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Lawful Combinations in Restraint of Trade

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LAWFUL COMBINATIONS IN RESTRAINT OF TRADE

By ERNEST C. CARMAN*

IT may be confidently asserted that with one exception[1] the decisions arising under the Federal Anti-Trust Act[2] have filled more pages of the law reports than can be traced to any other enactment of the Congress of the United States. With equal assurance it may be said that no other federal statute is enveloped in as much of judicial uncertainty and irreconcilable interpretation. It may be justly criticised more than any other statute as having an inherent aptitude and docility for meaning whatever a majority of the justices of the Supreme Court of the United States, as constituted at any particular time, think it then ought to mean.[3] The singular inconstancy of that great court in interpreting the Sherman Anti-Trust Act may be justified by its concept of the imperative necessity for a flexible statute designed to curb monopoly in interstate and foreign commerce. But these considerations, while desirably terrifying to malefactors of great wealth, are not reassuring to well-intentioned business men confronted in various fields with the necessity of adjusting production and sale to consuming requirements through coöperative effort without any means of knowing whether, in subsequent review, the hindsight of the Supreme Court will commend their genius for normal trade or condemn them to bankruptcy and years of servitude in federal prisons for having guessed poorly about the future mental attitude of the future justices of the Court.

Can any guiding principles of permanent worth be extracted from the decisions for the benefit of men, or combinations of

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[1]The act to Regulate Commerce, U. S. C. tit. 49, secs. 1-40, 49 U. S. C. A., secs. 1-40, Mason's Code, tit. 49, secs. 1-40.

[2]Sherman Act of July 2, 1890, U. S. C. tit. 15, secs. 1-7, 15 U. S. C. A. secs. 1-7, Mason's Code, tit. 15, secs. 1-7.

[3]Nearly all the leading cases except those involving railroad combines have been decided by a much divided court. Twenty-six justices have participated in the decisions interpreting the Sherman Act; namely, Fuller, Field, Harlan, Gray, Brewer, Brown, Shiras, White, Peckham, McKenna, Holmes, Day, Moody, Lurton, Hughes, Van Devanter, Lamar, Pitney, McReynolds, Brandeis, Clarke, Taft, Sutherland, Butler, Sanford and Stone. There is less unanimity in the anti-trust decisions of the past year (preceding Sept. 1, 1927) than in the first year of interpretation of the Act—the year 1895. See notes following.

men, desirous of cooperating to effect economies in business and to stabilize industry and prices without violating or evading the mandate of the law against monopoly and restraint of trade? The difficulty in answering this query is made apparent by some of the outstanding decisions.

Before the Federal Anti-Trust Act first came to the notice of the Supreme Court, the entire country had become alarmed by menacing monopolies which were beyond the reach of state statutes in respect to their transactions in interstate commerce and outside the restraining precepts of the common law, which never has pervaded the federal domain. At the outset the Supreme Court was quick to limit the act to interstate and foreign trade and commerce,[4] but sweeping and emphatic in its declarations that the act unconditionally prohibited all combinations in restraint of such trade, whether good or bad or of little or great effect.[5] This interpretation had the virtue of simplicity, however economically unsound or impractical it may have been. It did not long prevail. In the year 1904 the members of the Court, having before them a great holding company,[6] became divided in their allegiance to the interpretation condemning *all* combinations as declared in the previous decisions of the Court. Five of the justices adhered to this rule, while four of them dissented and contended for the "rule of reason." Two of the justices on each side of this divided Court died[7] and their places were filled before the next great cases[8] were decided in the year 1911, but all of the new justices were then won to the "rule of

[4]United States v. E. C. Knight Co., (1895) 156 U. S. 1, 56 Sup. Ct. 249, 39 L. Ed. 325.

[5]United States v. Trans-Missouri Freight Ass'n, (1897) 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Ass'n, (1898) 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Hopkins v. United States, (1898) 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, (1898) 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Addystone Pipe & Steel Co. v. United States, (1899) 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; W. W. Montague & Co. v. Lowry, (1904) 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

[6]United States v. Northern Securities Co., (1904) 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

[7]Justices Brown and Brewer on the majority side of the court in the Northern Securities Case had passed; as had also Justices Fuller and Peckham of the dissenting minority. Their places had been filled by Justices Hughes, Lurton, Lamar and Van Devanter before the decision in the Standard Oil case in which the "rule of reason" was adopted without any dissent except that of Justice Harlan.

[8]United States v. Standard Oil Co., (1910) 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619; United States v. American Tobacco Co., (1910) 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

reason"—that the statute condemns only contracts, acts or combinations which are *unreasonably* restrictive of competitive conditions. It can hardly be doubted that economic necessity was the mother of this liberalizing interpretation. It gave the statute the virtue of flexibility, but clothed it in complexity and plagued it with uncertainty such as the same Court has seldom permitted in penal statutes even of the same class.[9]

In the second of these decisions[10] the Court, however, took occasion to warn all persons that the statute would be interpreted as covering every conceivable act in furtherance of *unreasonable* restraint of trade "without regard to the garb in which such acts are clothed." But corporate greed was not thus easily to be taught its lesson; and only a year and a half later the Court struck down a vicious monopoly[11] by reverting to its earlier tenet of the year 1904 which had condemned the *bare existence* of a combination having power, whether exerted or not, to monopo-

[9]In Nash v. United States, (1913) 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, the court upheld the criminal provisions of the Sherman Act against attack on the ground of uncertainty arising from the "rule of reason" which was declared to be definitely understood in the common law. The Court said (Justice Pitney dissenting) that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment as here; he may incur the penalty of death." This was consistent with an earlier decision sustaining similar penal provisions in a state statute. Waters-Pierce Oil Co. v. Texas, (1908) 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417. But shortly thereafter the court struck down a Kentucky penal statute which made it a crime for any trade combination to fix prices of any commodity at more or less than its real value or market value under normal conditions. International Harvester Co. v. Kentucky, (1913) 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284. The Court declared this provision offered "no standard of conduct that it is possible to know," hence that it was too vague and uncertain for a penal statute! And on May 31st, 1927, the Court, without any dissent, struck down the penal provisions of the Colorado Anti-Trust Act as failing to describe the crime there created with requisite certainty. Cline v. Frink Dairy Co., (1926) 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146, The Colorado Act was substantially identical with the Sherman Act except that it had been rationalized with a proviso that trade combinations should not be deemed violators of the statute where their concerted action was only for the purpose, and with the effect, of obtaining a *reasonable price* for their products, etc. Hence it appears that the "rule of reason" is not too uncertain in the Federal Anti-Trust Act, but that the determination of a *reasonable price* as a basis of criminal liability is too uncertain in a state anti-trust act. See United States v. Trenton Potteries Co., (1926) 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 404. It is interesting to note that the Colorado Act was almost identical in its language with the California Cartwright Anti-Trust Act (Calif. Stat. 1907, p. 984 as amended by Calif. Stat. 1909, p. 593) which it may be assumed is also unconstitutional.

[10]United States v. American Tobacco Co., (1910) 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

[11]United States v. Union Pacific Ry. Co., (1912) 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

lize or restrain interstate trade and commerce. This decision was still new when the attention of the nation was diverted to the world war. In the reconstruction period following the close of that great conflict, with domestic and world trade at its worst, the government asked the Court to dissolve the United States Steel Corporation[12] not because of any proved evils arising from its operation but merely because it was a gigantic combination with power to monopolize or restrain trade. This the Court, in a decision by less than a majority of the justices,[13] refused to do. The economic wisdom of that decision, viewed in the light of the time when it was rendered, can hardly be doubted. But it cannot be wholly reconciled with any decision before or since. The Court not only re-adopted its "rule of reason" but further declared that the size of a combination, the extent of its *unexerted* power to restrain competition, and its previous unsuccessful efforts to do so, are all matters of little or no consequence; and that the Federal Anti-Trust Act is directed against *the realization of monopoly* and not against a mere expectation of it.

Less than two months later the court, having before it the most objectionable business coalition ever formed in this country,[14] emphatically declared that the mere existence of power in such organization to monopolize, *"regardless of the use made of it,"* constituted a violation of the Federal Anti-Trust Act. To justify this ruling the Court said that such power had been assembled in the combination before it "by deliberate, calculated purchase for control" and "not by *normal expansion* to meet the demands of business growing as a result of superior and enterprising management." If this was not a distinction without a difference, then it merely extracted another complex and uncertain test from the Federal Anti-Trust Act by which to determine the legality or illegality of trade combinations.[15]

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[12]United States v. United States Steel Corporation, (1919) 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343.

[13]Justices McReynolds and Brandeis took no part in the decision. This left a Court of seven justices which by a bare majority of four (Justices White, McKenna, Holmes, and Van Devanter) rendered the decision. Justices Day, Pitney, and Clarke dissented.

[14]United States v. Reading Co., (1919) 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760, which involved a monopoly of the principal anthracite coal deposits of the United States and a vicious railroad combination for the purpose of transporting same, all together dominated by the same group of individuals and characterized by a flagrant disregard for all laws (written and unwritten) relating to monopoly, price fixing and fair trade competition. In these circumstances, the broad and sweeping language of Justice Clarke in the opinion of the Court may be taken with a grain of salt in its application to more decent trade combinations. The decision of the

In the cases just discussed it appeared that the combinations there involved had all been effected through holding companies or purchase of stock control. But another kind of trade organization had also appeared in the Supreme Court—the loose voluntary association not involving stock ownership or interlocking directorates. Set up like tenpins to be knocked down promptly, these associations nevertheless led the Court farther into the field of political economy than it had gone in its decisions upon intercorporate relations; and the result was somewhat beneficial.

After condemning a retail association that blacklisted wholesalers for selling at retail,[16] failing to be convinced of the sincerity of an organization formed for the alleged purpose of promoting competition,[17] and placing the ban of judicial disapproval on the operation of a central bureau which divided the country into zones for price quoting,[18] the Court declared that the Federal Anti-Trust Act *does not* prohibit the formation of voluntary associations of manufacturers for the purpose of gathering and disseminating among their members all available information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, and similar information, all discussed and to be discussed in meetings from time to time of the members of such associations, provided there is no attempt to reach any agreement or any *concerted* action with respect to prices or production or restraining competition.[19] The Court said that

court, however, was unanimous except as to a dissent of three justices (White, Holmes, and Van Devanter) which went only to the form of relief to be granted.

[15]United States v. Lehigh Valley Ry. Co., (1920) 254 U. S. 255, 41 Sup. Ct. 104, 65 L. Ed. 253, had to do with a combine very similar to the one so emphatically condemned in the Reading Case. The same result followed. Justices McReynolds and Brandeis took no part; and there was a statement by Justices White and Holmes indicating that they concurred in the whole of the opinion not from conviction but because of previous decisions of the court.

[16]Eastern Retail Lumber Dealers' Association v. United States, (1914) 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490.

[17]American Column & Lumber Co. v. United States, (1921) 257 U. S. 377, 42 Sup. Ct. 114, 66 L. Ed. 284. Justices Holmes, Brandeis and McKenna dissented.

[18]United States v. American Linseed Oil Co. (1923) 262 U. S. 371, 43 Sup. Ct. 607, 67 L. Ed. 1035.

[19]Maple Floor Manufacturers' Association v. United States, (1925) 268 U. S. 563, 45 Sup. Ct. 578, 69 L. Ed. 1093. Justices McReynolds, Taft, and Sanford dissented.

such activities sans agreement left each manufacturer free to produce, although prudence and business foresight based thereon might influence free choice in favor of more limited production; that competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors of such operations; that the Federal Anti-Trust Act does not inhibit the intelligent conduct of business operations; and, in effect, that any course of conduct or action which tends to prevent overproduction and lessen the economic disturbances attendant thereon, to avoid waste, to stabilize trade and industry, and to produce fairer price levels, is lawful and permissible so long as it is not based upon agreement or concerted action to lessen production or raise prices arbitrarily.[20] These principles were stated by the Court in language broad enough to include operations through holding companies or corporations under group control; but it may be safely predicted that the closer the approach to unity of interest in any given case the more searching will be the scrutiny of the court to spell out of the transactions an unlawful concert or agreement.

Very recently the Court also approved as lawful a plan perfected and carried out by a very large producer for fixing and maintaining uniform prices to consumers throughout the country by retention of title of the product in the producer until passed to the ultimate consumer.[21] The producer made uniform contracts with retailers everywhere to sell the particular product at a fixed price as agent of the producer; and this was held by the Court to be permissible even though such agency contracts imposed upon the retailer substantially all the ordinary risks of ownership of the product and accorded the producer unusual security for payment to it of the net proceeds.

But still later, the Court emphatically condemned a less monopolistic achievement by a combination of corporations and individuals whereby they directly fixed only a *reasonable* price for their product.[22] The Court refused to apply the "rule of reason" to such direct price-fixing agreement and declared that

[20]To the same effect see Cement Manufacturers' Protective Association v. United States, (1925) 268 U. S. 588, 45 Sup. Ct. 586, 69 L. Ed. 1104. Justices McReynolds, Taft, and Sanford dissented.

[21]United States v. General Electric Co., (1926) 272 U. S. 476, 47 Sup. Ct. 192, 71 L. Ed. 221.

[22]United States v. Trenton Potteries Co., (1927) 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 404. Justices Van Devanter, Sutherland and Butler dissented. Justice Brandeis took no part.

agreements which create such potential power may well be held to be *in themselves* unreasonable and unlawful restraints.

And then in the last reported case[23] (prior to December 1, 1927) the Court, in refusing to dissolve a great but apparently inoffensive combine as requested by the government, held again that neither the size of a combination nor the existence in it of unexerted power constitutes a violation of the Federal Anti-Trust Act; and, further, that no suppression of competition or sinister domination is to be inferred from the mere fact that competitors see fit, in the exercise of their own judgment, to follow the prices of others.

During the period of these outstanding decisions the Court distributed lesser sign posts along the straight and narrow path which big business is required to travel in its evolution to harmless perfection under the Sherman Act;[24] and also repeatedly asserted the reserved right of the Court to decide each case strictly upon its own merits and without much regard to the language used in any prior decision where the Court may have had either a particularly black or an unusually white trade combination before it.

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[23]United States v. International Harvester Co., (1927) 274 U. S. 693, 47 Sup. Ct. 748, 71 L. Ed. 852. Justices McReynolds, Brandeis and Stone took no part.

[24]There can be no lawful combination to manipulate markets, Swift v. United States, (1905) 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, or to destroy rivals by concerted refusal to trade, Binderup v. Pathé Exchange, (1923) 263 U. S. 291, 44 Sup. Ct. 96, 68 L. Ed. 308; or to quote specified prices, Federal Trade Commission v. Pacific States Paper Trade Association, (1926) 273 U. S. 52, 47 Sup. Ct. 255, 71 L. Ed. 321; or to maintain price levels by refusing to handle products of non-union labor, United States v. Brims, et al., (1926) 272 U. S. 549, 47 Sup. Ct. 169, 71 L. Ed. 194; Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., (1926) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 581; or to fix resale prices after parting with title, Standard Sanitary Mfg. Co. v. United States, (1912) 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; Boston Store v. American Graphophone Co., (1918) 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 531; Dr. Miles Medical Co. v. Park & Sons, (1911) 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; or to limit imports, the parties to the combination being within the United States, United States v. Sisal Sales Corporation, (1926) 274 U. S. 268, 47 Sup. Ct. 592, 71 L. Ed. 715; or to limit the employment of labor to members of the combination, Anderson v. Shipowners Ass'n, (1926) 272 U. S. 359, 47 Sup. Ct. 125, 71 L. Ed. 168; or to boycott manufacturers of commodities intended for interstate transportation, Loewe v. Lawler, (1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488; or to buy up competitive industries under contracts restraining the sellers from re-engaging in same business and obligating them to discourage others from doing so, Shawnee Compress Co. v. Anderson, (1908) 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865; or to prohibit retailers from selling the goods of parties outside the combination, Standard Fashion Co. v. Magrane-Houston Co., (1922) 258 U. S. 346, 42 Sup. Ct. 360, 66 L. Ed. 653.

Cases arising from the Federal Trade Commission Act[25] are also significant where the decisions might have rested on the anti-trust act; but as the chief purpose of the Federal Trade Commission Act is to prevent unfair competition,[26] its interpretation need not be here discussed.

The Clayton Act[27] must not be overlooked; but it is believed that trade organizations operating in harmony with the Sherman Act will seldom be found transgressing the Clayton Act.[28]

State anti-trust acts may not be entirely ignored, but their potency has been directly lessened by federal decisions attacking their constitutionality[29] and indirectly weakened by other federal decisions defining interstate commerce as including nearly all commercial transactions which trade combinations of effective size might influence.[30]

Although irreconcilable and contradictory, the decisions justify the conclusion that trade combinations of any size or kind may

[25]Act of Sept. 26, 1914, U. S. C. tit. 15, secs. 41-51, 15 U. S. C. A. secs. 41-51, Mason's Code, tit. 15, secs. 41-51.

[26]Federal Trade Commission v. Klesner, (1926) 274 U. S. 145, 47 Sup. Ct. 553, 71 L. Ed. 639.

[27]Act of October 15, 1914, U. S. C. tit. 15, secs. 12-26; U. S. C. tit. 18, sec. 412; U. S. C. tit. 28, secs. 381-83, 386-90; U. S. C. tit. 29, sec. 52, 15 U. S. C. A. secs. 12-26; 18 U. S. C. A. sec. 412; 28 U. S. C. A. secs. 381-83, 386-90; 29 U. S. C. A. sec. 52, Mason's Code, tit. 15, secs. 12-26; Mason's Code, tit. 18, sec. 412; Mason's Code, tit. 28, secs. 381-83, 386-90; Mason's Code, tit. 29, sec. 52.

[28]Standard Fashion Co. v. Magrane-Houston Co., (1922) 258 U. S. 346, 42 Sup. Ct. 360, 66 L. Ed. 653; Standard Oil Co. v. Federal Trade Commission, (C.C.A. 3rd Cir. 1922) 282 Fed. 81, where the court said:

"Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words, 'restraint of trade or commerce,' and 'monopolize, or attempt to monopolize' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade' and 'restrict the common liberty to engage therein.'"

[29]Cline v. Frink Dairy Co., (1926) 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146; Fairmont Creamery Co. v. Minnesota, (1926) 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893, declaring unconstitutional a state statute forbidding discrimination between different localities in prices paid. The Minnesota Act, Minn. G. S. 1923, sec. 3907, was substantially the same as the California Act, Calif. Stat. 1913, chap. 276, which may now be also considered invalid.

[30]"Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another." Butler, J. in Federal Trade Commission v. Pacific States Paper Trade Association, (1926) 273 U. S. 52, 47 Sup. Ct. 255, 71 L. Ed. 321. See also Stafford v. Wallace, (1922) 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735; United States v. Live

be lawfully formed and operated for the purpose of effecting economies in the cost of production, distribution and sale of commodities through joint use or exchange of facilities, or elimination of waste by quantity production and distribution, or by any other method; that such trade combinations may acquire and distribute among their members all available trade, business, economic, or scientific information relating to production, distribution, sale or other disposal of their products, including studies and analyses of probable requirements of consumers and their ability and inclination to absorb such products from time to time, and including anything else which may be of aid to its members in the intelligent conduct of their business; that restraints upon production and sale by the individual members of a combination resulting from the effect upon their minds of such co-operative activities are not undue or unreasonable restraints of trade or commerce; and that co-operative efforts to adjust aggregate production to consuming requirements, without creating artificial scarcity or maintaining artificial price levels or destroying incentive for competition, are not prohibited by the Federal Anti-Trust Act.

Nor is such co-operation among the members of a combination any the less lawful because it is accomplished with full knowledge and realization by each member that the law does not compel him or it to compete,[31] or to produce a surplus, or to sell for less than a reasonable profit; but on the contrary he or it may limit production to any amount and sell or refuse to sell, at any price, to any person, at any time, anywhere.[32]

But such trade combinations cannot lawfully pool profits, divide trade territory, unduly oppress or destroy outside competitors, or by any agreement or concerted action of their members curtail production to less than consuming requirements, or artificially elevate prices.

To avoid attacks in the courts such trade combinations may well refrain from integrating stock ownership of their corporate members, or unifying or interlocking their directorates, or fos-

Poultry Dealers Ass'n., (D.C. N.Y. 1924) 298 Fed. 139; Williams v. United States, (C.C.A. 5th Cir. 1923) 295 Fed. 302.

[31]United States v. U. S. Steel Corp., (1920) 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343, where the Court said of the Sherman Act: "It does not compel competition, nor require all that is possible."

[32]Moore v. New York Cotton Exchange, (1926) 270 U. S. 593, 46 Sup. Ct. 367, 70 L. Ed. 750; Fed. Trade Commission v. Raymond, etc., (1924) 263 U. S. 565, 44 Sup. Ct. 162, 68 L. Ed. 448. The conclusions here stated have no application to public service corporations.

tering any other plan or scheme tending to destroy the individual capacity of their members to act independently and do business normally. Good faith is the first requirement of courts not confined within the circumscription of precedents.

Trade combinations which primarily limit their activities, however complicated and involved, to lessening the cost of production, distribution and sale of their products instead of increasing the price to the consumer, will never fare ill in the courts, even though the direct effect of their concerted effort is to avoid overproduction, stabilize industry and markets, and thereby lessen and restrain competition.

Adherence to these principles in the conduct of their activities may relieve trade combinations of some of the hazards arising from the reprehensible uncertainty of the Sherman Anti-Trust Act until Congress shall have seen the folly of attempting by indirection to compel traders to strive wastefully for that which they are forbidden to attain,[33] and shall have undertaken to regulate rather than annihilate mass production and sale of commodities in interstate and foreign commerce. But, if the congressional mind too long wanders outside the realm of economic reason, big business in retaliation may achieve complete and unregulated monopoly by consolidating ownership at the source of production and selling at its own fixed price through retail agency contracts.[34]

[33]Monopoly is the logical sequel of successful competition. The statute attempts to compel traders to compete by forbidding them to agree not to compete, and at the same time condemns the achievement of the monopoly which results to the survivor of successful competition. In legal contemplation, therefore, competing traders are compelled to strive for a goal which it is impossible to attain. The wastefulness of such legal requirements may be judged from and address of the secretary of the interior before the American Bar Association at Buffalo, New York, in September, 1927, in which he stated that overproduction of crude oil in the United States had reached the proportions of a national calamity involving an unprecedented waste of natural resources of the country. A committee of the American Bar Association had already formulated a report recommending amendment of the anti-trust laws of the country, and stating that the committee believed the Sherman Act to be economically unsound and its application to individual cases uncertain.

[34]An achievement already accomplished as to one commodity. See United States v. General Electric Company, (1926) 272 U. S. 476, 47 Sup. Ct. 192, 71 L. Ed. 221. The danger of such consolidation is emphasized in the dissenting opinion of Justices Brandeis and McKenna in American Column & Lumber Co. v. United States, (1921) 257 U. S. 377, 419, 42 Sup. Ct. 114, 159, 66 L. Ed. 284, 299, closing with these words: "May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation? And if they do, may not another huge trust, with highly centralized control over vast resources,—natural, manufacturing and financial,—become so powerful as to dominate competitors, wholesalers, retailers, consumers, employees, and in large measure, the community?"