduce the employer's profits if he is obliged to pay his workmen on a higher scale of wages when they combine to leave his employment. The loss which he sustains, if it can be called such, arises merely from the exercise of their lawful right to work for such wages as they choose and to get as high rate as they can. The loss is caused by the workmen, but it gives no right of action against them.

Again, if workmen are called upon to work with the material of a certain dealer and the material is of such character as to make their labor greater or more dangerous than that sold by another, they may lawfully agree that they will refuse to work with such material. The loss caused by such joint action of the workmen to the employer or the material man is not a

legal injury, and not the subject of action. The issue the workmen make and the purpose they have relate normally and directly to the terms of their employment and the work they have to do.

But on this common ground of common rights, where participants in business and manufacture and trade, employers and employees, are lawfully struggling against each other in peaceful methods for their respective interests and where losses suffered in the struggle must be borne, there are losses which are actionable, when wilfully caused by combinations in the exercise of what otherwise would be a lawful right, because of the indirect and unjustifiable means taken to accomplish the end sought. They may not use a lockout or a strike or a threat of either, or a withholding of patronage, or a threat of it, to compel third persons to join them in the fight which they are lawfully making with their competitors, their employees, or their employers.

This is a secondary boycott, so called. The essence of its illegality is in the coercion of third persons to lend assistance in a legitimate competition in business, or a perfectly lawful

contest between employers and employees, in which each may use against his rival or opponent his right of patronage, his right of labor, or his right of employment as he will. He may not by the same means coerce others to join him in the fight against their will. This view of the law has been taken in many cases in this country, and, while there have been some dissenting opinions, it has now been embodied in many statutes. A person injured by such a secondary boycott may invoke the action of the common-law courts in a suit for damages, or the courts of equity by way of injunction against the wrong-doers.

A secondary boycott has such possibilities in the way of injuring the whole community, of bringing into contests that are none of their own making so many indifferent and innocent persons, that ethics and law and public policy all require the recognition of the distinction which makes lawful the combination of working-men against employers in their natural controversies over wages and terms of employment, but condemns the use of combination by either party to compel third persons against their will to come into the fight.

The suggestion is made that the working-men ought to be allowed to use the secondary boycott, because if they do not, then they will resort to force. This seems to be a very poor argument. It assumes that militancy and the use of criminal means to further a cause should be recognized as an effective method of changing law.

The proper reason for the legality of a combination of laborers to raise prices is to be found in the necessity for enabling them to deal on an equality with their employers. If they did not have this power they would be at the mercy of employers who have capital and resources and who are not compelled to live from day to day on their daily earnings. The power to cease employment together—that is, to strike—is a most useful and legitimate weapon to bring their employers to terms. But why should they be permitted to use the strike to threaten third persons, and to compel such third persons to cease association with the employers on pain of being brought into the controversy and of themselves being subjected to similar treatment?

But it is said the right of labor is free. It is like any other right: it is free to use for a law-

ful purpose. But it is not free when it is used in a combination that effects such injustice as that I have described. To use the language of Mr. Justice Holmes speaking for the Supreme Court in Aikens *vs.* Wisconsin, 194, U. S. 205:

> No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

And so why should the right of labor be used to coerce third persons and thus bring about a result which will terrorize a community, as it did in the Debs case when the combination of the American Railway Union took the public by the throat and said, "We will starve your babies, we will prevent your food coming to you by stopping these railroads unless you intervene between Pullman and his employees and compel Pullman to pay higher wages than he is now willing to pay them"?

CHAPTER II

GENERAL FUNCTION OF CONSTITUTION AND COURTS IN PROTECTION AND LIMITATION OF INDIVIDUAL RIGHTS OF PROPERTY, CONTRACT, AND LABOR.

IN the first chapter I considered the state of the common law with reference to its limitations upon contracts and combinations in the exercise of the right of property and right of labor in the field of business, commerce, and industrial employment. It seems to me wise now to take up, in the course of discussion and as germane to it, a very general subject — to wit, the function of the courts in our system of government in the enforcement and limitation of such rights.

The United States Supreme Court's decisions under the Sherman law have been made the basis for a general attack upon our courts and for arguments in favor of grotesque and revolutionary changes in our judicial system

which bear the name of "the recall of judges and the recall of judicial decisions." We have heard much denunciation of what is called "judicial legislation" and "judge-made law." It will aid, at this point, before we attempt to state the result of judicial construction of the great anti-trust statute, to examine into the utility and indispensable character of the office that courts have performed in the history of the common law, in the construction of statutes, and in the application of written constitutions.

For purposes of discussion we can say that our municipal law is divided into three branches. The first is the customary or common law, inherited from England, and varied to meet our differing conditions here; the second is the statutory law, which, whenever the legislative branch of the government desires to change the customary or common law, is substituted for that law; and the third, the fundamental or constitutional law, which lays down the permissible limits of legislative discretion in enacting statutes.

In respect to the common law, we must have some official authority to say what it is. It was the judges in England who were learned

in the customs of the realm that in litigated cases between individuals adjudged what their rights and duties were by that custom; and their decisions, covering century after century, preserved in reports, made up the body of the common law.

As times changed in England, as new conditions arose for the application of the law of rights and duties and the lawmaking power of Parliament was silent, the judges exercised a wise discretion on principles of justice and morality to determine new forms for the application of old principles, by way of analogy, following so far as they could interpret it the prevailing morality and the predominant public opinion. From time to time it was found that the progressive quality of the law did not keep pace with enlightened public opinion and obvious public necessity, and then changes occurred both by statutory provision and by direct action of the king.

The customary law has been handed down to us, and its history one can trace in much detail for six hundred years. Indeed, if one will consult the great books on this subject like Holmes on the Common Law, Pollock and Maitland's

History of English Law, and other works of similar character, he can note the interesting development and progress that has been made in the English law from time to time under the necessities that the changing conditions in society imposed.

Sometimes the law has lagged behind public reforms and popular judgment. It generally lags behind the moral rules, but not so much now as in the past. The growth of equity in the English law presents one of the most inspiring histories that I know of, and the rules of equity, with some exceptions, represent as high a moral tone as we can hope to reach in municipal law.

If one would realize the growth of the common law in this respect he should read an article by that jurist and professor of law, James Barr Ames, on "Law and Morals," in the twenty-second volume of *The Harvard Law Review*, page 97. Dean Ames points out that the English law has squared itself more and more with the moral law and with the progress of society through two great instrumentalities.

The one was the statute of Westminster, Thirteenth Edward I., which, after all, was only

a statute of procedure, by which the clerks in chancery were authorized to form new writs for new cases, by analogy to old writs. This elasticity gave power to the lawyers as the initiators of new writs and declarations, on the one hand, and to judges in the consideration and approval of such writs and declarations on the other, to give progress to the principles of law under the common-law system and to adapt its rules and its remedies to the public and social needs.

The other instrumentality grew out of the king's executive interference with the common-law courts to abate their rigid technicalities and injustice through his Chancellor. This exercise of the royal prerogative was regarded by common-law lawyers as a great abuse. It settled down, after many years, into a judicial system grafted on to that of the common-law courts. In the greater variety of remedy in the Courts of Equity, in the opportunity to compel the defendant to act by way of restitution and specific performance, there was offered a means, which was fully improved by the great Chancellors stimulated by high ideals, to give the law a much more practical moral result than it ever

had before. That is why equity seems more all-embracing than law.

Professor Pound, of Harvard, has given the legal profession a great deal of aid in his discussion of the comparative jurisprudence of the various countries and of progress which the law has made. He thinks that in the adaptation of the common law to our new country and its development between the first years of the nineteenth century and the close of the Civil War a wonderful work was done by our courts, but that since the war they have not advanced the law as rapidly as they ought to have done, and he attributes it to the introduction of the elective judiciary and the failure to maintain experts of the law in independent judicial position since that time.

He points out that recent criticisms of courts based on their alleged failure to follow the changes in public opinion and to shape and adapt that law to the progressive needs of the people find their chief ground in the decisions of courts in which the judges are elective. His view is that great judges are those who understand so fully the fundamental principles of the law which must be retained, and have so

clearly the sense of proportion which expert legal knowledge gives, that they are able to keep the law abreast of the times by rejecting from it what is casual and retaining those fundamental principles in its administration the departure from which would involve disaster to society.

Judges are men. Courts are composed of judges, and one would be foolish who would deny that courts and judges are affected by the times in which they live, as well by the defects of those times as by the higher ideals prevailing.

The first half of the nineteenth century, ending in the Civil War, resulted in a great moral elevation of the people in the struggle over slavery and its final excision. Afterward we settled down to a tremendous material expansion, in which all the people had their attention focused on the extended applications of invested capital to further development. It was a period in which the political duties of the people were negligently exercised and in which the influence of wealth over politics became greater and greater, until plutocracy threatened; and if the attitude of the courts

reflected the attitude of the people, and the law did not make as much moral progress in that time, it is only because the courts were doing what it is denied they do now — *i. e.*, keeping pace with society.

Now the people have waked up. Now the courts have waked up. Now Congress has waked up and the legislatures have waked up to the danger that was before us, and a great reform in public spirit has come. It infuses not only the people, but legislatures and the courts.

Remedies for the ills that have developed in society, for the injustices that exist, are being suggested and pressed into operation with all the enthusiasm and all the lack of discretion that such a popular uprising as we have had at first inspires. The leviathan, the People, cannot thus be given a momentum that will not carry them in their earnestness and just indignation beyond the median and wise line. The excesses, which we may hope are only temporary, are part of the cost that we have to pay in curing the original disease. Therefore I think we may take heart in reference to the administration of our laws, and have confidence

that in the end and after some possibly serious mistakes we shall bring it into wise conformity with public needs and continue the courts as an effective instrument for the highest good.

I would not by anything I may say seem to uphold the diatribes and unjust and ignorant attacks that for demagogic and other purposes have been made upon our courts. All I mean to say is that they in their administration of the law have not been unaffected by the condition of the public mind, both for better and for worse, in the latter half of the nineteenth century.

Coming now to the field of statutory law, we find that while Congress has many lawyers, they are not always great jurists, they are not always exact in their knowledge of existing law, or statesmanlike in their appreciation of the operation of new law, and it is impossible for them to anticipate the myriad phases of transactions and points of contest between members of society that have to be decided in litigated cases. The necessity for filling the lapses that may occur in a statute, the inconsistencies that the statute has in itself and that it often has in concurrent operation with other statutes, require, in order to secure

any reasonable working of the law, a tribunal which shall supply these lapses by reasonable inference as to the intention of the legislature, and shall reconcile the inconsistencies.

Of course, it is impossible that such a function as this could be performed by judges, who are only men, without at times exceeding their just discretion, without at times stepping over the line which is very hard to draw between judicial construction and judicial legislation. But it must always be remembered that the legislature has complete power in this regard, and that if the courts in their construction of law miss the intention of the legislature there is immediate relief at hand in a new law which may be made more clearly to set forth the legislative will.

Finally, we are brought to the function of courts in reconciling statutes to constitutional limitations and in declaring when the permissible discretion of the legislature conferred by the Constitution has been exceeded in seeming laws which must be declared to be invalid. This requires a short consideration of our form of government and what the object of government is. We believe in popular government

in this country. But we insist that its duration and usefulness can only be secured in the long run by a recognition on the part of all the people that they must impose restraints upon themselves in order that the rule of a majority of the electorate, which is the only possible form of rule under a popular government, shall certainly be just and fair to the minority and the individual.

We believe that government is, of course, for the benefit of society as a whole, but that society is composed of individuals and that the benefit of society as a whole is only consistent with the full opportunity of its members to pursue happiness and their individual liberty. This, in its broadest and proper sense, includes freedom from personal restraint, right of free labor, right of property, right of religious worship, right of contract.

The people have imposed upon the electorate that represents them—and that is only a comparatively small percentage of all the people—certain restraints intended to preserve individual liberty and embodied in a written constitution. Were these restraints to be removed, and were a majority of the electorate, acting through

temporary passion or before the formation of a settled public opinion based on real knowledge and deliberate consideration, to do injustice to the minority or to the individual in the supposed interest of the majority or society, then the knell of popular government would be sounded. The injured minority would ultimately drift into forcible resistance to the authority of laws the outgrowth of the selfish exercise of power and of not doing justice; and, after chaos, we would have the "man on horseback."

Therefore those of us who insist upon the preservation of constitutional limitations upon the action of a majority of the electorate are convinced that we are the best friends of popular government. Popular government is only an instrument to be used in promoting the opportunity for the pursuit of happiness by society and its members. It is not an end; it should not be a fetish.

When men have capacity to govern themselves popular government offers greater benefit to them than the government by one or a few. When they do not have that capacity as a whole, then, as in the past and as in many parts of the

world to-day, government by one or the few is better.

Indeed, it is only a matter of degree. As I have already said, we are governed by the majority of an electorate. The minority of that electorate takes part, and therefore it cannot be said that it has not a voice in the government, because the minority changes into a majority and the majority into a minority in the practical operation of popular elections from time to time. But perhaps eighty per cent. of all the people never have any actual vote at all, and they are governed by the action of the twenty per cent. of the electorate. The electorate in a sense represents them, and, because their interests are similar or the same, in the long run the electorate carries out the public opinion of the whole body of the people—men, women, and children.

What we must keep clearly in mind, however, is that the end is the pursuit of community and individual happiness, that the means is popular government. There is not, therefore, the slightest reason *a priori* why we should not maintain in such a government the constitutional limitations upon the temporary action of the majority

of that comparatively small percentage of the whole people which constitutes its electorate.

The electorate, of course, must ultimately control the fundamental law containing these restraints. They may amend it in parts or revise it as a whole. But it is essential to a wise revision or amendment that the changes proposed be carefully weighed by constitutional conventions or legislatures in the light of their general application, and that they be considered abstractly and from a statesmanlike standpoint, with a wide vision of their probable operation, not only in the immediate present, but in the far future. Such a discussion of constitutional limitations excludes the possibility of a narrow partisan or one-sided view, stimulated by particular cases of a sensational and exaggerative color which lead to hasty and ill-advised generalizations.

Having fixed our constitutional limitations, we need somebody to keep us within them. We need somebody to whom the individual or the minority, unjustly treated by the majority, may appeal, and who will enforce the limitations that it was intended by the Constitution to impose.

This calls for an independent judiciary, for a judiciary whose tenure and salary and learning and ability and character are such that they can face temporary unpopularity with the majority in defending the rights of the individual or the minority. That is the federal system, and while it has been criticized and attacked with ill-disguised vituperation from Mr. Jefferson to Mr. Roosevelt, a calm review of history made by independent observers, not of our country, shows that there has been nothing in our form of government so admirable and useful in its workings as the Supreme Court of the United States and the authority which it has exercised, in its steadying opinions, in the security it has given to life, liberty, and property, in its keeping open, as far as the Constitution can secure it, the equal opportunity of all men.

Its peculiar functions undoubtedly make it the most powerful tribunal in the world. The fact that it has been able to maintain its authority against such attacks as those we had at the birth of the nation and that are being renewed to-day is a sufficient proof of the sound sense, the underlying conservatism, and the clear governing capacity of the American people.

The governing capacity of a people is measured by its self-restraint, by its recognition of the rights of the minority, and by its willingness to admit its liability to err and to lessen its liability to such error through fundamental restrictions upon its own action.

No one can read the judgments of the Supreme Court of the United States without realizing that no small or narrow prejudices contract their judicial views, or without recognizing that its members are, as they ought to be, not only great jurists, but great statesmen, and discharge their duties with the broadest appreciation of their responsibility and their duty not to substitute their opinion for the discretion which under our system it was intended that Congress and the State legislatures should exercise. The whole trend of their judicial decisions is as progressive as possible, and those who do not see it and assert the contrary are not familiar with them and speak in ignorance.

The Supreme Court of the United States is the final tribunal in all the critical issues of the present day arising out of the the Fifth and Fourteenth Amendments. Under those amend-

ments Congress and the States are forbidden to pass any laws depriving a person of life, liberty, or property without due process of law.

The rights included in these amendments are all the individual rights that we have come to regard as valuable in the pursuit of happiness. They embrace the right of personal freedom, the right to labor, the right to property, and the right to contract. Now it has always been recognized that these rights are not absolute rights, that they have to be exercised with reference to the exercise of similar rights by other individuals in the same community, and with due regard to community welfare, and that the permissible limitations upon their enjoyment must be affected by the changing conditions prevailing in society.

Three generations ago this was a sparsely settled country with a small population to the square mile, with small cities and towns and villages, with the great bulk of the population living in the country and most of them entirely independent in supplying themselves with the means of living. They raised their own food and prepared it, raised their own clothing and made it, they cut their fuel from the forest, and the

mutual dependence of one upon the other was far less than it is to-day. The urban population has greatly increased in proportion to the rural population, while the feeding of the people, and their clothing, their education, their health, and their domestic comfort have necessarily cut down somewhat the free exercise of individual rights, which was wider half a century ago; and the courts have recognized the change.

Consider the restraints upon personal freedom of action contained in the modern health laws. Take, for instance, the compulsory vaccination laws sustained by the Supreme Court. I have had an opportunity to witness the effect of such laws in the Philippines upon a people that had not had popular government and had been steeled to arbitrary rule, and yet they resented the health laws as savoring of intolerable tyranny.

What is true of personal restraint is true also of the right of property, of the right of labor, and of the right of contract. Tenement-house acts frequently require a destruction of income-producing property, and this without any compensation to the owner. We now have statutes which affect the rights of

contract, like that preventing the truck system, and like those which affect the character of insurance contracts that can be made.

Then there are statutes that change the law of agency and create liability against employers and limit their power to exempt themselves from it by contract.

Then we have the limitation upon the right of labor in the statutory inhibition against work for more than a certain number of hours and in child-labor laws.

In Lochner *vs.* New York, 198 U. S. 45, a statute of New York, which attempted to limit the hours of bakers' labor on the ground that baking was an unhealthful employment, was held by the Supreme Court, by a vote of five to four, to be unconstitutional. With the changed personnel of the court and the present trend of their decisions, I am inclined to think that a similar case before that court would meet a different fate.

The truth is that the court as at present constituted has shown itself as appreciative of the change of conditions and the necessity for a liberal construction of the restrictions of the

Constitution, with a view to such changes of conditions, as any court could be.

Mr. Justice Brown, in Holden *vs.* Hardy, 197 U. S., in considering the question whether the legislature of Utah had the right to prescribe hours of labor for miners, referred to the changes in the statutory law affecting individual rights which had been recognized as valid and as not transgressing constitutional protection of those rights. Speaking of those instances, he says:

> They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.
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> Of course, it is impossible to forecast the character or extent of these changes, but, in view of the fact that from the day Magna Charta was signed to the present moment amendments to the struc-

ture of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise.

This shows the state of mind and the view of its duty in which the Supreme Court has approached the construction of the anti-trust law and the recognition that it has given to the fact that under the changes of business and social conditions limitations of the Constitution affecting the right of property, the right of free contract, and the right of free labor may be qualified in a limited way without a breach of individual liberty and without removing or disregarding the fundamental ancient landmarks set by the Constitution of the United States. It is not that the court varies or amends the Constitution or a statute, but that, there being possible several interpretations of its language, the court adopts that which conforms to prevailing morality and predominant public opinion.

It is before such a court that a great number of instances of monopoly and attempted monopoly, prosecuted by indictment and conviction

or by bill in equity and decree in the inferior federal courts, have been brought, and it will be my effort in the chapters following to show how thoroughly the court has responded to settled public opinion in the construction and application of the anti-trust law and that the criticisms of those who attack that great court on this account are born of ignorance or demagoguery.

CHAPTER III

THE SUGAR TRUST CASE, ITS NARROWING EFFECT ON THE USEFULNESS OF THE STATUTE—JUSTICE HARLAN'S DISSENT NOW THE LAW.

THE text of the first and second sections of the Sherman anti-trust act, in so far as they are important for consideration, are as follows:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, etc.

Section 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed, etc.

The act was passed in Mr. Harrison's Administration in 1890. The first important case under it was known as "In *re* Greene"

(52 Fed. Rep. 104). It arose in August, 1892, on a petition for a writ of *habeas corpus* presented to Circuit Judge Jackson, afterward Mr. Justice Jackson, to test the legality of a warrant of removal under an indictment found in Massachusetts against Greene as one of the officers of the Whisky Trust, for violating the first and second sections of the act.

The indictment charged that the distilling company had acquired seventy distilleries in the whole country, had united them for the purpose of controlling the business of distilling whisky, and one count contained the specification that for the purpose of controlling the business and prices and establishing a monopoly it had sold its whisky with a contract for a rebate on the price to those who would maintain retail prices, and that by this restraint of trade it sought to compel purchasers in the market to maintain the price of its whisky. In this case Mr. Justice Jackson narrowed the application of the statute in such a way that it is interesting to read his language in the light of the present condition of the law, as follows:

It is very certain that Congress could not, and did not, by this enactment attempt to prescribe

limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached the magnitude or proportions that enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners.

He further says:

All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce, will in a popular sense monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly or attempt to monopolize which the statute condemns.

He follows then with a discussion of what monopoly means. After defining engrossing, he says:

It will be noticed that in all the foregoing definitions of "monopoly" there are embraced two leading elements—*viz.*, an exclusive right or privilege on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured.

Then, referring to the facts as averred in the indictment, he says:

In this acquisition and operation of the seventy distilleries which enabled the accused, or said Distilling and Cattle Feeding Company, to manufacture and control the sale of seventy-five per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration.

It would be very difficult to reconcile this case with Miles Medical Co. *vs.* Park Sons & Co., 220 U. S. 373, in which just such a contract

for maintaining retail prices was held a restraint of trade under this statute. Mr. Justice Jackson's view of the monopolies and restraints affected by the law was a much too narrow one. He evidently felt that the Constitution did not extend to Congress the power so to qualify the right of acquiring and of disposing of the property as to make the acquisition of property for the purpose of controlling interstate commerce in it or in the products of it a criminal monopoly. He further took the ground, which we shall see elaborated and insisted upon in U. S. *vs.* E. C. Knight Company, 156 U. S. 1, that the mere acquisition of plants in different States for the ultimate purpose of using this ownership to control and restrain interstate commerce was a subject only within the jurisdiction of the States and not within the control of Congress.

In the Knight case the statute was fully considered in the Supreme Court for the first time. It was argued in October, 1894, and decided in January, 1895. The opinion of the court was delivered by Mr. Chief Justice Fuller, the Attorney-General was Mr. Richard Olney, and he with the Solicitor-General, Mr. Max-

well, and a former Solicitor-General, Mr. Phillips, represented the Government.

The bill in the Knight case alleged that the defendant, the American Sugar Refining Company, was engaged in the refining and sale of sugar; that the other four defendants were corporations separately engaged in refining and dealing in sugar at Philadelphia; that the product of their refineries amounted to thirty-three per cent. of the sugar refined in the United States; that they were competitors of the American Sugar Refining Company; that the products of their several refineries were distributed among several States of the United States, and that all the companies were engaged in trade or commerce with several States and with foreign nations; that prior to March 4, 1892, the American Sugar Refining Company had obtained the control of all the sugar refineries of the United States with the exception of the Revere of Boston and the refineries of the other four defendants above mentioned; that the Revere produced annually about two per cent. of the total amount of sugar refined; that the American Sugar Refining Company in order to obtain complete control of the price of sugar in the

United States entered into an unlawful scheme to purchase the stock, machinery, and real estate of the other four members defendant, in pursuance of which on March 4, 1892, the defendant Searles, an agent of the American Sugar Refining Company, made a contract with each of the other companies by which for shares in the stock of the American Sugar Refining Company the American Sugar Refining Company received the shares of stock of these four companies.

It was averred that the American Sugar Refining Company, thus becoming the owner of refineries refining ninety-eight per cent. of the sugar refined in the United States, monopolized its sale in the United States and controlled its price; and by these contracts of sale of the stock Searles and the American Sugar Refining Company combined and conspired with the other defendants for the purpose of restraining, and in fact restrained, commerce in refined sugar among the several States and foreign nations in violation of the statute.

The prayer of the bill was as follows:

1. That all and each of the said unlawful agreements made and entered into by and between the said defendants on or about the 4th day of March,

1892, shall be delivered up, canceled, and declared to be void, and that the said defendants, the American Sugar Refining Company and John E. Searles, Jr., be ordered to deliver to the other said defendants respectively the shares of stock received by them in performance of the said contracts, and that the other said defendants be ordered to deliver to the said defendants, the American Sugar Refining Company and John E. Searles, Jr., the shares of stock received by them respectively in performance of the said contracts.

2. That an injunction issue preliminary until the final determination of this cause, and perpetual thereafter, preventing and restraining the said defendants from the further performance of the terms and conditions of the said unlawful agreements.

3. That an injunction may issue preventing and restraining the said defendants from further and continued violations of the said act of Congress, approved July 2, 1890.

4. Such other and further relief as equity and justice may require in the premises.

The view which the court took, in holding that the bill did not state a case affecting interstate commerce so directly as to constitute a violation of the statute was evidently much influenced by the emphasis laid in the bill and in the main prayer for relief on the acquisition of shares of stock by the American Sugar Refining Company in sugar-refining plants in Pennsyl-

vania. The court could not apparently look beyond the acquisition of property in one State to its ultimate purpose, which certainly was the control of the sale of refined sugar in country-wide trade.

The court said:

> The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Philadelphia, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce.
>
> It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though

in order to dispose of the product the instrumentality of commerce was necessarily invoked.

There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. [Italics mine.] The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Court to proceed in the way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The dissenting opinion of Mr. Justice Harlan was a very strong statement, and I don't think it is too much to say that it represents much more fully the present view of the court as to what may constitute a direct restraint upon interstate commerce than does the opinion of Chief-Justice Fuller. Mr. Justice Harlan, in his dissenting opinion, comments on the fact that the prayer of the bill was not wisely framed, for he says in the close of his opinion:

While a decree annulling the contracts under which the combination in question was formed may

not, in view of the facts disclosed, be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreement under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish—namely, to protect the freedom of commercial intercourse among the States against combination and conspiracies which impose unlawful restraints upon such intercourse.

But the truth is, as is shown by the above quotation from the opinion of Chief-Justice Fuller, the case for the Government was not well prepared at the circuit. No direct evidence that the sales of sugar across State lines, and the control of the business of such sales and of prices, were the chief object of the combination was submitted to the court. Nor was this chief feature of the Government's real case sufficiently set forth in the bill of complaint. And yet these facts must have been easily capable of proof. Especially noteworthy was the failure of the bill to pray for specific action by the court to enjoin the continuance of the combination.

The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts which, by the acquisition of all or a large percentage of the plants engaged in the manufacture of a commodity, by the dismantling of some and regulating the output of others, were making every effort to restrict production, control prices, and monopolize the business. So strong was the impression made by the Knight case that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through State legislation, and not through a national statute, and they said so in their communications to Congress.

CHAPTER IV

ERROR OF MR. JUSTICE PECKHAM IN HIS OPINIONS FOR THE MAJORITY IN THE TRANS-MISSOURI FREIGHT AND JOINT TRAFFIC CASES IN REFUSING AID OF COMMON LAW IN INTERPRETATION OF THE STATUTE—CONFUSION IN TERMS BUT NOT IN ULTIMATE RESULT.

I WISH now to point out an error which the majority of the Supreme Court at first made in rejecting as an aid in construing the statute the common-law rule for determining reasonable, valid, and enforceable restraints of trade.

In 1891 a suit was begun to enjoin continued performance of a contract between eighteen different railroads by which the contracting parties agreed through common action to fix the rates of traffic in all the vast territory west of the Missouri River and to abide by the rates thus fixed.

In the Circuit Court of Appeals there was a

divided court, two of the judges holding that the anti-trust law was intended to strike down only those combinations in restraint of trade which would be unreasonable and so invalid at common law, and that it did not appear that the provision for fixing the rates, or that the rates themselves, were unreasonable or would have been so regarded at common law, and therefore that the agreement was not a restraint of interstate commerce within the statute. Judge Shiras, of Iowa, dissented, holding that the contract was a restraint of trade denounced by the statute, and differing from the majority in their view as to its validity at common law.

When the case came to be decided by the Supreme Court, U. S. *vs.* Trans-Missouri Freight Asso., 166 U. S. 290, the court divided, five judges holding that the bill ought to have been sustained below, reversing the decree of the Circuit Court of Appeals. The two great points considered were, first, whether the terms of the anti-trust law in regard to combinations applied to interstate commerce carriers whose regulation was especially provided for by the interstate-commerce law, and, second, whether, assuming the contract to have been valid at

common law, the statute was to be construed as striking at only those restraints of interstate-commerce trade which would be held to be unreasonable at common law. A majority of the court held that the anti-trust law did apply to interstate railroads and supplemented the regulation of them by the interstate-commerce law; and, second, Mr. Justice Peckham, speaking for the majority, used language declaring that the inquiry whether the restraints were reasonable or unreasonable at common law was unimportant because the statute denounced all restraints.

What I wish to emphasize in respect to this case, as well as in respect to the opinion in the case of the United States Joint Traffic Association, 171 U. S. 93, which presented almost identically the same issues, and was decided soon after, is that, while the majority of the court did say that Congress intended to include in the condemnation of the statute restraints of interstate trade, whether reasonable or unreasonable at common law, they in fact, by express language in their opinion excluded from the operation of the statute all restraints which would be reasonable at common law.

The truth is, the lower court in the Trans-

Missouri case erred in holding the contract reasonable at common law, and the Supreme Court gave little attention to this point, assuming its correctness. This error Mr. Justice Brewer subsequently pointed out, as we shall see. The judges misconceived the effect of the decision of the highest English courts in the Mogul Steamship Company case and failed to note the difference I have already pointed out between the affirmative illegality and indictability of the combination in restraint of trade in that case which the House of Lords denied, and its void and unenforceable character at common law, because it was unreasonable, which the House of Lords admitted. Now the anti-trust law destroys this distinction by making restraints of trade unenforceable at common law, both criminal and actionable, when affecting interstate commerce. It must have been this Mogul Steamship Company case and a failure to note the distinction I have pointed out that temporarily drove the majority of the court away from the rule of reasonableness at common law in construing the terms of the statute. Mr. Justice Jackson in "In *re* Greene," 52 Fed. Rep. 104, already cited, made the same

error. Mr. Justice Peckham, in speaking for the majority, used this language:

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion of that subject they have shown that there has been a general though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory.

So long as the sale was the bona-fide consideration for the promise and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency toward enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own.

A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor

sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question. [Italics mine.]

In this language it will be seen that Mr. Justice Peckham concedes that a contract which is the mere accompaniment of the sale of property, entered into for the purpose of enhancing prices at which the vendor sells it, and where the main purpose of the whole contract is accomplished by such sale, was not included within the letter or spirit of the statute. As I attempted to demonstrate in my first article, such a contract and analogous contracts involving the same principle were the only kind of contracts in restraint of trade which were regarded as reasonable at common law, and all other contracts in restraint of trade were unenforceable. 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.

This is shown even more clearly by the language he uses in the Joint Traffic case, 171 U. S. 93, in which in the lists of restraints excepted by him from the operation of the statute are the five classes of contracts that were the only restraints regarded as reasonable at common law, and they are all described by him as restraints "incidental or indirect."

The same view was enforced by the opinion of the court given by Mr. Justice Holmes in the Cincinnati, etc., Packet Co. *vs.* Bay, 200 U. S. 879. In that case the owner of a line of steamboats on the Ohio River, engaged in interstate trade, sold his steamboats, and, as part of the contract of sale, agreed that he would not go into that trade for a period of years. One of the parties sought to avoid obligation under the contract on the ground that it was illegal, being a contract in restraint of interstate trade, and a violation of the anti-trust law.

The court held that the effect was incidental to the contract of sale and not within the statute.

As already said, the combinations in the Trans-Missouri and Joint Traffic Association

cases were both void at common law because they restrained the members of the combination from charging different prices from those fixed by the Joint Committee, they prevented the operation of free competition, and thus they restrained trade, and this was the main purpose of the contract. The fact, if it was a fact, that the rates which were fixed were reasonable did not make the contract reasonable or change its void character at common law.

I am strongly sustained in this view by the opinion of Mr. Justice Brewer in the case of the Northern Securities Company *vs.* the United States, 193 U. S. 197, where he concurred with the majority in a separate opinion in which, after stating that he was one of the majority in the Joint Traffic Association and Trans-Missouri cases, he said that, while a further examination had not disturbed his conviction that those cases were rightly decided, he thought in some respects the reasons given for the judgments could not be sustained, and that instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were

unreasonable restraints of interstate trade, and as such within the scope of the act; that that act, as appears from its title, was leveled at only "unlawful restraints and monopolies"; that Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld; that the purpose rather was to place a statutory prohibition which prescribed penalties for those contracts which were in direct restraint of trade, unreasonable, and against public policy; that whenever a departure from common-law rules and definitions was claimed, the purpose to make the departure should be clearly shown; that such a purpose did not appear and such a departure was not intended.

CHAPTER V

CASES AFTER THE SUGAR TRUST CASE AND BEFORE THE STANDARD OIL CASE IN WHICH THE EFFECT OF THE SUGAR TRUST DECISION WAS PRACTICALLY ELIMINATED.

WE now begin a building up of authority which finally has destroyed the obstructing effect of the Sugar Trust case in the effort of the Executive Department to reach these industrial trusts which by combining manufacturing plants have monopolized countrywide trade in the products made. The first of these was the Addyston Pipe Company case, 175 U. S. 211, 85 Fed. Rep. 271 (Feb., 1898, Dec., 1899).

The bill of complaint in this case struck at a contract between various manufacturing companies in iron pipe which, except for the contract, were independent companies and retained their separate corporate lives. This was a much easier case to bring within the purview

of the statute and the direct field of interstate commerce, because the subject-matter of the contract embraced what the Supreme Court in a long series of decisions had held to be interstate commerce.

The purposes and action of the combination, through the treachery of a stenographer, were laid before the court, so that minute dissection was possible. It was, in short, an agreement by which all the iron-pipe companies in the Ohio Valley and the Mississippi Valley, from which manufacturers in other parts of the country were naturally excluded by freight rates, agreed that they would maintain prices and share profits, and that in pursuance of these purposes no one of them would offer iron pipe to any intending purchaser, who was usually a municipal corporation, inviting public competitive bids, without the permission of the combination, and only after there had been a secret bidding among the members of the combination to see which member would make such a bid as would from the profits of the contract allow the best bonus to be divided among the other members of the combination.

It would be difficult to state a case of contract

for sales among vendors more certainly restrictive and more selfish and monopolizing in character than this was. The Circuit Court of Appeals, of which Mr. Justice Harlan was the presiding justice, and Judge Lurton and I were the associate judges, held that as a large part of the sales to be made necessarily involved, in the geographical location of the plants and indeed in the division of territory that also appeared as a feature of the combination, interstate commerce, the combination was certainly a restraint within the jurisdiction of Congress.

We referred to the language of the opinions in the Joint Traffic Association and Trans-Missouri cases, declaring that every restraint was aimed at in the statute, whether reasonable or unreasonable at common law; but in spite of that we thought it wise to show by an extended examination of the authorities that this combination would have been regarded as unreasonable at common law and pointed out the distinction that I have emphasized in what I have said, that the only contracts in restraint of trade that were regarded as reasonable at common law were those incidental contracts strictly commensurate with the needs of a prin-

cipal lawful contract of sale of good will or concerning the making or dissolution of partnerships.

The case went to the Supreme Court, and the Supreme Court unanimously affirmed the judgment of the court below. Neither in the Court of Appeals nor in the Supreme Court was any difficulty found with the opinion of the Superior Court in the Sugar Trust case, for in the Addyston case the subject-matter of the contract was not acquisition of title to property; it was actual and intended sales in interstate commerce. The relief sought was injunction against continuance of the combination, and the right to such a remedy was plain.

The next important case in the history of the proper construction and application of the law was the Northern Securities case, entitled, "Northern Securities Company *vs.* the United States," 193 U. S. 197. That, stated shortly, was an agreement between the owners of the majority of stock in the Great Northern Road and in the Northern Pacific Road, which were two railway lines extending from the Lakes to the Pacific coast through the northern tier of States, to unite their interests in a holding com-

pany organized in New Jersey which should take over into its possession not only a majority of stock in each of these roads, but also stock of the Chicago, Burlington & Quincy Railway Company, which owned a network of lines between Chicago and Minneapolis and Omaha, and made a convenient terminal union of the two longer lines.

The individuals who had to do with making the arrangement and the combination by which it was to be carried out, together with the three corporations, were made party defendants, and the relief sought was an injunction against the further execution of this arrangement and the rending of it asunder so far as it had been carried out, and this on the ground that it was a combination to restrain commerce among the northern tier of States.

Relying on the Sugar Trust decision, the defendants resisted the suit on the ground that it sought to nullify the acquisition of property and bring about the *status quo* before the consummated transfer of title, as in that case. It was insisted that the transaction in railway stock here had no more direct effect upon interstate commerce than had the acquisition of stock in

the various sugar-refining plants there. It was pointed out that the Northern Securities Company was a State corporation authorized by a State to hold stock in other railways and that it was not within the power of Congress to interfere with acquisition of such property, that this transfer of property was preliminary to interstate commerce and did not directly affect it, and there was nothing to show in actual running of the railroads and fixing of rates that any restraint had been put upon either, growing out of the project.

The majority of the court, however, held that what this whole arrangement amounted to was an arrangement between the actual controllers of the property of the three great railroad systems to run them as one system, and thus acquire power to avoid competition and to monopolize interstate railroad transportation in a large section of the United States.

This decision, delivered by Mr. Justice Harlan, was a most important step forward in the useful application of the anti-trust act, because it brushed away many of the difficulties that were presented in the opinion of the Sugar Trust case in enforcing the act. With the Addyston

Pipe case making clear the application of the law to any restraint by combination upon sales from one State to another, and with this Northern Securities case laying down the rule that courts might imply the intention and purpose of such a combination from its necessary effect to monopolize and control, and might enjoin its consummation before actual execution, the wide application of the statute became manifest.

There was nothing in this Northern Securities case that varied from the common-law rule as to reasonable and unreasonable contracts. This was made clear by the language of Mr. Justice Brewer, which I have already quoted.

The court, as courts of equity do, looked through the form of the transaction to its real essence and treated all the transfers of stock and the various corporate organizations as mere steps in the carrying out of a combination intended or calculated to secure a monopoly of interstate-commerce business. Such a contract as between its makers would certainly have been unenforceable at common law, and so the decision in this case was not inconsistent with the view that the statute was to be interpreted in the light of the common law.

The existence of the intent to gain power of control over interstate commerce is given more importance as cases proceed, as indeed it ought to be, and the circumstances that the particular transactions or steps alleged are immediately concerned with things or property or sales within a State does not prevent their being treated as part of a scheme to control interstate commerce if the intent to do so is averred and clearly made manifest by the evidence. We see this clearly in the next case to which I wish to refer, decided in 1905, just after the Northern Securities case. This was the Meat Packers' Trust case, 196 U. S. 375, in which the bill charged a dominant proportion of the dealers in fresh meat throughout the United States with maintaining a combination not to bid against one another in the live-stock markets of the different States at Chicago, Omaha, St. Joseph, Kansas City, East St. Louis, and St. Paul; to bid up prices for a few days in order to induce cattlemen to send their stock to the stock-yards; to fix prices at which they would sell, and to that end to restrict shipments of meat when necessary; to establish a uniform credit to dealers and to keep a blacklist; to make uniform and improper charges for

cartage; and, finally, to get less than lawful rates from the railroads, to the exclusion of their competitors, with intent to monopolize the commerce among the States and prevent competition therein.

The opinion is by Mr. Justice Holmes, and is very illuminating as to the attitude of the court in adapting the principles of pleading and procedure to the new conditions presented by litigation under the act. It was objected that the bill did not set forth sufficient or definite or specific facts. He said:

> This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we assume, the scheme is entertained, it is, of course, contrary to the very words of the statute.
>
> Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the fact to time or place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them.
>
> The law has been upheld, and we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague

as to put the whole conduct of the defendants' business at the peril of a summons for contempt.

We cannot issue an injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The sales described in the bill were actual sales and deliveries of cattle at the various stock-yards, followed by slaughter and preparation of meats in slaughter-houses, none of which by itself was an act of interstate commerce. It was urged that as these constituted the real acts under attack, it was effect upon state commerce and not interstate commerce that was complained of, and so it was not within the statute.

Mr. Justice Holmes's opinion in this case develops the importance of intent under the statutes and answers the objection as to the interstate effect of the acts charged as follows:

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme.

It is suggested that the several acts charged are lawful and that intent can make no difference. But

they are bound together as the parts of a single plan. The plan may make the parts unlawful. (Aiken *vs.* Wisconsin, 195 U. S. 194, 206.) The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt.

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. (Commonwealth *vs.* Peaslee, 177 Massachusetts 262, 272.) But when that intent and the consequent dangerous probability exists, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

And, again, he says:

It is said that this charge does not set forth a case of commerce among the States. Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their

transit, after purchase, in another, and when in effect (399) they do so, with only the interruption necessary to find a purchaser at the stock-yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

The whittling down of the scope of the Knight-Sugar Trust case goes on under the deft hand of Mr. Justice Holmes by bearing down on the general intent of the acts and plan. He says:

One further observation should be made. Although the (397) combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. It is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like United States *vs.* E. C. Knight Co., 156 U. S. 1, where the subject-matter of the combination was manufacture and the direct monopoly of manufacture within a State.

However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the

States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct.

It thus becomes clearer and clearer that the Sugar Trust judgment, in the opinion of the Supreme Court, turns on the defect in the pleadings and evidence in that case, in the failure of the Government to aver and prove that the purpose of the purchase of the stock in the Philadelphia refineries was only a step in a great scheme to monopolize the business of selling refined sugar among the States of the United States, a fact that, it would seem, might have been easy to establish. No one can deny that a plan merely to monopolize manufacture of sugar would be a State affair and not involve commerce among the States. Suppose that the profit in refining sugar was in tolls charged for the refining, as in grist-mills for grinding flour; this would be clearly only a State matter. The criticism of the court's decision in the Sugar Trust case, therefore, should really be directed, not against the principle of constitutional law it lays down, but against the narrow inferences of fact the majority of the court drew as to the

necessary and controlling effect of the union of the sugar refineries of the country upon the business of selling and delivery of sugar among the States. The man in the street knew that the acts set forth in the bill were part of a plan to monopolize interstate trade in sugar. Why should the court have refused to see it?

Thus by further consideration, in the Addyston Pipe case, in the Northern Securities case, and in the Meat Trust case, the court now reached a conclusion in regard to the practical application of the statute that justifies one in saying that if the Sugar Trust case were again brought before the court, different inferences of fact would be drawn from the evidence and a more liberal construction of the pleadings and the prayer for relief would be given and a different result would be reached.

The breadth and efficacy of the common-law rule as to restraint of trade finds a clear exposition in the opinion of Mr. Justice Hughes in Miles Medical Company *vs.* Park & Sons Company, 220 U. S. 373. Contracts between manufacturers and wholesale and retail dealers under which the manufacturers attempted to control the prices of their products in future sales

by their purchasers and subpurchasers, were held to be unenforceable at common law, and, if they affected interstate commerce, to be a violation of the anti-trust act. This is a most important case in demonstrating that the effort to control prices in interstate trade by contracts with retail men with penalties or threats of non-dealing is in the teeth of the Sherman act.

CHAPTER VI

THE STANDARD OIL AND TOBACCO TRUST CASES —EFFECT OF ANTI-TRUST LAW ON COMBINATIONS OF LABOR OBSTRUCTING INTERSTATE COMMERCE.

WE next come to the great and crucial Standard Oil case, 221 U. S. 1, which applied the interstate-commerce law to the greatest monopoly and combination in restraint of trade in the world. Its making and building up covered a period from 1870 down to the date of the opinion in the spring of 1912. The Standard Oil Trust was probably one of the chief reasons for passing the statute in 1890. The record in the case covered 12,000 printed pages. It took 184 printed pages just to tell the summary story of the birth and growth of the monopoly. It had resulted in nine different Standard Oil companies and sixty-two other corporations and partnerships operating oil-wells, refineries, pipe-line and tank-line companies. The ruling

body was the Standard Oil Company of New Jersey, that held stock in the other companies and did eighty-five per cent. of all the business of the United States selling refined oils and other products of petroleum. It was indeed an octopus that held the trade in its tentacles, and the few actual independent concerns that kept alive were allowed to exist by sufferance merely to maintain an appearance of competition.

In this case Chief-Justice White adopts for the court the view of Mr. Justice Brewer, expressed in his separate opinion in the Northern Securities case, that the terms of the statute, being words having common-law significance, are to be interpreted in the light of their meaning at common law and that the statute is thus to be construed by the rule of reason. The Chief-Justice states the history of restraints of trade and of monopolies and engrossing and regrating at common law, and shows the ultimate significance given to those terms and then applies it to the statute. He shows how the great congeries of corporations and business interests that were concentrated in the Standard Oil Company under one management were plainly an attempt to monopolize the refining

and sale of petroleum oil and its products throughout the country, among the States and in the foreign trade, and concludes that they were therefore obviously within the statute.

Mr. Justice Harlan, in a concurring opinion, criticizes the language of the court in its construction of the statute and calls the application of common-law meaning to the terms of the statute, judicial legislation.

In the next great case, reported in the same volume of the Reports, that against the American Tobacco Company for the monopoly of the tobacco business, the court reached a similar decision. The evidence of intent to restrain country-wide commerce and to monopolize it was not quite so overwhelming as it was in the Standard Oil Company case, only because care had been taken through the advice of keen counsel to make the transactions appear more innocent.

These two great judgments gave the widest scope to the anti-trust law, as may be seen from two passages that I must quote, one from the Standard Oil case and the other from the Tobacco case. In the Standard Oil case the Chief-Justice said:

In view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.

The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

In the Tobacco case the same great judge said:

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard Oil case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the

generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Notwithstanding the decrees for the United States in these cases and the all-embracing character of these decisions and the opportunity they afford through the statute to reach every conceivable trust or combination at which the statute could have been aimed, they were made the object of attack by many politicians.

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 decision 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. The verbal difference be-

tween the court and Mr. Justice Harlan, however, was soon reflected in controversies carried on in Congress, in the press, and in political contests, and its echoes are still sounding. This issue was engendered merely by language and not by real differences in result, or, indeed, in principle. The too-sweeping sentences of Mr. Justice Peckham in the Trans-Missouri and Joint Traffic Association cases, as to the irrelevancy of common-law meanings, with express exceptions really based on the common law such as I have pointed out, was really a statement of exactly the same principle of reasonable construction as that upon which Chief-Justice White proceeded in his opinion in the Standard Oil case. Indeed, the much-criticized "rule of reason" of the Chief-Justice was only a change of phrase from the expression which Mr. Justice Peckham had himself used as the guide to a proper construction of the statute. For in the Joint Traffic Association case that Justice says:

> An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does

not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

We also repeat what is said in the case above cited [*i. e.*, in his own opinion in the Trans-Missouri case], that "*the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possible to restrain it.*" [Italics mine.] To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court.

Again, the error which Mr. Justice Harlan made in his concurring opinion in the Standard Oil case, in saying that the use of the common law to interpret the meaning of the anti-trust statute was "judicial legislation," may be inferred by reference to his own course of reasoning in his very able and convincing dissenting opinion in the Sugar Trust case, which, as I have already said, has really become the position of the court. But when the court came

over to him and that opinion, he could not bring himself to see the real victory he had won.

In his dissenting opinion in the Sugar Trust case he used this language:

> The fundamental inquiry in this case is, What in a legal sense is an unlawful restraint of trade?
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> Sir William Erle, formerly Chief-Justice of the Common Pleas, in his essay on "The Law Relating to Trades-Unions," well said that "restraint of trade, according to a general principle of the common law, is unlawful"; that "at common law every person has individually and the public also has collectively a right to require that the course of trade should be kept free from unreasonable obstruction," and that the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law. [Pages 6, 7, 8.]
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> There is a partial restraint of trade which in certain circumstances is tolerated by the law. The rule upon that subject is stated in Oregon Steam Navigation Company *vs.* Minor, 20 Wall 64, 66, where it was said that "an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is

made. (Homer *vs.* Graces, 7 Bingh. 735, 743.) A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country as being too general a restraint of trade."

But a general restraint of trade has often resulted from combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right and are crimes against the public. To some of the cases of that character it will be well to refer.

The learned Justice then considers a great many cases at common law in this country to show that a case like the Sugar Trust would be an unlawful restraint in trade within a State, and so also in interstate trade, and so must be within the statute. In other words, he proceeded exactly as the Chief-Justice did in the Standard Oil case, to find out what the common law was, and in the light of the common-law definition of undue or unreasonable restraints of trade to bring the case before him within the statute. Yet this course, which he himself took in the Knight case, he pronounces

to be improper judicial legislation on the part of the eight Justices who voted for the majority opinion in the Standard Oil case.

In spite, however, of the breadth of the court's decision in the Standard Oil case, and its useful reconciling of the inconsistencies of previous decisions, the phrase "the rule of reason" brought out the condemnation of everybody of demagogic tendencies prominent in politics, and evoked from statesmen of little general information and less law, proposals to amend the statute, "to put teeth" into it, and to eliminate from the power of the court the right to use the rule of reason in the construction and application of the anti-trust law. Were it not for the then hysterical condition of the public mind, the futility and manifest absurdity of such a proposition, which its very words necessarily implied, would have aroused the sense of humor of the American people.

After the opinion was announced, I invited the gentlemen who were most stentorian in condemnation of the interpretation given to the statute by the Supreme Court to mention and describe a case in which they would have the statute apply to which it would not apply

under the reasoning of the court, and up to this time I have never heard such a case stated, and I think I may infer that the reason is that there is no such case.

But those politicians and demagogues who, as they have said, wish to draw blood, and whom nothing would satisfy but the absolute annihilation of the capital used in the trusts, are not the only persons who have made mistakes in dealing with the subject. There are those who are utterly opposed to the spirit of the law and who take the view that Lord Justice Bowen of the English Court of Appeal evidently took, judging by his language in the Mogul Steamship Company case, that the only proper way to remedy the evil of trusts and combinations of this character is to let them run riot and cure themselves. The contention of these opponents of the law has been that it is impossible for business men to live under the anti-trust law because nobody can tell what it means. They have continued this cry until they have put it in the mouths of their extreme opponents, who, accepting their view, now come forward to say that the law ought to be changed so as to denounce specific acts as in themselves criminal,

whether they are used to promote the real evil aimed at by the statute or not.

The truth is that the course of the construction of the statute in the last twenty years has been a valuable asset for the public. No man who reads this series of decisions need be doubtful whether, when he is making a business arrangement, he is violating the law or not. He can search his own heart and he can tell what his purpose is and what the effect of his act is going to be. If what he is dealing with is interstate commerce, if what he is going to do is to reduce competition and gain control of the business in any particular branch, if that is his main purpose and reduction of competition is not a mere incidental result, if except for that purpose he would not go into the arrangement, then he must know he is violating the law, and no sophistry, no pretense of other purpose need mislead him. It is a question of self-knowledge; it is a question of intention and necessary effect.

The operation of the act upon conspiracies of members of labor-unions to injure the interstate trade of employers by restraints that are direct and illegal—to wit, by a secondary boycott—

should be considered. It is quite clear that the mere striking to secure better wages or other terms of employment, and thus embarrassing the operation of a railroad engaged in interstate commerce, would not be within the statute, because such a combined action was not unlawful at common law, and it has come in modern days to be recognized as a legitimate means by which working-men through united action may put themselves on a level of resource and power with their employer. But when they go further and seek by striking and united withholding of patronage to coerce others who have no normal relation to the fight to assist them in it and injure their employer, they step over the line of lawfulness, and if by such means they obstruct the interstate trade of their employer they violate the act.

In the case of Loewe *vs.* Lawler, 208 U. S. 274, a hat-manufacturing company in Danbury, Connecticut, declined to accede to the demand of the hatters' union, consisting of nine thousand men, in respect to their terms of employment. Thereupon the hatters declared a boycott against the company, and the Federation of Labor, a federation embracing a number of

trades-unions having a membership of one hundred and fifty thousand, declared a boycott against the Danbury company all over the country, and notified the hat dealers that they would not purchase hats made by the Danbury Hat Company, and threatened the dealers themselves with a boycott if they sold such hats. The Danbury company sued the leaders of the boycott and the hatters' union for damages under the anti-trust act. Their liability was declared by the Supreme Court of the United States. This boycott, it will be noted, was a secondary boycott, because, while it was directed against the original manufacturing company, it sought to compel the hat dealers of the country to range themselves on the side of the labor-unions and injure the manufacturing company.

This was held to be a combination in restraint of interstate trade, and a substantial verdict for the company has since been recovered under the statute. The recovery would have been sustained at common law, and I do not know any reason why it does not necessarily come within the statute.

Attempts are being made in Congress to exclude from the operation of the anti-trust act

trades-unions and farmers. I hope this will never be done. It will be legislation establishing a privilege for a class that is supposed to be powerful in votes, without any real reason for the distinction. A law with a similar exemption was passed by the legislature of Illinois. It was held by the United States Supreme Court to be invalid because it denied to all the people of Illinois the equal protection of laws. While that case was under the Fourteenth Amendment, which prevents a State from denying equal protection of the laws to any persons within its jurisdiction, it would be a question whether the Supreme Court might not find in the first eight amendments of the Constitution a prohibition upon Congressional legislation having similar unjust operation.

CHAPTER VII

TEN CASES UNDER TRUST LAW, FOLLOWING STANDARD OIL AND TOBACCO DECISIONS, SHOWING BROAD SCOPE OF THOSE DECISIONS.

IN order to justify my statement as to the comprehensive character of the decisions in the Standard Oil and Tobacco cases I wish now briefly to state the effect of the ten cases which have been decided since, and the further application of the rule of construction as finally given in those two leading cases, all by a unanimous court.

The first of these involved the legality of a terminal association of railroads in unifying the terminal facilities of St. Louis, which, owing to the geographical conditions, all railroads entering St. Louis were under compulsion to use. It appeared that the combination was made by less than all the companies entering the city, and that an existing member could arbitrarily exclude new applicants for membership. It

was held that such a combination effecting exclusive ownership and control came within the first and second sections of the act and was an attempt to monopolize commerce among the States which must pass through the gateway of St. Louis; that a combination of all the companies for the purpose of giving every company entering St. Louis the same treatment would not have been a violation of the act. This case illustrates how the court by use of the remedial process of equity can effect exactly the right result. The "insiders" were required, on pain of being enjoined from doing any terminal business under the agreement, to let every other railroad entering St. Louis into the agreement on exactly equal terms as a member.

In the Bath-tub case, 226 U. S. 20, the defendants, sixteen manufacturers controlling eighty-five per cent. of the trade in enameled iron ware, were shown to have united to destroy competition, fix prices and terms of sale, and establish penalties for violation of the agreement. This was quite within the inhibition of the Addyston Pipe case. An attempt was made to escape the statute on the ground that some of the parties had patents covering the goods whose

sale was the subject of the agreement. But the court held that, while rights made by patents are extensive, they do not give any more than other rights a universal license against positive prohibitions of the statute. In answer to the proposition that the defendants had a good motive in their combination, Mr. Justice McKenna said that the cases in the court had demonstrated the sufficiency of the statute to prevent evasions of its policy by resort to any disguise or subterfuge of form or the escape of its prohibitions by any indirection, nor could the defendants escape by proof of good motives, adding that the law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties. It should be said that the good motives here averred and sought to be proved were the desire through a monopoly and control of the market and prices to prevent the sale to the public of inferior enamel for bath-tubs.

In the United States *vs.* Union Pacific Railroad Company, 226 U. S. 61, the bill in equity was directed against the consummated acqui-

sition of forty-six per cent. of the Southern Pacific stock by the Union Pacific Company when the two railroads were competing systems. Mr. Justice Day delivered the opinion of the court and held that the purchase was within the anti-trust act, and that the mere purchase of stock by one corporation in another if the intent and effect are to restrain commerce and obtain power to control competition is within the statute.

In United States *vs.* Reading Company, 226 U. S. 324, decided December 16, 1912, the defendants, a number of coal-carrying railroads and mining companies producing and transporting seventy-five per cent. of the annual supply of anthracite coal, combined to prevent the construction of an independent and competing line of railway into the anthracite region. The plan devised was to acquire for the Temple Iron Company, a corporation all of whose stock was owned by the defendants, the coal properties and collieries controlled by the largest independent producer whose support had been promised to the proposed new independent competing line of transportation. The plan succeeded, for, the independent properties having been acquired by

the Temple Iron Company, the projected competing railroad was abandoned. It was contended that because the new line had been abandoned it would be idle to enjoin the doing of an act already accomplished. In answering this contention, Mr. Justice Lurton for the court said:

> The combination by means of the Temple Company still exists. It has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other states. . . .
>
> So long as the defendants are able to exercise the power thus illegally acquired it may be most efficiently exerted for the continued and further suppression of competition. Through it the defendants in combination may absorb the remaining output of independent collieries.
>
> The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete.
>
> It is, of course, obvious that the law may not compel competition between these independent coal operators and defendants, but it may at least remove illegal barriers resulting from illegal agreements which will make such competition impracticable. Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may in doubtful cases turn

upon the intent to be inferred from the extent of the control thereby secured over the commerce affected as well as by the method which was used.

Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability the intent to produce the consequence may become important.

Here we see the important principle announced that when a combination necessarily effects a monopoly it is no defense that the combiners did not intend a monopoly; but when the result is not complete or controlling as a monopoly, the intent is the important factor.

In United States *vs.* Patten, 226 U. S. 525, decided in January, 1913, the defendants were indicted for a conspiracy to run a corner in the available supply of the staple commodity of cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country and compel all who had occasion to obtain it to pay the enhanced price or else leave their needs unsatisfied. The court held that the indictment was good in the terms of Section I. of the act, that to run a corner is to acquire control

of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, and that one of the important features of the corner is the purchase for future delivery, coupled with a withholding from sale for a limited time. Mr. Justice Van Devanter pronounced the judgment of the court. He said:

> It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.
>
> Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

The case of United States *vs.* Winslow, 227 U. S. 202, came to the Supreme Court on a judgment sustaining a demurrer to an indictment. The indictment charged that three companies engaged in different lines of busi-

ness and not competing, but making respectively sixty, eighty, seventy, and eighty per cent. of the lasting-machines, welt-sewing-machines, heeling-machines, and metallic-fastening-machines made in the United States, organized a new company to which they turned over their several businesses.

The court affirmed the judgment of the court below in sustaining the demurrer. Mr. Justice Holmes in delivering the judgment said:

On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, and it may be assumed that the success of the several groups was due to their patents having been the best.

As by the interpretation of the indictment below and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. We can see no greater objection to one corporation manufacturing seventy per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same

proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree.

It is as lawful for one corporation to make every part of a steam-engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone no intent could raise the conduct to the dignity of an attempt.

This brings out clearly that mere bigness, not used to effect monopoly, but only to increase efficiency, is not a violation of the statute.

In the criminal case of the United States *vs.* Pacific and Arctic Railway & Navigation Company and Others, 228 U. S. 87, the defendants, a railroad company and two steamship companies, who were not competitors, but together formed a continuous line of transportation by water and rail from Seattle to the interior of Alaska, had combined in order to put out of business a steamship company that was competing with one of the defendants on part of the through route and to throw all trade into the hands of the defendant steamship companies. The steamship defendants agreed with the defendant railroad company to establish through routes and joint rates with them, and

the latter agreed to refuse to do so with the competing steamship company. Defendants with like purpose so fixed the local rates that the combination of local rates was greater than the through rate agreed upon.

It was held that this was an infringement of the anti-trust law, and was something more than the exercise of the common-law right of selecting connections, and that the scheme was therefore illegal.

In Nash *vs.* the United States, 229 U. S. 373, a criminal case and conviction under the statute, the chief argument for the defense was that the anti-trust law was so indefinite and vague as to be inoperative on its criminal side. The court held that there was no merit to this contention. Mr. Justice Holmes said:

> The objection to the criminal operation of the statute is thought to be warranted by the Standard Oil Company *vs.* United States, 221 U. S. 1, and the United States *vs.* American Tobacco Company, 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. . . . We are of the opinion that there is no consti-

tutional difficulty in the way of enforcing the criminal part of the act.

In that case the court also held that a conspiracy indictment under the act need not aver the commission of an overt act, "as the Sherman act punishes the conspiracies at which it is aimed on the common-law footing, and we can see no reason for reading into the Sherman act more than we find there."

The last exposition of the Supreme Court's broad view of the purpose of the statute and practical enforcement of it is in the case of Straus *vs.* the Publishing Company, 231 U. S. 222. There it appeared that a publishers' association, composed of probably seventy-five per cent. of the publishers of copyrighted books in the United States, and a booksellers' association, including a majority of the booksellers throughout the United States, entered into a combination and agreement by which their members bound themselves to sell copyrighted books only to those who would maintain the retail price on copyrighted books. It further appeared, as a result of this combination, that competition on copyrighted books at retail was almost completely destroyed and that the plain-

tiffs in the case, who conducted a department store in New York and because of their methods of business had been able to undersell other bookstores, were put on a "cut-off" list and were unable to secure a supply of such books in the ordinary course of business because dealers who had supplied them were wholly ruined by the combination. Applying the principle of the bath-tub case, that the monopoly of a patent did not enable those who dealt in the patented device to enjoy immunity under the Sherman law, which was to be regarded as a limitation of rights which might be pushed to evil consequences, the court said:

> So in the present case it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending, because of the agreements or combinations entered into, to build up and perpetuate monopolies.

From this review of the Supreme Court's decisions, it is perfectly clear that the court has

no disposition to narrow the effect of the statute or to exclude any case that is properly within the evil which Congress intended to strike down.

The effect of the cases is that a mere union of capital in the same branch of industry for the purpose of promoting economy and efficiency, though it uses interstate commerce, and though to the extent of the business of the two firms or companies it suppresses the competition of each against the other, is not within the statute unless what is done necessarily has the effect to control all the business or can be shown by the character of the acts to be intended to effect that purpose or to be a step in the plot to bring it about. Mere bigness is not an evidence of violating the act. It is the purpose and necessary effect of controlling prices and putting the industry under the domination of one management that is within the statute. This evil is to be punished or restrained under the statute, no matter how ingenious or varied the device for bringing it about may be. The court will look through the form of the device adopted to evade the effect of the law to its essence, to the intent, and to the result.

CHAPTER VIII

POPULAR MISCONCEPTION OF SUPREME COURT'S ATTITUDE IN CONSTRUING ANTI-TRUST LAW—NO ASSUMPTION OF POWER TO ENFORCE ECONOMIC OR POLITICAL VIEWS OF JUDGES—MERELY FOLLOWING A COMMON-LAW STANDARD—ADMIRABLE ADAPTABILITY OF DECREES IN EQUITY TO ENFORCEMENT OF STATUTE—EFFICACY OF STANDARD OIL AND TOBACCO DECREES.

ONE might well infer from the unfair and false strictures upon the attitude of the Supreme Court in construing the statute that it had asserted its power to say, "It is true that this contract restraining trade and this monopoly it effects are within the literal terms of the statute, but, on the whole, we think, from our views of political economy, it would be unwise and unreasonable to include them, and so we limit the operation of the express words of the act to those things we believe to be injurious to the public weal."

I have said little to my purpose if I have not

made clear that the only reasonableness in the application of the statute which the court assumes to consider and decide is that of the restraint of trade, ancillary to a main contract with a different purpose and which the common law has for years furnished practical and definite legal rules for determining. The idea of the Supreme Court's ignorant but enthusiastic critics is that the court has said, "There are good trusts and bad trusts, and we have the power to say what are the good trusts and what are the bad trusts, according to our economic and political views." Now, of course, the court has asserted no such power. It would be unwise to intrust this power to the courts. It would be legislative power, not judicial power. What the court has said in effect is this:

"It is evident what the Congress had in its mind from the language it uses. We know from current history the evil it sought to remedy. It has used terms that had a well-understood meaning at common law—to wit, restraint of trade, monopoly, combination, and conspiracy. It is a settled rule of all American and English courts in construing statutes and constitutions that common-law terms are

to receive common-law meaning unless there is good reason to the contrary. In the light of reason, and applying common-law meaning to such statutory terms, we hold that such incidental restraints as were reasonable at common law were not intended to be included within the term 'restraints of trade' used in the statute."

That is not assuming legislative power at all. It is only exercising the function that courts have exercised in applying a well-measured and definite yardstick to contracts incidental and ancillary for now more than three centuries.

The legislators and political orators who rejoice in outradicaling every one else object to the courts using the rule of reason in construing statutes and say that in this regard the courts of our country exercise more power than in any other country. They are wrong. I commend them to the statute which has been passed in Australia, the home of radicalism and fads and nostrums on the subject of trade restraints.

The Australian act makes it a criminal offense to enter into any combination in relation to trade or commerce among the states of the

Commonwealth (*a*) with intent to restrain trade or commerce to the detriment of the public, or (*b*) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interest of producers, workers, and consumers. The act also makes it a criminal offense to monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize, any part of the trade or commerce among the states with intent to control to the detriment of the public the supply or price of any service, merchandise, or commodity.

It seems to me that this is conferring on the judges and courts a power that ought never to be intrusted to them. It is submitting, not to their legal, but to their economic and business judgment questions for decision that are really legislative in character. I regret to say that this is the tendency of the pending bills in Congress, in which it is proposed to leave first to an executive board and then to the courts to declare and forbid what in their judgment is unfair competition. If this means more than what is included in unreasonable restraints of

trade at common law now denounced by the anti-trust law, it would seem to be conferring legislative power.

By misrepresentation, ignorant or malicious, the public in this country have been given the impression that the power which the Australian courts are thus given, and which it is now proposed to give to the new trade commission and the courts, our Supreme Court has assumed to exercise. If I have made clear the unjust and unfounded character of this impression I shall count what I have written worth while.

Before concluding a discussion of the State, I wish to say something on the chief civil remedy provided by the anti-trust law for reaching the evil aimed at—to wit, the elastic and many-sided remedies afforded by procedure in equity.

The first advantage in dealing with a trust by decree of a court of equity is that the power of punishment by summary contempt proceedings for violation of the provisions of the decree insures their performance. No jury trial need intervene between a disobedience of its terms and deterrent punishment.

The second advantage is that the decree can be shaped to suit the situation so as to stamp

out the evil of monopoly and restraint, and yet to leave the capital and plant ably organized, to reduce the cost of production, and to carry on legitimate business for the benefit of the public. The court of equity can take hold of a trust and use the varying form of its remedies by injunction and receivership to squeeze the unlawfulness out of a trust and retain for the benefit of society those features of it that great business energy and genius have created and that can be continued entirely within the law.

This leads me now to the consideration of the decrees in the Standard Oil case and in the Tobacco case. Both of them have been referred to as altogether ineffective and of no use in preventing the continuance of the evil which the court found to exist and against which it entered its decree. I am firmly convinced from an investigation of the decrees in these cases that this charge is altogether unfounded and that the decrees were quite as effective to bring about the result desired as any decree in equity ever was.

In the Standard Oil case the decree required a dissolution of the company holding stock in the many other companies constituting the

congeries of agencies for the monopoly of the trade and followed the language of the prayer of the bill asking the dissolution of the trust. The holding company was enjoined from continuing its control and its stock was distributed to the various stockholders, and they were enjoined from maintaining any further concert or combination. The argument against the effectiveness of this decree is based on the fact that after the decree was put into operation the stock of the individual companies increased greatly in value. In other words, because the decree did not destroy or injure the value of the property, it shows that it was not effective to destroy the combination.

Nothing has been cited to show that the parts into which the combination was divided have violated the decree. Such violation could be promptly met and summarily punished by contempt proceedings before the Circuit Court. The mere fact that the business of the separate corporations into which the combination was divided has been good since the decree is no evidence that the decree is not effective to relieve the business of refining and selling oil from the heavy hand of the old monopoly.

In the first place, the increase in the market value of the stock of the old constituent companies is easily explained by two circumstances which have nothing to do with the decree. The first one is that the judicial investigation into the affairs of these companies disclosed what was not known to the public—that each company had a large surplus which did not appear in the published statements and which made its stock much more valuable than its previous market quotation had shown it. And the second is that the very large increase in the consumption of gasolene, a product of petroleum, due to the substitution of automobiles for carriages and wagons, has so increased the demand, and thus the price, as naturally to make the gasolene business more profitable.

But there are two circumstances that show beyond question the influence of the decree to accomplish the purpose of the act, which is to rid trade from restraint and give way to free competition. One of the manifestations of the power of the Standard Oil Company, when it was a monopoly, was the power it exercised to keep down the price of crude oil. The Standard Oil Company owned only a small percentage

—less than fifteen per cent.—of the oil-wells of the United States. It purchased the crude oil, and there was no circumstance showing its complete power over the trade more clearly than its keeping down to a point almost below cost of pumping the price of the crude oil. Under the influence of the decree the price of crude oil has gone up one hundred per cent. beyond what it was in the halcyon days of the trust.

Again, the percentage of the amount of oil refined and sold by the independent companies that never were in the Standard Oil combination, as compared with the percentage of those companies into which the Standard Oil was dissolved, has increased to forty-four per cent. from fifteen per cent., as it was before the decree. Indeed, counting as an independent the Waters-Pierce Company, which was controlled by the Standard Oil Company and is now in litigation with and in the bitterest opposition to its former associates, the independents refine and sell considerably more than half the oil of the country. An inquiry made of any leading independent oil-refiner will lead to confirmation of the view that the decree has been in every way most effective to help them to a free

and profitable business. But it is said prices have not been reduced. Gasolene has increased in price for reasons that have been explained. Other products of oil remain at about the same price. The increase in the price of crude oil, which the trust had kept down, easily explains this. Moreover, if competition is restored the statute has accomplished its purpose. The effect of this upon prices, to keep them lower, is an economic result dependent on so many causes that failure to reduce them can certainly not be charged to the form of the decree or the character of the remedy.

The Tobacco decree has been even more severely criticized than the Standard Oil decree. The fact is it was far more drastic. In it the Supreme Court for the first time recognized as a possible step in the equitable remedy against a monopoly the appointment of a receiver and the sale of the company's assets, if it be necessary to protect the public.

The details of the decree were left to the three judges of the Circuit Court to settle. They did so. It was not taken to the Supreme Court again. The decree divided the trust into four large companies, and the result has been

a genuine and strong competition between these four companies by advertising and lowering prices, so that the small so-called independent companies, in the face of the competition between the large companies, have been less comfortable than under the tolerance of the Tobacco Trust. But this furnishes no ground for criticizing the decree or its effect. These companies are not affected by illegal methods in the competition. They are only not able to keep the pace in modern business methods of selling and economical production. The object of the statute is to give opportunity for free and genuine competition.

There was found in the working of the Tobacco Trust the same feature as appeared in the case of the Standard Oil Trust. This was the concerted suppression of competition in the purchase of the raw product. The result in bearing down the price of white burley tobacco caused the night-riders and their lawless violence in Kentucky and Tennessee, intended by them to curtail the crop and compel higher prices. The price of that important raw product in the tobacco field of business under the effect of the Tobacco decree soared to one hun-

dred per cent. more than it had been. The four companies into which the trust was divided are trying to get business one from the other. They are not trying to drive independent companies out of business, but their purpose to win business in competition with one another leads them to great effort and expense. The mere fact that smaller companies are unable to keep the pace is an indication that they must have greater capital in order to keep down their cost of production so that they can sell with the other and larger companies. The objection to the decree, then, is that it did not divide up the companies into small enough pieces to prevent effective competition. In this view it is the aim of the anti-trust law not to free trade from obstruction or restraint, but rather to destroy the larger businesses whose capital and large plants enable them to produce goods cheaply, in order that small plants that cannot produce them as cheaply may live. This is not the purpose of the statute, and those who insist that it ought to be true misunderstand its useful intention.

The criticism of the Standard Oil and Tobacco decrees is that the dissolution into its

parts of each trust left the old shareholders owning aliquot shares in each corporation of those into which the trust was divided. That is true, but it was thought that the monitory effect of the decree and contempt proceedings and the motive for independent action would necessarily compel a voluntary separation of the interests when they could not be united for direct control of the whole business. Restrictions in the decree as to interlocking directorates and other limitations preventing the resumption of a common management justified this belief. In spite of the unjust criticism and misrepresentation, these anticipations have been vindicated.

CHAPTER IX

SUMMING UP OF THE EFFECT OF ANTI-TRUST LAW ON BIG BUSINESS—VALUE OF FIRST TWO SECTIONS AS CONSTRUED—DANGER IN AMENDMENTS LOOKING TO GREATER SEVERITY.

WHAT, then, is the result as to the lawful business, and especially the big business, of our country under the statute and these decisions? It is this:

It is possible for the owners of a business of manufacturing and selling useful articles of merchandise so to conduct their business as not to violate the inhibitions of the anti-trust law and yet to secure to themselves the benefit of the economies of management and of production due to the concentration under one control of large capital and many plants.

If they use no other inducement than the constant low price of their product and its good quality to attract custom, and their business is a profitable one, they violate no law.

But if they attempt, by a use of their preponderating capital and by a sale of their goods temporarily at unduly low prices, to drive out of business their competitors, or if they attempt, by price-controlling contracts with their patrons and threats of non-dealing except upon such contracts, or by other methods of a similar character, to use the largeness of their resources and the extent of their output compared with the country's total output as a means of compelling custom and frightening off competition, then they disclose a purpose to restrain trade and to establish a monopoly and violate the act.

The object of the anti-trust law was to suppress the abuses of business of the kind described. It was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby and took no advantage of its size by methods akin to duress to stifle competition with it.

I wish to make this distinction as emphatic as possible, because I conceive that nothing could happen more destructive to the prosperity of this country than the loss of that

great economy in production which has been and will be effected in all manufacturing lines by the employment of large capital under one management. There is usually a limit beyond which the economy of management by the enlargement of plant ceases; and where this happens and combination continues beyond this point, the very fact shows intent to monopolize, and not to economize.

The original purpose of many combinations of capital in this country was not confined to the legitimate and proper object of reducing the cost of production. On the contrary, the history of most trades will show at times a feverish desire to unite by purchase, combination or otherwise, all plants in the country engaged in the manufacture of a particular line of goods. The idea was rife that thereby a monopoly could be effected and a control of prices brought about which would inure to the profit of those engaged in the combination.

The path of commerce is strewn with failures of such combinations. Their projectors found that the union of all the plants did not prevent competition, especially where proper economy had not been pursued in the purchase and in

the conduct of the business after the aggregation was complete. The unemployed wealth of the country soon was devoted to the construction of new competing plants. In such cases they found they had, in order to keep out or destroy new competition, to resort to deep underselling, to exclusive dealing with retailers, to buying and dismantling competing plants, to making preferential contracts with railroads, and to doing many other things of an unfair character, which their capital and their control of a large part of the trade enabled them to make effective weapons for the purpose.

The statute has been on the statute-book now for two decades, and the Supreme Court in more than twenty opinions has construed it in application to various phases of business combinations and in reference to various subjects-matter.

The Sugar Trust escaped dissolution not because it was not held to be a trust, but because it was thought by the court to be a case within State jurisdiction. Every other important trust that has been haled before the Supreme Court in the twenty years which have elapsed since that decision has been condemned, and

the terms of the statute have been given a scope which leaves little doubt that every other one of these octopuses, as its organization and methods are disclosed and analyzed, will be subjected to the heavy hand of the law.

A statute which is rendered more and more certain in its meaning by a series of decisions of the Supreme Court is more and more valuable. This furnishes a strong reason for leaving the act as it is, to accomplish its useful purpose, even though if it were being newly enacted useful suggestions as to change of phrase might be made.

The effect of this series of decisions to prevent new organizations of this kind is already manifest. New combinations of large capital are few in number, and when projected they are made with the greatest circumspection to avoid breach of the law.

Existing organizations that feel themselves near the line of illegality have abandoned practices that would give color to the claim that they seek to restrain competition or aspire to monopoly. Many companies, rather than stand the test of litigation, are consenting to dissolution by agreement with government authorities.

How strongly this result makes manifest the thorough manner in which the Supreme Court has construed the statute to reach the evil aimed at! But for these decisions of which I have attempted to give a résumé the work of concentrating all business of the country in a few hands would have gone on and we would have had our being and our comfort largely under control of a small number of iron monopolies.

What now of the proposed amendments to the anti-trust act? I have already referred to one or two features of them. As I write, though they have passed one House, it is so certain that they will be much changed in the other House that it would not be worth while to discuss them. I can, however, properly refer to the disposition of some members of Congress to make the statute more severe. It has even been proposed to require sentences of imprisonment for conviction under the anti-trust law. I quite agree that a few prison sentences would have put a wholesome fear of violating the statute earlier into the hearts of promoters of trusts. Some such sentences have been already pronounced. But my impression is that an

amendment leaving no discretion between fine and imprisonment to the court would make convictions very much harder to secure. Even the fear of jail sentences when the court has had such discretion has led to many acquittals where the proof was conclusive and where the jury convicted the corporation but acquitted the president and other officers who really did the work. The fear of the law now is much greater than it was. The Supreme Court decisions have made it so. In theory, members of the public wish to draw blood, but when they are in a jury-box they do not like to send their fellow-citizens to jail for doing what some years ago was only regarded as shrewd business, unless there are some elements of outrageous defiance of public sentiment in what they have done. And even then, as in the meat-packers' indictments in Chicago after the civil suits were won, a complete case before the jury against men whose attitude cannot be said to have been contrite resulted in an acquittal lest a prison sentence should follow. A change of the law in the direction of greater severity or more specific definition of criminal acts would demonstrate its lack of wisdom by experience without per-

haps doing much harm, except as it would frighten capital and business men at a time when business conditions are by no means satisfactory. A change of the first two sections of the existing statute would be most harmful, however. The very value of the statute under the view the Supreme Court has taken of it is its general and widely inclusive language, which embraces every form of scheme to suppress competition and control prices and effect monopoly. What else does the legislator desire? If the law interpreted by the Supreme Court remains on the statute-book as it is, it will continue to free business from its real burdens.

THE END