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INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER

TEMPORARY NATIONAL ECONOMIC COMMITTEE

A STUDY MADE FOR THE TEMPORARY NATIONAL ECONOMIC COMMITTEE, SEVENTY-SIXTH CONGRESS, THIRD SESSION, PURSUANT TO PUBLIC RESOLUTION NO. 113 (SEVENTY-FIFTH CONGRESS), AUTHORIZING AND DIRECTING A SELECT COMMITTEE TO MAKE A FULL AND COMPLETE STUDY AND INVESTIGATION WITH RESPECT TO THE CONCENTRATION OF ECONOMIC POWER IN, AND FINANCIAL CONTROL OVER, PRODUCTION AND DISTRIBUTION OF GOODS AND SERVICES

MONOGRAPH No. 16

ANTITRUST IN ACTION

Printed for the use of the
Temporary National Economic Committee

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*Alternates.

MONOGRAPH No. 16

ANTITRUST IN ACTION

WALTON HAMILTON
AND
IRENE TILL

ACKNOWLEDGMENT

This monograph was written by

WALTON HAMILTON

Professor of Law, Yale University Law School

AND

IRENE TILL

Social Science Analyst, Temporary National Economic Committee Staff

The Temporary National Economic Committee is greatly indebted to these authors for this contribution to the literature of the subject under review.

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(Signed) JOSEPH C. O'MAHONEY,
Chairman, Temporary National Economic Committee.

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LETTER OF TRANSMITTAL

SEPTEMBER 5, 1940.

Hon. JOSEPH C. O'MAHONEY,
Chairman, Temporary National Economic Committee,
Washington, D. C.

MY DEAR SENATOR: I have the honor to transmit herewith a study on Antitrust in Action, which analyzes in detail the process of enforcement, including that which does or (notably) does not happen in industries after legal action in a case has been closed.

Professor Hamilton, formerly a member of the National Industrial Recovery Board, has served for more than 2 years as adviser to the Antitrust Division. Miss Till was for 3 years a member of the staff of the President's Committee on Price Policies. In addition to the considerable number of persons who have been consulted on various portions of this study inside and outside the Government, special acknowledgment is due those who have read it in its entirely, notably, Blackwell Smith, of the firm of Wright, Gordon, Zachry & Parlin, lawyers, New York City; Dean Acheson, chairman of the Attorney General's Committee on Administrative Procedure, Department of Justice; Walter Gellhorn, associate professor of law at Columbia University, and Oscar S. Cox, assistant to the general counsel, Treasury Department. Their comments and suggestions have been most encouraging and helpful.

Respectfully submitted.

THEODORE J. KREPS,
Economic Adviser.

SECTION I

THE TASK OF INDUSTRIAL REGULATION

1. THE QUESTION OF ANTITRUST

A half century ago the Sherman Act became the law of the land. In our hurried world 50 years is a long time, quite long enough to turn legislative intent into current reality. Yet today, in talk and in fact, the trust problem is as acute, as fresh, as unsolved as when first the National Government made the matter its concern.

The popular will, as expressed by Congress, is clear enough. A competition which keeps a free field and grants no favors is to maintain the life of trade. As a policeman with a big stick, the Government is to keep occupations open to all who desire to take their chances, to secure to individuals the "common right" to the unmolested pursuit of their callings, to remove obstructions from the avenues of opportunity, to free from restraints big and little the channels of trade. Hedged by such liberties, business enterprise is to work out its own salvation.

Amid the resounding clash of economic forces, the market is to hold the dominant place. Its function is to fix price, adjust production to the demand for goods, regiment the lines of enterprise to ever-novel situations, measure out success and solvency. As seller strives with seller and buyer vies with buyer, competition is the be-all and end-all of industrial order. It is an arena for restless energy; within a scheme of checks and balances clashing interests move toward an equilibrium. Yet that equilibrium can never be attained—for the volcanic urge of a dynamic society forbids.

But somehow public policy and current reality are at serious odds and industries have not been subdued into such well-behaved affairs. Hardly a trade exhibits the neat purposive lines of the legislative pattern. Every industry has its vocabulary, its trade practices, its common understandings, without which it could not carry on. On all sides the rivalry of isolated firms has been tainted by custom, by compromise, by collusion. Industries in their several designs present their zones of competition and their points of constraint; and across the industrial landscape lies a network of constriction—open here, loose there, tight over yonder—which abridge the liberty of the trade or deny the freedom of the market. It is an odd fact that restraint of trade and competitive practice are inextricably mingled; together they form a shifting pattern of control for an industry. Outright "monopoly" is as nonexistent as "pure competition," both concepts belong to picture books rather than to everyday activity. Everywhere departures blur the simple lines of black and white into a motley outline streaked with many colors.

Yet, despite this rift between legislative standard and industrial fact, the Sherman Act has become a great American tradition. For decades an antitrust plank has adorned the platforms of the major parties; phrases, hoary with age, remain vital from one campaign to the next. The general public apparently makes antitrust an article

of political faith. The will to depart is greatest among executives in rather closely-knit corporate domains; yet their illustrations come almost wholly from trades in which cut-throat competition threatens destruction. Small businessmen extoll "free enterprise" but their everyday practices are hardly in accord with its profession. There is little doubt that the halo about the law serves the practical purpose of forestalling any substitute measure for the control of industry. Yet a myth, long venerated, develops strong compulsions of its own. In the minds of many businessmen the belief in antitrust belongs to one world and the actualities of business conduct to quite another.

The Sherman Act has been called "a charter of freedom" for American industry.[1] Why has it not been a success? Is the crux of the trouble the congressional failure to implement the law with adequate funds? Or is its weakness due to an insecure foundation? Is a statute enacted in the far-away nineties adequate to the problem of restraint five decades later? Is the machinery for its administration subject to the wear and tear of time, and has it become obsolescent? Can the basic issues of industrial government be transmuted into causes of action? Can the process of litigation be made to put an erring trade back on the right track? Have courts the distinctive competence to bring order and justice into the affairs of industry? Can a series of suits be depended upon to hold the national economy true to the competitive ideal? Are the sanctions of the statute of a character to induce compliance? In a word, can antitrust be made the answer?

A "next step" in making industry serve the general welfare is imminent. Issues neglected can hardly be postponed longer. A question which persists is why the national economy, in spite of an up-to-date technology and a wealth of material and human resources, does not operate efficiently. Problems of surplus capacity, unemployment, under-consumption, inadequate standards of life, all drive back to organization of industry. In such a critical review, the Sherman Act is in for close scrutiny.

The edge of inquiry is being sharpened by the drive for national defense. As a method of regulation, trust-busting belongs to an era of laissez faire. In times of stress its freedom is likely to be curtailed. Antitrust was forgotten in the last war and it was effectively abated in the economic crisis of 1933. Its role in the future is most uncertain. Whether increased "power" is to be put behind the Sherman Act, its provisions are to be modernized, its resort to litigation is to be streamlined, awaits decision. It is even possible that antitrust will give way to some more up-and-coming mode of regulation.

The tangle of affairs to which the old, the amended, or the new measure will be applied come straight out of the past. Only from the knowledge of how it has worked can the law be remade and set on its way. The line gives position to the point; the sweep through time endows with meaning a problem of here and now.

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[1] Mr. Chief Justice Hughes, *Appalachian Coals* v. *U. S.* (228 U. S. 344, at 359 (1933)).

2. THE CHARTER OF FREEDOM

SCRUPLES AND THE CONSTITUTION

The Sherman Act is a weapon of policy from another age. As the eighties became the nineties, the Nation was becoming uncomfortably conscious of an industrial revolution. Although dinky little railways were a commonplace, the trunk line was still a novelty. The land was dotted with factories using simple mechanical processes; yet chemistry and biology had not been subdued into technologies and electricity had just ceased to be a toy. The telephone was still a novelty; the electric light had just passed its eleventh birthday; the wonders that lie within the vacuum tube were still to be explored. The automobile was a rather impious hope; the airplane, an adventurous flight in wishful thinking. The motion picture and the radio broadcast were as yet hardly tangible enough to be subjects of fancy. Agriculture, once the foundation of national wealth, was being driven back country. Petty trade had been forced to make a place beside itself for a big business which seemed to masses of the people to be strange, gigantic, powerful.

The unruly times offered opportunity to the swashbuckling captains of industry, whose ways were direct, ruthless, and not yet covered over by the surface amenities of a later age. In sugar, nails, tobacco, copper, jute, cordage, borax, slate pencils, oilcloth, gutta percha, barbed fence wire, castor oil they bluntly staked out their feudal domains. The little man caught in a squeeze play—the independent crowded to the wall by "the Octopus"—the farmer selling his wheat, corn, or tobacco under the tyranny of a market he did not understand—the craftsman stripped of his trade by the machine—the consumer forced to take the ware at an artificial price or go without—here were dramatic episodes. Industry was in the clutch of radical forces—and of iniquity. It was a period in which the ordinary man was confused, disturbed, resentful.

Of this confusion, disturbance, resentment, Congress became aware.[1] It was led by protest and petition to the necessity of doing something about it. Yet a number of obstacles blurred the vision and arrested the action of the Fifty-first Congress. At the time there had been little experience with administration. The regulatory commission was almost unknown. The Interstate Commerce Commission, but 3 years old, had not yet found its footing; the dominant purpose behind it was not to regulate the railroads but to put an end to rebates and discriminations upon which favored shippers thrived. Some of the State commissions were a bit older, but they had little to offer in the way of usage, device, invention. Just as little was

[1] The materials for this chapter come very largely from the bills introduced by various Senators and Representatives and from the debates in the Fifty-first Congress as reported in the Congressional Record. To equip each sentence, almost each phrase, with its particular citation would be as cumbersome as it is unnecessary.

known about industry, whose curious ways had not yet become a subject of detailed study; a speculative account of how competition was supposed to work was enough. Since, barring collusion, the general theory was applicable to any ware of trade, the bewildering variety of industrial activity was hardly suspected.

A restraint of trade was looked upon as a malicious act. All that was needed was an eradication of the evil. It was utterly foreign to the age to regard industry as an intricate affair, to control it through an administrative agency, to entrust oversight to a corps of specialists. Above all, it was hard for the fact of the rising national economy to register. The idea of petty trade lingered on long after industry had ceased to be local. The notion that business could govern itself or that its regulation belonged to the States was a matter of common sense just beginning to be challenged.

In direct attack a great many bills were introduced. In Senate and House Member after Member, with his ear to the ground and his head full of scruples, put on paper his own proposal for banning monopoly from the land. As their authors were unlike in courage, vision, knowledge, forthrightness, so did the bills differ in orbit of influence, range of remedy, agency of enforcement, making life mildly uncomfortable or distinctly disagreeable for enemies to the public good. Directness went straight to the mark with prison sentences for "malefactors of great wealth"; decorum countered with the proposal of a constitutional amendment to ease the way for "a strong measure". Nor could "the thumbscrew of monopoly" be considered as a question apart. As a possible "mother of trusts", at least to free-trade Senators, the protective tariff became a new-born iniquity. Thrusts at scarce money, at high money, at the money trust, at high finance, were constantly in evidence. The urge to trust busting went forward to overtones of the currency, investment banking, the tariff, options in grain, the sins of the other party.

To men of simple faith the ends came easily. As text of bill and gloss of debate indicate, their aim was to make monopoly in all its forms as odious at law as morally it was outrageous. In terms of a public policy, not yet overcharged with legalisms, they proclaim the norm of a free competition too self-evident to be debated, too obvious to be asserted.[2] The real task was to implement the act—an undertaking which had to run the gantlet of the supreme law of the land. A number of Senators believed that in granting to the Congress power over commerce among the several States, the Constitution meant what it said. But it was customary to make a mystery of the sacred word; and for the meaning of the clause the general disposition was to explore the recesses of conscience, the body of reputable belief, the hearsay of the law reports. A joy in the higher dialectic was not to be sacrificed to so earthly an end as effective legislation. In political thought it was a rather arid time; logic chopping was at the height of fashion; the immortal document was an intricate mosaic of rigidities, categories, citations.

[2] It is not to be understood that those who would do nothing about it were completely absent. The simple notion of evolution was in the air, and it was fashionable to assume that the trend toward bigness was inevitable and universal. Although such a concession ill became a representative of the people, one Senator was bold enough to assert that the Congressmen were trying to arrest the course of Nature itself.

Among holy things likeness passes by contagion, and the Constitution took on attributes of divinity. It ceased to be an instrument of national purpose and became a jealous God.[3] As a fetish, greedy for reverence, it indulged its limited tolerance and demanded its living sacrifice. "The people complain, they look to us with longing eyes." Yet, although senatorial hearts are touched with agony, "alas there is little that we can do." The world is still the great penitential; the concern of the body politic, the pilgrim's progress. The question ceased to be what ought to be done and became what the Constitution allowed. The end of legislation was the utmost in relief consistent with "satisfaction" of that immortal document.

As a voyage into the unknown, antitrust would have had hard going, even under a single authority. But the paradox of the Federal system made the venture doubly difficult. A division of powers between Nation and State was assumed to be marked by a simple, clear-cut line and raised the question of jurisdiction. Decades of inactivity lay between the concern of the Fathers to establish legislative control over the national economy and the curent legislative stage; powers no longer animated by dialectic and kept alive by citation seemed unreal; the necessities of the people under industrialism were not yet insistent enough to refresh the entry. An old Confederate soldier, skilled in dialectic, from his seat in the Senate read the avowed rights of the Lost Cause into the power of Congress over Commerce among the several States.[4] It was the fashion of the period to ground jurisdiction in a mechanistic analog; to make State and Nation alike sovereigns in their independent domains, and to regard the physical movement of goods across a boundary line as the test of Federal authority. As a division of powers is frozen into stifling severities, eyes cannot recognize the national economy when they experience it. Where reality is kept on the side lines, decision emerges from the verbal play of an ordeal.

Thus Senators turned the little end of the telescope to the Constitution in their search for power. Not that within the sheaf of bills there was wholly a lack of breadth or of courage. One or another of them boldly asserted national authority and proposed that a cause of action be available to any person damnified in his business by collusion; that the consumer stung with an outrageous price have his suit; that the courts be closed to litigation seeking to give effect to a contract in restraint of trade; that the creation and maintenance of a trust—a generic for a multitude of evils—be made a high misdemeanor. Nor was there lack of ingenuity in the discovery of sanctions. Trust-made goods were to be denied access to interstate commerce—upon their journey they might be seized as contraband—the franchises of corporations producing them might be forfeited—excise taxes, up to 40 to 80 percent of their value, might be levied against them—the wretches who boosted their price might be denied the use of the mails. The tariff, especially to the Southerners, was a

[3] The Preamble of the Constitution, stating the national aims in the light of which the instrument of government was to be construed, was, to the majority of the Senate and among reputable authorities upon constitutional law, terra incognito.

[4] Senator George, of Mississippi. A brother rebel from the same State, speaking for the United States Supreme Court, had found a seam in the seamless web of an industry and had thrown "production" to the States, "commerce" to the Nation.—Mr. Justice Lamar, *Kidd* v. *Pearson* (128 U. S. 1 (1888)).

persistent source of mischief. If a person or persons deliberately gave an upward tilt to a price curve, the article was to be put on the free list.[5] Even the protection accorded inventors was to be exposed to the crusade. Legal rights were to be forfeited whenever combinations or conspiracy was discovered in respect to any productive process "partially or wholly covered" by letters patent from the United States. Equally numerous were the agencies to be charged with enforcement—the district attorneys, the Commissioner of Patents, the Secretary of the Treasury, the Postmaster General, the Department of Justice, the President of the United States himself.[6]

In even this bold enumeration a desire to keep within the four corners of the Constitution is apparent. The ordeal of debate reveals a general determination to see that so exacting a master was completely satisfied. A barrage of suggestion and countersuggestion was provoked by the question of the proper ritual with which to invoke the jurisdiction of the Federal courts. National authority was not to be asserted without myopic survey and proper rubric. The attack direct had to be bent into a circumlocutious assault upon some unguarded salient of the higher law. Sanctions were to be speared to the Constitution rather than bottomed upon it.

BACK TO THE COMMON LAW

As a creature of such currents of thought the statute took shape. The original Sherman bill was a very tentative proposal. It professed to outlaw all arrangements which prevented "full and free competition," to open the Federal courts to suits by parties damnified by such agreements, to provide for the forfeiture of the charter of the offending corporation. Its terms were uncertain, it invited constitutional attack, its author was timid in its defense. Twice it was rewritten by the Committee on Finance; yet it remained the target for the kind of shafts which the statesmen of that generation loved to hurl. The author, confused, yielding, anxious to placate, time after time would concede objection and accept amendment. As thus from many desks rather incongruous bits came into place, members became quite uncertain as to the objective and content of the proposed measure. After running the gauntlet of "the habitudes of the lawyer," the bill retained its legal ban upon interference with competition and its right of private suit for double the amount of damages and costs. As for implementation, a clause—really a broad sheet of paper whereon judges might freely write—gave to the circuit courts of the United States jurisdiction over "all suits of a civil nature at common law or in equity" and authority to "issue all remedial process, orders or writs proper or necessary to enforce its provisions." A postscript granted a limited exception to trade unions in their resort to collective action to shorten hours and to raise wages, and to farmers' cooperatives in the sale of their own products.

But a posse of Senators on the warpath was not enthusiastic about so lukewarm a measure. Nor were statesmen from the Grain Belt content to let slip the opportunity to have the law on processors and speculators. Senator Reagan, of Texas, had gone trust-busting

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[5] In a diluted form such a prohibition was 4 years later read into the Wilson Tariff Act (28 Stat. 509 (1894)).

[6] Since he was supposed to know everything, the Librarian of Congress would have been made by a hardened legislator the chief among trust busters.

across the wide open spaces; no punctilios of an eastern etiquette deterred his sturdy soul from naming names. To him a "trust" was a crime; the persons perpetrating it, criminals; and he wanted the United States statutes bluntly to say so. In a bill untainted by decorous compromise he drove at the heart of the michief. In concrete terms it set down a list of activities any one of which tended to create a trust; made participation in any plan to abridge unrestricted competition a "high misdemeanor"; punished with a fine not to exceed $10,000 or imprisonment at hard labor for 5 years or both; and, that the punishment might be worthy of the crime, made each day of violation a separate offense. Senator Ingalls, of Kansas, who knew what the farmer was up against, sponsored an elaborate proposal to restrict trading in grain options. For a time Senators Reagan and Ingalls each sought to amend the Sherman bill by replacing it with his own. In the course of debate a colleague suggested that the Reagan measure was a complement, not a substitute, for the original bill. So bright an idea was bound to prevail, and the inexorable logic which joined the twain presently caught up the third in its sweep. Among statutes-to-be competition gave way to combination; the three bills had become one.

Step by step all seemed right. Yet somehow the whole of the resolve seemed different from the sum of the motions. A majority had gone along, yet only a straggling of supporters remained faithful to the completed work. Once—and then again—a motion had been made to recommit the bill, not to the Finance Committee whence in lean form it had come, but to the Judiciary Committee. On former occasions the proposal "to deliver the child for nurture to persons who have most interest in its death" had been voted down and for the time the measure was saved from "this great mausoleum of senatorial literature." Now for the third time the motion for reference was put and carried; and the Judiciary Committee—stung by criticism or avid to exploit an opportunity—within 6 days returned to the Senate a bill with the same caption. The committee had scrapped all that had been sent along; and, with Senator Hoar, of Massachusetts, as draftsman, had written its own law.

The new bill simply recited for "commerce among the several States," the rule of the common law against restraint of trade. This recitation was deemed necessary for it was believed that there was no "Federal common law." A statute was regarded as necessary to bring the body of ancient usage within reach of the United States courts. The statement was framed in familiar legal symbols, not in the language of industry or the idiom of public policy. The prohibitions, which had grown out of the experience with petty trade, were taken over intact.

The element of novelty was the public character of the act. The older rule against restraints had been largely an affair of private law. Contracts in restraint would not be enforced in the courts; the person injured might have his damages; he was entitled to relief from a collusion against him. It was only when the combination smacked of a criminal conspiracy that the offense clearly took on a public character. The States had led the way in calling the practice of monopoly a crime, and the Hoar bill now followed. The threat of fine and jail was meant to deter men of affairs from straying down for-

bidden paths; and, even upon the chance of their guilt, to load upon them a protracted and expensive defense. The confiscation of goods shipped in violation of the proposed act was also new. This sanction had been suggested in debate by an eminent lawyer as an easy way around the Constitution into the Federal courts. The Government might also resort to equity, dissolve illegal combines, enjoin unlawful practices. But if the Government made the matter its concern, the right of private action was not abandoned. It had attended the Sherman bill in all its vicissitudes; and was now set down in the Hoar bill as triple damages and costs. In this ultimate form it was copied straight out of the Statute of Monopolies. Thus a criminal action, a plea in equity, a libel against the goods, a private suit for three times the damage and the recovery of cost were intended to put teeth in the act. An old offense was made a violation of Federal law and fitted out with a number of remedies. Yet no one of these borrowed sanctions was adapted to its new employment.

Nor was there any attempt to devise new machinery of enforcement. In the thought of the nineties the law should be as nearly self-enforcing as possible. The main reliance seems to have been placed upon the private suit. A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry. If more were needed, the resort was to the usual course of Federal justice. Another duty was added to the overlarge obligations of the Attorney General and of the several district attorneys scattered throughout the land.

After the briefest of discussions the Senate adopted the Hoar bill. Its sponsors were apologetic for the very little distance the statute went; but the zeal for argument had long since been spent. It was accepted as a "first installment," presently to be amended as experience pointed the way. In the House a time limit forced an early vote; leave to print crowded the inaudible debate from the floor into the Congressional Record. A single amendment led to a struggle in conference and was eventually abandoned; the text was left intact. There was no enthusiasm; but here was something at least for the people back home—and the congressional campaign was warming up. Besides there were matters of real consequence, such as the McKinley Tariff Act, which wanted legislative attention. So, with only a single vote in dissent—though in both Houses Members answered "present" or were conveniently absent—on the 2d of July 1890, the bill became the law of the land. It is to this day strangely enough called the Sherman Act—for no better reason, according to its author, than that Senator Sherman had nothing to do with it whatever.[7]

THE INTENT—IF ANY—OF CONGRESS

A great deal has been said about the purpose of Congress in passing the act. At best legislative intent is an evasive thing. It is wrapped in the conditions, the problems, the attitudes, the very atmosphere of an era that is gone. But aside from saying that the

[7] George F. Hoar, Autobiography of Seventy Years, vol. II, p. 363. To Senator Sherman "the Sherman Act" was the silver purchase act, John Sherman, Recollection of Forty Years, vol. II, pp. 1062 1070

act reflects its date, there is little more in the way of concretion to recite. Instead, as a creation of the process of legislation, the statute bears the confused marks of its origin. A remedy is never neatly shaped to the annihilation of a clearly perceived evil; nor is the will of the people borne along an insulated current into its image at law. In this case a scattered mass of opinion and of feeling was never distilled into an articulate statement. As always, hazards marched with the emerging act—the clash of interests, the passing of the buck, the pressure of other matters, the delicate amenities of horse swapping, the clash of personality upon personality, the parade of good reasons for real ones, the rumblings from the approaching elections. Amid the pull and haul of myriad forces the common understanding was far from a meeting of minds.

In a search for intent the record has been thumbed through with meticulous care and to little purpose. The debates exhibit heat, passion, righteous indignation against the devil of monopoly. The bills proposed went much farther than the Hoar Act. In learned books and before learned judges, passage after passage has been cited to prove what the framers did—and did not—have in mind. The great bother is that the bill which was arduously debated was never passed, and that the bill which was passed was never really discussed. The House, in fact, never had a chance at the measure which provoked discussion.

A ruse, whose cleverness only legislative experts can appreciate, drove a barrier between debate and eventual statute. The matter went to a committee notoriously hostile to the legislation. The committee turned a deaf ear to all that the Senate had said and done and went its own way. Intent, therefore, forsakes the Congressional Record for the capacious recesses of that flexible corpus called the common law. When the bill was reported back the session was late, interest had died, apathy ruled. Yet the statute—untouched except for the Miller-Tydings amendment of 1937[8]—has for 50 years remained the basic act for the control of American industry.

The Fifty-first Congress sensed the rush of an oncoming industrialism. Its task, facing the future, was to create a barrier against shock, a road to order, a guaranty of justice. In debate it laid bare evils within the emerging national economy, but could bring itself to do something about it only in a babble of voices. Except for words, it made no thrust at present dangers; it came to no grip with the trends of the times; it made no attempt to chart a course for American industry. When the voters would no longer tolerate delay, it acted. When the need was to shape the future, it looked to the past. On the eve of the greatest of industrial revolutions, the National Government was fitted out with a weapon forged to meet the problems of petty trade. Out of an inability of Congress to face the economic problems of its day the "charter of freedom" for American industry was born.

[8] The proviso easing the way for the manufacturer who would price-fix a trade-marked good can hardly be referred to as a deliberate act of legislation since it was sneaked through as a rider to an appropriation bill.

3. THE CURRENT WAYS OF RESTRAINT

OLD STYLE AND NEW

A rule of the common law, emerging from petty trade, was thus evoked to control the affairs of industry. An instrument of a static society, it was accepted amid the din of economic change. As it has endured, it has had to serve a national economy whose structure, arrangements, and problems have departed farther and farther from the world of its framers.

The rule against restraints doubtless does nicely enough in an economy of farms and petty trades. Under a subsistence agriculture it is only the surplus that goes to market. Farms are scattered; farmers are as numerous as they are contentious. A gathering of neighbors from the four corners over impassable roads to fix prices is not even a temptation. In respect to it the law may remain in repose. Nor does petty trade require more than an occasional use of the weapon. The industrial techniques change slowly, the simple ways of trade are taken for granted, dickering is still an art, the buyer and the seller each shops around, men haggle long and loud over a bargain. A collusion between buyers to cheapen goods, or a conspiracy among sellers to boost prices, is occasional, quickly noted, indignantly resented. It is only in the exceptional instance that the law is called upon to interfere with freedom of contract. A corner upon wine presses at harvest, an engrossing of geese at Christmas, a monopoly of corn in time of harvest are conspicuous wrongs beyond legal tolerance. They are evils in themselves, and ignorance of the ways of the trade is no hindrance to their correction. To the law falls only the negative task of smashing the restraint. That done, an interminable process of bargaining between noisy men, each intent upon his own advantage, can be depended upon for positive control.

The very appearance of the Sherman Act testifies to the passing of so primitive a situation. The change that came was not uniform; the old lingered as the new came into play; its tempo, quality, incidence varied from trade to trade and from place to place. Its march followed no simple line of evolution; it left, in its passing, a rich colorful, variegated pattern of industry, pieces as it were from many systems. As big business came into place alongside little business, conditions emerged which the common law had never presumed. Questions once left to the free play of buying and selling came to invite personal or corporate discretion and it was inevitable that, as the governor of industrial activity, the open market should be supplemented, compromised, superseded. The corporation often forsook the spot market for long-term contracts or integration. An automobile concern, by a series of covenants which run for years ahead, takes conscious steps to assure itself of adequate supplies of all needful parts and materials. An oil company, whose domain stretches from well

to filling station, establishes a single discretion over an entire productive process. The result is to substitute managerial discretion at many points where the market once controlled and to remove many areas of industrial activity from "the automatic play of supply and demand." In instances in which the activities of huge concerns converge upon a sensitive price structure, a spot market responding to competitive forces has come to be regarded as too dangerous to be employed as an instrument of industrial regulation.

As a trade becomes an industry, it develops its own customary ways of getting things done. In time these arrangements get to be more detailed and more intricate. They harden into fixed rules which are generally followed in the industry. They may have their origin in a deliberate effort to control price; remain as a hang-over from earlier days; emerge as expediencies which persist through sheer inertia; or just happen into being. As events beat upon them, trade practices may retain their integrity, respond to changed conditions, be diverted to new uses. But however they come into being or whatever their character—a discount structure, a classification of customers, a basing point system, bureaus of estimate, market information surveys—they all tend to deflect the unbridled forces of competition. The market performs its office within an impinging network of institutions.

THE PROPRIETIES OF RESTRAINT

Such an industrial stage has developed its own type of actor. The Sherman Act has been the initial instrument of education and the Government itself has supplied the stimulus. As the crude combinations of old were attacked in court, the men who lord it over oil, tobacco, meat packing, steel, began to give conscious thought to their legal defenses. As good citizens they were concerned to be law-abiding; as able business men they were loath to refrain from activities which were to their advantage. Where values clash, a formula must be found—one which will reconcile the pursuit of gain with the prohibition against monopoly. Old ends came to be served with modulated means; coercion was dissipated into a discipline of gentle reminders; crude restraint was subdued into a fine art. Once education was under way, lessons were eagerly learned; and those who in defense had forged nimble weapons taught their use to men of affairs not yet under attack. Thus as business has become civilized, its leaders have professed the amenities. They are now versed in propriety, indirection, circumlocution. They operate in an economy so intricate as to give full play to ingenuity and finesse. Its pattern of usages presents many strategic points at which discretion may be exercised; its assorted controls are so many counters in an acquisitive game. Its devices and procedures, its tactics and strategy, represent a defense that keeps up with the times.

Current restraints bear the stamp of their industrial culture. The overt, the blatant, the outrageous is gone, or dwells only on the fringes of polite industry. The agent of common accord may be independent of all the participating firms. The four large building contractors of a city depend upon the same bureau of proven reliability for their estimates. Nine major companies quote oil prices based upon market reports published in a single journal. A number

of corporations separately pivot their prices upon a figure given in the papers. Surely all cheese should be sold at "the market price"; if a "kept" auction market at Plymouth, Wis., supplies the only quotation, there is nothing to do but follow.

Men may move in lockstep, not by agreement among themselves but in automatic response to identical stimuli. A large manufacturer of brass converts his judgment of "market prospects" into price. The little fellows, seriatim, follow the leadership of the big boy. If his prices rise, they raise theirs and appropriate the "gravy"; if his fall, they meet the quotations to hold their customers. Even an innocent pursuit of knowledge may become the brotherly tie that binds. An engineer of scientific bent, deeply touched by ignorance of accounting among the brethren, contrives a "cost formula" for the price of canvas goods. All the firms buy his book, experience conviction of pecuniary sin, in penance put the gospel into practice. In such instances combination is diluted into sheer coincidence; the act of discretion occurs outside the affairs of the rival corporations.

If the situation allows, personal discretion may be obliterated from the picture. A delivered price system is now native to steel, cement, cast-iron soil pipe. In steel one may purchase from any concern and take delivery from any mill. But the charge to the consumer is invariably the price the nearest basing point—Pittsburgh, Birmingham, or Sparrows' Point—plus freight to destination. In cast-iron soil pipe a similar scheme prevails with Birmingham as the dominant base. In cement, a heavy commodity of low value, the points are numerous and subject to change; but along an unbroken front a rigid price structure confronts the consumer. He may wish to choose his own source of supply, to provide his own transport, to save expense by using truck or boat, yet the option is not his.[1]

The guilt for restraint may even be dissipated into a general irresponsibility. The paper industry carries on through a durable agreement among gentlemen. Since no others are admitted to the closed club, a ceremonial meeting of minds would serve little purpose. Stability is maintained through ways of action taken for granted. In lead pencils and fertilizers "quality standards" have been used to do the pioneer work. A multitude of brands has been reduced to a few grades, plainly marked, easily identified. The resulting simplicity invites a uniform price structure, makes departures easy to detect enables "persuasion" to be brought to bear upon erring members. In cottonseed the appeal to reason is the torch of enlightment. Each firm is to shape its decisions in the light of the facts; the consultation of an up-to-date file of all the prices charged by all the firms in the industry is an essential of sound judgment. A definitive statement of "true and real costs" provides a uniform reference for price which falls little short of verity itself.

A mass of petty restraints lies like a blanket over a group of kindred trades. Origins may be unknown, yet restrictive practice, like a clock wound up long ago, may continue to click on. The building industry has been plastered over with a hierarchy of minor controls. Contractors, subcontractors, investment agencies, supply houses, producers of materials, trade-unions great and small, have each their

[1] A scheme like this promotes competition to the extent it allows producers, wherever situated, access to distant markets. But since in their rivalry for trade no price-cutting is to be tolerated, the consumer's option is between like units of a standard good.

codes of usage which with command and taboo impose a medley of impeding tentacles upon a backward, easy-going, myopic industry. Together they engulf demand, technology, finance, enterprise, employment in lethargy. Collusion and conspiracy—between union and union, union and contractor, contractor and contractor, contractor and official—is to be found here and there. But far more significant is the freezing of what should be a developing technology of building into a bedlam of medieval domains. In general, persons of high and petty command merely maintain an institution. Restraint has become convention; they carry on rather than create.

As the open market recedes the fabric of industrial control is woven. At strategic points parties move to their own advantage. In automobiles the chiefs of the assembly line have won authority over a far-flung business empire. They have, to their own gain, learned to play the parts manufacturers off against each other. A franchise from one of the Big Three means far more to the ordinary dealer than any ordinary dealer can mean to the manufacturer. Only the exceptional marketer can bargain with the company which controls his supply. It is all a kind of feudal regime in which the manufacturer is liege lord, the parts-maker vassal, the dealer merchant and peon.

In cigarettes the lines of the feudal pattern stand out even more sharply. The heights are occupied by the managements of the large concerns. The ranking officials graciously accept generous salaries; then, with a keen eye to the unique quality of their own services, they vote themselves sizable bonuses as "incentive compensation." Stockholders are lulled by regular dividends. At one frontier the farmer receives for leaf a price that nets less than a decent living. At the other the dealer is forced to carry the article upon the thinnest of margins. For the manufacturer encourages price cutting, and the merchant who sells other things cannot afford to have the buyer walk out of the shop because it does not carry his favorite brand.[2] It is all very subtle; no formal conspiracy meets the naked eye; there is no technical resort to duress. Yet, with little in the way of holdings, a small group of men lord it over the whole trade.

Industry is on the move, and restraint moves with it. As the fabric of industrial organization emerges, restraints are woven into its pattern. At a strategic point an advantage is asserted, extended, fortified. The usage which is its defense gets caught up into the whole scheme of working arrangements. In steel the basing point no longer attests mere willful collusion; it is inseparable from the conduct of the business. The location of plants, the industrial design, the growth of cities are all pivoted upon it. It has insinuated itself into the community life, taken hostages in far-flung connections, become an aspect of the whole economy. Its sudden overthrow would bring shock to the industry, a dozen cities, the ways of commercial life. As it weaves into the structure of an industry, restraint shifts its home from collusion to the folkways. In case after case the strictures have become self-operative. The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.

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[2] At the factory the labor costs per carton run lower than the sums expended in the competitive armament of advertising. In salaries and bonuses voted to themselves for the unique character of their services, the executives take the cream.

THE SANCTIONS OF DEFENSE

Yet restraint may be direct—if a legal sanction is at hand to offset the act. A manufacturer in an unguarded moment scribbles, "the patents upon which we pay royalties are of dubious validity, but they provide a device by which the industry may maintain a collective security and for such a defense against the chaos of competition the price is small." In a word, "we of a trade can exempt ourselves from antitrust, if a patent is at hand to take off the curse." The Constitution seeks "to promote the progress of Science and the useful Arts," and a furthering statute grants to the inventor an "exclusive right" to his novelty for a period of 17 years. The lawyer's art can commute such a sanction into a formidable defense.

In these days the higher finance plays about the ways of discovery. The inventor assigns his rights to a corporation; the corporation licenses various concerns to manufacture. Into the license agreements, as circumstances and profit-making may decree, are written restrictions in respect to territory, output, market channel, price. Such agreements present endless permutations. In shoe machinery a single patent-owning concern manufactures, leases, and services all the machines employed in the shoe industry. Its complement of techniques covers the whole art; the machines are never sold outright; the owner of the patents drives a monopoly horizontally through the whole industry. The fashioning of the optical lens—which reaches its wearer as a pair of spectacles—is by one company broken down into a series of operations which are assigned to the manufacturer, the wholesaler, the retailer. A price-fixing scheme, running from factory to consumer, parallels the productive process, defending with public warrant the ingenious restraints.

A concern, whose office is the maintenance of a strict discipline over technology, is overlord to the glass-container industry. Its task is to advance the art just fast enough to keep alive a few basic patents. It must stagger invention, prolong the life of old processes, withhold novelty until it is needed. The company, a creature of the dominant concerns, capitalizes its command of the productive process and upon its own terms grants or withholds the right to enter the industry. It apportions the national market and appoints to concerns local boundaries. It licenses its patents for specific uses; one concern may manufacture beer bottles alone, another has milk bottles for its province, the domain of a third is fruit jars. Its authority extends to all the firms within the industry and reaches to all the matters with which they may be concerned. A private corporation has in short established an industrial government; it maintains law and order within a province of the national economy.

The argument is that such restraints fall within an immunity which derives from the national authority itself. If such a protection is valid, the patent owner becomes sovereign to an industry. The sole condition of his feudal tenure is that he keep alive a few patents essential to production. He must shape invention and discovery, not to an advance of the technical arts, but as a defense against public policy. If he can do so, his czar-like power extends to quality, grades, brands, capacity, output, price, channels of trade, allocation of wares, division of territory, terms of sale. His authority has, in fact, banished the market from the control over the conduct of the

industry. His power to condition, to abridge, to deny opportunity is far more plenary than the Supreme Court has been willing to allow to the legislature of a State of the Union.[3] All modern industry rests upon the machine technology; there is hardly a process or a product which a patent, a measure of ingenuity and a bit of luck cannot obstruct. If the magic of letters patent makes innocent whatever it touches, a large industrial domain is put outside the law.

Other legal sanctions may be turned to the same defensive purpose. A police power invoked to serve the public health has on occasion become a smoke-screen for vested interest. In the name of milk pure, clean, and undefiled, municipal law has outlined the milkshed, erected barricades against the outsider and created a closed industry. Inspection, half forgetful, or even divorced from its function, has been elaborated into a very purposive ceremonial. Its elaborate ritual has enlarged administrative discretion, opened the door to favoritism, invited restriction of output and frozen channels of trade with legal sanctions. Almost the country over a scheme of payment by use has driven a price line through the whole industry. A high price is made for fluid milk for domestic use, a lower one for surplus milk which is canned, evaporated, made into butter, processed into cheese. Upon the legal foundation of inspection an intricate scheme of arrangements for the operation of the industry has been established. As an agency of control the free and open market belongs to the dim almost forgotten past.

Nor is milk an isolated case. In many States the legislature has decreed oleomargarine impure, taxed, or colored it off the market, thrown a protective tariff about butter. Local ordinances, professing solicitude for the public safety, have covered the building of a house with petty restraints and have kept the work in the hands of the orthodox. In the liquor industry only the sky fixes the limit of restraint if "public morals" can be plead in justification. In public utilities the oversight of the State has been as evident in saving established concerns from the competition of newcomers as in insuring fair rates to consumers.

A scrutiny of legal text for sanctions often encounters blurred edges. It has been argued—quite in vain—that the indulgence in collective activity, granted by Congress to farmers' cooperatives, extends to the commodity and by contagion makes valid the collusive activity of milk distributors.[4] Trade unions in a search for immunity have variously contended that "the labor of a human being is not a commodity"; that their activities are so local as to escape Federal jurisdiction; that the intent of the framers of the Sherman Act was to create for them a blanket exception; that the Clayton Act in specific terms accords exemption; that the protections which the Wagner Act throws about the process of collective bargaining extends to all that a trade union or its officers may do.[5] Even the American Medical Association has argued that the sanctities which attach to the name of physician creates a benefit of clergy for all who follow the calling and throws an immunity about their collusive acts.[6]

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[3] *New State Ice Co.* v. *Liebmann* (285 U. S. 262 (1932)).

[4] Brief for appellant *U. S.* v. *Borden Co.* (308 U. S. 188 (1939)). The argument did not appeal to the U. S. Supreme Court.

[5] Brief for appellee, *Apex Hosiery Co.* v. *Leader* (60 S. Ct. 982 (1940)).

[6] Brief for appellee, *U. S.* v. *American Medical Association* (110 F. (2d) 703 (1940)). The argument did not appeal to the Circuit Court of Appeals and the U. S. Supreme Court refused to disturb the judgment. (60 S. Ct. 1096 (1940)).

In fact all regulatory measures, however righteous their intent, run the risk of becoming legal defenses for private restraints. Where business takes to politics, the police power becomes a counter in an acquisitive game. All over the country the use of a legal sanction as a defense against authority is widespread. Such instances do not prove that sheer contact with a regulatory measure creates an immunity. But it does allow privilege to dig in behind a fortified line and calls for enforcement to look well to its strategy.

THE MATTER OF MORE OR LESS

Yet, with or without legal sanction, restraint is no longer the restraint of old. In a world without an absolute, we can hardly speak of a total monopoly. The ancient law would pronounce a single aluminum concern "malum in se"; and public policy today frowns upon the power to put "the squeeze play" upon competitors by raising the price of their raw material and depressing the price of the finished product. But to the scope of even such an authority there is qualification in the potential demand which a lower price might quicken. Our deposits of sulphur are confined to a narrow strip of Texas coast and two concerns regimented to money-making exploit the bulk of them. Yet, even where nature has done so much to help it along, restraint is not without its check. Other chemicals can do the work of sulphuric acid and substitutes dictate limits to sovereignty. Science, invention, and discovery are everywhere present with their quickening touch. The synthetic opposes the organic; the old art is confronted by the new process; the way blocked invites the channel around. In an economy like ours a myriad of techniques and a multitude of ingredients are every-day matters; a new trick may at any time turn the obscure into the ordinary.

Like other wrongs at which the law thrusts all is a matter of quality and degree. The tightest of trades may have its points of competition; a widely competitive industry may have its points of constriction. Restraint is always somewhat less than a total eclipse of trade. In the contracts of sale which keep a business moving, buyer and seller may not be of a kind. Whether on the one side or the other the firms are large or small, many or few, affects materially the terms of the bargain. If a gigantic concern deals with a host of little fellows, its greater power tells. It may fall short of a monopoly; its conduct may be untainted by conspiracy, yet it may enjoy an overshadowing advantage. The vendors of farm machinery, commercial fertilizers, electric current, telegraph service are in a position to say to the customer, "take it or leave it." The dominant buyer, set over against a host of insecure sellers, can likewise capitalize strategic position. The processor holds the upper hand in dealing with the grower of wheat, tobacco, cotton, corn. The chain store or the mail-order house—in respect to shoes, radios, toothpaste, imitation pearls—plays one source of supply off against another. It wears its industrial connections loosely; in shopping around for better bargains it brings the threat of insecurity to all the firms with which it deals. Exclusion from a trade—a curb upon output—a control over price—restraint in its every manifestation is a matter of more or less.

As often as not elements of competition and of restraint are woven into the same industrial pattern. A minimum of understanding is essential to an orderly struggle for trade; there are limits to which the firms in an industry will allow the most brotherly accord to go. The major oil companies stand together in keeping production in line and in banning hot oil from the market. Yet offsetting wells and rival filling stations on opposite corners present giant enterprises confronting each other in militant formation. All taxes aside, the high- and low-price zones scattered across the country present a design marked both by rivalry and restraint. The large movie interests, which stretch out fanwise from Hollywood to chains of captive theaters are here in deadly, there in lax, struggle for patronage. But bonds of union exclude the newcomer, impose vassalage upon the independent exhibitor, and deny to a modern art adequate opportunity for expression. Even gentlemen in agreement may maintain a private police, and bear down heavily upon the trouble makers, yet vie avidly for custom. The price structure must be guarded and all heroically will maintain the fiction of the quoted price. Yet price is a complex thing and somewhere within its intricate terms a place may be found for a hidden concession.

Inevitably the accord—formal, unexpressed, in the mores—seeks to defend the front against which the threat of security comes. Gentlemen are in agreement; yet severally they have their own separate interests. If so uniform a commodity as cement invites a trim price list, steel can be had in a multitude of forms and fashions, and electrical goods can fill the three dimensions of a large catalog. In dull times, and even times not so dull, a large order may tempt a manufacturer to keep the letter of the accord and break with its spirit. The quoted price remains the same; but amid the intricacies of the terms of sale, ways may be found to make the real price somewhat less. Against such contingencies the unified industry must be ever watchful. In the face of a falling market, a shift of technical base, the appearance of a substitute, vigilance is essential. Where an article cannot be strictly defined or a commodity may be had in a bewilderingly large number of forms, the operation of the price system demands formal guidance. Without its "book" showing how "extras" are to be figured, the steel industry could not carry on in lockstep. And although it makes no concession to quality, brand, grade, even cement in its simplicity could not confront every buyer with a single price were it not for its official book of freight rates. Even established usages are not fixtures; as armament against attack they are always exposed to industrial change.

COMPETITION AS THE MOTHER OF RESTRAINT

In instances competition itself may become the mother of restraint. There can be a plethora, as well as a dearth, in rivalry for trade. A glutted market, an excess output, a surplus capacity are unruly forces. They tend to drive price below cost, to touch off secret discounts, to turn quotations into fictions, to invite bankruptcy. In such a situation firms are prone to take counsel together to create a protection the market seems unable to provide. In women's dresses fashion has more to say than efficiency about the survival of firms. A multitude of

petty establishments are pawns in an acquisitive game in which anything goes. In bituminous coal disorder has become the normal thing and the industry seems by universal testimony to have reached a state of perpetual unbalance. In women's dresses the life of the average firm is a scant 5 years; in bituminous coal the mortality rate does not lag far behind. As a result of the leasing policy of the patent owner, anyone with a small amount of capital may become a shoe manufacturer. The resulting competition in production is intense and demoralizing; manufacturers have sought fruitlessly to come to some understanding—restrictive if you will—to bring stabilization into the industry. Automobile dealers have conferred again and again to find a way to abate the intense rivalry which the quota system of the manufacturers has forced upon them. Even in a big business like gasoline the drilling of wells, to an accompaniment of competition, makes for an overproduction with which the market cannot cope.

Where such situations prevail, the way of antitrust is not straight and narrow. It is an overplus, rather than a want, of competitive zeal which lies at the heart of the difficulty. As a governor of industry the market has failed of its office. Production obeys no command; the price structure is at the mercy of orderless forces; the incidence of affairs out of hand—in shock, confusion, displacement, unemployment, bankruptcy—is heavy. Often, as in the manufacture of shoes and the retailing of cigarettes, the competition which prompts efforts at restraint rests itself upon restraint. A constriction at one point creates elsewhere within the economy such hazards to markets as to evoke conscious thought toward a collective defense. Sometimes, as in glass, the thinnest sort of an edge stands between a regimented industry, with patents as the instrument, and one as wide open as bituminous coal. Unless the regulatory office of the market is taken over by some other agency, a situation out of hand threatens to engulf all who have a stake in it.

Yet any concerted move against impending disaster may run afoul of the law. Even a meeting of minds may be endowed with the sinister taint of conspiracy. In fact, as irony would have it, the more chaotic the situation that provokes action the greater the legal exposure. For where units are many, heat has marked the struggle for markets, feelings have grown tense, suspicions have been quickened. As a result the getting together has hard going. The meetings must be frequent, the talk frank, the understandings clean-cut, explicit, above board. The procedure generates evidence as it goes forward; the industry virtually invites a suit through the very ease of getting proof. But where very few units are involved, where cooperation is a practice of long standing, where a large body of understandings is a matter of course, the situation is quite otherwise. The necessity for conference is infrequent, minutes of meetings are prepared in advance by skilled attorneys, the question direct is never put. Action is taken without fanfare of trumpets; conduct is clothed in accepted practice; records are barren of evidence to the overt act. Unless the good cause becomes blatant, it may escape the attention of the authorities. Yet in violence to the competitive pattern, in departure from lawful norms, in hindrance within the national economy, the less obvious is by all odds the greater evil.

SECTION II

ADMINISTRATIVE PROCEDURES OF ANTITRUST

1. BIG ACT LITTLE STICK

THE SHORTAGE OF FUNDS

A statute lives by appropriations—and from the first the demands of Antitrust have fallen upon the deaf ear of Congress. Not until its fiftieth year was as much as $1,000,000 appropriated to the purposes of the Sherman Act. For more than a decade no separate staff was charged with its enforcement; and when in 1903 Antitrust became a division in the Department of Justice, it was given only half a million dollars, to be expended at the rate of $100,000 a year over a period of 5 years. Between 1908 and 1935 the appropriation varied between $100,000 and $300,000. In 1936 the figure was increased to $435,000; in 1939, to about $800,000, and for the fiscal years of 1940 and 1941 to an all-high of $1,300,000 and $1,325,000.

It is obvious that the staff has been inadequate to police against restraint the whole of American business. In the famous trust-busting campaign of Theodore Roosevelt, the average number of attorneys in active service was 5. In the Wilson administration, when the World War had caused prices to skyrocket, the number had risen to 18. In the twenties, when the corporation was evolved into an intricate and evasive structure, and merger, amalgamation, integration, holding company was the order of the day, the number engaged did not exceed 25.[1] Not until 1938 were as many as 50 lawyers actually employed; not until 1939 did professional personnel reach 200 attorneys and a half dozen economists.

For almost its whole life Antitrust has been a kind of a corporal's guard—a small section tucked away in the intricacies of a Government department. It has taken the great increase in its funds for the fiscal year 1940 to lift it to the level of an ordinary bureau. Even at that it was only about the size of the Bureau of Labor Statistics, with its appropriation of $1,012,500, and a little larger than the Bureau of Agricultural Economics with its budget of $928,000. It was still smaller than the Bureau of Foreign and Domestic Commerce with $2,188,744 to spend during the year.[2] The sums allocated to those agencies are solely for fact-finding and research. The work of each of the three is sharply limited in contrast to the miscellany of functions entrusted to the Antitrust Division. The latter has a task of gathering and analyzing information comparable with that of these other agencies. It must, in addition, police the activities of hundreds of industries and thousands of companies engaged in commerce among the several States. It must enforce the law by apprehending violations, presenting lawbreakers to the courts, carrying cases through

[1] It should, however, be pointed out that during this period Antitrust lawyers and some 30 agents of the Federal Bureau of Investigation worked closely together. The agents were assigned to Antitrust work, were housed in the Antitrust offices, and for all practical purposes were an integral part of the Division.

[2] The Budget of the United States Government for the fiscal year ending June 30, 1941. Government Printing Office, 1940

the mazes of protracted litigation. Then, when the last court has spoken, it must follow up judgments and make sure judicial decrees become everyday realities. It is obvious that a staff of 20 or 50 or even of 100 can give to the affairs of the national economy only the most casual oversight. The contrast between the miniature staff on duty and the enormity of the job to be done speaks for itself. As well attempt to maintain law and order in Boston, Philadelphia, or San Francisco with the bold police force of Oshkosh or Annapolis.

A brief comparison of Antitrust with the metropolitan police is suggestive. As $1,325,000 is being used to police industry, break up restraints, enforce competition throughout the United States, a sum around $60,000,000 is spent to preserve peace and order within New York City alone. The Antitrust Division now has 200 attorneys; the police force of New York City runs to an aggregate of 20,000 persons. An analog between unlikes must not be pushed too far; but, niceties aside, here is evidence of basic weakness in giving effect to the Sherman Act. To sharpen the contrast, the resources of Antitrust are dissipated; it is charged with legal duties in respect to some 30 other acts of Congress. As funds have increased, so likewise in the last 10 years have responsibilities. In 1929, for example, Antitrust provided legal services in respect to four other statutes—the Grain Futures, the Interstate Commerce, the Produce Agency, the Packers and Stockyards Acts. For the fiscal year 1940, the full time of about 25 lawyers was diverted from Antitrust to litigation concerned with 30 other statutes.

THE PATH OF UNPOLICED POLICY

This weakness in Antitrust administration has been almost continuously remarked; yet the negligence of Congress in failing to implement the statute has persisted. Of the causes for this neglect, some stand out plainly, others are lost in the silences of the legislative process.[3] In part the answer is found in the date of the law. Save for the tariff act—which has been with us always—and the Interstate Commerce Act, the statute is the oldest of the Federal laws for the regulation of industry. When the Sherman Act was passed, a separate budget for its enforcement was not even suggested. In 1903 when the Division got off to a start, budgetary allotments for the enforcement of Federal laws were traditionally small. In fixing its appropriations, year by year, Congress customarily uses as its standard the sums allotted in previous years. Legislative custom has it that this year's appropriation is about right. The sum is a norm, with every presumption in its favor; the burden of proof is upon the demand for more money. Thus ancient thought, frozen into a figure, stands as an obstacle agai t the appropriation which current knowledge and a later understanding suggest.[4]

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[3] Note, for example, the report from the House Committee on Appropriations on the 1941 Budget: "While the committee recognize that there is a vast potential field of possible activity in the prosecution of antitrust cases and that results to date of intensified antitrust drives indicate savings of several hundred million dollars to the consuming public as a result thereof; none the less, the impelling need for strict economy in governmental expenditures must be given serious consideration and weighed in the scales opposite the desire to project the Government's arm at further length into the multifarious fields of Federal activities." The committee did approve a $41,000 restoration of the $100,000 cut recommended by the Budget Bureau.

[4] This fiscal hurdle has also dogged the steps of the Federal Trade Commission. It was off to a far better start; its initial appropriation was $420,000. By a process of gradual growth its budget has since been multiplied five-fold. For the fiscal year 1940 the sum allotted was $2,324,000.

As experience is gained, it is not at once generally available. The latter wisdom is much more likely to be employed in creating the new, than in revising the old, venture into control. While an up-to-date model has been provided for the Maritime Commission, the Rural Electrification Administration, the Federal Reserve Board, Antitrust has been left without streamlines. If the newer agencies had been established before the turn of the century, their support from Congress would probably still be rather grudging; their late coming enabled them to be supplied with funds somewhat adequate to the tasks entrusted to them.

The impact upon the Federal Budget is startling. As against the scant million and a quarter dollars for Antitrust, the Budget for the fiscal year 1940 provides some striking contrasts; to the Securities and Exchange Commission, $5,470,000; to the Federal Power Commission, $2,715,000; to the Rural Electrification Administration, $2,790,000; to the National Labor Relations Board, $3,-189,600; to the Railroad Retirement Board; $3,254,000; to the Maritime Commission, $3,990,000. The last two sums were for administration alone. Yet the regulatory duties of these bodies extend only to a single industry, a single strand in industrial organization, or a group of related industries, while upon the Antitrust Division rests responsibility to hold all concerns engaged in interstate commerce to the competitive pattern.

But the folkways of the Budget cannot fully account for the neglect. The trickle of funds is symptom as well as fact and cause. In the hurly-burly of industrial movement there has been little conscious appreciation of the character and magnitude of the task Antitrust has to perform. The public can understand a chivalrous adventure in trust-busting in the grand manner. And when a champion of the people rides into the wind, seeks out the octopus in his lair, and brings home the scalp of a trust, it applauds. But it has little appreciation of the detailed, day-by-day drudgery essential to the assertion of the public interest in everyday business. With the shift from market to management, authority can be met only with authority. Thus the safeguarding of the public interest in business becomes a continuous and watchful task. In Antitrust old style, heroic victories were now and then to be won upon the open field. In Antitrust new style, a detail of pedestrian work must be done day by day and a multitude of decisions be made back of the line.

The cause of Antitrust lacks that massed support which causes congressional purse strings to loosen. Its appeal is greatest to the man on the outside who wants to barge in on a trade and needs its help in making his way. It is least to persons who, already established, are wary of interference. The support of labor is not easily enlisted. In many industries it has a vested interest in the maintenance of restraints; the power of its leaders depends upon the maintenance of things as they are. It is more prone to view the Sherman Act as a weapon to be used against the trade-union than as an instrument of a better living. The group of men—and women—of good will, who busy themselves more than most over public affairs, are well disposed; but to them Antitrust is only one among many worthy causes to which fitfully they give their attention. A general opinion may favor all the money needed to put teeth into the act; and interested groups may be

lukewarm or even hostile to appropriations. But, under our Government, the pressure of the many is difficult. It is the few who understand how to concentrate their pressure at the focal points that count.

The act, throughout the political community, is held in least favor where power and influence are greatest. A rather instinctive suspicion of Antitrust prevails in high industrial quarters. As a symbol the Sherman Act is grand. It sets down a lofty profession of economic faith; it proclaims industry to be the instrument of the common good; it preaches the philosophy which makes the market the rightful agency of business control. The statute holds enough of the raw material of thought, out of which the creed of laissez-faire was formulated, to have high ceremonial value in financial circles. It serves its function best, however, as a generality, left in Olympian aloofness, unsullied by contact with mundane affairs. As a control which might do active duty in his own industry, the ordinary man of affairs views it as suspect. As a scheme of regulation it moves toward diffusion of power and runs directly against the trend toward concentration.

The leanness of the budget has left its lines on the national economy. In 1890 free competition as the way of order for industry was not seriously questioned. Conformity to this standard was an obvious expression of public policy. In the years to come the pattern of industry was to be beaten upon by a continuous industrial revolution; turbulent forces were at large which the law said should be subdued. Yet at no time did Congress choose to do more than equip a few knights to go forth to romantic combat. The negligent oversight under which industry was left to its own devices has confused the problem and multiplied the modern task of Antitrust. Industry might once have been held to its competitive norms; it is now too late to restore the primitive design. The recession of the market, as an instrument of industrial control, has obscured the norms of reference provided by the common law. The situation was allowed to get out of hand before the agency was equipped for its task. Antitrust has never been accorded its chance.

2. THE LAW REFLECTS THE AGENCY

POLICY AND POLITICS

Funds are the plastic material of enforcement. Only as they are converted into a going organization—all complete with leader, staff, program, morale, sense of direction—are they turned to account. It is an axiom of government that much may be made of little or little of much. But at best it takes vision, drive, experience, years to convert a recurring item in the budget into a high-toned agency of control. Blundering first steps and errors of judgment must be commuted into practical guideposts which indicate where action is feasible. A workable program must be patiently evolved which combines continuity in policy with flexibility in operation. An assortment of persons must be molded into a personnel, independent enough to act without awaiting orders, adequately disciplined to move always toward the proper objective. Industry has many fronts, and Antitrust a small force; its lines must be spread thin. Its every attorney must be able to plan a strategy; he must be able—against superior resources and the best talent that money can buy—to win a campaign.

For such a venture as trust-busting, the office of the single administrator has decided advantages. A commission, it is true, has been much favored by Congress as the proper agency of administration. It is independent of the Executive; its personnel, at the head and in rank and file, change slowly; personnel lingers on from one administration to the next. A traditional viewpoint develops; a fairly consistent policy groups up; practice converts statutes into rather clear-cut codes of law. A measure of novelty cannot be escaped; new members appear, unfamiliar problems emerge, some accommodation must be made to the party in power. But even if certainty is never quite attained there is orderly sequence; if policy is not rigid it has a discernible trend. Week after week an agency such as Interstate Commerce, Federal Trade, Federal Power pursues its steady course. The danger is not lack of continuity but too much of so good a thing; as the years pass it does today what it did yesterday and the day before. It meets fresh problems with trouble-saving formulas; its activities sink into a comfortable groove. Its function is forgotten in the meticulous observance of ritual and routine.

As a division of a Cabinet department, Antitrust knows no such stability. The Attorney General, a member of the President's Cabinet, holds an appointive office. His views accord with the policies of his Chief, who has reached command of the Executive offices by a political process. As one administration replaces another the Attorney General and the heads of the various Divisions at Justice give way to their successors. For half a century there has been one Sherman Act, but many have been its prophets. From 1903—when the

Antitrust Division was established—down to 1940, 14 Attorneys General have served 10 administrations. During this period 17 different individuals have had direct charge of the work of the Division. Thus a major shift in leadership has become effective about once every 2 years.

A change of directors does not of necessity indicate a shift in policy. Where the administration remains in power, the successsor is likely to be more or less of a mind with the Assistant Attorney General whom he replaces. None the less the rapid rotation in office impresses its shifting incidence upon morale, tradition, policy. The head of the Division does not usually come from within the ranks; far more often than not he is an outsider. His post, from its very function, is a center of controversy. If his is a "strong" appointment, he is assured a continuous and highly critical scrutiny from business and the press. He is usually a lawyer of distinction; but ordinarily his career has not trained him for so unique an office in the national economy. The structure of industry is an intricate and baffling matter; trade practices are among the most deceptive of things. He must go it blind, trust to another, or take time to master antitrust practice. Suits once started are not easily dropped; there is always enough in the courts to carry on. But, unfinished business aside, his advent is usually followed by a lull. As a newcomer he must feel his way; he is unwilling to commit himself too far. Six months to a year are likely to pass before he is off to a good start. Then, if the law of the average holds, he is likely to leave office just as his program is getting under way. The man who takes his place comes on the scene as a novice; his initial task is his own education; another cycle begins its course.

The administration of Antitrust is by respondent superior. Its head directs, not in his own right, but as vicar to the Attorney General who is himself the agent of the President. The Assistant Attorney General has, as such matters go in Washington, a large zone of independence. Its traditions give to Justice something of aloofness; the ranking officials are expected to exalt conscience above party; the man in command—thwarted in his efforts—can always resign and make public his reasons. Accordingly, within the limits of his budget, he may to an extraordinary degree make his bureau an active or a quiescent body. His is a small staff; its personnel is largely professional, able to find places outside, susceptible to the contagion of leadership. His energy and vision—his skepticism of Antitrust—his imperturbable passivity—soon come to set the tone for the whole shop.

But as agent he cannot be unmindful of his principal. Not only must a choice be made between vigor and laxness, but the formulation of any program is a highly selective matter. On questions of policy alone there are inevitable differences which the head of the Division must settle with his superior. Along a vast industrial front only a few salients can be picked out for attack; the actual choice of cases can escape considerations neither of policy nor of politics. Persons put under indictment may not take it lying down nor limit their response to an answer in court. They see Congressmen, put pressure upon the Executive, enlist all who-know-who in their cause, move heaven and earth to have the suit stayed or stopped.

Major antitrust proceedings are things of great consequence: their ramifications run far and wide into the national economy: group, class, interest, not party to the controversy, may be seriously affected by its outcome.

Moreover Antitrust is not an isolated instrument of national control. Other agencies under other statutes may be exercising oversight over the same industrial domain. If arms of the Government are not to work at cross-purposes, separate efforts must be coordinated. So clearance with the Attorney General becomes a matter of course; and, if a fresh trail is to be followed, or litigation is likely to cut a wide swath, the issue may be referred to the White House. In instances the will of the Attorney General may clash with the wish of the President and his advisers. Thus, in the *United Shoe Machinery case*, President Taft was deeply opposed to a criminal suit until the possibilities of equity had been fully explored. Attorney General Wickersham stubbornly insisted upon using both proceeding simultaneously—and did so. But throughout the course of the criminal suit, he was through notes, newspaper clippings, memoranda, constantly reminded of the Chief Executive's displeasure.[1] If opposition is met on its way up, the case-to-be may be involved in protracted delay or unobtrusively dropped. A long succession of clearances may be necesssary to get a case of the first magnitude under way.

A change in administrations adds its complicating touch. If the departing and the incoming Presidents profess the same political faith, there is still a difference. The idiom of Coolidge in public affairs is very different from that of Hoover. A shift from party to party may lead to an abrupt change in the policy of the Division. Although by party platform Democrats and Republicans alike profess an almost identical devotion to the cause of Antitrust, differences in administration are evident in the record. It is no secret that the Republican Party exhibits the greater sympathy with business in the perplexing problems which it faces, and that industry feels more secure when the weapon of Antitrust is safely lodged in Republican hands. When in power the Democrats have exhibited a little more activity and a bit stronger determination to experiment with enforcement. But the differences must not be too sharply drawn. An administration is of men as well as of a party; a political label defines none too sharply what those who wear it will do.

The course of events may trick Antitrust out of its chance. In a period of depression it has always to take the hurdle "this is no time to monkey with business"; in one of prosperity it is confronted with the barrier "better let well enough alone." In Wilson's administration Antitrust seemed about to get going. In a burst of high resolve the Federal Trade Commission was established. Then came the blow of the World War and enforcement passed into eclipse. When the second Roosevelt came into office, hard times seemed to dictate something more radical, and Antitrust could not easily move in territory which N. R. A. had preempted.

Within these larger sweeps minor events leave their impress on administration. The bullet that killed McKinley provided Theodore

[1] Department of Justice files on *U. S.* v. *United Shoe Machinery Co.*, File No. 60–137–1.

Roosevelt with his "big stick." It was Taft's luck to have met Antitrust as a Federal judge, and he had the lawyer's delight in the intricate problems it raised. An opinion of his from the circuit bench still has currency,[2] and one of his messages to Congress, all fitted out with citations, sounds like the deliverance of a judgment.[3] Wilson was a trust buster by stern intellectual conviction—but as a great humanitarian his heart went more easily into other crusades. The little conference in the Congress Hotel at Chicago which made Harding President decreed through Daugherty the low point in the enforcement of the law. When, under Coolidge, Harlan Stone went to the Supreme Court and John Sargent became Attorney General, a vigorous Department of Justice became content to leave the world to business and to God. It was whispered at the time that Stone's intent to proceed against the Aluminum Co. of America was among the reasons for his elevation.

After the weakness of the N. R. A. was revealed by the Supreme Court in the *Schechter case*,[4] public policy did not at once take the old road. Minds were still full of "another way." Harold Stevens, staunch in the old faith, departed for the Federal bench; and John Dickinson, the new head, trained in economics as well as law, thought of the Sherman Act as only one of a number of instruments for the public control of industry. When in 1937 Robert Jackson became the Assistant Attorney General in charge, a vigorous drive was launched; and, under his successor, Thurman Arnold, with more ample funds and a larger personnel, this start was converted into a vigorous campaign along a number of fronts. As antitrust approached its semicentennial it attained an all-high in the number of cases under way and the vigor with which they were pushed.

THE CHANGE IN MODELS

A contrast between the twenties and the turn into the forties throws the subject into relief. It illustrates the play of event and force, pressure and person, upon the Sherman Act to make it of small or great account. The words of the statute can in action utter very different commands. In the 5 fiscal years 1925–29, the weapon of litigation fell virtually into disuse. Of a count of 75 cases started during this period, 37 were settled by consent decrees, 13 ended with the plea of guilty or nolo contendere, 12 were dropped before they came to judgment. The attack direct was superseded by a process of informal negotiation.[5] The policy ripened and in 1929 Attorney General Mitchell, in an address before the American Bar Association, was ready to give a rather complete explanation of current practice at Justice. The Department had made it an established practice to "consider" business plans and to "indicate in a limited way its views as to the legality of proposals."[6] Where activities did not appear to violate the Sherman

[2] *Addyston Pipe and Steel Co.* v. *U. S.* (85 Fed. 271 (1898)).
[3] Special message to Congress, December 5, 1911.
[4] *Schechter Poultry Corp.* v. *U. S.* (295 U. S. 495 (1935)).
[5] It was for the first time publicly stated in the Annual Report of the Attorney General for 1926 (p. 33): "The Department has encouraged the submission to it of policies and plans adopted by the various trade associations. To the associations which have submitted such statements the Department has made clear that it cannot and will not give a statement of approval or opinion as to legality. But in the case of associations which in the opinion of the Department have endeavored to comply with the law, but whose methods appear to be of doubtful legality, the Department has brought this fact to their attention."
[6] 16 American Bar Association Journal 9 (1930).

Act, the reply took the form of a carefully worded formula.[7] The Attorney General, however, cautioned businessmen that he had no power "to license anyone to violate any statute." A determination of legality, he emphasized, could be reversed by his successor or even by himself. Businessmen could extract such comfort and guidance as they could from the announcement that there was to be no immediate prosecution.

With respect to future policy the Attorney General made overtures toward cooperation. The Department would listen to, and take counsel with, businessmen who wished to submit to it their proposals. If the plan seemed to violate the law, Justice would so state. If it came so close to the line that "we feel it would be necessary to invoke the judgment of the courts in case the proposal is executed," the parties would be so advised. If the program did not appear on its face to violate the law, but assurance could come only from inquiry into an intricate array of data "for which we have no facilities," the Department would say nothing. Where a cursory reading suggested a presumption of illegality, the proposal would be met with a like silence. Only "in the clearest case" would the industry be advised that no legal process was likely to issue.

As the late thirties ran their course, Justice seemed to move into another universe. When N. R. A. went out and Antitrust returned, the policy of negotiation, so popular in the mid-twenties, passed into eclipse. In the years 1935–39 the Government instituted 45 cases but became a party to only 6 consent decrees. Only 2 cases were concluded by pleas of guilt or of nolo contendere—and 5 were dropped. The official preview of plans to detect signs of coming restraint came to an abrupt end. A number of statements released during 1938 explained the change in attitude. Bluntly Justice took the position that the Sherman Act contemplated enforcement by the courts; it could not bind itself through any extra-judicial proceeding. An "approval voiced by individual representatives of the Department in private conference cannot be binding on the Department or create immunity from prosecution."[8] The criminal action had again passed into the primacy originally held by the consent decree. The Department met the business group as parties to a potential adversary proceeding. The validity of trade practices was to be determined in open court instead of private conference.

Thus no continuity has dogged the steps of Antitrust. The law in action has worn the livery of many masters. The temper of the times, the fervor of the party, the preferences of officials have all become terms in the formula of enforcement. The Antitrust Division has been exposed to all the winds that blow. In a Cabinet department it has no immunity from the forces of policy, politics, and pressures which play upon the administration. The frequent shifts in attitude and policy have done much to confuse lines. What is frowned at under one regime is tolerated or even looked upon with favor by another. Nor have the courts, the final arbiter of the law, been given anything like an orderly docket of cases upon which to work. They

[7] "As the facts in this matter are understood by the Department, they present no occasion for institution of proceedings under the Federal antitrust laws at the present time. Inasmuch, however, as the transaction may at some future time become the subject of court proceedings under the Federal antitrust laws, the Department expresses no opinion as to its legality."

[8] Department of Justice release, July 20, 1938.

can act only on the motion of the Antitrust Division which initiates the suits and presents the issues. The want of even an approximation to continuity has been a serious defect in the clarification of the law.

It is probable that the Sherman Act cannot escape becoming a noble experiment with each passing decade. As industry goes its dynamic way, it exhibits unfamiliar trouble spots, exposes the public to unexpected dangers, demands fresh accommodation to its national habitat. Government regulation of industry has from the first been a matter bristling with controversy. The fact of the national economy, only dimly sensed a few years ago, can no longer be overlooked; the public has consciously come to think of industry as an instrument to serve the general welfare. The courts have haltingly made their adjustments to the new current of thinking. The Supreme Court of today could hardly go along with all its interpretations of 10 or even 5 years ago. The great value of the political process is that it stimulates, freshens, creates. It makes articulate the emerging necessities of the people; it prevents controls from rusting into disuse or into enervating routine. It emancipates the law in action from the shackles of the past and allows it to live with the breath of its own age.

THE LAWYER'S APPROACH TO ANTITRUST

A political control over the administration of a statute cannot entirely escape the hand of custom. In the larger bureaus, which like Antitrust are under executive direction, heads may go and come without upsetting the established order or causing disturbance within the ranks. This is especially true where the task is of a continuous character, where the agency has found its way of operation, and where discretion has been subdued into orderly procedure.

In a smaller division like Antitrust, personnel and function impose stubborn obstacles to regimented administration. The Division is of a size to which its head can give personal oversight. The staff runs heavily to the professional; it is made up of lawyers of various competences and sprinkled with economists. To such men independent assignments are given; they rely rather upon their own judgments than upon commands; they cannot escape personal responsibility. The day-by-day administration goes forward very largely by conference. The larger enterprise is, in fact, a series of independent, changing, unlike ventures. Each case concerns a different industry, confronts a novel cluster of market usages, presents a new set of legal problems, opens the way to a fresh experiment. There must, within limits marked out by policy, be novelty in strategy, variety in tactics, patient boldness in attack. Save for clerical work and case hounding, there is little chance for quantity production or routine. A number of separate campaigns are under the same general command. But a high-powered executive, who runs his works by pushing buttons, would be shocked at the minimum to which the formal giving of orders has been driven.

Yet, even in an enterprise in which old-fashioned individualism flourishes, tradition comes into play. Among skilled men, who can usually get jobs elsewhere, the turn-over in staff is relatively high. But a small nucleus persists through changing administrations; their hearts are in the cause and they have enlisted for the duration. Officials in the high command have seen service on all fronts—before

grand juries, in trial courts, in appeal against error to the highest courts. From their experience the rudiments of a general attack have been shaped. Their understanding of how to stage the unexpected attack, how to avoid pits dug by opposing counsel, how to build up a record, how to make argument persuasive, has accumulated into ways of thought and action. The newcomer, unless he has served his apprenticeship in defending Antitrust suits, is always something of a novice. As an apprentice—whatever his rank—he reads the files, looks into confidential papers, examines the detail of earlier cases, lunches with old-timers, absorbs the atmosphere, falls into the folkways of the shop.

As a Division of Justice, the way of the law pervades the work of Antitrust. Its task is to hold industry to a legal pattern. It could probably be best served by an amphibian who could use with equal ease the idiom of law and of economics. Yet from the first it was the need for lawyers which was manifest. In the Sherman Act the Congress decreed resort to legal process to give effect to public policy. The first and imperative need was for men who could garner testimony, prepare cases, make them stick in court. It was only as litigation revealed the intricacies of industrial structures as treacherous realities, that the need for economists was recognized. An awareness that one industry is not like another, that the unscrambling of combinations into competitive units is a highly technical, yet extra legal, matter came as a very belated afterthought. Although a small staff of industrial analysts has been added, the deficit has been supplied rather by grafting some capacity at economic analysis upon a legal competence than in an open door to members of another discipline. Although tasks of the most assorted kind are involved, a lawyer is expected to carry his suit all the way from complaint to final decision.

This usage finds expression in a balance of advantage and disadvantage. The character of the investigation is determined by the Division's obligation to prosecute. Data are collected, files are examined, witnesses are interviewed, trade practices are reviewed, industrial structure is torn apart—all to the good end of building up a case. In its very nature such a process is highly selective. As any advocate preparing for a legal bout, the Antitrust attorney seizes whatever is helpful, discards whatever might tell against him, draws items together into a purposive picture. He gathers evidence instead of finding facts; pieces together a conspiracy rather than dissects trade practice. The grand total at which he arrives is far more a recitation of wrongdoing than a picture of an industry at work. He must select his place of trial with an eye out against a hostile judge; he must be prepared to prove interstate commerce and to meet jurisdictional requirements; he must fortify his cause against demurrer and a plague of dilatory motions. In a word he brings to an intricate technical process the skills which make up the lawyer's art.

But such proficiencies are attended by serious costs. The reduction of the case to a sequence of legal moves obscures the very purpose of the suit. The attorneys develop zeal in their work, are persuaded of the guilt of the accused, bend every effort that the breach of the law shall be atoned. The one-sided character of investigation fortifies an initial presumption that there is something sinister in the transactions under review. As the novel and engaging action goes forward, move

must be matched with move; and, like his colleague on the defense, he becomes absorbed in the fine points of the case. The instrumental character of the statute, the objective the suit was intended to gain, the effect of the decision upon the industry fade into the background. The case comes to be as little concerned with consequences as a war with war aims. As the suit proceeds, it is wrong that is to be hounded down rather than an industry that is to be put in order. As a result, Antitrust is frequently caught unprepared by legal victory. When a decree is to be written, or the fruits of success secured, it does not have at hand resources for the follow-up. The rounded picture of industrial practice is absent, an adequate analysis is wanting, the what-to-do-about-it has not been thought through.

In its focus upon litigation Antitrust is not unique. In every organization, instrument tends to usurp the place of end. It is true that the need for bringing objectives into play has not been entirely overlooked. An Economics Section has been organized. It has, however, not been easy to discover economists who have the lawyer's skepticism of dialectic, are content to put general theories away in moth balls, and can roll up their sleeves for the exciting drudgery of the case-by-case approach. A Consent Decree Section has recently been added. It, too, is rather a gesture toward a necessary activity than a practical reality; a good part of the time it has been a mere division on paper inanimate through lack of staff. Moreover, such units tend to be excrescences upon a structure which has made little place for them. They are not easily woven into litigation which is the principal activity of the Division.

The attorney, who must pilot his suit through the court, has his eye upon the ball. The less he concerns himself with larger issues, the less he bothers over how in the national economy it will all come out, the more he can concentrate his attention upon the issues of the case in controversy. The more he is persuaded of the iniquity of the defendants, the less troubled is his conviction that the rascals ought to be in jail and the more sincerely his voice rings through the court room. The balance of on-the-one-hand against on-the-other-hand, the realization of all that is at issue in its far-flung influence, does not rank high in the art of advocacy. In fact, an attorney's effectiveness may be spoiled by a detached attitude. Once he wavers in single-minded purpose, once he concerns himself with remaking the structure of the industry, his energies are dissipated, his powers of advocacy gone. He becomes sensitive to the intricate economic forces which compel human behavior; he entertains doubts about the sinister character of the activities being brought to judgment. Before his very eyes evil intent degenerates into a natural response to an inviting or ticklish situation. He may even, if once he deserts prosecution for understanding, put himself in the other fellow's place—and then he is sunk. An element in his case—an indispensable element—is industrial analysis; yet in its attainment he cannot compromise his office of prosecutor. For years lip service has been given to the need for the economist, yet the economist is still the stranger. Reason assigns him a task—yet he is a threat to victory in court and the folkways of the law say "no."

So it continues as the case takes its tortuous course. In large measure the attorney in charge determines the relief to be asked of the court. If criminal process is employed, the judgment of guilt ends the

action. It is, however, presumed that penalty is a deterrent; that the erring brethren will sin no more and in the absence of further evil, all will be well. Thus, by the grace of presumption, the industry is restored to health. If, however, other offenses than those of which the defendants have been found guilty exist, another action must be begun or the devil left with his due. If the plea is in equity, the relief asked is limited to the offense alleged and proved. However intricate and devious the ways of the industry, it cannot extend beyond the wrongdoing which has been demonstrated. If the basic remedy which the situation demands is extraneous to the matters litigated, it cannot be directed by the court to issue. In either case the strategy of the attack fixes the limits within which constructive moves are possible. If the case is settled by consent decree, there is fuller opportunity for reform and the larger office for the industrial analyst. The terms of such an agreement are not pent in by what can be proved in courts. Yet even here the attorney who prosecutes the action is usually in charge of the settlement; and the counts he stands ready to prove mark the way for the decree.

Thus the act in action becomes the product of its own environment. A group, whose craft is litigation rather than industrial control, has made it the instrument that it is. Another agency than Justice, another craft than lawyers, an institution of enforcement other than litigation, would have made of it something else. The ways of its shop have stamped their peculiar identity upon the antitrust law.

3. THE ORIGIN OF THE SUIT

TROUBLE SPOTS AND COMPLAINTS

A case has its beginnings in a complaint. Although it proceeds on its own motion, Antitrust is largely dependent upon private information for its knowledge of violations of the law. Its first intimation of the need for action comes from outside.

The complaint responds to its welcome. If met with silence or indifference, it comes in intermittently; if the hope flares that something will come of it, the stream flows full and fast. Thus figures present a rought index of the vitality of the enforcement agency. For the fiscal year 1932, when the computation was first started, there were 356 complaints; for 1933, the number had increased to 499. In 1934 and 1935, the years of the N. R. A., the numbers had jumped to 1,020 and 1,451; but almost all of these were concerned with violations of provisions of the codes. The spurt of interest in the regulation of industry carried over in 1936, when there were 730 complaints; but for 1937 the number had fallen to 581. The revival of activity in Antitrust shot the number up to 923 for 1938; for 1939, it had risen to 1,375; and 1940 established an all high of 1,993.

The great bulk of these complaints come from businessmen. The run-of-mine complainant is a small enterpriser who recalls with feeling and in detail some painful experience he has had with a supplier, a competitor, a party to whom he has attempted to sell. He is certain that the incident reveals a fracture of the law or at least conduct so shady as to warrant investigation. In the exceptional case he knows his industry, presents events against their industrial background, endows the questionable conduct with its legal significance. In most instances he recites only what happened to him, with little regard to industrial habitat, and with no more than a suspicion as to the source of the mischief. An oil refiner writes that he has been denied a license from the Ethyl Gasoline Corporation; as a consequence he cannot market high-test gasoline containing tetraethyl lead. A dealer in farm implements complains that the International Harvester Co. is taking from him the lines on which he makes money and, as the price of his franchise, is forcing him to handle machines that put him in the red. A small baker insists that the big bread companies are in conspiracy to put him out of business and to that end have cut prices in his sales area below the cost of production. A small dealer in fertilizer insists that the big companies maintain a solid front on price. A would-be maker of glass containers states that to the best of his knowledge a single concern holds patents to all the machinery and that, although he is willing to pay the fair price, he cannot obtain a license.

Such complaints trickle into Justice in a variety of forms. The great bulk takes the form of letters to the head of the Division, the Attor-

ney General, the President. A sizable volume is still referred to the Division by the various district attorneys. If there is personal acquaintance—and often where there is not—the victim of restraint proceeds through his Congressman; in some cases considerable pressure is exerted "from the hill" to invoke the law against the wrongdoer. If the complainant has means, he may send a lawyer to Washington to make his plea orally. In the rare instance, counsel have been able to work up a substantial amount of evidence. The miracle is the presentation of a fully developed case which, with little to add, the Division can at once take into court.

Almost without exception the complainants are little fellows—the small manufacturer crowded toward the wall, the dealer fretful at his peonage, the retailer up against sources of supply in solid phalanx. A large chain, a mail-order house, a great metropolitan store may find a united front among manufacturers but the volume in which they purchase gives power with which to force concessions. Seldom do they complain to Justice or directly resort to the courts. Few tales of woe come from concerns whose names are nationally familiar; almost none represent big business. It is easier and safer for major companies to patch up their differences than to invoke the aid of so dangerous an outsider as the Federal Government. Where a multitude of small concerns operate side by side, every man's hand is against his neighbor's. In the bedlam that ensues, guilt cannot stand out as sharply personal and a general dissatisfaction touches off few concrete complaints. The general run of complaints spring from a trend in an industry towards concentration, a situation in which the little fellow is up against the giant corporation, a point in an industrial sequence at which large units pass a good along to smaller ones.

All through the national economy vision is blurred, wrongdoing obscure, complaint half articulate. If violations of the law are blatant and obvious to the eye, the victim may be expected to cry out. If they are discreet and lie well back of the lines, they are likely to escape public notice. A swift and spectacular change in the habits of an industry will bring them out. An all but imperceptible pressure towards a different order will usually leave them mute. If a restrictive practice is well established, it belongs to the scheme of things and provokes no complaint. An old firm, even if hurt, may never have known anything different; a new one accepts the mores of the industry into which it enters. The restraint is hardly to be distinguished from other habits and hazards that must be accepted. It calls for adjustment rather than for outside help. The businessman does his thinking in terms of output, markets, profits and loss, not in the categories of public law. It is the threat to his security rather than violence to a command of Congress which prompts his initiative. He is not a research economist; he cannot trace the obvious difficulties he is up against to their hidden and unholy lairs. More often than not it does not occur to him to translate things which impinge from afar into violations of the Sherman Act and to appeal to the authorities.

Even when the matter is clear, very practical reasons may deter. The small independent is often afraid to complain. His name may become known; his act may be noised abroad; he may be disciplined by the larger concerns in the industry. Although such matters are

kept confidential, this fear is manifest in a sizable number of anonymous complaints. Appeal to Antitrust is a habit common to some industries and little known in others. In steel the usage is conspicuous by its absence. In a celebrated case, the Government was seriously embarrassed by inability to discover independents who in public were conscious of their wrongs.[1] In oil a continuous stream of complaints alleges restraint along the industrial line from well to filling station. Here the habit goes back to the eighties and nineties; it was dramatized in the victory of the Government over "the octopus" of Standard Oil. A sharp enmity marks the struggle between the major companies and the independents; the cry of monopoly is in the nature of a tradition. Antitrust has had the industry under almost constant observation; the person who recites incidents to show restrictive practices in oil is sure of his audience.

In fact, as often as not official interest touches off complaint. Complaints against the American Medical Association began to pour in after the Government had started its action. Milk became a topic for public correspondence after the suit against the Chicago distributors was gotten under way. The initial moves against parties to the building industry opened the gates to a multiple recitation of acts of omission and commission. In 1939 the bulk of complaints centered about oil, motion pictures, milk, medicine, and building—all industries into whose affairs the Division had begun to probe. An examination indicates that complaints are rather the result of actions than actions a result of complaints. This means that the number and source of complaints are rather an index of the interest of Antitrust in an industry than a barometer of actual violations. Invade a fresh industry with a suit and complainants will at once get busy. Double the number of cases and the incoming mail will show an immediate response.

The stream of correspondence goes to the Complaints Section. If a case is under way or an investigation in process, the letter is referred to the attorney in charge. If it invites an excursion into inactive territory, a lawyer in the section handles it. He calls for the file on the industry, examines previous complaints and correspondence, looks at reports from the Federal Bureau of Investigation, studies memoranda prepared on earlier occasions. If the complaint appears to justify action, a preliminary investigation may be ordered. Beyond this point it has to take its chance against others of its kind. It all depends upon its being able to support an action, finding a place in the program of the Division, proving worth while as against other uses to which staff and resources might be put.

As a forerunner of litigation, such a procedure is at a disadvantage. Complaint does serve an important office. The right to petition for a redress of grievances is highly cherished; and these letters allow victims of collusive practices to call the attention of the authorities to points within the economy where legal rights may be abridged or denied. In instances they come from responsible businessmen who have taken pains to inform themselves on the matters whereof they speak and are at least pointers in the direction of action. But the mass fall far short of the plane upon which a suit at law should begin. Some of them are "quack" letters, the work of "crackpots," who in

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

scribbling attain the vicarious importance of the officials to whom they go. Others come from parties who keenly feel real or imaginary wrongs, yet cannot rise to an articulate statement of the breaches of the law of which they complain. Still others are voiced by businessmen who wish to use the Government to get even with, or to put to a disadvantage a competitor in the industry. As a whole the stream of complaints is too personal in character, too scattering in origin, too skimpy in description to reveal the current picture of restraint. Place the intelligence it yields against the topography of the national economy and its inadequacy becomes obvious. Current procedure yields numerous tips, frequent clues, an occasional lead of significance.

All of which is not enough. Complaint yields far too small and rickety a foundation for a program of enforcement. A violation of great importance to the public may go unreported and escape the vigilance of the Division. An insignificant offense may be emphasized by a flood of complaints. An attorney, or a member of Congress, by reiterated calls, may press constantly for action. This type of activity sometimes brings results irrespective of the validity of the complaint and the importance of the practice in question. Nor is the Government always certain of cooperation from those who have invoked its aid. The case once started becomes a counter in a private game. The complainant, having set the law on his adversary, may cash in his advantage and compromise. He then becomes forgetful of what he has said; if put on the stand, he becomes an unsympathetic witness. He may even urge Justice to abandon a proceeding for which he is responsible.

Thus reliance upon complaints makes enforcement sporadic and haphazard. A violation substantially the same everywhere may occur in a number of industries—yet the several wrongdoers experience a variable justice. In one industry loud complaints touch off a case; in a second, a lesser hue and cry get the matter listed for action at a later time; in a third it escapes official notice. In respect to open-price filing, delivered price, identical bids, many schemes are in vogue; the process of litigation has touched only isolated instances. The real function of complaint is to do scouting service for the Division. Yet it does not bring in the information requisite to the formulation of a program, the planning of a campaign, the shaping of strategy and tactics. A raid into oil, a foray against patents, a thrust at an oversized corporation, an attack upon a racket in poultry or fur, an offense against a petty conspiracy in a pettier trade—this is an orderless miscellany.

CHECK AND FOLLOW-UP

A stream of complaints pours in. The great mass can be disposed of by polite answer, reference to another agency, relegation to the files. One is incoherent and implausible; a second involves a local matter and is outside the coverage of the Sherman Act; a third concerns unfair competition and goes to the Federal Trade Commission; a fourth reiterates a charge it has already been decided not to press; a fifth supplies a corroborative detail for an action under way. It is only the *n*th letter which presents a lead of promise that demands a follow-up. It may await action until growing doubts cause its discard; be held over for the time when available personnel allow it to be taken up; be scheduled at once for further investigation.

For the follow-up the Division is not well equipped. The older notion that all wrongdoing is of a kind has persisted and justice has been fitted out with a single agency of inquiry. For a lack of a staff of its own, the Division has to rely upon the Federal Bureau of Investigation. Accordingly, an attorney prepares a memorandum. This does not sketch a tentative outline of trade practices against the background of the industry with the request that lines be corrected and blanks be filled in. Instead, conforming to a pattern worked out for the apprehension of run-of-the-mine crime, it lists the complaint, makes much of the concretions of name-time-place, recites particular questions to which specific answers are wanted. The Bureau assigns a special agent, who operates in the locale to make the investigation. The agent calls upon the complainant, rounds out his statement, secures the names of others who may have similar grievances, puts his catechism to each of them, writes his report. If requested to do so, he interviews the parties against whom the charges are made. His report goes to his headquarters in the field, to the central office of the F. B. I. in Washington, and eventually to the Antitrust Division.

It is hardly fair to F. B. I. to impose upon it such a responsibility. Its dominant task is to track down ordinary crime. It is organized to follow the trail that leads to the extortionist, the white slaver, the kidnaper, the racketeer, the bank robber, the automobile thief, the professional spy, the person natural or corporate who makes wrongful use of the mails. Its techniques and traditions are geared toward detecting personal guilt, uncovering the fraudulent scheme, getting the goods on the gang. Its process of investigation has developed in response to the persistent demands upon F. B. I.—and are largely irrelevant to the highly specialized needs of Antitrust. They are put to their hardest—possibly to an impossible—test when used to re-create a crime which is largely impersonal, lurks in the network of industrial practice, is inseparable from the ordinary conduct of a legitimate business. The craft of Sherlock Holmes was never contrived for the folkways of the national economy.

The F. B. I. has no special group assigned to Antitrust work and experienced in its ways. Men are detailed as they are needed, are available, are near at hand. A fitness for the task or previous work in the field is wholly a matter of chance. If there is personal choice, Antitrust is likely to be avoided; the better men in the Bureau do not like to be sidetracked from ventures for which they are specially fitted, where their footing is sure, and in which definite results are fairly certain. Actually, the complaint presents merely one lead—possibly a very inadequate one—into the restrictive practices of industry. The task of the operator is to gather as much information as he can in the time available about the way in which the industry operates. To be successful, the process of inquiry should be flexible and cumulative. Lead should touch off lead. A practice, against which complaint is made, must be followed into the network of impinging trade usages. The questions asked in interviews should evoke further questions. The investigator, competent in industrial matters, experienced in its ways, with an intuitive smell for his stuff, must feel his way. The known must be used as the key to the unknown; an analytical picture must be compounded out of items which at the beginning may not even have been suspected. If the operator is blessed with such attainments,

it is from other experience or by the grace of the gods. It does not inhere in the current discipline of F. B. I.

At best F. B. I. is an instrument to be employed by Antitrust. Yet its independence prevents the oversight essential to such a work of agency. The present separation of Bureau from Division leaves its impress upon the investigation. All communications move along ordained channels and are set in a rubric of formalism. Antitrust submits its request; the task may be undertaken immediately, await its turn on a crowded calendar, linger for weeks before men are free for the job. An inquiry may be started, and the operators presently diverted to some new case of its own which F. B. I. deems more important. Investigation may be delayed, deferred, sidetracked, when the urge at Antitrust is for full steam ahead. The Bureau lacks norms by which to judge immediacy and importance. The brief memorandum which comes in lists only the facts of the complaint and asks a few categorical questions. It is a shot where there is little light; yet the man assigned to the case—without previous acquaintance with the trade and untutored in economic analysis—is expected to penetrate to the intricate arrangements of an industry and to bring back the materials by which to judge the complaint. Occasionally, a brilliant report is received. A single concern furnishes tomato crates to a Mississippi territory; it skyrockets its price just as the crop is ripe and must be shipped; the nearest alternative source of supply is 4 days away. But this is a simple situation and the operator a person of unusual competence. It is inevitable that a large number of reports are quite inadequate to a decision in respect to further action. Nor is it surprising that the ordinary operator finds Antitrust work an unpleasant chore in contrast to the man hunt which is his usual employment. A dualism runs through the whole procedure. Antitrust has no direction over its essential instrument of investigation; the Bureau performs detailed tasks isolated from the objectives they are to serve.

The saving feature is the flexibility of the arrangement. The role of F. B. I. is not exclusive. Although its means are limited, the Division cannot completely escape field work. In instances the facts are obviously so intricate and the issues predominantly so legal that Antitrust attorneys take to the road. In "the big case" members of Division and Bureau take the trail together. The work may be divided between them, or an organized team representing the two agencies may descend upon persons suspected of wrongdoing. But as yet action in concert rather adorns than gives character to the process of investigation.

PROMOTION TO A CASE

A decision to make a comprehensive investigation really amounts to the selection of a case for trial. It rarely happens, after a matter has been thoroughly probed, that the issue is dropped. In virtually every instance departures in the pattern of the industry from the standards of antitrust are discovered and enough evidence is gathered to support a legal process. In older days, when a single restraint was an object of legal attack, the complaint was something of a guide. It limited the investigation and suggested the remedy to be asked. Today it is in the nature of a motion to open up the whole industry, its structure and corporate controls, to official scouting. In its course the investigation

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may stray far from the practices toward which the complaint was pointed. The original grievance may sink to a minor trouble spot in a larger pattern of restraint to which the attention of the court is to be directed.

In a particular case a decision to proceed or not to proceed rests upon a number of factors. By far the most significant of these is cost. A major antitrust suit is almost of necessity a Hollywood production; it is a venture into litigation on a grand scale. A single action constitutes a heavy drain upon the resources of the Division. A venture such as the *Madison Oil case* could go forward only at the expense of other important suits that needed to be pushed. At its inception in 1935, 3 lawyers were assigned to it; once it was really under way the number was increased to 7. Of the 42 lawyers then in the Division one-sixth were concentrated upon the affairs of the major oil companies. The cost of the preliminary investigation—analysis of complaints, trips into the field to verify hunches, scrutiny of the practices of the industry—ran to $30,000. In addition, there was the expense incurred by F. B. I. for the 15 or 20 agents whom they put on the case. The expense of the grand jury—used to gather testimony as well as to return an indictment—was another $40,000. Expenses incident to the trial—interlocutory motions, removal hearings, defense of the indictment's validity, preparation, and photostating of exhibits, the combat at law itself—ran to a figure of $60,000. Another $25,000 was spent upon the various appeals which ensued to the circuit court of appeals and to the United States Supreme Court. In the years 1936 to 1939, over $150,000 was expended upon a single case.[2] A saving might be effected by resort to equity in lieu of criminal action. The expense of grand jury proceeding might thus be avoided. Yet the saving is not net; investigation, often quite protracted, must be used as a substitute in gathering evidence.[3] And in equity, where all the issues to be faced in a decree must be anticipated, proceedings are likely to be long drawn out. The suit against the Sugar Institute was before the lower court for several months.[4] The cause against the Aluminum Corporation of America, after 26 months, had not passed beyond formal trial.[5]

This means, of course, that only a very limited number of major suits can go forward at any one time. An average expense can roughly be set down at $50,000 a year; yet the figure means little. It is quite impossible to work out in advance a budget estimate for a prospective case. The evidence of wrongdoing may be easy or difficult to get; it may be assembled in a few weeks or over many months; it may be testimony to overt fact or inferences to be wrung from intricate circumstance. Between indictment or complaint and the proceeding in open court stretches a period of legal skirmish. Venue, jurisdiction, party, are to be fought over in interlocutory motions. A demurrer may be filed to the indictment; if it is sus-

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[2] In a criminal case, fines imposed upon defendants found guilty may recoup the Government for the costs. They might even be made—under a shrewd selection of causes of action—to make Antitrust a profitable business enterprise. But such considerations are alien to the conduct of the Division; all fines go into the General Treasury; its expenses must be met out of its own budget.

[3] In a criminal case, the expense of the grand jury can be avoided by the use of an "information" instead of an indictment. This has been done in *U. S.* v. *American Tobacco Co.* (1940). In this case the Antitrust Division spent large sums in making the investigation of the cigarette companies.

[4] *U. S.* v. *Sugar Institute* (15 F. Supp. 817 (1934); 297 U. S. 553 (1936)).

[5] *U. S.* v. *Aluminum Co. of America* (S. D. N. Y., Eq. No. 85–73, filed April 23, 1937).

tained by the district judge, it may have to go up to the highest court in the land before a day is set for trial. In the Chicago milk case an inordinate time passed before the substantive issue could be raised in open court.[6] It was a year and a half after action was begun against the American Medical Association before the court of last resort removed the ultimate legal difficulty and the case could go to trial.[7]

The attitude of the defense is an unknown quantity in the formula of expense. It may be friendly or hostile, inclined to speed the matter along or to obstruct with every delay. It may seek to escape controversy, enter a plea of nolo contendere, accept a small fine, get quickly out of court. It may cooperate in simplifying the trial, expediting the appeal, securing a definitive legal judgment upon the practices in question. Or it may marshal every technique of obstruction known to the resourceful lawyer and for month after month stage battle after battle over relevancy and irrelevancy. Always a settlement between the parties is an alternative to formal decision; always the consent decree hovers around the fringes of the legal proceeding. A feeling-out begins long before the case comes to trial. Informal negotiation blows hot and cold, sometimes many times over, during the course of the litigation. At any moment cost stretches uncertainly ahead; at any moment expense may abruptly cease.

All of this has its incidence in the decision to drop, to defer, to proceed. It is no simple matter of violation, presentment, judgment. If Congress or some kindly source would make adequate funds available, suits would go to trial upon their merits. As it is the Division does its work within a fixed budget; a substantial part of this is laid out on legal staff. Cases cannot go to trial except as attorneys are available to guide them through the mazes of the process of litigation. Yet plausible causes, in which the Division is anxious to proceed, are piled high. Preliminary investigation follows close upon the heels of complaint; as it yields a strong presumption, a fresh entry is added to those awaiting action. Then, as lawyers become available, they are assigned to ventures which for months or even years have been awaiting their turn. Thus the budgeting of cases is primarily a matter of personnel.

Within the zone of discretion fixed by budget and personnel a number of considerations shape the selection of cases. An element of chance cannot be eliminated. A number of invitations to action may be equally plausible in volume of complaints, persistence of pressure, importance within the economy. There may be little to choose between them. A full investigation is necessary to resolve the competing claims. Yet in each instance investigation is a costly process; the Division feels called upon to get results from funds laid out; and results are forthcoming only by pressing the matter to suit. Causes should go to action in terms of their importance; yet only through

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[6] The indictment against the Borden Co. was returned November 1, 1938. The district court sustained the demurrers of the defendants (28 F. Supp. 177 (1939)) but was reversed by the United States Supreme Court (308 U. S. 188 (1939)). The case was settled by consent decree on September 16, 1940.

[7] The indictment was returned December 20, 1938. On July 29, 1939, defendants' demurrers were sustained (28 F. Supp. 752). The Government appealed the case to the court of appeals and also petitioned for writ of certiorari. Certiorari was denied (308 U. S. 188 (1939)). The court of appeals reversed the lower court (110 F. (2d) 703 (1940)), and the Supreme Court again denied certiorari, this time on request of the defendants (60 S. Ct. 1096 (1940)). The case is set for trial in October 1940.

action is importance determined. Rough criteria must, therefore, do duty for detail of fact, clean-cut analysis, careful comparison. The criteria of choice, far too beset with intangibles to be reduced to a formula, include the volume of complaints, the pressure of their reiterated beat, the strategic position of dominant firms within the industry, the power of the mighty to impose discipline upon their brethren, the significance of the injury to the general public, the ease or difficulty of securing evidence, the anticipated hazards of the judicial battle ahead.

As there are many terms in the call to decision, so are there many attorneys pressing for action on many fronts. Almost every member of the staff gets persuaded by his own case. The lawyer who is aggressive in digging up "the stuff," and in getting his points in convincing array, is likely to get quicker action than one who is detached, retiring, inclined to nurture his own doubts. The attitude of the head of the Complaint Section, the experience and predilection of its staff, the interest and zeal aroused by the initial inquiry among other officials of the Division, all impinge upon the judgment. In addition, there the activities of their attorneys, the persistent calls at Justice, the are the pressures of interested outsiders—the voices of the petitioners, receipt day after day of telling bits of evidence, the inspired requests for "information" by Members of Congress.

The formal decision rests with the Assistant Attorney General in charge of the Division. His scheme of values determines the kinds of cases which are to be brought. As the directive head gives way to a man of another mind, the active front may shift from gigantic monopolies to trade associations, to basing points and price leadership, to privilege asserted in the name of patents, to conspiracies of contractors with trade-union officials. His reluctance to employ the sanctions at hand against concerns whose dominant position had been attained by "natural growth," against gentlemen whose concert of action may be sheer coincidence, against laborers in league with contractors to improve their condition of work, defines the orbit of his program. Within such limits, marked out by a personal conception of public policy, cases are selected upon their showings.

4. BUILDING THE CASE

THE STAFF AND ITS TASK

The matter somehow has crossed the line which separates complaint from cause of action. In recognition of the fact, rather than as an act of judgment, it is transferred to the Trial Section. The lawyer who has conducted the initial investigation, may move across with it, or it may be assigned to new hands. In either case the attorney in charge puts in his request for assistants—and accepts a far smaller staff than he deems adequate. If the suit is of the first magnitude, he may, for a time at least, command as many as a dozen or more men. In planning a major attack he may count upon six to eight lawyers; probably a couple of technical consultants, possibly an economist and an accountant. His technical staff numbers one or two men of senior and three or four of junior rank, often quite recently fresh from law school. It will be supplemented by five to a dozen agents from F. B. I. But for ventures so variable, no formula will do. In number and competence the staff must be as flexible as the work to which it is put.

The small force is sent into the field to gather evidence. If the preliminary inquiry has been kept secret, the appearance of a deputation from Justice is a signal to the industry. The underground grapevine swings into action; within a few hours the prospective defendants—and even persons only remotely concerned—will get wind of their arrival. Usually the industry has become aware of the Division's interest long before F. B. I. agents first were in evidence. Since time must always lapse between the inquiry prompted by the complaint and the decision for a thorough investigation, the defendants-to-be have already been accorded opportunity to construct bulwarks of defense. Files may have been gone over with a fine-tooth comb; intercompany conferences may have been held to determine a unified strategy of defense. Even independents—suspected to be the original complainants—may have been sounded out to determine how much they know and where they stand. The small group from Antitrust finds itself in an atmosphere fraught with anxiety and suspicion. Even in a petty industry the resources for defense vastly exceed those of the prosecution.

The task of the staff is to build the case. Facts, information, intelligence about the conduct of the industry must be sought and transmuted into acts of personal conduct. In marshaling its proof the Government must make use of the moves of litigation devised for the private suit. In a personal controversy the parties are equally involved and are presumed to have a like familiarity with the facts. For the same reason they are assumed to have equal access to such documentary evidence as exists. In any event plaintiff and defendant are antagonists, each with his eyes open to the salient matters in

controversy. The office of judge and jury is to hear both sides, to listen to proof and rebuttal from parties equally interested and informed, to scrutinize circumstance for evidence, to allow color to be canceled by color, to come to a fair judgment. The situation is quite different in an antitrust case. Here the enforcement agency enters the domain of controversy as an outsider. The facts, the records of activity, the documentary evidence, are all in the possession of the adverse party. Unless the persons injured are able and willing to supply the material, the testimony with which to convict must come from the lips and records of the accused.

THE WITNESS—EAGER OR OBSTINATE

Rarely can Justice build its case upon the evidence of victims of restraint. They may have taken its full impact; they may be glib with suspicions, rumors, clues, theories. But as persons sinned against rather than sinning, they did not sit in on the conspiracy. Through eye and ear they can give little overt testimony to the eventful decisions. A threat clumsily phrased, an indiscreet letter gone astray, a note of instructions sent out to an agent, a suspicious memorandum fallen into the wrong hands, a conversation overheard from a nearby table, a remark of an indiscreet salesman—such are the shreds of proof which the injured party can offer. They offer presumptions of guilt feeble indeed against the skills which make up the art of restraint. For less is spoken than is to be done; the face of the understanding is given an appearance of innocence; the secret is hedged against discovery. Unless the conspirators blunder or blurt, unless their victim is a skilled industrial sleuth, a harvest of surmises yields a small grist of proof.

But suppose that the little fellow does have important bits of information. He may have been an insider now kicked out for "chiseling on the trade." He may have been a member of a trade association, where the cooperation of all the firms is essential to make a restrictive practice effective. He may for long have participated in the negotiations for maintaining a united front. He knows; yet he hesitates to speak. A pledge of a sort has been given to his fellows in his going into such an arrangement. Even if the result is to his own hurt, morally he is not quite free to tell on the other fellow. Nor does conscience alone deter. The harm he suffers must be balanced against the still greater harm he may have to endure if he becomes an informer. Every group, from schoolboys to parsons, has its distinctive way of making life uncomfortable for the nonconformer. Even when sharp differences arise, the act of breaking over the traces is a last resort. The dissenter cannot guess just what the consequences of his tattling will be—to him as well as to the trade. His own enterprise may go down in the general demoralization of the price structure. Moreover, his brethren hold over him an effective club; he himself is involved in the violation. If he turns State's evidence, ordinarily he is rewarded with immunity from prosecution—but is exposed to the private police of the industry. If he merely "squeals," he bares everyone—including himself—to the vengeance of the law.

The ties that bind the victim of restraint to his trade make him an unwilling witness. If he operates as an independent within the

crevices of the industry, his chance to carry on is by the grace of the big fellows. His business does return a living; his investment and personal competence is built about it; he has no manifest alternative where he would be better off. Better a vassal, to whom a trickle of "gravy" is doled out, than utter freedom and nowhere to go. Moreover the practice that irks and constrains him cannot be viewed in isolation; it is an aspect of a network of impinging usage which keeps the industry going. He may want to rid himself of a baneful practice; yet he cannot afford the role of a modern Sampson who pulls the structure down upon all its occupants. He may quarrel and seek amendment; he may use the threat of prosecution to better his position; but he will hesitate long before giving full vent to his complaints. Even as a vassal, he has given hostages and cannot escape their pledge.

In the decision to be a friendly or hostile witness the fear of reprisals is an important factor. His alliance with the Government is for the duration of the case; his contact with brethren of the trade—as associate and competitor—is for his business life. He must live in peace with a group aware of the need for a collective security. He cannot afford to be a "sorehead"; there are too many ways of "getting" him which are alike effective and legal. Aspects of a business are many; its connections run far; points are numerous at which the heat may be put on. Great possibilities lie in the field of finance; loans may be called in at an embarrassing moment; long-time arrangements, maintained as a matter of course, may suddenly be revised; the demand for short-term credits abruptly may be refused. The return of imperfect goods, once taken for granted, may become a subject of prolonged negotiation. The services of repair men, formerly quite prompt, may take weeks to secure; the delay may spell the difference between profit and loss. Goods may be dispatched to the wrong destination; through some clerical error they may not be shipped at all. When eventually they arrive, the wares may be defective in workmanship, of sizes different from those ordered, of colors for which there is little sale. All of these devices are of proven "educational value"; all of them can be made reminders of the consideration which the rugged individual should show to his fellows. And, as instruments of discipline, one may succeed another faster than the industrial sleuth can turn such activities into the kind of evidence that a court will respect.

It is, accordingly, not surprising that a witness in an antitrust case is unreliable and unpredictable. Time and again he appears in excellent health in private conference and develops a mysterious malady as the case goes to trial. Time and again he talks one way in a confidential interview and with quite another accent on the witness stand. Time and again the difference in testimony between the story to the grand jury and the evidence in open court indicates lapses in memory of a most alarming character. Time and again a witness, quite certain beforehand about the chain of events, jumps the traces, discovers another reservoir of fact, and becomes a belligerent witness for the defense. A threat of prosecution for perjury is a necessary defense of the Government's case; but even its imminence does not always deter. It is frequently suggested that witnesses for the Government have been "tampered with" by the other side; in instances, no doubt they have. But the discrepancy is usually due to the

more refined methods by which witnesses for the prosecution are reached.

All the chicanery which attends ordinary litigation is imported into the antitrust case. It is possible for defendants rather shrewdly to guess who the principal witnesses for the prosecution are to be and ingeniously to appeal to all the motives which prompt action. Incentives to greed, prestige, position, fear, getting ahead, are skillfully played upon. A dealer gets a better contract, an agent is shifted to a more promising territory, a distributor is unexpectedly blessed with a large customer, a small competitor learns quite out of the blue something to his advantage. No threats are employed, but stories get around of what happened under similar circumstances to kindred persons who had persisted in stubborn ways. Where the defending companies are large, well financed, adequately staffed at law, the possibilities are almost unlimited. The game is the ordinary game of litigation, but it is played on the level and with the refinements of power politics. A brotherly boost is, however, far more common than the open bribe and the veiled threat has almost replaced downright intimidation. If the witness hostile to the defense has left, or intends to leave, the industry, a number of pressures may adroitly be put into play. If he is to stay, a few reminders may be enough to make him walk warily; he has much to lose and little to gain from wearing the Government's livery in the witness box.

In fact, the witness for the prosecution faces an agonizing ordeal. As a man of integrity he may want to tell "the truth, the whole truth, and nothing but the truth." As a law-abiding citizen he may be concerned that business conduct shall measure up to the standards which the state sets for it. But his anomalous situation closes upon his capacity for independent action. As a businessman an indulgence in testimony which may take away his livelihood is a luxury which even the law has no right to impose upon him. As a servant called upon to serve two masters, he puts on a front, tries to smother beneath outward poise the conflict within, and endures as best he can his tortuous hours in the witness chair. And as law and its language go, his conscience has its zone of tolerance. The limits of a transaction are not sharply fixed; no two persons will recite the event with just the same details. Actions are more than overt behavior; their legal quality proceeds from the motives which prompted them, and no one can with certainty probe the human heart and find intent. Evidence is not an instrument of precision which can capture human conduct with strict accuracy; words are symbols, each of which has its synonym; the chosen phrase not only recites the fact but elicits an emotional response.

The friendly witness would—if he could—tell his story simply, directly, with corroborative detail. He is constrained by personal interest to tell no more than that which against every doubt stands out as the truth. He responds to the stimulus which for the occasion the Government puts on. But an antitrust suit is a passing episode. When the case is won or lost the attorneys for the prosecution will turn off the heat and move on. But the witness is left within his industry; he must face the hostile scrutiny of his associates in the trade. It is the pressure of what lies ahead which is the real "intimidation" of persons called to the stand for the Government. The

creation of a parade of horribles in the mind of the informer is usually enough. A resort to the overt threat is to be reserved for the literal-minded.

EVIDENCE BY CONSCRIPTION

As a result, the Government must look elsewhere to round out its case. The testimony of witnesses—friendly or hostile—is invaluable. It maintains the ceremonial of a trial; kindles the fire of personal combat; provides illustration, concretion, human interest to the drama at law. But it rarely sustains a complaint by the weight of the evidence. The requisite data, in massive formation, must be secured from the persons, natural and corporate, who have violated the act. Of necessity, this evidence is largely confined to documentary materials. Save in the rarest case, the companies in defense present a united front in categorical denial of violation. If out of their own mouths no word of guilt is to be had, resort must be to their files.

The evidence may be pointed and abundant—yet hard to reach. The Division has no formal power to subpena incriminating documents from the files of the accused. Short of calling a grand jury, its only available device is polite request. But where persons may presently become adversaries in a legal action the amenities are at a discount. Businessmen are not likely to cooperate with enthusiasm in an enterprise designed to prove that they are criminals. They can hardly be expected, with unerring eyes, to draw from a multifarious record just those exciting items which are most likely to send them to jail. A ritual which will quiet suspicion and open files has not yet been devised. An attorney for Antitrust may state that "The investigation is a mere matter of routine"; he may recite that the intent is no more than "to clear up a misunderstanding" or "to silence a complaint." He may plead that "the law-abiding firm has nothing to hide." It is of little use; the very word "Antitrust" suggests an adversary proceeding. The inspection of records is regarded as a skirmish before battle; and the accused are ready to throw up a defense.

The polite request is met with a variety of tactics. A small concern, lacking experience, may be ignorant of the lack of formal power by the investigators. It may be abashed before the might of the United States, especially if agents of F. B. I. are present. Authority or access to a subpena may be assumed; the documents asked for may be forthcoming; the inquisitors may even be taken directly to the files to make what examination they will. A large concern does not yield so easily. To it the matter is not novel; it possesses an informed legal staff; its attorneys are present at the conference; they are under no illusion as to the Government's power. The usual technique is to play along and to defer hostile engagement. The initial call at the offices of the corporation frequently defers decision; a discreet interval must be given for a consideration of the request. The company's attorney is occupied with court work, is out of town on business, has just departed for the first vacation in years. In a matter that may have legal consequences, the officials do not feel free to act without consulting him.

Sometimes certain general data—often accessible to the public in

some form or other—is proffered with a show of gallant cooperation. Promptly and without reserve are offered articles of incorporation, the names of major holders of securities, published reports of the company, statements of profit and loss. It is often not difficult for the Government to secure the minutes of the meeting of the board of directors, particularly if they have been skillfully "recorded" by attorneys for the company. And, as a show of good faith, an assortment of records—marked alike by engaging variety and generous quantity—attends the ceremonial response to the request for information.

The crux of the matter is access to the files. A request usually induces the response of willingness to comply "if we can know exactly what you want." The argument is that there are hundreds of filing cabinets; that it is physically impossible to subject all to examination; that it is only reasonable for the Government to state exactly what it wants. All of which is quite plausible; yet Antitrust is not able—nor can it afford—to be specific. It is at the beginning, not the end, of the trail; it has a handful of clues and hunches, not a catalog of incriminating writings; the very purpose of its inquiry is to discover exactly what documentary evidence there is. So a list of documents is asked for with enough of detail to make certain the identity of each. The procedure is to be specific, yet to make the words of the request broad enough to comprehend any item which later proves to be valuable. The request is set down in the manner of a subpena; files are asked for by subject and period of time; specific documents, if actually known, are played up.

In practice, access to files becomes a matter of many moves. Like the action at law which it heralds, it is freighted with circumstances, request and answer, limitation and definition of the issue, delay. It is an extralegal and overtly friendly procedure; yet its process is strangely reminiscent of a case in controversy. Investigators are regretfully informed that files which are "now no more than ancient history" are miles away in an old warehouse. Or that, as "no longer useful," they have been destroyed. If they are in existence, it may be some weeks before subordinates of the company can be freed for the necessary search. It sometimes happens, through the inadvertence inseparable from such a matter, that a file under critical scrutiny reveals obvious gaps—apparently as surprising to the officials of the corporation as to the investigator. Officials vary enormously in their outward attitude, although in the large corporations, particularly, the tendency is in the direction of politeness and friendly cooperation. Nevertheless procrastination, a deficit in materials, the wild-goose chase are omnipresent to deflect or discourage official aim.

But etiquette has little to do with the result. Amity or hostility, the open record or the file stubbornly closed, usually leads to the same thing in the end. Always some time elapses between the first appearance of Antitrust investigators and the granting or withholding of material. The initial call is an event which officials may turn to the advantage of their corporation. It is, in effect, an announcement of an impending antitrust suit and a warning to the company to regiment its activities for defense. In the interval marked by "deliberation," files may be rifled, entombed in some unlikely spot, mysteriously disappear for all

time. Difficulties are discovered which must be resolved; simple requests are made complex and require clarification; an attempt is made to wear the question out before it ever comes to a decision. A series of ingeniously timed delays may protract the issue for months or even years.

RESEARCH BY GRAND JURY

As an alternative Antitrust is led to employ the grand jury to build its case. A staff of attorneys, with a corps from F. B. I., is sent into the field. It seeks clues to specific acts, fixes dates, names names. In a short time—usually 2 months will suffice—it has quite enough in the way of leads to prompt an agency equipped with power to issue subpenas and inquire further.

Usually the first call of an Antitrust attorney or an F. B. I. agent is speedily noised through the whole industry. Occasionally officials are taken unawares with summons, under threat of lawful punishment, to come, to tell, to bring all the documents. If the scouting party does its work with neatness and dispatch, the subpenas can usually go out before the officials of important companies can formulate a concerted line of defense. The resulting variations in the stories which the several parties tell make the grand jury suspicious. It is also possible to check personal statements against the testimony which the documents yield and to note discrepancies. In any event, the files have been brought under the jurisdiction of the court and can be subjected to careful examination. In the *Madison Oil case*, 18 tons of records were shipped by the major oil companies to Wisconsin.[1] In the current *Drug Case* 10 tons of documentary data were sent to the District of Columbia for antitrust examination. Thus a judicial inquisition is employed to replace or to supplement the Division's voluntary inquiry and the Government is supplied with plenteous materials out of which to fashion its case.

The grand jury is a rather blunt device. It is employed by the Division only for lack of an instrument that is better. It was never shaped for industrial research and, like every agency upon which the law imposes an alien function, it responds clumsily, expensively, uncertainly to the demands upon it. Its mechanics are not geared to antitrust work. In many places it meets only at occasional intervals; it is confronted with a run-of-the-mine assortment of crime; its period of life is severely limited; it lacks opportunity for the painstaking work which an infraction of the Sherman Act involves. Only in cities like New York and Chicago, where grand juries are sitting continuously, can immediate action be expected. A special grand jury may be called; but only the exceptional case will justify the bother and cost.

It presents an extravagant way to carry on an investigation. A group of 23 must be kept continuously in session to discard rumor, to separate fact from surmise, to determine the probability of guilt. A judge must be at hand, a group of attorneys busy, the retinue of a court in the offing. Witnesses must be brought from far and near to testify in person; their per diem runs to a sizable sum.

Nor is the personnel of the grand jury ideally adapted to its work. The task is to probe into intricate matters, to get on top of the heap of

[1] *U. S. v. Socony-Vacuum Oil Co.* (23 F. Supp. 937 (1938); 105 F. (2d) 809 (1939); 310 U. S. 150 (1940)).

collected fact, to cut through industrial structure to the trade practices beneath, to assess as legal or illegal the conduct of individuals. Skilled analysts, much experienced in the ways of the national economy, would have great difficulty at such a job. It is hardly fair to expect superlative performance from such citizens of the world as make up the ordinary grand jury. The group may be a miscellany of middle-class men and women who take such a public service very seriously. They find the work exciting, become deeply interested in the evidence presented, are shocked at the character of the practices paraded before them. After a few witnesses have testified, their attitude has been determined; they are usually quite ready to return indictments against all suspicious characters. Often it is hard to keep them from definite action until the work of inquiry has been completed. The attorney wants to hold them until he has built up a case; they want to set the wheels of justice moving and go home. A "run away" grand jury is a threat to the success of his suit.

But grand juries are not of a kind. Their several types behave in quite different ways. In recent years the "silk stocking" jury has been a powerful agent in law enforcement. It is composed of respectable men and women—recipients of funded income, salaried persons in the higher brackets, business executives of high standing in their communities. If the case concerns the racketeer, fraudulent use of the mails, kidnapping, narcotic drugs, the traffic in white slaves, the ordinary run of Federal crime, their presence is a joy to the prosecutor. But if it is an antitrust suit, there are hazards. In the domain of public control the members of such a jury have views of their own, and the attorneys must walk warily. On occasion jurors have displayed a knowledge of the fine points of the law and have even insisted upon distinguishing cases—a competence a little unseemly for persons who are supposed to belong to the laity. Frequently, too, they find it not impossible to put themselves in the other fellow's place. As often as not they are reluctant to indict persons who belong to their own class and are respectable pillars of society.

Nor is the grand jury proof against the hazards which attend its type of investigation. The individual summoned before it must bring all the documents listed or "described" in the order. But to the words "subpena duces tecum" the words "cum box-car" can hardly be added, and reason must appoint limits to the demand. Again, there is not enough knowledge of the operation of the industry to draw up a catalog; the order has to appear specific in the face of a want of concretions. If materials are spirited away before the subpena is served, there is usually nothing that can be done about it. The witness, when questioned, asserts that a periodic clearance of the files is to the corporation a matter of routine. If records are destroyed after the summons has been served, the witness exposes himself to the charge of contempt. The barrier that protects him from imprisonment is the difficulty of securing proof of his act. There is no certain norm by which the completeness of files can be determined. Even when it is established that materials have been withheld, a number of plausible explanations must be overcome. The witness misunderstood the character of the documents wanted; the materials were garnered by a subordinate; specific records could not be discovered in the wilderness of miscellany called storage. The positive proof that documents

have wilfully, wantonly, contumaciously been withheld from the court is a heroic endeavor.

Yet the sanctions of juristic process are compelling. From days of old, as a body which probes into grave matters, the grand jury has enjoyed great prestige. The mere summons to appear before it evokes considerable alarm. The threat of being in contempt of court tends to restrict evasive behavior to subtle and indirect forms. A witness can, of course, "stand upon his constitutional rights" and refuse to testify. But that is an expensive indulgence which under the circumstances he can ill afford. His act creates a bad impression upon the grand jury and induces an easy presumption of guilt. Ordinarily he is asked to sign a waiver before he begins; if he does, his evidence stands even against himself; if he refuses, he is dismissed. The technique often employed is to use minor officials as witnesses. They can tell all that their principals can tell; their failure to waive is of little consequence; for, as agents, they have followed instructions and are not responsible for policies. Their function is the elucidation of the matters before the grand jury; they may not even be listed as defendants.

Nor is the inquisitorial power of the grand jury to be treated lightly. Its duty is to inquire diligently into breaches of the law, and its discretion is almost limitless. Its procedure is of an ex parte character, its task to do no more than to present suspicious individuals. It is the function of the court, when the case comes to trial, to listen to the counts, to hear the answer, to render judgment. At that time the witness enjoys benefit of counsel; his attorney is at hand to keep straight the path of his testimony, to guard him against pits dug by the enemy. At the trial every adverse move, act, question, is subject to challenge. But in the grand-jury room the witness has no such friendly help. His lawyer is not in attendance to select, arrange, direct, color, interpret his recitation of facts. Since he has only the vaguest notions of the direction the inquiry may take, any real preparation by his attorneys is out of the question. During the ordeal he must rely largely upon his own ingenuity. A business official who is accustomed to lean upon counsel approaches with something like terror a legal situation in which he is compelled to go it alone. And anything like a united front by the several concerns is out of the question. Moreover, the hazard of conflicting narratives serves to discourage fabrication. There may be silence, reticence, lapses of memory; but the testimony of record is a nearer approximation to truth than any later proceeding is likely to yield.

Thus the grand jury has a peculiar rôle in antitrust. Its traditional task is to present infractions of the law; the function of industrial analysis has been grafted upon it. In the development its initial office has passed into eclipse. Nominally, the grand jury has the power to indict or refuse to indict; in reality it usually does the will of the prosecuting attorney into whose hands the real discretion has passed. Yet it has not been reshaped to perform the inquisitorial duties thrust upon it. The inquiry partakes of the nature of discovery; yet requests for documents must be reduced to bills of particulars. The files should remain intact until needed; yet an interval between rumor and subpena allows many a slip. The procedure puts a premium upon guile and penalizes the virtuous businessman who refuses to tamper.

It may even tempt the corporate executive to an orgy of destruction.[2] Often the documents upon which the Government would like to rely are gone for good.

THE THRUST AT WEAKNESS

This reliance upon documentary evidence has its repercussions. A half century of experience with the Sherman Act has taught industry a great deal. An art of defense has been refined which makes the spelling out of the restraint a tedious affair. An overt agreement to limit production, to allocate output, to fix price—unless a validating sanction is at hand—is now passé. It thrives currently only in the quieter back country of the national economy—in the medical profession, among trade unions, in a highly competitive industry whose members must in explicit terms bind themselves not to kick over the traces. But the up-to-date industry is streamlined against testimentary exposure. The informal understanding, the telephone accord, the accepted gesture which all are to follow is enough. In segments of the industrial system even such forms of collusion are fading into disuse. A general acceptance of the same notion of a fair mark-up, of the same terms for a cost-into-price formula, of an established system of delivered price turns the trick. A "moral front" may restrain the chiseler whose practices are a menace to the industry; yet the ties that bind may be so ethereal as to be invisible to the law. The courts ask for documents; evidence of collusion must be distilled out of thin air.

Industrial arrangements, however, will not stay put. There is usually a firm or two disposed, when the opportunity comes, to play lone wolf. If personal interest turns that way, under cover of the hubbub which attends change, they will look to the main chance. To hold these apostates in line, there must be some formal negotiation. If they remain uncooperative, measures of an educational character must be taken. As long as business is good, it is easy for the member of the trade to remain a gentleman; if there is a downturn in sales, the usage which binds tends to lose its power to govern. Even where discipline is close, situations come from around the corner which fall a little outside the terms of accord. A whisper at least must go the rounds or some company will fall out of step. All may remain informal, documents may remain at a minimum—yet moments of strain come to every industry with an attendant lapse into communication.

A stream of informal understanding has its accents of conscious accord. It is toward these lapses into formal discretion that the investigator thrusts. The overt act of conspiracy is usually by word of mouth; only echoes of the understanding get into writing. The search is addressed to incidental references, to discreet conversations, to telltale terms scattered throughout the company's files. These fragments of testimony may be anywhere—in personal letters to officials alone, in interoffice memos seeking to implement the unexpressed pact, in minutes of the board of directors recording actions whose rationale must derive from a trade accord. Time and again a file lives with the atmosphere of an effective restraint, yet discloses nowhere the formal statement. As document follows document there is everywhere tacit

[2] Once in a while—as happened in a recent congressional investigation on civil liberties—the investigating staff is lucky; the incriminating documents make their way into refuse boxes and thence into the hands of the investigators.

acceptance of some understanding which remains mute. The yield is scattered bits of circumstance, each of which in itself falls short of testimony; yet the series of coincidental items can bear no other explanation than "act of God" or conscious design. A presumption of guilt is by grace of theory—no other explanation can account for all the facts.

So delicate is the task that the investigator must be wary of a "hot trail." Minor officials of a large company often seek to impress their superiors with their zeal in the cause. In their reports they magnify incidents into events, parade their feats in warding off every threat to the price structure, brag about exploits in which they kept competitors from kicking over the traces. In reports from the field they set themselves down as important characters in a drama of collusion. And, with a vanity that is not alien to sale of self, they write as if they were on the inside of a gigantic plot organized for the glory and defense of an industrial realm. The boastfulness of the subordinate who seeks to impress is in striking contrast to the reticence of the higher-up who seeks to suppress. If the minor impulses which come in from the principal need to be amplified, the blatant voices of the agents need to be toned down. Where there are many words but few deeds, the investigator may be off to a false start. Weeks may be wasted upon a broad trail that leads into nothingness. Between faint clues to major understandings and bugle calls down blind alleys, the investigator must watch his step.

STRATEGY IN THE CHOICE OF ACTION

An important factor in the search for evidence is the character of the suit which the Government intends to bring. In practically all cases the selection of procedure is limited to a choice between a criminal action and a plea in equity. As often as not the choice is merely nominal. The Government is certain the law is flouted, it has a vast mosaic of inference, its cause is deficient in overt testimony. It is driven to the use of the grand jury to develop quickly a sound foundation in fact. In years of aggressive enforcement, the resort is almost as a matter of course to the criminal action. When Antitrust is less active, the elaborate and sedate process of negotiation dominates; the presumption favors the plea in equity and the criminal action is the exception.

Where there is choice, a number of considerations direct it. If the intent is to sting the wrongdoer with punishment, to throw the fear of God into the industry, to outlaw a particular practice, the criminal action does well enough. A conviction is virtually a ban upon the line of conduct passed in review; the party who repeats it proceeds at his peril. It is a warning to would-be violators that they run the risk of being branded with the mark of the criminal. But if a combination needs to be dissolved or positive measures need to be taken to put an industry in order, equity is the only available weapon. If aluminum is the monopoly the Government insists, a number of smaller units must occupy its domain; a resolution of its economic power into lesser equities can be effected only through the supervision of a court. If the pattern of the motion-picture industry is as unlawful as the complaint declares, a mere judgment upon past conduct is not an insurance of future behavior. The structure of the industry must be

redesigned; its trade practices must be grooved the way public interest lies; equity alone is capable of so constructive a task.

Often, however, the choice is not obvious. It is not as if the cloth had freshly come into the shop, and the Division could cut it to whatever litigious pattern it wished. An issue between the United States and the private parties may have been running for years; as the matter has gone forward, it has taken assumed form; attorneys ultimately in charge can but shape as best they can a half-done job. The policy of clearance of proposed plans, prevalent during the twenties, has been a frequent source of later embarrassment. A policy-on-paper is never a policy in action; a proposal innocent on its face, when caught up into a going network of usages may become an instrument of restraint.

How much importance should be attached to a formal approval, a tacit acceptance, a failure to prosecute when there has been knowledge, cannot be set down with certainty. Acceptance, inaction, silence has probative value rather than compelling weight; it raises moral rather than legal questions. The rights of the public ought not to be waived by the act of an official who is ignorant, negligent, or unable to pierce the intricacies of the future and lay bare what lies there. There is no case in which a court has set down a pledge given—or silently passed—as a bar to prosecution. But in one instance a failure to take action after Justice had declined to approve a plan appears to have been a factor in the victory of the defendants.[3] And in the *Madison Oil case* a plea that a prior act of the Government sanctified the conduct later called into question was made much of.[4] Advance approval cannot be denied all legal significance. The very disclosure to justice is presented as evidence of a desire to do the right thing.

But, the law aside, the moral question is not to be escaped. Is it quite proper to institute punitive proceedings against persons who have acted in reliance upon the approval—or even the silence—of earlier officials of Justice? In such instances a sense of good faith has prompted the Division to make the necessary suit as impersonal as possible. It aims not to punish the offenders but to rectify the offense; so the resort is to equity. In the motion-picture case it was publicly announced that in the face of the previous policy of "cooperation" between the Division and the industry it would be "inequitable" to institute criminal proceedings and that as a consequence an injunc-

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[3] In the dominant case, in which a sanction was found in "agency" for resale price maintenance, the district court stated: "Conditions complained of have been in existence since at least May 1, 1912. The agency method of selling, as well as license agreements in question, were not adopted until after they were submitted to the Attorney General of the United States for his information and consideration. They were neither approved nor disapproved, but defendants' later operations have been only after a full disclosure and during a period of prolonged silence. In 1919 all the matters complained of were brought to the attention of the Federal Trade Commission. In 1920 they dismissed the complaint. To be sure the Federal Trade Commission does not estop the Government in this proceeding, but its conclusions correctly summarize the facts as disclosed in this record and accurately state my view of the law" (*U. S. v. General Electric Co.*, 15 F. (2d) 715 (1925). Subsequently the Supreme Court, speaking through Mr. Chief Justice Taft, mentioned the fact that the Attorney General had declined to express an opinion of the legality of the plan, and also pointed out that it had been in operation since 1912 (*U. S. v. General Electric Co.*, 272 U. S. 476 (1926). There is an inference here that the public may lose its rights through silence or negligence on the part of its officials.

[4] The major oil companies insisted that the "buying pool" for the maintenance of which they had been indicted was not to be distinguished from a similar arrangement approved by the Secretary of the Interior in the heyday of the N. R. A. The district judge informed the jury that unless the Government had given specific authorization after the N. R. A. the companies would not be exempt from the antitrust laws; and charged them, as a matter of law, that evidence was lacking to support authorization. The court of appeals, in reversing the convictions, fou[illegible] that the Secretary's approval brought a similar plan within the test of reasonablene[illegible] The Supreme Court supported the district court.

tion would be sought.[5] In like manner, in the *Hartford-Empire case* it was deemed unfair to put in jeopardy of life and limb corporate officials who had given testimony before the Temporary National Economic Committee; and the resort was not to the punitive but to the corrective process.[6]

It is, of course, possible to employ the criminal and the equity actions concurrently. A smashing offense may be followed up with a constructive attack. In certain situations the defense of the public interest may require the double action; and on occasion it has been used. If evidence is not to be had except through a grand jury, and if a remedial program must be imposed, the cooperation of law and equity seems essential. The only escape would be to call the grand jury, use it to build the case, quash the indictment, institute a plea for a decree. It is, however, a little awkward all at once to drop and to press moves against the same parties for the same offense; the presumption of guilt laid alongside one of innocence would utterly confuse the layman and leave the lawyer not without qualms. It is more usual, when a criminal action leads off, to allow equity to abide its time. In almost every case overtures for a peaceful settlement are presently made. They may be abruptly dropped or they may lead to prolonged negotiation. If eventually it appears that no agreement can be reached, Justice may then turn to chancery for its correctives. If a consent decree emerges in definitive terms, the Division may abandon its criminal case, institute its plea for relief, and present for its imprimatur the settlement agreed upon out of court.

In the past, as of late, there has been some censure of the Division for the concurrent use of the two procedures. In 1912 President Taft severely reproved his Attorney General for bringing a criminal action before he had exhausted the possibilities of equity. In the automobile finance cases a Federal district judge officially became highly incensed when he discovered that the parties to a criminal action before his court were moving toward an amicable settlement behind his back.[7] And often businessmen insist that the punitive proceeding is a club wielded with the intent of coercing the accused into consent decrees. If the consent decree were an effective instrument of industrial government, the charge might warrant consideration; but where it does little more than painlessly and quietly close the case, it is quite academic. Even were it effective, the presumption must be set down in its favor. Actions for crime and in equity are not alternatives in the Sherman Act. And the return of an industry to the competitive design is so rare a product of litigation that tolerance should be accorded the law for however many instruments it employs to achieve the result.

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[5] Department of Justice release, July 20, 1938. A further reason given was that the aim of the suit—the divorce of exhibition from production and distribution—could be accomplished only through an equity decree. It would seem probable that, even were the first reason unavailable, the second would have proved compelling.

[6] Department of Justice release, December 11, 1939. Hearings on the glass container industry were held before the Temporary National Economic Committee in December 1938. The equity action was instituted by Antitrust in December 1939. Trial of the case was set for October 1940.

[7] *U. S.* v. *General Motors Corp.*, hearing of Judge Geiger discharging grand jury, Milwaukee, December 17, 1937.

5. ANTITRUST IN THE COURTROOM

THE WAY OF BUSINESS—AND OF COURTS

In an antitrust action litigation assumes the office of business. Yet as it takes over the task it retains its own ways. It attempts to impose order, pattern, responsibility upon an industry through the decorous process of law.

Business moves at a quick tempo. Its activities stretch away in a hurried series of transactions. Events occur, questions are presented, decisions are made. The emerging judgments concern executives, shareholders, workers, consumers—all who have a stake in the enterprise. They reach out to affect competing concerns, the market for raw materials, the activities of investment banks, all whose interests impinge. The lines of influence radiate to the fringes of the national economy; their incidence affects the fortunes of corporations and pervades the lives of individuals. Yet such decisions must be speedily made. Contingencies, situations, even emergencies must be met with as much or as little of knowledge and understanding as is immediately at hand. The course of affairs will not wait while the claims of every party which has a stake in the outcome are measured with meticulous scrutiny. In the taking of trade from rivals, in producing a new ware, in invading a new market, in paralyzing competitors through patent litigation, in doing all that constitutes carrying on a business there is no time for notice to all the persons concerned, for elaborate findings of fact, for tentative orders, for full hearings before they are made final, for the ceremonial observance of the rubric of due process. Business must go on; it is desirable that a question be answered right; it is imperative that it be answered at once. Thus in expediency crowded upon expediency a rough sort of industrial justice is dispensed. From the exercise of managerial discretion there is usually no appeal to a higher court.

The concern of an antitrust suit is with questions of the same sort. The statute invoked is an instrument of policy; the object of the action is to subdue the activities of the industry to the general good. The Government seeks to keep open the doors of opportunity, to remove obstacles from the channels of trade, to tear down private toll gates, to deflect trade practices from antisocial use, to curb the pursuit of gain run wild. Its purpose is not to stop the contest or even to shift the players, but to subdue the rules of the business game to the requirements of fair play. It is, as truly as the ordinary conduct of business, an announcement of industrial policy, a creation of industrial government, an exercise of industrial discretion.

Yet in court an industrial issue must be fitted out with all the appurtenances of litigation. The symbol must replace the actuality; the real question be commuted into a cause at law; the essential issue be resolved through the observance of the ritual decreed for a genuine

case in controversy. An impersonal is converted into a highly personal matter. The actual question is whether a particular pricing practice, a specific classification of customers, a scheme of open price-filing, a cost formula for price, a system of basing points has a proper place in the pattern of an industry. The legal issue is whether the conduct of specific officials of particular corporations falls within or without the law. The matter of concern pertains to industrial organization; the process of decision belongs to the rules of litigation. It brings to the settlement of questions of economic order the processes, hazards, confusions, evasions, circumlocutions, delays of the legal folkways. As if the issues were not in their own right perplexing enough, the way towards judgment is charted through alien paths. Reality waits upon the sidelines to abide the event of a trial by ordeal.

The device of a lawsuit envelops a question of policy in an atmosphere of personal controversy. The very terms "prosecution" and "defense" disguise the question of choice between alternative industrial arrangements. If the suit is in equity, every presumption is arrayed on the side of current practice. It is not enough that, by the norms of the statute, the suggestions of the Government are the better. An irreparable damage must be shown before the court can decree "correction," and constructive measures must masquerade as "relief." If it is a criminal action, the industrial status quo appears as a person accused, whose innocence must be presumed until proof of guilt no longer admits of a reasonable doubt. Over the centuries the common law, the statutes, and even the Constitution have conspired to create an intricate system of defenses about the man whose freedom is in jeopardy. He must be fully informed of the charges against him; he must be confronted by witnesses to his wrongdoing; he cannot be made to bear testimony against himself; evidence that is tainted with unlawful search or the third degree cannot be used against him; his guilt must stand out sharply above every blinder his skilled attorneys can devise. Such safeguards to personal innocence, private character, individual integrity become buttresses about a distinctive way of business conduct which may be antisocial. All of them, reasonable enough when the life or liberty of a human being is in jeopardy, become the elements of an obstructing machinery when the real issue is the amendment of a trade practice.

The resort to law involves a shift in personnel. Persons competent in the habits of industry must give way to those skilled in the techniques of legal combat. The economic analyst recedes; at best he can provide only the raw material which must be reshaped for courtroom use. The businessman becomes a spectator while his legal representative engages the legal representative of public policy in a protracted campaign. The opposing champions are well versed in demurrer, interlocutory motion, the tactics of seeking or avoiding a general engagement. They are less at home with overhead cost, Pittsburgh plus, the fiction of the quoted price. Experience, particularly for the defense, has been largely with private causes, and both sides prefer to fight over terrain upon which their feet feel secure. As a result an insistent urge draws controversy away from substantive toward procedural issue. The flight from the unfamiliar world of actualities into the shadowland of symbol and rite is almost in-

evitable. The atmosphere of litigation invites it; the lawyer is wary of public appearance about matters he does not understand; he impresses his client most in the display of his priestcraft.

As the case goes forward the champions become more and more creatures of the courtroom. The staging of the question as an adversary proceeding sets lawyer against lawyer. As the opponents invoke every technical device to secure the advantageous position in the oncoming struggle, personalities clash. Every move, every witness, every fact, every document becomes a counter in a legal game. "The record" has come to do vicarious duty for an analysis of the industry in operation; and every item, favorable to one side, can win admission only against the heavy cross-fire of the other. Every procedural device which may arrest or speed action, flank or snipe the verbal minions of the enemy, color the conduct on parade with innocence or guilt, is called into play. The campaign is lost in its events; interest is focused upon an interminable series of petty conflicts. The judge becomes engrossed in the detail of his work as umpire. It takes the final summing up of the lawyers to bring the jury back to the dominant legal issue. And somehow antitrust as an instrument of public policy has gotten lost in the scuffle.

The ancient spirit of trial by combat broods over the whole affair. It is manifest in a series of skirmishes which precede the general engagement. An indictment in a criminal case is invariably met with demurrer and motion to quash. If the judge resolutely denies, request is put in for a full bill of particulars. If the demurrer is sustained, appeal will be taken, usually all the way up to the United States Supreme Court; and only after an ultimate victory on points at law can the case come to trial. A plea in equity is regularly met by a long answer, categorical denial, and a prayer to dismiss the complaint. Along the whole course interlocutory motions—some of them subject to appeal—will be made, contested, amended, reargued, decided while the real issue abides its time in the offing. If one side shifts to the procedural front, the other must meet it there; and the techniques possessed by the defense are adequate to a real game of obstruction. In an antitrust suit, where large sums may be available to beat off attack, the older devices of the law are mere primitive elements out of which "the higher procrastination" has been refined. No attorney of skill would be content to create two issues where one had been before; at least half a dozen would be essential to satisfy his professional pride. Procedure becomes a buttress against substantive attack; behind its fortifications the defense digs in for a long siege.

FACT INTO LEGAL PROOF

An epitome of the whole difficulty is the problem of proof. At the trial the court demands evidence; yet in respect to conversations, documents, testimony, oral and written, the insiders enjoy every advantage. If incriminating evidence is in the hands of the Government, it is the function of the defense attorneys to fight its admissibility. For, if it is kept out, it cannot reach the minds in judgment to entice reaction. If it does not get into the record, presumably the higher court which some day must hear an appeal will get no wind of it. Time, patience, resource, guile, ingenuity, indirection, are re

quired of the prosecution to draw it forth, fit it into an articulate indictment, refine it into the testimony the court will entertain. For every item, before it can take its place within the contemplation of the court, must make its peace with "the rules of evidence."

The code of evidence, with its stubborn precisions, grew up out of concern with ordinary cases in tort, contract, and crime. Its exactions were pivoted upon a simple, easily identifiable act, clean-cut in intent and effect, the deed of an individual or a small group of persons. It aims to fix a focus, to avoid the irrelevant and untrustworthy, to make the line of inquiry converge upon the event in question. It seeks to protect the accused against gossip, rumor, surmise, inference by limiting testimony to direct, straightforward, authenticated statement. In response to such a purpose an elaborate testament has been formulated. It is expedient and practical, rather than articulate and speculative in character, for it has emerged out of experience from a multitude of suits. But it has been shaped largely by the business of the courts with such elementary wrongs as slander, fraud, assault, theft, arson, seduction, manslaughter. Its norms of admission, relevancy, competence, exclusion lie far removed from the arena in which legal combats over the patterns of industries are staged.

Actually these rules of evidence are vague enough to allow considerable latitude. The discretion they accord the presiding judge accounts in part for the care with which—if any choice is possible—the Division selects the particular district in which to bring its case. One judge, who regards the rules as a general guide, will set down a presumption in favor of what is offered and exclude only when clearly he must. Another judge, who regards the rules as severities demanding strict conformity, imposes upon every bit of testimony the duty of proving its way into the record. A third, who frankly admits he is feeling his way, is inclined to say, "Let it in at least for the time and later we can decide its worth." Thus the judge's conception of his office, his temperament, his habits on the bench, his feeling at ease or his bother with the instant case, obtrude into the rules of evidence, as he makes stubborn or easy, speedy or protracted, the way of proof. He may generously admit irrelevances and blur perspective or he may haughtily exclude essentials and create a distortion.

In so intricate a matter as antitrust only the unusual judge can pursue a consistent course. Experience alone enables him to drive ahead through the miscellany of unlike items which seek admission to the record. At one stage of the proceedings a bit of testimony seems clearly apart; at another, quite in point. If put in one way or presented for one purpose, the facts are to be denied admission; if stated in other terms and shaped to another issue, they appear material. Thus, if data seem to be very important, an attorney who is polite, ingenious, and persistent can usually contrive to get them in. It has happened that a potential entry, met at first with shocked judicial surprise, has within 3 days been accorded an enthusiastic welcome from the bench. As the case goes forward, the pattern of rulings may become more sharply defined; the judge has mastered the case; he has learned by trial and error what is helpful and what time consuming; his feet have become set in the path that leads to decision. He can, therefore, at once become generous to the loser and guard his rulings against reversal on appeal. Often, as the trial

proceeds, the vigilance with which evidence is guarded is relaxed. The judge has discovered that data will get in anyhow; he is bored and wants the thing over; his mind is made up. All that lies ahead is the fulfillment of procedural requirements.

The range of discretion is indicated in the problem of relevance. It is accepted that judge and jury should get "all the facts"—with the qualifying clause, by "competent" evidence. Here rule and proviso, when applied to evasive and intricate evidence, yield a latitude of severe appearance. The lawyer presents his testimentary materials; a series of offer, objection, ruling, performed by a professional caste, must purify entries for admission into the record. Again and again the attorney and the witness raise their antiphonal voices; the counsel for the adverse party chants the approved formula "incompetent, irrelevant, and immaterial"; the judge from the loft above interjects a responsive "sustained" or "overruled"; and the loser, who intends to fight another day, comes in dramatically with "exception." As the witness proceeds, a series of variations are performed on an abiding theme.[1]

It is obvious that the scope of inquiry must be somewhat confined—else the meandering of counsel would never cease. The channel in which the examination must run is fixed by the judicial concepts of "the material" and "the relevant." But the court has no instrument, save its own judgment, to weigh the material against the immaterial and to separate the relevant from the irrelevant. In an affair so complicated, with the lines of the case only slowly coming into place, the umpire possesses only the vaguest standards of reference. Any item put in is relevant if it is "connected up"; but such connection may come later and is never quite free from the taint of inference. The procedure creates an outer atmosphere of pomp and circumstance within which His Honor feels at home. Within its formal familiarities his detail of rulings must take its strange and empirical course over alien territory barren of recognized landmarks. But, like any other aspect of legalistics, the exactions to which testimony must conform have been written down as verbal formulas; and the judge, to whom the law is the letter, finds the rules of evidence very compelling. He is bound by them even against his common sense and his better judgment.[2] Since in a major action involving such an industry as oil, aluminum, or motion pictures, relevancy does not come down to earth until the architecture of the case appears, the literal-minded judge may sacrifice pertinent testimony to the law-in-vacuo.

At best, competence is a matter of many variables. It is sheer speculation to decide in advance what may be significant in the light of the entire edifice. The logical thing would be to get the whole case in before any part of it is presented; then, since relevancy is relative, norms for the acceptance or rejection of testimony would be

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[1] As a series of exhibits was being put in at the Aluminum trial in New York, an attorney for the defense solemnly read the following formula more than 20 times: "In behalf of our defendants we have examined this exhibit only to the extent necessary to determine what, if any, cross-examination should be conducted by us. We believe the exhibit is erroneous in theory, incorrect, and irrelevant. However, we make no formal objection to its admission, and we believe our position in regard to this exhibit can be made clear in our evidence for the defense."

[2] In the course of the *Madison Oil case* the presiding judge informed the defense that he saw clearly that certain testimony was irrevelant and if it objected he would be compelled by the rules of evidence to refuse admission. Yet he regretted the objection because the testimony in question had proved to him to be unusually illuminating.

at hand. But, since even a court of law cannot rise to such a requirement, the process of justice must put up with a compromise. The note may be taken for the cash; the item is let in in response to the attorney's plea that the connecting tissue will later be supplied. Again the judge must be governed by his own standard as to how far such an indulgence is to go. Once in, the practical presumption is in its favor; it can later be struck out if it continues to stand apart. But even the ultimate act of expunging from the clerk's record is nominal. It is not so easily erased from the minds of the jury and it may even leave an indelible imprint in its passage through the judge's mind. Moreover, once in, the bit of testimony has a will of its own. At its appearance it may be a stranger, but presently it finds itself quite at home. It is the habit of the inquiring mind to reach for connections among the isolated facts which at one time it entertains.

A device improvised in the heat of conflict is "admission for a limited purpose." A bit of testimony may be let in as to some, but not as to others, among the defendants. Or it may be admitted only as tending to prove thus-and-so "and for no other use whatever." The practice is particularly rife in conspiracy cases, where the parties are many and the plot is compounded of numerous acts. Here the knowledge of each of the accused and the part of each of the actors in the enveloping drama, presents a neat problem of imputation. Picture each member of a jury with a huge sheet of paper before him. At the top of the various columns, set down the names of the alleged conspirators. At the left list in line after line the various acts which are alleged. Then, where horizontal lines cross the vertical columns, set down check marks as specific acts are proved against particular defendants. It is a task in the intricacies of blame to which a concert of 12 good men and true could hardly rise.

If the matter is intricate, justice almost compels a resort to equity. Even a judge who in his school days may not have been a paragon at simultaneous equations will have his difficulties. His usual procedure is to be broad-minded, admit all that promises to be of significance, and "instruct" himself to disregard all that remains irrelevant at the close of the case. The picture of a jurist, sitting as a presiding officer to determine what he has a right to consider, is not without interest. It is a neat exhibit of a situation in which logic and reason are beyond the reach of the law.

The tangled miscellany known as the hearsay rule looms large in Antitrust. The defendants seldom admit guilt; their files—complete enough upon many topics—are strangely fragmentary in respect to restraint; overt testimony can rarely be put together to prove the act. A search will usually reveal numerous bits of evidence of an incriminating kind. But as often as not they are not the kind of testimony which a court is willing to receive as currency. A series of letters by trained market observers may implicate third parties; the foreign head of an international cartel may write an associate abroad about the activities of an affiliate in this country; a host of office communications, when shrewdly pieced together, may spell out a pattern of conspiracy. Against indictment by such evidence the defendants seek asylum at the shrine of hearsay; and such ephemeral evidence gives no warrant for laying profane hands upon

them. In more secular walks of life market letters may be held in higher regard than the testimony of the eye witness; trade reports may be looked to as furnishing a better informed account of what was going on than the word of an amateur Johnny-on-the-spot. Not so at law, where the emphasis still lingers on the single dastardly deed and the court must have as witness the one who saw it done.

As with many another legal usage, common sense eats at rigidity. The rule must be applied, yet it must be made to work. It is to be reverenced, yet it must make its peace with the world of today. As hard situations are met, the exactions of the hearsay rule break down into exceptions. Concessions are made to custom, convenience, the ways of business, the need of getting ahead with the case. As such adjustments to reality multiply in number, the statement of the rule becomes increasingly intricate. The records of business regularly kept are rather easily admitted. If the man who saw them come into being is put upon the stand to vouch for their identity and integrity, documents of various sorts may be gotten into the record. They currently appear, however, not in their own right but as a kind of appendage to human testimony. Interoffice memos and even market reports are still usually made to fall into the ancient category of hearsay. It is all very curious, for such accounts are generally accepted and used as a matter of course by the very companies against which the Government is proceeding. In fact they are among the most accredited materials upon whose foundation corporate policies are posited. Such is the gulf which separates the process of business from that of litigation.

There is, of course, no sharp line between overt testimony and hearsay. It is easiest to draw in the case of crime or tort, where the focus is upon a single overt act of wrongdoing. It is harder to maintain in respect to the deed of the abstract person, at law called the corporation, where a medley of officials may be involved in the offense. The boundary becomes a sheer fiction in an antitrust case; there the unlawful act is a series of events stretching across the years; a large number of corporations, with ranking officers and factotums, are parties; the various persons, natural and artificial, are involved in very different capacities. The policy of restraint is continuous; each who has a role sees with his own eyes only a segment of the larger design; each shapes his conduct upon activities which he takes for granted but about which he has no intimate personal knowledge. To any particular witness what is overt and what is hearsay depends upon how little or how much is crowded into the specific event about which he testifies. A shift in the definition of act from the minute incident to the policy-in-action converts hearsay into direct testimony. The very tissue which gathers the parts into a going conspiracy is knowledge that extends far beyond personal observation. In antitrust it is utterly impossible for a judge to apply the hearsay rule without benefit of a series of fictions.

ANALYSIS AS A LAWYER'S ART

In the trial of the law of agency has a heroic role. The Government invokes respondeat superior, insists that the acts of its agents are the acts of the corporation, and calls upon both to answer. The corporation retorts that the alleged acts of officials were never authorized

and clearly lay beyond the scope of their employment. If the plea is accepted, the individuals have little to fear; their activities are divorced from the conduct of the corporation; in isolation they can hardly be thought of as pieces in a conspiracy. As yet the strictures of evidence have not been loosened enough to accord with the great impersonality of the corporation. The dualism of the high command, as officials of the company and as individuals in their own right, presents to "responsibility" a game of hide and seek; and the technical rigidities of admission do not permit the easy assembly in court of diverse events into a single act of restraint.

At times even testimony near its best may flatten itself against the evasive intricacies of corporate structure. The Government has a "perfect case" against "state agents" who put the screws upon the dealers in a certain ware. But discretion lies with the "executive"—and the corporate charter is there to show it. The men at the top disclaim the acts of the agents and deny all responsibility. It is even reported that subordinates have been disciplined for exceeding their authority in a matter affected with a public interest. The Government's proof, plain as day, has difficulty in getting over the high hurdles of agency. In instances the rule-in-action produces a curious result. In the suit against General Motors, all officials were found innocent by a jury which heaped their collective guilt upon the company. An impersonal corporation had acted without the intervention of human agency.[3]

Thus it is not easy to impose a rigid judicial pattern upon the ebullient facts of an industry. The judge may attempt to limit the jury's attention to evidence which meets all the canons of acceptability; he may righteously seek to exclude from his own mind all that he regards as inadmissible. Yet considerations that are taboo will creep in by stealth and the minds of men who must decide cannot be kept from forbidden trails. The opening statements of attorneys admit of great latitude; knowledge is not yet at hand by which to hold it to its proper orbit; attempts to limit its scope are of doubtful success. In the qualification of a witness, counsel may bring out history which would prove irrelevant in the examination proper. Upon direct questioning, the witness may not be led; still the skilled inquisitor can plot the course that testimony is to follow and in neatly worded questions he may suggest answers.

On cross-examination tolerance is a little broader. And the attorney on re-direct may capitalize disclosures through the wider latitude accorded him. A statement on direct may be explained on cross-examination; an apparently innocent detail may, as the other side takes the witness, prove an open door into closed territory. An exhibit which would be dramatic, if it were forced in against vigorous objection, becomes a dud when the opposition gets to the gun first and puts it in. A question quite out of bonds, reiterated by being rephrased—even though eventually overruled—may prove as effective as the categorical statement which would have been the reply. An answer, bad if labeled "guess," becomes competent if presented as "the witness' best judgment." If arduous wrangling occurs over a document, whose identity and contents are not allowed even to be whispered, the curi-

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[3] *U. S.* v. *General Motors Corp.*, N. D. Ind., Criminal No. 10039, filed February 1938 (unreported).

osity of the jury is aroused. Thus if formally—or through the air—it ever comes to their attention, its value is enhanced.

To the resourceful trial lawyer the technology of evidence—which he never thinks of as a corpus of rigid rules—is a challenge rather than a barrier. His problem is not whether he can get a telling testimentary bit in, but how he can get it in. His usual shortcoming is not in want of strategy in the courtroom, but in such intimacy with the practices of industry as to discover the implications which it holds. Yet against a procedure never designed for industrial analysis, even an adroit practice of his mystery is a feeble instrument. It serves to capture a salient, defend an exposed spot, throw a line of legal defenses about a position. It presents an intricate barricade through which a trickle of fact can come to judgment but gives it no insulation against overtones of suspicion. It falls far short of providing the materials out of which a clash between industrial practice and public policy can be resolved. In the courtroom not even the rules of evidence stand still, but the adjustment of an ancient rubric to modern actuality can hardly come by way of piecemeal. The fact that both sides can play at a legalistic game is no argument against reform.

A PAWN WITH A WILL OF HIS OWN

In this battle of lawyers the witness is an indispensable henchman. The strategy of selecting persons to give testimony is not wholly guided by a pure demand for information. The witness who is flustered, likely to be led into a trap, or easily broken, is not to be chanced, no matter how comprehensive his knowledge. The one who can clothe evasiveness with a spirit of sincerity is far more to be desired, even if more poorly informed. If he is glib enough to get in answers to the questions before the opposition can object, so much the better. If he is ingenious enough to explain a slip in an unguarded moment, he is almost sure of a place on the stand. Two persons may be equally able, equally informed, equally committed to the cause; yet one will prove a skillful and the other an impossible witness. An overconscientious person, who exalts the scruple above the impression, is above all others distrusted by counsel. These are the standards, be it noted, of professional pleaders, not of industrial analysis. If the fact, however obvious and authentic, must be purified by a testimentary ordeal to become evidence, it is because legal procedure makes a luxury out of more realistic process of inquiry.

It happens that much of the Government's case must be proved by hostile witnesses. They are under oath in respect to the truth but are in duty bound to do no more than answer questions. The witness alone has the information; he will yield only what he is compelled to give; the game is to extract "the evidence." All along, the thrusts are met with evasion, lack of knowledge, qualification, denial. The witness who knows in detail a sequence of events about which his questioner possesses only hunches, has a large domain in which to maneuver his defenses. Against them the prosecutor must tilt adroitly as best he may. He may allow the witness enough rope to hang himself, snare him into contradictions, pick up fresh leads as the story unravels. He may meet forgetfulness with a document, confront stark oblivion with the statement of another, present an excerpt from testimony else-

where "to refresh the recollection." He may even, in the extreme instance, seek to use admissions before the grand jury to "impeach" the witness. The line between "refreshment" and "impeachment" is precarious; and blunt going might easily touch off "reversible error." He may, in nimble overtones, allow the hazard of an indictment for perjury to hang heavy over the head of the witness. The whole course of the examination is beset with leeway and intangibles. The attitude of the judge, the indulgence to leading questions, the latitude to refreshment, the standing granted to the proceedings before the grand jury, are all elements in the result.

INTENT AND MANY INTENTS

The greatest obstacle in making a case stick lies in the proof of "intent." As yet little attempt has been made under the Sherman Act to outlaw "monopoly per se"; the usual case involves a charge of conspiracy.[4] Section 1 recites the words "contract, combination, or conspiracy in restraint of trade"; yet the first of the verbal trio has least and the third most color of a legal offense. When to a particular situation all are equally applicable, that one is chosen which carries the greatest legal taint. An agreement which seeks private gain in the face of an opposing declaration of public policy is at law to be called by the ugliest name. And the more tenuous type of informal understanding is in form neither contract nor combination; it is fashioned of stuff too insubstantial easily to be drawn together into either of these categories.

In a technical way "conspiracy" lends itself rather nimbly to the task in hand. Men may stealthily plot about any matter under the sun; the essential vagueness of the concept permits the entrance of a large and miscellaneous array of facts; under adroit guidance a somewhat well-rounded picture of the activities of an industry may be approximated. The factor of time and the statute of limitations are not serious bothers; all the acts which make up the conspiracy, whatever their dates, are admissible. The successful consummation of the illegal undertaking does not have to be proved; the meeting of the conspirators for a nefarious purpose is enough. Yet there is no bar against testimony to the overt act; instances of restrictive activities are introduced as proof that there has been a conspiracy. In fact proof is usually at its scantiest in respect to "the plot." Scraps of evidence of this fact usually have to be supplemented by data, memos, oral testimony revealing the design in operation. Often a thread of inference—an inference against which no alternative inference is plausible—has to set the parts of the conspiracy in their places. As a result, elusive as it is, conspiracy is generally the easier way to a verdict of guilt. In antitrust it is the instrument of general reliance.

The task of showing a concert in activities to be sinister is extremely difficult. When the law undertook to probe into the mind of man and to read the motive hidden there it let itself in for a perilous venture. Long ago the task proved to be a little too much for its resources, and the law had to accept its compromise. In vexing sit-

[4] A statute is, of course, as the legal usages which it calls into being make it. It is of note that in antitrust section 1 rather than section 2 of the Sherman Act has become the dominant sanction. For antitrust we have an articulate law of conspiracy; as yet we have little in the way of a law of monopoly.

uations it was held that the deed spoke for itself; that the wrongdoer "intended the probable consequences of his act." Thus the thing sought became manifest in the very character of the deed, and a "constructive intent" would suffice. Although such notions are now well established in many domains, the "constructive conspiracy" is virtually unknown in antitrust law. It is true that judges have said that a conspiracy can be inferred from overt acts which could only have resulted from conscious design, but the concession here is little more than nominal.[5] In practice the tolerance in an antitrust action is far smaller than if the Government seeks to bring to justice labor leaders, draft dodgers, or bootleggers. As yet the courts are not content with a showing of uniform rises in price or a demonstration that a division of territory in fact exists.

The word "intent" is hardly indigenous to the matter in dispute. Men do not in an abstract way aim at a restraint of trade. Their object is to create and to exploit to their own advantage money-making opportunities. Nor does the pure state of mind, manifest in the legal concept, shape a course of conduct carried out through many acts, comprehending a host of detailed judgments extending over a period of years. The conduct of a business enterprise is a process; a series of situations are touched off; as the situation changes the motive of the actors is no higher and no lower than the pursuit of gain. At one time advantage lies in engaging in collusive undertaking; at another, in luring away an important customer from a competitor; at a third, by joining the group in a raid upon a troublesome fellow; at a fourth, in granting a secret discount, profferring a free service, adding a unit not paid for, making the real lower than the quoted price.

As decision follows decision, the course of events exhibits more or less of knowledge and ignorance, system and confusion, purpose and accident. The various characters in the drama of restraint are very differently involved as respects interest, act, participation, ultimate objective. To invoke intent is, as it were, to make all the participants a single person, to simplify a tangled medley of behavior into a single deliberate act, to endow all that has come to pass with a unity of preconceived meaning. The stream of activities springs in part from a realization that the security of a stable price structure can be had only through cooperative action. But it derives in part, too, from the precarious situations in which businessmen find themselves, from a response to a stimulus which—assuming a money-making economy—is not too inaccurately to be set down as tropismatic. To isolate from the complex of impulses playing upon a host of persons a particular motive, or to make one impulse to action dominant and the others recessive, is to indulge sheer fiction. Not even the individual actors, in the sanctity of a public-rights confessional, could enumerate, appraise, reduce to a hierarchy the promptings to which they had responded.

This taint of ceremonial gives to the defendants a singular advan-

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[5] It is possible to spell out from the opinions of the United States Supreme Court enough to show that proof of intent is no longer necessary. See especially *U. S. v. Trenton Potteries Co.* (273 U. S. 392 (1927)); *Interstate Circuit, Inc. v. U. S.* (306 U. S. 208 (1939)); *U. S. v. Socony-Vacuum Oil Co.* (310 U. S. 150 (1940)). Yet, for all the Supreme Court has said, it would be a negligent attorney who before the trial court would omit to prove—and to prove up to the hilt—"intent."

tage. In every criminal action the prosecution must establish the intent to commit a crime. This makes it very difficult to secure the conviction of individuals. To the ordinary jury a corporation is not sacrosanct; it is an impersonal and affluent sort of thing; in the run-of-mine case the jury takes pleasure in making the creature disgorge to the benefit of the personal litigant. Bigness itself tends to connote evil; a jury is not indisposed to see chicanery in the activities of the large corporation. But suspicion needs to be underlined and fortified if persons of consequence in their communities are to be sent to jail or fined. It is hard to connect important officials, who carry on far back of the operating front, with overt deeds. Minor employees can more easily be connected with acts of legal wrong, but there is general sympathy with their plight. Here the juryman deftly puts himself in the other fellow's place; the salary of the poor wretch is small, he has no voice in policy, his job may be in jeopardy.

In the equity suit, sentiment and sympathy do not obtrude so baldly. Here the dominant task is not to assess personal guilt but to contrive a way of undoing an evil. None the less proof of wrong is the necessary antecedent of relief. Only rarely will the facts tell their own story without some strands of inference to hold them together. Inference invites counter inference; and the defense can usually contrive a theory of its own to account for all that has happened. So, to bolster the case, to fasten the picture of restraint upon the facts, to rebut the counter explanation, the Government is constrained to argue intent. It is compelled to look beneath the acts themselves to the stream of personal judgments of which they are no more than outward expression. In the case against the *Sugar Institute*[6] the defendants were permitted to testify that they had submitted their plan of operation to the Division before its final adoption. The plea was received by the court, not as an estoppel to the action, but as an item of evidence tending to establish the good faith and the rightful intent of the defendants.

If the judge tends to indulge business conduct with the latitude of "the rule of reason," intent becomes a counter of consequence. If, as in the *Maple Flooring case*,[7] the object of common endeavor was only to provide, in the form of simple regimented statistics; the information about the industry which every member needed for the intelligent conduct of his business, the concert of action was of little legal significance. If, as in *Appalachian Coals*,[8] the concerns in a limited territory did no more than take common action against the disorder of an industry, the court would at least suspend judgment and wait for the antisocial result. Here the departure from competition was justified by its unruly character. The thought of the barons of bituminous had been, not an attack upon the public, but a defense of themselves against the shock of industrial anarchy. In the *Madison Oil case*, the district judge cited *Trenton Potteries* for the rule that the power to fix prices, irrespective of purpose or incident, was enough.[9] The Court of Appeals cited *Appalachian Coals*, held that a

[6] *U. S.* v. *Sugar Institute, Inc* (297 U. S. 553 (1936)).
[7] *Maple Flooring Manufacturing Assn.* v. *U. S.* (268 U. S. 563 (1925)).
[8] *Appalachian Coals, Inc.* v. *U. S.* (288 U. S. 344 (1933)).
[9] *U. S.* v. *Socony-Vacuum Oil Co.* (23 F. Supp. 937 (1938)).

"rule of reason" should have been applied, and reversed.[10] In turn, it was reversed on the identical point by the United States Supreme Court.[11] If intent is formally abandoned, it refuses to stay out of the case. It has a way of sneaking back as a correlative of other issues.

THE JUDGE'S LOT IS NOT A HAPPY ONE

The judge throughout is an actor of paramount importance. In the criminal action his attitude is an important factor in the verdict of the jury. By admitting or excluding evidence he shapes the pattern of activities upon which they are called to pass judgment. By relaxing the rules, he permits animadversions by counsel upon the sterling qualities of the men indicted. By indulgence to one side and sternness to the other, he creates in his court an atmosphere within which the jury must determine guilt or innocence. He may in respect to some—or even all—of the defendants decide that there is not enough evidence to warrant submission of the case to the jury. In fact his whole manner during the trial is a force which plays intangibly and persistently upon the 12 men who sit in the box. If he is alert or looks bored; if he parades pleasantries or indulges tantrums; if he hews to the line or preaches sermons, the reiterate beat has its telling effect in the verdict.

At equity, where there is no jury to share discretion, the facets of his personality have even freer rein. The action, in fact, occurs largely in the universe of the judge's mind. No informed person doubts that the sources of personal preference lie deep and that the techniques of the law are henchmen in the service of the jurist's scheme of values. In matters of public control the dominant urges which make for decision come from without the formal law. The minds of many—in fact of most—Federal judges reflect the attitudes and traditions of the upper middle class from which they spring. Some of them have their own substantial blocks of securities; many belong to clubs where only respectable opinions are voiced; all read newspapers whose slant does not escape the vigilance of their advertisers. Until "New Deal judges" came in numbers to the bench, the presumption ran strongly against any interference by Government with the affairs of business; the placing of the burden of proof upon regulation was a widespread article of judicial faith.

The discipline of the law likewise imposes its overtones of conservatism. The law is hoary with precedent and in its eyes the established is largely the rightful. Its practice, too, has made hard the way of the Government. The able lawyer, in quest of retainers and distinction, has found the best market for his services with large corporations. It is a mark of the profession that some of its ablest members have learned to serve affluent clients for whom they have little respect with arguments which to themselves are unconvincing. But such an attainment sets a standard of objectivity to which every lawyer cannot aspire. It is far more common for the heart and the

[10] 105 F. (2d) 809 (1939). It is easy enough to reconcile the opinion of the Court in *Trenton Potteries* with that in *Appalachian Coals*. Any person can concur with the Court in both rulings without putting strain upon his urge toward consistency. Yet of late, in antitrust actions, the two holdings have been polarized. The attorneys for the defense habitually try to analogize their case to *Appalachian Coals*. The attorneys for the prosecution make a likeness to *Trenton Potteries* their trump card.

[11] 310 U. S. 150 (1940).

cause to travel hand in hand. Yet out of lawyers who have served the vested interests most judges are made.

An action in antitrust involves not only judicial attitude but also judicial competence. A major suit occurs in a given district so rarely that the ordinary judge is lucky to get one in a lifetime. Yet when it comes it falls upon him like a bolt out of the blue. He is unprepared for its procedural maze, its pattern of disputed industrial practice, its unregimented array of issues. Now there appear before him for judgment defendants, who are among the leaders of American business, whose names are household words, whose salaries run into staggering figures. The distinguished members of the American bar come into his court, great in repute, learned in the law. They are intent upon the game, alert to every move, ready with every trick, far more resourceful than the old-fashioned Philadelphia lawyer. The judge must be as knowing as they; if possible he must win their respect and acclaim; above all, amid the treacherous moves of litigation, he must save his face. Representatives of the large newspapers are present; for perhaps the first time in his life his honor discovers that he is news. The trial is staged in a city of the second magnitude, or perhaps in a small town. Two opposing legal commands, with all their retinue, descend and for an interval the place enjoys a prosperity unknown to its history. Hotel accommodations are grossly inadequate; the townspeople move out of their homes and rent them at exorbitant prices. Old buildings, unoccupied for years, yield up their decay for offices. In an action which would test to the limit the ablest jurist, in the presence of eminent attorneys before whom he dare not display a misstep, in a judicial capital overrun with an unaccustomed hurly-burly, the judge must maintain his learning and his nimbleness, his temper and his poise.

In the trial itself his footing falls upon unfamiliar terrain. If the case involves a major industry, the arrangements under which it operates are singularly complex. At the beginning the judge is a novice; within a few weeks he must make his way through a culture of trade practices which the business executives have unconsciously mastered as one masters the English language. He must confront as witnesses specialists who have spent years in a single branch of the trade and have the intricacies of its operation at their finger tips. He is beaten upon by the smooth advocacy and obstreperous tactics of skilled attorneys who seek to impress opposing pictures upon the none too certain facts. He is expected to have a critical mastery of corporate finance, marketing practice, industrial structure; to have a sound grasp of physics, chemistry, electrodynamics, in fact the fundamentals of all the mechanical arts. He must be at once an experienced analyst and a man critically skilled in the intricacies of cost accounting.

He must have the capacity quickly to grasp the detail of industrial arrangements stretching away from the factory to the consumer. He must be able to sense the place of small units within the trade, to discover the real relation between large companies and independents, to appraise the industry-in-action in terms of the legal norms of competition. In a word, he must be alike omnicompetent in law and in industry—an expert in the multiplex of affairs and disciplines which converge upon the case. All of these capacities must be kept

in play as day-by-day the trial moves to its issue. And with eyes alert to all that belongs within, and with resolution steeled against all that should be put without, the judge must proclaim the stream of decisions out of which the record of the case emerges. He must, as items come along, rule on their admission, even when relevancy can be discovered only as the story is fully revealed.

It is all a little too much to ask of a judge who cannot escape his own humanity. Yet upon his poise and sanity obtrude the knowledge that he himself, as well as the cause in action, is upon trial. He conducts the case as best he may through all the hazards of litigation to a definite result. Then error will be alleged by the losing side and appeal taken to the circuit court, and, if it chooses to hear the case, to the United States Supreme Court. In the face of his own ordeal, his tendency is to retire somewhat from the domain of industrial reality and to fortify his judicial performance with a meticulous observance of the technicalities. With both sides adept at the ancient art of splitting legal hairs, the protections of proper process become barriers to understanding. Even the judge himself becomes an obstacle to bringing into sharp relief the pattern of the industry and its points of restraint.

The lines of the picture come tortuously into place. A distorted perspective emerges in a logical fashion all its own. Where the case is entirely in, the industry may be all trees and no forest. The hubbub of battle is not yet stilled; contradiction runs through the testimony, huge gaps appear in the structure, material facts are left stranded as irrelevant, the significance of the result is not beyond peradventure. Yet all parties have a stake in an articulate statement and a constructive settlement. In essence the matter is not a controversy between persons at all. The real issue, which must upon the sidelines abide the result of a combat at law, is the pattern of arrangements upon which an industry should be conducted.

THE APPEAL TO OLYMPUS

A trial court is a court on trial. The judge, as umpire, presides over a combat at law, applies the rules, drives issues to their conclusion. At the end he sets down a decision; and an appeal lies to the tribunal above to correct error, to order a new trial, even to reverse judgment. The trial court sets down a tentative hypothesis, the final appeal court records an ultimate judgment. For, as a creature of flesh and blood, the trial judge is presumed to be prone to error while the appeal judge—if he is a member of the United States Supreme Court and votes with the majority—is beset with no such frailty.

A sharp contrast marks the tasks of the trial and appeal courts. The case in controversy remains in the tribunal below; it is the conduct of the judge which is passed in review above. The proceeding below has been an interminable affair; the review above moves with brevity and dispatch. The rulings of the presiding judge have been legion; a very few can be challenged above. The appeal is upon error, error concerns "points of law." So the focus above is upon issues in their more abstract statement. An understanding of a ruling demands its factual setting; so shreds and patches of the industrial situation are carried along for scrutiny from on high. The testi-

mony in its entirety, some scores of thousands of pages of it, are in reserve to be consulted as will and an insistent docket allow. But, in the usual appeal, samples must do duty for the whole; and the humanity, concretion, circumstance of bitter and prolonged combat tend to fade toward a fragile cluster of dialectical differences.

The reality of ordeal by law is replaced by a show of make-believe. The parties make no corporeal appearance; attorneys vicariously defend their legal rights. The parade of witnesses with stammering tongues, tell-tale face, contradictory statements appear only as a transcript of testimony in an interminable and lifeless record. Look, accent, gesture are no longer there to help the reviewing bench distinguish truth from falsehood. The fabric of the industry, painfully discovered through tortuous inquiry, survives only in such fragments as stand out from the vantage point of error. The atmosphere of the trial, the perspective which protracted consideration yields, the saturation essential to valid hunches have all receded. Their ghosts emerge as items in oral argument, passages in a brief, entries buried in the volumes of transcript. The record can be sampled, but rarely studied; its sheer bulk and the press of unfinished business forbid. The months that have gone into the trial are condensed into a single session and casual reading.[12] The jurists who must correct error—and are presumed not to err themselves—live in a rarified atmosphere where they never see a litigant, observe a witness, or smell the sweat and blood of battle. In their forum quarreling persons are the abstract "appellant" and "appellee"; industrial problems, legal contentions; actuality, verbal currency.

The appeal court is the custodian of the law. Through its opinions, which are alike corrections of error and admonitions to lesser judges, it is presumed to make judgments take the right path. Yet one could hardly expect even the United States Supreme Court to convert so brief and general an act into a certain, articulate, and comprehensive corpus adequate to the control of industry. The very conditions under which it must hammer out rules of tolerance forbid. The cases stretch across almost five decades; they began when a trust was new and strange and terrible; they extend into the period when the giant corporation is taken for granted, when bigness can be distinguished from iniquity and quantity production means efficiency. Not even a court which moves in the upper stratosphere is insulated against the pervading atmosphere of belief. Over half a century other branches of the law, more secure in foundation and far more specific in language, have yielded before the impact of an emerging industrial culture. What then could be expected of the antitrust law?

Only a few industries out of the whole national economy have been hailed into court. Out of a bewildering fabric of trade practices the merest sample has been subjected to judicial scrutiny. The larger domain of business conduct is still unblessed—or uncursed—with the imprimatur of the courts. At any moment the jurists who sit as a bench are not of one mind. As judge gives way to judge, an idiom of mind, of preference, of language gives way to its successor. A single jurist may take a stand and maintain a somewhat consistent

[12] In the *Madison Oil case* there is abundant evidence that Mr. Justice Douglas not only read but carefully studied the whole record. But the realistic quality of his opinion by comparison underscores the ordinary performance.

position; the Court must go as to the will of its changing members take it. Public policy in respect to business is a subject upon which men differ, opinion changes, feeling runs too deep for formulas. It follows that the United States Supreme Court has said—it could not possibly escape saying—very contradictory things about antitrust.[13]

A review of legal error made in the trial court would appear to be somewhat beside the point. Between the cryptic words of the general law and the evasive actualities of industry a gulf yawns which the process of litigation seems unable to bridge. A vague feeling that the matter demands standards more earthly than those of the statute has found expression in a search for a "rule of reason." It has been invoked, denounced, accepted, and rejected in a dialectical war which runs through volumes of the reports. Its meaning has never been drawn out of the clouds into articulate statement.[14] The Sherman Act came out of the common law and the rule may be no more than a belated attempt to have its "reasonable man" come along. It may be an assertion that norms of conduct must be flexible in their reach and sensible in their application. It may be a device for separating good trusts from bad. It may be technique by which the will of Congress is accommodated to the circumstances of unlike industries. It may be an invitation to the creation of a code industrial. Yet it does little to define, clarify, qualify the competition to which the Sherman Act is by inference committed. In spite of all the opinion it has called forth, it remains an evasive idiom whose words remain to be filled with specific values.

The plain truth is that the "rule of reason" is symptom rather than device. It records the discomfort which the appeal court feels in having to concern itself with a task which fits neatly neither its distinctive competence nor its conditions of work. The retreat from the rule, manifest in recent holdings, is prompted by an awareness that an antitrust suit demands a realistic attack that a body appointed to correct legal error cannot give. It is a self-denying ordinance by which the Supreme Court attempts to lodge discretion hard by the facts.

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[13] It is no part of this account to draw into place the opinions of the Court in respect to the Sherman Act. Its lines of decision have again and again been subjected to critical scrutiny in the law reviews.

[14] For the changing fortunes of the "rule of reason" note in succession, *U. S.* v. *Trans-Missouri Freight Assn.* (166 U. S. 290 (1897)); *U. S.* v. *Joint Traffic Assn.* (171 U. S. 505 (1898)); *Northern Securities Co.* v. *U. S.* (193 U. S. 197 (1904)); *Standard Oil Co. of N. J.* v. *U. S.* (221 U. S. 1 (1911)); *U. S.* v. *Trenton Potteries Co.* (273 U. S. 392 (1927)); *Interstate Circuit, Inc.,* v. *U. S.* (306 U. S. 208 (1939)); *U. S.* v. *Socony-Vacuum Oil Co.* (310 U. S. 150 (1940)).

6. THE EFFICACY OF SANCTIONS

EQUITY AS INDUSTRIAL ARBITER

The suit in equity is designed as a constructive device. Under its machinery attempts to constrict the channels of trade or to freeze the structure of industries can be enjoined. Agreements in restraint of trade can be declared null and void. Or, if more extreme measures are deemed necessary, combinations may be broken up and dissolved.

The remedy of dissolution has limited application; its occasional use has rarely been successful. It can be invoked only where the almost complete concentration of the business has made absence of competition conspicuous. A major difficulty is that in most industries a trickle of rivalry is preserved to becloud the issue for the courts. And the blatant monopoly is often safeguarded by rights of patent which can be pleaded in extenuation. Not one line in the Sherman Act proclaims the exact norm to which competitive practice must conform or lists the requisites which make up proof of violation. The confused industrial picture and the lack of definite criteria make the courts hesitant; they are loath to sanction extreme remedies, and retreat into requirements of proof which spell ultimate defeat for the Government.[1]

The usual plea in equity is for an injunction. Yet even here, where the aim is merely to prevent a future recurrence of illegal activities, the process has its hazards. The absence of subpena power means that the Government must—unless it has held unusual cooperation or used the grand jury—go into court half prepared. It knows in little more than general terms the wrongs at which it will thrust; a large part of the facts out of which it must construct its edifice of proof are still missing; it is still vague about the remedies which are required. Unless the judge who sits is willing to entertain questions and to speed the investigation by the exercise of his powers to compel answers, the suit may break down even before it is under way.

Even, if it should issue, an injunction cannot operate as a real deterrent. Under the administration of antitrust, a single action must do police duty for many. An injunction, however, does little to punish, to warn, to deter the wrongdoer himself. It leaves the past as it is; all gains that have accrued through activities now pronounced illegal are left undisturbed; the defendants pass through the confessional and are told to go and sin no more. The result is to bless with legality that which was done without the law; and the incidence of wrongdoing is borne by the victims of the conspiracy. As for the future the defend-

[1] All through antitrust gropes a leading question. It is whether the Sherman Act is a legal reference or an instrument of policy—whether it supplies a strict norm to which business conduct must conform or is a sanction to be invoked in directing industry to the general good. If a norm, what are its obvious contours? What the criteria by which departures from its standards are to be detected? If an instrument, what are the ends it serves? When are its sanctions to be invoked? And who is to be the judge? This has been, is, and will continue to be the dilemma of the courts.

ants are still free to seek the same objectives—so long as the means employed are clearly to be distinguished from those which the court forbids. Only the parties are bound who were named in the suit. As for others, whose activities may be similar to, or even identical with, those condemned, there is little more than an admonition by hearsay. They are free to pursue a like course until their activities are called before a court and are enjoined. Thus the injunction is not a general prohibition of the type of conduct which in the instance has been outlawed. Beyond its concrete terms it presents no real hazard to unlawful conduct.

Nor can a series of injunctions furnish detailed guidance to businessmen. In antitrust there can be no simple formula of "one trade practice, one suit, one clean-cut rule of law." It is impossible to discover a single usage of industry which in the abstract appears to be a violation of the Sherman Act. The legal test is its actual operation. But in practice its identity becomes merged in the complement of usages which impinge. It takes a number of interrelated practices to constitute a restraint of trade. The court may clearly condemn the entity; it is outside of its office—and probably beyond its competence in imputation—to pronounce separately upon the elements out of which the fabric is compounded. As a result, the "case by case" attack is a necessary—if vexatious—route to an industrial code. A book of freight rates, a formula for ascertaining cost, a system for classifying customers may be a sheer convenience to the firms—or an instrument toward their accord with respect to production and quotation. The bid depository, the filing of "past prices," the exchange of industrial information, the stereotyped contract between manufacturer and dealer—all such devices have dual possibilities. A trade practice in its industrial setting may be adjudged a breach of the law. But it is not easy to discover a second industry whose modus operandi is so closely in accord that the judgment clearly applies.

The injunction has little function in inducing general compliance with the law. A victory for the Government has its effect, not as a command to be obeyed, but as an incitement to "the fear of God." Its impact is emotional rather than legislative; its urge is toward inducing businessmen to scrutinize their operations and to abandon practices exposed to legal attack. But where restraint means enhanced profits or greater industrial security, a mere sermon from the bench is not enough. The very procedure of chancery covers with immunity all that happens before it puts in its decree. Even after a suit has been started, the dilatory tactics of defense counsel and the long time consumed in trial may defer for years the ultimate ban upon the questionable practices.

Despite its innocuous character, the courts have not looked upon the equity process with great favor. Over a period of 50 years, 272 equity cases have been instituted and 93 have come to trial. Of these 64 have been won and 29 lost by the Government. In 32 instances the defendants have looked to the courts above to correct error, and Justice has taken 18 appeals. The prosecution has fared rather the better in the review of the findings. As the appellee, decisions in its favor have been affirmed in 21 cases, affirmed in part in 2, reversed

in 7, and dismissed as moot in 2. As the appellant, it has secured reversals in 12 cases,[2] failed in 5, and had 1 case dismissed as moot. A mere count cannot, of course, allow for the relative importance of the suits involved. A glorious triumph over a petty lot of cleaners and dyers[3] is small compensation for defeat in an attempt to bring coal barons[4] and processors of maple flooring[5] to account. Nor can a tally in the column marked "won" tell how much or what sort of a victory has been achieved until the detail of the decision is laid bare. In sustaining some of the contentions of Antitrust, the trial court may so emasculate others as to turn technical success into actual failure. Or, in affirming a judgment, the appeal court may so severely circumscribe its language as to strip from the decree its general warning. At bit of dicta, inadvertently let in or consciously planted, may open to collusive action a far wider territory than is closed by the decision.

Moreover, a legal victory is one thing; its practical realization in the reform of the industry something else. The court lays down the law; but it possesses no facilities for seeing that the terms of its decree are carried out. It has plenary power to punish for contempt, but it lacks means for discovering that its orders are not obeyed. If the victory in court is to make a difference in the conduct of the industry, the decree must be policed. Thus the problem is thrown back upon the enforcement agency which, save for the opportunity to invoke contempt, is exactly where it was before the trial began. Actually, the Division, as at present financed and staffed, is quite unable to undertake a task of such magnitude in the oversight of industrial activity. As matters currently go, the decree of the court—whether for or against the Government—is looked upon as ending the case. The defendants, as law-abiding citizens, are presumed to amend their practices and give no further cause for complaint. The Division moves its personnel to another trouble spot along the industrial front.

The task of police really falls to the industry itself. Without a court to guide and Justice to supervise, the wrongdoer is left to amend his own ways. It is the unusual industrialist who, faced by the same problems and animated by the same profit motive, does not soon forget the court decree. He may live up to the letter of the court's order, yet indulge behavior calculated to produce the same restraints. Thus persons who found the former practices distasteful are likely to renew their protest. In fact, a victory of the Government in the courts may accelerate the number of complaints in the industry. Yet the Division is unwilling to draw upon its meager funds and limited staff to explore again issues just threshed out.[6]

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[2] This fact raises the interesting question of what might happen if the Government were permitted to appeal adverse decisions in criminal cases in the trial court. At present, of course, a defeat automatically ends the case—on the ground that a person cannot be put in jeopardy of life and limb twice for the same offense.

[3] *Atlantic Cleaners & Dyers, Inc.*, v. *U. S.* (286 U. S. 427 (1932)).

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

[5] *Maple Flooring Manufacturers' Assn.* v. *U. S.* (268 U. S. 563 (1925)).

[6] In only two instances has contempt been invoked to give effect to an equity decree of the court. The first was a labor case in 1894, when Eugene Debs and three others were sentenced to imprisonment for disobeying a labor injunction grounded upon the Sherman Act. The second involved the famous New York poultry racket case started in 1930. The contempt proceeding followed close upon the heels of an injunction granted by the district court in 1932; Weiner and four others were given jail sentences in 1934.

So the issue is back where it started, in the complaint stage, with little likelihood of there being any immediate action. The cycle has run its course.

What effect the sixty-odd equity decrees now in force have had it is impossible to say. The law presumes innocence even after a party has been formally accused. It must, therefore, be presumed, for want of evidence to the contrary, that the companies named have lived up to the decrees. But to assume that they have foresworn the objectives toward which the forbidden practices moved would be either to disparage their zeal in the pursuit of gain or to reflect upon the competence of their legal counsel. Many paths have been open—to chance it as if there were no decree, to respect its letter and avoid its command, to change corporate identity by a juggling of holdings. Nor is it certain that the decrees were adequate to eliminate restrictive practices from the industry.

At its best the terms of the decree can hardly be broad enough to reach the industrial malady. It is limited to the persons who have been before the court; yet the matters in question usually comprehend the acts of many other parties. It is in nature a new industrial charter; yet the practices which are enjoined may be no more than evidences of a disorder whose roots lie elsewhere. Unless the remedy reaches the source of the difficulty, any significant change is out of the question. Nor can a static decree maintain its vitality for long in a rapidly changing industry. Many, now decades old, are utterly unsuited to current industrial practices.

CRIMINAL SUIT AS ECONOMIC CONTROL

In antitrust the criminal action departs far from its norm. The men in the dock are not denizens of the underworld, but gentlemen of substance and standing. In financial circles the word of the accused is as good as his bond; in the ordinary affairs of life his integrity is beyond question. The defendants are members of the best clubs, pillars of Christian churches, leaders in civic enterprises. They are represented, not by shysters, but by leaders of the American bar. Their lawyers put on a decorum fitting to the occasion; the jury are conscious that rulers of the national economy are before them; even the judge recognizes that he confronts men who have attained eminence in a respectable line of endeavor. That such persons have to stand trial for crime becomes a towering fact. It creates an atmosphere which pervades the court room and shapes the legal procedure.

The incidence of such intangibles has made futile the provision for imprisonment. In 5 decades the number of criminal actions has run to 252, yet in only 24 did the trial court impose penal sentences.[7] But even so poor a showing on paper exaggerates the reality. Eleven of the cases involved trade unions; 96 out of 102 defendants involved served sentences which ran from a few months to 2 years. Two of the suits, strictly speaking, are not antitrust cases, but concern the activities of alleged German spies during the World War. The Sherman Act served, for want of a better, as the instrument for

[7] In addition, in the 2 cases mentioned above—*U. S.* v. *Debs* and *U. S.* v. *Weiner*—imprisonment was imposed for contempt. See Appendix A, Convictions of Imprisonment Under Federal Antitrust Laws, July 1890–July 1940, p. 121.

incarcerating 8 suspects in jail. Only the 11 cases which remain are really in point; they alone involve violations of the Sherman Act by business men. In 10, actual racketeering practices—threats, intimidation, holdups, personal violence—entered as a significant element in insuring conviction. Thus out of the whole number, a single suit proclaims that along with the racketeer and the trade union official, the respectable man of business goes to jail for restraint of trade. In *Trenton Potteries*, sentences were pronounced upon 8 individuals, but were suspended by the trial court and the terms were never served.

If a racket is set within a pattern of business restraint, conviction is difficult. In cases involving American Naval Stores and the National Cash Register Co., the trial court found for the Government, but the judgments were reversed upon appeal. In 5 other cases, some or all of the defendants won reversals or contrived to receive suspended sentences. In fact, racketeering must be quite uncontaminated with ordinary industrial usage to make imprisonment imminent. During the life of the Sherman Act, less than 110 individuals altogether—an average of 2 a year—have served prison sentences. And, without a single exception, all have been trade-union officials or racketeers.

It is obvious that as a sanction the prison sentence has virtually been a dead letter. The enforcement agency must fall back upon the penalty of fines to secure compliance with the law. Yet an examination of instances indicates that the pecuniary deterrent has been sparingly used. Between 1890 and 1940, the criminal action has resulted in fines in 97 cases. The total sum assessed—ranging in the instant case from $50 to $370,000—aggregates $3,509,331.[8] Of this amount $47,950 must be deducted for reversals and suspensions, making the figure $3,461,381. That is, over the half-century, fines have been asssessed at the rate of $70,000 a year.

The average fine imposed upon the individual is small. The 97 cases in which fines were imposed involve some 1,500 individuals and corporations. As an average, this runs to about $2,000 per defendant. Such a calculation, of course, takes no account of the far larger group of persons—natural and corporate—who were originally indicted and for one reason or another dropped out of the case. It is not known what part of the sums assessed were ever paid. Curiously enough, the smallest amount assessed has been in cases which actually went to trial. In 34 instances pleas of nolo contendere led to fines of $1,233,502; in 39, pleas of guilt, $1,184,415. In 34 cases submitted to trial, the fines amounted to $1,091,414, but reversals and suspensions bring the total down to $1,043,464.[9]

It may be just as well that the fine alone punishes violation of the Sherman Act. A restraint of trade is a far more nebulous thing than a crime like arson or murder. Its incentive is more definitely set in circumstance; it is more sharply a response to a situation; its continuous character dwarfs individual responsibility. The devices by which it is sustained are so numerous, varied, innocent in

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[8] In addition there were fines, aggregating $11,500, imposed in 3 cases involving contempt proceedings in consent decrees. See Appendix B, Fines Imposed Under Federal Antitrust Law, July 1890–July 1940, p. ——.

[9] See Appendix C, Analyses of Fines Imposed Under Federal Antitrust Law, July 1890–July 1940, p. —.

themselves, that inference is necessary to discover that the statute outlaws them. In many instances the restrictions are so inseparable from the practices by which the industry is carried on that only through an intricate process of reasoning can they be isolated. In simplest terms the question often is whether the zeal displayed in the pursuit of gain—a cardinal virtue in a system of private business enterprise—has been carried too far. Or, in an idiom habitually employed by the judiciary, it is whether the lure of profit has crossed the line marked out by a rule of reason. No great landmarks fix the boundary between the commendable and the intolerable; and as in case after case the courts renew their survey, the line refuses to stay put. In a society in which business shapes the destinies of the people, the norms of what may be reasonably expected of industry refuse to become static. So long as policy sets down its sanctions in vague terms, it seems unfair to treat as a crime to be punished by imprisonment lapses from lawful standards of business conduct.

But, if a fine is to deter, it must be large enough for its task. In an era of big business a maximum penalty of $5,000 is utterly inadequate to secure compliance. The figure is a conventional one set down in 1890, when it connoted a far larger sum than today. Moreover, it was not meant to stand alone; the fine and the prison sentence were to be used alternately or in conjunction as the occasion might suggest. The recession of the threat of jail into the mists has weakened the criminal sanction. To a corporation of even modest size, the hazard of a loss of a few thousand dollars has little persuasive effect. Even petty decisions of corporate policy are pivoted upon far wider margins.[10]

It is, in fact, the criminal indictment, rather than its event in pecuniary penalty or prison sentence, which looms largest in the minds of executives. No respectable citizen wishes to have his name attainted by a formal charge of crime. None relishes the discomfort, the routine, the anxiety of the process of arraignment; none wishes to be fingerprinted in the manner accorded the ordinary criminal.[11] Thus the stigma of the indictment tends to be the real punishment. The actual penalty comes at the beginning, rather than the end, of the trial. The effect is to punish by presumption and not by proof. The accused is branded with the hypothesis of guilt, which in the office, at the club, on the golf links he must rebut as best he can. The judgment emerges from the verdict of the grand jury; it derives from an ex parte process in which he is not heard in his own behalf. Thus the reality of the criminal action has strayed far from its legal profession—and conviction comes as something of an anticlimax.

How long so informal a sanction can retain its power is uncertain. It rests upon the attitude toward a criminal indictment prevalent

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[10] The sums expended in defending a suit are vastly in excess of the legal penalties that may be imposed. In the *Madison Oil case* the court, after trial of the defendants, assessed $65,000 in fines. Estimates of the legal expense of the defendants vary from $2,000,000 to $2,500,000. No doubt cost of litigation is a factor in a decision to enter a plea of guilty or of nolo contendere. It is unlikely, however, that the hypothetical cost of the hypothetical defense of a hypothetical suit can be a serious deterrent to violation of the antitrust law. The lightning strikes too fitfully to make the risk one to be taken into account.

[11] The usages of the criminal action are already beginning to be relaxed in respect to businessmen. As defendants they are no longer required to be present during the whole course of the interminable trial. In instances they have been excused from being arraigned and fingerprinted. The drift is definitely toward the use of "kid gloves."

within the business community. It may well be that its efficacy derives from the rarity with which it is employed. If frequent use makes it commonplace, its moral edge may be blunted. A businessman can hardly feel its sting very keenly if all his fellows have been tainted with the same turpitude. As the congregation of the guilty is enlarged, the look askance may give way to the jocular remark. An executive may even be acclaimed by his more fortunate fellows as "slipping" because Justice has not considered his particular scheme of enough consequence to indict him. If such an attitude should become general, the threat of the indictment would lose its magic. It is a fragile—and possibly an ephemeral—sanction upon which to rest compliance with the antitrust law.

Yet, as the matter stands today, the criminal action is the law's most effective sanction. It insures resort to the grand jury, access to the power of subpena, an opportunity for Justice to build its case. Take the sanction away and the Government would be hard put to it in gathering evidence with which to go into court. For the moment at least those who would violate the antitrust act shudder at the threat of an indictment; and, while this attitude endures, there is something of a deterrent. So long as in resources and staff Antitrust is unable to police all American industry, its task must remain largely preventive. And prevention moves by example; it dangles before the many the fate of the few. The situation is beset with irony; the penalties which Congress decreed as warnings no longer deter; the fear of God, so far as it is effective, comes from a sentiment which businessmen themselves have built up in respect to the criminal law.

SUIT AGAINST THE WARE

The libel action has been used only 3 times. In all 3 the issue was settled out of court before the cases went to trial. In 1907, its first invocation, 175 cases of cigarettes were seized, later to be released under bond to the British American Tobacco Co.[12] In 1913, on motion of the United States, the libel was dismissed. The 2 later actions were likewise directed at foreign corporations; the one, in 1928, involved imports of quinine; the other, in 1930, of Norwegian sardines.[13] Alike they were legal accompaniments to more direct suits against the offending companies; alike they were dropped when consent decrees were entered in the civil cases.[14] The difficulty of reaching the defendants had dictated the use of the suit in rem against the alien corporation.

It has often been suggested that the libel should be widely employed in antitrust. The real concern of the enforcement agency, it is argued, is the correction of trade practices, and the confiscation of goods might lend itself admirably to that end. It is the threat which counts, and immediate seizure might prove more effective as a deterrent than the prosecution of personal offenders. However, the range of the action in rem is rather limited. In the service trades there is no commodity which can be seized. In instances, too, the

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[12] *U. S.* v. *One Hundred and Seventy-Five Cases of Cigarettes.* The case was instituted a few months after the famous suit of *U. S.* v. *American Tobacco Co.* (164 Fed. 1024 (1908), 221 U. S. 106 (1911)).

[13] *U. S.* v. *383,340 Ounces of Quinine Derivatives. U. S.* v. *5,898 Cases of Sardines.*

[14] *U. S.* v. *Amsterdamsche Chininefabriek* and *U. S.* v. *A. B. C. Canning Co.*

harshness of the remedy may fall more heavily upon outsiders than upon brethren of the trade. In the good old days, when procedure was by piecemeal, a suit would be brought against one branch of an industry. Then the seizure of goods would lay its obstructing hand upon trade; other groups in the industry, as well as the general public, might suffer as much or even more than the defendants. For much the same reason the libel appears somewhat unsuited to current employment. If its effects were to confiscate the goods of those who had broken the law and for the time to surrender the market to their more law-abiding competitors, it might do well enough. The offending concerns could have their goods and their access to market back when they had amended their practices. But where, as at present, a whole industry is involved, it is not feasible to engage in a wholesale seizure of the wares of trade. A public antagonism might develop which would flare more mightily against the Government than against the lawbreaker.

But even if the libel cannot be generally employed, it is still possible to thrust with it at strategic points. If antitrust must operate largely by example and prevention, the mere threat of the seizure of goods might be enough. For, in terms of delay, confusion, embarrassment to the defendant companies, its penalty may be most severe. The bother, in the use of so disturbing a remedy, is to make the action stick. The libel penetrates far into the internal affairs of a business, and the courts will expect the Government to make out its case beyond peradventure. Yet, unless the conspirators have left a broad trail, the evidence of restraint is as securely locked away as if the action were in equity. Unless Justice is forearmed and fortified, the dramatic act of seizure may be followed by a dull thud in court and a venture that got off bravely may turn into a boomerang.

Under the health laws, the seizure of deleterious goods and drugs has been rather effective. So, too, has the confiscation of diseased cattle and of prison-made goods. But in such instances proof presents a relatively simple problem. In foods, medicines, cattle, evidence of illegality lies in the thing itself; in prison-made goods, evidence of origin is enough. The illegal taint can be tracked back through no such simple trail to an unlawful origin in conspiracy.

PRIVATE SUIT AND TREBLE DAMAGES

In provision for private suit Congress intended to make the Sherman Act self-operative. An industry generally law-abiding was to be its own policeman. The businessman engaged in restraint at his peril; if his act caused harm to his competitor or his customer, he might be stung for three times the damage and costs. The stake to be won by an appeal to the majesty of the law made it abundantly worth the victim's while. There were, of course, the hazards of litigation; but the rewards were far larger than those which ordinarily lure individuals into the uncertainties of business enterprise. In the gamble the incentives of the money economy were put behind an ancient sanction of the common law.

Yet, for all its promise, from the start the action was doomed to futility. The injured person is free to take his complaint into court; but, once there, he has to make out his case. The very fact that he complains means that he is not a party to the restraint. He may have

quite a bit of circumstantial evidence; perhaps something in writing may attest indiscretion in closing in upon him too overtly. But circumstance is easily to be explained away, and some theory other than restraint may be made to account for all the facts which the court will entertain. In respect to proving his case, his plight is far worse than that of the Government. Before the legal bout begins, he has no power to requisition documents by subpena, no grand jury to garner the evidence and help bring the case together. And if the case survives the preliminary heat, the plaintiff is in for a prolonged and costly trial. The private suit is just as susceptible to delay, interlocutory motion, the tactics of procrastination as one of a public character. In formal combat the small businessman meets a protagonist possessed of vastly greater resources; his opponent can lose and appeal, but he can afford no such financial indulgence. The accumulating costs become a heavy drag on the plaintiff—if he is already "broke," on his lawyer; they may be driven into a settlement out of court or the suit may break down for want of funds. And while the law takes its due course, the upstart—if he remains afloat—can expect to undergo the discipline of the industry.

An attempt was made, through the Clayton Act, to alleviate these difficulties. The statute provides that a finding for the Government, at law or in equity, shall be accepted as prima facie evidence of restraint in the action for personal damages. The intent was to make it easy for the private litigant to follow where the Government had blazed the trail. The provision has been of little avail. The law specifically exempts judgments, such as consent decrees, in which there has been no taking of testimony. Likewise it excepts when the recitation of testimony has been commenced but not concluded. This narrowly restricts its use since only a fraction of all the cases are carried through trial to a definitive judgment. In practice the courts also exclude cases in which the verdicts rendered are still undergoing appeal.

Moreover, such judgments in public actions constitute only a presumption of restraint. They are subject to attack and rebuttal by the defense. The edge given to the private plaintiff is thus a tentative hypothesis to be explored, checked, rewritten. In general the courts have looked upon suits for triple damages with such disfavor that the statutory presumption in favor of the plaintiff is rather lightly entertained and the rebuttal rather generally indulged. The provision is quickly swallowed up in the rules of evidence and presently there is little to distinguish the trial from others of its kind.

In addition the plaintiff in the private action must show his damages. He must, in effect, isolate one from the numerous factors which impinge upon his business and demonstrate its pecuniary consequence upon his profits. A discovery of cause within a complex is at best a perilous undertaking, and a legal review of the affairs of an industry is not an ideal occasion for its exercise. A corporation is a going concern; it operates amid changing conditions; its fortunes are played upon by a myriad of forces. The terms of the equation which spells—or refuses to spell—solvency are so intertangled that an attempt to separate and evaluate is sheer imputation. A business loses money for a variety of reasons—an industrial recession, obsolete machinery, want of credits, labor trouble, inaccessibility to patents, poor management, shifts in the location of industry, restrictive practices of

competitors, changes in the public taste. It requires courage, imagination, and indulgence to shaky assumptions, to isolate a factor, mark out its causal domain, and commute the result into dollars and cents. If, moreover, a company is a victim of conspiracy, it does not sit passive. It fights back for its life; it seeks to escape as much of the restraint as may be. It may change its prices, eliminate a free service, even cheapen its product. Into a tangle which converges upon the balance sheet this introduces further complicating factors.

Nor is the private action immune to legal abuse. A concern starts a nuisance suit against a rival, makes the cause at law a counter in a nonlegal game, and secures advantage through private settlement. A firm, quite willing to go along with others, yet insistent upon its own terms, starts a "strike suit." A fly-by-night, barging into an industry, attempts to pick up a little cash by being bought off. Of greater consequence has been the ease with which the suit has lent itself to use along the labor front. One of the largest sums ever assessed under any provision of the Sherman Act has been against a trade union.[15] For a time employers had access to the labor injunction, preferred preventative to corrective measures, and with a court order sought to paralyze the strategy of a militant union. When the Norris-LaGuardia Act put such a device almost beyond reach, the tendency was to fall back upon the suit for damages. For this action the available precedents went back beyond the turn of the century to a code hardly touched by the modern humanitarian impulse. The movement was halted by the United States Supreme Court in the *Apex Hosiery case;*[16] once again the triple damage provision was set back upon its original track.

In controversies between businessmen, the private suit has not justified the trust reposed in it.[17] Few genuine cases have been brought; fewer have gone to trial; in fewer still has the action taken all the bumps to an award of damages. In the rarest instance has it performed the office for which it was intended. The little fellow, to whom it was to have been sword and shield, has been almost barred from its use. The trade-unionist, whose affairs can better be handled in another arena, has taken the brunt of its attack. It invites a clash of values between private purpose and national policy. Suits aimed at personal advantage usually fall far short of the public mark at which they are aimed. In cases which have only nuisance value, the objectives of the Sherman Act never put in an appearance. Even the man with the righteous cause drives primarily at a better bargain for himself and the general interest tags behind. All but a fraction of the cases are settled out of court, where relative bargaining power dominates and the Government is not present to assert the law.

Moreover, the cases are somewhat off the beaten track. Their concern is with matters too much of their own kind to serve as reminders

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[15] For $232,240 in *Lawlor* v. *Loewe* (209 F. 721 (1913), 235 U. S. 522 (1915)).

[16] *Apex Hosiery Co.* v. *Leader* (60 S. Ct. 982 (1940)).

[17] In February 1939 the Government sought for the first time to make use of the treble-damage provision. Suit was instituted to recover approximately $1,000,000 from 18 tire manufacturers charged with collusive bidding on Government contracts. A major question raised by the defendants is whether the Government may make use of this provision. The act provides that "any person" injured may sue and recover threefold the damages sustained. The Government claims that as a buyer it is a person within the purview of the act. The district court upheld the contention of the defendants and granted their motion to dismiss the complaint (31 F. Supp. 848 (1940)). The order of dismissal was affirmed by the Circuit Court of Appeals for the Second Circuit. Writ of certiorari has been filed with the U. S. Supreme Court.

and to deter those who would violate the law. At best such such actions are hardly more than complaints; and complaints to courts tell as little about the real trouble spots as do complaints to Justice. In industries which are highly centralized, all firms are insiders. Here it is against the united front that legal attack should be hurled—yet there is no one to complain. In industries threatened with chaos and struggling for discipline, informers are easily to be found—yet the restraint threatens to fall of its own weight. It is only when the insider has been turned out into the cold that the private action promises to perform its public office. Suits recede when most needed and become dominant when there is no larger interest to serve. The time is past when each man, in quest of his personal advantage, is led along a process of law to a general good which is no part of his intention.

7. THE REACH AFTER NEW WEAPONS

THE ADVISORY OPINION

All of the sanctions in the Sherman Act—the plea in equity, the criminal action, the libel on the goods, the private suit for damages—rely directly upon litigation and the courts. In the procedure all that government or private party can do is to make complaint; it is for the judiciary to straighten out the tangled lines of the industrial pattern. The result is a dual system of control; the accusing party does no more than raise the question; its settlement is up to the courts. Such an antiphonal process of administrative initiative and litigious response makes the technology of regulation a very involved process. It is slow, clumsy, inefficient; and it is usually a moral victory, rather than an industrial corrective, which a resort to law will yield.

The reach after new weapons began early in the administration of the antitrust law. The advisory opinion got its toe-hold almost by accident. In 1913, when James Clark McReynolds became Attorney General,[1] an amicable settlement was brewing with the American Telegraph & Telephone Co. As a gentleman dealing with gentlemen, the head of Justice did not insist upon a formal decree and a court sanction. The word of the company was enough. The Department, he stated, would not abate "the insistence that the statutes must be obeyed"; it desired "to promote all business conducted in harmony with the law"; it welcomed opportunity to effect adjustments necessary to the "reestablishment of lawful conditions without litigation."[2] In response to such a stimulus, numbers of businessmen descended upon Justice with their problems. The Attorney General was firm in a refusal to confer except in instances in which the Department had taken action. An initial drive to forestall litigation through negotiation failed.

An opening wedge, however, was not easily withdrawn. A going concern is a cosmos of activities and the business executive wants to discover his shortcomings, amend illegal ways, avoid exposure to litigation. Against a pressure so persistent and praiseworthy, resistance gradually gave way. At first the conferences were so informal and occasional that no record is left; by the mid-twenties it was publicly acknowledged by the Attorney General as established practice. It was made clear that a favorable ruling merely promised immunity from immediate prosecution; it had no binding effect upon a later administration. In recent years the trend has been away from "cooperation." The Department's position has been that the Government cannot barter away its power to sue in an extrajudicial proceeding.

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[1] At present, of course, Mr. Justice McReynolds.
[2] Quoted in Cummings and McFarland, *Federal Justice*, p. 344 (Macmillan, 1937).

In spite of such professions, businessmen habitually call at Justice. They seek to secure some inkling of an official attitude toward their practices. If they represent an industry of importance, custom dictates a ceremonial call upon the Attorney General. To raise issues they must go to the head of the Division and are usually referred to officials of lower rank. It is, at the very beginning, pointed out with scrupulous care that nothing said can bind Justice. Yet as interview follows interview, upon the facts disclosed, the official does render a legal opinion. The informal conference has too confirmed a place within the folkways of the law to be excluded from antitrust. And so insistent is the demand that the Division has been forced to recognize a procedure which—welcomed, sanctioned, or frowned upon—goes on as a matter of course.[3]

The current procedure falls short of the demands of business executives. It marks out a rough limit of tolerance; it reveals, at least for the time, the temper of the personnel charged with enforcement. But it subjects industrial practice to no definitive scrutiny; it gives no assurance that the conferee of today may not become the prosecutor of tomorrow. Assurance, such as it is, comes from an underofficial. It carries no sanction that binds; the opinion given is personal rather than official. The conference may in fact create a hazard. It raises an issue, opens or reopens a file, leads to a preview of complaints, revives the industry's past, invites an independent investigation.

As currently organized, the Division is in no position to give advisory opinions. Unless the industry is under investigation, there is no one on the staff informed on its practices; no personnel is available for a comprehensive check upon the industrial pattern outlined by business officials. If the request is for advance approval upon a new and untried plan, the difficulties are even greater. Its operation cannot be anticipated; the public interest requires careful observation of its consequences as it swings into action. But with Antitrust concentrated upon cases elsewhere in litigation, staff cannot be spared for this administrative work.

In lending its sanction, Antitrust in fact surrenders its freedom of action. In name it may be at liberty to take such action as later circumstance demands. But good faith has its compulsions; and the presumption runs strongly against prosecution—certainly, the criminal action—whatever the unforeseen events. If a number of industrial fronts equally invite legal attack, choice is likely to fall upon that which is a stranger to Justice. In litigation, a prior approval by the Government is a card of consequence to the defense; at the very least, it must be explained away. It is, of course, easy to argue that the State cannot sacrifice its indefeasible rights through the negligence of its officials. But in Antitrust, where intent of the parties looms so large in the result, prior clearance of some or all of the acts in question creates serious hazards for the Government's case.

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[3] In an address before the Trade and Commerce Bar Association of New York on March 21, 1940, Wendell Berge, official of Antitrust, suggested a "procedure whereby parties may make full disclosure to the Department about the facts of any activity which they have undertaken or desire to undertake. If the Department finds that such activity violates the law, it will so inform the parties, who must thereafter act at their peril in the event they disagree with the Department's position. If, however, the Department is not in a position to state positively that the practices are illegal at the time they are submitted, either because of lack of personnel to investigate or for any other reason, and the parties decide to go ahead with the proposed activity, any future action on the part of the Department would be through civil proceedings."

THE CONSENT DECREE

A novelty which has found a firmer foothold is the consent decree. The Sherman Act provides for no such procedure; there is no reference to it in the congressional debates. It emerges out of the very process of litigation; settlement out of court is one of the oldest of legal usages. Its first use dates from 1906;[4] since that time 143 consent decrees have been written. Of approximately 270 proceedings instituted in equity, over half have resulted in settlements by negotiation.[5]

As a device to escape litigation, the consent decree cannot wholly circumvent the courts. Its origin stems from the broad power of equity. The decree, shaped by the immediate parties to the controversy, must receive a judicial blessing. Its legal status is that of a decree written by the court; the violation of its command invites the action for contempt. In theory the part of the judge is that of a master in chancery; he is supposed to lay bare the questions in controversy, and in informed judgment satisfy himself that the agreement does justice between the industry and the public. In fact, his role is ceremonial; he brings to the accord a passive spirit and his imprimatur. The adverse parties have been in protracted conference; they have arrived at the terms of settlement; they confront the judge with a *fait accompli.* The jurist has only casual knowledge of the issues; he lacks facilities for informing himself; he has no ready norms for testing the fairness of the provisions. He asks a few perfunctory questions; he may make a minor change or two. The lawyers for the Government appear satisfied. He accepts the instrument on faith.

The consent decree permits a direct attack upon problems in industrial government. Questions do not have to be transmuted into the alien language of the law; the procedures ordained for ordinary courtroom use do not obtrude with their distractions. The parties meet in informal conference; no weight of intent and harm hangs heavy overhead; fact and value do not have to trickle into the discussion through the conventional rules of evidence. An opportunity is presented to a group of men, sitting around a table, to reach a settlement grounded in industrial reality and the demands of public policy.

In addition, the instrument has a sweep which no process of law could ever impart. It can go beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial order. If the demand is for adjustment within an intricate scheme of trade practices, at least it supplies the instrument. It can reach beyond the persons in legal combat to comprehend all the parties to the industry. It can accord some protection to weaker groups and safeguard to some extent the rights of the public. It can, unlike a decree emerging from litigation, take into account the potential consequences of its terms. It can make its attack upon the sources, rather than the manifestations, of restraint; give consideration to activities which would never be aired in open court; probe into matters which the prosecution could never prove; explore conduct just outside of

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[4] *U. S.* v. *Otis Elevator Co.* (1 Decrees and Judgments in Federal Anti-Trust Cases. 197).

[5] See Appendix D, Consent Decrees Entered Under Federal Antitrust Law, July 1890–July 1940, p. —.

restraint; follow wherever the trail leads. It can amend usage, create new trade practices, provide safeguards against unintended harm.

As yet such possibilities have been little realized. The consent decree still clings rather closely to the injunction whence it sprang. Its dominant use has been to free dockets from cases against minor industries; and within this narrow domain its concern has too often been with trivial matters. It has been invoked to establish industrial order among makers of candy stick, peanut cleaners, and shellers, dealers in perforated music rolls, producers of shirting cloth, the poultry trade in New York City, wholesale jewelers, candy jobbers in four cities, manufacturers of rubber heels, dealers in barber supplies, the hat-frame industry, a thread company. Some 40 cases involve trade associations; in about a dozen of these the members agree to a dissolution of the organization. In all such instances the parties in defense neither deny nor admit the Government's allegations. They simply agree, now and forevermore, to refrain from an enumerated list of forbidden activities.[6]

In no more than 30 cases have large corporations been involved. In each instance power was great, issues tangled, a mere list of prohibitions hardly adequate. In 1912 a consent decree struck at the monopoly position of the Aluminum Corporation by voiding several of its contracts. In 1916 the National Cash Register Co. was forbidden, directly or indirectly, in whole or in part, to acquire "an essential part of the business, patents, or plant of any competitor without the consent of the court." In 1926, the National Food Products Corporation was ordered to divest itself of ownership in the stock of certain other corporations. In 1920 a procedure against the meat packers produced a formidable instrument of industrial government. Threatened with Federal regulation, the Big Five sought refuge in a consent decree prepared by Justice. It provided, among other things, that the defendants with reasonable dispatch should divest themselves of their interests in public stockyards, storage plants, stockyard terminal railroads, and other productive facilities. They were ordered to cease to do business in some one hundred and forty commodities unrelated to their principal activity and were forbidden to own and operate retail stores or to sell fresh butter and cream. A separation of meat packing from the irrelevant enterprises in which it had become embedded was to be effected within 2 years of the date of the decree.

In 1932 a similar pattern of divestment was with its consent imposed upon the Radio Corporation of America; and in 1936 upon Columbia Gas & Electric, where a trustee was appointed to hold the securities of the affiliates until their disposal. The Ford and Chrysler decrees in 1938 contain a complicated—perhaps an unenforceable—plan for placing independent finance companies on a

[6] Two decrees written in 1940 contain interesting variations. In *U. S.* v. *National Container Association* an attempt is made to draw a line between price fixing and activities sanctioned by the courts. The trade association is specifically permitted to gather and disseminate information of the cost of manufacture, to compile and circulate recommended procedures for the computation of selling prices, to promote the application of uniform cost accounting, to discuss such statistics at meetings, to exchange credit information, and to publish data on specific current contracts of sale "for the sole purpose of avoiding interference with such contracts." Since such activities all tend to produce a united front in the industry, the line between the legal and illegal gets pretty thin. In *U. S.* v. *Tile Contractors' Association of America* an elaborate scheme is established for policing the decree by the labor union.

plane of competitive equality with their own subsidiaries.[7] In 1940 the large typewriter companies were enjoined from securing control of competitors—through stock ownership, purchase of assets, or otherwise—without prior consent from the court.[8] The recent consent decree in the optical-goods case declared void a number of contracts between the Bausch & Lomb Co. and a German concern and forbade the payment of royalties until further order by the court. The decree involving the Southern Pine Association splits up the activities of the trade association and establishes a separate organization—open to all manufacturers of southern-pine lumber without discrimination—for grading and standardization services.

The decrees appear more formidable upon paper than in operation. More than half were written during the 1920's, when government and business were in close accord. The device lends itself to a lax enforcement of the law. The parties meet informally behind closed doors; the negotiations leave no public record; groups who do not participate are left in the dark. The only information available to inquiring parties is the decree itself; and, although it is filed with the court, its terms can be understood only by the person who intimately knows the industry. As a result, the instrument is useful to a sympathetic administration in building up a paper record of accomplishment. Further, the suit in equity carries little opprobrium; the settlement out of court is convenient, involves little expense, and offers little embarrassment to the activities of the defendants.

But weakness does not inhere in the process. If the Government is bent upon enforcement it offers an instrument of vigorous attack. Its use must be preceded by resolute court action elsewhere; executives do not willingly shackle their own discretion; they yield only as pressure is put upon them. A vigorous campaign, a large number of suits, a fanfare of litigation sets the stage for its constructive use. The great difficulty lies not in the capacity of justice to impose measures but in its want of technical skill to turn concessions to account. The resort to law necessitates a staff whose training and experience has been in trial work. Their interests are focused by the task of proving charges in open court. It is customary, when negotiations are begun, to assign the shaping of the consent decree to the attorneys already busy upon the case; there are no others at hand conversant with the practices of the industry. The trouble is that materials of a case are not the stuff for creating an instrument of industrial order. The distinctive competence of the resourceful lawyer does not find its easiest outlet in prescribing for the maladjusted industry.

In its procedure the formal position of the Government is that the matter is voluntary. It cannot dictate terms; the initiative must come from the industry; its task is no more than to accept a preferred arrangement which accords with the law. In fact, it plays no such passive role. Its representatives start with ideas about what they would like to demand; as the conversations go forward their notions become articulate. Yet the absence of a reliable picture of the industry, a superficial knowledge of its structure and folkways,

[7] As late as September 1940 a system of registration the real implementation of the decree—has not been brought into use. The tardiness has been due in part to a waiting for the outcome in the *General Motors case.* The consent decrees were made contingent upon the success of the Government in its suit against General Motors.

[8] *U. S. v. Underwood Elliott Fisher Co.*

and ignorance in regard to the real sources of trouble hang heavy about the conference table. They make for a process of bargaining that is uncertain, speculative, confused. The representatives of the Government suggest leads; but across an unfamiliar industrial terrain their footing is insecure, their sense of direction none too certain. They must, for want of detail and perspective, seek guidance from the gentlemen of the industry.

Such a search for an industrial order is rather like the blind leading the blind. At operating a corporation within an industry executives are adept. It is their business, and their minds have been conditioned to its tasks. But their viewpoint is that of the single concern, and they are little accustomed to think in terms of an entire industry. They lack an over-all view; they are little given to detachment, critical analysis, the consideration of alternative arguments.[9] So the defendants propose, the Government counters, the parties mutually thrust at plans; the ordeal yields an aggregate of isolated prohibitions. At best, the agreement which emerges is a makeshift answer to the problem of industrial order.

Nor does Justice really view the consent decree as an instrument of industrial government. The dangers which attend its creation have invoked timidity in exploring its possibilities. The want of an independent source of information, of a clear grasp of industrial practice, of an arsenal of constructive reforms from which to choose, have made officials cautious in committing themselves. The proposed arrangements might be misused; a contingency might render them obsolete; a scheme designed to restore competition might in practice prohibit its return. Accident is as powerful as design; the pattern of the industry might change overnight. Practices, which defy its spirit, might be shaped to the very letter of the writ; a sanction accorded to an innocent practice might later be found wrapped around a vicious one. So long as good intent can be affected, a lot of provisions can be made to do the things they ought not to do. And, after all, provisions are commitments and the Division is afraid of what might later be discovered within their none-too-certain terms. So the positive gives way to taboo and negation comes into control of the proceedings.

A consent decree anticipates the outcome of the suit; the threat of recourse to law has been a factor in its growth. As attorneys shift to conference, the carryover of a scheme of values from litigation is inevitable. At any moment the defendants may withdraw and throw the Government back upon its chances in open court. The handicaps of legal procedure are powerful cards which the defense can play in diluting the decree. When more cases are on hand than can be handled and the prosecution must play for time, it is often constrained to accept terms which will fall short of clearing up the situation. Where sympathy with the plight of the industry prevails in official circles, the concessions secured are usually far less. But, friendly or hostile, the division confronts a formidable docket, and the best settlement possible frequently becomes a sheer necessity.

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[9] The framing of a consent decree presents to the parties in interest an unusual opportunity to educate themselves in the problems they face. But a lesson that has not been learned cannot be passed on, and without the greater knowledge and the larger vision which the task demands the opportunity is usually allowed to slip.

Thus the consent decree is largely a device of economy. It spares the defense the expense of a protracted legal campaign; it allows the division, in some sort of way, to cover an extended front. It is a resort to an informal process of bargaining, an attempt to capture—without incurring the cost—the answer which the legal ordeal would yield. It shifts the focus from the need of industrial reform to the strength of the Government's case. A situation may stink to high heaven; yet, if testimony cannot be regimented into proof or if inference must come along to fit pieces into a pattern of restraint, the exaction must be mild. If the companies are small and litigation an extravagance they can ill afford, more can be demanded. If the conduct has been flagrant, a series of solemn commandments can be written. In consequence, litigation and negotiation become alternative means to much the same result.

OVERSIGHT WITHOUT AN OVERSEER

A matter of concern in the current use of the consent decree is its industrial reach. The only parties bound are those named in the instrument. If a company loses its identity through reorganization, the decree may or may not be the kind of a chattel which passes on. Corporations which freshly enter the industry lie beyond its jurisdiction.. Save for the vague threat of prosecution—blunted by knowledge that the industry has already been the subject of legal scrutiny—they are at liberty to ignore its terms. Where an industry is half-bound, half free, those who must obey the decree are put at a competitive disadvantage.

A shift in trade practices, decreed in the settlement, may have consequences far outside the orbit of the original decree. In destroying established usages it may hurry the demise of the small units precariously perched in the industry. Unless these companies are parties to the decree, they have little voice in the formulation of its terms. Ordinarily the original complainants are informally consulted during negotiations, but no over-all coverage of parties affected by its terms is possible. If repercussions extend beyond the lines of the industry to allied trades, no machinery is available for the expression of their views. In any event the formal document can tell little of how its terms will work in practice. The policy of secrecy accentuates the problem. Conference often goes on when the matter is in the courts, and any publicity might prejudice the Government's case. Yet the real issue is affected with a public interest, for it concerns the arrangements under which an industry is to carry on. It ought to be open to all who have a stake in the outcome.[10]

A kindred difficulty is police. The instrument with which to make the commands effective has not yet been forged. So long as the dominant objective of Antitrust is legal victory, the consent decree must remain a way of "closing a case." A result has been reached, the zeal in the cause has been spent, interest moves on. If a decree provides for immediate changes, such as the sale of a property, a divestment

[10] In some of the recent consent decrees the Government has sought to secure the viewpoint of interested outsiders. First, an effort was made to secure representation of opinion in court at the time of the filing of the decree, but in two or three instances judges were reluctant to open their forums to possibly prolonged debate in open hearing. Then the Government experimented with giving publicity to decrees before they went into effect and issuing a general invitation for comment. There was no response.

of shares of stock, the dissolution of a trade association, the file is held open until such steps are taken. After that is done, the matter is adjudicated, the issues are removed from controversy. In the records of Justice the episode is closed; the case has gone to the hall of records; a fresh initiative is necessary to call it once more into action. Nor is an effort made to follow up the decree, observe success and shortcomings in operation, check practical result against intent, determine upon necessary revisions.

The occasional modifications throw into sharp relief its inflexibility. A large number of decrees are decades old, the industry has been made over beyond recognition, the consent decree endures untouched. About 25 decrees have been hailed into court. In general the revision has risen to no higher plane than formal change. A command to sell, divert, dissolve has been stayed until a more propitious moment; a concern has been permitted to acquire a negligible competitor, a trade association has been indulged the collection of harmless information, a prohibition has been recast in the light of a later decision of the Supreme Court. Such modifications are made at the behest of private parties, in every instance the purpose has been to liberalize the requirements imposed upon the industry. In but a single case has Justice sought reconsideration because the decree had become unsuited to later conditions in the industry. In the spring of 1939 it moved to vacate a decree entered 3 years earlier against the Columbia Gas & Electric Co.

In only five instances have proceedings been brought for contempt. In one case fines aggregating $5,500,[11] and in another $4,000[12] were imposed. A couple of proceedings, involving the motion-picture industry, are still in court.[13] It is only the fifth, concerned with the manufacture and sale of cash registers, which has left an engaging chapter in judicial history. The case, in fact, presents in graphic illustration the assortment of difficulties experienced by Justice in attempting to give effect to an order of the court. It reveals the weakness of the instrument with which a consent decree must be policed.

The story began in 1911, when civil and criminal suits were concurrently brought against the National Cash Register Co. and some 29 of its officials. The criminal action resulted in a verdict of guilty and jail sentences ranging from 9 months to a year were imposed upon 27 of the defendants. The president of the company, one John H. Patterson, was given a 1-year sentence and fined $5,000.[14] The circuit court of appeals reversed the judgment of the District Court for Southern Ohio[15] and the Supreme Court refused certiorari.[16] The opinion of the circuit court was so far-reaching that Justice felt it hopeless to go forward. So in 1916, in opposition to the district judge who sat on the case, the Government asked for a dismissal. On the same day a consent decree was entered in the civil suit.[17]

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[11] *U. S.* v. *Southern Wholesale Grocers Association* (207 Fed. 434 (1913)). The decree dates from 1911, 2 years earlier.

[12] *U. S.* v. *National Retail Credit Association* (plea of guilty, 1935). The consent decree was entered in 1933.

[13] *U. S.* v. *Barney Balaban* (1938), involving consent decree in *U. S.* v. *Balaban & Katz Corp.*, entered in 1932; and *U. S.* v. *Fox West Coast Theatres Corp.* (1939), involving decree in *U. S.* v. *West Coast Theatres, Inc.*, entered in 1930.

[14] *U. S.* v. *Patterson*, 1 Decrees and Judgments in Federal Anti-Trust Cases 795.

[15] 222 Fed. 499 (1915).

[16] 238 U. S. 635 (1915).

[17] *U. S.* v. *National Cash Register Co.*, 1 D. and J. 315.

The consent decree was rather sweeping. Among other things, it enjoined the parties from intimidating competitors and their customers, from wrongfully obtaining the names of their competitors' prospective purchasers, from the theft of business secrets, from wrongful trade practices, from espionage. Hardly was the ink dry upon the decree before complaints began to pour in; the company likewise began to busy itself with the limits of its legal bonds. First, it asked the court for a number of interpretations of the text of the decree. Then it went to Justice to ask for modifications. Justice in turn called upon the Federal Trade Commission for an analysis of the operation of the decree. Within 2 months the company withdrew its request. Meanwhile complaints continued to accumulate and a major competitor, the Remington Cash Register Co., employed a prominent New York law firm to press for action. The evidence accumulated; an Attorney General went and another took his place; in 1925 Antitrust determined to institute proceedings. A major question was who in particular was to be cited for criminal contempt. Salesmen were engaging in practices which the decree forbade; circumstance pointed to knowledge and complicity by the officials of the company; there was no overt testimony to supply the connecting tissue. Some attorneys in the Division were loath to strike high without the necessary proof. Others believed that proof of actual knowledge, while helpful, was not essential; that it was the business of the company to see to it that their petty officials were law abiding; that the mere fact of violation was enough to constitute contempt of court. In the end—as so frequently happens—the less hazardous view prevailed, and the action was confined to the 92 sales agents who had been direct participants in disobeying the court's order.[18]

The company was not at a loss for weapons of defense. As soon as the action for contempt was brought, the corporation was reorganized; it was plead that the new legal person was immune to the court order. A like immunity was claimed for persons who were not in the company's employ at the time of the decree. It was also contended that the powers of the court of equity were limited to its district; that the judge could punish for contempt only those salesmen who had operated in the southern district of Ohio. It was insisted that, unless action was begun within 1 year of the time the acts occurred, it was barred by the statute of limitations. In the course of the trial, the charges against 70 of the defendants were dismissed because of insufficient evidence. Later, on the ground that the Government had not acted in time, the judge dismissed 18 of the 22 who were left.[19] The later ruling was appealed to the Supreme Court which reversed.[20]

Back the case went to the district court. Meanwhile the energies of the Government had flagged; it now moved to dismiss 20 of the defendants. Thus of the original 92, 2 survived the ordeal of interlocutory motions to be tried. In 1928 the district court found 1 of them guilty on 2 counts and imposed a fine of $1,000 on each count. It dismissed the information against the remaining person. In 1929 a motion by Justice for a new trial was denied. As a final blow,

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[18] Department of Justice files on *U. S.* v. *National Cash Register Co.*, file No. 60–51-0.
[19] *U. S.* v. *National Cash Register Co.* (23 F. (2d) 352 (1927)).
[20] 277 U. S. 229 (1928).

in 1931, the decree was modified to permit National Cash Register to acquire Remington Cash Register, the very company which throughout the twenties worked aggressively for the enforcement of the decree. Since 1916 violation of the decree had been flagrant, yet the net result of all efforts was a fine of $2,000 against a single salesman.

The ordinary antitrust suit has problems enough. The follow-up in contempt, in addition, presents difficulties all its own, many of them new to the courts. What is the precise meaning of the language of the decree? How are set terms to be accommodated to a changing pattern of trade practices? In the hierarchy of an industry whom does it bind? How far does its jurisdiction extend beyond the persons, natural and artificial, who are named in the instrument? Along the various planes of corporate officialdom, how much of knowledge and of participation must be proved? If violation is virtually compelled by the necessity of meeting competition from companies not named in the decree, what then? If new practices are devised as a way around the prohibitions, has there been contempt? How long must the Government wait after a decree has been entered before bringing an action? And how long can it pause after the overt act before losing its right to strike? What if, in the interval, the industry has been quite transformed in technology, structure, trade practices, markets, and wares? What if only a few among many former units are now bound? [21]

In five cases involving divestment proceedings, trustees have been appointed pending the disposal of the stock.[22] A major difficulty here has been the spasmodic interest of Justice. The decree usually antedates the current administration; the attorneys who handled it are gone or to them it has grown cold. Their knowledge has been submerged beneath the materials of more recent cases; the intangibles have left little trace behind in the records. All that remains alive of the industry, its trade practices, ancient pattern of restraint, is a bulking and silent file over which—as a ghost of a case closed—hovers the decree. In isolation, and without the Division's lawyers to prod, the trustee takes his course. He is more responsive to pressures which are current than to those that are gone; to the flesh and blood that bears down upon him than to volitionless files. He is driven forward—or stopped in his tracks—by a personal interest. His task is to speed the sale of securities in his hands; his stake in a job which expires when his duty is done bids him await a favorable market. As a result, a company may maintain its equity for years after it has been ordered by the court to divest itself of the holdings. In any event the immediate counts for more than the remote, and the trustee tends more and more to take the industry's view of the matters he handles.

All the difficulties appear in the classic of consent decrees, that against the meat packers.[23] The agreement of 1920 provided, among

[21] A move has lately been made toward easier administration of consent decrees. A provision embodied in all recent decrees grants to Justice access to all books and records. Reports upon the operation of the decree may also be required. The provision holds real possibilities. For the first time the files of the offending company are open without roundabout of grand jury and subpena. The great weakness is that the Division lacks the facilities for the follow-up essential to keep the decree alive.

[22] *U. S.* v. *New York, New Haven & Hartford R. R.* (1914); *U. S.* v. *Swift & Co.* (1920); *U. S.* v. *Fox Theatres Corp.* (1921); *U. S.* v. *Rand Kardex Bureau* (1926); *U. S.* v. *Columbia Gas & Electric Corp.* (1936).

[23] *U. S.* v. *Swift & Co.*

other things, for an immediate disposal by the "Big Five" of their interests in public stockyards. They were likewise required to separate themselves from concerns dealing in various canned products. At the outside the process of divestment was to be completed within a period of 2 years. Almost at once the packers began an attack upon the decree to which they had voluntarily consented. The first move came from off stage; the California Cooperative Canneries appealed to the Attorney General for modification.[24] Then, as a third party, they asked to intervene, went into court, and moved that the decree be vacated on the ground that it disturbed their contractual relations with a party to it. The canneries had a 10-year contract for the sale to Armour of all their products it might require. A clause provided that, in case of Government interference, Armour was free to abrogate the contract on 60 days' notice. At the time the canneries were heavily in debt to Armour. Whether the canneries acted on their own motion, or whether they were prompted by the packers, is a moot question. The trial court decided for the Government and was reversed on appeal. The court of appeals declared that the canneries had lost valuable assets without a right to be heard; that there had been a taking of property without due process of law.[25]

In 1924, while this matter was still pending, Swift and Armour filed their own motions to vacate the decree. They argued that the packers had denied violations of the antitrust acts; that there was no genuine case in controversy; that the court lacked jurisdiction to enter the decree; that the Attorney General had no power to exclude persons from a legitimate business. A number of ancillary attacks were made on the decree—its vagueness and generality, its comprehensive character, its want of factual support. The trial court, feeling itself bound by the appellate ruling in the *Canneries case*, suspended the decree. In such a matter, a definitive ruling could come only from the highest court, and in 1928 and 1929 the Supreme Court found no merit either in the direct attack by the packers [26] or in the collateral attack upon the decree by the canneries.[27]

The packers, however, were prepared for this legal pitfall. In 1930 they again embarked upon litigation—this time to secure modification of the decree. Their complaint was a woeful series of corporate wrongs; their prayer for relief—finite in the instance—asked in the aggregate for a virtual scrapping of the instrument. Their argument postulated a revolutionary change in economic conditions, the rise of the grocery chains, their need for diversifying their business, the necessity for retail outlets, the economies in distribution direct from process to consumer, the utility of all of this to the consumer, its compatibility with the ideal of competition. In the trial court the packers won a partial victory, which again was lost in the Supreme Court.[28] In 1932 a period was written to 12 years of litigation; the letter of the decree and the position of the parties had not been changed one bit.

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[24] Department of Justice in *U. S.* v. *Swift & Co.*, file No. 60–50–0.
[25] *Calif. Cooperative Canneries* v. *U. S.* (299 Fed. 908 (1924)).
[26] *Swift & Co.* v. *U. S.* (276 U. S. 311 (1928)).
[27] *U. S.* v. *Calif. Cooperative Canneries* (279 U. S. 553 (1929)).
[28] *U. S.* v. *Swift & Co.* (286 U. S. 106 (1932))

So long as cases were in the courts, the packers made no effort to divest themselves of equities in forbidden companies. Then in 1931, 11 years after the command had been given, Armour hastened to obey the order of the court. Its interest in the General Stockyards Corporation was disposed of to three companies owned by members of the Armour family. When corporate gears are disengaged, personal ties may still abide and it seems probable that so fictitious a divestment still leaves the order of the court unfulfilled. The Swift Co. showed no such precipitate haste. In 1932, in accordance with the mandate of the Supreme Court, the trial court appointed a trustee and directed that gentleman to dispose of the prescribed holdings in Libby, McNeil & Libby within 1 year. In 1933 the defendants asked for a further period in which to rid themselves of their interest in the canning company. The court refused and directed the trustee to see that the block of stock found its way into hands legally competent to hold it. In 1936 Swift divested itself of a part of its investment in stockyards.

The months dragged on. In the spring of 1939 Justice, its patience exhausted, sought to force disposal of Swift's interest in the large canning concern. It attempted to secure from the court an order to the trustee calling for bids. This action was vigorously contested on the ground that market conditions did not warrant sale of the stock. During the summer the judge called the parties to his chambers and announced that he had decided to grant the motion. He would, however, refrain from taking public action until the defendants had been accorded a reasonable time to dispose of the holdings. Shortly thereafter the sale was made and in November of that year the court approved a plan for the disposal of the Swift stock. Thus, after 19 years of litigation, an important provision in the packers' consent decree was at last given real effect.

The innovation of the consent decree has made its modest addendum to the Sherman Act. If experience has ripened into so little of novelty, at least strands have appeared upon which a fabric of administrative control may be woven.

SECTION III

A PROGRAM OF ACTION

1. STREAMLINING THE ACT

A revision of the Sherman Act is long overdue. The attitude of the Fifty-first Congress was experimental; yet its Mid-Victorian machinery has endured. In 50 years American business has undergone a revolution, yet antitrust has made a faltering response. A belated recognition of the national economy led to the creation of the Antitrust Division in Justice. The consent decree grew up to escape the severities of an ordeal at law and to impose some positive corrective upon the processes of industry. The courts have made now dominant, now recessive, a rule of reason which they seem to regard as existing primarily for purposes of dialectic. The Division within Justice has expanded, yielded to a division of labor, started a body of tradition of its own. And that is all. It is difficult to think of another institution, played upon by dynamic forces over so eventful a period, which has exhibited fewer responses to the urges of growth.

A constructive attack may be made upon any one of several planes. It may aim to vitalize the current act or it may seek another way of industrial order. It may aim to hurry along the suit at law or it may abandon litigation for an administrative venture into control. It may remain true to the ancient creed of competition or it may choose to ground regulation upon another philosophy. But antitrust is a rather intricate affair; one question easily touches off another; and, as it goes forward, inquiry is likely to take its way to another level. It is, therefore, essential to separate proposals for revision into groups and to keep always clear the current plane of discussion.

It is well to begin by taking antitrust as it is and to ask what can be done within the four corners of the Sherman Act. A number of moves are obvious. First of all, Antitrust should be provided with adequate funds. The idea of its authors that, through the right of private action, the act was self-enforcing can no longer be entertained. A modern economy has come into being and in kindred domains experience has revealed the magnitude and intricacy of supervision. The current task belongs to a contemporary world; the appropriation should no longer be set down at a figure shaped by the ideas and circumstances of the nineties. This is not a demand that procedure by sample give way to a prosecution of all offenders. To make an "example" of a violation before his erring brethren is right enough. It is the method of traffic control, of the abatement of nuisance, of the law generally. The idea is to deter, rather than to punish, to bring the number of offenses within hailing distance of the capacity of the state to handle them. For antitrust it is the only possible way: but there ought to be sample cases enough to show that the Division means business. There should be suits enough to persuade judges and juries that in convicting the persons

before them, they are not hounding the unfortunate few where a multitude are guilty.

Adequate funds would provide samples enough to allow a strategy. If examples are to deter, the points of attack must be shrewdly chosen. At the moment the law of antitrust stands out in sparse and indistinct lines. A few score of suits have been brought; a handful of them have reached the only court which can speak with authority. In a field so controversial, where public opinion takes its uncharted course and jurists come and go, the decisions of even a dozen years ago do not circulate at par. The law can never be fully certain. Restraints go in and out of fashion; no list of prohibitions is proof against the novelties which ingenuity contrives. As a result, the legislative mandate is most effective if its terms transcend the particular. A catalog of acts which lie beyond legal tolerance can easily be met by others of innocent appearance which attain the same result of restraint. A lawsuit may be a nuisance, still there is need of a surge of cases along the industrial front. It is needed as much by business executives as by the Government. The idea of landmarks may be a legal myth; but it will take quite an assortment of beacons to light the twilight zone which separates the legal from the illegal. The law may never become certain; but a little less of uncertainty is desirable if the Sherman Act is to become an effective instrument of control.

An increase in funds should improve the quality of performance. A larger staff would allow a continuous analysis of the more important industries, an essential to a strategy of attack. So long as complaints from without are the guide, enforcement will be of a hit-or-miss character. Minor restraints may usurp the legal stage while far-flung conspiracies may go their way obscured by the shadows. At present the accent falls too heavily upon the well-beaten trail, the loud-mouthed industry, the lucky accident that uncovers lawless conduct. Only in an informed knowledge of the operation of the industries which make up the national economy can antitrust rise to its task. Policy and strategy converge in the selection of cases.

It is likewise high time for the modernization of antitrust machinery. For the task of investigation, Justice should be fitted out with the power of subpena. The national economy is the instrument of general welfare; its hierachy of industries performs a public office and is affected with a public interest. It is scoffing at reality to make access to the records of a company a "private" right of its management and to exclude other parties who have a stake in its operation. As matters currently go, consumers, laborers, even stockholders may be scattered, unorganized, powerless; unless protected by the Government their real interests may be obscured or even ignored. A corporation, a creation of the state, is a convenience through which a miscellany of individuals combine their contributions of divers kinds in a collective enterprise. Yet it has come to be the practice to invest its files with the sanctity of personal right. And under the legal cloak the officials of a corporate body have usurped a monopoly of knowledge of its affairs. A practice which turns to the account of a strategic group an exclusive privilege which is not theirs is an anachronism. Antitrust represents parties of interest in the industry. A management occupies a position of trust and an action at law is a way of holding it

to its fiduciary office. The individual defendants are hostile witnesses; outsiders have little to relate. Evidences that acts lie beyond the tolerance of the law repose in the company's own files. The record of its activities is necessary to hold officials to their assumed obligations. As the representative of unvocal interests and of the public, Justice should have free access to all records whenever occasion demands.

The grant of subpena would not be to the disadvantage of business. Equity is the legal process best suited to restraint of trade; if a constructive remedy is demanded, it can be secured in no other way. The resort to the criminal action has been compelled, not because it is appropriate, but because the use of the grand jury was necessary to secure evidence. A power of subpena by Justice would put the two actions upon an equality and allow merit to shape the choice between them. It would obviate the urge to prosecute where the acts in question correspond so crudely with the norm of crime.

The grant to Justice of subpena power would simplify enforcement. In all save the extraordinary case its direct use would supersede the costly, clumsy, complicated procedure by grand jury. Even more, a knowledge that the Government held in reserve an easy access to all books and files would tend to insure a readier and more universal conformity with the law. At present the lawbreaker may capitalize the interval between initial demand and eventual subpena to put its records in order. Even the sudden summons from the grand jury permits a hurried survey before the fateful arrival; and, since human nature is prone to error, it is always possible to get confused, misunderstand the order, become muddled as to the relevant and the irrelevant. With the subpena ready for use, the interval disappears and inquiry can be conducted in the company's office before files have been destroyed. No doubt the disadvantage of having to enumerate in advance incriminating documents whose existence Justice only suspects will for a time continue. But, with a sanction within easy reach for a search upon the spot, it will become less embarrassing. Eventually the very logic of the situation should establish complete access to all files as occasion warrants.

The Government would not pay too high a price for its easier access to evidence. The criminal process results in a verdict of guilt; its satisfaction is a fine. The penalties are always pecuniary, respectable men of business do not go to jail. But the equity decree, for all its limitations, does permit an appraisal of usage, the revision of trade practice, the remaking of the pattern of the industry. The criminal action, of course, is not at once to be tucked away in mothballs. It is not to be relinquished until teeth have been put in civil process and it has become adequate to its larger job. Even then it is well to have the more drastic weapon in reserve; for an exhortation to good works and an injunction against bad ones means little unless there is something at hand with which to make words good. But, more important, equity and its decree allowed correctives to be applied in advance rather than assess penalties against conduct which has run its course. If industrial activity is to measure up to the requirements of law, the revision of arrangements is rather more important than winning criminal suits.

A kindred suggestion concerns the form of action. It is recognized that the criminal process is not well adapted to antitrust, and it is

proposed to shift the punitive sanction to a civil base.[1] The offense is to be treated, not as a crime against the majesty of the state, but as a wrong to the general welfare. A restraint of trade is an infraction of the national economy, an affront to the Commonwealth; hence a public action in tort appears to be the more appropriate remedy. There is nothing novel in the use of a civil procedure to impose penalties for the violation of Federal law. As a remedy it is to be found in statutes concerning matters as diverse as patents, customs duties, Indian lands, alien immigrants, interstate carriers, sugar quotas, the securities of corporations and Federal revenue. The shift removes the taint of crime, focuses the issue sharply upon the departure from legal norms, strips the suit of much of its ceremonial irrelevance. The jeopardy of life and limb is gone; the pecuniary penalty remains.

The shift from crime to tort speeds the action; so the stage is set for a revision of penalties. A fine of a dime will hardly stop the filching of a dollar; the risk of a $5,000 penalty is not guaranteed to kill off a conspiracy that promises to net five millions. If a legal threat is to deter, the impact of the punishment must be worthy of the crime. In like manner it does little good to limit the fine to the offending company when the acts of restraint are decreed by its officials. If damages are to become a preventive, they must be assessed against the parties who made decisions as well as against those who harvest the benefits. So it is proposed that a corporation violating the act forfeits to the United States a sum equal to twice the total of the net income accruing during the period of wrongdoing. An offending officer is likewise to forfeit to the Government double the compensation he has received during the period of violation. In addition, an executive may for an appropriate period be separated from his corporate office for such malfeasance in the discharge of his duties. The burden of the penalties is automatically adjusted to the gain derived from the illegal activities. Offense and penalty are written in the language of the national economy.

The shift to a civil action improves the weapon. It creates a responsibility alike corporate and personal, makes substantial damages a term in the businessman's equation, renders it far more certain that the penalty will follow the illegal act, places a deterrent before the breach of the law. In a word, it attempts to make restraint of trade a bad business risk.

One further provision eases the course of litigation. In the usual antitrust suit the doctrine of agency presents an endless bother. It is extremely difficult to connect overt acts with the willful decision of corporate officials. A presumption can be made easily to bridge the gap; respondeat superior is to mean what it plainly says. The knowledge on the part of any officer or director of any of the acts making up the conspiracy is to be presumed to constitute authorization of the restraint. Such a presumption must, of course, be subject to rebuttal. But its fiction—if fiction it be—runs in accord with common sense; and it places the burden of proof where it ought to lie, upon the party which enjoys access to all the facts.

As a forward move it is also proposed to endow the consumer with a cause of action. Although its text gives no express warrant, the

[1] See bill to provide additional civil remedies against violations of the antitrust laws, and for other purposes (the O'Mahoney bill), S. 2719, 76th Cong., 1st sess. (1939).

Sherman Act does not forbid such a suit. In early drafts, in defining the offense as a denial or abridgement of "full and free competition," it seemed to invite it. But an early judicial ruling, discovering the consumer to be without an interest of real substance, closed the door.[2] Yet, as one of the two parties to a sale, he has his common law rights; and, so long as the norm of contract remains the picture of two parties, each with equal power to shape the terms of the bargain, it is hard to follow the logic by which access to the courts was denied. The act grants him the right to such a price as the open market effects, and if through collusion his pocket is picked for more, the deprivation of property appears obvious.

At the moment the Government, as a purchaser of automobile tires, alleges that identical bids from a number of companies attest collusion, and sues for triple damages. If as a buyer the United States is permitted access to the courts, the door can hardly be closed to the suit of the individual consumer or of the consumers' cooperative. The real argument against such an action is of a more practical character. The consumer meets the ware in the market place, not back of the line. He neither has access to the information nor possesses the funds with which to sustain his suit. The consumer's interest in the aggregate is the public interest; and it was that very interest which the public prosecution was intended to protect. Still there is a unit intermediate between the solitary buyer and the general public. However it may have been in the nineties, organizations of consumers are today realities. A consumers' cooperative, an association of purchasing agents, a trade union of housewives, ought legally to be free to maintain its access to a free market against collusion and conspiracy.

The clumsy instrument of Antitrust needs to be fashioned to its gigantic task. The hope in these interlocked proposals is to create an up-to-date model for a suit at law. If litigation must continue to be the instrument of public policy, it will enjoy an easier, speedier, more certain process, less freighted with procedures, less confused by the irrelevancies of legalism. It needs to borrow a bit of directness and dispatch from the world of business within which it must operate.

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[2] Citation.

2. TOWARD AN ADMINISTRATIVE BASE

TO BORROW AND ADAPT

In spite of its advantages, such a program of reform does not reach the heart of the difficulty. Antitrust is still grooved to the ordinary process of litigation. A movement toward an administrative base appears inevitable. Justice has, against its will, been forced to grant a skeptical indulgence to the advisory opinion. It has, to speed its work along, been compelled to make a cautious use of the consent decree. Each is still a blunt tool in the early stage of development; each needs to be shaped into a nimble instrument of control.

In other domains the advisory opinion has been converted into the administrative ruling. It is argued that rule-making ought to be domesticated to use in antitrust. Its informal process is simplicity itself. The representatives of a trade come to Justice with their program. Negotiations are entered into. The resulting agreement is virtually a contract between the industry and the Government. The companies pledge behavior in accordance with the terms of the document. Justice promises immunity in respect to the enumerated practices.

A few pencil strokes will create the ideal process. An industry seeks advance clearance for its program. Justice understands the operation of the national economy and is fully informed in respect to the proposal. It gives adequate notice, seeks out all parties who may be in interest, gives to all concerned an opportunity to be heard. The procedure is informal; all available knowledge is distilled into a common understanding, an agreement is reached as durable as the occasion and circumstances allow. The result represents a meeting of minds steeped in the realities of the industry. It is only fair that a legal immunity should be thrown about a course of conduct which scrupulously adheres to the lines of such an understanding. The Division could then safely say to those who had sought its advice, "Upon the basis of the facts as you have set them forth, you may proceed lawfully." But, "if you deviate from this particular pattern of conduct, you do so at your own peril."

The picture is persuasive. The single standard of the Sherman Act does well enough as a norm; but reason dictates its accommodation to the circumstances of particular industries. Litigation is too ponderous for the case-by-case approach; the administrative ruling seems to meet the need for a more flexible and expeditious remedy. It promises alike to free business enterprise from unnecessarily legal hazards and to bring its activities into closer accord with the law. It opens the door to executives honestly in quest of advice. It lifts the cloud of uncertainty beneath which businessmen must now launch their ventures. If ignorance of the law excuses no man, the reason is not

that the source of ignorance is presumed to lie within the law itself. Surely it is within the realm of reason that persons vitally concerned be informed in advance about the meaning of the statute; and if they act in reliance upon such advice, the consequent fault is not theirs.

Advance clearance also promises to raise the level of enforcement. The appearance of businessmen is voluntary. They come on their own business rather than as defendants. No stigma of potential crime attaches to their presence; no presumption of guilt has become an article of faith; the industrial landscape is not read in terms of a hypothesis of monopoly. In a spirit of amity the parties can address themselves to the practical problems in the industry.

Such a process can the better accommodate itself to the volume of traffic. A matter at issue can go forward at a fraction of the former cost; a substitute of the preview for the clean-up is the greatest of economies. The cost of investigation is the single item in the bill of expense that carries over to the new procedure; and inquiry, necessary in any event, would serve a more objective master. It would be addressed, not to fastening guilt upon the defendants, but to correcting industrial practice. In such research the industry would have a stake, and the costs might be materially reduced by the cooperation of business.[1] With the funds at its disposal, Antitrust could supervise a far larger segment of the national economy.

The very shift in emphasis is fraught with significance. As it is now the law is not invoked until after the fact. Justice steps in to run the clock back, undo what has been done, resolve a fused mass into its elements. A return to the status quo—or to some hypothetical status quo—is often impossible, the earlier pattern has been obliterated. It is far more sensible to invoke the law when it can get in its real licks, before forbidden usages have been woven into the very design of the industry. It is true that many practices come by growth, that folkways come into the law by stealth, that their arrival cannot be dated, that they do not fit the concept of a plan. But, however slowly and surreptitiously they emerge, they are constantly in process of change. Hence, with the administrative ruling, a public authority can give direction to their development.

If the matter were as easy as all this, little could be said to the contrary. But an issue in antitrust is a complicated matter, and a variety of hazards attends its conversion into a declaratory ruling. The plan brought forward is a code of behavior for the industry; it is—modified perhaps beyond recognition by event, expediency, adjustment—to continue over the years. The commitment of the Division concerns a concert of corporations, projects far into the future, involves consideration for the moment obscure. In nature it is rather a law for the conduct of an industry than an assessment of activities within it. Even assuming the utmost in good faith, the proposal cannot work out as formulated. The industrial system is highly dynamic, business practice is a stream of accommodations; in corporate structure, technology, marketing, consumer acceptance, the

[1] It can be plausibly argued that the outlay incurred keeping an industry orderly and within the law is a necessary cost of production. If so, the expenses essential to such a control might be borne by the trades concerned or by industry generally. The resulting betterment in the mores of business might well pay its own way. A precedent is offered in the office of the Coordinator of Transportation, 1934–36. The expenses of Commissioner Eastman's establishment were logically assessed against the railroads.

unexpected forever appears. No conference, however fully it is informed, can predict the future.[2]

The administrative process, which Justice is asked to borrow, is not as yet full grown. It exists as an aggregate of devices and procedures not yet articulated into an effective scheme of control. The agency of regulation is not easily held to its function. As establishment comes upon it, it will tend to lose initiative, bury itself in detail, create a stifling body of tradition, become a humdrum organization. All through human society the instrument tends to obscure the office; function tends to survive in the sheer daily grind of carrying on. Difficulties, too, attend the very process of administration. Its authority is pent in by legislative grant; and it falls back upon its delegated powers as a defense against anything it does not want to do. As "the words of the law" are invoked as a check upon the novel and the unusual, the agency retreats further and further within the verbalisms of the statute. The imaginative administrator still has room enough to accomplish what he deems essential; but the ingenuity of the ordinary official does not rise to so severe an ordeal. As a consequence there is an insistent demand for an enlargement of administrative powers in order that the agency may be lifted above the literal and restored to its office.

Thus pressure, retreat behind the act, a demand for increased power runs a merry chase. It is obvious that those whose style is cramped by its rulings constantly cry out against "the arbitrary acts of bureaucracy"; yet almost the unanimous judgment disinterested observers have is that leniency rather than severity is accorded vested interest. The serious complaint is that tolerance for business has involved injustice to the public. Antitrust would be subject to continuous pressure from the managerial group, and against such indulgence its process would have to be carefully guarded.

Yet, for all of this, a place may be found in Antitrust for the administrative ruling. Its effective use, however, requires a scheme of regulation shaped to its distinctive task. For the issue is not limited to a single transaction; the agreement becomes a statement of policy for the future conduct of an industry. It must be grounded in actuality, invite full deliberation, do justice among all the parties it concerns. It cannot emerge from a plan on paper; it must be shaped to the very life of the trade. In a word, it should be a code for the government of an industry. Such a process cannot come into practice full blown. It must begin as "a cautiously experimental power." The borrowed device must be accommodated to its habitat. As understanding grows, its lines should be reshaped until it becomes an effective agency of control.

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[2] A technical way out is, of course, always open to the Government. A plan on paper is one thing; the scheme in operation something quite different. It is in the abstract quite obvious that where business executives go beyond the terms of the agreement, justice is not bound. The solemn covenant has been overstepped by one party; the other, released from all promises, is free to take whatever steps circumstances demand. Immunity cannot be stretched to comprehend more than lies within the bond. Yet a limit of tolerance is implicit in the good faith which the Government has pledged. Words have very elusive meanings; their content varies enormously from application to application. An agreement is little more than a skeleton; to give it reality, a great deal must be spelled out from between the lines. The usages in vogue may run quite contrary to those in contemplation; yet their validity may be juggled out from the terms of the agreement. Or actuality may accord with the nominal understanding, yet present a situation which would never have been sanctioned. Its pledge once given, a technique of escape is not easily available to the Government.

HAZARDS AND QUESTIONS

A beginning could be made with cases already in controversy. The Government brings suit at law or in equity. The parties understand the cost, delay, confusion, irrelevance of litigation; they agree to take the administrative short cut. The task is to explore the line where public interest and private advantage clash and to resolve the conflict. Justice must see to it that the frontier of legal tolerance, as marked out by the Supreme Court, is not crossed. It must impose a ban against a closed trade, collusion to restrict output, agreement to maintain price. It must forbid to firms the use of a common formula for finding costs; it must not allow the consumer to be deprived of access to a free and open market. In such matters a series of prohibitions comes easily enough; an injunctive section of the decree could be made to shape their terms.

The positive provisions are no such simple matter. An information service, a system of open price filing, a classification of customers, a uniform scheme of discounts, a barrage of trade usages, are devices of business enterprise. In themselves they are neither good nor bad; their moral quality derives from the ways in which they are used. And no usage stands alone; each takes it quality from the group of trade practices of which it is a single aspect. An issue, then, no matter how narrow its initial statement, invites scrutiny of the whole pattern of the industry.

At the very threshold stand a series of questions. Exactly what is an industry? What are the limits of its coverage? Are producers of special products to be crowded off into an association of their own? Suppose that the byproduct of one industry competes with the main product of another? What of a case like rayon against silk, where the products of separate industries compete? How is representation to be secured for all who have a stake in the result? How is the group to be kept constant, when parties in interest vary from question to question? How are the rights of minority groups to be protected? Of firms that live along the fringes? Of outsiders to whom a connection is necessary to carry on? As interest becomes more and more remote, where is the line to be drawn? If lawful ends are to be served, all the interests involved should be represented at the conference. "Hearings open to all who are concerned" is easy to profess but almost impossible to realize. An industry is not a regimented array of firms, like one to another in all that gives identity. Its separate units are a miscellany whose interests harmonize and clash in various ways. Among them representation is a delicate problem, and the rule of the majority puts in jeopardy every minority interest. It would be highly difficult to adjust control to the complexities of industrial formation. Nor is it easy to tell how large the number of conferees must be to keep any legitimate party from being left out in the cold.

A change at one point has repercussions far and wide. If an issue arises in respect to automobiles, chemicals, or steel, the producers of raw materials and the distributors of the commodity are vitally affected. The larger units in an industry might seek an accord with Justice, and the independents—many in number but small in industrial power—might find their very existence at stake. The agree-

ment, in a direct or roundabout way, is a threat to the distinctive equities they have built up in the industry.[3] And if all who are concerned with the outcome are to be invited to the conference, amid the resulting babel of tongues what chance is there for a real accord? Would the decree bind only those who signed on the dotted line? What of the recalcitrant 10 percent whose activities might frustrate the result? [4]

How, too, in shaping the decree, could questions of policy be avoided? Would Justice encourage the advance of technology and the elimination of the unfit? Would it promote a highly dynamic economy in which every concern had forever newly to make good? Or would it, in recognizing demands for economic security, keep the little fellow in business? Could it, in the face of pressure from organized petty trade, escape "the politics of industry"? How could it avoid freezing the existing industrial structure with all its waste and extravagance? Could it keep industries open to all who wished to take their chances? Or would it, by sanction and injunction, create vested interests within an enduring framework of business? As the years passed, would the impact of its decisions tend toward a more efficient, articulate, purposeful economy? Would it in time be compelled to abandon competition for a more "realistic" philosophy? It is easy enough to extend such questions, immediate and remote, into a real catechism. But their import is clear enough. They indicate how uncharted is the way of formal control, how great the obstacles to be faced, how many the distractions to be avoided, how easily the end may be lost in concern with the instance.

The process of negotiation also demands its safeguards. The businessman wants advice before the fact; the Government demands security for its plighted word. If both are to be satisfied the judgment must be based upon a knowledge that anticipates the future. An open file on an industry should precede by many months the formal raising of any question. It should be kept up-to-date, be available at any moment. All information relative to trade usage should be gathered, arranged, indexed. But, if facts are to shape judgment, analysis must convert them into understanding. The administrative agency must become familiar with the industry; it must know intimately its structure, products, markets, technology, folkways, balance of large and small units, affiliations with other trades, and place in the national economy. It should possess norms with which to test the good faith in proposals submitted, envisage their practical operation, evaluate them as remedies for current maladjustment. It should not have to seek its data from the corporations before it. Its access to independent sources of information would eliminate the fear of entering into an agreement blindfold.

The character of the ruling which results must accord with its function. In a world of good and bad, an eternal ban can be laid against a practice that is evil; in a court of equity it may be perpetually enjoined. But the affairs of an economy are doomed to change and the perspective shifts with the increase in understanding.

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[3] During the N. R. A. the charge was persistent that in the codes the control of one's business had been "delivered into the hands of his competitors."

[4] In quite a different set-up, N. R. A. had to face many such problems. Had the experiment continued for some time, its experience might throw much light upon the path ahead. As it was, the great mass of these questions did not get answered; they were not even adequately raised.

In the current state of knowledge, a definitive code for an industry is out of the question. The agreement can at its first writing be little more than a tentative hypothesis for the conduct of an industry. Every measure which it contains is subject to correction; either party should at any time for good cause have the right to move for amendment.

Its use demands a constant oversight of the operation of the trade. In the past the serious bother has not been in the winning of cases, but in the follow-up of decrees. If their terms had been adequately policed, the story of antitrust enforcement would be far less a series of sporadic episodes. Justice cannot afford to win hard-fought battles only to allow victories to be eaten away by inaction. It hardly suffices to cure the patient if he is to be permitted to relapse into disease. It does little good to outlaw a practice if a substitute is permitted to achieve the same objective. The void in making the law work can be overcome only by a regular check-up.

Thus the administrative process becomes an instrument of industrial government. The initial provisions of the instrument would rest upon the best of current knowledge and belief. But they should be subject to amendment as practice, circumstance, and expanding knowledge might suggest. A breach of the terms should be a civil offense, reached by a simple administrative action, and remedied by mandate or punished by fine. To such an instrument a tentative official assent would be accorded. Justice could not protest activities which conform to its terms, but it could at any time move for their revision. Save for conduct that lay clearly without the law, firms would not have to carry on under permanent injunctions which they are powerless to lift. As the operation of the industry might demand and so far as the public interest would allow, any provision could be modified.

It is useless to minimize such a task of public oversight. The concern of most other supervisory bodies is with a narrow domain or a single aspect of an industry at work. In comparison to agencies concerned with the railroads, the merchant marine, corporate securities, the task would be gigantic. Antitrust would have to operate over almost the total area of the national economy. Certain provinces would be excluded or rarely demand attention. The trades local in character are beyond its scope; for many parts of the economy—motor transport, railroads, the staples of agriculture—Congress has made other provision; where competition is operative there is no need of supervision; aspects of industrial practice fall more properly within the orbit of the Federal Trade Commission. But, with due regard to every limit set by local charter, legislative exception, adequacy of regulation by the market—the domain is broad and still largely unexplored. It is idle to attempt to bring it under the authority of the Sherman Act all at once. There can be no immediate escape from the hit-or-miss approach of the individual case. A rough formula should determine the industries selected for immediate attention. Its terms should be departure from the competitive standard, the harm to competitors and consumers, the place of the trade in the national economy.

Once off to a good start, the superiority of the administrative process would become manifest. Its merits are so outstanding that

industries may be expected voluntarily to seek its sanctions. The demand might well exceed the capacity of the agency to furnish guidance. Justice should act only on its own motion until experience enables it to respond to such requests with assurance and understanding. It will be difficult to gear traffic to the requirement of competence; for, where a trade is well organized, there is constant apprehension lest some part of its intricate pattern lie without the law. The prospect of a conference with Justice, of amicable amendment, of freedom from legal vexation, is very alluring. If the industry is sprawling, disorganized, highly competitive, the search for security becomes frantic. The demand for an instrument flexible enough to allow an industry to take the course of events will be insistent. Eventually the initiative should be open both to justice and to the industry.

It is a hard road ahead—but it seems to be better than any other. On the lofty plane of purpose and principle the law has always been alert to the instrumental character of industry. If, in the realization of public policy, the avowed ends have been blurred or lost, a dominant reason is not far to seek. Antitrust has lacked suitable tools with which to do its work; its want has been in devices and procedures fitted to the task which needs to be done. It is upon this level that the urge toward invention must find outlet in techniques of regulation. The public control of business awaits the creative work of administration.

THE TASK OF RETOOLING

In the shift the work of Antitrust would be transformed. As a division of Justice, its pristine task has been that of a prosecutor; as an arbiter of arrangements under which an industry is to carry on, it has driven far into administration. It has become charged with the appraisal, the observation, the revision, of the pattern of trade practice. It has, in a word, come to perform an economic office. As a day-by-day supervision of the affairs of industry, its task is administrative. As a filling in of detail in the blanks of a statute, it is legislative. As a doing of justice between the parties who have interests in the industry, it is judicial. In all its aspects its concern is with industrial government. Its reorientation to its revised office will come slowly, fumblingly, step by step; but it is possible to anticipate, at least in general terms, the changes which impend.

To the newer process the Antitrust Division would have to be regeared. Administration would be pivoted upon sections charged with industrial analysis and the formulation of rulings and decrees. The task of the former should be to capture a picture, in clean-cut perspective and comprehensive detail, of the industry in operation. Against the background of structure and pattern of usage, the sources of maladjustment should be laid bare. If every case leads to an adequate diagnosis, the results should prove cumulative. Even under an ad hoc approach, little by little the topography of the national economy will emerge. Industries may range themselves into types; a trouble spot may be matched against others of its kind; fault lines will be discovered in the economy along which disorder may be expected. A growing body of experience will be at hand upon which to draw as occasion demands.

A distinct section should be concerned with remedies. Its task is constructive; its work begins where that of the other division leaves off. Its proposals must be grounded in adequate analysis; but they involve choices between alternative schemes of arrangement which imagination must help knowledge to predicate. Its concern is in a sense the technology of industrial order. As inventors further the economic arts, its office is to create and improve the devices and procedures through which an industry maintains order, carries on, does justice between the several parties concerned. To turn its work to account it must engage in a constant oversight of the decrees which it has to administer.

Such tasks are exacting in respect to personnel. It is obvious that the work is not in strict accord with the usual capacities of the lawyer. While in a sense the demand is for the practice of economics, its formal discipline—with severities which far too often reflect more of the remote world of mind than of the real industrial process—may prove as much a hindrance as a help. Academic economics, as well as legal law, may obtrude with alien stereotypes, irrelevant procedure, a scheme of rigid categories in which to pour seething actuality. The need is a round of skills shaped to the task. It is at present impossible to discover proficiency in so novel an art ready-made; it will have to be developed. For that reason innate qualities are more important in prospective officials than any formal schooling. Given a keen, retentive, and resourceful intellect, an ability to see the forest without losing the trees, an open mind that remains skeptically alert, a capacity to project a plan on paper into a scheme in operation, a devotion to the public interest—and the exposure of experience will do the rest. The general run of the craft may be immune—but there are lawyers and economists upon whose disciplines such a competence can be grafted. A staff for such a task cannot be assembled; it must, through trial, exposure, and discard, be painfully built up.

An institution can hardly drift so far without creating an antithesis between its inherited form and its assumed office. A number of serious questions press for more durable answers than an undirected process of growth can give. It is only through the tenuous link of equity that Antitrust has become a positive agency of business control. It has no legal warrant for such a function of oversight; it can command only as an industry is loath to risk a battle in court. Its exercise of authority is still set within the adverse formula of a cause of action; the office of arbiter has been grafted upon that of prosecutor; the rules to be decreed for the game masquerade as a legal judgment; the parties in quest of usages under which they are to carry on are still technically the defendants. Most anomalous of all, justice is dispensed by an agency whose task it is to police.

A clash between original and derived function cannot forever continue. As a division of Justice the task of Antitrust has been that of prosecutor. As an arbiter of arrangements under which an industry is to carry on, it has stumbled into an administrative office. The tasks should not be confused. Justice should be left free to inquire, to complain, to move for a remedy; such activities are in accord with its distinctive competence. The remedial section should be freed from

its ancient bondage to litigation, given its independence, fitted out with all the requisites of its office. Functions which are distinct should be separated; the prices of negotiation should be placed—where in character it has already drifted—outside the Antitrust Division in an independent administrative body.

Judicial review should be by way of a specially constructed industrial court of five or seven members. They should be as competent in the ways of industry as they are learned in its law. All protests against administrative rulings whether by Justice or by a private party, would go to this bench. From it appeal would lie directly to the United States Supreme Court. The court, like any Federal tribunal, would sit at law and in equity. In the exceptional case, it would sit en bloc; the run-of mine business would be dispatched by the single judge. As occasion demanded, it would hear criminal actions, refer issues to the jury, impose penalties. It would more often sit in tort and assess against corporations and their officials the appropriate fines. In the policing of decrees, a host of minor or major violations would be brought before it. It would issue injunctions, order divestment and dissolution, decree codes of fair conduct.

But if effective results are to be had, a vigorous agency of enforcement must be maintained. Its place must remain in Justice. It is one thing to decree, quite another to police; and again the functions must not be confused. The detachment essential to analysis, the studied poise required by judgment, are hardly assets in detecting malfeasance and calling to judgment suspicious conduct. Yet, since it is a trade practice rather than personal guilt which is to be presented, a zeal for righteousness needs to be tempered somewhat with the practice of an industrial art. The Division must likewise police the decrees of the Court; and, as these increase in number, its oversight will extend over larger areas of the industrial system. It must with diligence hunt out violations; but since the industry operates under a flexible instrument, it must constantly be alert to amendment. It must, as occasion demands, seek penalties for public tort; but it must also, through chancery, move to plug loopholes, prevent evasions, amend rents in the mesh of the decree.

Little change in structure would be necessary to accommodate the Division to its enlarged task. Its head, an Assistant Attorney General, would continue to be a Presidential appointee. His position would become one of strategy within the national economy; he would determine the types of trade practice which would be subject to revision, choose the industries to be brought into court, direct the techniques of investigation. His personal competence should accord with the task he is called upon to perform. As a political appointee his office would take color from the administration in power; and, within the limits of policy marked out in the law, it would reflect the party program. There would remain the chance of a lapse under a weak President into letting things take their own course. But the institution once established, its far-reaching tentacles should support its activities and the inertia of old would be difficult to achieve. Once its usefulness had been demonstrated, business could hardly get along without it. A fresher and more invigorating atmosphere would come to pervade the enforcement agency.

The whole scheme would sharpen structure along functional lines. A sharp separation of powers would divide the administrative from the judicial process. In a sense, the head of the Division would be an officer of court. He would control the docket; in his selection of cases he could not escape the role of accessory before the fact in the making of the law. But judgment none the less would lie with a body whose members were in no sense parties to the action. The new tribunal would not merely condemn and enjoin; it would correct and commend. Within its lesser orbit it would be as free as the Congress to make a constructive attack upon the disorder in an industry. It would substitute a regular for a casual, a competent for adventitious, determination of issues.

At present it is a matter of chance in what district an antitrust suit is brought. The case stands apart from the run-of-mine grist of the judicial mill; the judge's ability to keep his footing over an unfamiliar terrain is a matter of accident. Under the new arrangements cases would go to a court experienced in industrial matters. A host of scattered suits would be garnered into a single docket. In time there would emerge a "code industrial" possessed of such focus, breadth, and consistency as human nature and the changing circumstances allow. It would constitute a flexible law of industry for an economy which is on the march.

3. ANTITRUST FACES THE FUTURE

THE RESIDUAL ESTATE

At its beginning the Sherman Act was public policy in respect to business. Today it is one of a number of acts in which public policy is recorded. Then it was the legal weapon for the control of business; now it is a single instrument in the arsenal of regulation. It is still the dominant expression of public purpose, and other measures are still written as qualifications or special cases. But legislation already upon the statute books is grounded upon other assumptions; and economic creeds, other than competition, have arisen to dispute its foundation. Nor is the area in which industrial fact accords with its presumption as large as once it was. Almost everywhere the free and open market has lost its primitive simplicity; nowhere does it operate in the complete and automatic way once glibly assumed. In a word, the world has grown up, industry has compromised competition with its folkways, the sovereignty of antitrust in public policy is no longer absolute.

The Sherman Act was laid down as a defensive wall about laissez faire; today a Federal oversight of the national economy is a matter of course. So long as the market supplied a system of checks and balances which was assumed to keep industry in order, a passive Government did well enough. As the efficiency of market control was lost—or its shortcomings became manifest—the need of positive controls became apparent. Necessity decrees a search for techniques to keep industry going; opinion lingers lovingly upon "the free and open market." Pressures drive public policy forward; our beliefs command that novelties come by way of exception. As a result, the development of public control is pragmatic. The older pattern is beset by, and threatens to be smothered beneath, expediencies.

The current problem in public control gets stated as a sharp alternative. Choose you this day between the regimentation of industry and the rule of the free and open market. Either competition is to be imposed where there has been departure from its pristine pattern, or every trade is to be regimented under a bureaucratic control. The easy dichotomy is dramatic, speculative, and unreal. The landscape of the national economy is not a dull, monotonous gray. A number of industries, for one reason or another, could operate as competitive units only with a serious loss of efficiency. Others have strayed so far from the competitive norm that a return is a parlous adventure which would have to be shrewdly contrived and brilliantly executed. Hostages have been given to prevailing arrangements and the rank growth of years would have to be trimmed away to make a fresh beginning. Even the breaking up of so loose a union as a trade association presents its difficulties. The dissolution of a giant corporation calls for the exercise of an art which as yet is little perfected. There

are industries whose activities fall short of strict legal requirements, yet whose performance seems rather better than an enforced competition would be likely to induce. At the other extreme is the trade in which an excess of zeal has hammered the precise competitive design into a miniature of chaos. And in between, along the fringe, weaving in and out, are an assortment of industries, in which elements of restraint and competition have been colorfully woven into the same pattern.

It is hardly possible to reduce industrial actuality to trim categories. A threefold classification of the competitive, the undercompetitive, and the overcompetitive confuses analysis by parading simplicity. In the economy as with organic life and human culture, there is no straight line of evolution; nor is there a general trend toward concentration of control. Industries forever react to the circumstances they face. They may blunder into a struggle for markets as well as conspire to escape it; changes occur constantly and there is no single trend in development.

To large areas of the national economy the Sherman Act is for one reason or another inapplicable. Long ago the public utility was recognized and it is now established beyond recall. There we accept unity in operation as in the public interest. We no longer permit the entrance of newcomers except upon a showing of convenience and necessity; save for the right of the state to enter with its yardstick, the industry is virtually closed. An authority, therefore, is set up as a substitute for a free and open market which is no longer able to accord protection. The commission, and its scheme of regulation, still presents a series of unsolved problems, which break very differently for railroads, street railways, light and power, water.

An evolving agricultural policy has seriously compromised the rule of competition. The interest of the group has been exalted above that of the individual; the acquisitive urge has been forced to bow before regulation directed at a collective security; a quota has been assigned to the farmer—in excess of which he can sow and reap, but may not market. To the same end legislation seeks to redress a disadvantage in bargaining position by making lawful a concert of action by agricultural cooperatives.

Even when the departure from the competitive norm is marked, the Sherman Act may prove inert. Restrictive practices are often absorbed into the conduct of the industry. They arise, are accepted, lose their identities, in the general body of industrial usage. They come into being as restraints; yet they may linger after an avid struggle for markets is resumed. Once linked to the established order they are not easy to uproot. They may be no more than symptoms of an industrial disorder not yet discovered. If so, a ban upon them merely invites an encore appearance in novel form.

And a large domain, clearly competitive, lies beyond the remedial reach of antitrust. What of the overcompetitive industry, with its disorderly market, chaotic price structure, overdone capacity? An excess as well as a dearth of rivalry carries its detriment to the general welfare. The use of twice the human and material resources necessary to turn out our budget of bituminous coal ought to shock a sense of efficiency as much as cotton plowed under or

oranges kept away from the market. A constriction in the stream of commerce near the oil refinery yields a toll rightly called "unearned increment"; the colossal waste in the system of filling stations, through its inflated retail margin, impose a far heavier burden upon the consumer. A breaking of a bottle neck manifest in making illegal a concerted action to get "distress gasoline" off the markets, contributes nothing to freeing the economy of the heavy toll which the militant methods of marketing entail. At one point in an industry an antitrust action may break barriers and allow traffic freely to move; but at another point, where traffic needs to be checked rather than released, another sort of attack is needed.[1]

Nor does the pattern always stay put. Industries are moving at various tempos in various directions. If some move toward increased concentration, others are moving toward a bigger and better competition; still others shuttle back and forth in response to the stimuli which constantly beat upon them. A shift in technology, a deal in high finance, the appearance of a substitute, the loss of a foreign market, the development of a byproduct—and the fabric of trade practice reveals new lines. An overcompetition, with its induced demand for security, may breed conspiracy. A restraint itself, through some weakness in its armament, often invites a return to competition.

A vast realm, however, still lies within the orbit of the Sherman Act. The kind of restraints envisaged by the Fifty-first Congress still exist. The channel of trade is constricted at the strategic point; the corrective is the smashing of the bottle neck. A concern, which has developed bodies for automobiles, stands ready to supply the railroads with up-to-date, lightweight parlor and sleeping cars; the Pullman Co. has converted its monopoly into a series of exclusive contracts; an antitrust action should provide an escape from obsolete equipment. A serious check is imposed upon group health by a boycott of "organized medicine"; the physicians serving "the consumers' cooperative" are excluded from hospitals and expelled from the brotherhood; a breaking of the barrier clears the way for experimentation in the provision of medical services. It is impossible to establish a daily paper without news service. Yet access to any one of the Big Three news-gathering organizations is as severely guarded as entrance into an exclusive club. If their facilities were open to all upon the same terms, the trend toward fewer newspapers would pass into reverse and journals might come to reflect the diverse currents of opinion in the community. In a multitude of such cases the invocation of the Sherman Act offers a direct attack.

But over a large industrial domain a single legal blow is not enough. The smash may be needed—or it may not—but unless a corrective goes along, the end of the matter is likely to prove as bad as the beginning. A scheme of restraint, to which an industry has grown accustomed, is not at once sloughed off; it must little by little be eradicated from the organism of trade practices. A sporadic attack, not even a series of staccato blows, can be made to clear up the malady. It is, of course, quite possible easily to achieve immediate results; recent drives in milk,

[1] [illegible]ciency, too, is a factor in the definition of limits. In the personal service trades—the laundry, the barber shop, hairdressing, cleaning, and dyeing—a multiplicity of cor-[illegible]rals of industry are engaged in deadly rivalry; for their regulation a snooping force [illegible] of all proportion to the results would be demanded. If there must be oversight the [illegible] would seem to [illegible] for the local police.

fertilizer, potash, the building trades, have demonstrated as much. While the case is in process, restraints take to cover, prices fall, a flickering competition flares into vitality. But such phenomena represent a temporary response; the real test comes when the legions have been shifted elsewhere and the stimulus is removed. In victory or in defeat, for a time the behavior of the industry will appear circumspect; but the rectitude may provide a protective coloring, rather than obliterate the indelible lines of the older design. A corrective that pierces to the heart of the difficulty—and endures—defies the ordinary probe at law. The habits of industry are too compelling to be delicately readjusted by so blunt a weapon.

In actuality industries are a miscellaneous lot. The requisite, therefore, is a procedure rather than a recipe, and thus a more flexible process seems to offer. Broad ways of public control may be distinguished; but each needs to be readjusted to unlike instances. To become a mature instrument of regulation, the casual attack of Antitrust must be transformed into a habitual procedure. It can endure only by taking on the durable character of the activities it is used to direct. In a word, it must shift its base from litigation to administration.

A FINAL CAVEAT

Antitrust is a symbol of democracy. It is an assertion that every industry is affected with a public interest. Quite apart from its operation, it keeps alive within law and public policy a value which must not be sacrificed or abridged. It asserts the firm, the trade, the economy to be the instrument of the general welfare. If the fact falls short of the ideal, the call is to amend the fact rather than abandon the ideal. It may be that in many industrial areas, the free and open market has been compromised or is forever gone. Still its norms of order and justice endure to serve as standards for performance under another arrangement. In matters where the market can be restored to its economic office, there should be caution in substituting administration. A hazard to the common good attends the enlargement of personal discretion.

No matter how competent the agency, informed persons shudder at the replacement of the open market by personal discretion. Only the impotence of competition to do what is expected of it invites the change. A case for the shift is wanting unless safeguards can be contrived to replace those which the minority group, the consumers, the interests interlocked with the industry, are forced to surrender. The administrative agency invites the very invasion of economic power which the competitive market is supposed to be proof against. It is played upon by all the pressures which powerful groups can muster into service.

Other ventures have not pointed an alluring way. The commissions have been very effective in closing public utilities to outsiders; they have been far less successful in assuring fair charges to the users of their services. Their rigidities have discouraged experimentation with price which might have brought power and light within the reach of lower and lower income groups. The Interstate Commerce Commission has been swamped beneath a deluge of detail. Save for the brief life of the Coordinator's office, it has spent little

energy upon a forward plan for the railroads. The various agricultural controls—corn, milk, wheat, sugar, cotton, tobacco—have been very sensitive to the plight of the farmers, rather negligent of farm labor, and far too indifferent to the general public who must pay the bill.

The N. R. A., brief as was its life, staged a full-dress performance of the hazards of the administrative process. Wide powers were granted—to become sanctions under which the strategic group could lord it over the industry. The strong were served under the affectation of protecting the weak; managerial privilege was entrenched under a pretense of fairness to the little fellow and to labor. Rules were written, presently to be smothered beneath a flood of exceptions; the vague clauses in codes were made to mean what interested parties wanted them to mean: "emergencies" were invoked to justify orders which otherwise would have been intolerable.

Such dangers, always imminent, may be forestalled. But vigilance must not relapse for even a moment. The question of privilege is seldom directly put; it emerges in a score of disguised issues. A scheme to restrict output is presented as a limitation upon the hours of labor. A cost formula for price is invoked to allow the little fellow to recover his expenses. A reduction of capacity is intended to do no more than bring it within hailing distance of what the market will take. A provision, fair upon its face, operates to the detriment of a firm whose progressive ways have been an embarrassment to the industry. The barrage of pressures is so persistent—the writing of a special rule, the invocation of an emergency, the declaration of an exception—that the stanchest official has difficulty in withstanding it. It emerges in forms so innocent that he must be forever alert lest his resolution be outflanked. The impulses from the privileged are omnipresent and strong; the voice of the unorganized, weak, and faltering. To catch the perspective the administrative agency must supply its own amplifier.

Such moves are no more than next steps. As change obeys its dynamic urge, their contribution may be a restatement of the problem of public control. Trends are already manifest of which these proposals take little account. But their lines must be more sharply defined before they can become the concern of an articulate public policy. The stress and strain in industrial structure proceeds from a clash which runs deep. At the moment a triple demand is being laid upon the national economy—it must take the turbulent course of events; it must assimilate a medley of public controls long overdue; it must provide an adequate national defense. It may well be that here is more traffic than the system of free enterprise can carry. But if competition belongs to an interlude in history—a lull between ages of unlike authority—only its events can reveal the next stage.

The task of keeping industry the instrument of the Commonwealth is as arduous as it is everlasting.

APPENDIX A

CONVICTIONS OF IMPRISONMENT UNDER FEDERAL ANTITRUST LAW, JULY 1890–JULY 1940

Title	Type of case	Number of defendants	Sentences imposed	Year sentences imposed
U. S. v. *Debs*[1]	Labor union	4	3 to 6 months	1894
U. S. v. *Amer. Naval Stores Co.*	Business racketeering	2	3 months[2]	1909
U. S. v. *Haines*	Labor union	5	4 hours	1912
U. S. v. *Patterson*	Business racketeering	27	24 defendants, 1 year; 3 defendants, 9 months.[2]	1913
U. S. v. *Boyle*	Labor union	2	1 year[3]	1917
U. S. v. *Rintelen*	War spies	3	1 year	1917
U. S. v. *Bopp*	do	5	do	1917
U. S. v. *Alexander & Reid Co.*	Business racketeering	4	1 defendant, 2 months; 3 defendants, 4 months.[4]	1921
U. S. v. *O'Brien*	Labor union	5	4 defendants, 8 months; 1 defendant, 30 days.	1922
U. S. v. *Powell*	do	1	10 days	1922
U. S. v. *Trenton Potteries Co.*	Business	8	7 defendants, 6 months; 1 defendant, 10 months.[5]	1923
U. S. v. *Williams*	Labor union	5	10 months	1923
U. S. v. *Reilly*	do	4	1 year	1924
U. S. v. *Krewoski*	do	1	6 months	1926
U. S. v. *Baumgartner*	Business racketeering	6	3 to 9 months	
U. S. v. *Greater N. Y. Live Poultry Cham. of Comm.*	do	20	10 days to 4 months	1929
U. S. v. *Mercer*	do	1	3 months	1931
U. S. v. *Weiner*[6]	do	5	3 months to 3 years	1934
U. S. v. *Fish Credit Assn., Inc.*	do	11	6 months to 2 years[7]	1935
U. S. v. *Union Pacific Produce Co.*	do	3	2 defendants, 6 months; 1 defendant, 1 year.[8]	1936
U. S. v. *Protective Fur Dressers Corp.*	do	15	2 defendants, 2 years;[9] 13 defendants, suspended sentences.	1936
U. S. v. *Gramlich*	Labor union	36	2 years	1937
U. S. v. *Fur Dressers Factor Corp.*	Business racketeering	78	10 defendants, 2 to 15 months; 68 defendants, suspended sentences.	1938
U. S. v. *United Sea Workers Union.*	Labor union	5	3 defendants, 3 to 6 months; 2 defendants, suspended sentences.	1938
U. S. v. *Needle Trades Workers Industrial Union.*[10]	do	12	5 defendants, 1 year; 4 defendants, 6 months; 2 defendants, 3 months; 1 defendant, suspended sentences.	1940
U. S. v. *Local 807, International Brotherhood of Teamsters.*[10]	do	26	23 defendants, 1 to 18 months; 3 defendants, suspended sentences.	1940

[1] Contempt proceeding.
[2] Reversed.
[3] Sentence of 1 defendant commuted to 4 months.
[4] Sentence of 1 defendant commuted.
[5] Sentence suspended.
[6] Contempt proceeding for violation of decree in *U. S.* v. *Greater N. Y. Live Poultry Chamber of Commerce.*
[7] Sentences of 8 defendants suspended.
[8] Sentences of all suspended.
[9] Reversed as to 1 defendant.
[10] On appeal.

APPENDIX B

FINES IMPOSED UNDER FEDERAL ANTITRUST LAW, JULY 1890–JULY 1940

Title	Industry	Number of defendants fined	Fines imposed	Year fine imposed
U. S. v. *Moore*	Coal	1	[1] $200	1896
U. S. v. *Federal Salt Co*	Salt	1	1,000	1903
U. S. v. *Amsden Lumber Co*	Lumber	6	2,000	1907
U. S. v. *MacAndrews & Forbes Co*	Licorice paste	2	18,000	1907
U. S. v. *Phoenix Wholesale Meat & Produce Co*	Meat	1	1,000	1907
U. S. v. *Atlantic Investment Co*	Naval stores	6	30,000	1907
U. S. v. *American Seating Co*	Church furniture	18	47,500	1907
U. S. v. *Santa Rita Store Co. & Santa Rita Mining Co.*	Company store	2	[1] 2,000	1907
U. S. v. *Parks*	Paper	27	54,000	1908
U. S. v. *Union Pacific Coal Co*	Coal	5	[1] 13,000	1909
U. S. v. *Nat'l Umbrella Frame Co*	Umbrella frames	3	3,000	1910
U. S. v. *Simmons*	Plumbers' supplies	12	265	1910
U. S. v. *Albia Box & Paper Co*	Paperboard	33	63,000	1910
U. S. v. *Steers*	Tobacco	8	3,500	1910
U. S. v. *Imperial Window Glass Co*	Window glass	16	10,000	1910
U. S. v. *Ray*	Labor union	3	110	1911
U. S. v. *Palmer*	Copper wire	195	132,200	1911
U. S. v. *So. Wholesale Grocers' Ass'n* [2]	Groceries	4	5,500	1913
U. S. v. *Patten*	Cotton	1	4,000	1913
U. S. v. *Thompson*	do	5	18,000	1913
U. S. v. *John Reardon & Sons Co*	Fertilizer	2	8,000	1913
U. S. v. *Standard Sanitary Mfg. Co*	Enamelware	27	51,007	1913
U. S. v. *Geer*	Paperboard	6	16,000	1913
U. S. v. *Hunter Milling Co*	Flour	3	2,000	1913
U. S. v. *New Departure Mfg. Co*	Coaster brakes	18	81,500	1913
U. S. v. *Patterson*	Cash registers	1	[1] 5,000	1913
U. S. v. *Page*	Fruits and vegetables	15	8,450	1913
U. S. v. *North Pacific Wharves & Trading Co*	Wharf facilities	4	8,500	1914
U. S. v. *Pacific & Arctic Ry. & Navigation Co*	Steamships	5	19,500	1914
U. S. v. *American Wringer Co*	Clothes wringers	4	6,000	1914
U. S. v. *Collins*	Farm produce	29	650	1915
U. S. v. *Knauer*	Plumbers' supplies	34	8,500	1916
U. S. v. *McCoach*	do	32	5,265	1916
U. S. v. *Irving*	do	12	7,250	1916
U. S. v. *King*	Potatoes	5	3,500	1917
U. S. v. *Boyle*	Labor union	16	20,000	1917
U. S. v. *Bopp*	War spies	4	20,000	1917
U. S. v. *Cowell*	Cement	9	25,000	1917
U. S. v. *Mead*	Newsprint	5	11,000	1917
U. S. v. *M. Piowaty & Sons*	Onions	5	1,250	1917
U. S. v. *Nat'l Retail Monument Dealers Ass'n*	Monuments	17	6,255	1917
U. S. v. *Booth Fisheries*	Fish	5	13,000	1918
U. S. v. *Artery*	Labor union		4,500	1918
U. S. v. *Chicago Mosaic & Tiling Co*	Tile	12	7,500	1918
U. S. v. *Belfi*	do	10	[3] 9,000	1918
U. S. v. *Jensen Creamery Co*	Dairy products	1	7,500	1919
U. S. v. *Sumatra Purchasing Corp*	Tobacco	5	25,000	1920
U. S. v. *Alphons Custodis Chimney Construction Co*	Brick chimneys	20	18,325	1920
U. S. v. *Goodwin-Gallagher Sand & Gravel Corp*	Sand and gravel	15	40,000	1921
U. S. v. *Alexander & Reid Co*	Tile	52	122,000	1921
U. S. v. *Atlantic Terra Cotta Co*	Terra cotta	7	51,000	1921
U. S. v. *Clements*	Labor union	8	10,000	1922
U. S. v. *Whiting*	Milk	1	500	1923
U. S. v. *Feeney*	Labor union	8	6,000	1923
U. S. v. *Clow & Sons*	Plumbers' materials	16	20,000	1923
U. S. v. *Andrews Lumber & Mill Co*	Building materials	41	58,300	1923
U. S. v. *American Terra Cotta & Ceramic Co*	Terra Cotta	6	15,000	1923
U. S. v. *Trenton Potteries*	Pottery	35	169,000	1923

[1] Reversed.
[2] Fines imposed for contempt of consent decree.
[3] $1,950 reversed; balance remitted by President.

Title	Industry	Number of defendants fined	Fines imposed	Year fine imposed
U. S. v. *Williams*	Labor union	5	$12,500	1923
U. S. v. *Harvel*	do	2	50	1923
U. S. v. *Reilley*	do	4	13,000	1924
U. S. v. *Lindsley Bros. Co*	Red cedar poles	11	37,300	1925
U. S. v. *Coye*	Refrigerators	18	70,000	1925
U. S. v. *Baker*	Furniture	54	176,000	1925
U. S. v. *Brown*	do	93	209 000	1925
U. S. v. *Natl. Malleable & Steel Castings Co*	Iron castings	92	227,000	1926
U. S. v. *Lay Fish Co*	Fish	16	31,000	1926
U. S. v. *Amer. Agricultural Chemical Co*	Fertilizer	37	90,500	1926
U. S. v. *Shreve, Treat & Eacret*	Jewelry	18	26,850	1927
U. S. v. *Berger Mfg. Co*	Metal lath	5	10,850	1927
U. S. v. *Nat'l Cash Register Co.*[3]	Cash registers	1	2,000	1928
U. S. v. *Berkey & Gay Furniture Co*	Furniture	37	58,950	1928
U. S. v. *Aulsbrook & Jones Furniture Co*	do	37	46,950	1928
U. S. v. *Allied Cleaners & Dyers of Seattle*	Pressing machinery	1	750	1928
U.. S. v. *Baumgartner*	Confectionaries	17	[4] 20,010	1929
U. S. v. *Meyers*	Labor union	4	10,000	1929
U. S. v. *Greater New York Live Poultry Chamber of Commerce.*	Poultry dealers	66	[5] 40,650	1929
U. S. v. *Ludowici-Celadon Co*	Roofing tile	1	5,000	1929
U. S. v. *Mercer*	Trucking	1	250	1931
U. S. v. *Nevada Northern Ry. Co*	Railroads	9	557	1934
U. S. v. *Fish Credit Assn., Inc*	Fish	58	48,387	1935
U. S. v. *Protective Fur Dressers Corp*	Fur skins	12	[6] 38,000	1936
U. S. v. *Lockwood & Winant*	Fish	22	12,000	1936
U. S. v. *Hulse*[7]	Credit information	10	4,000	1936
U. S. v. *Union Pacific Produce Co*	Artichokes	1	1,000	1937
U. S. v. *Fur Dressers Factor Corp*	Fur skins	28	[8] 63,250	1937
U. S. v. *Gramlich*	Labor union	36	360,000	1937
U. S. v. *Dairymen's Assn., Ltd*	Milk	9	4,500	1937
U. S. v. *United Sea Food Workers Union*	Labor union	7	9,000	1938
U. S. v. *Standard Oil Co*	Gasoline	19	70,000	1938
U. S. v. *Socony-Vacuum Oil Co., Inc*	do	27	375,000	1938
U. S. v. *Local 20244, Wine, Liquor & Distillery Workers Union.*	Labor union	6	1,000	1939
U. S. v. *General Motors Corp.*[9]	Auto financing	4	20,000	1939
U. S. v. *Engineering Survey and Audit Co*	Building	26	6,000	1940
U. S. v. *Sheet Metal Assn*	do	1	1,000	1940
U. S. v. *Southern Pine Assn*	do	3	12,000	1940
U. S. v. *Long Island Sand & Gravel Producers Assn*	do	9	50,000	1940
U. S. v. *Bausch & Lomb Optical Co*	Optical goods	4	40,000	1940
U. S. v. *Needle Trades Workers Industrial Union*[9]	Labor union	4	7,000	1940
U. S. v. *Local 807, International Brotherhood of Teamsters*[9].	do	1	10,000	1940

[4] $500 Reversed.
[5] $5,250 suspended.
[6] $10,000 reversed.
[7] Fines imposed for contempt of decree in *U. S.* v. *National Retail Credit Assn.*
[8] $3,000 reversed.
[9] On appeal.

Fines imposed for contempt	$11,500
Total fines imposed under criminal action	3,509,331
Reversals, suspensions	47,950
Total net fines imposed	3,461,381

APPENDIX C

ANALYSES OF FINES IMPOSED UNDER FEDERAL ANTI-TRUST LAW, JULY 1890–JULY 1940

Title	Trial	Guilty plea	Nolo contendere plea
U. S. v. *Moore*	[1] $200		
U. S. v. *Federal Salt Co*		$1,000	
U. S. v. *Amsden Lumber Co*		2,000	
U. S. v. *MacAndrews & Forbes Co*	18,000		
U. S. v. *Phoenix Wholesale Meat & Produce Co*	1,000		
U. S. v. *Atlantic Investment Co*		30,000	
U. S. v. *American Seating Co*		47,500	
U. S. v. *Santa Rita Store Co. & Santa Rita Mining Co*	[1] 2,000		
U. S. v. *Nat'l Umbrella Frame Co*		3,000	
U. S. v. *Union Pacific Cool Co*	[1] 13,000		
U. S. v. *Simmons*		265	
U. S. v. *Ray*	110		
U. S. v. *Parks*		54,000	
U. S. v. *Albia Box & Paper Co*		63,000	
U. S. v. *Steers*	3,500		
U. S. v. *Imperial Window Glass Co*			$10,000
U. S. v. *So. Wholesale Grocers' Ass'n*.[2]	5,500		
U. S. v. *Patten*		4,000	
U. S. v. *Thompson*			18,000
U. S. v. *John Reardon & Sons Co*			8,000
U. S. v. *Standard Sanitary Mfg. Co*	51,007		
U. S. v. *Geer*			16,000
U. S. v. *Whiting*		500	
U. S. v. *Palmer*			132,200
U. S. v. *Hunter Milling Co*	2,000		
U. S. v. *Nat'l Cash Register Co*.[2]	2,000		
U. S. v. *New Departure Mfg. Co*		76,000	5,500
U. S. v. *North Pacific Wharves & Trading Co*		8,500	
U. S. v. *Pacific & Arctic Ry. & Navigation Co*		19,500	
U. S. v. *Patterson*	[1] 5,000		
U. S. v. *Page*		8,450	
U. S. v. *Knauer*	8,500		
U. S. v. *American Wringer Co*			6,000
U. S. v. *Booth Fisheries*			13,000
U. S. v. *Collins*			650
U. S. v. *McCoach*			5,265
U. S. v. *Irving*	7,250		
U. S. v. *King*	3,500		
U. S. v. *Artery*	2,500	2,000	
U. S. v. *Boyle*	20,000		
U. S. v. *Feeney*		6,000	
U. S. v. *Bopp*	20,000		
U. S. v. *Cowell*	7,500	17,500	
U. S. v. *Jensen Creamery Co*		7,500	
U. S. v. *Mead*			11,000
U. S. v. *Chicago Mosaic & Tiling Co*		7,500	
U. S. v. *M. Piowaty & Son*			1,250
U. S. v. *Nat'l Retail Monument Dealers Ass'n*			6,255
U. S. v. *Belfi*	[1] 9,000		
U. S. v. *Sumatra Purchasing Corp*			25,000
U. S. v. *Alphons Custodis Chimney Construction Co*			18,325
U. S. v. *Goodwin-Gallagher Sand & Gravel Corp*		40,000	
U. S. v. *Clow & Sons*		20,000	
U. S. v. *Alexander & Reid Co*		122,000	
U. S. v. *Andrews Lumber & Mill Co*	58,300		
U. S. v. *Atlantic Terra Cotta Co*		51,000	
U. S. v. *American Terra Cotta & Ceramic Co*		13,500	1,500
U. S. v. *Trenton Potteries*	169,000		
U. S. v. *Clements*	10,000		
U. S. v. *Williams*	12,500		
U. S. v. *Harvel*		50	
U. S. v. *Reilley*	13,000		

[1] Reversed.
[2] Contempt proceeding.

Title	Trial	Guilty plea	Nolo contendere plea
U. S. v. *Nat'l Malleable & Steel Castings Co*		$5, 500	$221, 500
U. S. v. *Lindsley Bros. Co*		37, 300	
U. S. v. *Coye*		68, 000	2, 000
U. S. v. *Baker*		176, 000	
U. S. v. *Brown*		209, 000	
U. S. v. *Berkey & Gay Furniture Co*		1, 000	57, 950
U. S. v. *Aulsbrook & Jones Furniture Co*		2, 000	44, 950
U. S. v. *Lay Fish Co*		31, 000	
U. S. v. *Shreve, Treat and Eacret*			26, 850
U. S. v. *Amer. Agr'l Chemical Co*			90, 500
U. S. v. *Allied Cleaners & Dyers of Seattle*			750
U. S. v. *Baumgartner*	[4] $20, 010		
U. S. v. *Berger Mfg. Co*		10, 850	
U. S. v. *Meyers*		10, 000	
U. S. v. *Greater New York Live Poultry Chamber of Commerce*	[5] 40, 650		
U. S. v. *Ludowici-Celadon Co*			5, 000
U. S. v. *Mercer*	250		
U. S. v. *Union Pacific Produce Co*		1, 000	
U. S. v. *Nevada Northern Ry. Co*			557
U. S. v. *Fish Credit Ass'n, Inc*	48, 387		
U. S. v. *Protective Fur Dressers Corp*	[6] 20, 000	18, 000	
U. S. v. *Fur Dressers Factor Corp*	[7] 63, 250		
U. S. v. *United Sea Food Workers Union*		9, 000	
U. S. v. *Lockwood & Winant*			12, 000
U. S. v. *Hulse* [2]		4, 000	
U. S. v. *Gramlich*	360, 000		
U. S. v. *Standard Oil Co*	65, 000		5, 000
U. S. v. *Socony-Vacuum Oil Co*			375, 000
U. S. v. *Dairymen's Assn., Ltd*			4, 500
U. S. v. *Local 20244, Wine, Liquor & Distiller Workers Union*		1, 000	
U. S. v. *General Motors Corp.* [8]	20, 000		
U. S. v. *Engineering Survey & Audit Co*			6, 000
U. S. v. *Sheet Metal Assn*			1, 000
U. S. v. *Southern Pine Assn*			12, 000
U. S. v. *Long Island Sand & Gravel Producers' Assn*			50, 000
U. S. v. *Bausch & Lomb Optical Co*			40, 000
U. S. v. *Needle Trades Workers Industrial Union* [8]	7, 000		
U. S. v. *Local 807, Internal Brotherhood of Teamsters*	10, 000		
Total	1, 098, 914	1, 188, 415	1, 233, 502

[3] $1,950 reversed; balance remitted by President.
[4] $500 reversed.
[5] $5,250 suspended.
[6] $10,000 reversed.
[7] $3,000 reversed.
[8] On appeal.

APPENDIX D

CONSENT DECREES ENTERED UNDER FEDERAL ANTI-TRUST LAW, JULY 1890–JULY 1940

Name of case	Date instituted	Decree entered	Further action
U. S. v. *Otis Elevator Co*	Mar. 7, 1906	June 1, 1906	
U. S. v. *Southern Wholesale Grocers' Assn.*	June 9, 1910	Oct. 17, 1911	Contempt proceedings, found guilty and fined $5,500, 1913.
U. S. v. *American Sugar Refining Co.*	Nov. 28, 1910	May 9, 1922	Modified to permit acquisition of another company, 1927.
U. S. v. *General Electric Co*	Mar. 3, 1911	Oct. 12, 1911	
U. S. v. *Harwick*	Aug. 31, 1911	Dec. 4, 1917	
U. S. v. *Colorado & Wyoming Lumber Dealers' Assn.*	Sept. 25, 1911	Dec. 29, 1917	
U. S. v. *National Cash Register Co*	Dec. 4, 1911	Feb. 1, 1916	Contempt proceedings, 1925; 1 defendant found guilty and fined $2,000, 1928; modified to permit acquisition of 2 companies, 1929 and 1931.
U. S. v. *Pacific Coast Plumbing Supply Assn.*	Dec. 18, 1911	Jan. 6, 1912	
U. S. v. *Aluminum Co. of America*	May 16, 1912	June 7, 1912	Modified to permit acquisition of company, 1922.
U. S. v. *Central-West Publishing Co.*	Aug. 3, 1912	Aug. 3, 1912	Modified to permit sale of company's assets, 1917.
U. S. v. *Master Horseshoers' Nat'l. Protective Assn.*	Dec. 12, 1912	1914; 1916	
U. S. v. *Philadelphia Jobbing Confectioners' Assn.*	Dec. 13, 1912	Feb. 17, 1913	
U. S. v. *Elgin Board of Trade*	Dec. 14, 1912	Apr. 27, 1914	
U. S. v. *Krentler-Arnold Hinge Last Co.*	Feb. 7, 1913	Feb. 7, 1913	
U. S. v. *Cleveland Stone Co*	Feb. 12, 1913	Feb. 11, 1916	
U. S. v. *Internat'l Brotherhood of Electrical Workers.*	Feb. 24, 1913	Feb. 27, 1914	
U. S. v. *American Thread Co*	Mar. 3, 1913	June 2, 1914	Modified to permit compliance with N. R. A. Code, 1933.
U. S. v. *Burroughs Adding Machine Co.*	do	Mar. 3, 1913	Modified to permit acquisition of German concern, 1922.
U. S. v. *American Coal Products Co.*	do	Mar. 4, 1913	
U. S. v. *New Departure Mfg. Co*	May 27, 1913	May 27, 1913	
U. S. v. *American Telephone & Telegraph Co.*	July 24, 1913	Mar. 26, 1914	Modified to permit consolidation of 2 telephone exchanges, 1914.
U. S. v. *National Wholesale Jewelers' Assn.*	Nov. 18, 1913	Jan. 30, 1914	
U. S. v. *New York, New Haven & Hartford R. R. Co*	July 23, 1914	Oct. 17, 1914	Modified several times.
U. S. v. *Bowser & Co*	June 10, 1915	June 10, 1915	
U. S. v. *National Assn. of Master Plumbers.*	May 19, 1917	May 19, 1917	
U. S. v. *Kluge*	Oct. 8, 1917	Oct. 8, 1917	
U. S. v. *Paris Medicine Co*	Nov. 12, 1917	Nov. 13, 1917	
U. S. v. *Mead*	Nov. 26, 1917	Nov. 26, 1917	
U. S. v. *Discher*	Dec. 4, 1917	Dec. 4, 1917	Defendants' motion for modification denied, 1919.
U. S. v. *Booth Fisheries Co*	Mar. 13, 1918	Mar. 13, 1918	
U. S. v. *Interlaken Mills*	Apr. 15, 1918	Apr. 15, 1918	Modified, 1919; also, 1934, to permit compliance with N. R. A. code.
U. S. v. *Victor Talking Machine Co.*	May 3, 1918	May 3, 1918	
U. S. v. *Button Export & Trading Corp.*	June 28, 1918	June 28, 1918	
U. S. v. *American Cone & Wafer Co.*	July 31, 1918	Aug. 3, 1918	
U. S. v. *Western Cantaloupe Exchange.*	Nov. 9, 1918	Nov. 9, 1918	
U. S. v. *Klaxon Horn Co*	Dec. 8, 1918	Dec. 8, 1918	
U. S. v. *American Assn. of Wholesale Opticians.*	Dec. 12, 1919	Dec. 12, 1919	Modified to permit compliance with N. R. A. code, 1934.
U. S. v. *Ironite Co*	Dec. 17, 1919	Mar. —, 1920	

Name of case	Date instituted	Decree entered	Further action
U. S. v. *Swift & Company*	Feb. 27, 1920	Feb. 27, 1920	Litigation from 1920-32. Defendants' efforts to have decree vacated or modified unsuccessful. Government forced disposal of Libby McNeill stock, 1939.
U. S. v. *Sumatra Purchasing Corp.*	Apr. 13, 1920	Apr. 13, 1920	
U. S. v. *Barbers' Supply Dealers Assn.*	May 7, 1920	May 7, 1920	Modified to permit compliance with N. R. A. code, 1934.
U. S. v. *California Associated Raisin Co.*	Sept. 8, 1920	Jan. 18, 1922	
U. S. v. *Albany Chemical Co.*	Jan. 10, 1921	Jan. 10, 1921	
U. S. v. *Goodwin-Gallagher Sand & Gravel Corp.*	Jan. 18, 1921	Jan. 18, 1921	
U. S. v. *Miller*	Jan. 28, 1921	Jan. 28, 1921	
U. S. v. *Corrugated Paper Mfrs. Assn.*	Feb. 2, 1921	Feb. 2, 1921	
U. S. v. *Kern*	Mar. 8, 1921	Mar. 8, 1921	
U. S. v. *American Coated Paper Co.*	Mar. 14, 1921	Mar. 14, 1921	
U. S. v. *American Lithographic Co.*	Mar. 26, 1921	Mar. 26, 1921	Modified to permit exchange of certain information, 1926.
U. S. v. *Tile Mfrs.' Credit Assn.*	Jan. 10, 1922	Nov. 26, 1923	Modified to permit exchange of certain information, 1928.
U. S. v. *National Enameling & Stamping Co.*	Feb. 14, 1922	Feb. 14, 1922	Minor modifications, 1924 and 1927.
U. S. v. *Bricklayers', Masons' & Plasterers' Internat'l Union.*	Feb. 28, 1922	Feb. 28, 1922	
U. S. v. *Wickwire Spencer Steel Corp.*	Mar. 20, 1922	Mar. 20, 1922	
U. S. v. *Gypsum Industries Assn.*	Dec. 27, 1922	Dec. 27, 1922	Modified to permit exchange of certain information, 1928.
U. S. v. *Live Poultry Dealers' Protective Assn.*	Jan. 18, 1924	Dec. 15, 1925	
U. S. v. *California Wholesale Grocers' Assn.*	Apr. 2, 1924	May 5, 1926	
U. S. v. *Utah-Idaho Wholesale Grocers' Assn.*	Apr. 9, 1924	Sept. 27, 1926	
U. S. v. *Wheeler-Osgood Co.*	May 5, 1924	June 18, 1925	
U. S. v. *Seattle Produce Assn.*	July 18, 1924	Mar. 21, 1925	
U. S. v. *Oregon Wholesale Grocers' Assn.*	Sept. 29, 1924	June 4, 1926	
U. S. v. *Nat'l Peanut Cleaners & Shellers Assn.*	Jan. 5, 1925	June 15, 1925	Modified in view of changed conditions, 1933; also in 1934 to permit compliance with N. R. A. Code. Decree dissolved, 1939.
U. S. v. *Tanners Products Co.*	June 11, 1925	Oct. 3, 1927	Petition for suspension of decree in light of N. R. A. dismissed.
U. S. v. *Porcelain Appliance Corp.*	Oct. 16, 1925	Feb. 25, 1930	
U. S. v. *Flower Producers Cooperative Assn.*	Dec. 15, 1925	Jan. 15, 1926	
U. S. v. *Ward Food Products Corp.*	Feb. 8, 1926	Apr. 3, 1926	
U. S. v. *Nat'l Food Products Corp.*	Feb. 13, 1926	Mar. 4, 1926	
U. S. v. *Noland Company, Inc.*	Apr. 13, 1926	June 2, 1926	
U. S. v. *Leibner & Company*	July 2, 1926	July 2, 1926	
U. S. v. *Lay Fish Company*	May 12, 1926	May 12, 1926	Order construing decree, 1927.
U. S. v. *Southern Hardware Jobbers' Assn.*	Aug. 9, 1926	Aug. 12, 1926	Modified to permit compliance with N. R. A. Code, 1933; also to permit defendants to take advantage of Miller-Tydings amendment, 1937.
U. S. v. *Rand Kardex Bureau*	Oct. 21, 1926	Dec. 9, 1926	
U. S. v. *Eighteen Karat Club*	Nov. 24, 1926	May 4, 1927	
U. S. v. *American Amusement Ticket Mfrs. Assn.*	Dec. 16, 1926	Dec. 30, 1926	Modified to permit compliance with N. R. A. Code, 1934.
U. S. v. *California Retail Hardware & Implement Assn.*	Feb. 4, 1927	May 12, 1927	
U. S. v. *National Gum & Mica Co.*	Feb. 18, 1927	May 27, 1927	
U. S. v. *National Hat Frame Assn., Inc.*	Feb. 23, 1927	Mar. 22, 1927	
U. S. v. *Northwest Shoe Finders Credit Bureau.*	Mar. 29, 1927	Jan. 11, 1928	
U. S. v. *Deutsches Kalisyndikat Gesellschaft.*	Apr. 7, 1927	Feb. 27, 1929	
U. S. v. *Richmond Distributing Corp.*	Apr. 13, 1927	Apr. 13, 1927	
U. S. v. *Gillette Safety Razor Co.*	Aug. 4, 1927	Aug. 4, 1927	
U. S. v. *Maine Co-Operative Sardine Co.*	Oct. 4, 1927	Oct. 4, 1927	
U. S. v. *Columbus Confectioners' Assn.*	Nov. 4, 1927	Nov. 4, 1927	
U. S. v. *The Fernald Co. & Soule Steele Company.*	Dec. 6, 1927	Dec. 6, 1927	
U. S. v. *Amsterdamsche Chininefabriek.*	Mar. 29, 1928	Sept. 20, 1928 Mar. 2, 1929	

Name of case	Date instituted	Decree entered	Further action
U. S. v. *Great Lakes Steamship Co.*	Apr. 7, 1928	May 9, 1928	
U. S. v. *Candy Supply Co*	June 8, 1928	June 8, 1928	
U. S. v. *General Outdoor Advertising Co.*	July 23, 1928	May 7, 1929	
U. S. v. *Barnard & Co*	Aug. 8, 1928	Aug. 8, 1928	
U. S. v. *Confectioners' Club of Baltimore.*	Sept. 14, 1928	Jan. 3, 1930	
U. S. v. *Alden Paper Co*	Oct. 1, 1928	Feb. 6, 1930	
U. S. v. *Balaban & Katz Corp*	Dec. 15, 1928	Apr. —, 1932	Modified to exclude Columbia Pictures Corporation, 1932. Contempt proceedings, 1938. Awaiting trial.
U. S. v. *Motion Picture Theatre Owners of Oklahoma.*	Dec. 26, 1928	Dec. 26, 1928	
U. S. v. *Bates Valve Bag Corp*	Jan. 4, 1929	Jan. 30, 1931	
U. S. v. *Evansville Confectioners' Assn.*	Feb. 21, 1929	Feb. 21, 1929	
U. S. v. *Ludowici-Celadon Co*	Mar. 12, 1929	Mar. 18, 1929	
U. S. v. *Fox Theatres Corporation*	Nov. 27, 1929	Apr. 15, 1931	Supplemental decree, 1931.
U. S. v. *Pittsburg-Erie Saw Co*	Dec. 23, 1929	Dec. 23, 1929	
U. S. v. *Greater N. Y. Live Poultry Cham. of Comm.*	Feb. 7, 1930	Nov. —, 1931	
U. S. v. *Standard Oil Co. of California.*	Feb. 15, 1930	Sept. 15, 1930	Modified to permit compliance with N. R. A. Code, 1933.
U. S. v. *Foster & Kleiser Co*	Apr. 20, 1930	Mar. 13, 1931	
U. S. v. *Radio Corporation of America.*	May 13, 1930	Nov. 21, 1932	Modified, 1935.
U. S. v. *Painters' District Council No. 2, etc.*	June 10, 1930	Dec. 31, 1930	
U. S. v. *A. B. C. Canning Co*	June 12, 1930	Jan. 16, 1931	
U. S. v. *Wool Institute, Inc*	June 27, 1930	June 27, 1930	Modified to permit compliance with N. R. A. Code, 1933.
U. S. v. *West Coast Theatres, Inc*	Aug. 21, 1930	Aug. 21, 1930	Contempt proceedings, 1939. Awaiting trial.
U. S. v. *Bolt, Nut & Rivet Mfrs. Assn.*	Mar. 17, 1931	Mar. 17, 1931	
U. S. v. *International Business Machines Corp.* (Court decree entered by consent against Remington Rand, Inc.)	Mar. 26, 1932	Jan. 29, 1936	
U. S. v. *Corn Derivatives Institute*	Apr. 6, 1932	Apr. 6, 1932	
U. S. v. *Fox West Coast Theatres*	Nov. 16, 1932	Nov. 16, 1932	
U. S. v. *Millinery Quality Guild, Inc.*	Mar. 23, 1933	June 9, 1934	
U. S. v. *National Retail Credit Assn.*	June 12, 1933	Oct. 6, 1933	Contempt proceedings; plea of guilty and fines totaling $4,000, 1936.
U. S. v. *Kansas City Ice Co*	June 5, 1934	June 5, 1934	Supplemental decree canceling certain contracts, 1934.
U. S. v. *Columbia Gas & Electric Corp.*	Mar. 6, 1934	Jan. 29, 1936	Government motion to vacate decree May 1939. Awaiting trial.
U. S. v. *Warner Bros. Pictures, Inc.*	Feb. 25, 1936	Apr. 30, 1936	
U. S. v. *Textile Refinishers Assn. Inc.*	May 1, 1936	May 1, 1936	
U. S. v. *Ox Fibre Brush Co*	July 30, 1937	July 30, 1937	
U. S. v. *Chrysler Corporation et al.*	Nov. 7, 1938	Nov. 15, 1938	
U. S. v. *Ford Motor Company et al.*	do	do	
U. S. v. *Wine, Liquor & Distillery Workers Union, Local 20244, et al.*	Nov. 9, 1939	Nov. 11, 1939	
U. S. v. *Imperial Wood Stick Co., Inc., et al.*	June 5, 1939	June 7, 1939	
U. S. v. *Local 807 of Internat'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America.*	July 17, 1939	July 17, 1939	
U. S. v. *Voluntary Code of Heating Piping & Air Conditioning Industry for Allegheny County, Pa.*	Dec. 8, 1939	Dec. 8, 1939	
U. S. v. *Excavaters Administrative Assn., Inc.*	Dec. 22, 1939	Dec. 22, 1939	
U. S. v. *Plumbing & Heating Industries Administrative Assn., Inc.*	do	do	
U. S. v. *Union Painters Administrative Assn.*	do	do	

Name of case	Date instituted	Decree entered	Further action
U. S. v. *New Orleans Chapter, Associated General Contractors of America.*	Jan. 15, 1940	Jan. 15, 1940	
U. S. v. *Half-Size Dress Guild, Inc.*	Aug. 13, 1940	Jan. 27, 1940	
U. S. v. *Party Dress Guild, Inc.*	Aug. 13, 1934	do	
U. S. v. *Sheet Metal Assn.*	Feb. 5, 1940	Feb. 5, 1940	
U. S. v. *Southern Pine Assn.*	Feb. 21, 1940	Feb. 21, 1940	
U. S. v. *National Assn. of Commission Lumber Salesmen.*	do	do	
U. S. v. *Engineering Survey & Audit Co.*	do	do	
U. S. v. *Western Penn. Sand & Gravel Assn.*	do	do	
U. S. v. *Marble Contractors Assn.*	Feb. 29, 1940	Feb. 29, 1940	
U. S. v. *Mason Contractors Assn. of District of Columbia.*	Mar. 12, 1940	Mar. 12, 1940	
U. S. v. *Pittsburgh Tile & Mantel Contractors Assn.*	Feb. 29, 1940	Feb. 29, 1940	
U. S. v. *Employing Plasterers Assn. of Allegheny County, Penna.*	Mar. 18, 1940	Mar. 18, 1940	
U. S. v. *National Container Assn.*	Aug. 9, 1939	Apr. 23, 1940	
U. S. v. *Underwood Elliott Fisher Co.*	July 28, 1939	do	
U. S. v. *American Potash & Chemical Corp.*	May 15, 1940	May 21, 1940	
U. S. v. *Long Island Sand & Gravel Producers Assn.*	May 22, 1940	May 22, 1940	
U. S. v. *Tile Contractors Assn. of America.*	June 10, 1940	June 10, 1940	
U. S. v. *Mosaic Tile Co.*	June 15, 1940	June 17, 1940	

APPENDIX E

DISPOSAL OF CRIMINAL CASES UNDER FEDERAL ANTI-TRUST LAW WHERE FINES OR IMPRISONMENT WERE *NOT* IMPOSED, JULY 1890–JULY 1940

CASES NOLLE PROSSED

Name	Date instituted	Date closed
U. S. v. *Patterson*	1892	1894
U. S. v. *Armour & Co.*	1905	1913
U. S. v. *American Ice Co.*	1906	1912
U. S. v. *Chandler Ice & Cold Storage Plant*	1906	1909
U. S. v. *Gloyd*	1906	1909
U. S. v. *Hogg*	1906	1909
U. S. v. *Stafford Mfg. Co.*	1907	1912
U. S. v. *Sticfvater*	1908	1910
U. S. v. *Purington*	1910	1913
U. S. v. *Holmes*	1911	1913
U. S. v. *Cotton*	1911	1912
U. S. v. *Payne*	1912	1913
U. S. v. *Mellen*	1912	1920
U. S. v. *White*	1913	1916
Do	1913	1914
U. S. v. *Hayes*	1913	1916
U. S. v. *Western Cantaloupe Exchange*	1914	1918
U. S. v. *Algoma Coal & Coke Co.*	1917	1917
U. S. v. *Simpson*	1917	1923
U. S. v. *Gilman*	1917	1921
U. S. v. *St. Clair*	1917	1918
U. S. v. *Ironite Co.*	1918	[1] 1920
U. S. v. *Schrader's Son*	1918	1923
U. S. v. *Andrews Lumber & Mill Co.*	1921	[2] 1921
U. S. v. *Poster Advertiser's Ass'n*	1921	1925
U. S. v. *Jones*	1921	1923
U. S. v. *Alpha Portland Cement Co.*	1921	1923
U. S. v. *Chicago Master Steam Fitters' Ass'n*	1921	1926
U. S. v. *Beigler Company*	1921	1926
U. S. v. *American Terra Cotta & Ceramic Co.*	1921	[2] 1923
U. S. v. *Central Foundry Co.*	1921	1925
U. S. v. *Johnston Brokerage Co.*	1921	1927
U. S. v. *United Gas Improvement Co.*	1922	1922
U. S. v. *Lehigh Portland Cement Co.*	1922	1926
U. S. v. *American Window Glass Co.*	1922	1926
U. S. v. *Bastin*	1923	1925
U. S. v. *Mitchell Brothers' Company*	1924	1926
U. S. v. *Mitchell*	1926	1930
U. S. v. *Metro-Goldwyn-Mayer Distributing Corp.*	1928	1932
U. S. v. *Amsterdamsche Chininefabriek*	1928	[1] 1928
U. S. v. *Greater N. Y. Live Poultry Chamber of Commerce*	1928	[1] 1931
U. S. v. *West Coast Theatres, Inc.*	1928	[1] 1930
Do	1929	[1] 1930
U. S. v. *Standard Oil Co. (Indiana)*	1936	[2] 1936
U. S. v. *Socony-Vacuum Oil Co., Inc.*	1936	[2] 1938
U. S. v. *Hawaii Brewing Corp., Ltd.*	1938	1938
U. S. v. *Chrysler Corporation*	1938	[1] 1938
U. S. v. *Ford Motor Company*	1938	[1] 1938
U. S. v. *Underwood Elliott Fisher Co.*	1939	[1] 1940
U. S. v. *American Potash & Chemical Corp.*	1940	[1] 1940

[1] Consent decree entered in civil case.
[2] Superseded by new indictment.

INDICTMENTS QUASHED, DEMURRERS SUSTAINED

Name	Date instituted	Date closed
U. S. v. *Nelson*	1892	1892
U. S. v. *Greenhut*	1892	1892
U. S. v. *Virginia-Carolina Chemical Co*	1906	1908
U. S. v. *National Packing Co*	1910	1910
U. S. v. *Cudahy Packing Co*	1910	1915
U. S. v. *Winslow*	1911	1918
U. S. v. *Pacific & Arctic Ry. Co*	1912	1912
U. S. v. *Miller*	1912	1912
U. S. v. *Hippen*	1913	1913
U. S. v. *Chapman*	1915	1915
U. S. v. *Baker-Whiteley Coal Co*	1917	1917
U. S. v. *Nash Bros*	1917	1918
U. S. v. *Colgate & Co*	1917	1919
U. S. v. *Moore*	1920	1920
U. S. v. *Smith*	1921	1924
U. S. v. *Johnston Brokerage Co*	1921	1927
U. S. v. *Peters*	1922	1923
U. S. v. *Hency*	1923	1923
U. S. v. *Great Western Sugar Co*	1929	1929
U. S. v. *Great Western Sugar Co*	1929	1930
U. S. v. *Dairymen's Assn., Ltd*	1937	[2] 1937
U. S. v. *National Dairy Products Co*	1938	1939

DIRECTED VERDICT FOR DEFENDANTS

Name	Date instituted	Date closed
U. S. v. *People's Ice & Fuel Co*	1906	1907
U. S. v. *Barton*	1917	1917
U. S. v. *Colgate & Co*	1920	1924
U. S. v. *McGlone*	1934	[2] 1934
U. S. v. *McGlone*	1937	1937
U. S. v. *Local 639, International Brotherhood of Teamsters*	1940	1940

JURY DISAGREED

Name	Date instituted	Date closed
U. S. v. *Cassidy*	1894	1895
U. S. v. *American Sugar Refining Co*	1909	1912
U. S. v. *Rockefeller* [3]	1914	1916
U. S. v. *Atlas Portland Cement Co*	1921	1925
U. S. v. *Wallace*	1928	1932

VERDICT NOT GUILTY

Name	Date instituted	Date closed
U. S. v. *DeMund Lumber Co*	1906	1907
U. S. v. *Corbett Stationery Co*	1907	1908
U. S. v. *Ray*	1908	1911
U. S. v. *American Naval Stores Co.* [4]	1908	1914
U. S. v. *Swift*	1910	1912
U. S. v. *Pearce*	1911	1912
U. S. v. *Rockefeller* [3]	1914	1916
U. S. v. *Aileen Coal Co*	1917	1917
U. S. v. *Webster*	1917	1919
U. S. v. *Fitzgerald*	1925	1926
U. S. v. *Warner Bros. Pictures, Inc*	1935	1935

VERDICT OF GUILTY REVERSED

Name	Date instituted	Date closed
U. S. v. *Moore*	1895	1898
U. S. v. *Santa Rita Store Co. and Santa Rita Mining Co*	1907	1911
U. S. v. *Union Pacific Coal Co*	1907	1910
U. S. v. *Patterson*	1912	1915

[2] Superseded by new indictment.
[3] Some defendants.
[4] Second trial.

APPENDIX F

DISPOSITION OF EQUITY CASES UNDER FEDERAL ANTI-TRUST LAW, JULY 1890–JULY 1940

[Consent decrees excluded]

CASES WON BY GOVERNMENT IN TRIAL COURT

	Date instituted	Date of trial court decree
U. S. v. *Jellico Mountain Coal & Coke Co.*	1890	1891
U. S. v. *Workingmen's Amalgamated Council*	1893	1893
U. S. v. *Debs*	1894	1899
U. S. v. *Debs*	1894	1898
U. S. v. *Elliott*	1894	1894
U. S. v. *Hopkins*	1896	1897
U. S. v. *Anderson*	1897	1897
U. S. v. *Coal Dealers' Ass'n*	1897	1899
U. S. v. *Chesapeake & Ohio Fuel Co.*	1899	1900
U. S. v. *Northern Securities Co.*	1902	1903
U. S. v. *Swift & Company*	1902	1903
U. S. v. *Federal Salt Co.*	1902	1902
U. S. v. *General Paper Co.*	1904	1906
U. S. v. *Nome Retail Grocerymen's Assn*	1905	1906
U. S. v. *Nat'l Ass'n of Retail Druggists*	1906	1907
U. S. v. *Standard Oil Co. of N. J.*	1906	1909
U. S. v. *American Seating Co.*	1907	1907
U. S. v. *Reading Company* [1]	1907	1910
U. S. v. *DuPont de Nemours & Co.*	1907	1912
U. S. v. *Allen Bros. Co.*	1909	1909
U. S. v. *Missouri Pacific Ry. Co.*	1910	1910
U. S. v. *Great Lakes Towing Company*	1910	1915
U. S. v. *Chicago Butter & Egg Board*	1910	1914
U. S. v. *Standard Sanitary Mfg. Co.*	1910	1911
U. S. v. *Hamburg-American Co.*	1911	1914
U. S. v. *Eastern States Retail Lumber Assn*	1911	1913
U. S. v. *Lake Shore Ry. Co.*	1911	1914
U. S. v. *Standard Wood Co.*	1911	1912
U. S. v. *Hollis*	1911	1917
U. S. v. *Keystone Watch Case Co.*	1911	1915
U. S. v. *International Harvester Co.*	1912	1914
U. S. v. *Associated Bill Posters*	1912	1916
U. S. v. *Motion Picture Patents Co.*	1912	1916
U. S. v. *Kellogg Corn Flake Co.*	1912	1915
U. S. v. *Chicago Board of Trade*	1913	1915
U. S. v. *Corn Products Co.*	1913	1916
U. S. v. *Eastman Kodak Co.*	1913	1916
U. S. v. *Reading Company* [2]	1913	1915
U. S. v. *United Shoe Machinery Corp*	1915	1920
U. S. v. *New England Fish Exchange*	1917	1919
U. S. v. *American Column & Lumber Co.*	1920	1920
U. S. v. *Consolidated Music Corp*	1920	1922
U. S. v. *Cement Mfrs' Protective Assn*	1921	1923
U. S. v. *Norcross*	1921	1924
U. S. v. *Cement Securities Co.*	1922	1924
U. S. v. *Schrader's Son*	1922	1923
U. S. v. *Railway Employees' Department of A. F. of L.*	1922	1923
U. S. v. *Nat'l Assn. of Window Glass Mfrs*	1923	1923
U. S. v. *Maple Flooring Mfrs' Assn*	1923	1924
U. S. v. *Industrial Assn. of San Francisco*	1923	1923
U. S. v. *Live Poultry Dealers' Protective Assn*	1924	1925
U. S. v. *Southern Calif. Grocers' Assn*	1924	1925
U. S. v. *Standard Oil Co. (Indiana)*	1924	1929
U. S. v. *Journeymen Stone Cutters Assn*	1927	1927
U. S. v. *Paramount Famous Lasky Corp*	1928	1930
U. S. v. *Painters' Dist. Council No. 14 of Chicago, etc*	1928	1931
U. S. v. *Atlantic Cleaners & Dyers Inc*	1929	1931
U. S. v. *Glaziers Local No. 27 of Chicago, etc*	1929	1930
U. S. v. *Greater N. Y. Live Poultry Chamber of Commerce*	1930	1932
U. S. v. *Sugar Institute*	1931	1934
U. S. v. *International Business Machine Corp*	1932	1935
U. S. v. *Appalachian Coals, Inc*	1932	1932
U. S. v. *Interstate Circuit, Inc*	1936	1937
U. S. v. *Ethyl Gasoline Corp*	1937	1939

[1] Government upheld in part.
[2] Government's contention upheld in part.

CASES WON IN TRIAL COURT AND APPEALED BY DEFENDANTS

	Date instituted	Trial court decree	United States Supreme Court	
			Affirmed trial court	Reversed trial court
U. S. v. *Workingmen's Amalgamated Council*	1893	1893 [3]		
U. S. v. *Hopkins*	1896	1897		1898
U. S. v. *Coal Dealers' Assn*	1897	1897		1898
U. S. v. *Chesapeake & Ohio Fuel Co*	1899	1900 [4]		
U. S. v. *Northern Securities Co*	1902	1903	1904	
U. S. v. *Swift & Company*	1902	1903	1905	
U. S. v. *Standard Oil Co. of N. J*	1906	1909	1911	
U. S. v. *Reading Company*	1907	1910	1912 [5]	
U. S. v. *American Tobacco Co*	1907	1908	1911	
U. S. v. *Standard Sanitary Mfg. Co*	1910	1911	1912	
U. S. v. *Hamburg-American Co*	1911	1911		1916 [6]
U. S. v. *Eastern States Retail Lumber Assn*	1911	1913	1914	
U. S. v. *Prince Line, Ltd*	1912	1915		1917 [6]
U. S. v. *Corn Products Co*	1913	1916	1919	
U. S. v. *Reading Company*	1913	1915	1920 [5]	
U. S. v. *United Shoe Machinery Corp*	1915	1920	1922	
U. S. v. *American Column & Lumber Co*	1920	1920	1921	
U. S. v. *Cement Mfrs'. Protective Assn*	1921	1923		1925
U. S. v. *Maple Flooring Mfrs'. Assn*	1923	1923		1925
U. S. v. *Industrial Assn. of San Francisco*	1923	1923		1925
U. S. v. *Live Poultry Dealers' Protective Assn*	1924	1924 [7]		
U. S. v. *Standard Oil Co*	1924	1929		1931
U. S. v. *Journeymen Stone Cutters Assn*	1927	1927	1928	
U. S. v. *Paramount Famous Lasky Corp*	1928	1929	1930	
U. S. v. *Painters' Dist. Council No. 14 of Chicago, etc*	1928	1930	1931	
U. S. v. *Atlantic Cleaners & Dyers, Inc*	1929	1929	1932	
U. S. v. *Greater N. Y. Live Poultry C. of Comm*	1930	1932	1934	
U. S. v. *Sugar Institute*	1931	1934	1936	
U. S. v. *International Business Machines Corp*	1932	1935	1936	
U. S. v. *Appalachian Coals, Inc*	1932	1932		1933
U. S. v. *Interstate Circuit, Inc*	1936	1937	1938	
U. S. v. *Ethyl Gasoline Corp*	1937	1939	1940	

CASES LOST BY GOVERNMENT IN TRIAL COURT

	Date instituted	Date of trial court decree
U. S. v. *Trans-Missouri Freight Assn*	1892	1892
U. S. v. *E. C. Knight Co*	1892	1894
U. S. v. *Joint Traffic Association*	1896	1896
U. S. v. *Baker & Holmes Co*	1903	1907
U. S. v. *Allen & Robinson*	1905	1915
U. S. v. *American Tobacco*	1907	1911
U. S. v. *Union Pacific R. R. Co*	1908	1911
U. S. v. *Periodical Clearing House*	1911	1913
U. S. v. *U. S. Steel Corp*	1911	1915
U. S. v. *United Shoe Machinery Co*	1911	1915
U. S. v. *American-Asiatic S. S. Co*	1912	1915
U. S. v. *International Harvester Co.* [8]	1923	1926
U. S. v. *Prince Line, Ltd*	1912	1915
U. S. v. *United Shoe Machinery Co. of N. J*	1913	1919
U. S. v. *Lackawanna R. R. Co*	1913	1914
U. S. v. *Quaker Oats Co*	1913	1916
U. S. v. *American Can Co*	1913	1916
U. S. v. *Southern Pacific Co*	1914	1917
U. S. v. *Lehigh Valley R. R. Co*	1914	1914
U. S. v. *American Linseed Oil Co*	1920	1921
U. S. v. *Moore*	1920	1920
U. S. v. *Fur Dressers' and Fur Dyers' Assn*	1922	1925
U. S. v. *Hudnut*	1922	1925
U. S. v. *New York Coffee & Sugar Exchange*	1923	1923
U. S. v. *General Electric Co*	1924	1925
U. S. v. *Sisal Sales Corp*	1924	1925
U. S. v. *First National Pictures, Inc*	1928	1929
U. S. v. *Republic Steel Corp*	1935	1935
U. S. v. *Terminal R. R. Assn*	1905	1910

[3] Affirmed by Circuit Court of Appeals, 1893.
[4] Affirmed by Circuit Court of Appeals, 1902.
[5] In part. Supreme Court decree more favorable to Government.
[6] Dismissal ordered on ground questions had become moot.
[7] Affirmed by Circuit Court of Appeals, 1924.
[8] Supplemental petition.

CASES LOST IN TRIAL COURT AND APPEALED BY GOVERNMENT

	Date instituted	Trial court decree	United States Supreme Court	
			Affirmed trial court	Reversed trial court
U. S. v. *Trans-Missouri Freight Association*	1892	1892 [3]		1897
U. S. v. *Joint Traffic Assn*	1896	1896 [9]		1898
U. S. v. *Addyston Pipe & Steel Co*	1896	1897 [10]		1899
U. S. v. *Terminal R. R. Assn*	1905	1910		1912
U. S. v. *Union Pacific R. R. Co*	1908	1911		1912
U. S. v. *U. S. Steel Corp*	1911	1915	1920	
U. S. v. *United Shoe Machinery*	1911	1915	1918	
U. S. v. *American-Asiatic S. S. Co*	1912	1915	1917 [6]	
U. S. v. *International Harvester Company* [8]	1912	1926	1927	
U. S. v. *Chicago Board of Trade*	1913	1915		1918
U. S. v. *Lackawanna R. R. Co*	1913	1914		1915
U. S. v. *Southern Pacific Co*	1914	1917		1922
U. S. v. *Lehigh Valley R. R. Co*	1914	1914		1920
U. S. v. *American Linseed Oil Co*	1920	1921		1923
U. S. v. *New York Coffee & Sugar Exchange, Inc*	1923	1923	1924	
U. S. v. *General Electric Co*	1924	1925	1926	
U. S. v. *Sisal Sales Corp*	1924	1925		1927
U. S. v. *First Natl. Pictures, Inc*	1928	1929		1930

CASES DISCONTINUED

	Date instituted	Date discontinued
U. S. v. *Metropolitan Meat Co*	1905	1917
U. S. v. *New York, New Haven & Hartford R. R. Co*	1908	1909
U. S. v. *National Packing Co*	1910	1910
U. S. v. *American Naval Stores Co*	1912	1914
U. S. v. *Sielcken*	1912	1913
U. S. v. *McCaskey Register Co*	1913	1915
U. S. v. *Terminal R. R. Assn*	1913	1915
U. S. v. *Pan-American Commission Corp*	1917	1918
U. S. v. *Atlas Portland Cement Co*	1919	1921
U. S. v. *Southern Pine Association*	1921	1927
U. S. v. *Mid-West Cement Credit & Statistical Bureau*	1921	1926
U. S. v. *United Gas Improvement Co*	1922	1923
U. S. v. *Kryptok Co*	1923	1925
U. S. v. *Western Pine Mfrs.' Assn*	1923	1925
U. S. v. *American Chain Co*	1923	1927
U. S. v. *Jeffrey Manufacturing Co*	1924	1934
U. S. v. *Colgate & Co*	1924	1925
U. S. v. *One-Piece Bifocal Lens Co*	1925	1927
U. S. v. *Carson Brewing Company*	1925	1929
U. S. v. *Chicago Assn. of Candy Jobbers*	1928	1932
U. S. v. *Asbestos Corporation, Ltd*	1928	1931
U. S. v. *Warner Bros. Pictures, Inc*	1929	1934
U. S. v. *Asphalt Shingle & Roofing Institute*	1930	
U. S. v. *United Theatres, Inc*	1932	1937
U. S. v. *Mather*	1935	1936
U. S. v. *Warner Bros. Pictures, Inc*	1935	1936

[9] Affirmed by Circuit Court of Appeals, 1897.
[10] Reversed by Circuit Court of Appeals, 1898.

APPENDIX G

CASES INSTITUTED UNDER FEDERAL ANTITRUST LAW, JULY 1890–JULY 1940, BY FISCAL YEARS ENDING JUNE 30

Title of case	Industry	Proceeding
1891		
U. S. v. *Jellico Mountain Coal & Coke Co*	Coal	Equity.
1892		
U. S. v. *Trans-Missouri Freight Assn*	Railroads	Do.
U. S. v. *Nelson*	Lumber dealers	Criminal.
U. S. v. *E. C. Knight Co*	Sugar refineries	Equity.
U. S. v. *Greenhut*	Distilled spirits	Criminal.
1893		
U. S. v. *Patterson*	Cash registers	Do.
U. S. v. *Workingmen's Amalgamated Council*	Labor union	Equity.
1895		
U. S. v. *Debs*	do	Do.
Do	do	Do.
U. S. v. *Elliott*	do	Do.
U. S. v. *Cassidy*	do	Criminal.
1896		
U. S. v. *Moore*	Coal retailers	Do.
U. S. v. *Joint Traffic Assn*	Railroads	Equity.
1897		
U. S. v. *Addyston Pipe & Steel Co*	Cast iron pipe	Do.
U. S. v. *Hopkins*	Livestock	Do.
U. S. v. *Anderson*	do	Do.
1898		
U. S. v. *Coal Dealers' Assn*	Coal dealers	Do.
1899		
U. S. v. *Chesapeake & Ohio Fuel Co*	Coal producers	Do.
1902		
U. S. v. *Northern Securities Co*	Railroads	Do.
U. S. v. *Swift & Company*	Meat packers	Do.
1903		
U. S. v. *Federal Salt Co*	Salt	Do.
Do	do	Criminal.
1904		
U. S. v. *Baker & Holmes Co*	Wholesale grocers	Equity.
1905		
U. S. v. *General Paper Co*	Paper	Do.

Title of case	Industry	Proceeding
1906		
U. S. v. *Armour & Co*	Meat packers	Criminal.
U. S. v. *Metropolitan Meat Co*	do	Equity.
U. S. v. *Nome Retail Grocerymen's Assn*	Retail grocers	Do.
U. S. v. *Terminal R. R. Assn*	Railroads	Do.
U. S. v. *Allen & Robinson*	Wholesale lumber	Do.
U. S. v. *Otis Elevator Co*	Elevators	Do.
U. S. v. *Amsden Lumber Co*	Lumber	Criminal.
U. S. v. *Nat'l Assn. of Retail Druggists*	Retail druggists	Equity.
U. S. v. *Virginia-Carolina Chemical Company*	Fertilizer	Criminal.
U. S. v. *MacAndrews & Forbes Co*	Licorice paste	Do.
1907		
U. S. v. *American Ice Co*	Ice	Do.
U. S. v. *Chandler Ice & Cold Storage Plant*	do	Do.
U. S. v. *Gloyd*	Lumber	Do.
U. S. v. *People's Ice & Fuel Co*	Ice	Do.
U. S. v. *DeMund Lumber Co*	Lumber	Do.
U. S. v. *Phoenix Wholesale Meat & Produce Co*	Wholesale meat	Do.
U. S. v. *Standard Oil Co. of N. J*	Oil	Equity.
U. S. v. *Hogg*	Lumber	Criminal.
U. S. v. *Atlantic Investment Co*	Naval stores	Do.
U. S. v. *American Seating Co*	Church furniture	Do.
Do	do	Equity.
U. S. v. *Santa Rita Store Co. & Santa Rita Mining Co*	Mine company store	Criminal.
U. S. v. *Reading Company*	Coal	Equity.
1908		
U. S. v. *National Umbrella Frame Co*	Umbrella frames	Criminal.
U. S. v. *American Tobacco Co*	Tobacco	Equity.
U. S. v. *Stafford Mfg. Co*	Church furniture	Criminal.
U. S. v. *Du Pont de Nemours & Co*	Munitions	Equity.
U. S. v. *One Hundred and Seventy-Five Cases of Cigarettes.*	Tobacco	Libel.
U. S. v. *Corbett Stationery Co*	Office supplies	Criminal.
U. S. v. *Union Pacific Coal Co*	Coal	Do.
U. S. v. *Simmons*	Plumbers' supplies	Do.
U. S. v. *Union Pacific R. R. Co*	Railroads	Equity.
U. S. v. *Ray*	Labor union	Criminal.
U. S. v. *Ray*	do	Do.
U. S. v. *Stiefvater*	Plumbers' supplies	Do.
U. S. v. *American Naval Stores Co*	Naval stores	Do.
U. S. v. *New York, New Haven & Hartford R. R. Co*	Railroads	Equity.
U. S. v. *Parks*	Paper	Criminal.
1909		
U. S. v. *Allen Bros. Co*	do	Equity.
1910		
U. S. v. *American Sugar Refining Co*	Sugar	Criminal.
U. S. v. *Albia Box & Paper Co*	Paperboard	Do.
U. S. v. *Steers*	Tobacco producers	Do.
U. S. v. *Imperial Window Glass Co*	Window glass	Do.
U. S. v. *National Packing Co*	Meat packers	Do.
U. S. v. *National Packing Co*	do	Equity.
U. S. v. *Cudahy Packing Co*	do	Criminal.
U. S. v. *Missouri Pacific Ry. Co*	Railroads	Equity.
U. S. v. *Southern Wholesale Grocers' Association*	Wholesale grocers	Do.
U. S. v. *Great Lakes Towing Company*	Towing	Do.
U. S. v. *Chicago Butter & Egg Board*	Trade board	Do.
1911		
U. S. v. *Patten*	Cotton	Criminal.
U. S. v. *Standard Sanitary Mfg. Co*	Enameled ware	Equity.
U. S. v. *Swift*	Meat packers	Criminal.
U. S. v. *John Reardon & Sons Co*	Fertilizer	Do.
U. S. v. *Standard Sanitary Mfg. Co*	Enameled ware	Do.
U. S. v. *American Sugar Refining Co*	Sugar	Equity.
U. S. v. *Purington*	Paving products	Criminal.
U. S. v. *General Electric Co*	Electric lamps	Equity.
U. S. v. *Hamburg-American Co*	Steamships	Do.
U. S. v. *Geer*	Paper board	Criminal.
U. S. v. *Eastern States Retail Lumber Assn*	Retail lumber	Equity.
U. S. v. *Whiting*	Milk	Criminal.
U. S. v. *Holmes*	Retail lumber	Do.
U. S. v. *Palmer*	Copper wire	Do.
U. S. v. *Periodical Clearing House*	Magazines	Equity.

Title of case	Industry	Proceeding
1912		
U. S. v. *Pearce*	Wall paper	Criminal.
U. S. v. *Lake Shore Ry. Co*	Coal	Equity.
U. S. v. *Harwick*	Retail lumber	Do.
U. S. v. *Hunter Milling Co*	Flour	Criminal.
U. S. v. *Standard Wood Co*	Kindling wood	Equity.
U. S. v. *Winslow*	Shoe machinery	Criminal.
U. S. v. *Colorado & Wyoming Lumber Dealers' Assn.*	Wholesale lumber	Equity.
U. S. v. *Hollis*	do	Do.
U. S. v. *U. S. Steel Corp*	Steel	Do.
U. S. v. *Cotton*	Labor union	Criminal.
U. S. v. *National Cash Register Co*	Cash registers	Equity.
U. S. v. *United Shoe Machinery Co*	Shoe machinery	Do.
U. S. v. *Haines*	Labor union	Criminal.
U. S. v. *Haines*	do	Do.
U. S. v. *Pacific Coast Plumbing Supply Assn*	Plumbing supplies	Equity.
U. S. v. *Keystone Watch Case Co*	Watch cases	Do.
U. S. v. *American Naval Stores Co*	Naval Stores	Do.
U. S. v. *New Departure Mfg. Co*	Coaster brakes	Criminal.
U. S. v. *North Pacific Wharves & Trading Co*	Wharves (Alaska)	Do.
U. S. v. *North Pacific Wharves & Trading Co*	do	Do.
U. S. v. *Pacific & Arctic Ry. Co*	Steamships (Alaska)	Do.
U. S. v. *Pacific & Arctic Ry. Co*	do	Do.
U. S. v. *Patterson*	Cash registers	Do.
U. S. v. *American-Asiatic S. S. Co*	Steamship	Equity.
U. S. v. *Miller*	Charcoal	Criminal.
U. S. v. *International Harvester Co*	Agricultural machinery	Equity.
U. S. v. *Aluminum Co. of America*	Aluminum	Do.
U. S. v. *Sielcken*	Coffee	Do.
U. S. v. *Prince Line, Ltd*	Steamships	Do.
1913		
U. S. v. *Central-West Publishing Co*	Publishing	Do.
U. S. v. *Associated Bill Posters*	Billboard advertising	Do.
U. S. v. *Motion Picture Patents Company*	Motion-picture patents	Do.
U. S. v. *Payne*	Trade union	Criminal.
U. S. v. *Masters Horseshoers' Nat'l Protective Assn*	Horseshoes	Equity.
U. S. v. *Philadelphia Jobbing Confectioners' Assn*	Candy jobbers	Do.
U. S. v. *Elgin Board of Trade*	Butter	Do.
U. S. v. *Mellen*	Railroads	Criminal.
U. S. v. *Kellogg Corn Flake Co*	Corn flakes	Equity.
U. S. v. *Page*	Fruits and vegetables	Criminal.
U. S. v. *Krentler-Arnold Hinge Last Co*	Shoe lasts	Equity.
U. S. v. *United Shoe Machinery Co. of N. J*	Shoe machinery	Do.
U. S. v. *Chicago Board of Trade*	Grain	Do.
U. S. v. *Cleveland Stone Co*	Stone	Do.
U. S. v. *Lackawanna R. R. Co*	Coal	Do.
U. S. v. *McCaskey Register Co*	Cash registers	Do.
U. S. v. *Internat'l Brotherhood of Electrical Workers*	Labor union	Do.
U. S. v. *Corn Products Co*	Corn products	Do.
U. S. v. *American Thread Co*	Thread	Do.
U. S. v. *Burroughs Adding Machine Co*	Adding machines	Do.
U. S. v. *American Coal Products Co*	Coal tar	Do.
U. S. v. *Terminal R. R. Assn*	Railroads	Do.
U. S. v. *New Departure Mfg. Co*	Bicycle and motorcycle parts	Do.
U. S. v. *White*	Labor union	Criminal.
U. S. v. *Eastman Kodak Co*	Kodak supplies	Equity.
U. S. v. *Quaker Oats Co*	Oatmeal	Do.
U. S. v. *Hippen*	Fruits and vegetables	Criminal.
1914		
U. S. v. *Thompson*	Cotton	Do.
U. S. v. *American Telephone & Telegraph Co*	Telephone	Equity.
U. S. v. *Reading Company*	Coal	Do.
U. S. v. *National Wholesale Jewelers' Assn*	Jewelry	Do.
U. S. v. *American Can Co*	Tin cans	Do.
U. S. v. *White*	Labor union	Criminal.
U. S. v. *Hayes*	do	Do.
U. S. v. *Southern Pacific Co*	Railroads	Equity.
U. S. v. *Lehigh Valley R. R. Co*	Coal	Do.
U. S. v. *Knauer*	Plumbing supplies	Criminal.
U. S. v. *American Wringer Co*	Clothes wringers	Do.
1915		
U. S. v. *Booth Fisheries Co*	Fish	Do.
U. S. v. *New York, New Haven & Hartford R. R. Co.*	Railroads	Equity.
U. S. v. *Western Cantaloupe Exchange*	Cantaloupes	Criminal.
U. S. v. *Collins*	Country produce	Do.

Title of case	Industry	Proceeding
1915		
U. S. v. *McCoach*	Plumbing supplies	Criminal.
U. S. v. *Irving*	do	Do.
U. S. v. *Rockefeller*	Railroads	Do.
U. S. v. *Chapman*	Wrecking	Do.
U. S. v. *King*	Potatoes	Do.
U. S. v. *Artery*	Labor union	Do.
U. S. v. *Boyle*	do	Do.
U. S. v. *Bowser & Co*	Gasoline storage tanks	Equity.
1916		
U. S. v. *United Shoe Machinery Corporation*	Shoe machinery	Do.
U. S. v. *Rintelen*	War spies	Criminal.
U. S. v. *Bopp*	do	Do.
1917		
U. S. v. *Cowell*	Cement	Do.
U. S. v. *Jensen Creamery Co*	Dairy products	Do.
U. S. v. *Aileen Coal Co*	Coal	Do.
U. S. v. *Algoma Coal & Coke Co*	do	Do.
U. S. v. *Baker-Whiteley Coal Co*	do	Do.
U. S. v. *Simpson*	Milk	Do.
U. S. v. *Mead*	Newsprint	Do.
U. S. v. *Chicago Mosaic & Tiling Co*	Tile	Do.
U. S. v. *National Association of Master Plumbers*	Plumbing supplies	Equity.
U. S. v. *M. Piowaty & Sons*	Onions	Criminal.
U. S. v. *Gilman*	Eggs	Do.
U. S. v. *New England Fish Exchange*	Fish	Equity.
1918		
U. S. v. *Pan-American Commission Corporation*	Sisal	Do.
U. S. v. *St. Clair*	Bread	Criminal.
U. S. v. *National Retail Monument Dealers Assn*	Monuments	Do.
U. S. v. *Nash Bros*	Fruit	Do.
U. S. v. *Webster*	Auto accessories	Do.
U. S. v. *Kluge*	Woven labels	Equity.
U. S. v. *Paris Medicine Co*	Drugs	Do.
U. S. v. *Barton*	Grocery dealers	Criminal.
U. S. v. *Mead*	Newsprint	Equity.
U. S. v. *Discher*	Auto bumpers	Do.
U. S. v. *Belfi*	Tiles	Criminal.
U. S. v. *Colgate Co*	Toilet articles	Do.
U. S. v. *Booth Fisheries Co*	Fish	Equity.
U. S. v. *Interlaken Mills*	Book cloth	Do.
U. S. v. *Victor Talking Machine Co*	Talking machines	Do.
U. S. v. *Ironite Co*	Powdered iron	Criminal.
U. S. v. *Schrader's Son*	Tire valves	Do.
U. S. v. *Button Export & Trading Corp*	Buttons	Equity.
1919		
U. S. v. *American Cone & Wafer Co*	Ice cream cones	Do.
U. S. v. *Sumatra Purchasing Corp*	Tobacco	Criminal.
U. S. v. *Western Cantaloupe Exchange*	Cantaloupes	Equity.
U. S. v. *Klaxon Horn Co*	Auto horns	Do.
1920		
U. S. v. *Atlas Portland Cement Co*	Cement	Do.
U. S. v. *Alphons Custodis Chimney Construction Co*	Chimneys	Criminal.
U. S. v. *American Assn. of Wholesale Opticians*	Wholesale opticians	Equity.
U. S. v. *Ironite Co*	Powdered iron	Do.
U. S. v. *American Column & Lumber Co*	Lumber	Do.
U. S. v. *Swift & Company*	Meat packers	Do.
U. S. v. *Colgate & Co*	Toilet articles	Criminal.
U. S. v. *Sumatra Purchasing Corp*	Tobacco	Equity.
U. S. v. *Barbers' Supply Dealers Assn*	Barbers' supplies	Do.
U. S. v. *American Linseed Oil Co*	Linseed oil	Do.
1921		
U. S. v. *Consolidated Music Corp*	Copyrighted music	Do.
U. S. v. *Moore*	Steamship brokers	Criminal.
U. S. v. *Moore*	do	Equity.
U. S. v. *California Associated Raisin Company*	Raisins	Do.
U. S. v. *Goodwin-Gallagher Sand & Gravel Corp*	Sand	Criminal.
U. S. v. *Albany Chemical Co*	Drugs	Equity.
U. S. v. *Goodwin-Gallagher Sand & Gravel Corp*	Sand	Do.
U. S. v. *Andrews Lumber & Mill Co*	Building trades	Criminal.
U. S. v. *Poster Advertisers Assn*	Outdoor advertising	Do.

Title of case	Industry	Proceeding
1921		
U. S. v. *Miller*	Rubber heels	Equity.
U. S. v. *Corrugated Paper Mfrs. Assn*	Corrugated paper	Do.
U. S. v. *Southern Pine Assn*	Lumber	Do.
U. S. v. *Jones*	Coal	Criminal.
U. S. v. *Alpha Portland Cement Co*	Cement	Do.
U. S. v. *Smith*	Coal dealers	Dol
U. S. v. *Kern*	Music rolls	Equity.
U. S. v. *American Coated Paper Co*	Glazed paper	Do.
U. S. v. *American Lithographic Co*	Lithographed labels	Do.
U. S. v. *Clow & Sons*	Plumbing supplies	Criminal.
U. S. v. *Chicago Master Steam Fitters' Assn*	Heating apparatus	Do.
U. S. v. *Biegler Company*	do	Do.
U. S. v. *Cement Mfrs.' Protective Assn*	Cement	Equity.
1922		
U. S. v. *Atlas Portland Cement Co*	do	Criminal.
U. S. v. *Alexander & Reid Co*	Tiles	Do.
U. S. v. *Andrews Lumber & Mill Co*	Building trades	Do.
U. S. v. *Atlantic Terra Cotta Co*	Terra cotta	Do.
U. S. v. *American Terra Cotta & Ceramic Co*	do	Do.
U. S. v. *Norcross*	Cement	Equity.
U. S. v. *Mid-West Cement Credit & Statistical Bureau*	do	Do.
U. S. v. *Johnston Brokerage Co*	Window glass	Criminal.
U. S. v. *Central Foundry Co*	Soil pipe	Do.
U. S. v. *Cement Securities Co*	Cement	Equity.
U. S. v. *Tile Mfrs.' Credit Assn*	Tile	Do.
U. S. v. *Peters*	Hay	Criminal.
U. S. v. *National Enameling & Stampin[illegible]*	Galvanized tubs	Equity.
U. S. v. *Bricklayers', Masons' & Plaster[illegible] Int[illegible] national Union.*	Labor union	Do.
U. S. v. *United Gas Improvement Co*	Incandescent lamps	Criminal.
U. S. v. *Lehigh Portland Cement Co*	Cement	Do.
U. S. v. *American Window Glass Co., Johnston Brokerage Co.*	Window glass	Do.
U. S. v. *Wickwire Spencer Steel Corp*	Kitchen utensils	Equity.
U. S. v. *American Terra Cotta & Ceramic Co*	Terra cotta	Criminal.
U. S. v. *O'Brien*	Labor union	Do.
U. S. v. *United Gas Improvement Co*	Incandescent lamps	Equity.
1923		
U. S. v. *Trenton Potteries Co*	Sanitary pottery	Criminal.
U. S. v. *Schrader's Son*	Tire valves	Equity.
U. S. v. *Railway Employees' Department of A. F. of L.*	Labor union	Do.
U. S. v. *Clements*	do	Criminal.
U. S. v. *Williams*	do	Do.
U. S. v. *Powell*	do	Do.
U. S. v. *Fur Dressers' & Fur Dyers' Assn*	Fur dressers and dyers	Equity.
U. S. v. *Hu[illegible]t*	Perfumes	Do.
U. S. v. *H[illegible]*	Labor union	Criminal.
U. S. v. *Gy[illegible]m Industries Assn*	Gypsum	Equity.
U. S. v. *Na[illegible]sn. of Window Glass Mfrs*	Window glass	Do.
U. S. v. *Basa[illegible]*	do	Criminal.
U. S. v. *Reilly*	Labor union	Do.
U. S. v. *Hency*	do	Do.
U. S. v. *Kryptok Co*	Optical goods	Equity.
U. S. v. *Maple Flooring Mfrs.' Assn*	Flooring	Do.
U. v. *v. New York Coffee & Sugar Exchange, Inc*	Sugar	Do.
U. S. v. *Western Pine Mfrs.' Assn*	Lumber	Do.
U. S. v. Industrial Assn. of San Francisco	Building trades	Do.
1924		
U. S. v. *American Chain Co*	Auto bumpers	Do.
U. S. v. *Live Poultry Dealers' Protective Assn*	Poultry dealers	Do.
U. S. v. *Mitchell Brothers' Co*	Flooring	Criminal.
U. S. v. *General Electric Co*	Electric lamps	Equity.
U. S. v. *Nat'l Malleable & Steel Castings Co*	Iron castings	Criminal.
U. S. v. *Southern Calif. Grocers' Assn*	Grocery dealers	Equity.
U. S. v. *California Wholesale Grocers' Assn*	do	Do.
U. S. v. *Utah-Idaho Wholesale Grocers' Assn*	do	Do.
U. S. v. *Jeffrey Manufacturing Co*	Coal-cutting machinery	Do.
U. S. v. *Wheeler-Osgood Co*	Fir doors	Do.
U. S. v. *Standard Oil Co. (Indiana)*	Gasoline	Do.
1925		
U. S. v. *Seattle Produce Assn*	Farm produce	Do.
U. S. v. *Sisal Sales Corp*	Sisal	Do.
U. S. v. *Oregon Wholesale Grocers' Assn*	Grocery dealers	Do.
U. S. v. *Colgate & Co*	Toilet articles	Do.

Title of case	Industry	Proceeding
1925		
U. S. v. *Lindsley Bros. Co*	Cedar poles	Criminal.
U. S. v. *Nat'l Peanut Cleaners & Shellers Assn*	Peanut cleaners and shellers	Equity.
U. S. v. *Fitzgerald*	Trade union	Criminal.
U. S. v. *Coye*	Refrigerator manufacturers	Do.
U. S. v. *Baker*	Chair manufacturers	Do.
U. S. v. *Brown*	Furniture	Do.
U. S. v. *One-Piece Bifocal Lens Co*	Optical supplies	Equity.
U. S. v. *Tanners Products Co*	Tanners products	Do.
U. S. v. *Carson Brewing Company*	Ice	Do.
1926		
U. S. v. *National Cash Register Co*	Cash registers	Criminal.
U. S. v. *Berkey & Gay Furniture Co*	Furniture	Do.
U. S. v. *Aulsbrook & Jones Furniture Co*	do	Do.
U. S. v. *Lay Fish Company*	Fish	Do.
U. S. v. *Porcelain Appliance Corp*	Porcelain insulators	Equity.
U. S. v. *Krewoski*	Labor union	Criminal.
U. S. v. *Flower Producers Cooperative Assn*	Florists	Equity.
U. S. v. *Ward Food Products Corp*	Bakery products	Do.
U. S. v. *National Food Products Corp*	do	Do.
U. S. v. *Noland Company, Inc*	Plumbing supplies	Do.
U. S. v. *Lay Fish Company*	Fish	Do.
U. S. v. *Shreve, Treat & Eacret*	Jewelry retailers	Criminal.
1927		
U. S. v. *Leibner & Company*	Fish	Equity.
U. S. v. *Mitchell*	Labor union	Criminal.
U. S. v. *Southern Hardware Jobbers' Assn*	Hardware jobbers	Equity.
U. S. v. *Rand Kardex Bureau*	Office furniture	Do.
U. S. v. *Eighteen Karat Club*	Jewelry retailers	Do.
U. S. v. *American Agricultural Chemical Co*	Fertilizer	Criminal.
U. S. v. *American Amusement Ticket Mfrs.' Assn*	Amusement ticket manufacturers	Equity.
U. S. v. *California Retail Hardware & Implement Assn.*	Hardware retailers	Do.
U. S. v. *National Gum & Mica Co*	Adhesive compounds	Do.
U. S. v. *National Hat Frame Assn. Inc*	Hat frames	Do.
U. S. v. *Journeyman Stone Cutters Assn*	Labor union	Do.
U. S. v. *Northwest Shoe Finders Credit Bureau*	Shoe findings	Do.
U. S. v. *Deutsches Kalisyndikat Gesellschaft*	Potash	Do.
U. S. v. *Richmond Distributing Corp*	Candy jobbers	Do.
U. S. v. *Allied Cleaners & Dyers of Seattle*	Pressing machinery	Criminal.
1928		
U. S. v. *Gillette Safety Razor Co*	Razors and razor blades	Equity.
U. S. v. *Maine Co-Operative Sardine Co*	Sardines	Do.
U. S. v. *Columbus Confectioners' Assn*	Candy jobbers	Do.
U. S. v. *Baumgartner*	do	Criminal.
U. S. v. *Berger Manufacturing Co*	Metal lath	Do.
U. S. v. *The Fernald Co. & Soule Steel Co*	do	Equity.
U. S. v. *Chicago Assn. of Candy Jobbers*	Candy jobbers	Do.
U. S. v. *Asbestos Corporation, Ltd*	Asbestos	Do.
U. S. v. *Metro-Goldwyn-Mayer Distributing Corp*	Motion pictures	Criminal.
U. S. v. *Amsterdamsche Chininefabriek*	Quinine derivatives	Equity.
Do	do	Criminal.
U. S. v. *Great Lakes Steamship Co*	Steamships	Equity.
U. S. v. *Wallace*	Labor union	Criminal.
U. S. v. *383,340 Ounces of Quinine Derivatives*	Quinine derivatives	Libel.
U. S. v. *Paramount Famous Lasky Corp*	Motion pictures	Equity.
U. S. v. *First National Pictures, Inc*	do	Do.
U. S. v. *Candy Supply Company*	Candy jobbers	Do.
U. S. v. *Myers*	Labor union	Criminal.
1929		
U. S. v. *General Outdoor Advertising Co*	Outdoor advertising	Equity.
U. S. v. *Barnard & Co*	Shirting cloth	Do.
U. S. v. *Greater N. Y. Live Poultry Chamber of Commerce.*	Poultry dealers	Criminal.
U. S. v. *Painters' Dist. Council No. 14 of Chicago, etc*	Labor union	Equity.
U. S. v. *Confectioners' Club of Baltimore*	Candy jobbers	Do.
U. S. v. *West Coast Theaters, Inc*	Motion pictures	Criminal.
U. S. v. *Alden Paper Co*	Watermarked paper	Equity.
U. S. v. *Balaban & Katz Corp*	Motion-picture exhibitors	Do.
U. S. v. *Motion Picture Theater Owners of Oklahoma*	do	Do.
U. S. v. *Bates Valve Bag Corp*	Bag-filling machines	Do.
U. S. v. *Greater N. Y. Live Poultry Chamber of Commerce.*	Poultry dealers	Criminal.
U. S. v. *Great Western Sugar Co*	Beet sugar	Do.

Title of case	Industry	Proceeding
1929		
U. S. v. *Atlantic Cleaners & Dyers, Inc*	Cleaning and dyeing	Equity.
U. S. v. *Glaziers Local No. 27 of Chicago*	Labor union	Do.
U. S. v. *Evansville Confectioners' Assn*	Candy jobbers	Do.
U. S. v. *Ludowici-Celadon Co*	Roofing tile	Criminal.
U. S. v. *Ludowici-Celaudon Co*	do	Equity.
U. S. v. *West Coast Theatres, Inc*	Motion pictures	Criminal.
1930		
U. S. v. *Great Western Sugar Co*	Beet sugar	Do.
U. S. v. *Fox Theatres Corp*	Motion pictures	Equity.
U. S. v. *Warner Bros. Pictures, Inc*	do	Do.
U. S. v. *Pittsburgh-Erie Saw Co*	Saw frames and blades	Do.
U. S. v. *Greater N. Y. Live Poultry Chamber of Commerce.*	Poultry dealers	Do.
U. S. v. *Standard Oil Co. of Calif*	Gasoline	Do.
U. S. v. *Foster & Kleiser Co*	Outdoor advertising	Do.
U. S. v. *Radio Corporation of America*	Radio	Do.
U. S. v. *Painters' District Council No. 2*	Labor union	Do.
U. S. v. *5,898 Cases Sardines*	Sardines	Libel.
U. S. v. *A. B. C. Canning Co*	do	Equity.
U. S. v. *Wool Institute, Inc*	Woolen goods	Do.
1931		
U. S. v. *West Coast Theatres, Inc*	Motion pictures	Do.
U. S. v. *Asphalt Shingle & Roofing Institute*	Roofing products	Do.
U. S. v. *Bolts, Nut & Rivet Mfrs. Assn*	Bolts, nuts, and rivets	Do.
U. S. v. *Sugr Institute*	Sugar	Do.
U. S. v. *Mercer*	Trucking	Criminal.
1932		
U. S. v. *International Business Machines Corp*	Business machines	Equity.
U. S. v. *Corn Derivatives Institute*	Corn products	Do.
U. S. v. *Appalachian Coals, Inc*	Coal	Do.
1933		
U. S. v. *United Theatres, Inc*	Motion pictures	Do.
U. S. v. *Fox West Coast Theatres*	do	Do.
U. S. v. *Millinery Quality Guild, Inc*	Millinery	Do.
U. S. v. *Union Pacific Produce Co*	Artichokes	Criminal.
U. S. v. *Nevada Northern Railway Co*	Railroads	Do.
U. S. v. *Fish Credit Assn., Inc*	Fish	Do.
U. S. v. *National Retail Credit Assn*	Credit information	Equity.
1934		
U. S. v. *Weiner*	Poultry dealers	Criminal contempt.
U. S. v. *Market Truckmen's Assn*	Trucking	Criminal.
U. S. v. *Local No. 202 of the International Brotherhood of Teamsters.*	Labor union	Do.
U. S. v. *Protective Fur Dressers Corp*	Fur dressers	Do.
U. S. v. *Needle Trades Workers Industrial Union*	Labor union	Do.
U. S. v. *Fur Dressers Factor Corp*	Fur dressers	Do.
U. S. v. *United Sea Food Workers Union*	Labor union	Do.
U. S. v. *Lockwood & Winant*	Fish	Do.
U. S. v. *McGlone*	Labor union	Do.
U. S. v. *Kansas City Ice Co*	Ice	Equity.
1935		
U. S. v. *Dress Creators League of America*	Dress manufacturers	Do.
U. S. v. *Party Dress Guild, Inc*	do	Do.
U. S. v. *Half-Size Dress Guild, Inc*	do	Do.
U. S. v. *American Society of Composers, Authors & Publishers.*	Copyrighted music	Do.
U. S. v. *McGlone*	Labor union	Criminal.
U. S. v. *Warner Bros. Pictures, Inc*	Motion pictures	Do.
U. S. v. *Republic Steel Corp*	Steel	Equity.
U. S. v. *Mather*	do	Do.
U. S. v. *Columbia Gas & Electric Corp*	Natural gas	Do.
U. S. v. *Hulse*	Credit information	Criminal contempt.
1936		
U. S. v. *Warner Bros. Pictures, Inc*	Motion pictures	Equity.
U. S. v. *Local No. 202 of the Int'l. Brotherhood of Teamsters.*	Labor union	Criminal.
U. S. v. *Warner Bros. Pictures, Inc*	Motion pictures	Equity.
U. S. v. *Textile Refinishers Assn., Inc*	Cloth sponging	Do.

Title of case	Industry	Proceeding
1937		
U. S. v. *Standard Oil Co. (Indiana)*	Gasoline	Criminal.
U. S. v. *Socony-Vacuum Oil Co., Inc*	do	Do.
U. S. v. *Gramlich*	Labor union	Do.
U. S. v. *Interstate Circuit, Inc*	Motion pictures	Equity.
U. S. v. *Standard Oil Co. (Indiana)*	Gasoline	Criminal.
U. S. v. *Socony-Vacuum Oil Co., Inc*	do	Do.
U. S. v. *McGlone*	Labor union	Do.
U. S. v. *Ethyl Gasoline Corp*	Gasoline	Equity.
U. S. v. *Aluminum Co. of America*	Aluminum	Do.
1938		
U. S. v. *Ox Fibre Brush Co*	Brushes	Do.
U. S. v. *Dairymen's Assn., Ltd*	Milk (Honolulu)	Criminal.
U. S. v. *Dairymen's Assn., Ltd*	do	Do.
U. S. v. *Postal Telegraph & Cable Corp*	Telegraph	Equity.
U. S. v. *Western Union Telegraph Co*	do	Do.
U. S. v. *Hawaii Brewing Corp., Ltd*	Beer (Honolulu)	Criminal.
U. S. v. *Chrysler Corp*	Auto financing	Do.
U. S. v. *Ford Motor Co*	do	Do.
U. S. v. *General Motors Corp*	do	Do.
U. S. v. *Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America.*	Labor union	Do.
1939		
U. S. v. *Paramount Pictures, Inc*	Motion pictures	Equity.
U. S. v. *The Borden Co*	Fluid milk	Criminal.
U. S. v. *National Dairy Products Corp*	Ice cream	Do.
U. S. v. *Columbia Gas & Electric Corp*	Natural gas	Equity.
U. S. v. *Chrysler Corp*	Auto financing	Do.
U. S. v. *Ford Motor Co*	do	Do.
U. S. v. *Barney Balaban*	Motion pictures	Criminal contempt.
U. S. v. *American Medical Assn*	Medical services	Criminal.
U. S. v. *The Cooper Corp*	Auto tires	Triple damage.
U. S. v. *Griffith Amusement Co*	Motion pictures	Equity.
U. S. v. *Wine, Liquor & Distillery Workers Union, Local 20244.*	Labor union	Criminal.
U. S. v. *Imperial Wood Stick Co., Inc*	Candy stick	Equity.
1940		
U. S. v. *Crown Zellerbach Corp*	Newsprint	Criminal.
U. S. v. *Local 807 of the Internat'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America.*	Labor union	Equity.
U. S. v. *Kraft Paper Assn*	Kraft paper	Criminal.
U. S. v. *Underwood Elliott Fisher Co*	Typewriters	Do.
U. S. v. *Schine Chain Theatres, Inc*	Motion pictures	Equity.
U. S. v. *National Container Assn*	Paperboard	Criminal.
U. S. v. *Crescent Amusement Co., Inc*	Motion pictures	Equity.
U. S. v. *Fox West Coast Theatres Corp*	do	Criminal contempt.
U. S. v. *Local 639, International Brotherhood of Teamsters.*	Labor union	Criminal.
U. S. v. *The Assn. of American Railroads*	Railroads	Equity.
U. S. v. *William L. Hutcheson*	Labor union, building trades	Criminal.
U. S. v. *Local 20244, Wine, Liquor & Distillery Workers Union.*	Labor union	Equity.
U. S. v. *Glaze-Rite*	Building trades	Criminal.
U. S. v. *General Petroleum Corp. of Calif*	Gasoline	Do.
U. S. v. *Long Island Sand & Gravel Producers Assn*	Building trades	Do.
U. S. v. *Wheeling Tile Co*	do	Do.
U. S. v. *Voluntary Code of Heating, Piping & Air Conditioning Industry for Allegheny County, Penna.*	do	Equity.
U. S. v. *Hartford-Empire Co*	Glass containers	Do.
U. S. v. *Engineering Survey & Audit Co*	Building trades	Criminal.
U. S. v. *Sheet Metal Assn*	do	Do.
U. S. v. *San Francisco Electrical Contractors Assn*	do	Do.
U. S. v. *E. L. Bruce Co*	do	Do.
U. S. v. *Cadillac Electric Supply Co*	do	Do.
U. S. v. *Plumbing and Heating Industries Administrative Assn.*	do	Equity.
U. S. v. *Union Painters Administrative Assn*	do	Do.
U. S. v. *Excavators Administrative Assn*	do	Do.
U. S. v. *Master Plasterers Assn. of San Francisco*	do	Criminal.
U. S. v. *Joseph E. Sirrine*	do	Do.
U. S. v. *New Orleans Chapter, Associated General Contractors of America.*	do	Equity.
U. S. v. *Building & Construction Trades Council of New Orleans, La.*	do	Criminal.
U. S. v. *Mosaic Tile Co*	do	Do.
U. S. v. *Arthur Morgan Trucking Co*	do	Do.

Title of case	Industry	Proceeding
1940		
U. S. v. *International Longshoremen's Assn*	Labor union	Criminal.
U. S. v. *Heating, Piping and Air Conditioning Contractors Assn. of So. Calif.*	Building trades	Do.
U. S. v. *United Brotherhood of Carpenters & Joiners of America.*	Labor union	Do.
U. S. v. *Contracting Plasterers' Assn. of Long Beach, Calif.*	Building trades	Do.
U. S. v. *Chicago Cook County Building & Construction Trades Council.*	do	Do.
U. S. v. *Sheet Metal Assn*	do	Equity.
U. S. v. *Beardslee Chandelier Mfg. Co*	do	Criminal.
U. S. v. *Harbor District Chapter, Nat'l Electrical Contractors' Assn.*	do	Do.
U. S. v. *So. Calif. Marble Dealers' Assn*	do	Do.
U. S. v. *Southern Pine Assn*	do	Do.
U. S. v. *Southern Pine Assn*	do	Equity.
U. S. v. *Western Penna. Sand & Gravel Assn*	do	Do.
U. S. v. *Engineering Survey & Audit Co*	do	Do.
U. S. v. *Lumber Institute of Allegheny County, Penna*	do	Criminal.
U. S. v. *Santa Barbara County Chapter, Nat'l Electrical Contractors Assn.*	do	Do.
U. S. v. *Marble Contractors Assn*	do	Equity.
U. S. v. *Pittsburgh Tile & Mantel Contractors' Assn*	do	Do.
U. S. v. *San Francisco Electrical Contractors' Assn*	do	Criminal.
U. S. v. *Masonite Corp*	do	Equity.
U. S. v. *Mason Contractors' Assn. of District of Columbia.*	do	Do.
U. S. v. *W. P. Fuller Co*	do	Criminal.
U. S. v. *Harbor District Lumber Dealers' Assn*	do	Do.
U. S. v. *Employing Plasterers' Assn. of Allegheny County, Penna.*	do	Equity.
U. S. v. *Brooker Engineering Co*	do	Criminal.
U. S. v. *Bausch & Lomb Optical Co*	Optical goods	Do.
U. S. v. *Local No. 3, International Brotherhood of Electrical Workers.*	Labor union Building trades	Do.
U. S. v. *New York Electrical Contractors' Assn*	do	Do.
U. S. v. *Central Supply Assn*	do	Do.
U. S. v. *Nat Hoffman*	Labor union Building trades	Do.
U. S. v. *Underwood Elliott Fisher Co*	Typewriters	Equity.
U. S. v. *National Container Assn*	Paper board	Do.
U. S. v. *Associated Plumbing & Heating Merchants*	Building trades	Criminal.
U. S. v. *Kelly-Goodwin Hardwood Co*	do	Do.
U. S. v. *Local No. 99, Sheet Metal Workers International Assn.*	Labor union Building trades	Do.
U. S. v. *Glass Contractors' Assn*	do	Do.
U. S. v. *Local No. 46, International Union, Wood, Wire & Metal Lathers.*	Labor union Building trades	Do.
U. S. v. *American Potash & Chemical Corp*	Potash	Equity.
U. S. v. *American Potash & Chemical Corp*	do	Criminal.
U. S. v. *St. Louis Tile Contractors Assn*	Building trades	Do.
U. S. v. *Long Island Sand & Gravel Producers Assn*	do	Equity.
U. S. v. *Hiram W. Evans*	do	Criminal.
U. S. v. *American Optical Co*	Optical goods	Do.
U. S. v. *Optical Wholesalers Nat'l Assn*	do	Do.
U. S. v. *John P. Nick*	Labor union	Do.
U. S. v. *Tile Contractors' Assn. of America, Inc*	Building trades	Equity.
U. S. v. *Chattanooga News-Free Press Company*	Newspapers	Criminal.
U. S. v. *Mosaic Tile Co*	Building trades	Equity.
U. S. v. *Associated Marble Companies*	do	Criminal.
U. S. v. *Johns-Manville Corp*	do	Equity.
U. S. v. *Michael Carozzo*	Labor union Building trades	Criminal.
U. S. v. *Lumber Products Assn*	do	Do.
U. S. v. *United States Gypsum Co*	Gypsum	Do.
U. S. v. *Certain-Teed Products Corp*	do	Do.

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